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

MILL LANE MANAGEMENT, LLC. AND GARY SINDERBRAND, Plaintiffs, v. WELLS FARGO ADVISORS, LLC. AND STEVEN SINDERBRAND, Defendants.	Index No. 652025/2017 IAS Part 53

MEMORANDUM OF LAW OF DEFENDANT WELLS FARGO ADVISORS, LLC IN SUPPORT OF ITS APPLICATION FOR INJUNCTIVE RELIEF AND A PROTECTIVE ORDER

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PRELIMINARY STATEMENT

Defendant Wells Fargo Advisors, LLC ("Wells Fargo") submits this memorandum of law in support of Wells Fargo's application pursuant to CPLR Articles 31 and 63 for an order: (i) enjoining Plaintiffs Mill Lane Management, LLC and Gary Sinderbrand (collectively, "Gary") and their agents, representatives and/or affiliates, including lawyers Aaron Zeisler, Esq. and his firm, Zeisler PLLC, and Andrew Miller, Esq. (collectively referred to herein as "Plaintiffs") from reviewing, using, copying and/or disseminating confidential customer information and privileged information ("Confidential Information") inadvertently produced to Gary in a related New Jersey action, (ii) requiring Plaintiffs immediately to return all Confidential Information in their possession, (iii) requiring Plaintiffs to identify all persons to whom they have shown or disclosed Confidential Information and (iv) granting Wells Fargo such other and further relief as may be just and proper.

This case is an especially egregious one. Not only did the attorneys – who instantly recognized the potential implications of confidentiality and privilege – fail to honor their ethical and legal obligations to immediately return the Confidential Information, but they released the materials directly to their client, who, without skipping a beat, then dispatched the materials to *The New York Times.* The *Times,* in turn, published an article on July 21, 2017.

The underlying action arises out of a dispute between two brothers who were both Wells Fargo financial advisers. Gary originally commenced litigation in the Superior Court of New Jersey against Steven. Gary delivered a release in favor of Wells Fargo after his employment was terminated.

During the course of the New Jersey action, Gary sought third-party discovery from Wells Fargo. As friction grew, Gary sought to circumvent his release of Wells Fargo by commencing a

parallel action in this Court on behalf of his limited liability company, Mill Lane Management. LLC. As a result, everyone concerned is a party to this action, but Well Fargo remains a non-party in New Jersey. Gary is represented by different counsel in the two actions, Mr. Miller in New Jersey and Mr. Zeisler here in New York.

On February 13, 2017, Wells Fargo was served with a **third-party** subpoena in the New Jersey action, Gary Sinderbrand vs. Steven Sinderbrand, in the Superior Court of New Jersey, Atlantic County, Docket No.: ATL-L-2182-16 (the "NJ Action") seeking, among other documents, electronic communications between Defendant Sinderbrand and Wells Fargo. See ¶ 2 of Angela Turiano Affirmation (herein referred to as "Turiano Aff.") and the subpoena annexed thereto as Exhibit A. Wells Fargo retained the law firm of Bressler, Amery & Ross, P.C. ("Bressler") to assist with the subpoena response and any related discovery, with Angela Turiano as the lawyer in charge of this matter. See ¶2 of the Turiano Aff.

Based upon discussions between Ms. Turiano and Mr. Miller, Wells Fargo agreed to conduct a search of four custodians' email boxes using designated search terms. Wells Fargo, like many large corporations, uses an outside e-discovery service to conduct e-mail searches. The vendor conducted the search, which produced more than 5,000 emails. Ms. Turiano then reviewed the search results in order to exclude from production any emails containing confidential or privileged information. Following the completion of the review and directions to delete or redact Confidential Information, Bressler sent the documents in an encrypted CD to Gary's counsel, Mr. Miller. The CD was stamped "Confidential." The letter enclosing the CD stated as follows:

> Please also note that with regard to the current production – and as consistent with WFA's original objections - all responsive emails were produced (whether relevant or not to the subject matter of the court action) [1] ***with the exception of: privileged***

[1] As a non-party to the NJ Action, WFA was not in a position to choose which emails counsel deemed relevant and thus, we produced all emails that were responsive to the search requested by counsel, excluding only those with confidential and/or privileged information.

emails and non-relevant emails that contained customer and/or company confidential information.

See ¶ 3 of the Turiano Aff. and the letter annexed thereto as Exhibit B. (Emphasis added).

On Thursday, July 20, 2017, Ms. Turiano received a letter from Mr. Zeisler, copying Mr. Miller, stating that Gary had provided Mr. Zeisler with copies of the production in the NJ Action and that the documents contained Confidential Information. See ¶ 4 of Turiano Aff. and the letter annexed thereto as Exhibit C. This was the first Bressler knew of the mistake, which resulted from an attorney's misunderstanding of the complex interfaces with the process employed by Wells Fargo's outside document vendor, as more fully explicated in paragraph 3 of the Turiano Aff.

Confirming that he appreciated the sensitivity of the materials and his ethical obligations, Mr. Zeisler stated that he was alerting us "as a matter of ethics and courtesy" that Wells Fargo had "produced documents marked privileged" and "revealing billions of dollars of client account information . . ." On Thursday, July 20, the day before *The Times* ran the article, despite the pending litigation, Gary sent to an email to Mike Carroll, a Wells Fargo Regional President. The email stated that Gary is "now in possession of sufficient information to prove [his] claims . . . ." He then stated that Bressler's production in the NJ Action contained a "massive amount of highly confidential material that – while relevant to my cases on damages and WFA's carelessness with confidentiality – was not expressly called for in the subpoena and the disclosure of which apparently violates FINRA/SEC regulations and many state privacy laws." See ¶ 8 of Turiano Aff. and the email communications and correspondence annexed hereto as Exhibit H. Despite the fact that we requested that counsel direct Gary not to communicate directly with Wells Fargo business personnel, on July 23, he sent as email to Jonathan Weiss, the Head of Wealth & Investment Management, which stated "[a]s you are now aware by virtue of the NYT article that was published yesterday, I received thousands of documents . . ." and requested a meeting with Mr. Weiss to "find a solution .

. . ." That same day Ms. Turiano sent emails and a letter demanding the return of the CD. See ¶ 4 of Turiano Aff. and the email communications and correspondence annexed thereto as Exhibit D.

On Thursday, July 20, 2017, Ms. Turiano also received a letter by email from Mr. Miller stating that he had received Mr. Zeisler's letter and that he had provided Gary a copy of the CD to review. Mr. Miller further stated that although he would not review documents that were "not relevant to the action," he would not return the CD because he subjectively did not think the information contained therein "was inadvertently sent based upon [the] cover letter which accompanied the disc." See ¶ 5 of the Turiano Aff. and the letter annexed thereto as Exhibit E. Mr. Miller reiterated his refusal to return the CD in a follow up email, and continued to take this position notwithstanding a direct representation from Ms. Turiano, as an officer of the Court, that the emails were inadvertently produced and a further statement that this situation "could have been dealt with simply and appropriately by providing a heads up to the issues and returning the CD – as is [his] professional obligation." See ¶ 5 of the Turiano Aff. and the email communications annexed there to as Exhibit F.

Rather than return the CD as Wells Fargo demanded on July 20 and thereby prevent the risk of disclosure of Confidential Information concerning Wells Fargo customers, one or more Plaintiffs took a polar opposite step, outrageously furnishing the Confidential Information to *The New York Times*. On Friday, July 21, 2017, the *Times* published an article entitled "Wells Fargo Accidentally Releases Trove of Data on Wealthy Clients." Although the article contains a number of inaccuracies, it also states that the *Times* "**was shown large portions of the data [i.e., the Confidential Information] and confirmed that it included what appeared to be clients' names, unredacted Taxpayer Identification Numbers, assets under management, portfolio performance, mortgage information and details on 529 education savings plans.**" See ¶ 6 of the Turiano Aff. and the article annexed thereto as Exhibit G.

By letter dated July 21, 2017, Wells Fargo advised the Court of the foregoing facts and made a conference request for emergency relief pursuant to Rule 14 of the Commercial Division. See ¶ 8 of the Turiano Aff. and the letter annexed thereto as Exhibit H.

Once Wells Fargo advised Messrs. Zeisler and Miller that it had inadvertently produced Confidential Information and requested the return of the CD, they were ethically and legally bound to comply – an obligation acknowledged by Mr. Zeisler himself in his initial letter to Ms. Turiano. Professional Rules of Conduct, DR 1-102(A)(5) prohibits conduct that is prejudicial to the administration of justice and ABCNY Comm. Prof'l. Jud. Ethics Opinion 2003-04 states that DR 1-102(A)(5) supports the conclusion that a lawyer receiving an inadvertent communication may not freely exploit it without undermining the administration of justice. The ethics authorities have explicitly stated this sort of tactic is "ethically impermissible." This Court has the inherent authority to enjoin Plaintiffs as requested in this application. See, e.g., Galison v Greenberg, 5 Misc3d 1025(A) (Sup Ct NY County 2004 [Cahn, J]). See also N.J. Court Rules, RPC 4.4 (b) (A lawyer who receives a document and has reasonable cause to believe that the document was inadvertently sent shall not read the document or, if he or she has begun to do so, shall stop reading the document, promptly notify the sender, and return the document to the sender.)

Messrs. Miller's and Zeisler's assertions in their respective letters of July 20 (and in additional communications with undersigned counsel) that our production of Confidential Information was not inadvertent are baseless. As stated above, the cover letter to the production made clear that we intended to exclude Confidential Information. See ¶ 3 of the Turiano Aff. and the letter annexed thereto as Exhibit B. Moreover, as soon as Wells Fargo was advised of the issue, it promptly advised counsel of the mistake and demanded the immediate return of the CD.

LEGAL ARGUMENT

I. PLAINTIFFS SHOULD BE ENJOINED FROM USE OF THE MATERIAL AND COMPELLED TO RETURN IT

Both the disclosure rules set forth in CPLR Article 31 and the elements of a preliminary injunction in Article 63 support immediate and comprehensive relief here. It is critical, not just for the integrity of the discovery process but also the interests of customers' Confidential Information, that this gross abuse of inadvertent disclosure be stopped and reversed.

Under New York law, the party seeking a preliminary injunction must demonstrate a probability of success on the merits, danger of irreparable injury [1] in the absence of an injunction and a balance of equities in its favor. Second on Second Café v. Hing Sing Trading, 66 A.D.3d 255 (2009), citing CPLR §6301; Grant Co. v. Srogi, 52 N.Y.2d 496, 517 (1981). A mandatory injunction is preliminarily granted in "extraordinary circumstances," where the granting of the relief is essential to maintain the status quo. Id.; see also Guardian Life Ins. Co. v. Brill, 2011 NY Slip. Op. 31208 (Gische, J.) (mandatory injunction requiring former agents to return documents); Vill. of Westhampton Beach v. Cayea, 38 A.D.3d 760, 762 (2007) (mandatory injunctive relief can issue where necessary to maintain the status quo); Matos v. City of New York, 21 A.D.3d 936 (2005).

The facts of this case squarely fall within the extraordinary circumstances where mandatory injunctive relief is warranted, and surely within the lesser standards of disclosure practice under CPLR §3103. Section 3103 states, in pertinent part:

> (a) Prevention of abuse. The court may at any time on its own initiative, or on motion of any party or of any person from whom or about whom discovery is sought, make a protective order denying, limiting, conditioning or regulating the use of any disclosure device. Such order shall be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts.

[1] Irreparable injury or harm is a continuing harm resulting in substantial prejudice caused by the acts sought to be restrained if permitted to continue, pendent lite, and if granted tailored to fit the circumstances so as to pressure the status quo to the extent possible. Second on Second Café v. Hing Sing Trading, 66 A.D.3d 255 (2009).

* * *

> (c) Suppression of information improperly obtained. If any disclosure under this article has been improperly or irregularly obtained so that a substantial right of a party is prejudiced, the court, on motion, may make an appropriate order, including an order that the information be suppressed.

The precise procedure requested by defendants herein was implemented by Justice Cahn in Galison v. Greenberg, 5 Misc.3d 1025(A) (Sup. Ct. NY County 2004). There, as here, an attorney inadvertently released privileged and confidential materials during the disclosure process. After the recipient refused to return and suppress the materials, the producing party moved for protective and ameliorative relief.

The Court agreed, holding in language equally applicable to the present case:

> Inadvertent disclosure of a document protected by the attorney-client privilege, will not constitute a waiver of the privilege. An intent to waive the privilege by disclosure of the document must be shown, in order to have a valid waiver. Manufacturers and Traders Trust Co. v. Servotronics, Inc., 132 AD2d 392, 398 (1987).
>
> Here, it is clear that the disclosure was inadvertent and unintentional. Upon finding that the e-mail had been turned over to plaintiffs' counsel, Grossman immediately took steps to demand its return. Her actions belie a claim of intentional waiver. Nothing submitted in opposition to the within motion, shows that the disclosure was intentional.
>
> Granting the within motion would not prejudice the plaintiffs. Since the document should not have been produced in the first place, plaintiffs will not be worse off by not being able to use it.
>
> Further, the document at issue is clearly protected by the attorney-client privilege. It is between a Rounder employee and Rounder's counsel, with copies being sent to the other Rounder personnel.
>
> The court recognizes that granting the within motion will not place the parties in the position they were in before the disclosure — the genie cannot be put back in the bottle. By preventing further use of the document, and requiring that all copies be returned to Rounder's counsel, the court can, at least, minimize the damage.

The Court specifically noted that a recipient's failure to return inadvertent disclosure is both unethical and sanctionable:

> The court also notes that both the Association of the Bar of the City of New York, in an opinion of its Committee on Professional and Judicial Ethics, opinion number 2003-04, 2004 WL 837937, and the New York County Lawyers Association, in an opinion of its Committee on Professional Ethics, opinion number 730, 2002 WL 31962702, have considered the issue. Both conclude that when receiving a communication or e-mail which the lawyer knows or should reasonably know contains privileged material, the attorney is obligated to "promptly notify the sending attorney" thereof, to refrain from further review of the communication, and to return or destroy it if so requested. Counsel should be aware of their obligations in these circumstances, and promptly adhere to them, in order to avoid sanctions.

Acting upon the holding, the Court directed:

> (1) Return all copies of the e-mail in his possession, to Grossman, and, of course, not make other or additional copies.
>
> (2) To the extent that plaintiffs' counsel has disseminated copies of the e-mail, he shall serve a copy of this decision and order on all persons or firms to whom it was disseminated, together with a letter demanding immediate return of all copies of the e-mail for return to Grossman.
>
> (3) Mars shall serve and file an affidavit of compliance with the above, within three days of service on his office of a copy of this decision.
>
> (4) To the extent that any of the papers submitted in opposition to the motion to dismiss refer to, or quote from, the e-mail, the document(s) shall be redacted to remove all such references or quotes, or in the alternative, new documents may be submitted in place of the offending ones. This is to be done within one week of service of a copy of this decision and order.

While Galison is particularly instructive and emanates from this very Commercial Division in New York County, this is far from an isolated order. The courts have repeatedly condemned its

misuse and taken immediate measures to repair any damage caused. Thus, in Manufacturers and Traders Trust Co. v. Servotronics, Inc., 132 AD2d 392, 398 (1987), the Appellate Division reversed the lower court's order denying a bank's motion for the return of inadvertently disclosed documents, noting that "although confidentiality can never be restored to a document already disclosed, a court can repair much of the damage done by disclosure by preventing or restricting use of the document at trial. While reasonable precautions might be required to promote appropriate standards of care in document production, there is no reason to apply the harsh traditional approach to a litigant who inadvertently discloses a document, at least prior to the time that remedying an accidental production would cause the adversary any prejudice." See also United States v. Rigas, 281 F. Supp. 2d 733, 738 (S.D.N.Y. 2003) (balancing (1) the reasonableness of the precautions taken by the disclosing party to prevent inadvertent disclosures; (2) the length of time taken by the disclosing party to redress or cure the error; (3) the size of the disclosure relative to the entire volume of discovery involved; and (4) the overarching issue of fundamental fairness and protection of the privilege).

It is clear that Wells Fargo's intent was to maintain the privilege and confidentiality of the documents produced and it took reasonable steps to prevent the disclosure. Indeed, at the very least, plaintiffs' attorney's initial notification to defendants' attorney explicitly acknowledged that the production of the Confidential Information raised an issue of possible inadvertence. But instead of preserving the information from disclosure, one of plaintiff's attorneys blithely relinquished the materials to his client. And the client, in turn, wasted no time in disseminating the information in controversy to the world by affirmatively handing it over to *The New York Times*.

Each day that Plaintiffs maintain the Customer Information there is a danger posed, amounting to irreparable harm, to Wells Fargo's customers. There is no better evidence of that risk than the undisputed fact that Plaintiffs have already gone to great lengths to promulgate this information not just for their own narrow purposes, but to the entire world.

It is also clear that any inclination to rely on Plaintiffs' attorneys, as officers of the Court, to restrain their clients and maintain the status quo, would be misplaced here. Plaintiffs' attempt to retain the documents notwithstanding notice of the inadvertent disclosure is a violation of their legal and ethical obligations. Moreover, one or more of the Plaintiffs' escalation of an issue, including the involvement of the press, which could have and should have been resolved with a simple return of the CD is reprehensible and indicative of their true motives here – to improperly malign Wells Fargo and gain what they perceive to be a tactical advantage in the pending litigation. In the process, Plaintiffs have endangered the interests of not only Wells Fargo, but many innocent customers as well.

The Court need not be detained long by plaintiffs' self-serving and baseless contention that they do not consider the disclosure to have been inadvertent. Even if their counsel seriously believed that the production was deliberate, they were not permitted to release the information on their own accord. This point was made very clearly by Judge Sweet in American Express v. Accu-Weather, Inc., 1996 U.S. Dist. LEXIS 8840 (S.D.N.Y. 1966), where the court sanctioned the recipients' counsel for opening a package of confidential documents after being informed by producing counsel that the package contained inadvertently produced documents and should not be opened. Citing American Bar Association Formal Ethics Opinion 92-368, the court held that the recipients' counsel "should have adhered to the [producer's] instructions and not decided for themselves if the document warranted the attorney-client privilege." The current situation is even more flagrant. Not only did counsel ignore the prompt alert from their counterparts about the inadvertence, but they facilitated the leak of those very documents to one of the world's leading newspapers.

Under these circumstances, Wells Fargo has more than satisfied the requirements for a preliminary injunction or a protective order. The applicable ethical rules and case law – combined with the absence of any legitimate purpose for Plaintiffs' use of the Confidential Information – augur

the likelihood of success on the merits. The potential for irreparable harm is manifest, reflected in the abuse of the information already perpetrated by Plaintiffs. And the balance of the equities strongly favor Defendants, as well as third parties who have an interest in the Confidential Information.

CONCLUSION

Based upon the foregoing, Wells Fargo respectfully requests that the Court issue an order: (i) enjoining Plaintiffs from reviewing, using, copying and/or disseminating the Confidential Information inadvertently produced to Gary Sinderbrand in a related New Jersey action, (ii) requiring Plaintiffs immediately to return all Confidential Information in their possession, (iii) requiring Plaintiffs to provide immediate disclosure and to identify all persons to whom they have shown or disclosed Confidential Information and (iv) granting Wells Fargo such other and further relief as may be just and proper.

Respectfully submitted,

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By: _____
Angela A. Turiano

Dated: New York, New York
July 24, 2017