UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LOG ON AMERICA, INC.,

Plaintiff,

- against -

CREDIT SUISSE FIRST BOSTON CORPORATION,

Defendant.

01 Civ. 0272 (RMB)(MHD)

DECISION AND ORDER

I. BACKGROUND

Promethean Asset Management L.L.C. ("Promethean") and HFTP Investments L.L.C. ("HFTP") (collectively, the "Non-parties") object to United States Magistrate Judge Michael H. Dolinger's Memo Endorsed Order, dated August 24, 2001 (the "Memo Endorsed Order"). The Memo Endorsed Order denied the Non-parties' motion to compel Plaintiff, Log On America (the "Plaintiff" or "LOA"), to return a two-page fax containing information regarding the Non-parties' Bank of New York accounts that Plaintiff allegedly obtained from an anonymous third-party. **For the reasons set forth below, Magistrate Judge Dolinger's Order is affirmed.**

II. STANDARD OF REVIEW

A District Court judge "shall modify or set aside any portion of the magistrate judge's [nondispositive] order found to be clearly erroneous or contrary to law." Fed. R. Civ. P. 72(a); see also Thompson v. Keane, 1996 WL 229887 at *1 (S.D.N.Y. May 6, 1996). An Order is "clearly erroneous" if "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed," and it is

"contrary to law" where the Order "fails to apply or misapplies relevant statutes, case law or rules of procedure." Thompson, 1996 WL 229887 at *1 (citations omitted); see also Siao-Pao v. George, 1992 WL 236184 at *2 (S.D.N.Y. Sept. 10, 1992). A magistrate judge's order is afforded substantial deference. Derthick v. Bassett Walker Inc., 1992 U.S. Dist. LEXIS 14505 at *23 (S.D.N.Y. Sept. 23, 1992); see also Siao-Pao, 1992 WL 236184 at *2.

III. ANALYSIS

Upon review of the record in this case, including among other things, the Memo Endorsed Order, the Objections of the Non-parties (the "Non-parties' Objections"), Plaintiff's Memorandum of Law in Response to Promethean's Objections (the "Plaintiff's Response"), the Reply Memorandum of the Non-parties (the "Non-parties' Reply"), the District Court's Conditional Dismissal Order, dated July 27, 2001 (the "Conditional Dismissal Order"), and the Stipulation and Order of Dismissal, dated August 24, 2001, (the "Stipulated Dismissal Order"), and the applicable law, the Court finds that Magistrate Judge Dolinger's denial of the Non-parties' motion was neither clearly erroneous nor contrary to law.

The Non-parties assert that they are "entitled to the return of the... information... regardless of the settlement of this action...." See Non-parties' Objs. at 4; Non-parties' Reply at 2-3. Plaintiff argues that the Conditional Dismissal Order "divested this Court of jurisdiction..." even to resolve the issue. See Pl. Resp. at 4. Magistrate Judge Dolinger noted that the Non-parties "waited until this action has been dismissed to seek relief...," but did not directly address the issue of jurisdiction. See Memo Endorsed Order. He ruled that "there is no basis to suggest that the materials will be used in this

now dismissed lawsuit and [ ] movants make no showing of...a factual basis for demonstrating any impropriety by plaintiffs...." See Memo Endorsed Order.

Jurisdiction

"It is well established that a federal court may consider collateral issues after an action is no longer pending." Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 395 (1990); see also Chemiakin v. Yefimov, 932 F.2d 124, 128 (2d Cir. 1991) ("Even if a court does not have jurisdiction over an underlying action, it may have jurisdiction to determine whether the parties have abused the judicial system...."). This extends to issues raised by non-parties. See Gumbel v. Pitkin, 124 U.S. 131, 145-46 (1888) ("[T]he equitable powers of the courts of the United States,...may be invoked by strangers to the litigation as incident to the jurisdiction already vested...."). Courts have, for example, heard requests for costs, attorney's fees, and sanctions. See Heinreichs v. Marshall and Stevens Inc., 921 F.2d 418, 421 (2d Cir. 1990) ("The Court's reasoning [in Cooter & Gell] "applies with no less force to discovery sanctions...."); Chemiakin, 932 F.2d at 127 ("[O]ne can derive from Cooter & Gell the broader principle that Rule 11 jurisdiction is independent of subject matter jurisdiction and that the decision to sanction is 'a collateral one'...."); see also Grundberg v. Upjohn Co., 140 F.R.D. 459, 463 (D. Utah 1991) ("[W]hen permissive intervention is sought for the sole purpose of modifying a protective order, the district court has jurisdiction for that limited purpose even though the main action has been dismissed."). Moreover, determining whether LOA wrongfully obtained a document used in a deposition taken under the auspices of the Court "is not a judgment on the merits of an action...[r]ather it requires the determination of a collateral issue...." Cooter & Gell, 496 U.S. at 396; see also Non-parties' Objs. at 2.

Non-Parties Motion

Promethean and HFTP argue that "the harm to non-parties...from the unauthorized disclosure of [the] information continues notwithstanding the settlement and regardless of the level of involvement by LOA or its counsel," and that "LOA's counsel was under an obligation to refrain from using confidential materials obtained from unauthorized sources." Non-parties' Objs. at 4-5. Plaintiff asserts that its "continued retention of the subject document has not nor will it harm" the Non-parties, and that Promethean and HFTP "made no showing that plaintiff engaged in any 'impropriety' in obtaining the subject document." See Pl. Resp. at 5-6.

Generally, "neither the Federal Rules of Civil Procedure nor courts' inherent powers support an order prohibiting use of information innocently obtained from third parties without use of judicial process." Wole v. Fayemi, 174 F.R.D. 319, 325 (S.D.N.Y. 1997) (quoting Schalifer Nance & Co. v. Estate of Andy Warhol, 742 F. Supp. 165, 166 (S.D.N.Y. 1990)); see also Bridge C.A.T. Scan Assocs. v. Technicare Corp., 710 F.2d 940, 944-945 (2d Cir. 1983) ("Rule 26...is not a blanket authorization...but is rather a grant of power to impose conditions on *discovery*...."); Krishner v. Uniden Corp. of America, 842 F.2d 1074,1081 ("[T]he court may not issue an order limiting a party in the use it may make of information not acquired under the discovery rules...."). "A court may, however, exercise its inherent equitable powers to sanction a party that seeks to use...evidence that was wrongfully obtained." Fayemi, 174 F.R.D. at 325; see also Gumbel, 124 U.S. at 145-146 ("[T]he equitable powers of the courts...over their own process, to prevent abuse, oppression, and injustice, are inherent....").

Magistrate Judge Dolinger specifically determined that the Non-parties failed to show "a factual bases for demonstrating any impropriety by plaintiff...." See Memo

Endorsed Order. This determination cannot be termed clearly erroneous. See Bridge C.A.T. Scan, 710 F.2d at 946 ("[A]lthough [the defendant] suggested obliquely...that [the plaintiff's] possession of the trade data was wrongful, it presented no evidence that [the plaintiff] had come by the information by other than legitimate means."); see also Siao-Pao, 1992 WL 236184 at *2. Nor is it contrary to law.

The Non-parties also fail to establish harm. "[T]here is no basis to suggest that the materials in question will be used in this now dismissed lawsuit," see Memo Endorsed Order. See also Grundberg, 140 F.R.D. at 464, n. 5 ("[T]he District Court must refrain from issuing discovery orders applicable only to collateral litigation. 'Federal civil discovery may not be used merely to subvert limitations on discovery in another proceeding....'").

IV. CONCLUSION

Accordingly, Magistrate Judge Dolinger's Order, dated August 24, 2001, is affirmed.

DATED: New York, New York
November 5, 2001

RICHARD M. BERMAN
U.S.D.J.