SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

HON. EILEEN BRANSTEN

Index Number : 651486/2011
ALLIANCEBERNSTEIN L.P.
vs
GELWARG, PETER A.
Sequence Number : 002
PUNISH FOR CONTEMPT

PART 3

INDEX NO. 651486/2011
MOTION DATE 10/6/2011
MOTION SEQ. NO. 002

The following papers, numbered 1 to 3, were read on this motion to/for Civil Contempt

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1
Answering Affidavits — Exhibits _____ | No(s). 2
Replying Affidavits _____ | No(s). 3

Upon the foregoing papers, it is ordered that this motion is

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 4-23-12

Eileen Branston J.S.C.
HON. EILEEN BRANSTEN

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☒ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART THREE

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ALLIANCEBERNSTEIN L.P.,

Plaintiff,

-against-

Index No. 651486/11
Motion Date:10/6/11
Motion Seq. No.: 001, 002

PETER A. GELWARG and KENNETH A. MAYER,

Defendants.

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BRANSTEN, J.

Motion sequence numbers 1 and 2 are consolidated for disposition.

In motion sequence number 1, Plaintiff AllianceBernstein L.P. ("Plaintiff") moves for a temporary restraining order, preliminary injunction and expedited discovery. Defendants Peter A. Gelwarg ("Gelwarg") and Kenneth A. Mayer ("Mayer") (collectively "Defendants") cross-move pursuant to CPLR §§ 7503 and 2214 for an order compelling arbitration of this matter. Pending a hearing of motion sequence number 001, on June 1, 2011, this court issued a temporary restraining order prohibiting Defendants from, *inter alia*, violating Defendants' 60-day notice obligation to Plaintiff, soliciting the business of any of Plaintiff's clients and from retaining or using any of Plaintiff's confidential information (the "June TRO").

In motion sequence number 2, Plaintiff moves for an order holding Defendants in civil contempt of the court for violating the June TRO. Plaintiff also moves for an order compelling Defendants and third-party witnesses to provide additional deposition testimony

concerning a June 1, 2011 conversation between Defendant Gelwarg, his counsel and two Morgan Stanley employees.

1. Background

A. Defendants' Employment at AllianceBernstein

Defendant Gelwarg began working for AllianceBernstein as a financial advisor on or about August 1998. Memorandum of Law in Support of Plaintiff's Motion for a Temporary Restraining Order, Preliminary Injunctive Relief, and Expedited Discovery ("Plaintiff's TRO Memo"), p. 3. Defendant Mayer began his employment with AllianceBernstein on or about February 1992. *Id.* Defendants became highly compensated and entrusted advisors at AllianceBernstein.

In 2009 and 2010, Plaintiff agreed to provide Defendants with additional compensation in the form of publicly-traded restricted stock. *Id.* In exchange for this additional compensation, Defendants agreed that they would provide 60-days notice to Plaintiff before they resigned their employment with Plaintiff. Defendants also agreed to not solicit the business of Plaintiff's clients and to not recruit Plaintiff's employees to work for a competing employer. Finally, Defendants agreed to maintain the confidentiality of Plaintiff's trade secret information and to not make use of such confidential information except in the course of their employment with Plaintiff. Plaintiff's TRO Memo, p. 4; *see* Affidavit of Colin T. Burke ("Burke Aff."), Ex. A (the "2009 Gelwarg ICAP Agreement");

see also Burke Aff., Ex. B (the "2010 Gelwarg ICAP Agreement"); *see also* Ex. C (the "2009 Mayer ICAP Agreement"); *and* Ex. D (the "2010 Mayer ICAP Agreement").[1]

On May 27, 2011, Defendants resigned their employment at AllianceBernstein. Defendants provided no advance notice and immediately joined a competing firm to AllianceBernstein, Morgan Stanley.

Plaintiff maintains that Defendants' actions breached their anti-solicitation, 60-day notice and confidentiality obligations to AllianceBernstein as stated in the ICAP Agreements.

B. Agreement to Arbitrate

On January 1, 2002, Defendants executed Financial Advisor Agreements with Alliance Capital Management L.P. (the "FA Agreements"). *See* Burke Aff., Exs. G, H. Neither party explains the relationship between Alliance Capital Management L.P. and Plaintiff AllianceBernstein L.P. While counsel for Plaintiff Colin T. Burke states that Defendants entered into these FA Agreements with AllianceBernstein L.P., (Burke Aff., ¶ 27), Plaintiff also states that AllianceBernstein L.P. was not a party to the FA Agreements. Plaintiff's Injunction Reply Memo, p. 7.[2]

The FA Agreements specified that any controversy arising out of Defendants' employment with Alliance Capital Management L.P. was to be settled in arbitration. *See*

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[1] The provisions pertinent to the instant motions in both Mayer and Gelwarg's 2009 and 2010 ICAP Agreements have identical language. The court herein refers to the agreements together as the "ICAP Agreements."

[2] Plaintiff's Memorandum of Law in Further Support of Preliminary Injunction and in Opposition to Defendants' Cross-Motion to Compel Arbitration ("Plaintiff's Injunction Reply Memo").

Burke Aff., Exs. G, H. Defendants argue that the FA Agreements cover the instant dispute, and the court should thus compel arbitration for the instant action.

Defendants also contend that the court should compel arbitration because it is required by FINRA rules. Defendants base their contention on the fact that Sanford C. Bernstein & Co., LLC, an affiliate company of Plaintiff, is a member of FINRA. Defendants also assert that they are considered FINRA associated persons. *See* FINRA Code of Arbitration Procedure for Industry Disputes Rule 13100. FINRA rules require arbitration of disputes between FINRA members and FINRA associated persons. *See* FINRA Code of Arbitration Procedure for Industry Disputes Rule 13200. Defendants thus contend that this action is a dispute between a FINRA member and FINRA associated persons, and arbitration is therefore mandatory under FINRA Rule 13200.

Plaintiff contends that the ICAP Agreements were entered into seven and eight years after the FA agreements, and that the ICAP Agreements provide exclusive jurisdiction for resolution of disputes arising thereunder to the New York courts. *See* ICAP Agreements, § 12. Plaintiff contends that arbitration should therefore not be compelled.

C. Circumstances Surrounding Defendants' May 27, 2011 Resignation

Three other AllianceBernstein associates submitted notice of their resignation and new employment at Morgan Stanley on May 27, 2011: Keri Goldberg ("Goldberg"); Richard Bloom ("Bloom"); and Jacqueline Lukasik ("Lukasik"). Complaint, ¶ 34. The court need not discuss the circumstances surrounding the resignation of Goldberg, Bloom and Lukasik in the instant motions.

Plaintiff contends that, in the weeks leading up to Defendants' resignation, Mayer's administrative assistant downloaded a sales relationship list that shows both Mayer and Gelwarg's AllianceBernstein client relationships. It is undisputed that Defendants provided at least one AllianceBernstein client list to Morgan Stanley prior to their resignation on May 27, 2011 (the "Client List"). *See* Affirmation of Paul A. Saso ("Saso Affirm."), Ex. C ("Gelwarg Deposition"), pp. 70-71. Morgan Stanley used the Client List to send announcements to AllianceBernstein's clients that Gelwarg and Bernstein were now with Morgan Stanley. *Id.* Defendants, while employed at Morgan Stanley, allegedly used the Client List from May 27, 2011 until June 1, 2011, when this court issued the June TRO, to contact their former AllianceBernstein clients. Plaintiff contends that the Client List contains confidential information within the meaning in the ICAP Agreements and that Defendants should thus be further enjoined from using and retaining this confidential information.

D. The June TRO and June 1, 2011 Conversation

The June TRO prohibited defendants from, *inter alia*, violating Defendant's 60-day notice obligation to Plaintiff, soliciting the business of any of Plaintiff's clients, recruiting AllianceBernstein employees to work for a competitor and from retaining or using any of Plaintiff's confidential information. *See* Saso Affirm., Ex. A ("June TRO").

Immediately after this court entered the June TRO, Defendants' counsel, John Greco ("Greco"), went to Morgan Stanley's offices to advise Defendants the circumstances of the TRO. *See* Gelwarg Deposition, p. 128. Defendant Mayer was not at Morgan Stanley that

day. Greco therefore advised Gelwarg and the two called Mayer on the phone to discuss Defendants' compliance with the TRO. *Id.*, p. 131.

On the same day, Morgan Stanley's in-house counsel[3] requested that Greco advise Gelwarg, Bloom and Goldberg as to how to comply with the TRO. Defendants' Memorandum of Law in Opposition to Plaintiff's Motion for Contempt and for Discovery of the June 1, [2011] Communication ("Defendants' Contempt Opposition Memo"), p. 28. Defendants claim that the conversation in which Mr. Greco advised Defendants, Bloom and Goldberg is privileged.[4] *Id.*, pp. 28-29.

After the June 1, 2011 conversation, Gelwarg gave Bloom handwritten notes Gelwarg had taken based on his phone calls to clients made from May 27, 2011 through June 1, 2011, when this court issued the June TRO. *See* Saso Affirm., Ex. D ("Bloom Deposition"), p. 107. According to Bloom, Gelwarg told him to look at the notes and "follow up with [clients] where it says it was okay to follow up." *Id.* Gelwarg testified that he has no recollection of giving Bloom his handwritten notes. Gelwarg Deposition, p. 169.

Bloom did call AllianceBernstein's clients using Gelwarg's handwritten notes as a guide. Bloom testified that after June 1, 2011, he called AllianceBernstein clients on the list to let them know that Gelwarg was unavailable because of a pending legal action and that Bloom was available to answer the clients' questions in the meantime. *See* Bloom Deposition, pp. 95-96.

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[3] Defendants do not provide the name of Morgan Stanley's in-house counsel.

[4] It is unclear whether Lukasik was present during this conversation.

E. Appeal of the June TRO

Defendants appealed the June TRO. On June 9, 2011, Appellate Division Judge Helen Friedman upheld the TRO. Defendants contend that Judge Friedman clarified, off the record, that though the TRO prohibited Defendants from soliciting AllianceBernstein clients, Defendants were not prohibited from contacting AllianceBernstein clients for the purposes of servicing their accounts at AllianceBernstein.[5] The June TRO clearly states this same fact on its face. *See* June TRO (stating that Defendants are enjoined from "soliciting the business of any client or prospective client of AllianceBernstein for any purpose other than to obtain, maintain and/or service the client[']s business for AllianceBernstein.").

On June 9, 2011, allegedly based on Judge Friedman's off the record "clarification," Defendants began returning phone calls to Plaintiff's clients. Defendants contend that they did not solicit Plaintiff's clients. Rather, Defendants stated that they returned calls to clients, informed them that if they had not received new AllianceBernstein advisors that they should be assigned one soon and offered to answer client questions. Defendants' Contempt Opposition Memo, pp. 16, 24.

Plaintiff filed its motion for a preliminary injunction and temporary restraining order on May 21, 2011. This court entered the June TRO on June 1, 2011. Defendants opposed the motion and cross-moved to compel arbitration on June 17, 2011. Plaintiff filed its contempt motion claiming Defendants violated the June TRO on July 15, 2011. Oral

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[5] Defendants still worked as financial advisors for AllianceBernstein at this time because the June TRO required Defendants to honor their 60-day notice of resignation obligation.

argument on the contempt motion was held on September 30, 2011. *See* Transcript of Oral Argument of September 30, 2011 ("Oral Argument Transcript") (Lee Ruthen, Official Court Reporter). The motions were fully submitted on October 10, 2011.

2. Discussion

A. Cross Motion to Compel Arbitration

As a threshold issue, Defendants' cross-motion to compel arbitration of the instant action is denied.

Defendants cross-move to compel arbitration on the basis that arbitration is required by FINRA rules and by Defendants' FA Agreements. Defendants' Memorandum of Law in Opposition to Motion for Preliminary Injunction and in Support of Defendants' Cross-Motion to Compel Arbitration ("Defendants' Injunction Opposition Memo"), p. 13. However, as Plaintiff correctly contends, the ICAP Agreements, and not Defendants' FA Agreements, are the subject of the instant action. The Complaint consists of one cause of action. That cause of action is for breach of the ICAP Agreements.[6] The court, as detailed below, does not agree with Defendants that the court should compel arbitration of controversies arising under the ICAP Agreements.

First, the ICAP agreements do not contain an agreement to arbitrate. On the contrary, they contain forum selection provisions selecting the New York courts for the resolution of disputes. *See* ICAP Agreements, § 12. The ICAP agreements are thus subject to the jurisdiction of this court.

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[6] Plaintiff may have other causes of action against Defendants pursuant to the FA Agreements which should be resolved in arbitration.

Additionally, AllianceBernstein L.P. is not a party to the FA Agreements. The FA Agreements are between Alliance Capital Management L.P. and Gelwarg and Mayer respectively. Defendants do not make clear how Alliance Capital Management and Plaintiff are affiliated, and Defendants cite no authority binding one company to an affiliated company's arbitration agreement. The court declines to do so here and will not compel arbitration on this basis.

Defendants further argue that Plaintiff's affiliate corporation, Sanford C. Bernstein & Co., LLC ("SCB"), is a member of FINRA. Defendants contend that, as a result, this case must be argued in accordance with the FINRA rules requiring arbitration of disputes between FINRA members and FINRA associated persons. Defendants' Injunction Opposition Memo, pp. 13-14. However, Plaintiff is not itself a member of FINRA and SCB is not a party to this action, nor does SCB appear to have any relation to this action. Defendants cite to no authority requiring a parent company with a FINRA-member affiliate to arbitrate all employment disputes arising out of contracts with employees of the parent company. Two recent New York County Supreme Court Justices have declined to compel arbitration in identical scenarios. *See AllianceBernstein L.P. v. Clements*, 31 Misc. 3d 1234A (Sup. Ct. New York Co. 2011) (finding that the economic incentive agreement specifically provided jurisdiction to the New York courts and that plaintiff itself was not a FINRA member, thus the court did not compel arbitration); *see also AllianceBernstein L.P. v. Bustos*, Sup. Ct. New York Co., Index No. 650999/11 (May 27, 2011) (finding that where plaintiff is not a member of FINRA, despite having an FINRA-registered affiliate company, arbitration should not be

compelled). The court will thus not compel arbitration on the grounds that an affiliate of Plaintiff is a member of FINRA.

The court does not find any grounds in Defendants' argument to compel the parties to arbitrate the dispute herein. Defendants' cross-motion is denied.

B. Motion for a Preliminary Injunction

The court now turns to Plaintiff's motion for a preliminary injunction.

In order to obtain a preliminary injunction under New York law, a party must demonstrate (1) a likelihood of success on the merits of the claim; (2) the potential for irreparable injury if the injunction is not granted; and (3) that the balance of the equities lies in its favor. *Chernoff Diamond & Co. v. FitzMaurice, Inc.*, 234 A.D.2d 200, 201 (1st Dep't 1996). Harm compensable by monetary damages does not constitute irreparable injury. *Zodkevitch v. Feibush*, 49 A.D.3d 424, 425 (1st Dep't 2008).

The June TRO restrained defendants from (a) violating Defendants' 60-day notice obligation under the ICAP Agreements; (b) soliciting the business of Plaintiff's clients; (c) recruiting Plaintiff's employees to work for Defendants or any other entity; and (d) using, disclosing or retaining Plaintiff's confidential information. Plaintiff seeks the same relief from the June TRO in its motion for a preliminary injunction.

i. Solicitation of AllianceBernstein Clients and Recruitment of Employees

Pursuant to § 4 of the ICAP Agreements, Defendants were prohibited from soliciting AllianceBernstein clients and recruiting AllianceBernstein employees to work for a

competitor while employed by Plaintiff. *See* ICAP Agreements, § 4. Defendants resigned from AllianceBernstein on May 27, 2011, without providing sixty days notice as required by the ICAP Agreements. Plaintiff's TRO Memo, p. 5. The June 1, 2011 TRO required that Defendants honor the 60-day notice obligation. Defendants were therefore employed by Plaintiff, at latest, until July 31, 2011, sixty days after this court issued the June TRO.[7] Because the ICAP Agreements specify that the anti-solicitation and anti-recruitment provisions were in effect only while Defendants were employed by Plaintiff, the June TRO provisions regarding employee recruitment and client solicitation are no longer in force. *See* June TRO; *see also* ICAP Agreements, §§ 4(b), 4(c).

The anti-solicitation and anti-recruitment obligations under section 4 of the ICAP Agreements have been satisfied upon completion of Defendants' employment with AllianceBernstein.[8] Accordingly, the court does not extend the temporary restraining order provisions pertaining to solicitation of AllianceBernstein's clients and employees. Plaintiff's request to further enjoin Defendants from soliciting the business of Plaintiff's clients or recruiting Plaintiff's employees to work for a competitor is denied.

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[7] The court could also consider July 26, 2011, sixty days after Defendants tendered their resignation at AllianceBernstein, as Defendants' last day of work at AllianceBernstein. It is irrelevant to the court's determination herein. Both July 26, 2011 and July 31, 2011 have passed and the anti-solicitation obligations in the ICAP Agreements are thus no longer in force.

[8] The court considers completion of Defendants' employment with AllianceBernstein to have taken place no later than July 31, 2011.

ii. 60-Day Resignation Notice Requirement

The court similarly declines to extend the June TRO provision enjoining Defendants from violating their 60-day notice of resignation obligation under the ICAP Agreements. *See* ICAP Agreements, § 3. This provision requires only that Defendants provide 60-days notice of their resignation to Plaintiff. The obligation was extended until July 31, 2011, at the latest, sixty days after this court entered the June TRO. The 60-day time period has expired, and the court will not extend Defendants' obligation beyond what is required under the ICAP Agreements.

iii. Use, Disclosure and Retainage of Confidential Information

Plaintiff also moves to enjoin Defendants from using Plaintiff's Confidential Information, as defined and temporarily granted in the June TRO.[9] The ICAP Agreements' confidentiality obligations continue even "after [Defendants'] last date of employment [with Plaintiff]." ICAP Agreements, § 4(d). Unlike the ICAP Agreements' anti-solicitation and anti-recruitment obligations, Defendants' obligation to maintain Plaintiff's Confidential Information thus remains beyond the employment relationship.

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[9] The June 1, 2011 TRO specifically enjoins Defendants from "using, disclosing, or transmitting for any purpose, any records, documents, or information relating in any way to the clients, business or marketing strategies, or business operations of AllianceBernstein, whether in original, copied, computerized, handwritten, or any other form (hereafter the "Confidential Information"); and . . . retaining, in any form, including without limitation original, copied, computerized, handwritten or any other form, any Confidential Information[.]" June TRO.

Here, though Defendants' confidentiality obligations remain beyond the employment relationship, Plaintiff has not shown that it will suffer irreparable harm in the absence of an injunction. *Chernoff Diamond*, 234 A.D.2d at 201. The court thus declines to further enjoin Defendants from retaining or using Confidential Information as defined by the ICAP Agreements.

Plaintiff has alleged that Defendants used AllianceBernstein client lists to contact and solicit AllianceBernstein clients. Plaintiff argues, that as a result, many clients have transferred their assets from AllianceBernstein to Morgan Stanley. Plaintiff has not alleged that these AllianceBernstein client lists contained any information other than client contact information and the size of their investments with AllianceBernstein. The court finds that any harm to Plaintiff resulting from Defendants' use of AllianceBernstein's Confidential Information as alleged would be adequately remedied by monetary damages. *See Zodkevitch*, 49 A.D.3d at 425.

Plaintiff's motion that Defendants be enjoined from using, disclosing, transmitting or retaining Plaintiff's Confidential Information is therefore denied.

C. AllianceBernstein's Motion for Contempt

Plaintiff requests that the court hold Defendants in contempt for violating the June TRO. Plaintiff claims that after the issuance of the TRO, Defendants continued to solicit clients, use Plaintiff's Confidential Information and failed to resign from Morgan Stanley, all in violation of the TRO.

"To sustain a civil contempt, a lawful judicial order expressing an unequivocal mandate must have been in effect and disobeyed." *McCain v. Dinkins*, 84 N.Y.2d 216, 226 (1994). The party to be held in contempt must have "had knowledge of the order . . . [and] prejudice to the rights of a party to the litigation must be demonstrated." *Id.* (internal citations omitted). To hold Defendants in civil contempt, Plaintiff must demonstrate with reasonable certainty that Defendants failed to comply with an order of this court. *Mccormick v. Axelrod,* 59 N.Y.2d 574, 583 (1983); *see also Hynes v. Hartman*, 63 A.D.2d 1, 4 (1st Dep't 1978).

i. Defendants are not in Contempt of the 60-Day Notice Obligation from the June TRO

Plaintiff contends that Defendants violated the June TRO by failing to formally resign from Morgan Stanley. Plaintiff argues that by not resigning, Defendants were in contravention of their TRO requirement to honor the 60-day notice of resignation obligation. Defendants contend that they did not violate this 60-day provision, and are thus in compliance with the June TRO.

The court does not find that Defendants failed to comply with the TRO by not formally resigning from Morgan Stanley. For the purposes of this contempt motion, the court is satisfied that Defendants stopped working for Morgan Stanley as soon as Defendants learned they were subject to the June TRO. Defendants left Morgan Stanley's offices on

June 1, 2011 and did not return for sixty days.[10] *See* Defendants' Contempt Opposition Memo, p. 26.

Plaintiff's contention that Defendants were required to file a Form U-5 with FINRA indicating that they did not work for Morgan Stanley is without merit. As Defendants point out, the Form U-5 is used by "broker dealers to register, and terminate the registrations of, associated persons with self-regulatory organizations (SRO's), and jurisdictions." *See* FINRA Website's Current Uniform Registration Forms for Electronic Filing in Web CRD, www.finra.org/industry/compliance/registration/crd/filingguidance/p005235 (last updated June 18, 2001). Thus, it appears to have been Morgan Stanley's obligation to file a Form U-5 indicating that Defendants did not work there. The court declines to hold Defendants in contempt for Morgan Stanley's failure to file a Form U-5.

ii. Gelwarg Caused Bloom to Retain Plaintiff's Confidential Information in Violation of the June TRO

Plaintiff contends that Gelwarg violated the June TRO by soliciting Plaintiff's clients after June 1, 2011. Plaintiff further argues that Gelwarg instructed his associate, Bloom, to retain Plaintiff's confidential information and to solicit Plaintiff's clients on Gelwarg's behalf.

Gelwarg testified that he did have conversations with some AllianceBernstein clients after the June TRO went into effect on June 1, 2011, but that he did not solicit those clients

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[10] The court assumes that, for the purposes of this motion, Defendants did not return to Morgan Stanley's offices at least until the 60-day notice of termination period had passed, at latest, on July 31, 2011. Plaintiff has not argued otherwise.

in violation of the TRO. Gelwarg explains that, after it was clarified to him on June 9, 2011 that he could be in contact with clients so long as it was in his capacity as an AllianceBernstein advisor,[11] he began to return phone calls to clients. Gelwarg Deposition, pp. 141-42.

Gelwarg testified that in a typical phone call to a client, he would state:

> the reason I'm calling you now is I've been advised, it's been clarified that I can talk to you to just let you know that there is an adviser at Bernstein who either is assigned or will be assigned to your accounts, that if you need any help with transactions or advice, there are people there who will be pleased to help you with that. In addition, if you need my thoughts on any matters of that nature, I'm more than happy to help you.

Id., p. 145. Gelwarg testified that after June 1, 2011, when a client expressed an interest to him in transferring its money to Morgan Stanley, Gelwarg stated, "[a]t present, due to the [c]ourt [o]rder, I can't talk about those matters." *Id.*, p. 146. Based on Gelwarg's testimony, it does not appear to the court with certainty that Gelwarg's conversations after June 1, 2011 with Plaintiff's clients constituted solicitation in violation of the June TRO. *McCormick*, 59 N.Y.2d at 583. The court will thus not hold Gelwarg in contempt on this ground.

The court does find, however, that Gelwarg improperly instructed his associate, Bloom, to retain Plaintiff's Confidential Information and to continue to make phone calls to

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[11] Though Gelwarg resigned from AllianceBernstein on May 27, 2011, the June TRO required the Defendants to remain employees of AllianceBernstein for an additional sixty days. Thus, Gelwarg was technically still an AllianceBernstein employee on June 9, 2011, and the June TRO did not prohibit him from contacting AllianceBernstein's clients in his capacity as an AllianceBernstein advisor.

Plaintiff's clients on his behalf. Plaintiff contends that Gelwarg used the Client List he took from Plaintiff to make phone calls to Plaintiff's clients prior to the June TRO. Plaintiff contends, and Bloom testified, that on June 1, 2011, Gelwarg gave Bloom a handwritten list of clients that Gelwarg had previously contacted. Gelwarg instructed Bloom to follow-up with those clients which Gelwarg's notes indicated it was allowable to do so. Memorandum of Law in Support of Plaintiff's Motion for Contempt ("Plaintiff's Contempt Memo"), p. 4; *see* Bloom Deposition, pp. 107-08.

The June TRO unequivocally prohibited Gelwarg or any of his agents from using in any way and "retaining, in any form, including without limitation original, copied, computerized, handwritten or any other form, any Confidential Information." June TRO. Confidential Information is defined within the TRO to include "any records, documents, or information relating in any way to clients[.]" *Id.* Gelwarg's handwritten list indisputably contained information relating to Plaintiff's clients. *See* Oral Argument Transcript, p. 15 (Defendants' counsel stated "I'm not disputing that the information on the [handwritten] list contained information about AllianceBernstein clients.").

The court finds that Gelwarg gave Bloom Plaintiff's Confidential Information and caused Bloom to use the Confidential Information to reach out to Plaintiff's clients. This conduct was in violation of the June TRO that unequivocally prohibited the retention and use by Defendants or their agents of Confidential Information. *Mccain*, 84 N.Y.2d at 226. Gelwarg was fully aware of the June TRO and its prohibitions. *Id.* Further, Plaintiff's rights

were prejudiced by Bloom's retention and use of their Confidential Information. Bloom's deposition testimony reveals that he may have attempted to solicit the business of clients on the list.[12] *Id.* On these grounds, the court therefore grants Plaintiff's motion to hold Gelwarg in civil contempt of this court's June TRO.

The court finds that, as compensation for such contempt, Gelwarg must pay Plaintiff reasonable attorneys' fees and costs Plaintiff incurred bringing the contempt motion (motion sequence number 2).

For good cause being shown for contempt on Plaintiff's motion, Gelwarg is further sanctioned by this court in the amount of $500, payable to the Lawyer's Fund for Client Protection, 119 Washington Avenue, Albany, New York 12210.

iii. Mayer's Conversations with Clients after June 1, 2011 Constituted Solicitation in Violation of the June TRO

Plaintiff alleges that even after entry of the June TRO, Mayer continued to solicit Plaintiff's clients in violation of the TRO.

Mayer, similarly to Gelwarg, began returning phone calls to clients after Judge Friedman "clarified" the June TRO. Mayer testified that after June 1, 2011, if a client asked him where he moved his investments, Mayer would answer that he moved his assets to

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[12] The court does not here find that Gelwarg instructed Bloom to solicit the business of clients on the handwritten list. The court finds only that some of Bloom's conversations with clients after June 1, 2011 may have constituted solicitation meant to deprive Plaintiff of the value of some of their clients' assets. *See* Bloom Deposition, pp. 112-13 (explaining the handwritten notes pertaining to a call between Bloom and Plaintiff's client Stan Horowitz about potentially transferring his assets to Morgan Stanley).

Morgan Stanley. *See* Mayer Deposition, pp. 177-78. If a client also asked Mayer why he moved his money, Mayer answered "I don't think the core domestic and international equity services [at AllianceBernstein] are performing properly, and I needed to pursue another alternative." *Id.*, p. 178. Plaintiff alleges that by doing so, Mayer used questions from clients as an opportunity to solicit the clients by demeaning the performance of Plaintiff's investments and thereby promoting the performance of Morgan Stanley's investments. Plaintiff alleges that this conduct was in violation of the June TRO prohibiting solicitation of Plaintiff's clients.

Mayer argues that his communications with clients after June 1, 2011, did not constitute solicitation. He contends that the June TRO did not prohibit him from answering client questions "honestly."

The court finds that Mayer's communications with clients in which he gave the reasons for moving his assets from Plaintiff to Morgan Stanley constituted solicitation in violation of the June TRO. Under New York law, even announcing one's new employment can still be considered a form of solicitation. *United States Trust Co., N.A. v. MacLachlan*, 2008 N.Y. Slip Op30030U *6 (Sup. Ct. New York Co. 2008).

Here, Mayer went beyond announcing his new employment with Morgan Stanley. Mayer told Plaintiff's clients that he no longer had confidence in AllianceBernstein and implied that the clients' investments would perform better at Morgan Stanley. Even if Mayer were just answering the client's questions "honestly," as he contends, the June TRO prohibited him from soliciting AllianceBernstein clients' business. Informing a client that

the client's investments at AllianceBernstein were not performing properly and implying they would perform better elsewhere served the purpose of soliciting those clients. Defendant Mayer estimated as of June 16, 2011, between $50 and $100 million of assets he managed with AllianceBernstein clients had transferred to Morgan Stanley. Mayer Deposition, p. 157.

The court thus finds that Mayer solicited Plaintiff's clients after June 1, 2011. Mayer's solicitation violated the June TRO, of which Mayer had knowledge, that unequivocally prohibited the solicitation of Plaintiff's clients. *Mccain*, 84 N.Y.2d at 226.

The court finds that Plaintiff's rights under the ICAP Agreements and the June TRO were prejudiced because several AllianceBernstein clients did transfer their funds to Morgan Stanley as a result of Mayer's continued solicitation of clients. *See CreditRiskMonitor.com v. Fensterstock*, 232 N.Y.L.J. 42 (Sup. Ct. Nassau Co. 2004) (finding that plaintiff's rights were prejudiced where defendant's actions, in violation of a court order, caused the loss of 102 of plaintiff's customers). On these grounds, the court therefore holds Mayer in civil contempt of the June TRO.

The court finds that, as compensation for such contempt, Mayer must pay, in conjunction with Gelwarg, Plaintiff's reasonable attorneys' fees and costs incurred in bringing the contempt motion (motion sequence number 2). Mayer and Gelwarg shall be jointly and severally liable to Plaintiff for such fees.

For good cause being shown for contempt on Plaintiff's motion, Mayer is further sanctioned by this court in the amount of $500, payable to the Lawyer's Fund for Client Protection, 119 Washington Avenue, Albany, New York 12210.

D. June 1, 2011 Conversation with Counsel and Attorney-Client Privilege

i. Background

On June 1, 2011, after the issuance of the June TRO, Defendants' counsel, Greco, met with Defendant Gelwarg at the Morgan Stanley office and spoke to Defendant Mayer over the telephone to advise Defendants that they were under a TRO. Morgan Stanley's in-house counsel requested that Greco also advise the other former AllianceBernstein associates, Bloom and Goldberg as to compliance with the June TRO.[13] Accordingly, Greco had a conversation regarding compliance with the TRO with his client Gelwarg as well as Bloom and Goldberg (the "June Conversation"). Greco did not represent Bloom and Goldberg.

Plaintiff argues that information regarding the June Conversation is discoverable. Defendants argue that the June conversation falls under the attorney-client privilege. Defendants rely principally on the Supreme Court for the United States' holding in *Upjohn Co. v. United States*, 449 U.S. 383 (1981). The court finds that the circumstances present in *Upjohn* are not present here. Accordingly, the court does not find that the June Conversation is privileged.

ii. Standard

As the Court of Appeals set forth in *Spectrum Systems Int'l Corp. v. Chemical Bank*, 78 N.Y.2d 371, 377 (1991), CPLR 4503(a) states that "a privilege exists for confidential

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[13] It is unclear if Lukasik was a part of this conversation. However, her presence, or lack thereof, does not alter the court's analysis of the privilege issue.

communications made between attorney and client in the course of professional employment, and CPLR 3101 (b) vests privileged matter with absolute immunity." *Spectrum Systems Int'l Corp.*, 78 N.Y.2d at 377. In order for the privilege to apply, the communication from attorney to client must be made "for the purpose of facilitating the rendition of legal advice or services, in the course of a professional relationship." *Rossi v. Blue Cross & Blue Shield of Greater N.Y.*, 73 N.Y.2d 588, 593 (1989).

"A corporation's communications with counsel, no less than the communications of other clients with counsel, are encompassed within the legislative purposes of CPLR 4503." *Rossi,* 73 N.Y.2d at 592. As a general rule, communications with an attorney, in the presence of a third party not an agent or employee of counsel are not privileged. *People v. Osorio*, 75 N.Y.2d 80 (1989); *see also Aetna Cas. & Sur. Co. v. Certain Underwriters at Lloyd's, London*, 176 Misc. 2d 605, 611 (Sup. Ct. New York Co. 1998).

iii. Defendants' Arguments based on Upjohn and Similar New York Cases

It is undisputed that Gelwarg's communications with his counsel during the June Conversation were in the presence of third parties. On this basis, the communications should not be privileged. *Osorio*, 75 N.Y.2d at 85.[14]

Defendants rely principally, however, on the Supreme Court of the United States' holding in *Upjohn* and a similar line of New York cases. The Supreme Court for the United

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[14] Defendants do not cite any cases holding that the presence of third parties does not waive privilege in the context of the June Conversation. Defendants instead rely on cases stating that communications between an employee and their employer's counsel are privileged in certain contexts. Those cases do not analyze whether conversations are privileged between more than one employee and their employer's counsel. Because the court finds that the cases relied on by Defendants are inapplicable to the instant case, it does not analyze this issue herein.

[* 24]

Goldberg and Bloom "at the request of Morgan Stanley's in-house counsel." Defendants' Contempt Opposition Memo, p. 29. Defendants' reliance on *Upjohn* is therefore misplaced.

The privileged communications at issue in *Upjohn* were between Upjohn employees and Upjohn's counsel. The communications between Gelwarg and his counsel Greco were made in the presence of Morgan Stanley employees that Greco did not represent. Greco did not represent or work on Morgan Stanley's behalf and did not represent Goldberg and Bloom. *Upjohn* and the similar New York cases therefore do not apply, and the court thus does not find that the June Conversation is privileged.

Plaintiff's request that the court order further discovery of the June Conversation is granted.

Order

Accordingly it is hereby

ORDERED that plaintiff's motion for a preliminary injunction enjoining defendants Peter A. Gelwarg and Kenneth A. Mayer, directly or indirectly, and whether alone or in concert with others, including any officer, agent, employee, or representative of defendants' current employer from violating the 60-day notice obligation to AllianceBernstein under their ICAP Agreements is DENIED; and it is further

ORDERED that plaintiff's motion for a preliminary injunction enjoining defendants, directly or indirectly, and whether alone or in concert with others, including any officer, agent, employee, or representative of defendants' current employer from soliciting the

business of any client or prospective client of AllianceBernstein for any purpose other than to obtain, maintain and/or service the client's business for AllianceBernstein is DENIED; and it is further

ORDERED that plaintiff's motion for a preliminary injunction enjoining defendants, directly or indirectly, and whether alone or in concert with others, including any officer, agent, employee, or representative of defendants' current employer from soliciting or hiring any employee of AllianceBernstein to work for the defendants or any other person or entity is DENIED; and it is further

ORDERED that plaintiff's motion for a preliminary injunction enjoining defendants, directly or indirectly, and whether alone or in concert with others, including any officer, agent, employee, or representative of defendants' current employer from retaining, using, disclosing, or transmitting for any purpose, any records, documents, or information relating in any way to the clients, business or marketing strategies, or business operations of AllianceBernstein, whether in original, copied, computerized, handwritten, or any other form is DENIED; and it is further

ORDERED that defendants' cross motion to compel arbitration is DENIED; and it is further

ORDERED that plaintiff's motion for an order holding defendants Peter A. Gelwarg and Kenneth A. Mayer in civil contempt of this court's June 1, 2011 temporary restraining order is GRANTED; and it is further

ORDERED that plaintiff submit proof to defendants of its reasonable attorneys' fees and costs in connection with its contempt motion (motion sequence number 2); and it is further

ORDERED that upon plaintiff's submission of proof to defendants of such reasonable attorneys' fees and costs, defendants shall jointly and severally pay such fees within thirty days of the receipt of the proof, unless Defendants contest the costs, in which case defendants are to submit a motion contesting the costs within thirty days of the receipt of the proof; and it is further

ORDERED that defendant Peter A. Gelwarg is hereby sanctioned by this court in the amount of $500, payable to the Lawyer's Fund for Client Protection, 19 Washington Avenue, Albany New York 12210; and it is further

ORDERED that written proof of the payment of this sanction shall be provided to the Clerk of Part 3 and opposing counsel within 30 days after service of a copy of this order with notice of entry; and it is further

ORDERED that, in the event that such proof of payment is not provided in a timely manner, the Clerk of the court, upon service upon him of a copy of this order with notice of entry and an affirmation or affidavit reciting the fact of such non-payment, shall enter a judgment in favor of the Commissioner and against defendant Peter A. Gelwarg in the aforesaid sum; and it is further

ORDERED that defendant Kenneth A. Mayer is hereby sanctioned by this court in the amount of $500, payable to the Lawyer's Fund for Client Protection, 19 Washington Avenue, Albany New York 12210; and it is further

ORDERED that written proof of the payment of this sanction shall be provided to the Clerk of Part 3 and opposing counsel within 30 days after service of a copy of this order with notice of entry; and it is further

ORDERED that, in the event that such proof of payment is not provided in a timely manner, the Clerk of the court, upon service upon him of a copy of this order with notice of entry and an affirmation or affidavit reciting the fact of such non-payment, shall enter a judgment in favor of the Commissioner and against defendant Kenneth A. Mayer in the aforesaid sum; and it is further

ORDERED that, in accordance with 22 NYCRR 130-1.3, a copy of this order will be sent by the Part to the Lawyer's Fund for Client Protection; and it is further

ORDERED that plaintiff's request for discovery of the June 1, 2011 conversation between Peter A. Gelwarg, John Greco, Keri Goldberg and Richard Bloom is GRANTED.

This constitutes the decision and order of the court.

Dated: New York, New York

April 23 2012

ENTER:

Hon. Eileen Bransten, J.S.C.