IN THE SUPREME COURT OF THE STATE OF NEVADA

LISA JOHNSON, Appellant, vs. WELLS FARGO BANK NATIONAL ASSOCIATION, Respondent.	)	Docket No. 66094 District Case A655393

APPELLANT'S REPLY BRIEF

HUTCHISON & STEFFEN, LLC.

Michael K. Wall (2098)
Peccole Professional Park
10080 Alta Drive, Suite 200
Las Vegas, Nevada 89145
Attorneys for Appellant

TABLE OF CONTENTS

I. Introduction

It is not the function of a reply brief to reargue matters presented but not responded to in the answering brief. Appellant Lisa Johnson will rely primarily on the arguments of her opening brief, which we believe have not been refuted by Wells Fargo Bank in the answering brief.

The bank's answering brief focuses entirely on its core position in the action below, which is now its sole defense to this appeal. The bank pounds the table with the argument that it has the right to close any account at any time for any reason or no reason, and the customer has no right to know the reason or the lack of a reason for the closing. Lisa does not now and has not ever challenged this position.

The bank's backup position is that its refusal to provide discovery of documents related to the closure of the account is based in federal privilege and national security interests. These arguments are superficial and wrong.

Lisa's argument is that the bank has no right to defame her. If a Wells Fargo employee defames a person, that person is entitled to the documents that would prove or disprove the defamation. Those documents may be important to prosecution of the defamation action, even if the defamer has belatedly admitted there was no truthful basis for the defamatory statements. The wronged person in

this case is Lisa. The bank's belated withdrawal of its truth defense has done nothing to remedy the wrong done to Lisa; that of accusing Lisa of being a criminal and then hiding behind an inapplicable federal privilege to preclude her from discovering why the bank accused her of being a criminal.

If, in addition to showing why the bank defamed Lisa, the documents reveal the reason Wells Fargo closed Lisa's account, so be it. Evidence that is inadmissible for one purpose often comes in because it is admissible for another. Lisa is entitled to basic discovery in her defamation action; it is irrelevant that absent the defamation, Lisa would not be entitled to discover the reason for the closure of her accounts. The reason for the closure of her accounts, though generally confidential, became subject to Lisa's lawful discovery requests when an employee of Wells Fargo relied on those reasons to defame Lisa. More importantly, Lisa's future business dealings may be adversely affected by information kept by Wells Fargo, and kept from Lisa by Wells Fargo.

Wells Fargo has not even attempted to respond to this argument in the answering brief. And Wells Fargo has not attempted to address the statutory arguments of the opening brief, demonstrating that the federal law does not give Wells Fargo blanket protection to commit fraud and hide the evidence thereof. The federal privilege is narrow, and does not apply in this case. Lest this Court be

tempted to sweep this matter aside because Lisa won her defamation action, *i.e.*, no harm, no foul, Lisa would remind this Court that the reach of the federal law is a question of first impression in Nevada. Lisa is suffering and may suffer ongoing harm based on the bank's action, and she cannot even determine the reason for that action. But it is not only Lisa who cannot live with the bank's and the district court's breathtakingly broad application of a narrow federal privilege; it is the state of Nevada, and all of its citizens, who need clarification and restriction of the federal privilege to only those matters it was intended to cover. This case cries out for judicial intervention.

II. Discussion

The bank asserts in its statement of the case that "an *in camera* review of bank records found that disclosure of the bank's reasons for closing the accounts would require disclosures prohibited by the Bank Secrecy Act." RAB 1. Strictly speaking, this is not a fact; it is the discovery commissioner's conclusion of law, which this Court should review *de novo*. Further, this characterization of the discovery commissioner's review is not entirely accurate.

From the outset, as set forth in the opening brief at pages 14 -16, the discovery commissioner took a breathtakingly, overly-expansive view of the reach of the "Patriot Act" and the privilege afforded to banks under that act. As argued

in the opening brief, the Patriot Act has little or nothing to do with this case, which is not a case of national security. AOB 27. The commissioner's view was largely accepted by the district court, but the district court remanded to the commissioner for a privilege log. The commissioner conducted an *in camera* inspection of the documents, but the proceedings on remand mainly concerned creating a privilege log. The privilege log eventually produced by the bank and approved by the commissioner was the equivalent of no privilege log at all: it identified no documents and simply said all documents are privileged. The bank continued to assert that even identifying the documents would violate the privilege, a position the district court properly labeled "ridiculous." The commissioner then indicated that she had reviewed the documents, and made a general pronouncement that some documents are privileged under the law, and other are not. But she never determined which of the documents she reviewed fell into which category, and she never required production of any document. This is all set forth in detail with appropriate citation to the record in the opening brief at 14-21.

The problem with the commissioner's review is that she was applying an incorrect and overly broad construction of the federal privilege, and she never identified which, if any documents, were privileged. *See* discussion of commissioner's decision at page 34 of the opening brief. Lisa was left entirely in

the dark, and all bank records were protected without even identification of what documents exist. The bank cannot be allowed to hide behind an *in camera* inspection that began with an incorrect presumption that the federal law, allegedly embodied in the Patriot Act (waive a flag here), allows a bank may cloak all of its processes in a shroud of secrecy, whether or not related to an SAR. This simply cannot be the law.

The bank asserts that what its employee, Dounel, viewed on his computer screen that caused him to accuse Lisa of past criminal conduct did not show why the accounts were closed, RAB 4, but the fact is, we do not know what that screen showed. All we have is Dounel's self-serving testimony and the bank's self-serving assertion that such information would not have been displayed. Lisa was not able to challenge these bald assertions with evidence obtained through the most rudimentary discovery.

What we know is that immediately after viewing the screen, Dounel accused Lisa of criminal conduct. What we can assume is that something on that screen prompted the comments. What the bank wants us to believe is that nothing was displayed on the screen, and Dounel just speculated that Lisa was a crook. What is missing is proper discovery. The screen may or may not have told Dounel the exact reason for the closure of the account, but it most certainly told him

something; otherwise, why would he have even looked it up? And why did his defamatory comments immediately follow his reading of whatever was on his computer screen?

The bank's position at trial and in this appeal, as was adopted by the district court, was that Lisa is never entitled to know why the accounts were closed, because federal law will not allow the court "to go there." RAB 11 (quoting district court's reason for denying declaratory relief). The bank argues at length that it is not required to inform a customer of why it closes an account. According to the bank, Lisa's first basis for wanting to know why the accounts were closed fails because the relationship between the bank and Lisa is not uncertain. This is not in response to any argument Lisa made in the opening brief. It is true that Lisa wants to know why her accounts were closed for the same reasons any customer would want to know why its bank would unilaterally take such action. But Lisa's claim for declaratory relief and this appeal are not about the relationship of the bank to Lisa. Lisa understands that as a generally proposition, a bank can close an account and not tell a customer why.

This case is about the bank's defamation, and the fact that Lisa was not allowed garden variety discovery in her garden variety defamation action. In a general lawsuit, the parties are allowed discovery which is not limited to

information that is relevant to the claims. It is broad enough to allow discovery of all information that could lead to anything relevant. If the bank were a grocery store and a clerk defamed a customer, no one would argue that the customer would not be allowed discovery of the store's documents that would prove or disprove the defamatory comments, even if truth were not asserted as a defense. The information could lead to a better understanding of all aspect of the claims and defenses, and would not be protected absent privilege. Thus, the focus of this case is not whether the reason for the defamation became irrelevant when the bank belatedly abandoned its truth defense. The focus of this case is privilege.

The focus of Lisa's claim for declaratory relief below is the same focus of this appeal: Is the federal privilege claimed by the bank so broad that it denies Lisa any information the bank possesses, whether or not that information is related to an SAR? That is how broadly the commissioner and the district court construed the federal privilege, and Lisa asserts that construction is an error of law.

In response to this pivotal question, and the arguments in the opening brief addressing at length the language of the statute and its proper construction, the bank offers only general, superficial arguments about the broad protection the Bank Secrecy Act allegedly gives to SARs and SAR related documents. RAB 16-20. But the point is, the federal law is limited by its very language–language that

is not addressed or analyzed in the answering brief–and it protects only SARs and documents specifically attached to or directly related to SARs. It does not protect all bank investigatory information unrelated to an SAR. It does not give a bank *carte blanche* to create a department that shrouds in secrecy all bank documents because some might be related to an SAR. The argument that documents that documents cannot even be identified so that a determination can be made that the documents are or are not related to an SAR was labeled "ridiculous" by the district court, but her ruling then adopted that very ridiculous argument. (Double entendre intended). The Bank Secrecy Act does not purport to be a license for banks to commit and hide fraud or other misconduct, Without discovery of routine business documents not directly protected by the narrow language of the Bank Secrecy Act, that is exactly what banks can do.

There is no indication in this case that the bank's documents were in any way related to an SAR. But the bank thinks all of its investigatory documents are privileged, regardless of the nature of the documents or whether the investigation had anything to do with an SAR, because if the documents are not related to an SAR, that shows that there is no SAR. The bank thinks it can create a separate department to handle SARs, and filter any document it wants to through that department and create secrecy, even for routine bank documents. The bank thinks

the only documents a victim can obtain from the bank are copies of her own bank statements that were already mailed to her in the ordinary course of business. The bank simply cannot be right.

In this case, we still do not know why the bank closed the accounts. That is disappointing to Lisa, who is personally offended and hurt by the bank's treatment of her as a loyal and upright customer with no previous blemish on her record. But that is not what this appeal is about. What Lisa still does not know, and what she is entitle to know, and what the federal law does not purport to keep her from knowing, is what information the bank has that caused the bank's employee to defame her by calling her a criminal. Unless that information is directly contained in an SAR, or is attached to an SAR, or would affirmatively reveal the existence or non-existence of an SAR, Lisa was and is entitled to the information. There is nothing in the authorities cited by the bank that would require a broader reading of the Bank Secrecy Act, or would defeat Lisa's right to discovery of basic information directly relevant to, or that could lead to relevant evidence about, her claim against the bank for defamation. The bank reads the cases as providing an expansive privilege, but the case only set out a limited privilege at to SARs and directly related SAR documents.

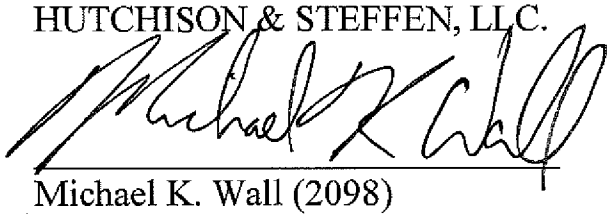
The remainder of the bank's brief is dependent on these two incorrect arguments, and are fully refuted in the opening brief. The point is, the correct construction of the Bank Secrecy Act requires analysis of the language of the act, not just citation to general case law stating that the privilege exists. Lisa and the state of Nevada look to this Court for an authoritative declaration of just how the Bank Secrecy Act is to be applied in Nevada. We believe that declaration will necessarily include a conclusion that Lisa was entitled to discovery of non-privileged documents relevant to her defamation claim as a matter of law, and her right was not defeated simply because such documents might have revealed the reason the bank closed her account.

CONCLUSION

This Court should reverse the decision of the district court.

DATED this 9 day of October, 2015.

HUTCHISON & STEFFEN, LLC.



Michael K. Wall (2098)
Peccole Professional Park
10080 West Alta, Suite 200
Las Vegas, Nevada 89145

Attorneys for Appellant

ATTORNEY'S CERTIFICATE

1. I certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because it has been prepared in a proportionally spaced typeface using WordPerfect X4 in 14 point Times New Roman font.

2. I further certify that this brief complies with the type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points and contains 2326 words.

3. Finally, I certify that I have read this appellate brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event the

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accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 9 day of October, 2015.

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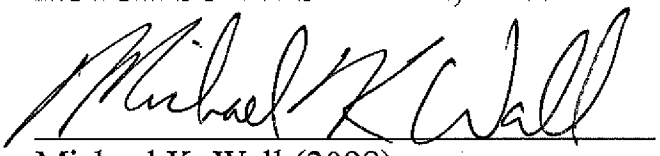

Michael K. Wall (2098)
Peccole Professional Park
10800 Alta Drive, Suite 200
Las Vegas, Nevada 89145
Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that I am an employee of HUTCHISON & STEFFEN, LLC and that on this date **APPELLANT'S REPLY BRIEF** was filed electronically with the Clerk of the Nevada Supreme Court, and therefore electronic service was made in accordance with the master service list as follows:

Kent F. Larsen (3463)
Paul Haire, Esq. (5656)
SMITH LARSEN & WIXOM
Hills Center Business Park
1935 Village Center Circle
Las Vegas, NV 89134
kfl@slwlaw.com
pmh@slwlaw.com
Facsimile 702-252-5006

Attorneys for Respondents

DATED this 9th day of October, 2015.

An employee of Hutchison & Steffen, LLC