

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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LBBW LUXEMBURG S.A., :

Plaintiff, :

-against- :

MEMORANDUM AND ORDER

WELLS FARGO SECURITIES LLC, f/k/a :
WACHOVIA CAPITAL MARKETS LLC, and :
FORTIS SECURITIES LLC, :

12-CV-7311 (JPO) (KNF)

Defendants. :
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KEVIN NATHANIEL FOX
UNITED STATES MAGISTRATE JUDGE

INTRODUCTION

Before the Court is a motion¹ by the plaintiff, LBBW Luxembourg S.A., “for sanctions and for Contempt,” based on the defendants’² failure to obey the Court’s March 29, 2016 order to produce certain discovery by March 31, 2016. The plaintiff seeks an order directing the defendants to: (1) produce the documents directed to be produced in the March 29, 2016 order; (2) pay the reasonable attorney’s fees the plaintiff incurred in connection with the depositions of Kevin Massi (“Massi”) and Barbara Wright (“Wright”) and this motion; (3) produce Wright and Massi for depositions “after full document production has been completed and at Defendants’ expense”; (4) “issue an adverse inference that Defendants sought and held short positions on GAI [the Grand Avenue II collateralized debt obligation] notes and collateral before or at

¹ The plaintiff’s notice of motion does not comply with Local Civil Rule 7.1(a)(1) of this court, requiring that a notice of motion “specify the applicable rules or statutes pursuant to which the motion is brought, and . . . the relief sought by the motion,” as it neither specifies the applicable rule or statute nor the relief sought.

² Although the plaintiff uses a plural form “the defendants” in its motion and seeks sanctions against “the defendants,” it does not appear to contend that Fortis Securities LLC failed to comply with the March 29, 2016 order. Thus, it is not clear why relief is sought against “the defendants” when the plaintiff argues only that defendant Wells Fargo Securities LLC (“Wells Fargo”), that is referenced in the motion, failed to comply with the March 29, 2016 order directing production of discovery in connection with the discovery demands the plaintiff served on Wells Fargo.

closing”; and (5) “hold Defendants in contempt³ of Court and impose fines or other remedies as appropriate.” Wells Fargo opposes the motion.⁴

PLAINITFF’S CONTENTIONS

The plaintiff asserts that, since the March 29, 2016 order granting its motion to compel (Docket Entry No. 152), the defendants “have not produced a single additional document used as an exhibit to the SEC’s [Securities and Exchange Commission] depositions, and the production of documents pertaining to the shorting strategy, to the E&Y [Ernst & Young] audit, and to Massi’s declaration are [sic] incomplete.” According to the plaintiff, the defendants produced only one document in accordance with the March 29, 2016 order: an unredacted PX72, on March 30, 2016. Subsequent to the March 29, 2016 order, the defendants produced 9,404 documents, namely, an unredacted PX72 on March 30, 2016, and the remainder in April 2016, of which 9,134 are “documents that had been produced before March 29, 2016 in a redacted form.” The new 270 documents were produced on April 15 and 19, 2016, none of which is an exhibit used during the SEC depositions. The plaintiff contends that the defendants violated the March 29, 2016 order because they refused to produce: (1) 68 exhibits pertaining to the SEC investigation, namely, Exhibit Nos. 1-24 from James Burke’s (“Burke”) October 21, 2008 deposition, Exhibit Nos. 1-14 from Dashielle Robinson’s (“Robinson”) July 14, 2008 deposition, Exhibit Nos. 42, 44, 45, 47, 48 and 49 from Robinson’s November 17, 2010 deposition, Exhibit Nos. 1-14 from Michael Thompson’s (“Thompson”) February 4, 2009 deposition, Exhibit Nos. 41, 42, 43 and 44

³ A United States magistrate judge’s civil contempt authority is limited to cases in which the magistrate judge presides with the consent of the parties, pursuant to 28 U.S.C. § 636(c). See 28 U.S.C. § 636(e)(4). No such consent exists in this action; thus, the Court has no authority to hold a party to this action in contempt.

⁴ Wells Fargo contends: “Neither the Order nor the Motion is directed to Defendant Fortis. Thus, this Opposition solely addresses Wells Fargo’s compliance with the Order.” Wells Fargo’s contention is erroneous because the plaintiff’s previous motion to compel concerned the plaintiff’s document requests served on Fortis Securities LLC (Docket Entry No. 124-8) and the March 29, 2016 order was directed to both defendants, not just Wells Fargo.

from Thompson's November 18, 2010 deposition and Exhibit Nos. 1-2, and 4-11 from Yu-Ming Wang's ("Wang") August 5, 2008 deposition; (2) documents relating to their strategy to short GAI and its underlying collateral, namely, (i) any relevant daily profit and loss statements, including those from the "proprietary trading book," (ii) "documents related to and explaining what is included in the \$19 million upfront swap done for GAI" and (iii) "documents demonstrating that the defendants held, sold or wrote down any GAI Class C or Class D notes they owned"; (3) documents related to the report of an E&Y audit produced by the defendants on April 27, 2016; and (4) documents used to support Massi's February 8, 2016 declaration. The plaintiff asserts that the March 29, 2016 order was unambiguous, directing that: (1) "the plaintiff is entitled to all documents used by the SEC as exhibits"; (2) the defendants produce documents "related to the defendants' shorting strategy"; and (3) Massi's "Declaration, including the evidence cited and conclusions made in it, raises relevant issues that need to be explored in connection with the claims and defenses in this action."

According to the plaintiff, in April 2016, the defendants produced "unredacted versions of documents previously redacted as 'non-responsive.'" However, the defendants did not produce 68 SEC exhibits used at various depositions, and produced only one "daily profit and loss statement" for "9/1/06" and one "document pertaining to 'upfront swaps.'" The plaintiff contends that, although short depositions of Wright and Massi were taken, on April 28, 2016, as ordered, they were ineffective due to the paucity of documents that were produced. The plaintiff asserts that, in response to the plaintiff's demand for compliance with the March 29, 2016 order, the defendants "lodged numerous baseless excuses." With respect to the 68 SEC exhibits, the defendants assert "that they only have to produce exhibits that they unilaterally deemed relevant to some aspect of GAI," notwithstanding that the relevancy was already determined by the

Court when it ordered the production. Concerning documents related to Wachovia's strategy to short GAI, such as daily profit and loss reports, trade tickets and confirmations, the defendants rely on an argument already rejected by the Court that no shorting strategy existed. However, no shorting strategy documents were produced in connection with the plaintiff's request for: (1) "daily profit and loss statements or accounting records, particularly those pertaining to the 'proprietary trading book'"; (2) "documents that show precisely what is included in the \$19,613,937 'upfront swap' done for GAI"; and (3) "documents demonstrating that Defendants held, sold, or wrote down any of the GAI Class C or Class D notes they purportedly owned at one time or another."

The plaintiff asserts that, although the defendants argued that no E&Y audit ever occurred, the defendants produced a report, dated May 24, 2006, entitled "SCP [Structured Credit Products] Business & Internal Controls Review." When the plaintiff requested documents supporting the audit, the defendants objected, for the first time, that such documents are not within their possession or control because E&Y conducted the audit for Wachovia, rather than Wells Fargo.

The plaintiff maintains that the defendants' production is untimely and deficient and they acted willfully and in bad faith because the defendants continue to rely on arguments that the Court already rejected when it determined the plaintiff's motion to compel. The plaintiff maintains that the March 29, 2016 order is unambiguous and the defendants do not contend that compliance is beyond their control or burdensome. With respect to the defendants' argument that they have no control over E&Y documents provided by Wachovia to perform the audit, it is undermined by the fact that the defendants "directed E&Y to produce a copy of the allegedly newly discovered audit from 2006, and E&Y promptly complied."

WELLS FARGO'S CONTENTIONS

Wells Fargo asserts that the plaintiff acted in bad faith when it filed its “frivolous and overheated motion. As described [in Wells’ Fargo’s memorandum of law] and in the accompanying declarations of Jayant W. Tambe, Alexander P. McBride, and Jennifer Zelnick [“Zelnick”],⁵ the core assertions in the Motion are false and misstate the record.” Wells Fargo contends that it complied with the March 29, 2016 order because it produced: (a) “the remaining confirmation/trade documents and P&L data for all Wachovia credit default swap (*i.e.*, ‘short’ and ‘long’) positions related to [GAI]”; (b) “the documents that the SEC appeared to use as exhibits in its investigation of [GAI] during its interviews of the six Wachovia employees identified in the Order”; and (c) “attachments to responsive documents, the executed co-placement agreement between the Defendants, and the unredacted PX72.” More specifically, Wells Fargo produced: (1) “all confirmations, trade ledger information, and P&L data for each Wachovia CDO (*i.e.*, ‘short’ and ‘long’) position referencing [GAI’s] securities or investment portfolio of collateral assets”; (2) the GAI-related SEC exhibits; (3) “E&Y Review”; and (4) Wright and Massi for deposition.

In connection with documents concerning the shorting strategy, Wells Fargo asserts that, “[u]pon the issuance of the Order, Wells Fargo gathered and produced the remaining confirmations, trade ledger information, and the P&L data for all CDS trades in which Wachovia was a counterparty that referenced Grand Avenue II’s securities or the collateral assets in its

⁵ In support of its arguments, Wells Fargo relies on a declaration with exhibits by Jennifer Zelnick. See Docket Entry No. 193. However, no declaration with exhibits by Jennifer Zelnick was filed with the court either under seal or in an unredacted format and no courtesy copy was provided to the Court, pursuant to Rule 2.B of the Court’s Individual Rules of Practice. The sealed envelope filed with the court, Docket Entry No. 196, does not contain Jennifer Zelnick’s declaration with exhibits in paper format or on the accompanying digital disc. Moreover, a courtesy copy of a digital disc sent to the Court in connection with Wells Fargo’s opposition to the instant motion and labeled “Defendants [sic] Unredacted Exhibits filed 6/7/2016” was empty of content.

investment portfolio, from September 2006 to ultimate disposition of those positions.” Wells Fargo contends that the plaintiff “charges Wells Fargo failed to produce additional documents neither mandated by the Order nor even requested by Plaintiff during fact discovery.” According to Wells Fargo,

[a]lthough it referenced the phrase “shorting strategy” from Plaintiff’s briefing papers, the Order actually required Defendants to produce documents responsive to Plaintiff’s second RFPs and produce the remaining confirmation and P&L data for Wachovia’s CDS (i.e., “short”) positions related to Grand Avenue II. *See* Dkt. No. 152 (Order) at 2-3, 14-15 (citing to Plaintiff’s second set of RFPs). The order identified no other specific documents for production.

Furthermore, the plaintiff argues that the defendants failed to produce documents about the GAI “upfront swap” – a routine loan provided to the CDO’s Issuer at closing that, notwithstanding its term ‘swap’, has nothing to do with Wachovia’s ‘short’ or ‘long’ positions on Grand Avenue II,” as well as “the supposed prop book” documents, but none of these documents were requested by the plaintiff and the plaintiff referenced the “upfront swap” for the first time in its reply papers on its motion to compel. Thus, the March 29, 2016 order did not include any directive to produce the “upfront swaps.”

Concerning the SEC exhibits, Wells Fargo contends that it “reviewed the SEC transcripts . . . and attempted to identify, based on the content of the transcript describing particular exhibits, any exhibit relating to Grand Avenue II.” According to Wells Fargo, it “determined that approximately 29 of the introduced exhibits appeared to be related to Grand Avenue II,” and “[i]n the weeks following the issuance of the Order, Wells Fargo produced to Plaintiff (i) cross-reference sheet indicating the Bates ranges of 26 of those 29 responsive documents that had already been produced in discovery, and (ii) two remaining responsive documents.” Wells Fargo asserts that the defendants “were unable to identify or produce one of the 29 responsive

documents used as an exhibit: [David] Boling [“Boling”] Exhibit 8. Based on our review of the transcript, the document appears to be a hand-written document presented to Mr. Boling during his testimony.” Wells Fargo asserts that it complied with the March 29, 2016 order because it “produced Grand Avenue II-related SEC exhibits introduced in the interviews of the six Wachovia employees at issue.”

Wells Fargo contends that its “interpretation of the Order is more than reasonable given the language used and, more importantly, the underlying document requests at issue,” and sanctions are unwarranted because, even if the Court determines that Wells Fargo’s production was deficient, Wells Fargo attempted to comply with the March 29, 2016 order diligently and in a reasonable manner. According to Wells Fargo, “[i]n the first half of April, following issuance of the Order, Wells Fargo worked as quickly as practicable to obtain and produce documents in its possession, custody, and control responsive to the Order, and advised both the parties and the Court of its progress in these rolling productions.” Wells Fargo contends that the plaintiff did not act in good faith to resolve this dispute before seeking leave to file the instant motion. Within days of the March 29, 2016 order, Wells Fargo’s “counsel advised Plaintiff of their interpretation of the Order with respect to the alleged ‘shorting’ category of documents, and noted the parties could discuss further if Plaintiff disagreed,” but the plaintiff “sat on its hands, waited for Wells Fargo to produce its substantial discovery in response to the Order through April, and then at the end of the month issued Defendant an ultimatum: produce the additional discovery demanded within a couple of business days, or face a motion for sanctions.” Wells Fargo asserts that, the plaintiff “complains that the P&L data produced is ‘indecipherable,’ but that information is directly responsive to Plaintiff’s Second RFPs and it is exactly what they requested: it is the actual day-to-day P&L data (both realized and cumulative unrealized) of each

Wachovia-GAII CDS position from Wachovia's legacy derivatives system of records." Wells Fargo maintains that an adverse inference jury instruction is unwarranted because, inter alia, "Defendants fully complied with the Order," and their "actions following the Order were substantially justified." According to Wells Fargo, the plaintiff "seeks to shirk its evidentiary burden by trying to manufacture 'evidence' of a shorting strategy where none exists" and speculates that Wachovia engaged in a strategy to short GAII without any evidence to support the speculation. Moreover, the missing evidence the plaintiff seeks, even if it exists, is not relevant because the complaint does not contain allegations containing Wachovia's CDS positions and Wells Fargo produced "all confirmations, trade ledgers, and P&L data for each Wachovia-GAII CDS position."

PLAINTIFF'S REPLY

The plaintiff contends that the defendants "desperately try to revisit the 'relevance' argument they already lost." The plaintiff asserts that the defendants "have misrepresented the sequence of events leading up to this sanctions briefing." According to the plaintiff, the March 29, 2016 order directed that: (1) "the plaintiff is entitled to all documents used by the SEC as exhibits"; (2) even if no audit was conducted or completed, "the plaintiff may obtain documents E&Y collected in initiating the audit and the defendants must produce them to plaintiff"; (3) "[d]ocuments related to the defendants' shorting strategy are relevant and must be produced to plaintiff"; and (4) Massi's "declaration, including the evidence cited and conclusions made in it, raises relevant issues that need to be explored in connection with the claims and defenses in this action." At Massi's and Wright's depositions, it became clear to the plaintiff that the defendants had not produced all documents the Court directed them to produce. For example, Massi testified: "I pulled it out of a system called Calypso. I put it in the spreadsheet, and I forwarded

it on to my boss and the legal department.” When asked whether that spreadsheet was produced, Massi responded that he did not think it was produced. The plaintiff’s counsel asked for the “charts” that Massi “pulled out of Calypso” to be produced, but they were not produced. Moreover, on April 29, 2016, the parties conferred about the defendants’ failure to comply with the March 29, 2016 order. According to the plaintiff, “through their artful wording in their Response, Defendants tacitly admit exactly what they attempt to deny: that they are relying on their own strained, unilateral, willful misrepresentation of the Court’s order to continue withholding relevant documents that they admit they possess.” The plaintiff asserts it acted in good faith and “repeatedly apprised Defendants during the Wright and Massi depositions that it believed Defendants were disobeying the Court’s order,” but the defendants stated only that they would take the plaintiff’s concerns “under advisement.” Moreover, the plaintiff sent a deficiency letter to the defendants after the depositions, but they “continued to stonewall and produced nothing.” The plaintiff contends that an adverse inference jury instruction is warranted because the defendants “have actively sought to impede the production of documents they concededly possess, have selectively produced some but not all of those documents, and have continued to assert objections to those documents’ relevance that have been roundly rejected by the Court.”

LEGAL STANDARD

“If a party or a party’s officer, director, or managing agent . . . fails to obey an order to provide or permit discovery, including an order under Rule 26(f), 35 or 37(a), the court where the action is pending may issue further just orders.” Fed. R. Civ. P. 37(b)(2)(A).

Instead of or in addition to the orders [issued pursuant to Fed. R. Civ. P. 37(b)(2)(A)], the court must order the disobedient party, the attorney advising that party, or both to pay the reasonable expenses, including attorney’s fees, caused by

the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.

Fed. R. Civ. P. 37(b)(2)(C).

An order is clear and unambiguous when it “leaves no uncertainty in the minds of those to whom [the order] is addressed.” Gucci America, Inc. v. Weixing Li, 768 F.3d 122, 142-43 (2d Cir. 2014) (citation omitted). “[T]he severity of sanction must be commensurate with the non-compliance.” Shcherbakovskiy v. Da Capo Al Fine, Ltd., 490 F.3d 130, 140 (2d Cir. 2007).

APPLICATION OF LEGAL STANDARD

Whether the March 29, 2016 Order Was Clear and Unambiguous

In its motion to compel, the plaintiff sought: (1) documents related to the defendants’ shorting strategy, namely, documents responsive to the plaintiff’s first set of requests to Wells Fargo for production (“RFP”) No. 7 and the second set of requests to Wells Fargo for production (“RFP2”); (2) documents responsive to RFP Nos. 15 and 16, namely, “documents and communications related to the SEC investigation of the GAI CDO”; (3) documents responsive to RFP Nos. 10 and 11, namely, documents E&Y collected in initiating and conducting an audit; (4) documents responsive to RFP No. 12 and the first set of requests for production to Fortis (“RFP Fortis”) No. 11, namely, agreements between the defendants related to GAI; (5) 9,133 unredacted documents that have been redacted improperly and an unredacted copy of a document marked PX72 at the deposition of Michael Thompson (“Thompson”); (6) Bloomberg instant messages regarding GAI; and (7) a deposition of a corporate representative. The March 29, 2016 order directed the defendants to produce the following “on or before March 31, 2016”: (1) “the documents related to the defendants’ shorting strategy”; (2) “all documents used by the SEC as exhibits when it obtained the testimony of David Boling, James Burke, Dashiell

Robinson, Thompson, Yu-Ming Wang and Jennifer Zelnick”; (3) “even if no audit was conducted or completed, ultimately, by E & Y, . . . documents E&Y collected in initiating the audit”; (4) “executed versions of all agreements between the defendants regarding GAI”; (5) 9,133 unredacted documents and PX72; (6) “Bloomberg instant messages”; and (7) Massi and Wright for depositions. Wells Fargo did not, at any time prior to the filing of this motion, or in its opposition to this motion, contend that the March 29, 2016 order was ambiguous. Thus, Wells Fargo’s contentions respecting its “interpretation of the Order are frivolous.” The Court finds that the March 29, 2016 order was clear and unambiguous because it leaves no uncertainty with respect to its specific directives as well as the date by which compliance was required, March 31, 2016.

Whether Wells Fargo Complied with the March 29, 2016 Order

Date for Compliance

On March 30, 2016, Wells Fargo produced an unredacted PX72. Wells Fargo admits that it did not comply with the March 29, 2016 order’s deadline to produce documents “on or before March 31, 2016,” because its counsel states in his declaration in opposition to the motion: “On April 1, 2016, I communicated with counsel for the Plaintiff, Mr. David Warden, via telephone and email regarding a proposed timetable for Wells Fargo to produce documents responsive to the Order.” Wells Fargo did not seek or obtain from the Court an extension of time to comply with the March 29, 2016 order. Thus, the Court finds that Wells Fargo did not comply with the March 29, 2016 order’s compliance date, March 31, 2016, because it produced only one document, an unredacted PX72 “on or before March 31, 2016,” and failed to produce other documents that the March 29, 2016 order directed to be produced.

Directive No. 1: Documents Related to the Defendants' Shorting Strategy

Wells Fargo's contention that "the Order actually required Defendants to produce documents responsive to Plaintiff's second RFPs and produce the remaining confirmations and P&L data for Wachovia's CDS (i.e., 'short') positions related to Grand Avenue II," and "identified no other specific documents for production" is disingenuous. The plaintiff in its motion to compel identified specifically the relevant documents it sought related to the defendants' shorting strategy, which included daily P&L reports starting in September 2006, trade tickets, confirmations and P&L reports for the proprietary trading book, and the March 29, 2016 order directed that "the documents related to the defendants' shorting strategy" be produced. Moreover, in its RFP2, the plaintiff requested "[a]ll swap documents from June 2006 to March 2007." The March 29, 2016 order did not limit production of shorting strategy documents, as the defendants contend, to "the remaining confirmations, trade ledger information, and the P&L data for all CDS trades in which Wachovia was a counterparty that referenced Grand Avenue II's securities or the collateral assets in its investment portfolio, from September 2006 to ultimate disposition of those positions." Moreover, the plaintiff's contention that Wells Fargo did not comply with the March 29, 2016 order's directive to produce "the documents related to the defendants' shorting strategy" because it did not produce all responsive documents, namely, "all daily P&L reports, trade tickets, confirms [and] all P&L reports for the proprietary trading book ('prop book')" is not rebutted by Wells Fargo. The Court finds that Wells Fargo failed to comply with the March 29, 2016 directive to produce "the documents related to the defendants' shorting strategy."

Directive No. 2: All Documents Used by the SEC as Exhibits

The March 29, 2016 order directed the defendants to produce “all documents used by the SEC as exhibits when it obtained the testimony of David Boling, James Burke, Robinson, Thompson, Yu-Ming Wang and Jennifer Zelnick.” Wells Fargo contends that, subsequent to the March 29, 2016 order, it “attempted to identify, based on the content of the transcript describing particular exhibits, any exhibit relating to Grand Avenue II.” Wells Fargo asserts it complied with the March 29, 2016 order because the plaintiff’s “own motion to compel sought only GAI-related SEC exhibits” and Wells Fargo “produced Grand Avenue II-related SEC exhibits introduced in the interviews of the six Wachovia employees at issue.” The March 29, 2016 directive concerning the SEC exhibits was clear and unambiguous and it directed the defendants to produce “**all** documents used by the SEC as exhibits,” not “Grand Avenue II-related SEC exhibits.” In light of the clear and unambiguous language directing production of “**all** documents used by the SEC as exhibits,” it is not clear why Wells Fargo “attempted to identify . . . any exhibit relating to Grand Avenue II,” or why it only produced “Grand Avenue II-related SEC exhibits,” and not “**all**” exhibits the SEC used during the six depositions, as directed by the March 29, 2016 order. Wells Fargo does not contest the plaintiff’s representation that “none of the documents produced after the March 29, 2016 Order were used as exhibits to the SEC depositions.” The Court finds that Wells Fargo failed to comply with the March 29, 2016 directive to produce “all documents used by the SEC as exhibits when it obtained the testimony of David Boling, James Burke, Dashiell Robinson, Thompson, Yu-Ming Wang and Jennifer Zelnick.”

Directive No. 3: Documents E&Y Collected in Initiating the Audit

In their opposition to the motion to compel, the defendants contended that no responsive “documents pertaining to an alleged Ernst & Young audit of Wachovia’s structured products unit” exist, “even after inquiring with Ernst & Young itself for any such documents.” The Court’s March 29, 2016 order concerning documents related to an alleged E&Y audit directed the defendants to produce documents E&Y collected in initiating the audit based on the defendants’ representation that no audit was conducted and the evidence submitted by the plaintiff in its motion to compel that an E&Y audit appeared to have been initiated. However, on April 27, 2016, Wells Fargo instructed E&Y to produce a copy of the May 24, 2006 audit report, which E&Y produced. In its opposition to the instant motion, Wells Fargo maintains that “this report is completely irrelevant to the issues in this case.” Wells Fargo’s contention that “this report is completely irrelevant to the issues in this case” is contrary to the March 29, 2016 order, because the Court already determined, when it directed their production, that the documents related to an alleged E&Y audit are relevant. The Court finds that Wells Fargo failed to comply with the March 29, 2016 directive to produce “documents E&Y collected in initiating the audit” because it did not produce any documents in connection with initiating the May 24, 2006 audit report.

Directive No. 4: Executed Versions of All Agreements between the Defendants Regarding GAI

The plaintiff does not contend that the defendants failed to comply with the March 29, 2016 directive to produce executed versions of all agreements between the defendants regarding GAI.

Directive No. 5: 9,133 Unredacted Documents and PX72

The plaintiff does not contend that the defendants failed to comply with the March 29, 2016 directive to produce 9,133 unredacted documents and PX72.

Directive No. 6: Bloomberg Instant Messages

The plaintiff does not contend that the defendants failed to comply with the March 29, 2016 directive to produce Bloomberg instant messages.

Directive No. 7: Massi and Wright for Depositions

The plaintiff concedes it deposed Massi and Wright, as directed by the March 29, 2016 order, but contends that those depositions “were ineffective due to the lack of documents produced that these witnesses would have been questioned about, including SEC exhibits, the shorting strategy documents, the E&Y work papers and interviews,” and “documents and other materials used by Kevin Massi to support his February 8, 2016 Declaration.” The plaintiff contends that the “Defendants refuse to produce all documents used by Massi to support his February 8, 2016 Declaration regarding allegations about Defendants’ shorting strategy,” relying on the language of the March 29, 2016 order that “the Court is persuaded by the plaintiff’s argument that Massi’s declaration, including the evidence cited and conclusions made in it, raises relevant issues that need to be explored in connection with the claims and defenses in this action.” However, the March 29, 2016 order did not direct the defendants to produce “documents and other materials used by Kevin Massi to support his February 8, 2016 Declaration.” It only directed that Massi and Wright be produced for deposition. The Court finds that Wells Fargo complied with the March 29, 2016 directive to produce Massi and Wright for depositions.

CONCLUSION

For the foregoing reasons, the Court finds that Wells Fargo failed to comply with the March 29, 2016 order, without substantial justification. Therefore, the plaintiff's motion for sanctions, Docket Entry No. 179, is granted. Under the circumstances of this case and upon consideration of the various forms of relief requested by the plaintiff for Wells Fargo's failure to comply with the March 29, 2016 order, the Court finds that the following sanctions are warranted as reasonable and appropriate:


1. On or before July 15, 2016, Wells Fargo must produce documents directed to be produced by the March 29, 2016 order that were not produced, including: (i) all daily P&L reports, trade tickets, confirmations, all P&L reports for the proprietary trading book, documents showing what is included in the \$19,613,937 upfront swap done for GAI and documents demonstrating that defendant Wells Fargo held, sold, or wrote down any of the GAI Class C or Class D notes defendant Wells Fargo purported to own; (ii) all documents used by the SEC as exhibits when it obtained the testimony of Boling, Burke, Robinson, Thompson, Wang and Zelnick; (iii) all documents E&Y collected in initiating, conducting and completing the May 24, 2006 audit; and (iv) all documents upon which Massi relied in his February 8, 2016 declaration. Wells Fargo and its counsel will be liable, in equal parts, to the plaintiff for failing to comply with the July 15, 2016 date as follows: (a) \$250 for the first day of failure; (b) the amount for each day subsequent to the first day of failure will be calculated by doubling the amount assessed on the previous day for example, on the second day the failure continues, \$500, on the third day the failure continues, \$1,000, etc.;

2. Wells Fargo and its counsel must pay to the plaintiff, in equal parts, the reasonable attorney's fees and expenses the plaintiff incurred in connection with taking Wright's and Massi's deposition and the instant motion; and
3. Between July 22 and August 5, 2016, Wells Fargo shall produce Wright and Massi for depositions.

The plaintiff shall submit its reasonable attorney's fees application to the Court on or before July 15, 2016. Any challenge to the reasonableness of the requested attorney's fees shall be filed on or before July 22, 2016, and any reply shall be filed on or before July 27, 2016.

Dated: New York, New York
July 7, 2016

SO ORDERED:



KEVIN NATHANIEL FOX
UNITED STATES MAGISTRATE JUDGE