SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

MILL LANE MANAGEMENT, LLC. AND GARY SINDERBRAND,

Plaintiffs,

v.

WELLS FARGO ADVISORS, LLC. AND STEVEN SINDERBRAND,

Defendants.

Index No. 652025/2017

IAS Part 53

MEMORANDUM OF LAW OF DEFENDANT WELLS FARGO ADVISORS, LLC IN REPLY TO PLAINTIFFS' CROSS-MOTION

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PRELIMINARY STATEMENT

Defendants Wells Fargo Advisors, LLC ("Wells Fargo") and Steven Sinderbrand (collectively referred to herein as "Defendants") submit this memorandum of law in opposition to plaintiffs' unprecedented cross-motion to require Wells Fargo to preserve its own inadvertently disclosed irrelevant information, to provide not only a "privilege log" but, in effect, an unheard of "irrelevance log," and to provide attestations concerning Wells Fargo's controls over the confidential information unlawfully disseminated by plaintiff Gary Sinderbrand ("Sinderbrand") to *The New York Times* and potentially others. The cross-motion is nothing more than a disingenuous attempt to blame the victim here and to distract the Court from the emergent issue of protecting the confidential information of Wells Fargo's customers.

In opposing our motion and in support of his cross-motion, Sinderbrand proffers no meaningful evidence to refute Wells Fargo's position that the information is confidential, belongs to institution and its customers, is immaterial to the underlying dispute between Sinderbrand and his brother over defamation and revenue sharing, and came inadvertently into the possession of Sinderbrand and his respective attorneys in New York and New Jersey. In their affidavits, one or more of those three individuals concede that there was, at the very least, reason to believe that the information was confidential and inadvertently disclosed, that the information was placed in the hands of Sinderbrand by his New Jersey attorney and that Sinderbrand then scheduled a meeting with two reporters for *The New York Times* at which he revealed portions of the confidential information, resulting in a news article the following day.

Thus, in this case, at this juncture, the Court confronts one issue and one issue only – emergent relief to prevent the further dissemination and use of the confidential customer information and to contain and suppress any distribution already made. Despite these unassailable

parameters, plaintiff – in addition to advancing the unfathomable argument that all of the relief sought is now moot[1] – asks this Court to order the preservation of the inadvertently disclosed material and order the production by Wells Fargo of an irrelevance log and, together with its discovery vendor and its attorneys, attestations concerning how Wells Fargo and its own circle have handled the information.

Plaintiffs ignore the fact that the discovery at issue was produced in the action pending between the Sinderbrand brothers in New Jersey, and worked its way into New York only because Sinderbrand's New Jersey attorney improperly provided the material to Sinderbrand, who, in turn, delivered a copy to his New York attorney and ultimately shared key portions with *The New York Times*. Plaintiffs' own legitimate discovery needs can be dealt with in New Jersey in the regular course of the action. The only immediate order of business in this Court is containing the leakage of the confidential information, pending determination of our motion to compel arbitration.

ARGUMENT

I

THE RELIEF SOUGHT BY SINDERBRAND IS UNAUTHORIZED AND UNNECESSARY

While Wells Fargo has neither reason nor intention to destroy its copy of the production disk, plaintiffs fail to disclose to this Court that the New Jersey court directed Sinderbrand's counsel in that action to relinquish his disk to the court, which was done, and the court there has impounded it. Thus, whatever relief Sinderbrand requests here in that regard, legitimate or not, has already been granted preliminarily in New Jersey and will be dealt with there.

[1] The only branches of our motion that are moot are the request for return of the disk and an expedited deposition of Sinderbrand. On July 26, 2017, the New Jersey court ordered the return of the disk, a direction with which plaintiffs have complied. On August 7, 2017, the New Jersey court, over Sinderbrand's strident opposition, ordered Sinderbrand to appear for examination in New Jersey on August 11, 2017.

Next, Sinderbrand demands that Wells Fargo "re-produce" the entire inadvertent production, with redactions for the confidential information. That is a ridiculous, unnecessary and oppressive request. The production was inadvertent because it was irrelevant. While many of the materials were confidential and some may have been privileged, they were collected without full relevance screening. This is not a situation in which the lot of documents produced by Wells Fargo was privileged. Rather, the documents were irrelevant and produced only because of a confined act of human error. While the CPLR does allow for the generation of a *privilege* log for responsive documents, plaintiffs cite no authority for any further relief. No court, to our knowledge, has ordered a nonparty[2] to create a log of irrelevant or immaterial documents. Taken to its logical extreme, that would cause the responding party to identify virtually every document in its files. Moreover, even if this relief were feasible, the discovery was produced in the New Jersey action, thereby consigning issues of logs and production sufficiency to that court. No disclosure requests have yet been served in this action, where a motion to compel arbitration is pending.

As far as a privilege log is concerned, Wells Fargo provide an appropriate amended document production in the New Jersey action, from which the subpoena that led to this imbroglio emanated. A privilege log will be provided in accordance with New Jersey Court Rule 4:10-2(e)(1) ("When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection").

[2] The inadvertent production occurred in the New Jersey action, where Wells Fargo is a nonparty. The New York action was commenced as a subterfuge, in an attempt by Sinderbrand to circumvent a release he granted to Wells Fargo when he left its employment.

There is no reason for an over-inclusive privilege log describing the irrelevant documents that were inadvertently produced.

Sinderbrand's request for a modification of the "order to show cause" to allow him to address or respond to any court, regulatory agency or governmental body is moot, since the issue before the Court now is the preliminary injunction, not the temporary restraining order. In any event, Sinderbrand has not identified any pending need to address or respond to any such court, agency or body. Indeed, Wells Fargo is concerned that Sinderbrand would exploit such an exception to make unilateral, unnecessary disclosures that would further his objective of a public relations campaign against his former employer. If Sinderbrand receives a subpoena or other legitimate form of compulsion from the government, Wells Fargo's concern would be protection of the confidential information and adequate advance notice for that purpose. This Court should not issue Sinderbrand a pass to continue his improper efforts to blackmail or harass Wells Fargo with threats of further dissemination.[3]

Finally, Sinderbrand asks the Court to direct Wells Fargo to produce a series of affidavits from itself, its e-discovery vendor and its attorneys to describe their own efforts to corral and secure the confidential information. Obviously, Sinderbrand has no standing or legitimate reason to know or inquire into Wells Fargo's discovery and information security procedures, which themselves are confidential, and implicate attorney work product and privileged communications.

There was an isolated human error that allowed the customers' confidential information to escape through a single, identified portal to Sinderbrand's New Jersey attorney. This is, as the ethics authorities have recognized, an unfortunate but commonplace occurrence in this information

[3] As the Court will recall, quickly after plying *The New York Times* with the confidential information, Sinderbrand e-mailed a Wells Fargo executive proposing that Wells Fargo submit to his demands, under the threat of further publication of the information. (*See* Turiano Affidavit, Jul. 25, 2017, Ex. H.)

age. *See* NYCLA Ethics Opinion 730 ("the possibility is greater than ever before that a lawyer may face the problem of inadvertent disclosure of privileged information - either as the sender or the recipient - at some point in the lawyer's career"). Wells Fargo has gone to enormous expense and effort to rectify the situation.

The proximate cause of the problem here was not the lawyer's accidental release – by all accounts, she promptly demanded the return and suppression of the information – but, rather, the failure of receiving counsel to honor their legal and ethical obligations to return the materials, and their affirmative enablement of Sinderbrand's malicious visit to *The New York Times.* As demonstrated in its applications to two courts, Wells Fargo has taken extraordinary measures to contain and reverse the inadvertent disclosure of this information. It inarguably has every incentive to maintain the strictest protective measures for its customer data.

II

PLAINTIFF'S REMAINING ARGUMENTS LACK MERIT

Our moving memorandum of law relied upon apposite, valid and uniform opinions spanning the period before and after New York adopted the Model Rules of Professional Conduct, including Rule 4.4. See, e.g., Galison v Greenberg, 5 Misc3d 1025(A) (Sup Ct NY County 2004 [Cahn, J]); Manufacturers and Traders Trust Co. v Servotronics, Inc., 132 AD2d 392 (1987). Rather than distinguish those precedents, or cite any authority that would license a party and his attorney to deliver inadvertently produced confidential information to *The New York Times* or anyone else, plaintiff argues only that ABA Formal Opinion 92-368, which was cited by U.S. District Judge Sweet in his decades-old opinion in American Express v. Accu-Weather, Inc., 1996 U.S. Dist. LEXIS 8840 (S.D.N.Y. 1996), has been superseded by Opinion 05-437 issued after the adoption of Rule 4.4. Even that argument is disingenuous.

Contrary to plaintiff's implication, Opinion 05-437 does not overrule New York's federal or state case law. Quite the opposite, the opinion, though withdrawing Opinion 92-368, goes on to state, citing Comment 3 to Rule 4.4:

> Some lawyers may choose to return a document unread, for example, when the lawyer learns before receiving the document that it was inadvertently sent to the wrong address. **Where a lawyer is not required by applicable law to do so**, the decision to voluntarily return such a document is a matter of professional judgment ordinarily reserved to the lawyer. [Emphasis added.]

In this case, "applicable law" required the return and prohibited any use or further dissemination of the information. Cases such as Galison v. Greenberg and Manufacturers and Traders Trust Co. v. Servotronics remain good law, along with a host of others decided after the enactment of Rule 4.4. Plaintiff's attorneys were indeed obligated by applicable law to return the information. In fact, in the State of New Jersey, where the information was inadvertently delivered to Sinderbrand's New Jersey attorney by one of WFCS's attorneys, Court Rule 4:10-2(e)(2) explicitly prohibited any use of the information and mandated immediate remedial measures:

> Information Produced. If information is produced in discovery that is subject to a claim of privilege [], the party making the claim may notify any party that received the information of the claim and the basis for it. **After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved.** A receiving party may promptly present the information to the court under seal for a determination of the claim. **If the receiving party disclosed the information before being notified, it must take reasonable efforts to retrieve it**. The producing party must preserve the information until the claim is resolved. [Emphasis added.]

Racing to a national newspaper with the information is as defiant of the ethical and legal mandates as one could imagine.[4] Yet that it precisely what plaintiff did. Despite rulings and admonitions from both this Court and the New Jersey court on our successful applications for

[4] Furthermore, RPC 4.4(b), as adopted in New Jersey, requires the immediate return to the sender of any inadvertently produced document.

temporary restraining orders and other relief, plaintiff and his attorneys still stubbornly refuse to accept the conclusion that, absent their outrageous attempt to blackmail WFCS with publicity, this should have been an inconsequential instance of inadvertent production that occurs daily in the modern world in which law and electronic data intersect. Whether Sinderbrand's lawyers should have sequestered the disk pending a resolution or immediately returned it to the sender as New Jersey law requires, one point is crystal clear: the lawyers had no business transmitting the material to their client and their client acted improperly in displaying the material to *The New York Times* and then trying to extort a settlement from Wells Fargo with a transparent threat to engage in further leaks.

Similarly, the relief sought by WFCS is far from moot. We do not yet know the extent to which plaintiff disseminated the confidential information. We know that *The Times* was not his only attempt at dissemination, as he tried to share the information with his employer, albeit unsuccessfully. He will not be appearing for an expedited deposition until Friday – and then only after we obtained an order from the New Jersey court that he do so, following weeks of refusing our requests as we sought to protect our customers.

And even if plaintiff has effectively destroyed all copies of the information and scrubbed his devices – a conclusion that we are not yet able to confirm with certainty – we cannot fully understand what he did with it while it was in his possession or erase what he may retain himself. Thus, a preliminary injunction against any further use of the information remains essential for the protection not just of WFCS, but, more importantly, the blameless Wells Fargo clients who were innocent victims of plaintiff's malicious acts. Wells Fargo's customers and regulators are entitled to the maximum assurance that the information will not be misused.

Finally, Wells Fargo's preclusion motion is anything but premature. This action is ongoing. Sinderbrand has already revealed his thirst for publicity. The inadvertently produced documents are for the most part irrelevant to the issues in this dispute, which is subject to arbitration in any event. Wells Fargo will make a new, corrected production in New Jersey, and Sinderbrand will be free to use them for legitimate purposes in that action. Sinderbrand will thereby suffer no prejudice whatsoever from preclusion of the inadvertent disclosures.

CONCLUSION

Based upon the foregoing, Wells Fargo respectfully requests that the Court deny the cross-motion in all respects and grant Wells Fargo such other and further relief as may be just and proper.

Respectfully submitted,

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Dated: New York, New York
August 10, 2017