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

MILL LANE MANAGEMENT, LLC and GARY SINDERBRAND,	:	Index No. 652025 / 2017
Plaintiffs,	:	Hon. Charles Ramos
-against-	:	
	:	(Mot. Seq. Nos. 2 & 3)
WELLS FARGO ADVISORS, LLC and STEVEN A. SINDERBRAND,	:	
Defendants.	:	

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' ORDER TO SHOW CAUSE AND IN SUPPORT OF PLAINTIFFS' NOTICE OF CROSS-MOTION

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PRELIMINARY STATEMENT

Defendant Wells Fargo Advisors ("Wells Fargo") seeks two forms of relief in its Order to Show Cause: relief that Plaintiff Gary Sinderbrand ("Sinderbrand") and his counsel have already provided, and relief that is entirely unwarranted at the early stage of this pre-answer lawsuit. Significantly, in an unabashed effort to hedge their bets the day after this Court entered its temporary Order, Wells Fargo filed a virtually identical motion before the New Jersey Superior Court adjudicating the underlying case in which the documents at issue were actually produced. By seeking redundant and unnecessary Court intervention here – through rhetoric that falsely impugns the professional integrity of Sinderbrand and his counsel – Wells Fargo hopes that this Court provides a media-ready denunciation of Sinderbrand for being the unwilling recipient of Wells Fargo's grossly negligent document production including tens of thousands of Wells Fargo clients' names, social security numbers, account numbers, addresses and loan amounts representing billions of assets and investments (the "WFA Documents"). While Wells Fargo's efforts to dodge blame for its egregious breach of client confidentiality are, perhaps, understandable from the public relations perspective of a scandal-prone financial institution,[1] they do not deserve this Court's stamp of approval.

First, as Wells Fargo is well aware, there is no need to enjoin the "further review, use and/or dissemination" of the WFA Documents by Sinderbrand or his counsel – for the simple reason that ***neither Sinderbrand nor his counsel or agents have the WFA Documents***. Sinderbrand and his counsel have submitted affirmations swearing to the destruction and deletion of WFA Documents, and have also submitted reports from independent e-security analysts

[1] See, e.g., Stacy Cowley, *Wells Fargo May Have Found a 'Significant Increase' in Its Fake Accounts*, N.Y. TIMES, Aug. 5, 2017 at B5; Gretchen Morgenson, *Wells Fargo Required Borrowers to Buy Needless Auto Insurance*, N.Y. TIMES, July 28, 2017 at A1.

confirming that any trace of Wells Fargo's production has been removed from their computing systems. For this reason, Wells Fargo's request that Sinderbrand and his counsel be "directed … to return to [Wells Fargo] the CD containing privileged documents and Confidential Information" is also moot – counsel and Sinderbrand cannot return what they do not possess.

Similarly, Wells Fargo's request for "immediate disclosure, including depositions, to identify the privileged documents, Confidential Information and all persons with whom plaintiff Sinderbrand and his agents, representatives, attorneys or affiliates have shared the Confidential Information" ignores the reality that the affirmations submitted set forth ***this exact information*** at length and in great detail. Having pre-judged these sworn submissions as inadequate, Wells Fargo insists that it is entitled to depose Sinderbrand – and, on August 3, wrote the New Jersey Superior Court to demand a next-day deposition, maligning Sinderbrand as "an ongoing threat to [Wells Fargo customers]." Now having raised the deposition issue in New Jersey, Defendants should not be permitted to forum shop and litigate the same issue here.

Wells Fargo's suggestion that Sinderbrand represents a "threat" to its customers is particularly ironic. The record suggests that the actual "threat" to Wells Fargo's customers is the apparent lack of policies and protocols within Wells Fargo and its agents that would allow unredacted, sensitive confidential information to be disclosed without review or protection. Although Wells Fargo would prefer to pretend that the breakdown in internal and external controls designed to protect this information never happened, Sinderbrand's efforts to bring this oversight to light, and his refusal to be complicit in any attempt to hide it, did nothing more than inform Wells Fargo clients that their confidential information apparently enjoys far fewer protections than it deserves. Tellingly, despite counsel's repeated requests, Wells Fargo ***has refused to provide a single certification*** – from the bank, its outside counsel, its e-discovery

vendor, or anyone else to whom it released this information – regarding the security of the data it released to Sinderbrand without redaction.

Finally, Wells Fargo's request to "preclude the use of the privileged documents and Confidential Information in this action" is unquestionably premature. Wells Fargo has yet to file an Answer (and, in fact, initially had moved to divest this Court of jurisdiction by compelling arbitration). Whether and to what extent Wells Fargo waived any privilege over documents it has not even identified must be resolved with reference to a redacted version of Wells Fargo's full production and a log describing the specific privileges claimed – not by the wholesale preclusion of unidentified documents before discovery has even begun.

For these reasons, Wells Fargo's request for injunctive relief should be denied or modified, and Plaintiffs' Notice of Cross-Motion should be granted.

ARGUMENT

I. SINDERBRAND'S COUNSEL ACTED IN ACCORDANCE WITH THEIR ETHICAL OBLIGATIONS IN ALL RESPECTS

In a transparent attempt to deflect blame for its extensive and unwarranted disclosure of confidential client information, Wells Fargo's papers repeatedly assert that Sinderbrand's counsel "fail[ed] to honor their ethical and legal obligations." See Wells Fargo Memo. of Law at 3. Setting aside the ironies inherent in *ad hominem* attacks from counsel who approved the release of a massive trove of confidential information, without having secured the basic client protections of a confidentiality agreement or protective order, Wells Fargo's assessment flatly misstates the law and mischaracterizes the record.

Rule 4.4(b) of the New York Rules of Professional Conduct, 22 N.Y.C.R.R. § 1200, states:

> A lawyer who receives a document, electronically stored information, or other writing relating to the representation of the lawyer's client and knows or

> reasonably should know that it was inadvertently sent shall promptly notify the sender.

As the ABA has explained, "Rule 4.4(b) thus only obligates the receiving lawyer to notify the sender of the inadvertent transmission promptly. The rule ***does not require the receiving lawyer*** either to refrain from examining the materials or ***to abide by the instructions of the sending lawyer***." *See* ABA Formal Opinion 05-437. The New York City Bar Formal Opinion 2012-01 states the same in interpreting New York's Rule 4.4(b).

There can be no question that Sinderbrand's counsel complied with their ethical obligations in accordance with these rules. On the morning of July 20, 2017, the undersigned counsel notified Wells Fargo's counsel that documents containing personally identifying information, as well as documents that appeared to be privileged, were included in the WFA Documents. See Zeisler Aff. Ex. 1. Counsel noted that "WFA's actions in producing these documents appear to constitute violations of various state data privacy protection laws . . . as well as FINRA and SEC regulations." Id. When Wells Fargo's counsel demanded the destruction or return of Wells Fargo's entire 15,000-page production, Sinderbrand's counsel asked, instead, for the Bates numbers of the documents WFA would like to be returned. See Turiano Ex. F, Email dated July 20, 2017 fr. A. Miller to A. Turiano ("[P]rovide me Bate[s] stamped numbers of all documentation you determine was sent in error."). Wells Fargo's counsel insisted, without explanation or justification, that it was entitled to the return of even those documents that were responsive to the subpoena – in effect, asking Sinderbrand's counsel to treat Wells Fargo's extensive disclosure of confidential client information as though it had never happened. See Turiano Ex. F, Email dated July 20, 2017 fr. A. Turiano to A. Miller ("Just return the entire CD . . . .").

When counsel declined Wells Fargo's invitation to be party to a cover-up of the data breach in potential violation of state and federal law, Wells Fargo's counsel wrote to this Court, offering evolving explanations for their oversights. Compare Email fr. Turiano to Zeisler dated July 20, 2017 [attached as Ex. D to Turiano Aff.] ("I personally reviewed the thousands of emails provided by the vendor, marked them appropriately and then returned them to the vendor. . . . [Y]ou clearly have never been involved with an email review and have no idea what you are talking about.") and Letter fr. Turiano to Ramos dated July 21, 2017 [attached as Ex. I to Turiano Aff.] ("[U]ndersigned counsel personally reviewed each and every email provided by the outside vendor and, using e-discovery software, marked emails where appropriate as privileged and/or confidential.") with Turiano Aff. at ¶ 3 ("I thought I was reviewing the complete set, when in fact, I only reviewed the first thousand documents. . . . I may have miscoded some documents during my review.").

Wells Fargo's baseless assertion that Sinderbrand's counsel was required to do their bidding and ignore the breach of client confidentiality by "return[ing] the entire CD" mistakenly relies on outdated case law and an ethics opinion that the ABA Ethics Committee formally withdrew almost thirteen years ago. See ABA Formal Opinion 05-437 ("[B]ecause the conclusion of Formal Opinion 92-368 presently conflicts with amended Rule 4.4, the opinion is hereby withdrawn."); see also Wells Fargo Memo. of Law at 12 (relying on Formal Opinion 92-368 and case law citing it). Contrary to Wells Fargo's suggestions, from the moment Sinderbrand's counsel became the unwilling recipient of unwanted confidential information, they have taken the utmost care to act in accordance with their ethical and legal obligations – both for the benefit of Sinderbrand, and for the protection of Wells Fargo's clients.

II. THE REQUESTED INJUNCTION IS NOW LARGELY MOOT

A. Sinderbrand and His Counsel Do Not Have the WFA Documents

Wells Fargo asks this Court to enter an order "enjoining Plaintiffs from reviewing, using, copying and/or disseminating the Confidential Information inadvertently produced to Gary Sinderbrand" and "requiring Plaintiffs immediately to return all Confidential Information in their possession." See Wells Fargo Memo. of Law at 14. It is important to note that, despite numerous requests, Wells Fargo has refused to identify the documents that constitute the "Confidential Information" – notwithstanding their proposed Order's reliance on this critical yet undefined term.

Wells Fargo's deliberately vague demands are, in this case, immaterial: neither Sinderbrand nor his counsel or agents have the WFA Documents. See Affidavit of Gary Sinderbrand sworn to August 7, 2017, the Affirmation of Aaron Zeisler executed on August 1, 2017, and the Certification of Andrew Miller sworn to August 7, 2017. Because Sinderbrand and his counsel have voluntarily deleted and destroyed the documents produced by Wells Fargo – and have provided sworn affirmations detailing the lengths to which they have gone to ensure that they have no trace of these documents – the order Wells Fargo requests is unnecessary and moot. Counsel and Sinderbrand cannot possibly "review[], us[e], copy[] or disseminat[e]" documents and information they no longer have; similarly, counsel and Sinderbrand cannot possibly "return" the unidentified "Confidential Information" Wells Fargo requests. For this reason, the Court should deny Wells Fargo's request as unnecessary and moot.[2]

[2] However, Wells Fargo's use of the undefined term "Confidential Information" is problematic in another respect: to the extent the proposed Order might be read to prevent Sinderbrand from addressing or responding to any other court, regulatory body or government agency concerning Wells Fargo's disclosure of the "Confidential Information," the Court should modify any injunction to make it clear Sinderbrand is not restrained from doing so.

As the Affirmation of Aaron M. Zeisler, counsel to Sinderbrand, makes clear, "Neither I nor any member or employee of Zeisler PLLC possesses any physical or electronic copies of the documents produced by Wells Fargo in response to the subpoena issued in the New Jersey action." See Zeisler Aff. ¶ 4. Cyber-security consultants confirmed that all data had been permanently deleted from the thumb drive on which the WFA documents were stored, and from the sole laptop used by Mr. Zeisler to view the documents. Id. ¶ 17 ("GoVanguard confirmed that the thumb drive (Lexar 32GB) I possessed had, indeed, been previously erased and did not contain any documents or files. . . . They also confirmed that no autosave copies of the accessed files existed on my computer, and they took the precaution of removing any search indices and recent files that may have contained sensitive cached information, thumbnails or metadata.").

Similarly, Sinderbrand's affidavit provides his sworn attestation that he "gave all paper copies and any portable electronic copies that I possessed (thumb drives) to my New Jersey counsel, Andrew Miller, for him to deliver to . . . the New Jersey Court for safeguarding pursuant to that Court's July 26, 2017 Order." See Sinderbrand Aff. ¶ 7. Sinderbrand's affidavit also makes clear that he "fully deleted any digital files on any hard drives or non-portable electronic storage." Id. at ¶ 8. The independent cyber security firm Sinderbrand retained provided a detailed report concluding "Mr. Sinderbrand no longer has access to any of the identified data." Id. at ¶ 9; see also Sinderbrand Aff. Ex. 2.

Mr. Miller's certification also provides his attestation that he has not reviewed the Confidential Information since July 20, that he delivered all portable copies he possessed to the New Jersey Court for safeguarding, that he deleted the information from his computers, and that a cyber security firm is currently making sure that the information Mr. Miller possessed has, indeed, been properly deleted. See Miller Cert. ¶¶ 11, 15-16, 18-20.

New York courts consistently hold that where the injunctive relief sought has become moot, as here, a request for a preliminary injunction should be denied. See, e.g., Berenger v. 261 West LLC, 93 A.D.3d 175, 185 (App. Div. 2012) (denying injunction that would require defendant to take action over property he did not control, noting "there is no indication that it is within [defendants'] power to comply with the injunction"); Schulz v. State, 200 A.D.2d 936, 937 (App. Div. 1994) (denying motion to enjoin ceremony on state grounds after planned ceremony was relocated to private property, noting that "the underlying controversy had been rendered moot"); Perez v. Wei Li, 37 Misc.3d 1213(A) (Sup. Ct. 2012) (denying preliminary injunction "where the relief sought has already become moot").

B. Having Raised the Deposition of Sinderbrand in New Jersey, Defendants Should Not Be Permitted to Forum Shop and Litigate the Same Issue Here

Wells Fargo also asks this Court to order Sinderbrand "to submit to immediate disclosure, including depositions, to identify the privileged documents, Confidential Information, and all persons with whom plaintiff Sinderbrand . . . ha[s] shared the Confidential Information." See Order to Show Cause. Since seeking this relief by Order to Show Cause, Wells Fargo's counsel has been informed on no fewer than five occasions that Sinderbrand was prepared to provide exactly the information Wells Fargo sought in a sworn affidavit. Despite having presented the matter to this Court, and having pre-judged Sinderbrand's forthcoming affidavit as somehow inadequate, Wells Fargo appealed to the New Jersey Superior Court by letter dated August 3, insisting that Wells Fargo was entitled to depose Sinderbrand "by Friday, August 4, 2017." Now having raised the deposition issue in New Jersey, Defendants should not be permitted to litigate the same issue here.

Setting aside Defendants' decision to seek identical relief before two separate courts, Wells Fargo's insistence that its disclosure of client information in a New Jersey action somehow

entitles it to an expedited deposition in connection with these proceedings ignores the reality that this lawsuit is in its earliest stages. Wells Fargo has yet to file a responsive pleading in this action – in fact, Wells Fargo's only substantive filing moves to compel arbitration, arguing that Plaintiffs' claims are not properly before this Court. The parties have not begun any aspect of the discovery process, which makes Wells Fargo's request to compel a deposition about a document production mishap of their own making all the more premature.

C. Wells Fargo's Attempt to Preemptively Preclude Unidentified Documents Is Premature

Wells Fargo's final request is equally ill-conceived. Ignoring the fact that Wells Fargo has not yet identified which documents in its production it claims are "privileged" or "confidential," Wells Fargo asks this Court to ***preemptively preclude*** these unspecified documents' use – presumably, even in redacted form – in this action or any other. See Order to Show Cause (seeking order "precluding the use of the privileged documents and Confidential Information in this action, in any other action among the parties or for any other purpose"). This request is unquestionably premature. If Wells Fargo wishes to assert a privilege over documents it has produced, it must do so not only by identifying those specific documents and the privilege it claims, but also by explaining why its conduct in producing those documents has not waived the asserted privilege. This procedure is so well-established in New York jurisprudence as to be nearly self-evident. See, e.g., Nicholson v. Keyspan Corp., 14 Misc.3d 1218(A), 836 N.Y.S.2d 487 (Table) (Sup. Ct. 2007) ("The Defendants are directed to prepare a privilege log and bates number the remaining documents that the Plaintiffs seek and which the Defendants allege are protected from discovery"); see also 22 N.Y.C.R.R. § 202.70(g) (requiring a privilege log "setting forth with specificity those facts supporting the privileged or protected status of the information"). Unsurprisingly, Wells Fargo has cited no legal authority whatsoever that would

entitle it to preclude the use of unidentified, unspecified documents "in this action, in any other action among the parties or for any other purpose."

In addition, even if Wells Fargo had properly asserted a privilege over a document it produced to Sinderbrand, the "privileged" nature of this document would be far from settled. As this Court has recognized, where a producing party's conduct "was so careless as to suggest that it was not concerned with [the] protection of [the] asserted privilege," any applicable privilege may be waived. See Scott v. Beth Israel Medical Center, 847 N.Y.S.2d 436, 443 (Sup. Ct. 2007) (J. Ramos). Although the question of whether Wells Fargo's conduct rises to this level is best left for a later day, Wells Fargo may not dodge this critical inquiry by declaring its entire production off-limits for any and all future uses.

For the reasons set forth herein, Wells Fargo's request for injunctive relief should be denied in its entirety.

III. SINDERBRAND'S CROSS-MOTION SHOULD BE GRANTED

Unfortunately, the impact of Wells Fargo's release of thousands of clients' names, social security numbers, account numbers, addresses and loan amounts extends beyond the borders of the troubled financial institution – it affects not only the individuals whose information was disclosed, but the individuals who unwittingly and unwillingly received it. Through no fault of their own, Sinderbrand and his counsel became the recipients of a trove of highly sensitive Wells Fargo client financial information. Sinderbrand and his counsel did not request this information, they did not want it in unredacted form, and they have done everything in their power to rid themselves of it. However, the reckless and unsolicited disclosure of confidential client information to Sinderbrand and his counsel may put them at risk of future liability for Wells Fargo's and its agents' carelessness: to the extent Wells Fargo and its attorneys or vendors fail to secure the confidential client information they disclosed, and such information is released to

the harm of Wells Fargo customers, Sinderbrand is concerned that he and his agents could be wrongly blamed. Wells Fargo has done nothing to address these concerns.

First, despite written requests, Wells Fargo has refused to certify or explain what steps it or its agents have taken to secure or delete the sensitive customer information since they first disclosed it. See Letter from A. Zeisler to D. Pikus dated July 27, 2017 (Sinderbrand Aff., Ex. 3). Wells Fargo's position is particularly troubling given that its counsel Bressler, Amery & Ross P.C. ("Bressler") admitted in a sworn affirmation to this Court on July 24, 2017 that it mishandled this information. Indeed, even though Bressler wrote this Court on July 21 saying it had reviewed every document (and despite having sought to charge Sinderbrand for Bressler's legal time to "carefully" review the Wells Fargo documents), Bressler partner Angela Turiano then admitted in her July 24 Affirmation that: (i) "I only reviewed the first thousand documents"; (ii) "I realize now that I misunderstood the role of the vendor"; and (iii) "I may have miscoded some documents during my review."

Outrageously, Wells Fargo and its lawyers have tried to deflect blame from where it belongs, writing the New Jersey Court on August 3, 2017, that "our customers deserve to know whether Sinderbrand is an ongoing threat to them." It bears emphasis that, had Sinderbrand neglected to notify Wells Fargo of its egregious data breach, or acquiesced to Wells Fargo's efforts to ignore it, Wells Fargo's customers may never have learned that their confidential information had been disclosed to a party in a litigation where counsel had failed to seek a protective order or a confidentiality agreement. If Wells Fargo's customers are under "an ongoing threat," it may well be from Wells Fargo itself in the form of the apparent lack of policies and controls within Wells Fargo and its agents that would allow such voluminous, unredacted, sensitive customer information to be disclosed to me without review or protection.

For these reasons, Sinderbrand and his counsel request assurance that any future disclosure of the Wells Fargo confidential client information will not be falsely attributed to them. Accordingly, Wells Fargo and the agents involved in the disclosure of the client information at issue should be ordered to certify that they have taken the necessary steps to secure this data from future unwarranted release as is set forth in the Notice of Cross-Motion. If these organizations are truly concerned about protecting Wells Fargo's customers, they should readily agree to the Court issuing a ruling:

1. Ordering Wells Fargo to provide a sworn affidavit certifying what efforts it has taken to assure that the Confidential Information has been properly secured within Wells Fargo;

2. Ordering Wells Fargo's e-discovery provider, Document Technologies, Inc. ("DTI"), to provide a sworn affidavit certifying what efforts it has taken to assure that the Confidential Information has been properly secured or deleted within DTI;

3. Ordering Bressler to provide a sworn affidavit certifying what efforts it has taken to assure that the Confidential Information has been properly secured or deleted within Bressler; and

4. Ordering Wells Fargo to identify any other known disclosures or pre-existing breaches of the Confidential Information.

Despite Plaintiffs' efforts to resolve these issues (see, e.g., Sinderbrand Aff., Ex. 3), Defendants have refused.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that Defendants' Order to Show Cause be denied, and that Plaintiffs' Cross-Motion be granted.

Dated: New York, New York
August 7, 2017

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