

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF CARVER

FIRST JUDICIAL DISTRICT
CASE TYPE: PROBATE DIVISION

In the Matter of:

Case File No.: 10-PR-16-46

Estate of Prince Rogers Nelson,

**REPLY MEMORANDUM OF LAW IN
SUPPORT OF MOTION FOR RETURN
OF FLASH DRIVE AND MOTION FOR
COSTS**

Decedent.

REDACTED**INTRODUCTION**

Personal Representative Comerica Bank & Trust, N.A.'s ("Comerica") opposition is based on a hyperbolic misrepresentation of both this Court's Orders and nonparty Michael Lythcott's ("Lythcott") actions in this matter. Comerica ignores that, *inter alia*, Lythcott was hired *by the Heirs* to work on a transaction for the Heirs' benefit; that he repeatedly took steps to protect the Estate's confidential information [REDACTED]

[REDACTED]

[REDACTED]; that he followed best practices for due diligence periods such as that involved here [REDACTED];

that Omarr Baker filed a declaration with this Court supporting Lythcott and his actions; and, Comerica has never specified *any* improper disclosure that resulted in damage to the Estate. To the extent the Estate must contribute to payment of nonparty Lythcott's costs associated with responding to Comerica's alarmist demands, it is because of *Comerica's* repeated time-consuming, resource-depleting contentions in the absence of any evidence of damage to the

Estate. Perhaps as troubling is Comerica's pattern of involving the Court prematurely rather than engaging in good faith negotiations to resolve, or narrow the scope of, its concerns with Lythcott. To do so would conserve the resources of all parties, as well as the Court.

ADDITIONAL BACKGROUND

Since the filing of Lythcott's Motion, several events have taken place that inform the issues before the Court.

Comerica asserts that "Mr. Lythcott did not provide any explanation of what (if any) new documents he was producing and what the differences were between the original and replacement productions." (Comerica's Mem. in Opp'n at 4.) But two days before Comerica filed its opposition, Lythcott's counsel provided a chart that compared the DocumentIDs from Lythcott's February 25, 2019 native production to the duplicate documents produced with Bates numbers on March 7, 2019. (April 8, 2019 Ahrens Decl. Ex. 1.) Thus, at the time Comerica filed its memorandum, Comerica had information available to it to allow it to determine the documents that had been produced on March 7 compared to the documents that had been produced on February 25.

Comerica also argues that Lythcott had the data site taken down in response to Comerica's March 5, 2019 letter. (Comerica's Mem. at 6.) This assertion is also false.

Comerica's March 5 letter demanded that Lythcott, *inter alia*:

Disable all third-party access to the site (but not modify, alter, or otherwise destroy any of the data associated with the site, which must be preserved pending resolution of [Lythcott's] violation of [his] confidentiality obligations); [and] . . .

Provide us a log from the data site showing all individuals who downloaded information from the site (rather than the access log previously provided), as well as what information was downloaded[.]

(March 15 Cassioppi Decl. Ex. 3.) Lythcott’s counsel responded that the data site was taken down on March 6 and because of that fact, Lythcott’s counsel no longer had access to the site.

(March 15 Cassioppi Decl. Ex. 4.)

Moreover, in a letter dated March 18, 2019, Comerica assumed that the data site was taken down in response to its March 5 letter and accused Lythcott of “intentional spoliation of evidence.” (Apr. 8 Ahrens Decl. Ex. 2.) But Lythcott requested that the data site be taken down *before the Court’s Order Regarding Estate Confidential Information* (the “February 13 Order”) because (1) the data site was no longer needed; and (2) he wanted to prevent incurring additional storage costs of \$2,000 per month. (Apr. 8, 2019 Lythcott Decl. ¶¶ 1, 3, Ex. 1.) Lythcott repeated this request on February 28, 2019, and the request was confirmed on March 6, 2019. (*Id.* ¶¶ 4-5, Ex. 2.)

On March 21, 2019, Lythcott’s counsel explained this series of events to Comerica’s counsel in a letter. (Apr. 8 Ahrens Decl. Ex. 3.) Lythcott’s counsel also provided a link to the archive of the data site to Comerica’s counsel that same day. (*Id.*) This archive is described by the vendor as a “compliance archive”:

The compliance archive provides a fully compliant offline viewpoint of the data room. The archive maintains a complete audit trail of every action that was taken in the data room, including activity with the files and folders as well as the business intelligence aspect (reporting). *This archive may be used for litigation purposes should the need arise.*

(*Id.* (emphasis added).) Thus, contrary to Comerica’s overwrought spoliation claims, Comerica knows that the archive may be used for litigation purposes to allow it to conduct whatever searches it finds helpful. Comerica could have engaged in a meet-and-confer process, or even spoken with Lythcott’s counsel, to learn these facts. It chose not to do so, instead opting to level additional, baseless attacks that waste the Court’s time.

Lythcott's counsel has *repeatedly* invited Comerica's counsel to meet and confer regarding Comerica's concerns about privilege. (*See* Mar. 15 Cassioppi Decl. Exs. 1-2; Apr. 8 Ahrens Decl. Ex. 3.) Comerica has refused to engage with Lythcott's counsel on this issue. (Apr. 8 Ahrens Decl. Ex. 3.)

ARGUMENT

I. The Court's retention of the flash drive is unnecessary.

A. Lythcott no longer seeks *in camera* review.

As explained in detail in his opening brief, Lythcott no longer seeks *in camera* review of the flash drive provided to the Court on February 22, 2019. (*See* Lythcott's Mem. at 5.) In short, that request was made to preserve any potential privilege claims because there was not enough time to do a fulsome privilege review—there was not even time to Bates-number the documents. (*See, e.g.*, C. Madel's Feb. 22, 2019 Letter to the Court; Mar. 8, 2019 Ahrens Decl. Ex. 1 (Feb. 25, 2019 letter to Comerica's counsel explaining that the documents produced were not Bates-labeled).) Under those circumstances, Lythcott provided the flash drive to the Court, explaining the necessarily over-inclusive nature of the documents produced, in an effort to show good-faith efforts to comply with the February 13, 2019 Order. Lythcott did not provide the flash drive to Comerica precisely because there was not time to attempt to run privilege terms. Of course, now Comerica's counsel has received the responsive, non-privileged documents from the flash drive provided to the Court. (*See* Mar. 8 Ahrens Decl. ¶¶ 2-6, Exs. 1-4.) In other words, Comerica's counsel now has all documents required by the Court's February 13 Order.

Contrary to Comerica's assertion that Lythcott did not comply with this Court's Second Order Regarding Estate Confidential Information (the "February 27 Order") (Comerica's Mem. at 6-7), the February 27 Order only required a motion for *in camera* review, a basis for the

privilege claims, and a surety bond “[i]f Mr. Lythcott believes that some form of review is necessary.” (Feb. 27 Order.) Because Lythcott withdrew his request for *in camera* review, the items described in the Court’s February 27 Order are no longer necessary.

Lythcott complied with the Court’s February 13 Order and withdrew any request that would have required action under the February 27 Order. Indeed, Lythcott has expended significant amounts of time to comply with the Court’s February 13 Order in the absence of a procedural mechanism to object or otherwise seek modification of that Order. (*See* Feb. 13 Order ¶ 3 (restricting the ability to request a hearing to vacate or amend the Order to “any party (the Estate or any Heir)”; Mar. 8, 2019 Lythcott Decl. ¶ 4.) Lythcott simply seeks to resolve, or narrow, the issues arising out of the February 13 Order directly with Comerica, rather than waste the Court’s valuable time and resources. Comerica’s contentions that Lythcott wants to “pick and choose” which orders to comply with, therefore, has no basis in reality.

B. Lythcott did not waive privilege.

Comerica asserts that Lythcott waived privilege by failing to provide a privilege log and by not taking reasonable precautions to prevent the disclosure of privileged information. (Comerica’s Mem. at 8.) Comerica is wrong with respect to both the facts and the law.

1. Comerica refuses to engage with Lythcott regarding the provision of a privilege log.

Lythcott explained why he did not provide a privilege log: it is cost-prohibitive, and it was impossible to do a privilege log and provide Comerica’s counsel with the documents ordered by the February 13 Order by March 7. (Mar. 15 Cassioppi Decl. Ex. 1.) Comerica now raises waiver for the first time in its memorandum.

First, Comerica should have filed a formal motion because it seeks a ruling on a discovery issue; i.e., a nondispositive issue. *See* Minn. R. Civ. P. 7.02(a) (“An application to the

court for an order shall be by motion . . .); Minn. Gen. R. Prac. 115.01(a) (describing nondispositive motions as motions that do not seek to dispose of all or part of the claims or parties and motions that include discovery issues).

Second, Comerica failed to engage in *any* efforts to reach a solution with Lythcott's counsel, contrary to the General Rules of Practice. *See* Minn. Gen. R. Prac. 115.10 ("No motion will be heard unless the parties have conferred either in person, or by telephone, or in writing in an attempt to resolve their differences prior to the hearing."). The Court should not find waiver without giving the parties a meaningful opportunity to meet and confer on this issue and ordering Comerica to engage in this process.

Third, Lythcott's counsel has asserted privilege since February 25, 2019 with Comerica. (*See* Mar. 8 Ahrens Decl. ¶ 2.) Following this assertion of privilege, Comerica agreed not to review the flash drive, yet now it consistently ignores this conversation took place. (*See id.*) In their March 7 letter, Lythcott's counsel explained it was cost prohibitive to conduct a manual privilege review sufficient to create a privilege log; such a review was estimated to cost between \$9,400 and \$18,800. (Mar. 15 Cassioppi Decl. Ex. 1.) As part of the same communication, Lythcott's counsel expressed a desire to confer with Comerica's counsel on this issue, stating "[w]e are . . . willing to work with you on the most cost-effective manner to provide you with the information that you need regarding the privileged documents." (*Id.*) On March 11, Lythcott's counsel requested Comerica's counsel claw-back 1,007 documents based on privilege. (Mar. 15 Cassioppi Decl. Ex. 2.) Again, Lythcott's counsel invited Comerica's counsel to address any

questions it had in a phone call.¹ (*Id.*) Comerica has not responded in writing, nor has it requested or initiated a phone call regarding privilege issues, preferring instead to run to the Court to determine that Lythcott waived privilege. Comerica's representations in this regard are disingenuous. As Comerica well knows, there are alternative, less costly methods to handle privilege claims or disputes. To effectively employ any of these methods, however, takes *both* parties to engage in a good-faith meet-and-confer—a process Lythcott has invited and Comerica continues to castoff.

2. Lythcott did not waive privilege because he took reasonable precautions to prevent the disclosure of privileged information.

Comerica argues that Lythcott cannot meet the requirements of Minnesota Rule of Evidence 502(b). (Comerica's Mem. at 10.) Notably, Rule 502 is not designed "to supplant applicable waiver doctrine generally." Minn. R. Evid. 502 committee comment. And Comerica cites nothing to suggest that Rule 502 somehow displaces Minn. R. Civ. P. 26.02(f)(2)—a rule with which Lythcott has complied. Regardless, Lythcott meets the requirements for inadvertent disclosure, meaning that privilege is not waived.

First, the disclosure was inadvertent. As has been explained, the March 7 production superseded and replaced the February 25 production. (Mar. 8 Ahrens Decl. Ex. 4.) At the time of the March 7 production, Lythcott's counsel specifically advised Comerica's counsel that it anticipated clawing back documents from the February 25 production. (*Id.*) Comerica's counsel did not respond with an argument that Lythcott waived any such privilege claims. Indeed, the first time that Comerica used the word "waiver" was in its brief to this Court. Just two business

¹ Since the filing of Comerica's Memorandum, Lythcott's counsel has, for a third time, expressed willingness to confer regarding privilege issues. (Apr. 8 Ahrens Decl. Ex. 3) ("We are open to proposals that will allow you to assess our privilege claims without conducting a full privilege review at your expense.")

days after the March 7 production—the *same day* that the privilege documents were identified—Lythcott’s counsel requested the claw-back of 1,007 documents. (Mar. 15 Cassioppi Decl. Ex. 2.)

Comerica identifies three courses of action that it alleges Lythcott could have taken, but none of these options were available. (*See* Comerica’s Mem. at 10.) Lythcott could not have sought an extension for the production of documents from the Court because Lythcott was prohibited from objecting to the February 13 Order—a prohibition that necessarily included requesting an extension of time. (Feb. 13 Order ¶ 3 (“*[A]ny party (the Estate or any Heir) can request a hearing to vacate or amend this order or to seek additional remedies for any alleged violation of a Non-Disclosure Agreement (NDA) or duty to the Estate.*” (emphasis added)); *see also* Mar. 8 Lythcott Decl. ¶ 4.) It should go without saying that Lythcott could not have sought an extension directly from Comerica because Comerica has no authority to amend a Court order and in the absence of such an amendment Lythcott would have been in violation of the Court’s Order—a risk that Lythcott was not willing to take. Further, Comerica’s actions demonstrate that it would not have granted an extension. Within *hours* of the February 25 production, Comerica filed a letter with the Court that acknowledged that it received documents from Lythcott but nonetheless complained that Lythcott’s planned March 7 production was “almost two weeks after the Court’s deadline.” For Comerica to now suggest that Lythcott somehow erred in seeking an extension that Comerica had no intention of considering, much less agreeing to, is illogical. Along those same lines, seeking a claw-back agreement under Minnesota Rule of

Evidence 502(d) or producing documents on a rolling basis would have delayed Lythcott's timeline even further, again causing him to violate the Court's Order.²

Second, Lythcott took reasonable steps to prevent the disclosure of privileged information. As described above, Lythcott and his counsel were prohibited from responding to the Court's February 13 Order in any way. On February 25, Lythcott's counsel notified Comerica's counsel that the documents provided to the Court contained privileged information. (Mar. 8 Ahrens Decl. ¶ 2.) When providing its February 25 production, Lythcott's counsel reserved its right to claw back documents pursuant to Minn. R. Civ. P. 26.02(f)(2). (Mar. 8 Ahrens Decl. Ex. 2.) Given the large volume of information, Lythcott's counsel continued to work to identify privilege documents after the February 25 production. (Apr. 8 Ahrens Decl. ¶ 5.) In particular, this work included separating privileged terms from non-responsive terms to ensure that the term "privilege" was not used too broadly. (*Id.*) In light of the short timeline established by the Court, Lythcott took reasonable steps to prevent the disclosure of privileged information.

And finally, Lythcott took reasonable steps to claw back documents, including complying with Minnesota Rule of Civil Procedure 26.02(f)(2). Only *two business days* after providing the March 7 production, and as soon as the privileged documents were identified, Lythcott clawed back 1,007 documents. (Mar. 15 Cassioppi Decl. Ex. 2.) Lythcott is working towards providing Comerica with more details regarding its privilege claims. (Apr. 8 Ahrens Decl. ¶¶ 8-9.) This endeavor, however, has been interrupted by Comerica's hyperaggressive handling of this case.

² And again, it bears repeating that Lythcott was not provided notice or an opportunity to be heard *before* the February 13 Order was issued. It is thus disingenuous for Comerica to now claim that he should have objected to, or sought amendment of, the Order *after* it was issued, particularly when Lythcott was precluded from doing so in the Order itself.

Specifically, since the filing of the February 13 Order—and in addition to the time-intensive task of complying with the Court’s Order—Lythcott has had to respond to:

- Comerica’s March 5 letter to Lythcott’s counsel demanding a response to five specific requests;
- Comerica’s March 7 letter to the Court threatening to disparage Lythcott, which was not served on Lythcott’s counsel; and
- Comerica’s March 18 letter to Lythcott’s counsel alleging Lythcott waived privilege, alleging Lythcott spoliated evidence; and demanding information that is not required by the Court’s February 13 Order.

Lythcott has learned that, in fact, Comerica is sending letters to people for whom it found contact information in Lythcott’s productions. [REDACTED]

[REDACTED]

[REDACTED]. (Mar. 15 Cassioppi Decl. Ex. 4) [REDACTED]

[REDACTED].

(Apr. 8 Lythcott Decl. Ex. 4.) Comerica is *also* doing this despite the pending motion filed by Heirs Alfred Jackson and Omarr Baker’s requesting, *inter alia*, that the use of the produced information be limited to the Court’s determination that Lythcott and Gregg Walker violated their respective NDAs with the Estate. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. (Apr. 8 Lythcott Decl. Ex. 3.)

Comerica’s letter misrepresents that there has been a conclusion that Lythcott was “not authorized to provide [the recipient] access to any confidential information that belongs to the

upon Comerica Bank & Trust, N.A.'s ('Comerica') February 8, 2019 Letter requesting an order requiring Michael Lythcott and Gregg Walker to provide any communications with third-parties that disclosed confidential Estate information.” (emphasis added)).) Thus, as argued in Lythcott’s opening brief, the February 13 Order arose out of a circumstance similar to—if not identical to—a party issuing a subpoena: Comerica demanded that Lythcott produce documents within ten days and the Court acquiesced. Unlike a nonparty in receipt of a subpoena, Lythcott was prevented from objecting to this request and was not afforded an opportunity to object to the order the Court issued at Comerica’s request. (*See id.* ¶ 3 (“[A]ny party (the Estate or any Heir) can request a hearing to vacate or amend this order or to seek additional remedies for any alleged violation of a Non-Disclosure Agreement (NDA) or duty to the Estate.” (emphasis added)); *see also* Mar. 8 Lythcott Decl. ¶ 4.) Because this production of documents is functionally the same as a response to a subpoena, the Court should award Lythcott remuneration from Comerica as the Court would be required to do if a subpoena were served. *See* Minn. R. Civ. P. 45.03(d); *Wick Bldg. Sys., Inc. v. Emp’rs Ins. of Wausau*, 546 N.W.2d 306, 308 (Minn. App. 1996) (“The rule leaves no room to exercise any discretion in deciding whether or not to award costs. Because these costs are not discretionary and appellants are neither parties to the Wisconsin litigation nor employees of a party, they are entitled to reasonable compensation under Minn. R. Civ. P. [45.03(d)].”⁴ (internal quotation marks and citation omitted)).

The case Comerica cites is inapposite. (*See* Comerica’s Mem. at 11 (citing *Macy’s Retail Holdings, Inc. v. Cty. of Hennepin*, Nos. 27–CV–09–15221, 27–CV–10–08453, 27–CV–11–07991, 27–CV–12–11082, 2014 WL 1379288 (Minn. Tax. Ct. Feb. 25, 2014)).) No court that

⁴ Rule 45.06 was later moved to Rule 45.03(d). *See* Minn. R. Civ. P. 45 advisory committee comment to 2006 amendment.

cites *Macy's* has relied on the proposition that compensation to a nonparty is not appropriate when the nonparty was ordered by a court to produce documents. More importantly, however, *Macy's* contains several relevant facts that are not present here. The nonparty requesting compensation in *Macy's* was an appraiser whose report was subject to Rule 705 of the Minnesota Rules of Evidence. 2014 WL 1379288, at *3. In accordance with Rule 705, the court required the “disclosure of the facts or data underlying the appraiser’s opinion.” *Id.*; *see also* Minn. R. Evid. 705 (stating that the court may require the disclosure of “underlying facts or data” from a testifying expert). Thus, the court stated that “an appraiser must reasonably expect that any facts, data or documentation actually relied upon in formulating his opinions and conclusions will be subject to disclosure.” 2014 WL 1379288, at *7. Additionally, the court found that a licensed appraiser is required by law to “include and retain in his workfile any facts, data, or documentation necessary to support his opinions and conclusions.” *Id.*

Here, Lythcott has not been proposed as an expert witness or to provide an expert report and is not required by law to maintain documents—much less his email—in a specific format. Instead, Lythcott is a nonparty who was hired by the heirs to provide services related to the Estate. (Mar. 8 Lythcott Decl. ¶¶ 2, 4.) As stated above, Comerica should have served Lythcott with a subpoena because it demanded—and subsequently asked the Court order—that Lythcott produce documents. Despite the fact that Comerica instead opted to use informal procedures, and despite the fact that Lythcott had no opportunity to object to the February 13 Order either before or after it was entered, Lythcott is a nonparty subject to the demands of a party to produce documents and should be compensated as such.

Finally, Comerica argues Lythcott violated the NDA to obtain money. Comerica's so-called support for this assertion includes documents where Lythcott discusses receiving payment for his work. (Comerica's Mem. at 15.) Comerica's irrelevant assertions overlook the simple fact that Lythcott was hired to perform a service for the heirs and wanted to be paid for providing that service. Getting paid for working is a social construct in which we all engage, including Comerica, who collects significant payments from the Estate as its Personal Representative (even though all of the Heirs want it to be removed). Comerica's attempt to impute a nefarious motive to obtaining money for work performed is yet another attempt to disparage Lythcott to the Court and the parties.

Comerica's unilateral and erroneous interpretations regarding Lythcott's actions and motivation should not be taken at face value. Comerica purports to file a report with the Court with its recommendation on how to handle the matter. (*See* Comerica's Mem. at 16.) To do so would be akin to allowing Comerica to move for summary judgment and then enter an order in its favor. This Court has not made a factual or legal finding that Lythcott violated his NDA with the Estate, and Lythcott is entitled to due process, including a jury trial, to adjudicate such a claim. Comerica's constant running to the Court inhibits the Court from focusing on what all parties are involved to accomplish: transferring the Estate of Prince Rogers Nelson to his legal heirs.

CONCLUSION

Because Lythcott complied with the February 13 Order and did not waive privilege, Lythcott respectfully requests that the flash drive be returned to his counsel for preservation. Further, Lythcott requests that he be compensated for time spent responding to the Comerica's demand for production of documents as formalized in the February 13 Order.

Respectfully submitted,

Dated: April 8, 2019

MADL PA

By: *s/Christopher W. Madel*

Christopher W. Madel (# 230297)
Jennifer M. Robbins (#387745)
Ellen M. Ahrens (#391004)
800 Hennepin Avenue
800 Pence Building
Minneapolis, MN 55403
Phone: (612) 605-0630
Fax: (612) 326-9990
cmadel@madellaw.com
jrobbins@madellaw.com
eahrens@madellaw.com

Attorneys for Michael Lythcott

ACKNOWLEDGMENT

The undersigned hereby acknowledges that pursuant to Minn. Stat. § 549.211 costs, disbursements, and reasonable attorney and witness fees may be awarded to the opposing party or parties in this litigation if the Court should find that the undersigned acted in bad faith; asserted a claim or defense that is frivolous and that is costly to the other party; asserted an unfounded position solely to delay the ordinary course of the proceedings or to harass; or committed a fraud upon the Court.

Dated: April 8, 2019

MADEL PA

By: *s/ Christopher W. Madel* _____

Christopher W. Madel (# 230297)
Jennifer M. Robbins (#387745)
Ellen M. Ahrens (#391004)
800 Hennepin Avenue
800 Pence Building
Minneapolis, MN 55403
Phone: (612) 605-0630
Fax: (612) 326-9990
cmadel@madellaw.com
jrobbins@madellaw.com
eahrens@madellaw.com

Attorneys for Michael Lythcott