UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Case No. 11-cv-61314 – ZLOCH/ROSENBAUM

ELLEN AGUIAR,

Plaintiff

v.

WILLIAM NATBONY, individually and as trustee of the THOMAS S. KAPLAN 2004 QUALIFIED TEN YEAR ANNUITY TRUST AGREEMENT and the DAFNA KAPLAN 2003 EIGHT YEAR ANNUITY TRUST AGREEMENT, THOMAS KAPLAN and DAFNA KAPLAN,

Defendants.

**PLAINTIFF'S MOTION AND INCORPORATED MEMORANDUM OF LAW TO CONFIRM WAIVER AND ALLOW USE OF DOCUMENTS FILED WITH THE NEW YORK COURT**

**BOIES, SCHILLER & FLEXNER LLP**

Carlos M. Sires, Esq.
csires@bsfllp.com
Sigrid S. McCawley, Esq.
smccawley@bsfllp.com
Alec H. Schultz, Esq.
aschultz@bsfllp.com
401 East Las Olas Boulevard, Suite 1200
Fort Lauderdale, Florida 33301
Telephone: (954) 356-0011
Facsimile: (954) 356-0022

*Attorneys for Plaintiff Ellen Aguiar*

**TABLE OF CONTENTS**

## TABLE OF AUTHORITIES

**Page**

Cases



Statutes

## I. Preliminary Statement

This motion arises out of Defendants' efforts to improperly taint this litigation and sway the Court with the conduct of Plaintiff's son, Guma Aguiar. Defendants' counsel, after wrongfully accusing Plaintiff and her counsel of being exposed to allegedly privileged documents that "Guma Aguiar stole," proceeded to tactically submit to the Court and serve on Plaintiff copies of these exact documents as part of a legally baseless effort to stay this action. [1] Specifically, Defendants' counsel included the allegedly privileged documents as exhibits to a declaration that stated: "During the Leor Lawsuit, Guma Aguiar sent e-mails to his counsel and to his brother-in-law, Corey Drew, ***containing privileged material he had stolen. Copies of those e-mails are attached as Exhibits A and B respectively."*** (*See* Exhibit 1, November 9, 2010 Tropin Decl. at ¶8 (Exhibits A & B of Mr. Tropin's Declaration are held under seal to be submitted to the Court for in camera review upon the Court's direction.) (emphasis added).) The exhibits—which at over 100 pages composed the majority of Defendants' filing—were then filed along with the signed declaration with the New York Federal Court and served on opposing counsel. Based upon the plain language of the declaration, it is undisputedly clear that the allegedly privileged materials were intentionally attached to the declaration for all parties and the Court to review.

Even if the plain language of Mr. Tropin's declaration was not dispositive here—which it is—the conduct of Defendants' counsel in handling these documents constitutes a clear case of waiver under the applicable New York law. Here, the declaration and exhibits passed through

[1] Plaintiff initially filed this action in the Southern District of New York, the forum where Defendants reside and whose law governs this case, and the location of the operative facts and actions at issue in Plaintiff's complaint. Despite that Court's transfer of the case to this forum, Plaintiff contends that under the governing law, personal jurisdiction does not exist over all Defendants in the Southern District of Florida, nor is this forum a proper venue pursuant to 28 U.S.C. § 1391. The Plaintiff filed a "pre-motion conference letter" as required by Judge Gardephe's rules, in advance of filing a motion on the waiver issue. Judge Gardephe transferred the action to this Court prior to making a ruling on the waiver issue.

two different law firms (first the Tropin firm, where the declarant presumably read and reviewed the filing before signing it, and second, the Herrick Feinstein firm where the declaration was printed and prepared for filing) before being hand-delivered to the Court and e-mailed to counsel. The evidence also demonstrates that no lawyer at the Tropin firm, including the declarant, and no lawyer at the Herrick Feinstein firm took the time to review the exhibits to the Declaration before providing them to the Court and opposing counsel. This fact alone establishes that Defendants' counsel acted in a manner sufficiently careless to justify a waiver finding under existing precedent. As if this carelessness in the handling of documents that Defendants' counsel claims are privileged and extremely sensitive was not enough, defense counsel also failed to review the filing ***a second time*** when they received the filing via e-mail from counsel in New York who distributed it to plaintiff's counsel and copied Defendants' counsel, including Mr. Tropin, Mr. Ronzetti and Mr. Rathkopf. And, again, Defendants' counsel failed to review the filing ***a third time*** after Plaintiff's counsel inquired whether they intended to attach the allegedly privileged documents to their filing. Instead, defense counsel responded to Plaintiff's inquiries on multiple occasions without raising any issue with the attachment of the documents, and only raised the issue of inadvertent disclosure a full 4 days after serving the documents. Under the governing law, defense counsel's claims of inadvertent disclosure are legally and factually baseless, and application of existing precedent requires this Court to find that Defendants have waived any applicable privileges as to these documents.

## II. Factual Background

Ellen Aguiar filed this action in the Southern District of New York on September 1, 2010, against William Natbony, Thomas Kaplan and Dafna Kaplan for wrongfully removing her as a beneficiary of two Grantor Retained Annuity Trusts (GRATs). Defendants initiated this

removal of Plaintiff from the GRATs in retaliation for a dispute that had erupted between her brother, Defendant Thomas Kaplan, and her son Guma Aguiar. The actions by Mr. Natbony as trustee in wrongfully removing Ms. Aguiar at the direction of the Kaplans, when he owed her strict duties as an impartial trustee, constitute a clear breach of his fiduciary duties to Plaintiff.

Upon receipt of Plaintiff's complaint, Defendants sought to avoid litigating the case on the merits and instead attempted to stay the proceedings by tainting the action with the unrelated misconduct of Guma Aguiar. Defendants' request for a stay included allegations that Ms. Aguiar and her counsel had either been privy to or somehow exposed to allegedly privileged e-mails obtained by Guma Aguiar in the Florida litigation.[2] After Defendants made these allegations, Judge Gardephe held a pre-motion conference on October 27, 2010, and directed the parties to file declarations regarding the alleged exposure to privileged information. Plaintiff and her counsel, Sigrid McCawley of Boies, Schiller & Flexner LLP, filed their declarations on November 2, 2010, and both stated that they were not privy to any allegedly privileged materials at issue in the Florida litigation. (*See* Exhibit 2, November 2, 2010 Decl. of Plaintiff Ellen Aguiar; Exhibit 3, November 2, 2010 Decl. of Plaintiff's Counsel Sigrid S. McCawely.) On November 9, 2010, Harley Tropin submitted a response declaration wherein he stated that he was attaching copies of the e-mails containing the privileged materials that he claimed Guma Aguiar had stolen.[3] (*See* Exhibit 1, November 9, 2010 Tropin Decl. (Exhibits A & B of Mr. Tropin's Declaration are held under seal to be submitted to the Court for in camera review upon the Court's direction.)) Upon receipt of the filing, counsel for Plaintiff distributed the filing to the

---

[2] The "Florida litigation" refers to the cases of *Leor Exploration & Production LLC, Pardus Petroleum L.P., et al. v. Guma Aguiar*, Case No. 09-60136-CIV-Seitz/O'Sullivan (S.D. Fla.) and *Guma Aguiar v. William Natbony, Thomas Kaplan, and Katten Muchin Rosenman, LLP*, Case No. 09-60683 (S.D. Fla.)

[3] "During the Leor Lawsuit, Guma Aguiar sent e-mails to his counsel and to his brother-in-law, Corey Drew, ***containing privilege material he had stolen. Copies of those e-mails are attached as Exhibits A and B respectively.***" Harley Tropin Nov. 9, 2010, Decl. at ¶8 (emphasis added).

lawyers and staff in her firm working on the case, her client and the joint defense team. The filing was also circulated by Defendants' New York counsel at Herrick Feinstein to all of Defendants' Florida counsel at the Tropin firm. None of Defendants' lawyers made any claim of inadvertence upon receipt of the filing.

Counsel for Plaintiff believed, based on the plain language of Mr. Tropin's declaration, that he and his clients intended to disclose the "stolen" documents as stated in the declaration and attached as Exhibits A and B in support of their motion. However, in an abundance of caution, and in accordance with her ethical obligations upon receipt of material that could be subject to a privilege claim, counsel for Plaintiff wrote a letter to Harley Tropin on November 11, 2010, alerting him that Plaintiff was in receipt of the documents that he had characterized as "privileged materials." (*See* Exhibit 4, November 11, 2010 correspondence from Sigrid McCawley to Harley Tropin.) Ms. McCawley received a voicemail from Tucker Ronzetti later that evening stating that he had received her letter, but he did not make any claim of inadvertence or otherwise assert a privilege in his voicemail. After consulting with her managing partner, Ms. McCawley took the added step of calling counsel on November 12, 2010, at approximately 8:30 a.m. and left a voicemail once again stating that she was in receipt of the documents characterized as "privileged materials" and was calling to notify counsel of her receipt of those documents. At 11:06 a.m. on Friday, November 12, 2010, Ms. McCawley received an e-mail from Mr. Tropin thanking her for her November 11, 2010, letter and stating: "Thanks for your letter. We do not believe the Court's order contemplates any response to my declaration other than your position as to whether oral argument would be helpful." (*See* Exhibit 5, Tropin November 12, 2010, e-mail.) Mr. Tropin did not mention anything about the "privileged" documents nor did he make a claim of inadvertent disclosure. At that point, four days had

passed since the receipt of the filing and counsel had received two communications from Defendants' counsel in response to her privilege inquiry, neither of which raised any claim of inadvertence.

Thereafter, just before noon on November 12, 2010, Defendants' counsel sent an e-mail stating that exhibit B contained inadvertently produced privilege materials. Moments later he sent another e-mail correcting his first e-mail and stating that both Exhibits A and B contained privileged materials. The e-mail also requested the return of the over 100 pages of documents and requested that counsel agree to allow him to substitute Exhibits A and B with new exhibits. (*See* Exhibit 6, November 12, 2010, 11:57 e-mail from Tucker Ronzetti.)

Given the plain language of the declaration stating that Mr. Tropin was attaching the privileged materials, and given Defendants' failure to assert any privilege claim after repeated inquiries, Plaintiff sent a letter to the Court on November 12, 2010, stating that Defendants' Motion to Stay based on Plaintiff's alleged exposure to privileged materials was moot, because defendants had waived any claim of privilege. (*See* Exhibit 7, November 12, 2010, correspondence to Judge Gardephe.) Plaintiff's counsel also sent Defendants' counsel an e-mail response explaining that she believed any privilege attached to the documents was waived by sending them to the Court and to counsel but nonetheless agreeing to seal the documents pending a resolution by the Court of the waiver issue. (*See* Exhibit 8, November 12, 2010 e-mail.) Ms. McCawley also alerted her joint defense counsel and her client that the electronic documents should be sealed until the parties received a ruling on the waiver issue from the Court.

On November 12, 2010, Defendants' counsel filed a "pre-motion conference letter" with the Court pursuant to Judge Gardephe's rules to allow the Defendants to replace the existing Exhibits A and B. (*See* Exhibit 9, November 12, 2010 correspondence to Judge Gardephe from

Harley Tropin.) Defendants' correspondence essentially attempted to lay blame for the disclosure on a second-year associate at Kozyak Tropin, Mr. David Matz, who submitted a declaration stating that he had mistakenly downloaded and attached to the filing entire e-mail chains instead of just cover pages. (*See* Exhibit 10, Matz Declaration.)[4] On November 16, 2010, Plaintiff's counsel filed a "pre-motion conference letter" response pursuant to Judge Gardephe's rules stating that the Defendants should not be entitled to replace the exhibits because there had been a clear waiver of any privilege based on the conduct of Defendants' counsel. (*See* Exhibit 11, November 16, 2010 correspondence to Judge Gardephe from Sigrid McCawley.) Defendants filed a pre-motion conference letter response with Judge Gardephe on November 17, 2010. (*See* Exhibit 12, November 17, 2010 correspondence from Harley Tropin to Judge Gardephe.) The Court never ruled on Defendants' pre-motion conference letter seeking to replace Exhibits A and B, and it denied the two other pending motions, Defendants' Motion to Dismiss and Defendants' Motion to Stay, as moot upon transferring the case to this Court.

## III. Legal Argument

Under the governing New York law, Defendants' careless treatment of their allegedly privileged materials satisfies the standard for a finding of waiver of all applicable privileges.[5] The applicable test for a finding of waiver in cases involving allegedly inadvertent disclosure is

---

[4] Mr. Matz simply states that he sent the privileged documents for printing and filing from his firm's electronic system believing that the electronic files contained only the e-mails of Guma Aguiar and not the privileged materials. Many questions remain unanswered by the Matz declaration. There is no statement regarding who else read or received the filing. It is unclear for example if the client also received the filing or if it was distributed to third parties. It is also unclear who else had access to these privileged documents and whether they were reviewed by anyone. Without a full evidentiary hearing on these issues these questions remain unanswered. *See Gormin v. Hubregsen*, No. 08-CIV-7674 (PGG), 2009 WL 508269, *4 n.2 (S.D.N.Y. Feb. 27, 2009) (J. Gardephe) (court finding that a fully developed record on whether the documents are privileged is necessary before making a definitive ruling.)

[5] As this is a diversity action, New York law governs the question of waiver in this case. However, courts have noted that New York law and federal law are indistinguishable on the issue of waiver in cases of alleged inadvertent production. *See Gragg v. International Management Group*, No. 03-CV-0904, 2007 WL 1074894, *5 (N.D.N.Y. Apr. 5, 2007) ("New York and federal law do not materially differ with respect to principles governing inadvertent disclosure.")

as follows: "[1] the reasonableness of any precautions taken to prevent inadvertent disclosure of the privileged documents; 2) the relative volume of the privileged documents in relation to the full extent of the discovery at issue; 3) the length of time taken by the producing party to raise and rectify the issue; and 4) overarching considerations of fairness." *Gragg v. International Management Group,* No. 03-CV-0904, 2007 WL 1074894, * 5-6 (N.D.N.Y. Apr. 5, 2007).[6] Here, the Defendants have the burden on each of these elements. *See AFA Protective Systems, Inc. v. City of New York*, 13 A.D.3d 564, 565 (N.Y.A.D. 2d Dept. 2004).

In this case, the evidence reveals that Defendants are unable to meet their burden on any of these elements, and this Court must find waiver as a result. Indeed, this is not a case of inadvertent production involving a document production of thousands of pages, where a few allegedly privileged documents are mistakenly included in the production. Here, discovery had not even begun, and Defendants proceeded to file and serve their allegedly privileged documents apparently without noticing that the inclusion of these documents nearly ***doubled*** the size of their filing. This pattern of carelessness demonstrates that neither law firm involved in the drafting and service of the declaration and exhibits took any precautions to prevent inadvertent disclosure. Indeed, it is apparent that no one at either Kozyak Tropin or Herrick Feinstein bothered to read or review this filing before its submission. Not only was this a small filing before the commencement of any discovery—and not the typical situation of inadvertent disclosure in the context of high volume document productions—but no lawyer at either of

[6] *Gragg* applied the federal law test for waiver in the context of inadvertent disclosure. As stated above, New York courts utilize a standard that is materially the same. *See AFA Protective Systems, Inc. v. City of New York*, 13 A.D.3d 564, 565 (N.Y.A.D. 2d Dept. 2004) ("disclosure of a privileged document results in waiver of the privilege unless the party asserting the privilege meets its burden in proving that (1) it intended to maintain confidentiality and took reasonable steps to prevent its disclosure, (2) it promptly sought to remedy the situation after learning of the disclosure, and (3) the party in possession of the materials will not suffer undue prejudice if a protective order is granted.")

Defendants' law firms reviewed the filing after its submission so as to catch the alleged mistake and raise a claim of inadvertent disclosure. Finally, it would be fundamentally unfair to Plaintiff to allow Defendants to use their allegedly privileged documents as a sword to deprive her of an opportunity to have this Court hear her claims, while then allowing Defendants to retreat behind a claim of inadvertence after they have publicly disclosed the contents of these documents. Therefore, a finding of waiver is appropriate in this case.

**A. Defendants Did Not Take Any Precautions to Protect the Privileged Documents**

As to the first factor in the waiver analysis, Defendants took no reasonable steps to prevent an inadvertent disclosure of their allegedly privileged documents. None of the at least five lawyers involved in the filing took the time to read the declaration and exhibits before sending them to opposing counsel and the Court. In *Gragg*, the Court explained that where one firm fails to review the documents that were compiled on an electronic disc and sends the disc to a second law firm for production, and the second firm also fails to review the documents, the parties have waived any claim of privilege because they did not take any reasonable precautions to prevent the inadvertent disclosure. 2007 WL 1074894 at *5-6 ("Given the significance of the attorney-client privilege and the potential consequences associated with a waiver of that privilege, this nonchalance leads me to conclude that reasonable precautions were not taken to prevent the disclosure of privileged materials.")

Similarly, *Minor I Doe et. al. v. School Bd for Santa Rosa Cty., Fla. et. al.*, No. 3:08CV361/MCR/EMT, 2009 WL 2591323, *7-9 (N.D. Fla. Aug. 18, 2009) involved a situation where a non-party delivered a letter containing privileged information to the clerk's office in response to an Order to Show Cause. After a claim of inadvertent disclosure, the court held the privilege was waived even though the clerk's office did not docket the letter and instead returned

it to the non-party because the Order to Show Cause had not yet issued. Specifically, the court found:

> In this case, Winkler voluntarily disclosed the material to a third party by delivering it, unsolicited to the clerk's office with no request that the information be sealed or otherwise kept confidential. At a minimum, this voluntary delivery to the clerk, where the document might have been filed in due course and distributed to all parties and the public, is inconsistent with the purpose of the privilege. These circumstances present no reasonable basis for believing that the material would be kept confidential, and no purpose to keep the material confidential can be implied from the court's return of the document to Winkler.

*Id.* at *8. Just as in that case, here the Defendants sent their letter filing to the Court and also to opposing counsel.

Moreover, the documents were not protected in any way and were not labeled "confidential" or "privileged." *See id.* at *5-6. In a similar situation, the court in *Atronic Intern. GMBH v. SAI Semispecialists of America, Inc.*, 232 F.R.D. 160, 164 (E.D.N.Y. 2005), found that the inadvertent disclosure of certain privileged e-mails resulted in a waiver of the privilege, explaining:

> First, plaintiff's counsel failed to take adequate steps to preserve the confidentiality of the e-mails. For example, counsel failed to label the documents "confidential" or "privileged" so as to put others on notice of their privileged nature. *See Spanierman Gallery, Profit Sharing Plan v. Merritt*, No. 00-CIV-5712 LTSTHK, 2003 WL 22909160 at *3 (S.D.N.Y. Dec. 9, 2003) (finding defendant failed to take reasonable precautions to preserve the privilege where defendant produced documents that were not labeled 'confidential' or 'privileged' and 'there was not agreement…that the documents were to be treated privileged and confidential'); *Gangi*, 1 F.Supp.2d at 264 (noting that governments failure to designate as confidential or privileged a prosecution memorandum contributed to a finding of waiver); *Lambert v. Chase Manhattan Bank*, No. 93CV5298 LLM RLE; (MDL), 1996 WL 944011, at *5 (S.D.N.Y. Dec. 19, 1996) (finding counsel failed to take appropriate steps to avoid disclosure where documents were not sufficiently labeled to put others on notice of the confidential nature of the materials); *Large v. Our Lady of Mercy Medical Center*, No. 94-CIV-5986 (JGK) THK., 1998 WL 65995, at *5-6 (S.D.N.Y. Feb. 17, 1998) (holding 'plaintiff did not take reasonable precautions to protect purported privileged materials by simply providing handwritten notations on 'post it notes'"). Additionally, there is no evidence in the record that plaintiff's counsel

> adequately employed a reasonable procedure for separating out the confidential materials from the non-privileged communications.

*Id.* at 164. Similarly here, while Mr. Matz states that he pulled the documents from an electronic file, none of the documents were imaged with a "confidential" or "privileged" stamp. Defendants' only response to this is that they were not conducting an official discovery production review but were instead pulling documents to be used as exhibits. The fact that the documents were being collected for a declaration rather than a discovery production does not alter counsels' fundamental obligation to take steps to protect privileged materials. Moreover, like in *Atronic*, it is clear from Mr. Matz's declaration that the cover e-mails were lumped with the privileged e-mails without any reasonable procedure for separating out the privileged documents from the non-privileged documents.[7] Furthermore, Mr. Matz's declaration conclusively demonstrates one over-arching and critically important fact: *not a single partner* at either Kozyak Tropin or Herrick Feinstein took the time to review Mr. Tropin's declaration and exhibits before they were filed and served. That Defendants would entrust what they claim to be highly sensitive and privileged documents to the care of a junior associate—with no partner oversight—establishes either that Defendants intended to attach these documents, or they were grossly negligent with regard to this filing. From this evidence it is clear that Defendants took ***no*** reasonable precautions to prevent inadvertent disclosure and instead carelessly filed the allegedly privileged documents and served them on Plaintiff. A finding of waiver is appropriate as a result.[8]

---

[7] Defendants' argument that their attachment of a purported privilege log to Mr. Tropin's declaration supports a finding of inadvertence is unavailing. The plain language of the declaration with regard to the privilege log states: "Attached as Exhibit C is a privilege log of the privileged communications that Guma Aguiar had stolen, copied into a Word document and attached to the e-mails he sent to his counsel and to Corey Drew among others." Nothing in this passage at all contradicts the plain language of paragraph 8 of Mr. Tropin's declaration, where he explicitly states he is attaching copies of Guma Aguiar's e-mails containing the allegedly privileged materials.

[8] Defendants' reliance on *Hydraflow, Inc. v. Enidine Inc.*, 145 F.R.D. 626 (W.D.N.Y. 1993) is wholly unavailing. In that case, the plaintiff inadvertently produced documents that were subject to a pending motion to compel by the

**B. The Allegedly Privileged Documents Represented Nearly Half of Defendants' Filing**

The second factor of the waiver test - "the relative volume of the privileged documents in relation to the full extent of the discovery at issue" -- also militates in favor of a finding of waiver. *Gragg* at *5-6. Simply put, this is not a situation were a few privileged e-mails slipped through the cracks in a production of thousands of pages of non-privileged documents; rather, the documents in question were attached to a declaration with a limited number of exhibits that could be quickly reviewed, particularly since the issue at stake was Plaintiff's alleged access to the privileged e-mails.

In this case, the fact that the second factor in the waiver analysis specifically references inadvertent productions in the discovery process, where large volumes of documents are being reviewed, is telling. Clearly, the test anticipates that true cases of inadvertent disclosure in large document productions can occur, even when reasonable precautions are in place to identify privileged material, and may not result in waiver. However, here there was no massive document production at issue. Defendants had not sent their filing to any third party as part of the filing process. The documents at issue remained within the exclusive control of Defendants' two law firms, and the entire filing comprised only a couple hundred pages. In this context—where a party failed to exercise any due care with regard to a small filing—a waiver finding is entirely appropriate. *See Liz Claiborne Inc. v. Mademoiselle Knitwear, Inc.*, No. 96 Civ. 2064, 1996 WL 668862, at *5 (S.D.N.Y. Nov. 19, 1996) ("where overall scope of production was limited...failure to protect privileged documents is more likely to constitute a waiver."); *see also*

---

defendant. Unlike this case, there the plaintiff had specifically identified the documents in question as privileged and objected to their production in discovery, thereby necessitating the motion to compel. *Id.* at 638. The court had ordered their production for an *in camera* inspection, and plaintiff mistakenly served them on opposing counsel. *See id.* That fact pattern is entirely distinct from this action, where Defendants intentionally chose to file and serve these documents on their own initiative to gain an advantage in this proceeding. The Defendants were not seeking to defend any privilege claim, as was the plaintiff in *Hydraflow* through its objection to the discovery request, rather they were using their allegedly privileged documents in an offensive manner against Ms. Aguiar.

*Local 851 of the International Brotherhood of Teamsters v. Kuehne & Nagel Air Freight, Inc.*, 36 F. Supp.2d 127 (E.D.N.Y. 1999) (court finding waiver where counsel failed to take reasonable precautions to preserve the confidentiality of a small number of documents that it was filing with the court); *Gragg*, 2007 WL 1074894 at *6 (court found that second factor weighed strongly in favor of waiver where "four privileged documents are at issue, out of a total of only approximately 200 e-mails included within the CD-ROM" and "the task associated with reviewing the contents of the CD-ROM in order to determine whether it contained any privileged communications would not have been particularly onerous.")

**C. Defendants' Counsel Did Not Timely Attempt to Rectify The Disclosure**

The third factor also compels a waiver finding, as Defendants' counsel took no independent steps to rectify the disclosure and indeed responded to multiple inquiries from Plaintiff's counsel without raising any claim of inadvertent disclosure. First, after the filing with the federal court, Defendants' New York counsel circulated the filing to her other co-counsel and to Plaintiff's counsel. If one were to accept Defendants' present claim of "inadvertence," then one must also accept that none of the lawyers on Defendants' team who received the filing bothered to review its contents. Second, even after counsel for Plaintiff notified the Defendants, by a written letter and by a voicemail, of the inclusion of the documents in their submission to the Court, their first two responses to the notice (one by Mr. Tropin and one from his partner, Mr. Ronzetti) failed to even mention any claim of inadvertent production. Mr. Tropin's failure to express any concern after being told that he submitted privileged documents to the Court, his failure to offer any explanation for this disclosure in his November 12 letter to Plaintiff's counsel, and the fact that he is the signatory of the declaration at issue, all combine to demonstrate that Defendants failed to identify and rectify their allegedly inadvertent disclosure in

a reasonable period of time. Furthermore, even if this Court were to find that Defendants did not unduly delay in raising the inadvertence issue and thus this factor was neutral, it should nevertheless render a finding of waiver, as each of the remaining factors weighs strongly in favor of waiver. *See, e.g.*, *Gragg*, Case No. 2007 WL 1074894, at *6 (finding waiver where third factor was deemed "neutral"); *United States v. Gangi*, 1 F.Supp.2d 256, 266 (S.D.N.Y. 1998) (finding waiver despite court's determination that third factor weighed against waiver).

**D. Defendants Put the Privileged Material At Issue and Overarching Fairness Mandates a Finding of Waiver**

The final prong of the test is "overarching fairness," which clearly weighs in favor of a finding of waiver. Throughout this litigation, Defendants have sought to use Guma Aguiar's conduct and his review of allegedly privileged documents as a sword against this Plaintiff. It is abundantly clear that Defendants' aim is to taint Ms. Aguiar's claims—claims which are supported by the deposition testimony of Defendants Natbony and Kaplan—in the hope that this Court will somehow foreclose Ms. Aguiar from obtaining any relief. It was the Defendants who put this privilege discussion at issue by making the unfounded accusations that Plaintiff and her law firm have been unfairly exposed to privileged materials. Defendants then proceeded to send to plaintiff and her lawyers those very materials. Upon receiving the filing, counsel for Ms. Aguiar proceeded to forward the Tropin Declaration and its exhibits to her client and counsel participating in a joint-defense agreement, as was her normal practice when receiving a court filing. Due to the dissemination of these materials to multiple parties—all of whom have an interest in it—it would be fundamentally unfair and prejudicial to Ms. Aguiar and counsel involved in the joint defense agreement to find that these documents are privileged and may not be utilized. In a similar case of distribution, Judge Kaplan in the Southern District of New York made the following ruling on a party's claim of inadvertent disclosure.

> Finally, there are no overarching concerns of fairness dictating a contrary result. While the Commission, to be sure, is entitled to privacy for its deliberative communications with counsel, it has the same obligation to protect the confidentiality of its communications as any private party. There is no reason why its carelessness should be disregarded. Moreover, this document has been distributed to a number of others. Although distribution has not been as wide as in *Gangi*, this bell nevertheless would be very difficult to unring. Surely there would be little equity in some defendants going forward with the benefit of counsel who have read the memorandum while others do not.

*S.E.C. v. Cassano*, 189 F.R.D. 83, 86 (S.D.N.Y. 1999) (finding waiver); *see also Gangi*, 1 F.Supp.2d at 267 (finding that waiver was appropriate where memorandum at issue had been widely distributed).

As in *Cassano*, here it would be inherently unfair for the Defendants to be able to raise unsubstantiated allegations that the Plaintiff and her counsel were exposed to privileged materials, thereafter send those very privileged materials to counsel and the Court (with resulting distribution to joint-defense counsel), fail to take any adequate measures to protect the documents, and then have the Court not find a waiver of the privilege. Simply put, Defendants cannot employ their allegedly privileged documents in a tactical manner, using them offensively on the one hand in an attempt to foreclose Ms. Aguiar's right to relief in this Court, while simultaneously seeking to shield Plaintiff from reviewing them after their intentional disclosure.

## IV. CONCLUSION

For all of the foregoing reasons, Plaintiff Ellen Aguiar respectfully requests that this Court find that Defendants have waived all privileges with regard to the documents they filed with the New York Federal Court and served on Plaintiff on November 9, 2010.

**CERTIFICATE OF COMPLIANCE**

Pursuant to Local Rule 7.1(A)(3), plaintiff certifies that she made a good faith attempt to resolve the issues raised in this Motion without the need for Court intervention, but was unable to do so.

Dated: June 10, 2011

Respectfully submitted,

**BOIES, SCHILLER & FLEXNER LLP**

By: s/ Sigrid S. McCawley

Carlos M. Sires, Esq. (Fl. Bar No. 319333)
csires@bsfllp.com
Sigrid S. McCawley, Esq. (Fl. Bar No. 129305)
smccawley@bsfllp.com
Alec H. Schultz, Esq. (Fl. Bar No. 035022)
aschultz@bsfllp.com
401 East Las Olas Boulevard, Suite 1200
Fort Lauderdale, Florida 33301
Telephone: (954) 356-0011
Facsimile: (954) 356-0022

*Attorneys for Plaintiff Ellen Aguiar*

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on June 10, 2011, I electronically filed the foregoing document with the Clerk of the Court by using the CM/ECF system and that the foregoing document is being served this day on all counsel of record identified below via transmission of Notice of Electronic Filing generated by CM/ECF.

Harley S. Tropin
hst@kttlaw.com
Thomas A. Tucker Ronzetti
tr@kttlaw.com
KOZYAK TROPIN & THROCKMORTON, P.A.
2525 Ponce de Leon Boulevard, 9th Floor
Coral Gables, Florida 33134
Tel. (305) 372-1800
Fax. (305) 372-3508

*Attorneys for Thomas Kaplan and Dafna Kaplan*

Stephen M. Rathkopf
srathkopf@herrick.com
Marisa A. Leto
mleto@herrick.com
HERRICK, FEINSTEIN LLP
2 Park Avenue
New York, New York 10016
Tel. (212) 592-1415
Fax. (212) 545-3444

*Attorneys for Defendant William Natbony, individually and as trustee of the Thomas S. Kaplan 2004 Qualified Ten Year Annuity Trust and the Dafna Kaplan 2003 Eight Year Annuity Trust Agreement*

By: s/ Sigrid S. McCawley
Sigrid S. McCawley

# EXHIBIT 1

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

| | | |
|---|---|---|
| ELLEN AGUIAR,<br><br>Plaintiff,<br><br>v.<br><br>WILLIAM NATBONY, individually and as trustee of the THOMAS S. KAPLAN 2004 QUALIFIED TEN YEAR ANNUITY TRUST AGREEMENT and the DAFNA KAPLAN 2003 EIGHT YEAR ANNUITY TRUST AGREEMENT, THOMAS KAPLAN, and DAFNA KAPLAN,<br><br>Defendants. | ) | Case No. 10-cv-06531 (PGG) |

**DECLARATION OF HARLEY S. TROPIN**

1. My name is Harley S. Tropin. I have been a member in good standing of the Florida Bar since 1977 and am a founder and shareholder of Kozyak Tropin & Throckmorton, P.A. In addition to serving as counsel for Thomas and Dafna Kaplan in the above-captioned case, I have served as counsel in the following related cases (the "Litigation"):

(i) *Leor Exploration & Production LLC, et al. v. Guma Aguiar*, Case No. 09-60136-CIV-SEITZ, United States District Court for the Southern District of Florida (hereinafter, the "*Leor* Lawsuit"), representing Plaintiffs Leor Exploration & Production, LLC, Pardus Petroleum, LP, Pardus Petroleum, LLC and William Natbony;

(ii) *Guma Aguiar v. William Natbony, et al*, Case No. 09-60683-CIV-SEITZ, United States District Court for the Southern District of Florida (hereinafter, the "*Aguiar* Lawsuit"), representing Defendant Thomas Kaplan;

(iii) *Thomas Kaplan, et al. v. Guma Aguiar, et al.*, Case No. 09001509 CA (07), in the Seventeenth Judicial Circuit in and for Broward County, Florida (hereinafter, the "*Charitable Foundation* Lawsuit"), representing Thomas Kaplan and Dafna Kaplan; and

(iv) *Leor Exploration & Production LLC v. Angelika Aguiar, et al.*, Case No. 09-014890 CACE (02), in the Seventeenth Judicial Circuit in and for Broward County (hereinafter, the "*Drew* Lawsuit"), representing Plaintiffs Leor Exploration & Production, LLC, and Leor Energy, LP.

2. I provide this declaration in response to that of Ellen Aguiar, who asserts in conclusory fashion that she has not "reviewed or been made aware" of the contents of any privileged emails, Ellen Aguiar Decl. ¶ 4, and the accompanying declaration of her attorney, to similar effect.[1]

3. The evidence adduced in the Florida lawsuits establishes the following:

(i) Guma Aguiar obtained Kaplan's privileged and work product information;

(ii) Guma Aguiar disseminated that information widely;

(iii) Guma Aguiar sent many emails to his mother;

(iv) Guma Aguiar is exceptionally close to his mother -- she lives near him, she sees or speaks to him regularly and she is working with him in litigating against Kaplan and William Natbony, a co-defendant in the *Aguiar* lawsuit and a principal in the *Leor* lawsuit and the *Drew* lawsuit;

(v) Ellen Aguiar shares counsel with Corey Drew, Guma Aguiar's brother-in-law, who the evidence suggests helped Guma Aguiar steal Kaplan's privileged information.

[1] In her declaration, Sigrid McCawley, Ellen Aguiar's attorney, says that I represented in federal court that I did not contend "any of the lawyers in the Florida Actions had reviewed the allegedly privileged e-mails." *See* McCawley Declaration ¶ 4. It is true I do not contend any impropriety on the part of the attorneys. However, assuming the attorneys, including Ms. McCawley, have not "reviewed" the privileged emails, that does not mean that they, and Ms. Aguiar, have not received information from those privileged emails. In fact, the opposite is likely true, given the amount of communications, the closeness of the Aguiar's relationship, the intensity of the litigation, the joint defense agreement, and the evidence of which we are already aware.

Notwithstanding Ellen Aguiar's declaration, evidence establishes that she and, likely unknowingly her counsel, have received privileged and work product information converted by her son.

4. Ellen Aguiar's self-serving denial should therefore be tested by an independent judicial review of her computer and cross-examination before it is given credence by the Court. Indeed, a critical question is not only what confidential or privileged emails she has knowingly or unknowingly seen, but also what Guma Aguiar communicated to her in conversations and in the emails that he sent to her based on Kaplan's privileged information that he hacked. Beyond that, because Guma Aguiar to this day retains possession of Kaplan's privileged communications with his counsel and co-litigants, discovery is necessary to determine whether there are sufficient safeguards to ensure that future transmissions of privileged information do not occur. For the reasons set forth below, the Court should:

A. appoint a Magistrate or special master to conduct an *in camera* forensic inquiry into what information has been provided to Ellen Aguiar;

B. require Ellen Aguiar to produce to the Magistrate or special master her computers for analysis, using a court-appointed expert at Defendants' expense, regarding whether the computers presently contain the Defendants' privileged information or previously contained such information but it has been altered or erased;

C. require Ellen Aguiar to produce to the Magistrate or special master all communications she has had, directly or indirectly with Guma Aguiar and/or Corey Drew relating to Thomas Kaplan and/or the Litigation; and

D. thereafter, require Ellen Aguiar to submit to a deposition regarding what has been communicated to her, orally, in writing, or electronically by her son or his confederates.

Case law supports this relief. *See Ameriwood Indus., Inc. v. Liberman*, No. 4:06CV524-DJS, 2006 WL 3825291, at *4-5 (E.D. Mo. Dec. 27, 2006) (ordering the mirror imaging of items on a computer hard drive where the defendant allegedly used the computer to "secrete and distribute plaintiff's confidential information"), *clarified on other grounds*, 2007 WL 685623 (E.D. Mo. Feb. 23, 2007); *Koosharem Corp. v. Spec Personnel, LLC*, No. 6:08-583-HFF-WMC, 2008 WL 4458864, at *1-2 (D.S.C. Sept. 29, 2008) (granting plaintiff's request for an expert to examine defendants' computers to, among other things, "conduct a search or run other appropriate programs to determine whether emails have been deleted, destroyed, altered or otherwise compromised . . . ."); *Antioch Co. v. Scrapbook Borders, Inc.*, 210 F.R.D. 645, 651-52 (D. Minn. 2002) (granting plaintiff's request to appoint an expert to examine defendants' computer equipment to locate potentially relevant information which might "be in the form of stored or deleted computer files, programs or e-mails . . .").

**Guma Aguiar Obtained Privileged and Work Product Information**

5. In the course of the *Leor* and *Aguiar* Lawsuits, Guma Aguiar obtained highly privileged and confidential communications and work product by stealing or "hacking" the email account of his uncle and Ellen Aguiar's brother, Thomas Kaplan, as established by "[t]he undisputed evidence [] that [Guma] Aguiar had in his possession emails from Kaplan's account and actually forwarded some of those emails to counsel and others." *Leor Exploration & Prod. LLC v. Aguiar*, No. 09-60136-CIV, 2010 WL 3782195, at *3-5 (S.D. Fla. Sept. 28, 2010); *see also Leor Exploration & Prod. LLC v. Aguiar*, No. 09-60136-CIV, 2010 WL 2605087, at *6-7 (S.D. Fla. Jun. 29, 2010). In the *Leor* Lawsuit, Guma Aguiar invoked his Fifth Amendment privilege and thereby refused

to answer questions about his hacking, refused to provide any information about the emails he had stolen, and refused to produce his computers pursuant to court order. Accordingly, neither Kaplan nor the Court was ever able to determine the extent of the privileged information Guma Aguiar had stolen, the persons with whom he conspired, or the persons with whom he shared that information. *See Leor Exploration & Prod. LLC*, 2010 WL 3782195, at *2-3, 5, 7 (S.D. Fla. Sept. 28, 2010); *Leor Exploration & Prod. LLC*, 2010 WL 2605087, at *15 (S.D. Fla. Jun. 29, 2010).

6. Nevertheless, the evidence adduced in the hearings in the *Leor* and *Aguiar* Lawsuits irrefutably establish that when he hacked Kaplan's account, Guma Aguiar obtained all the emails that Kaplan had to date with his counsel. *See Leor Exploration & Prod. LLC*, 2010 WL 2605087, at *6, 15.

7. Because Guma Aguiar invoked his Fifth Amendment privilege and refused to produce his computers in compliance with a court order, Kaplan was never able to recover any of the privileged information. The privileged information that Guma Aguiar stole remains in his possession to this day. *See Leor Exploration & Prod. LLC*, 2010 WL 2605087, at *15.

**Guma Aguiar Widely Disseminated Kaplan's Privileged Information**

8. During the *Leor* Lawsuit, Guma Aguiar sent emails to his counsel and to his brother-in-law, Corey Drew, containing privileged material he had stolen. Copies of those emails are attached as Exhibits A and B, respectively. Attached as Exhibit C is a privilege log of the privileged communications that Guma Aguiar had stolen, copied into a Word document, and attached to the emails he sent to his counsel and to Corey Drew, among others.

9. Kaplan's counsel obtained Guma Aguiar's emails to his counsel and Corey Drew only because Aguiar copied Stephen Rathkopf, a partner at Herrick Feinstein and Kaplan and Natbony's counsel in New York. Because of Aguiar's ability to transmit "blind" copies to third persons, it is impossible to know all of the recipients of this highly confidential and privileged document. I only know of the emails Aguiar sent directly to Kaplan and his counsel. However, the earlier email chain demonstrates that this email was also forwarded to Guma Aguiar's attorney, Alan Dershowitz, and Guma Aguiar's brother-in-law and the Chief Executive Officer of his businesses, Corey Drew.

**Guma Aguiar Sent Many Emails to His Mother**

10. During the *Leor* Lawsuit, Guma Aguiar sent several emails to his mother, Ellen Aguiar. Copies of those emails are attached as Composite Exhibit D. As just one example, Guma Aguiar's November 17, 2009 email states that "Kaplan's fantasy is to rape [Aguiar's wife] Jamie in front of their children while [Kaplan's rabbi] Tropper plays with himself". Despite receiving these emails,[2] Ellen Aguiar testified that she has "never seen any emails" that Guma Aguiar sent regarding Thomas Kaplan that were "inappropriate". *See* E. Aguiar Dep. Tr. at 35-36, June 2, 2010, attached hereto as Exhibit E. These emails thus establish both that Ellen Aguiar received many communications from Guma Aguiar and that her credibility is questionable.

11. Kaplan's counsel, again, obtained these emails only because Guma Aguiar also copied numerous third parties on these emails in addition to Ellen Aguiar, including Kaplan, Kaplan's attorneys, and current Leor employees. Because Guma Aguiar often

[2] Ellen Aguiar admitted that her email address is Ellenag112@aol.com. *See* E. Aguiar Dep. Tr. at 36, June 2, 2010.

blind copied third parties when he sent emails, it is impossible to determine what privileged communications he may have forwarded to Ellen Aguiar.

**Ellen Aguiar Participated with Her Son Guma in the Litigation**

12. Guma Aguiar is exceptionally close to his mother. According to Guma Aguiar, the two live "maybe 30 feet away from each other, so [they] normally see each other on a regular basis." *See* G. Aguiar Dep. Tr. at 276:14-18, Apr. 1, 2009, attached hereto as Exhibit F.

13. Ellen Aguiar is also intimately involved in the litigation with her son. She acted as Guma Aguiar's emissary in late 2008 in an attempt to negotiate a global settlement of all claims. One such settlement discussion between Ellen Aguiar and Kaplan is attached as Exhibit 1 to the Complaint in this action. Although she was not a formal party, Ellen Aguiar is a director of the Lillian Jean Kaplan Foundation, a named defendant in the *Charitable Foundation* Lawsuit. She has helped enable her son to loot money from the Foundation. On April 12, 2010, Ellen Aguiar, represented by Sigrid McCawley, participated in the mediation in the *Leor* and *Aguiar* Lawsuits in Miami, Florida. On June 2, 2010, Ellen Aguiar was deposed in those Lawsuits. Ellen Aguiar was also listed as a witness to testify at evidentiary hearings in the *Leor* and *Aguiar* Lawsuits, and made herself available to testify, though after her deposition she was not called. Also, her counsel attended several hearings in the *Leor* and *Aguiar* Lawsuits.

**Ellen Aguiar's Counsel of Record also Represents Corey Drew**

14. Counsel of record in this case representing Ellen Aguiar also represents Guma Aguiar's brother-in-law, and Ellen Aguiar's son-in-law, Corey Drew. Corey

Drew, who Aguiar has described as the CEO of his organizations, assisted Guma Aguiar in stealing Kaplan's privileged emails.

15. Information obtained from America Online ("AOL") – specifically, internet protocol or "IP" connection logs showing access to Kaplan's email account from July 2009 to September 2009 – includes access attempts from IP addresses associated with locations where Drew was present on those same dates. *See* Composite Exhibit G: AOL IP Logs and whois.domaintools.com registration information for IP Addresses. For example, on August 13, 2009, Kaplan's account was accessed by a computer at the Trump International Hotel in Chicago. Drew admitted that he stayed at the Trump International Hotel the night of August 12, 2009. *See* Defendant Justin Corey Drew's Responses to Plaintiffs' Second Set of Interrogatories in the Drew lawsuit, attached hereto as Exhibit H. Similarly, on September 3, 2009, an IP address associated with a company located in Tampa, Florida accessed Kaplan's AOL account. Corey Drew also admitted that he was in Tampa on this same day. *See id.*

16. Additionally, Drew received several emails in late 2007 and 2008 relating to invoices or expenses paid to "PCIC", the company associated with the email account through which Guma Aguiar obtained access to Kaplan's email account.

**Conclusion**

Although Ellen Aguiar has stated in a conclusory fashion that she has not seen Kaplan's confidential emails, that is questionable and, in any event, begs the more significant question: whether Guma Aguiar imparted privileged information to his mother (orally or in email) based on his having obtained, and retained to this day, Kaplan's attorney-client privileged emails. The Defendants should have an opportunity

to test Ellen Aguiar's conclusory statement through a magistrate's or special master's *in camera*, independent forensic examination of her computers, and then, based on whatever information the magistrate or special master imparts to counsel, to investigate that information through a deposition of Ellen Aguiar.

The Defendants respectfully request oral argument on these issues, to help clarify the extraordinary circumstances that create their need for these special procedures.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: Nov 9, 2010

Harley S. Tropin

319106.1

# EXHIBIT A HAS BEEN SEALED AND REMOVED

# EXHIBIT B HAS BEEN SEALED AND REMOVED

# EXHIBIT 2

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

| | | |
|---|---|---|
| ELLEN AGUIAR,<br><br>Plaintiff<br><br>v.<br><br>WILLIAM NATBONY, individually and as trustee of the THOMAS S. KAPLAN 2004 QUALIFIED TEN YEAR ANNUITY TRUST AGREEMENT and the DAFNA KAPLAN 2003 EIGHT YEAR ANNUITY TRUST AGREEMENT, THOMAS KAPLAN and DAFNA KAPLAN,<br><br>Defendants. | : | **10 CV 6531 (PGG)** |

**DECLARATION OF ELLEN AGUIAR**

I, Ellen Aguiar, declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct as follows:

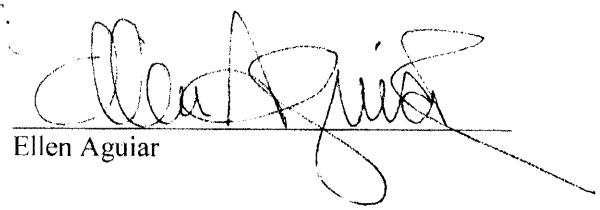
1. I am over the age of eighteen, and I have personal knowledge of the facts set out in this affidavit.

2. I am the sister of Thomas Kaplan, one of the defendants in this case. I am the mother of Guma Aguiar, who is a party to the Florida Actions. I was never a party to any of the Florida Actions that were brought by my brother and my son.

3. I am aware that my brother contends that my son improperly accessed his e-mail account while my son was experiencing a manic episode of his bipolar disorder. My son was involuntarily committed to a psychiatric hospital in January 2010.

4. I have not reviewed or been made aware of the contents of any of the allegedly privileged e-mails that my brother claims were improperly accessed by my son. More specifically, I have not received copies of any e-mails between my brother and his attorneys.

FURTHER AFFIANT SAYETH NAUGHT.



Ellen Aguiar

# EXHIBIT 3

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

| | | |
|---|---|---|
| ELLEN AGUIAR,<br><br>Plaintiff<br><br>v.<br><br>WILLIAM NATBONY, individually and as trustee of the THOMAS S. KAPLAN 2004 QUALIFIED TEN YEAR ANNUITY TRUST AGREEMENT and the DAFNA KAPLAN 2003 EIGHT YEAR ANNUITY TRUST AGREEMENT, THOMAS KAPLAN and DAFNA KAPLAN,<br><br>Defendants. | : | **10 CV 6531 (PGG)** |

**DECLARATION OF SIGRID STONE McCAWLEY**

I, Sigrid Stone McCawley, declare under penalty of perjury that the foregoing is true and correct as follows:

1. I am over the age of eighteen, and I have personal knowledge of the facts contained in this declaration. I am a partner at the law firm of Boies, Schiller & Flexner LLP and am counsel for Plaintiff Ellen Aguiar.

2. I submit this declaration pursuant to the Court's directive at the pre-motion telephonic conference held on October 27, 2010, in response to the statement in Defendants' Pre-Motion Conference correspondence dated October 6, 2010, that "Plaintiff and her counsel have almost certainly received confidential information taken from Kaplan's e-mail account by Guma Aguiar, through conversations with her son and

counsel who are parties to a joint defense agreement in the Florida Actions."[1] (*See* Harley Tropin's October 6, 2010, Correspondence to The Honorable Paul G. Gardephe at p. 3).

3. I have not read any e-mails between Thomas Kaplan and his lawyers (other than e-mail provided in discovery in the Florida Actions) nor have I been made aware of the contents of any such privileged e-mails by anyone, including Guma Aguiar, the lawyers to the joint defense agreement, my clients Ellen Aguiar, Justin Corey Drew or Angelika Aguiar.

4. I am a party to the joint defense agreement in the Florida Actions as a result of my representation of Ellen Aguiar who was a fact witness in an action filed by Thomas Kaplan against the Lillian Jean Kaplan Foundation. The lawyers that are parties to the joint defense agreement in the Florida Actions have not disclosed to me the contents of any of Thomas Kaplan's allegedly privileged e-mails. In fact, Mr. Tropin (counsel for Mr. Kaplan) represented in Federal Court in the Florida Actions that he did not contend that any of the lawyers in the Florida Actions had reviewed the allegedly privileged e-mails. (*See* October 2, 2009 Hearing Tr. 8:17-19.)

Executed this 2nd day of November, 2010.

Sigrid S. McCawley

[1] The "Florida Actions" include *Leor Exploration & Production LLC, Pardus Petroleum L.P., et al. v. Guma Aguiar*, Case No. 09-60136-CIV-Seitz/O'Sullivan (S.D. Fla.); *Guma Aguiar v. William Natbony, Thomas Kaplan, and Katten Muchin Rosenman*, LLP Case No. 09-60683 (S.D. Fla.); and *Thomas Kaplan v. Guma Aguiar and The Lillian Jean Kaplan Foundation, Inc.*, Case No. 09-001509 (Fla. Cir. Ct., 17th Jud. Cir). The case of *Leor Exploration & Production LLC and Leor Energy, L.P. v. Angelika Aguiar and Justin Corey Drew*, Case No. 09-014890 (Fla. Cir. Ct., 17th Jud. Cir.) was voluntarily dismissed by Leor on April 7, 2010.

# EXHIBIT 4

BOIES, SCHILLER & FLEXNER LLP

401 EAST LAS OLAS BOULEVARD • SUITE 1200 • FORT LAUDERDALE, FL 33301-2211 • PH. 954.356.0011 • FAX 954.356.0022

Sigrid S. McCawley
Email: smccawley@bsfllp.com

November 11, 2010

**VIA ELECTRONIC MAIL & U.S. MAIL**

Harley S. Tropin, Esq. (HST@KTTLaw.com)
KOZYAK TROPIN & THROCKMORTON, P.A.
2525 Ponce de Leon Boulevard, 9th Floor
Coral Gables, Florida 33134

Re: *Ellen Aguiar v. William Natbony*, et al.,
Case No. 10-CV-6531 (PGG)

Dear Harley:

We are in receipt of your submission to the Court of your Declaration and Exhibits with copies to Tucker Ronzetti, Stephen Rathkopf, Carlos Sires and Howard Vickery, which references and attaches what you characterized as "privileged material." We will be responding to the Court shortly.

Sincerely,

Sigrid S. McCawley

SSM/et

cc: Thomas A. Tucker Ronzetti
Marisa Leto
Stephen M. Rathkopf
Howard Vickery
Carlos Sires

35064v1

# EXHIBIT 5

**Sigrid McCawley**

**From:** Harley Tropin [hst@kttlaw.com]
**Sent:** Friday, November 12, 2010 11:05 AM
**To:** Sigrid McCawley; M Leto; Stephen M. Rathkopf; TUCKER RONZETTI
**Cc:** Carlos Sires; Howard Vickery
**Subject:** Re: Correspondence

Dear Sigrid:
Thanks for your letter. We do not believe that the Courts' order contemplates any response to my declaration,other than your position as to whether oral argument would be helpful.
Best
Harley

Harley Tropin
Kozyak Tropin & Throckmorton
2525 Ponce de Leon, 9th Floor
Miami, FL 33134
(305) 372-1800 office
(305) 372-3508 fax
hst@kttlaw.com

---

**From:** "Sigrid McCawley" <Smccawley@BSFLLP.com>
**Date:** Thu, 11 Nov 2010 18:08:15 -0500
**To:** <harleytropin@att.blackberry.net>; MarisaLeto<MLeto@herrick.com>; srathkopf@herrick.com<srathkopf@herrick.com>; TUCKER RONZETTI<TR@kttlaw.com>
**Cc:** Carlos Sires<csires@BSFLLP.com>; Howard Vickery<hvickery@BSFLLP.com>
**Subject:** Correspondence

Please see attached.

---

# EXHIBIT 6

**From:** TUCKER RONZETTI
**To:** HARLEY TROPIN; M Leto; Sigrid McCawley; Stephen M. Rathkopf; TUCKER ...
**CC:** Carlos M. Sires Esq.; Howard Vickery
**Date:** 11/12/2010 11:57 AM
**Subject:** Re: Correspondence

Sigrid, exhibits A and B had the privileged material. As you know, this has happened on previous occasions and we have returned material as well. We appreciate your letter's notice.

We will serve a motion to substitute and substitute material as soon as possible. Please let us know your position.

Regards,

Tucker Ronzetti

>>> TUCKER RONZETTI 11/12/2010 11:51 AM >>>
Sigrid, exhibit B contains inadvertently attached privileged material. We ask that you destroy or return any copy; we will re-serve a substitute. We also ask the you agree to a motion to file a substitute with the court. Kindly let us know your position as soon as possible.

Regards,

Tucker Ronzetti

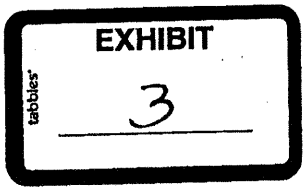
>>> "Harley Tropin" <hst@kttlaw.com> 11/12/2010 11:05 AM >>>
Dear Sigrid:
Thanks for your letter. We do not believe that the Courts' order contemplates any response to my declaration,other than your position as to whether oral argument would be helpful.
Best
Harley
Harley Tropin
Kozyak Tropin & Throckmorton
2525 Ponce de Leon, 9th Floor
Miami, FL 33134
(305) 372-1800 office
(305) 372-3508 fax
hst@kttlaw.com

-----Original Message-----
From: "Sigrid McCawley" <Smccawley@BSFLLP.com>
Date: Thu, 11 Nov 2010 18:08:15
To: <harleytropin@att.blackberry.net>; MarisaLeto<MLeto@herrick.com>; srathkopf@herrick.com<srathkopf@herrick.com>; TUCKER RONZETTI<TR@kttlaw.com>
Cc: Carlos Sires<csires@BSFLLP.com>; Howard Vickery<hvickery@BSFLLP.com>
Subject: Correspondence

Please see attached.

---





# EXHIBIT 7

BOIES, SCHILLER & FLEXNER LLP

401 EAST LAS OLAS BOULEVARD • SUITE 1200 • FORT LAUDERDALE, FL 33301-2211 • PH 954.356.0011 • FAX 954.356.0022

Sigrid S. McCawley

E-mail: smccawley@bsfllp.com

November 12, 2010

**VIA FACSIMILE (212) 805-7986**

The Honorable Judge Paul G. Gardephe
United States District Court
Southern District of New York
500 Pearl Street, Room 920
New York, New York 10007

Re: *Ellen Aguiar v. William Natbony*, et al.,
Case No. 10-CV-6531 (PGG)

Dear Judge Gardephe,

We represent Plaintiff Ellen Aguiar in the above-referenced matter. Pursuant to the Court's direction at the October 27, 2010, pre-motion conference, we submit this letter to request oral argument and respond to new assertions and new requests for relief raised in defendants' declaration submitted on November 9, 2010. (*See* October 27, 2010, Hearing Transcript at 9.) Defendants' declaration is in effect a new motion seeking special discovery (including unrestricted forensic access to plaintiff's home computer) to be overseen by a special master or magistrate concerning whether plaintiff had knowledge of allegedly privileged communications between defendants and their attorneys.

Plaintiff believes that defendants' motion should be denied out of hand. If the Court concludes, however, that the unequivocal declarations submitted by plaintiff are not sufficient to bring this matter to a close, plaintiff believes that oral argument would be helpful for the following reasons:

The issue of whether the Court should grant the extraordinary relief of a stay, and whether the Court should allow discovery to determine whether plaintiff was ever privy to any of the alleged privileged communications that were at issue in the Florida Actions, has been rendered moot by defendants' production to the Court, and to plaintiff, of approximately 100 pages of purportedly privileged e-mails, which were attached to Mr. Tropin's November 9, 2010, declaration served upon plaintiff and submitted to the Court. This disclosure results in a voluntary waiver of any privilege claim, not only with respect to these documents but to any other privileged documents on the same subject. *Crawford v. Franklin Credit Management Corp.*, 261 F.R.D. 34, 43 (S.D.N.Y. 2009) ("It is well-settled that the voluntary disclosure of confidential materials to a third party waives any applicable attorney-client privilege.") There is thus absolutely no basis now for defendants to claim that knowledge of these emails, if it even existed (which plaintiff denies), should have any effect in this action. *See Tribune Co. v. Purcigliotti*, 1997 WL 10924, *5 (S.D.N.Y. 1997) ("Depending upon the extent and context of the partial disclosure, the waiver may be broad, covering all communications relating to the

subject matter of the disclosure . . . for example, where there is partial disclosure in the context of the litigation for the benefit of the privilege holder, there may be a complete subject matter waiver as to all communications on the subject.") The attorney-client privilege cannot be used as a sword and a shield. Therefore, the issue of whether Ellen Aguiar has ever seen any privileged materials, which she has not, is moot because the materials are no longer privileged.

After receiving the November 9, 2010, letter from counsel with Mr. Tropin's Declaration that stated at paragraph 8 he was attaching as exhibits A & B the "stolen" materials, we sent opposing counsel a letter confirming that we received copies of this material that they had previously claimed was privileged. (*See* Exhibit 1.) After notifying defendants' counsel of the obvious fact that the exhibits purported to be privileged documents, defendants' counsel did not immediately respond. When they did respond plaintiff's counsel received a voicemail and an e-mail, neither of which asserted an inadvertent waiver or asked for the return of the documents. (*See* Exhibit 2.) It was only later – nearly three days after the exhibits were filed with the court - that we received an e-mail from Tucker Ronzetti at 11:52 today stating that--despite the clear language of Mr. Tropin's Declaration stating that he was attaching the "privileged materials," despite all counsel receiving copies of the filings (including Harley Tropin and Tucker Ronzetti), despite receiving a letter from plaintiff's counsel that we had received these documents that they claimed were privileged, despite taking no steps to seek to seal these documents or mark them as confidential in any way, they now seek to claim that the production was inadvertent. *See Local 851 of the International Brotherhood of Teamsters v. Kuehne & Nagel Air Freight, Inc.*, 36 F. Supp.2d 127 (E.D.N.Y. 1999) (court finding no inadvertent disclosure where counsel failed to take reasonable precautions to preserve the confidentiality of a small number of documents that it was filing with the court). In an abundance of caution, even though we firmly contend that this could not possibly be a situation of inadvertent production, we have sealed the filing that was submitted to us containing these privileged materials pending this Court's ruling on whether the privilege was waived. We believe any privilege regarding these purportedly privileged materials that were intentionally filed with the Court was knowingly waived.[1] We, therefore, request that the Court find a waiver as to these documents and documents concerning similar subject matter, and that plaintiff be allowed to review and make use of these documents.[2]

Even if the Court were to still entertain defendants' request for the extraordinary relief of a special master, it is clear that is based on nothing more than suspicion and innuendo. The point of the declarations was to allow defendants to substantiate their claims of improper conduct if plaintiff denied them (as she has). Instead, their declaration is wholly devoid of any factual support for any assertion concerning the plaintiff and, instead, simply attempts to impute the

---

[1] Even if the defendants did not intend to produce privileged documents to the Court, the privilege would still be waived if they negligently produced the documents without taking proper precautions to safeguard the privilege. This is not a case where a handful of privileged documents were inadvertently produced in the midst of a voluminous document production.

[2] The parties to this case have not entered into a confidentiality agreement requiring the return of documents inadvertently produced during the course of discovery.

actions of Guma Aguiar – which took place during a time when he was experiencing a psychotic episode, as confirmed by both parties' experts in the Florida Actions -- to the plaintiff based on the fact that they are mother and son. There is no basis for doing so.

Moreover, defendants' own recent actions belie their accusations in this case. If defendants really believed that Ms. Aguiar was somehow privy to the allegedly privileged information, they would have sought that discovery from her during the nine months that the federal court in the Florida Action was taking discovery on these issues. They did not. They only raise these rash and unfounded accusations now in a transparent attempt to avoid the merits of this case and to smear plaintiff by association.

Defendants also try to implicate another family member, Corey Drew, yet they completely fail to inform this Court that Judge Bowman in the case of *Leor Exploration & Production LLC and Leor Energy, L.P. v. Angelika Aguiar and Justin Corey Drew*, Case No. 09-014890 (Fla. Cir. Ct., 17th Jud. Cir.) denied defendants' attempt to depose Mr. Drew on the alleged hacking issues after Mr. Drew submitted answers to interrogatories denying any involvement.

Defendants will have the opportunity to depose Ms. Aguiar and also request the production of documents from Ms. Aguiar in the normal course of discovery. Plaintiff respectfully requests that the Court summarily deny defendants' irregular motion for extraordinary relief because defendants have shown no foundation for their suspicions and have waived any further right to assert privilege with respect to the documents in question. If the Court should conclude that this matter warrants further attention, plaintiff requests oral argument in order to respond to the arguments made in defendants' new motion.

Respectfully submitted,

Sigrid S. McCawley
*Attorney for Plaintiff*

SSM/et
Enclosures

cc: Howard Vickery
Carlos Sires
Harley S. Tropin
Thomas A. Tucker Ronzetti
Stephen M. Rathkopf

# EXHIBIT
# 1

BOIES, SCHILLER & FLEXNER LLP

401 EAST LAS OLAS BOULEVARD • SUITE 1200 • FORT LAUDERDALE, FL 33301-2211 • PH. 954.356.0011 • FAX 954.356.0022

Sigrid S. McCawley
Email: smccawley@bsfllp.com

November 11, 2010

**VIA ELECTRONIC MAIL & U.S. MAIL**

Harley S. Tropin, Esq. (HST@KTTLaw.com)
KOZYAK TROPIN & THROCKMORTON, P.A.
2525 Ponce de Leon Boulevard, 9th Floor
Coral Gables, Florida 33134

Re: *Ellen Aguiar v. William Natbony*, et al.,
Case No. 10-CV-6531 (PGG)

Dear Harley:

We are in receipt of your submission to the Court of your Declaration and Exhibits with copies to Tucker Ronzetti, Stephen Rathkopf, Carlos Sires and Howard Vickery, which references and attaches what you characterized as "privileged material." We will be responding to the Court shortly.

Sincerely,

Sigrid S. McCawley

SSM/et

cc: Thomas A. Tucker Ronzetti
Marisa Leto
Stephen M. Rathkopf
Howard Vickery
Carlos Sires

35064v1

# EXHIBIT
# 2

**Sigrid McCawley**

**From:** Harley Tropin [hst@kttlaw.com]
**Sent:** Friday, November 12, 2010 11:05 AM
**To:** Sigrid McCawley; M Leto; Stephen M. Rathkopf; TUCKER RONZETTI
**Cc:** Carlos Sires; Howard Vickery
**Subject:** Re: Correspondence

Dear Sigrid:
Thanks for your letter. We do not believe that the Courts' order contemplates any response to my declaration,other than your position as to whether oral argument would be helpful.
Best
Harley

Harley Tropin
Kozyak Tropin & Throckmorton
2525 Ponce de Leon, 9th Floor
Miami, FL 33134
(305) 372-1800 office
(305) 372-3508 fax
hst@kttlaw.com

---

**From:** "Sigrid McCawley" <Smccawley@BSFLLP.com>
**Date:** Thu, 11 Nov 2010 18:08:15 -0500
**To:** <harleytropin@att.blackberry.net>; MarisaLeto<MLeto@herrick.com>; srathkopf@herrick.com<srathkopf@herrick.com>; TUCKER RONZETTI<TR@kttlaw.com>
**Cc:** Carlos Sires<csires@BSFLLP.com>; Howard Vickery<hvickery@BSFLLP.com>
**Subject:** Correspondence

Please see attached.

---

# EXHIBIT 8

## Sigrid McCawley

**From:** Sigrid McCawley
**Sent:** Friday, November 12, 2010 3:20 PM
**To:** 'TUCKER RONZETTI'; M Leto; Stephen M. Rathkopf; HARLEY TROPIN
**Cc:** Carlos Sires; Howard Vickery
**Subject:** RE: Correspondence

Tucker I am in receipt of your e-mails below.

We do not agree that this was an inadvertent production but instead a voluntary waiver as Mr. Tropin's Declaration stated that he was attaching the "stolen" "privileged" materials in paragraph 8 and then proceeds to attach the documents without any designation of confidentiality or attempt to seal.

You and all your co-counsel were copied on the filing that was submitted to the Court on Tuesday. We are sending our submission to the Court regarding the waiver of any alleged privileged that was attached to these documents. While we await the Court's ruling I am sealing the documents. I am unaware of what prior situations you are referring to in your correspondence below. We do not consent with your submission of a revised filing at this time until the Court has ruled on this issue.

Thank you,
Sigrid

-----Original Message-----
From: TUCKER RONZETTI [mailto:TR@kttlaw.com]
Sent: Friday, November 12, 2010 11:57 AM
To: Sigrid McCawley; M Leto; Stephen M. Rathkopf; HARLEY TROPIN; TUCKER RONZETTI
Cc: Carlos Sires; Howard Vickery
Subject: Re: Correspondence

Sigrid, exhibits A and B had the privileged material. As you know, this has happened on previous occasions and we have returned material as well. We appreciate your letter's notice.

We will serve a motion to substitute and substitute material as soon as possible. Please let us know your position.

Regards,

Tucker Ronzetti

>>> TUCKER RONZETTI 11/12/2010 11:51 AM >>>
Sigrid, exhibit B contains inadvertently attached privileged material. We ask that you destroy or return any copy; we will re-serve a substitute. We also ask the you agree to a motion to file a substitute with the court. Kindly let us know your position as soon as possible.

Regards,

Tucker Ronzetti

>>> "Harley Tropin" <hst@kttlaw.com> 11/12/2010 11:05 AM >>>
Dear Sigrid:
Thanks for your letter. We do not believe that the Courts' order contemplates any response to my declaration,other than your position as to whether oral argument would be helpful.
Best
Harley
Harley Tropin
Kozyak Tropin & Throckmorton
2525 Ponce de Leon, 9th Floor

Miami, FL 33134
(305) 372-1800 office
(305) 372-3508 fax
hst@kttlaw.com

-----Original Message-----
From: "Sigrid McCawley" <Smccawley@BSFLLP.com>
Date: Thu, 11 Nov 2010 18:08:15
To: <harleytropin@att.blackberry.net>; MarisaLeto<MLeto@herrick.com>;
srathkopf@herrick.com<srathkopf@herrick.com>; TUCKER RONZETTI<TR@kttlaw.com>
Cc: Carlos Sires<csires@BSFLLP.com>; Howard Vickery<hvickery@BSFLLP.com>
Subject: Correspondence

Please see attached.

# EXHIBIT 9

KOZYAK · TROPIN
THROCKMORTON
ATTORNEYS AT LAW

**Harley S. Tropin,** Esq.
hst@kttlaw.com | 305.377.0662

November 12, 2010

The Honorable Paul G. Gardephe
United States District Court
Southern District of New York
500 Pearl Street, Room 920
New York, New York 10007

Re: *Ellen Aguiar v. Natbony, et. al.*
Case No. 10-cv-06351 (PGG)

Dear Judge Gardephe:

Defendants are outraged by the letter sent to your Honor this afternoon by Plaintiff's counsel, Ms. McCawley. Defendants hereby respond and request leave to file substituted Exhibits A and B (attached as Exhibit 1) to the Declaration of Harley S. Tropin (the "Declaration"), for those exhibits which contain privileged material that was inadvertently attached. As the accompanying declaration of David Matz, Esq. explains, only the two transmittal emails (without the attachments) were intended to be included as Exhibits A and B, with a privilege log (Exhibit C to my Declaration). *See* Exhibit 2.

Defendants first learned about the inclusion of the actual privileged emails themselves today, after counsel for Plaintiff sent Defendants' counsel a letter yesterday and then exchanged messages with Plaintiff's counsel today. Upon realizing the error, we requested that Plaintiff's counsel return or destroy all copies, and asked that they agree to this motion. Though they agreed to keep the materials under seal – tacitly acknowledging the materials' privileged nature as all counsel to these proceedings, including Ms. McCawley, have in the past – Plaintiff's counsel have refused to consent to the motion. They now falsely claim that there has been a knowing waiver of attorney-client privilege in an effort to achieve an advantage from an innocent mistake.

On January 8, 2010, Guma Aguiar, Ellen Aguiar's son, sent two emails containing as attachments privileged and confidential communications that he had stolen from Defendant Thomas Kaplan's email account. At paragraph 8 of my Declaration, I plainly state I am attaching "[c]opies of those emails" – the transmittal emails by Guma Aguiar – and "a privilege log of the privileged communications that Guma Aguiar had stolen . . . ." We never had any intention to attach the privileged communications themselves. We intended to attach to the Declaration only the Aguiar emails, without the privileged attachments, along with Exhibit C, the Privilege Log Regarding Attorney Communications Sent by Guma Aguiar. It is well established that inadvertent disclosure does not result in waiver of privilege. *See Fuller v. Interview, Inc.*,



2525 Ponce de Leon, 9th Floor, Miami, Florida 33134 | Phone 305.372.1800 | Fax 305.372.3508 | kttlaw.com

2009 WL 3241542, at *3-4 (S.D.N.Y. Sept. 30, 2009); *Stratagem Dev. Corp. v. Heron Inter. N.V.*, 153 F.R.D. 535, 543 (S.D.N.Y. 2001).

To now argue, as Plaintiff does, in their November 12 letter to the Court, that I "was attaching as Exhibits A and B the 'stolen' materials ..." is an outrageous misinterpretation of my Declaration. It defies both the plain wording of the Declaration, which refers to the Aguiar emails (not the privileged material) and common sense - - why would we take precautions in the Florida federal court to protect the material and attach a privilege log to my Declaration if we inteded to waive the privilege? Finally, the declaration of David Matz explains that it was a simple error to attach the privileged emails.

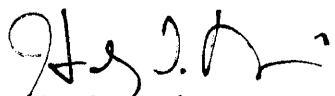
These documents have never been previously released with consent, and Defendants have taken extreme precautions to maintain the confidentiality of these documents. The privileged documents were filed under seal in the Florida action, and the Southern District of Florida found that these emails were a "55-page compilation of approximately 73 emails containing confidential communications from Kaplan's AOL account." *Leor Exploration & Prod. LLC v. Aguiar,* No. 09-60136-CIV, 2010 WL 2605087 (S.D. Fla. Jun. 29, 2010). Through a clerical error, the privileged documents were inadvertently included in the file containing the Aguiar email and attached to the Declaration. *See* Matz declaration at 3. Once the error was recognized, we sought relief immediately, by emails at 11:51 and 11:57 a.m. today – emails which Plaintiff's counsel have omitted from their exhibits, and which are attached hereto as Exhibit 3.

The one decision Plaintiff cites that is on point, *Local 851 of International Brotherhood of Teamsters v. Kuehne & Nagel Air Freight, Inc.*, 36 F. Supp. 2d 127 (E.D.N.Y. 1999), is distinguishable, because in that case there was no evidence of any effort to ensure confidentiality. *Id.* at 132. Here, in contrast, we have consistently made every effort to ensure confidentiality, until this one inadvertent mistake by a junior associate.

Accordingly, Defendants request leave to substitute the attached Exhibits A and B to the Declaration, to include only the Aguiar emails without their attached privileged communications, and to require that Plaintiff's counsel return the privileged materials to us unread.

Finally, we ask that the Court disregard the argument contained in Plaintiff's November 12 letter, which violates the Court's order of October 27, which simply asked the Plaintiff to advise the Court as to whether oral argument would be helpful. Plaintiff has seized upon the sham claim of knowing waiver to attempt inappropriately to argue in response to defendants' Court ordered November 9 submission.

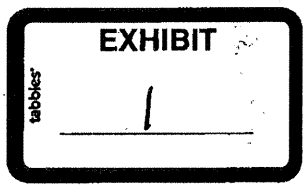
Respectfully submitted,



Harley S. Tropin

HST/sf
Enclosures
cc: Counsel of Record (*via email*)

# EXHIBIT A



**Unknown**

---

**From:** gumaaguiar77@aol.com
**Sent:** Friday, January 08, 2010 5:40 PM
**To:** Rathkopf, Stephen M.
**Subject:** Fwd: (no subject)
**Attachments:** new year doc.docx

---

From: gumaaguiar77
To: gumaaguiar77, dersh@law.harvard.edu, JCoreyDrew
Sent: 1/9/2010 12:38:10 A.M. Jerusalem Standard Time
Subj: (no subject)

# EXHIBIT B

**Unknown**

---

**From:** gumaaguiar77@aol.com

**Sent:** Friday, January 08, 2010 5:49 PM

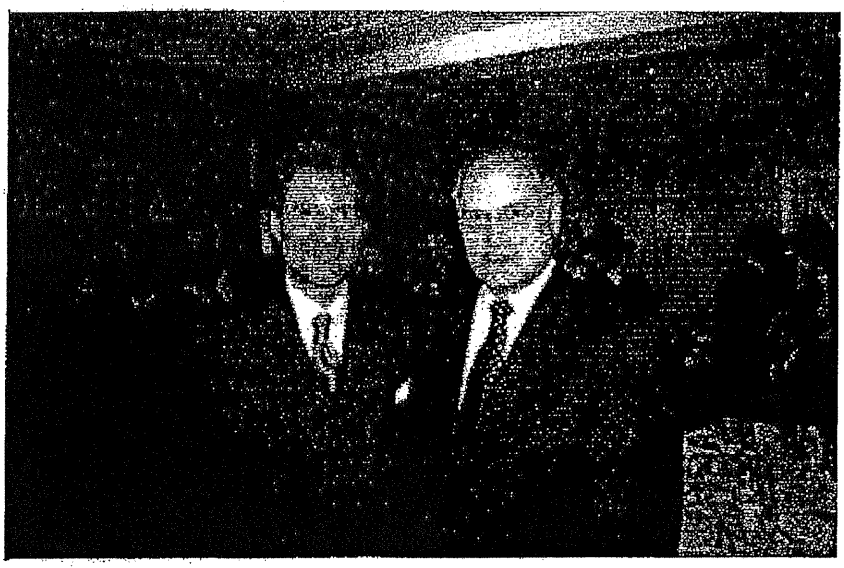
**To:** Kaplan600@aol.com

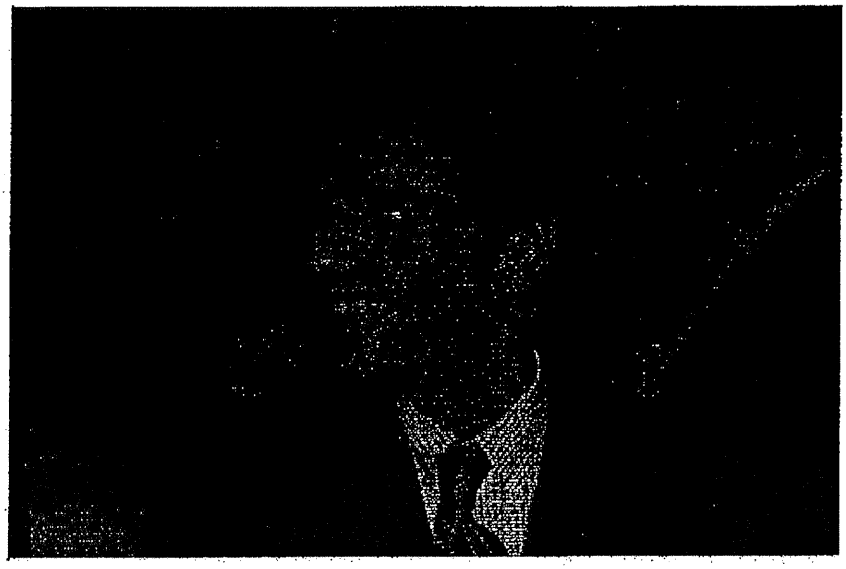
**Cc:** TWiegand@winston.com; JCoreyDrew@aol.com; Gumaagular@aol.com; dersh@law.harvard.edu; TGrimm@winston.com; GMiareck@winston.com

**Subject:** 1950 PICTURE OF THE REBBE

**Attachments:** new year doc.docx; Rebbe1950.jpg

Just because I have a camera in his ass doesn't mean I want people dropping off info about Tom on Shabbat! Alan, Please ask Tom's officers to stop harrassing me please...Someone just dropped these pictures and the attachment off at my house....what the hell?





UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

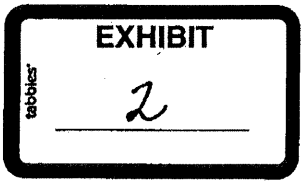
| | |
|---|---|
| ELLEN AGUIAR,<br><br>Plaintiff,<br><br>v.<br><br>WILLIAM NATBONY, individually and as trustee of the THOMAS S. KAPLAN 2004 QUALIFIED TEN YEAR ANNUITY TRUST AGREEMENT and the DAFNA KAPLAN 2003 EIGHT YEAR ANNUITY TRUST AGREEMENT, THOMAS KAPLAN, and DAFNA KAPLAN,<br><br>Defendants. | Case No. 10-cv-06531 (PGG) |

**DECLARATION OF DAVID R. MATZ**

1. My name is David R. Matz. I am an attorney at Kozyak, Tropin, & Throckmorton. I have been a member in good standing of The Florida Bar since 2008.

2. I participated in the sanctions hearings in *Leor Exploration & Production, LLC v. Guma Aguiar*, No. 09-60136-CIV (the "Leor sanctions proceedings"). At issue in those proceedings were two emails sent on January 8, 2010 by Guma Aguiar, Ellen Aguiar's son, containing a 55-page attachment of privileged and confidential communications that he had stolen from Defendant Thomas Kaplan's email account. Throughout those proceedings, we took precautions to maintain the confidentiality of the 55 page attachment throughout those proceedings, including filing the attachment under seal. All counsel in the Leor-related litigation, including Sigrid McCawley, treated these materials as confidential.

3. I was responsible for assembling the exhibits attached to the Declaration of Harley S. Tropin (the "Declaration"), and was directed to provide only the emails of Guma



Aguiar and a privilege log of the 55-page attachment, as had been admitted in the Leor Litigation in the Southern District of Florida, and not the privileged material itself. In the process of assembling the exhibits, I sent the documents for printing and filing from electronic files saved on the firm's document management system, believing that the electronic files contained only the emails of Guma Aguiar, and not those emails' attachments of privileged material.

4. Today, Friday, November 12, 2010, I received a forwarded telephone message from Sigrid McCawley explaining that she had received the privileged material. This was the first I had learned that the privileged material may have been included as exhibits to the Declaration. I then confirmed the error, and immediately notified my superiors of the inadvertent disclosure.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: November 12, 2010.

By: _____
David Matz, Esq.

319332

**From:** TUCKER RONZETTI
**To:** HARLEY TROPIN; M Leto; Sigrid McCawley; Stephen M. Rathkopf; TUCKER ...
**CC:** Carlos M. Sires Esq.; Howard Vickery
**Date:** 11/12/2010 11:57 AM
**Subject:** Re: Correspondence

Sigrid, exhibits A and B had the privileged material. As you know, this has happened on previous occasions and we have returned material as well. We appreciate your letter's notice.

We will serve a motion to substitute and substitute material as soon as possible. Please let us know your position.

Regards,

Tucker Ronzetti

>>> TUCKER RONZETTI 11/12/2010 11:51 AM >>>
Sigrid, exhibit B contains inadvertently attached privileged material. We ask that you destroy or return any copy; we will re-serve a substitute. We also ask the you agree to a motion to file a substitute with the court. Kindly let us know your position as soon as possible.

Regards,

Tucker Ronzetti

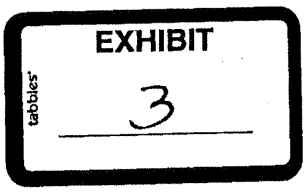
>>> "Harley Tropin" <hst@kttlaw.com> 11/12/2010 11:05 AM >>>
Dear Sigrid:
Thanks for your letter. We do not believe that the Courts' order contemplates any response to my declaration,other than your position as to whether oral argument would be helpful.
Best
Harley
Harley Tropin
Kozyak Tropin & Throckmorton
2525 Ponce de Leon, 9th Floor
Miami, FL 33134
(305) 372-1800 office
(305) 372-3508 fax
hst@kttlaw.com

-----Original Message-----
From: "Sigrid McCawley" <Smccawley@BSFLLP.com>
Date: Thu, 11 Nov 2010 18:08:15
To: <harleytropin@att.blackberry.net>; MarisaLeto<MLeto@herrick.com>; srathkopf@herrick.com<srathkopf@herrick.com>; TUCKER RONZETTI<TR@kttlaw.com>
Cc: Carlos Sires<csires@BSFLLP.com>; Howard Vickery<hvickery@BSFLLP.com>
Subject: Correspondence

Please see attached.

---





# EXHIBIT 10

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

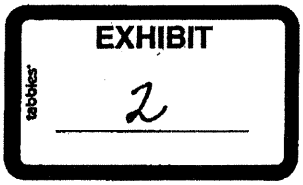
| | |
|---|---|
| ELLEN AGUIAR,<br><br>Plaintiff,<br><br>v.<br><br>WILLIAM NATBONY, individually and as trustee of the THOMAS S. KAPLAN 2004 QUALIFIED TEN YEAR ANNUITY TRUST AGREEMENT and the DAFNA KAPLAN 2003 EIGHT YEAR ANNUITY TRUST AGREEMENT, THOMAS KAPLAN, and DAFNA KAPLAN,<br><br>Defendants. | Case No. 10-cv-06531 (PGG) |

**DECLARATION OF DAVID R. MATZ**

1. My name is David R. Matz. I am an attorney at Kozyak, Tropin, & Throckmorton. I have been a member in good standing of The Florida Bar since 2008.

2. I participated in the sanctions hearings in *Leor Exploration & Production, LLC v. Guma Aguiar*, No. 09-60136-CIV (the "Leor sanctions proceedings"). At issue in those proceedings were two emails sent on January 8, 2010 by Guma Aguiar, Ellen Aguiar's son, containing a 55-page attachment of privileged and confidential communications that he had stolen from Defendant Thomas Kaplan's email account. Throughout those proceedings, we took precautions to maintain the confidentiality of the 55 page attachment throughout those proceedings, including filing the attachment under seal. All counsel in the Leor-related litigation, including Sigrid McCawley, treated these materials as confidential.

3. I was responsible for assembling the exhibits attached to the Declaration of Harley S. Tropin (the "Declaration"), and was directed to provide only the emails of Guma



Aguiar and a privilege log of the 55-page attachment, as had been admitted in the Leor Litigation in the Southern District of Florida, and not the privileged material itself. In the process of assembling the exhibits, I sent the documents for printing and filing from electronic files saved on the firm's document management system, believing that the electronic files contained only the emails of Guma Aguiar, and not those emails' attachments of privileged material.

4. Today, Friday, November 12, 2010, I received a forwarded telephone message from Sigrid McCawley explaining that she had received the privileged material. This was the first I had learned that the privileged material may have been included as exhibits to the Declaration. I then confirmed the error, and immediately notified my superiors of the inadvertent disclosure.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: November 12, 2010.

By: _____
David Matz, Esq.

319332

# EXHIBIT 11

BOIES, SCHILLER & FLEXNER LLP

401 EAST LAS OLAS BOULEVARD • SUITE 1200 • FORT LAUDERDALE, FL 33301-2211 • PH. 954.356.0011 • FAX 954.356.0022

Sigrid S. McCawley
E-mail: smccawley@bsfllp.com

November 16, 2010

**VIA FACSIMILE (212) 805-7986**

The Honorable Judge Paul G. Gardephe
United States District Court
Southern District of New York
500 Pearl Street, Room 920
New York, New York 10007

Re: *Ellen Aguiar v. William Natbony*, et al.,
Case No. 10-CV-6531 (PGG)

Dear Judge Gardephe:

We represent plaintiff Ellen Aguiar in this matter and write to respond to defendants' motion for leave to replace the approximately 100 pages of putative attorney client e-mails that were attached as exhibits to the Declaration of Harley Tropin and hand-delivered to the Court and served on plaintiff on November 9, 2010, on the basis that the documents were "inadvertently" produced.[1] As discussed below, under New York law defendants' claim of inadvertence falls flat because defendants placed the content of these emails at issue, and they admittedly did not even read the documents before filing them with the Court and serving opposing counsel, so they do not come close to meeting their burden under the four-factor test to substantiate a claim of inadvertence. *See Gragg v. International Management Group*, No. 03-CV-0904, 2007 WL 1074894, * 5-6 (N.D.N.Y. April 5, 2007) (finding waiver where documents passed through two law firms without anyone reviewing them). Defendants have failed to meet their burden with their short and selective affidavit, and their claim should be denied. At a minimum, the Court should allow discovery by plaintiff concerning the production of the documents so as to test defendants' assertion.

For starters, it is significant that defendants are the ones who put the emails at issue when, based on nothing more than rank speculation, they accused the plaintiff of having gained access to the privileged emails that were allegedly inappropriately acquired by her son, Guma Aguiar. Again based on nothing but shear speculation, defendants even asserted that plaintiff's counsel somehow gained knowledge of the emails as a result of the joint-defense agreement with counsel for Mr. Aguiar in the Florida actions. In response, Ms. Aguiar and her counsel submitted unequivocal denials of these unfounded accusations in their declarations served on November 2, 2010. Rather than take these declarations at face value, defendants submitted the rebuttal declaration of one of their lawyers, Harley Tropin. (*See* Exhibit A, Tropin Decl.

[1] It is noteworthy that the entire filing was only 250 pages so the over 100 pages of privileged materials represents a substantial portion of the filing.

(without exhibits).) As was the case with their initial letter raising the issue, Mr. Tropin's declaration contained nothing but speculation as to Ms. Aguiar, and did not substantiate any of defendants' allegations.

Attached to Mr. Tropin's declaration were over 100 pages allegedly consisting of the privileged e-mails defendants claimed Guma Aguiar had inappropriately accessed from his uncle Thomas Kaplan's e-mail account. (*See* Exhibit A, Tropin Decl. at ¶ 8.) Defendants now claim that they meant to attach only two non-privileged emails sent by Guma Aguiar, and that the inclusion of the allegedly "stolen" emails as exhibits to the declaration was "inadvertent."[2] However, Mr. Tropin's letter does not satisfy the burden on defendants of establishing excusable inadvertence.

Indeed, it is apparent from Mr. Tropin's letter and the declaration of David Matz, the young lawyer who supposedly made the error, that no lawyer at Mr. Tropin's firm, including Mr. Tropin, reviewed the exhibits to his declaration.[3] It is also apparent that none of the lawyers at defendants' second law firm, Herrick Feinstein[4], reviewed the exhibits to the declaration before printing them and hand delivering them to the Court. Moreover, it is also apparent that none of the lawyers for the defendants who were copied on the electronic filing, which included numerous lawyers from Mr. Tropin's firm and from Herrick Feinstein, reviewed the documents upon receiving them. (*See* Composite Exhibit B, Correspondence to Court and Electronic Correspondence to Counsel dated November 9, 2010.)[5]

---

[2] A fair reading of the plain language of paragraph 8 of Mr. Tropin's Declaration establishes that he is attaching the privileged materials: "During the Leor Lawsuit, Guma Aguiar sent emails to his counsel and to his brother-in-law, Corey Drew, *containing privileged material he had stolen. Copies of those e-mails are attached as Exhibits A and B respectively.*" (*See* Harley Tropin Nov. 9, 2010, Decl. at ¶ 8 (emphasis added).

[3] Defendants' letter lays blame on Mr. Matz for failing to review the exhibits, yet neither Mr. Tropin, the signatory, nor any of the other lawyers copied on the submission explain why they failed to review the documents prior to their filing with the Court.

[4] The Herrick Feinstein firm is also counsel in the Southern District of Florida Actions so they are clearly aware of any privilege issues relating to these e-mails.

[5] There are many other unanswered questions. For example, who else had access to the privileged documents? Were they reviewed by anyone? Did the clients receive a copy of the declaration and exhibits? Did counsel initially intend to include the e-mails, as a fair reading of paragraph 8 of the declaration dictates, and then changed their position? Without a full evidentiary hearing on the issues these questions remain unanswered. *See Gormin v. Ubregsen*, 2009 WL 508269, *4 n.2 (S.D.N.Y. Feb. 27, 2009) (J. Gardephe) (court finding that a fully developed record on whether the documents are privileged is necessary before making a definitive ruling.)

If this was the case, defendants cannot meet the burden of showing inadvertence under New York law. It is clear that defendants took no steps to ensure the documents were kept confidential – indeed none of the lawyers on their team apparently even read the actual submission before it was sent to the Court and opposing counsel. In *Gragg*, the Court explained that where one firm fails to review the documents that were compiled on an electronic disc and sends the disc to a second law firm for production, and the second firm also fails to review the documents, the parties have waived any claim of privilege because they did not take any reasonable precautions to prevent the inadvertent disclosure. 2007 WL 1074894 at *5-6; *see also Local 851 of the International Brotherhood of Teamsters v. Kuehne & Nagel Air Freight, Inc.*, 36 F. Supp.2d 127 (E.D.N.Y. 1999) (court finding waiver where counsel failed to take reasonable precautions to preserve the confidentiality of a small number of documents that it was filing with the court).

The *Gragg* court explained the four factors to be considered in determining whether waiver of an attorney client privilege will be found: "[1] the reasonableness of any precautions taken to prevent inadvertent disclosure of the privilege documents; 2) the relative volume of the privileged documents in relation to the full extent of the discovery at issue; 3) the length of time taken by the producing party to raise and rectify the issue; and 4) overarching considerations of fairness." *Id.* at *5. Here all of these factors weigh in favor of a finding of waiver.

First, there were no precautions taken here, as none of the lawyers even read the exhibits before sending them to opposing counsel and the Court. Moreover, the documents were not protected in any way and were not labeled "confidential" or "privileged." *See id.* at *5-6. In a similar situation, the court in *Atronic Intern. GMBH v. SAI Semispecialists of America, Inc.*, 232 F.R.D. 160, 164 (E.D.N.Y. 2005), found that the inadvertent disclosure of certain privileged e-mails resulted in a waiver of the privilege, explaining:

> First, plaintiff's counsel failed to take adequate steps to preserve the confidentiality of the e-mails. For example, counsel failed to label the documents "confidential" or "privileged so as to put others on notice of their privileged nature. *See Spanierman Gallery, Profit Sharing Plan v. Merritt*, 2003 WL 22909160 at *3 (S.D. N.Y. 2003) (finding defendant failed to take reasonable precautions to preserve the privilege where defendant produced documents that were not labeled 'confidential' or 'privileged' and 'there was not agreement...that the documents were to be treated privileged and confidential'); *Gangi*, 1 F.Supp.2d at 264 (noting that governments failure to designate as confidential or privileged a prosecution memorandum contributed to a finding of waiver); *Bank Brussels Lambert v. Chase Manhattan Bank*, 1996 WL 944011, at *5 (S.D.N.Y. Dec. 19, 1996) (finding counsel failed to take appropriate steps to avoid disclosure where documents were not sufficiently labeled to put others on notice of the confidential nature of the materials); *Large v. Our Lady of Mercy Medical Center*, 1998 WL 65995 at *5-6 (S.D. N.Y. Feb. 17, 1998) (holding 'plaintiff did not take reasonable precautions to protect purported privileged materials by simply providing handwritten notations on 'post it

> notes'"). Additionally, there is no evidence in the record that plaintiff's counsel adequately employed a reasonable procedure for separating out the confidential materials from the non-privileged communications.

*Id.* at 164. Similarly here, while Mr. Matz states that he pulled the documents from an electronic file, none of the documents were imaged with a "confidential" or "privileged" stamp. Moreover, like in *Atronic*, it is clear from Mr. Matz's declaration that the cover e-mails were lumped with the privileged e-mails without any reasonable procedure for separating out the privileged documents from the non-privileged documents.

Second, this is not a situation were a few privileged e-mails slipped through the cracks in a production of thousands of pages of non-privileged documents; rather, the emails in question were attached to a declaration with a limited number of exhibits that could be quickly reviewed, particularly since the subject matter was access to the privileged emails. *See Liz Claiborne Inc. v. Mademoiselle Knitwear, Inc.*, No. 96 Civ. 2064, 1996 WL 668862 at *5 (S.D.N.Y. Nov. 19, 1996) ("where overall scope of production was limited...failure to protect privileged documents is more likely to constitute a waiver.")

Third, the lack of care extended beyond the actual filing of the declaration. Even after counsel for plaintiff notified the defendants, by a written letter and by a voicemail, of the inclusion of the emails in their submission to the Court, their first two responses to the notice (one by Mr. Tropin and one from his partner, Mr. Ronzetti) failed to even mention any claim of inadvertent production. The notice to defendants' counsel and Mr. Tropin's responding email were included with my letter of Friday, November 12, 2010. Mr. Tropin's failure to express any concern after being told that he submitted privileged documents to the Court, his failure to offer any explanation for this communication in his November 12 letter, despite complaining of other aspects of my November 12 notice letter, and the fact that he is the person who authored the declaration at issue, all combine to demonstrate that defendants did not take the level of care that is required in order to support their claim of inadvertence.

The final prong of the test is "overarching fairness," which clearly weighs in favor of finding a waiver. It was the defendants who put this privilege discussion at issue by making the unfounded accusations that plaintiff and her law firm have been unfairly exposed to privileged materials. Defendants then proceeded to send to plaintiff and her lawyers those very materials. The *Atronic* court explained that the final factor focuses on whether the act of restoring the immunity of the disclosed document would be unfair. 232 F.R.D. at 166. Here it would be inherently unfair for the defendants to be able to raise unsubstantiated allegations that the plaintiff and her counsel were exposed to privileged materials, thereafter send those very privileged materials to counsel and the Court, fail to take any adequate measures to protect the documents, and then have the Court not find a waiver of the privilege. This is particularly true given that their disclosure moots any issues defendants were trying to drum up with respect to these allegedly privileged documents.

Accordingly, plaintiff respectfully requests that this Court find that the privilege has been waived, or at a minimum grant further discovery and an evidentiary hearing to explore defendants' claim of inadvertent production.

Respectfully submitted,

Sigrid S. McCawley
*Attorney for Plaintiff*

SSM/et
Enclosures

cc: Howard Vickery
Carlos Sires
Harley S. Tropin
Thomas A. Tucker Ronzetti
Stephen M. Rathkopf

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

| | | |
|---|---|---|
| ELLEN AGUIAR,<br><br>Plaintiff,<br><br>v.<br><br>WILLIAM NATBONY, individually and as trustee of the THOMAS S. KAPLAN 2004 QUALIFIED TEN YEAR ANNUITY TRUST AGREEMENT and the DAFNA KAPLAN 2003 EIGHT YEAR ANNUITY TRUST AGREEMENT, THOMAS KAPLAN, and DAFNA KAPLAN,<br><br>Defendants. | ) | Case No. 10-cv-06531 (PGG) |

**DECLARATION OF HARLEY S. TROPIN**

1. My name is Harley S. Tropin. I have been a member in good standing of the Florida Bar since 1977 and am a founder and shareholder of Kozyak Tropin & Throckmorton, P.A. In addition to serving as counsel for Thomas and Dafna Kaplan in the above-captioned case, I have served as counsel in the following related cases (the "Litigation"):

(i) *Leor Exploration & Production LLC, et al. v. Guma Aguiar*, Case No. 09-60136-CIV-SEITZ, United States District Court for the Southern District of Florida (hereinafter, the "*Leor* Lawsuit"), representing Plaintiffs Leor Exploration & Production, LLC, Pardus Petroleum, LP, Pardus Petroleum, LLC and William Natbony;

(ii) *Guma Aguiar v. William Natbony, et al*, Case No. 09-60683-CIV-SEITZ, United States District Court for the Southern District of Florida (hereinafter, the "*Aguiar* Lawsuit"), representing Defendant Thomas Kaplan;

to answer questions about his hacking, refused to provide any information about the emails he had stolen, and refused to produce his computers pursuant to court order. Accordingly, neither Kaplan nor the Court was ever able to determine the extent of the privileged information Guma Aguiar had stolen, the persons with whom he conspired, or the persons with whom he shared that information. *See Leor Exploration & Prod. LLC*, 2010 WL 3782195, at *2-3, 5, 7 (S.D. Fla. Sept. 28, 2010); *Leor Exploration & Prod. LLC*, 2010 WL 2605087, at *15 (S.D. Fla. Jun. 29, 2010).

6. Nevertheless, the evidence adduced in the hearings in the *Leor* and *Aguiar* Lawsuits irrefutably establish that when he hacked Kaplan's account, Guma Aguiar obtained all the emails that Kaplan had to date with his counsel. *See Leor Exploration & Prod. LLC*, 2010 WL 2605087, at *6, 15.

7. Because Guma Aguiar invoked his Fifth Amendment privilege and refused to produce his computers in compliance with a court order, Kaplan was never able to recover any of the privileged information. The privileged information that Guma Aguiar stole remains in his possession to this day. *See Leor Exploration & Prod. LLC*, 2010 WL 2605087, at *15.

**Guma Aguiar Widely Disseminated Kaplan's Privileged Information**

8. During the *Leor* Lawsuit, Guma Aguiar sent emails to his counsel and to his brother-in-law, Corey Drew, containing privileged material he had stolen. Copies of those emails are attached as Exhibits A and B, respectively. Attached as Exhibit C is a privilege log of the privileged communications that Guma Aguiar had stolen, copied into a Word document, and attached to the emails he sent to his counsel and to Corey Drew, among others.

## Sigrid McCawley

**From:** Leto, Marisa [MLeto@herrick.com]
**Sent:** Tuesday, November 09, 2010 2:59 PM
**To:** Sigrid McCawley; Howard Vickery; Carlos Sires
**Cc:** HARLEY TROPIN; TUCKER RONZETTI; Rathkopf, Stephen M.
**Subject:** Aguiar v. Natbony, et al., Case No. 10-cv-06531 (PGG)-Declaration of Harley S. Tropin

**Attachments:** Ltr to Judge Gardephe.pdf; Scan_Attachment0-001.pdf


Ltr to Judge Gardephe.pdf (29 ...


Scan_Attachment0-001.pdf (11 M...

<<Scan_Attachment0-001.pdf>> Please see the attached declaration (with annexed exhibits) that has been hand delivered to Judge Gardephe's chambers this afternoon. Hard copy will follow via regular mail.

Best regards,
Marisa

Marisa A. Leto
Herrick, Feinstein LLP
2 Park Avenue
New York, New York 10016
Tel 212.592.5974
Fax 212.545.2332
mleto@herrick.com
www.herrick.com

HERRICK

NEW YORK
NEWARK
PRINCETON

MARISA LETO
Direct Tel: 212.592.5974
Direct Fax: 212.545.2332
Email: Mleto@herrick.com

November 9, 2010

BY HAND

The Honorable Paul G. Gardephe
United States District Court
Southern District of New York
500 Pearl Street, Room 920
New York, New York 10007

Re: *Ellen Aguiar v. Natbony, et al.*, Case No. 10-cv-06531 (PGG)

Dear Judge Gardephe:

Pursuant to the Court's October 27, 2010 Order, and in response to plaintiff's November 2, 2010 submission, we enclose for the Court's review the Declaration of Harley S. Tropin with annexed exhibits. We appreciate the Court's attention to this matter.

Respectfully submitted,

Marisa Leto

Enclosures

cc: Counsel of Record (via E-mail and U.S. Mail)

# EXHIBIT 12

KOZYAK · TROPIN
THROCKMORTON
ATTORNEYS AT LAW

**Harley S. Tropin,** Esq.
hst@kttlaw.com | 305.377.0662

November 17, 2010

The Honorable Paul G. Gardephe
United States District Court
Southern District of New York
500 Pearl Street, Room 920
New York, New York 10007

Re: *Ellen Aguiar v. Natbony, et al.*
Case No. 10-cv-06351 (PGG)

Dear Judge Gardephe:

We are surprised and disappointed that the Plaintiff is persisting in this claim, as evidenced by Plaintiff's counsel's November 16 letter. They know the documents were privileged; they know there was no intentional waiver--even if there was any colorable doubt, my November 12 letter and accompanying declaration erased it; and to persist in the claim and to argue "gross negligence" is insulting to their adversaries and a waste of the Court's resources.

The Plaintiff is attempting to gain an unfair advantage from a mistake made by a junior associate in a clerical capacity. The circumstances of the Defendants' inadvertent disclosure are plain, and established in the record. First, the Defendants have always maintained the privilege of the *Word attachments* to the emails sent by Guma Aguiar. In my Declaration, I intended to provide the emails and a privilege log for the Word attachments, but not the attachments themselves. Paragraph 8 of my Declaration makes that plain:

> 8. During the *Leor* Lawsuit, Guma Aguiar sent ***emails*** to his counsel and to his brother-in-law, Corey Drew, containing privileged material he had stolen. ***Copies of those emails*** are attached as Exhibits A and B, respectively. ***Attached as Exhibit C is a privilege log of the privileged communications that Guma Aguiar had stolen***, copied into a Word document, and attached to the emails he sent to his counsel and to Corey Drew, among others.

(Emphasis supplied.) As this language shows, we submitted as evidence the Aguiar *emails* but did not intend to submit the attachments, which contain privileged material. Had I intended to provide the Word attachments themselves, I would not have provided a privilege log. *See* Tropin Decl. ¶ 8 & Ex. C. Providing the privilege log itself "generally constitute[s] a reasonable precaution against inadvertent disclosure of privileged

documents . . . ." *Employers Ins. Co. v. Skinner*, 2008 WL 4283346, at *8 (E.D.N.Y. Sept. 17, 2008).

Beyond that, Plaintiff's counsel also ignores the history of the parties' litigation, which well establishes the privileged nature of the attachments. The Defendants had multiple evidentiary hearings in *Leor v. Aguiar* over these very emails (and other Kaplan privileged emails), where the District Court held the emails were privileged, confidential attorney-client information and had been stolen. Ms. McCawley herself, when confronted with evidence that another of her clients, Ellen Aguiar's son-in-law Corey Drew, had received the same stolen privileged material, notified her client, who then deleted the material and submitted an affidavit to that effect. *See* Ex. A, attached. This context, which Plaintiff deliberately ignores and of which Your Honor is not aware, fully establishes that the attachments were intended to be kept confidential.

The Plaintiff makes much of the fact that none of the lawyers who worked on the Declaration caught this mistake. That, of course, is the nature of a mistake; had it been caught, it would not have been made. The nature of the mistake, however, is understandable. The senior lawyers drafted the papers and directed which exhibits were to be attached, and a junior lawyer who assembled the exhibits mistakenly forwarded an electronic version of Aguiar's letters with their attachments. It is unreasonable to demand that other attorneys check such a function. "Imposing a duty on attorneys to personally double check simple tasks . . . would needlessly increase the costs of litigation." *Prescient Partners, L.P. v. Fieldcrest Cannon, Inc.*, 1997 U.S. Dist. LEXIS 18818, at *15 (S.D.N.Y. Nov. 26, 1997). Delegating the final assembly of the exhibits to junior counsel does not result in the waiver of privileges.

The Plaintiff cites and applies the law of inadvertent disclosure in the context of a discovery production, *Gragg v. International Management Group*, 2007 WL 1074894 (N.D.N.Y. Apr. 5, 2007). That law is distinguishable. Here, counsel was not in the process of reviewing discovery for privilege and marking documents as "confidential," and so did not have the safeguards of that context. Discovery has not yet begun, and no protective order is even in place. Instead, documents were assembled to be attached to the Declaration, a clerical function. These thus do not constitute "circumstances of such extreme or gross negligence as to warrant deeming the act of disclosure to be intentional." *Federal Deposit Ins. Corp. v. Marine Midland Realty Credit Corp.*, 138 F.R.D. 479, 482 (E.D. Va. 1991), *quoted in Bank Brussels Lambert v. Credit Lyonnais (Suisse) S.A.*, 160 F.R.D. 437, 443 (S.D.N.Y. 1995).

Instead, this case is much like *Hydraflow, Inc. v. Enidine Inc.*, 145 F.R.D. 626 (W.D.N.Y. 1993). There, in the course of submitting documents for *in camera* inspection, the plaintiff's counsel mistakenly delivered the documents to opposing counsel. Four days after receiving notice from opposing counsel of the mistake, the plaintiff's counsel demanded them back. The court held that "the circumstances of the instant disclosure demonstrate it was inadvertent, and that such oversight by Plaintiff's counsel does not warrant imputing to Plaintiff an intention to waive its privilege . . . ." *Id.* at 638. The court reasoned, in part that "it would work a fundamental unfairness" to

deprive a party of a privilege when the mistaken disclosure occurred in the midst of litigating to protect that privilege. *Id.*

The reasoning of *Hydraflow* applies equally here. Guma Aguiar's Word attachments were mistakenly included, a clerical error like the diverted documents in *Hydraflow*. We notified opposing counsel by noon the day after she sent a letter regarding the privileged documents[1] -- faster than the plaintiff in *Hydraflow*.[2] Most importantly, the circumstances include not only the extensive *Leor* litigation, and exchanges with Ms. McCawley herself in the *Drew* litigation, to preserve the privilege of these very documents, but also the very proceedings in this case, where I provided the Court with a privilege log for the specific purpose of protecting the documents. As in *Hydraflow (arguably more so here)*, depriving the Kaplans of their privilege would "work a fundamental unfairness". 145 F.R.D. at 638.

The circumstances, the law, and fundamental fairness all dictate that the Defendants' counsel's inadvertent disclosure should not result in a waiver. The Court should reject the Plaintiff's blatant attempt to take advantage of this situation. We view this letter writing as unseemly and an unnecessary burden on the Court, but Plaintiff's counsel's continued inappropriate and inaccurate letters leave us no choice but to respond lest the Court not have a full and accurate picture.

Respectfully submitted,

Harley S. Tropin

HST/sf
Enclosures
cc: Counsel of Record (*via email*)

319446.1

[1] Plaintiff's counsel claims that, because our first responses did not demand the return of the privileged documents, we waived any privileges. In reality, we found her letter confusing, and believed she was indicating only that she wanted to file a reply, which was not authorized by the Court. After Plaintiff's counsel sent her letter at 6:08 p.m. on November 11, that very evening, Defendants' counsel Tucker Ronzetti called to inquire what the letter meant, leaving a message asking for a return call. I sent my original email message while I was out of the office the next morning, the circumstances still unclear, still believing Plaintiff's counsel wanted to file an unauthorized response. Upon receiving a responsive message from opposing counsel when I returned to the office the same day, and realizing the error, we immediately demanded the return of the privileged materials, and both emailed and called each of Ms. McCawley, Mr. Sires, and Mr. Vickery to see if they would agree to our motion to substitute. Rather than answer our calls or promptly respond to our emails, Plaintiff's counsel kept us waiting several hours, all while drafting their letter to the Court to argue their position on the merits and claim waiver. Such conduct should not be rewarded.

[2] Notably, in the *Leor* litigation where Ms. McCawley participated through joint prosecution, we agreed to destroy inadvertently produced privileged material upon request, well after their production. *See* Ex. B, attached.

# Exhibit A

**From:** Sigrid McCawley <Smccawley@BSFLLP.com>
**To:** Sigrid McCawley <Smccawley@BSFLLP.com>, "'tr@kttlaw.com'" <tr@kttlaw.com...
**CC:** "'HST@kttlaw.com'" <HST@kttlaw.com>, "'david.spector@akerman.com'" <davi...
**Date:** 1/11/2010 1:16 PM
**Subject:** RE: Fwd: 1950 PICTURE OF THE REBBE
**Attachments:** Declaration.pdf

Tucker,

In response to your e-mail below I attach the above declaration from my client, Corey Drew. As you acknowledged in your e-mail below, I was not a recipient of the e-mail in question and as such I did not receive the alleged privileged material. It was not sent to me except by copy of the e-mail you sent below which did not contain an attachment.

Thank you,
Sigrid

Sigrid S. McCawley
Partner
Boies Schiller & Flexner LLP
401 East Las Olas Blvd.
Suite 1200
Ft. Lauderdale, FL 33301
(954) 356-0011

-----Original Message-----
From: Sigrid McCawley
Sent: Saturday, January 09, 2010 4:48 PM
To: 'tr@kttlaw.com'; 'twiegand@winston.com'; 'dersh@law.harvard.edu'; 'tgrimm@winston.com'; 'gmiarecki@winston.com'
Cc: 'HST@kttlaw.com'; 'david.spector@akerman.com'; 'bstack@stackfernandez.com'; 'Jonathan.Rubenstein@bakerbotts.com'; 'EG@kttlaw.com'; Sigrid McCawley
Subject: Re: Fwd: 1950 PICTURE OF THE REBBE

I am in receipt of your email below and will look into the issue and get back to you.
Thank you,
Sigrid
---

Sigrid S. McCawley
Boies Schiller & Flexner LLP
401 East Las Olas Boulevard Suite #1200
Fort Lauderdale, Florida 33301
Tel (954) 356-0011
http://www.bsfllp.com

----- Original Message -----
From: Tucker Ronzetti <tr@kttlaw.com>
To: twiegand@winston.com <twiegand@winston.com>; dersh@law.harvard.edu <dersh@law.harvard.edu>; tgrimm@winston.com <tgrimm@winston.com>; gmiarecki@winston.com <gmiarecki@winston.com>; Sigrid McCawley
Cc: HARLEY S TROPIN <HST@kttlaw.com>; David Spector <david.spector@akerman.com>; Brian Stack <bstack@stackfernandez.com>; Jonathan Rubenstein <Jonathan.Rubenstein@bakerbotts.com>; ELIZABETH GAUKROGER <EG@kttlaw.com>
Sent: Sat Jan 09 09:55:36 2010
Subject: Fwd: 1950 PICTURE OF THE REBBE

> Counsel:

Yesterday evening each of you received the email below (except Sigrid McCawley, whose client, Corey Drew, received it) from Guma Aguiar. Attached to the email was highly confidential work product and attorney client privileged material.

We and our clients have not authorized the transmission or release of that privileged material, which was illegally obtained. All such privileged material should be turned over to us immediately, without review, with certification that there has been no copying or dissemination of the material.

We also ask that you identify anyone who has received or read the privileged material, and immediately act to preserve and provide us any information regarding the privileged material and any other privileged material that has been obtained by Aguiar, Drew, or any of Aguiar's or Drew's counsel, including not only the privileged material itself but also the transmission emails or other related emails with metadata in native format.

We ask that you now confirm your receipt of this email and your intention to comply with these requests, and comply as soon as possible.

Regards,

Tucker Ronzetti

> ------Original Message------
> From: gumaaguiar77@aol.com
> To: Tom Kaplan
> Cc: TWiegand@winston.com
> Cc: JCoreyDrew@aol.com
> Cc: Gumaaguiar@aol.com
> Cc: dersh@law.harvard.edu
> Cc: TGrimm@winston.com
> Cc: GMiareck@winston.com
> Subject: 1950 PICTURE OF THE REBBE
> Sent: Jan 8, 2010 5:48 PM
>
> Just because I have a camera in his ass doesn't mean I want people
> dropping off info about Tom on Shabbat! Alan, Please ask Tom's
> officers to stop harrassing me please...Someone just dropped these
> pictures and the attachment off at my house....what the hell?

IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT IN AND FOR BROWARD COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO: 09-014890 CACE (02)

LEOR EXPLORATION & PRODUCTION LLC, and LEOR ENERGY L.P.,

Plaintiffs,

v.

ANGELIKA AGUIAR and JUSTIN COREY DREW,

Defendants.
_____/

**DECLARATION OF JUSTIN COREY DREW**

I, Justin Corey Drew, declare under penalty of perjury as follows:

1. I am over the age of eighteen, and I have personal knowledge of all of the following facts contained in this Declaration.

2. I received an e-mail allegedly sent by Guma Aguiar on Thursday, January 8, 2009 that was directed to Tom Kaplan and included as "ccs" Tom Wiegand, Greg Miarecki, Guma Aguiar, Alan Dershowitz, Terry Grimm and myself.

3. I am informed by my attorney Sigrid McCawley that she was informed by Tucker Ronzetti that the attachment to the e-mail contains allegedly privileged information. I did not open the attachment. I have deleted the e-mail. I did not forward the e-mail to anyone.

Dated: January 11, 2010

JUSTIN COREY DREW

# Exhibit B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

LEOR EXPLORATION & PRODUCTION LLC, et al.,

Plaintiffs,

v.

GUMA AGUIAR,

Defendant.
_____/

CASE NO. 09-60136-CIV-SEITZ/O'SULLIVAN

GUMA AGUIAR,

Plaintiff,

v.

WILLIAM NATBONY, et al.,

Defendants.
_____/

CASE NO. 09-60683-CIV-SEITZ/O'SULLIVAN

**AGREED ORDER REGARDING WAIVER OF PRIVILEGE OR IMMUNITY**

Pursuant to the Court's instructions at the August 21, 2009 Informal Discovery Conference, and the agreement of the parties, it is ordered as follows:

1. The production of documents by any party or third party in these consolidated proceedings shall not be deemed to waive any attorney-client privilege, accountant-client privilege, immunity under the work product doctrine, or other applicable privilege or doctrine in this case or any other proceeding.

2. All privileged documents produced in this case shall be treated as such and shall be deemed Confidential as defined under the Protective Order entered in this matter. Neither

party shall provide privileged documents received in this litigation to third-parties or use the privilege documents for purposes other than this litigation.

2. If a party or third party believes in good faith that: 1) a document has been produced which is privileged or immune from discovery; 2) the party or third party holds a privilege or immunity with respect to that document; and 3) the receiving party neither was nor is within the group of people entitled to know the contents of the document, then the party or third party may request that the document be returned to its possession. Upon such a request, the receiving party shall promptly return or confirm the destruction of such document and of any copies, hard or electronic or otherwise, made of the document.

DONE and ORDERED in Chambers at Miami, Florida, this 31 day of August, 2009.

JOHN J. O'SULLIVAN
UNITED STATES MAGISTRATE JUDGE

Copies provided to:
United States District Judge Seitz
All Counsel of Record