

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,  
  
Decedent.**MEMORANDUM OF LAW IN  
SUPPORT OF MOTION FOR RETURN  
OF FLASH DRIVE AND MOTION FOR  
COSTS**

In an effort to reduce the amount of resources spent by the Court and the parties on this matter, nonparty Michael Lythcott (“Lythcott”) hereby informs the Court that he complied with the Court’s February 13, 2019 Order Regarding Confidential Estate Information (the “February 13 Order”) by providing documents to Comerica’s counsel on February 25, 2019 and March 7, 2019. Thus, Lythcott withdraws his request for *in camera* review, moves the Court to return the flash drive provided to the Court on February 22, 2019, and moves the Court to order Comerica to pay reasonable costs to Lythcott incurred in complying with the Court’s February 13, 2019 Order Regarding Confidential Estate Information.

Lythcott, on behalf of himself and the heirs he represents, simply wants to bring this lengthy and expensive litigation to a close as quickly as possible. Unfortunately, it appears that Comerica is determined to multiply this matter and find issues where none exist.

**I. Nonparty Lythcott withdraws his request for *in camera* review and requests return of the flash drive provided to the Court.**

**A. The Court issued its February 13 Order and Nonparty Lythcott produced documents to the Court with a request for *in camera* review.**

Counsel for Comerica Bank & Trust, N.A. (“Comerica”) requested the Court order Lythcott and Gregg Walker (“Walker”) to provide any communications with third parties that disclosed confidential Estate information. This request is based on Comerica’s allegation that

Lythcott and Walker violated their non-disclosure agreements (“NDAs”) with the Estate. The Court held a conference call on February 13, 2019, in which Lythcott was not permitted—neither personally nor through counsel—to participate.<sup>1</sup>

Following the conference call, the Court issued the February 13 Order, which states in relevant part:

Within 10 days, Michael Lythcott and Gregg Walker shall provide counsel for Comerica all communications and related documents with any third-parties (including, but not limited to, the two entities referenced in the February 8, 2019 Letter filed by Alfred Jackson, Omarr Baker, and Tyka Nelson) that included confidential information that belongs to the Estate. Without limiting the foregoing, Mr. Lythcott and Mr. Walker shall provide all communications and documents related to the “pitch book” attached to the February 11, 2019 letter filed by White Wiggins & Barnes, LLP. Mr. Lythcott and Mr. Walker shall also provide an access log to the data site referenced in the White Wiggins & Barnes, LLP letter that discloses all parties who accessed the site and what they reviewed.

As the Court is aware, on February 22, Nonparty Lythcott provided the Court with a flash drive and sought *in camera* review. Lythcott requested *in camera* review before the documents were provided to opposing counsel in part because the short timeframe involved between his counsel’s engagement and the date required for production under the Court’s Order did not allow for a privilege review. On the following business day—February 25, 2019—counsel for Lythcott called counsel for Comerica to advise him that the flash drive provided to the Court contained privileged information and that Nonparty Lythcott would produce documents directly to Comerica’s counsel that day that did not contain privileged documents. (Ahrens Decl. ¶ 2.) Nonparty Lythcott’s counsel again explained the difference between the Court’s flash drive and the documents produced on February 25 in an email exchange on February 28, 2019. (Ahrens

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<sup>1</sup> On February 26, 2019, Alfred Jackson and Omarr Baker moved to amend the Court’s February 13 Order. In their motion, and among other things, Messrs, Jackson and Baker explained that there was no violation of the NDA, that Lythcott is a valuable advisor to them, and why this Court should place restrictions on the review and use of the information required to be produced by Lythcott to Comerica.

Decl. ¶ 7, Ex. 5 (February 28, 2019 Ahrens email to Cassioppi).) Comerica's counsel agreed that he would not review any documents provided to him by the Court without calling Lythcott's counsel first. (Ahrens Decl. ¶ 2.)

**B. Nonparty Lythcott complied with the February 13 Order.**

As promised, Lythcott produced documents to Comerica's counsel that same day, i.e., February 25, 2019 (the "February 25 Production"). (Ahrens Decl. ¶¶ 3-4, Exs. 1-2 (February 25, 2019 Ahrens letter and email to Cassioppi).) Consistent with the phone call earlier that day, Lythcott's counsel advised Comerica's counsel that Lythcott was withholding documents based on privilege and that Lythcott intended to make a supplemental production that included Bates-labeled documents. (Ahrens Decl. ¶ 4, Ex. 2 (February 25, 2019 Ahrens letter).) The documents in the February 25 Production were not Bates-labelled because there was insufficient time to convert to TIFF format which is required to apply Bates-labels on the images of the documents. Therefore, the documents were produced in native format. (Robbins Decl. ¶ 2.) The documents provided to the Court on the flash drive were similarly provided in native format. (Robbins Decl. ¶ 3.) Nevertheless, Comerica's counsel submitted a letter to the Court after it received the February 25 production lamenting having to wait for Lythcott's intended March 7 supplemental production. (Robbins Decl. ¶ 4, Ex. A.)

On February 28, 2019, a different attorney representing Comerica called Lythcott's counsel regarding the February 25 Production. Comerica's counsel requested metadata for the February 25 Production, which was provided that same day.<sup>2</sup> (Ahrens Decl. ¶ 7, Ex. 5 (February

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<sup>2</sup> In its declaration in support of Comerica's motion to hold Gregg Walker in contempt, Comerica's counsel states "Because of problems with the metadata provided with the production (which counsel for Mr. Lythcott sent us a fix for late last week), we have reviewed to date only a small portion of the 9,561 records." This statement omits the fact that Comerica's counsel received the metadata the same day they requested it. (Ahrens Decl. ¶ 7, Ex. 5 (February 28, 2019 Ahrens email to Unger with link to metadata).)

28, 2019 Ahrens email to Unger with link to metadata.) During that call, counsel also discussed the supplemental production expected on March 7, 2019.

On March 7, 2019, Lythcott made what he hopes to be his final production (the “March 7 Production”). The March 7 Production is Bates-labeled and contains 5,346 documents. (Ahrens Decl. ¶¶ 5-6, Exs. 3-4 (March 7, 2019 Ahrens email and letter to Cassioppi and Unger regarding March 7 Production).) This production is smaller than the February 25 Production because it excludes non-responsive documents and documents that are protected by privilege. For the same reason, rather than what was initially expected to be a supplemental production, it is now a replacement production. Lythcott’s counsel has already explained to Comerica that as soon as all privileged documents in the February 25 Production have been identified, Comerica will receive a clawback letter identifying each document that Lythcott requests Comerica delete or destroy. (Ahrens Decl. ¶ 6, Ex. 4.)

Mere hours after receiving the March 7 production, Comerica’s counsel again wrote to the Court complaining about Lythcott’s production. (Robbins Decl. ¶ 5, Ex. B.) It is literally impossible for Comerica to have reviewed the March 7 production to a sufficient extent before whining to the Court. Moreover, Comerica’s counsel did not attempt to schedule a meet-and-confer with Lythcott’s counsel to try to obtain answers to any questions or narrow the scope of any potential dispute. Lythcott is already in a position of having to produce documents without the time required to engage in a document-by-document review. And while he and his counsel invite Comerica and its counsel to meet-and-confer regarding further questions on these productions, Comerica’s apparent habit of immediately writing to the Court is counterproductive and unnecessary. For their part, Lythcott and his counsel would prefer to resolve this matter as efficiently and effectively as possible.

Because Lythcott has now produced documents directly to Comerica's counsel in response to the Court's February 13 Order, Lythcott has complied with that Order.

**C. Nonparty Lythcott respectfully requests return of the flash drive and withdraws his request for *in camera* review.**

On February 27, 2019, the Court issued its Second Order Regarding Confidential Estate Information (the "February 27 Order"). This Order states:

If Mr. Lythcott believes that some form of review is necessary before the flash drive is turned over to counsel for the Personal Representative, Mr. Lythcott shall do the following prior to March 8, 2019:

- a. file a motion requesting *in camera* review,
- b. set forth the basis for a claim of privilege and the factual basis upon which the claim of privilege is being made, and
- c. file a surety bond of \$25,000 with the Court which shall be used to pay the fee of a special master to review the contents of the flash drive if the Court grants the motion.

Comerica is now in possession of Lythcott's production in response to the February 13 Order. Lythcott therefore withdraws his request for *in camera* review.

Because Lythcott produced documents directly to Comerica's counsel, it is no longer necessary for the Court to retain the flash drive provided on February 22. Further, Lythcott respectfully requests that the Court not provide it to Comerica's counsel because Comerica's counsel has now received the responsive, non-privileged documents contained on the flash drive. Indeed, Comerica has already used the documents provided in the February 25 production in support of its motion for contempt of Mr. Walker. Lythcott proposes that the flash drive be returned to his counsel, who will preserve it in the event issues arise with respect to its contents.

**II. Nonparty Lythcott is entitled to reasonable costs of compliance.**

It is undisputed that Lythcott is not a party to this case. The February 13 Order makes clear that it was issued on the basis of Comerica's request: "The above-entitled matter came before the undersigned via conference call on February 13, 2019, *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.”* (Feb. 13 Order (emphasis added).) Lythcott was prohibited from participating in the February 13, 2019 conference call. (See Lythcott Decl. ¶ 4.) Similarly, the February 13 Order prohibits Lythcott from objecting to or otherwise seeking modification of the Order. (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 Lythcott Decl. ¶ 4.) Nonetheless, concerned that he would be subject to a motion for contempt—like the one filed against Walker—Lythcott complied with the February 13 Order.

Thus, despite the absence of a subpoena (and Lythcott’s inability to object to or be heard on this issue), the February 13 Order arose out of a substantially similar circumstance as a party issuing a subpoena to a nonparty. Here, Comerica—a party to this case—demanded that nonparties—Lythcott and Walker—produce documents. The Court issued the February 13 Order as if it was granting a motion to compel compliance with a subpoena. Therefore, Comerica should likewise be responsible for compensating Lythcott pursuant to the Minnesota Rules of Civil Procedure.

Rule 45.03(d) of the Minnesota Rules of Civil Procedure states that

a witness who is not a party to the action or an employee of a party . . . and who is required to give testimony or produce documents relating to a profession, business, or trade, or relating to knowledge, information, or facts obtained as a result of activities in such profession, business, or trade, is entitled to reasonable compensation for the time and expense involved in preparing for and giving such testimony or producing such documents.

Awarding a nonparty costs under Rule 45.03 is not subject to a Court’s discretion; it is mandatory. See *Wick Bldg. Sys., Inc. v. Employers 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)].”<sup>3</sup> (internal quotation marks and citation omitted)). Similarly, Rule 45.03(a) provides that “[a] party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena.” It is clear, therefore, that the Rules of Civil Procedure require the protection of nonparties not only from the costs of giving testimony or producing documents but also from any undue burden associated with the request to do so.

Here, at Comerica’s request, the Court mandated that Lythcott produce documents within 10 days. Lythcott has undertaken what can only fairly be described as undue burden and expense in an effort to comply with the Court’s Order. Because this production of documents is functionally the same as a response to a subpoena, the Court should award Lythcott costs from Comerica as the Court would be required to do if a subpoena were served. *See* Minn. R. Civ. P. 45.03(d). In short, Lythcott respectfully requests the protection, and application, of the Rules of Civil Procedure and this Court, the same as any nonparty.

Lythcott spent 120 hours, at an hourly rate for this matter of \$250, working independently and with counsel to comply with the February 13 Order. (Lythcott Decl. ¶ 8.) Additionally, the vendor hired to produce documents charges \$569.45 to host the document database per month, including the Relativity user access fees, which are necessary for Lythcott’s counsel to run required searches and view documents. (Robbins Decl. ¶ 6, Ex. C.) The vendor has so far charged \$5,967.75 for its work to collect, process, and prepare the documents for production and a one-time \$1,000 for database initiation. (Robbins Decl. ¶ 6, Ex. C.) The costs

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<sup>3</sup> Rule 45.06 was later moved to Rule 45.03(d). *See* Minn. R. Civ. P. 45, advisory committee comment to 2006 amendment.

associated with the vendor's work in March—without any additional productions or assistance (a questionable assumption given Comerica's March 7 letter)—are expected to be between \$1,000 and 1,500. (Robbins Decl. ¶ 6, Ex. C.) Monthly hosting charges and user access fees of \$569.45 are also billed for March and each month going forward. Thus, Lythcott's time (a total of \$30,000 to date) and vendor costs (a total of \$9,356.65 to date), all of which were required to comply with the Court's February 13 Order, currently equal \$39,356.65. And although Lythcott is not seeking attorneys' fees incurred for the costs of his productions and compliance with the Court's February 13 Order, it bears noting that his counsel and paralegals spent over 85 hours just from February 21 to February 28—not including their time for the month of March to date—to ensure compliance with the Court's Order.

Thus, regardless of the absence of a subpoena, Lythcott has already incurred substantial expense complying with the February 13 Order. Because the February 13 Order was issued at Comerica's request, Comerica should be ordered to pay these expenses. Lythcott, therefore, respectfully requests that the Court enter an Order requiring Comerica to pay Lythcott the total amount of \$39,356.65, to date. To the extent Comerica requires additional time from Lythcott or expenses to be incurred by him for its discovery requests, Lythcott intends to file additional requests for those costs and expenses with the Court.

### **CONCLUSION**

For the foregoing reasons, Nonparty Lythcott respectfully withdraws his request for *in camera* review, requests that the Court return the flash drive to his counsel, and requests that the Court order Comerica to pay the costs Lythcott incurred in complying with the Court's order in the amount of \$39,356.65, to date.

Respectfully submitted,

Dated: March 8, 2019

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**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: March 8, 2019

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