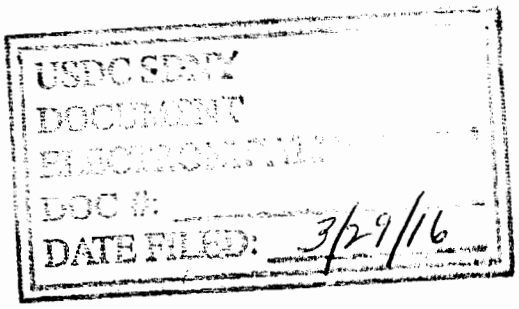


UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LBBW LUXEMBURG S.A.,

Plaintiff,

-against-

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

Defendants.

**MEMORANDUM AND ORDER**

12-CV-7311 (JPO) (KNF)

KEVIN NATHANIEL FOX
UNITED STATES MAGISTRATE JUDGE

The plaintiff, LBBW Luxemburg S.A. ("LBBW"), commenced this action against the defendants, Wells Fargo Securities LLC, f/k/a Wachovia Capital Markets LLC (referred to as "Wells Fargo" or "Wachovia"), and Fortis Securities LLC ("Fortis"), alleging: (1) fraud; (2) constructive fraud; (3) breach of fiduciary duty; (4) negligent misrepresentation; and (5) breach of contract, based on the defendants' failure to disclose the true value of the allegedly low-risk debt securities issued as part of the Grand Avenue II ("GAII") collateral debt obligation ("CDO"), which the plaintiff purchased for $40 million, and other material facts alleged to have been known to the defendants. On March 31, 2014, the assigned district judge granted the defendants' motion to dismiss the plaintiff's breach of fiduciary duty claims, but denied the motion to dismiss the plaintiff's remaining claims, finding that the plaintiff asserted plausibly that: (1) the defendants did not disclaim effectively their promise to notify the plaintiff of any change to any characteristics of the CDO's capital structure; (2) the valuation of the CDO collateral was fraudulent at the time of closing and losses were delayed because the defendants defrauded additional investors who purchased inflated CDO shares subsequently; (3) Fortis committed fraud; (4) the defendant induced its investment misrepresenting intentionally a

material matter within the defendants' peculiar knowledge, the defendants' valuation of the CDO collateral; (5) a special relationship existed between the plaintiff and Wachovia to justify reliance on a misrepresentation; and (6) Fortis had some information within its peculiar knowledge. The remaining claims against the defendants are: (a) breach of contract; (b) fraud; (c) constructive fraud; and (d) negligent misrepresentation.

Before the Court is the plaintiff's motion, made pursuant to Rule 37 of the Federal Rules of Civil Procedure, to compel production of the following documents from the defendants: (1) "[d]ocuments demonstrating Defendants' strategy to short Grand Avenue II, including but not limited to P&L [profit and loss] statements, trade tickets, and confirmations"; (2) "[d]ocuments concerning the SEC's [Securities and Exchange Commission] investigation of Grand Avenue II"; (3) "[d]ocuments related to the Ernst and Young audit performed in 2006"; (4) "[a]greements between Fortis Securities LLC and Wachovia Capital Markets LLC related to Grand Avenue II"; (5) "[u]nredacted copies of thousands of documents that Defendants improperly redacted"; (6) "[a]n unredacted copy of PX 72"; and (7) ""Bloomberg Instant Messages that are responsive to Plaintiff's Requests for Production." To the extent that the defendants assert "that any of these documents no longer exist, LBBW requests a corporate representative deposition to explore the details of the documents' disappearance." The defendants oppose the motion.[1]

***Plaintiff's Contentions***

The plaintiff contends that the defendants failed to produce documents related to their shorting strategy in response to the plaintiff's first set of requests for production to LBBW

[1] Without seeking or obtaining permission to file supplemental submissions after the instant motion was briefed, the parties filed post-motion letters in which they discuss various matters, including the defendants' post-motion production. See Docket Entry Nos. 144, 145, 146 and 147. The Court will not consider these letters in determining the instant motion because they have been filed improperly and involve post-motion matters.

("RFP") No. 7[2] and the second set of requests for production to LBBW ("RFP2"). According to the plaintiff, the shorting strategy documents are relevant to the plaintiff's claims and include "trade tickets, CDO confirmations, and profit and loss statements from September 2006 to the time of ultimate disposition of each position." The plaintiff maintains that "[t]hese documents would demonstrate how Defendant sought, entered into, and ultimately disposed of all short positions or hedges related to—and even on—GAII." The plaintiff asserts that the documents related to the defendants' strategy to short GAII securities and the underlying collateral are relevant because, in addition to the secret internal markdown of the preference shares asserted in the complaint, "Defendants' investment in short positions of GAII's securities and the underlying collateral is another act that relates to whether Defendants knew that GAII was far riskier than represented." The plaintiff contends that "[s]everal documents related to Defendants' strategy to short GAII have already been produced," and the deposition testimony of Jennifer Zelnick supports the conclusion that additional documents likely exist. According to the plaintiff, during the deposition of Michael Thompson ("Thompson"), at the offices of Hogan Lovells in New York, a document marked PX 72 was produced "related to the shorting strategy," which was not produced before the deposition and is responsive to the plaintiff's requests related to the defendants' short positions. The plaintiff contends:

> The bizarre appearance of this document is significant because Hogan Lovells was involved in the SEC's investigation. When one combines Defendants' failure to produce any SEC documents on the basis of unavailability, with the fact that this highly relevant document magically appeared while the parties were conducting depositions at Hogan Lovells' office, it is easy to conclude that Defendants are playing games with LBBW by storing responsive documents at other law firms and then claiming a lack of possession. . . . Any of Defendants' documents that are being stored at Hogan Lovells or at Sullivan Cromwell's

[2] RFP No. 7 seeks: "All documents and communications concerning financial projections concerning the profitability or loss projections of any of the securities of the Grand Avenue II CDO."

> offices (or elsewhere) on Wells Fargo's behalf are within Wells Fargo's "possession, custody, or control" and should be immediately produced.

The plaintiff maintains that the defendants do not deny that they have responsive documents related to the short positions purchased on GAII, but avoid producing them "based on a disclosure contained in the Offering Circular," stating "that Wachovia may be an initial synthetic security swap counterpart facing the CDO to create synthetic collateral supporting the CDO"; however, "the disclosure has no bearing on the scope of discovery" or on "'Wachovia's doubling-down on the failure of the CDO and the assets underneath it.'" The plaintiff asserts:

> As Defendants are well aware, LBBW seeks documentation that shows that Wachovia wanted to short the Class C Notes of the CDO itself (i.e., Wachovia was betting that the Class C Notes of GA II would default and sought protection for this before the closing) and wanted to short specific assets that were in the CDO deal (i.e. Wachovia was betting that specific bonds in the deal would default and sought protection on these securities before closing). What is misleading about Defendants' reliance on the disclosure is that the disclosure does not relate to Defendants' attempts to buy protection on the Class C Notes of GAII . . . . Here, however, Wachovia not only bought protection on certain securities from the CDO but it also then proceeded to double-down its position by seeking to buy more protection on those same securities from others in the market (i.e., if these securities failed, Wachovia would get cash from the CDO and from others in the market). This disclosure has no relevance [to] Wachovia's doubling-down on the failure of the CDO and the assets underneath it. As a result, defendants' reliance on this disclosure is misplaced (and even misleading), and the disclosure has no bearing on whether documents related to the short strategy are relevant.

The plaintiff contends that the defendants must respond to RFP Nos. 15[3] and 16[4], seeking documents and communications related to the SEC investigation of the GAII CDO, because the SEC investigation involves the same CDO at issue here and the documents are within the defendants' control. According to the plaintiff, although the SEC provided "17 unredacted deposition transcripts without exhibits," other documents exist that the SEC refused to produce

[3] RFP No. 15 seeks: "All documents and communications provided to the SEC for its investigation into the Grand Avenue II CDO."

[4] RFP No. 16 seeks: "All documents and communications concerning the SEC investigation into the Grand Avenue II CDO."

because it would be "unduly burdensome, particularly given LBBW's ability to obtain them from Defendants." Moreover, the statements made by Wells Fargo's in-house counsel, Barbara Wright ("Wright"), at the deposition of the defendants' corporate representative Dashiell Robinson indicate that Wells Fargo collected and preserved all documents relating to Wells Fargo's CDO business in 2006 and 2007.

The plaintiff asserts that the defendants must also respond to RFP Nos. 10[5] and 11[6], seeking "all documents and communications involving any internal audit arranged, conducted, or administered by E&Y [Ernst and Young] related to Defendants' structured products, specifically GAII." The plaintiff asserts that it is certain that "E&Y undertook an audit of Defendants' structured products shortly before GAII closed given references to such an audit contained in Defendants [sic] own documents." The plaintiff maintains that these documents are relevant because the plaintiff's claims are "centered around the fact that the Defendants knew that the shares purchased by LBBW were much less than represented" and any audit conducted in 2006 would have included GAII, which was one of Wells' Fargo's structured products. The plaintiff contends that, even if no audit was performed, the documents E&Y collected in initiating the audit should have been produced in response to RFP Nos. 10 and 11.

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[5] RFP No. 10 seeks: "All documents concerning communications relating to the valuation of any securities of the Grand Avenue II CDO; internal to Wachovia; between Wachovia and Fortis; between Wachovia or Fortis and LBBW; between Wachovia or Fortis and TCW [TCW Asset Management Company]; between Wachovia, Fortis, or TCW and any Rating Agency; and between Wachovia, Fortis, or TCW and Ernst & Young or any other accountant or accounting firm."

[6] RFP No.11 seeks: "All communications and documents involving any audit arranged, conducted or administered by Ernst & Yong for or in respect of Wachovia concerning discerning and/or correcting differences and/or deficiencies relating to what Wachovia was telling investors investing in any structured products arranged by Wachovia and what Wachovia was telling personnel of Wachovia internally about any such structured products."

Moreover, the defendants failed to respond to RFP No. 12[7] and the first set of requests for production to Fortis ("RFP Fortis") No. 11[8], seeking agreements between the defendants related to GAII. The plaintiff maintains that the defendants "produced multiple emails referencing the agreement between them," but none of the attachments to those e-mail messages, and they provided no excuse or explanation for not producing the attachments. Since the defendants relied on their agreements in their depositions and pleadings, they must produce them. Alternatively, the plaintiff "reserves the right to move to strike any argument raised by Defendants in subsequent briefing and at trial that relies upon agreements that were improperly withheld from production."

The plaintiff contends that the defendants should produce "unredacted version[s] of the 9,133 documents that have been improperly redacted as non-responsive" and the unredacted e-mail message, marked as "PX 72" at Thompson's deposition. The plaintiff maintains that, although the documents are redacted as non-responsive, "portions of the coding is [sic] not redacted, and in many cases the coding implicates Grand Avenue II and individuals who have been deposed." For example, "document Bates labeled WF_LBBW_0000003280 is a PDF entitled 'Cashflow for Grand Ave II as of 1/26/2007,' and it lists Dashiell Robinson as the custodian." According to the plaintiff, many other examples of coding suggest that the documents contain relevant information. Concerning the PX 72 e-mail message, it was produced with text at the top stating "Material Redacted," without any explanation for the redaction.

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[7] RFP No. 12 seeks: "All documents concerning any claim or potential claims for indemnification or contribution concerning the Grand Avenue II CDO."

[8] RFP Fortis No. 11 seeks: "All documents concerning any claims or potential claims for indemnification or contribution concerning to [sic] this Action."

The plaintiff asserts that the defendants failed to produce any Bloomberg instant messages regarding GAII. Should the defendants claim that the documents requested were destroyed, lost or are unavailable, the plaintiff requests that a deposition be allowed to explore the circumstances of the documents' disappearance, in light of the testimony of the defendants' corporate representative "that documents related to Wells Fargo's CDO business from 2006 and 2007 have been maintained."

The plaintiff contends that the discovery sought through this motion is proportional to the needs of this case to recover $40 million the plaintiff invested in GAII, the litigation is more than three years old, and the attorneys' fees incurred exceed millions of dollars. The defendants have the resources to produce the requested discovery, while the plaintiff has no way of obtaining these documents other than from the defendants. Since the documents requested are necessary to resolve this litigation, they should be produced.

***Defendants' Contentions***

The defendants contend that

> the only theory that survives concerns Wachovia Capital Market's ('WCM,' predecessor in interest to defendant Wells Fargo) internal mark on the CDO's most junior security – the preference shares – around the time of the CDO's closing, in late 2006. That theory turns on what connection, if any, this mark bore to WCM's alleged view of the CDO's investment portfolio at that time.

According to the defendants, their "substantial document productions and deposition testimony establish unequivocally that WCM's mark had nothing to do with WCM's views on the CDO or its underlying collateral." The defendants contend that, after it recognized that its case is "doomed," the plaintiff "sought to open a completely new front in discovery," speculating "that Wachovia perhaps adopted a strategy to use 'cash-flows' from its retained Grand Avenue equity to 'fund short positions' on the securities issued by or backing Grand Avenue" and contending

"that Wachovia engaged in a 'double-down' shorting strategy with regarding [sic] to the CDO in a transaction that was 'designed to fail.'"

The defendants contend the plaintiff did not seek leave to make a motion to compel and the following requests are untimely because they are asserted in the plaintiff's motion for the first time: (1) "[v]arious alleged draft agreements between Wachovia and Fortis"; (2) "Bloomberg messages"; and (3) a "document destruction deposition." The defendants maintain that the plaintiff's request for documents concerning the alleged shorting strategy should be denied because the defendants already produced "credit default swap ('CDS' or 'swap') documents related to the actual transaction at issue," including documents concerning "the relevant off-setting or 'hedging' positions." The defendants contend that, contrary to the plaintiff's assertion, the produced documents show that "Wachovia was perfectly hedged (as opposed to 'short')" with respect to the relevant CDS or swap trades. Since "Wachovia was perfectly hedged in its CDS positions referencing the CDO, there is no merit or justification for LBBW's rank speculation about some nefarious 'shorting' strategy." In support of this contention, the defendants rely on a declaration by Kevin Massi ("Massi"), Wells Fargo's assistance vice president, in which Massi makes citation to certain evidence and draws conclusions concerning Wachovia's CDS positions related to GAII. Furthermore, "LBBW was fully aware that dealer banks like Wachovia took short positions on CDOs as part of their market-making activity," and "the Grand Avenue offering circular explicitly disclosed that Wachovia could enter such short positions to form the CDO's 'Synthetic Securities,'" which the plaintiff acknowledged. The defendants assert that the plaintiff's request for additional swap documents should be denied because "[t]rading activity with respect to collateral that underlies the CDO, but does not reference the securities issued by the CDO or Synthetic Securities within

the CDO, is completely irrelevant." Furthermore, the plaintiff's request for any "profit and loss" documents concerning trades "related to swap" are "unnecessary, given Wells Fargo's "agreement to produce the transaction documents themselves, which individually provide the economics of each of Wachovia's positions and, collectively, indicate that Wachovia was perfectly hedged with respect to the synthetic securities in Grand Avenue and the Grand Avenue D Note."

The defendants assert that they decline to produce documents related to the SEC investigation "that do not pertain to Grand Avenue," given that the SEC investigation "substantially pertained to other matters and transactions that are not at issue here." The defendants contend that they have produced all SEC-related documents concerning GAII that are in their possession, custody and control. They maintain that they do not have the complete set of transcripts in connection with the SEC investigation or copies of the interviews and deposition exhibits used by SEC, and the plaintiff "failed to cite a single Grand Avenue-related document that served as a supposed exhibit but that Wells Fargo has failed to produced [sic]."

Concerning the plaintiff's request for documents pertaining to the alleged E&Y audit, the defendants contend that they do not have any responsive documents. The defendants assert that they have already produced a "draft version of [the] agreement" regarding GAII between themselves, "including drafts nearly identical to the allegedly missing attachments cited by Plaintiff in its Motion papers." The defendants maintain that they "have no obligation to produce further versions of these drafts: they are unrelated to the Wachovia's mark or Defendants' analysis of the CDO at the time and, in any case, are mooted by Defendants' productions of the final version and substantially identical prior drafts."

The defendants contend that the plaintiff's request for production of unredacted non-responsive documents is belated. Moreover, the majority of the documents are "unrelated to the subject matters responsive to Plaintiff's surviving claim," and "over half of the documents about which Plaintiff complains are not 'documents' at all. 4,178 of these 'missing documents' are automatically generated 'tmp' files containing no information that are generated when emails are sent with attachments." Other documents are "required disclosures regarding company responsibility for information contained in the communication." The defendants assert:

> In an effort to resolve this dispute, and without waiving its objections to relevancy, Defendants will produce a handful of attachments to the following documents that make specific reference to the CDO (although they are entirely irrelevant to any issue in this case): WF_LBBW_000081513; WF_LBBW_000003280; WF_LBBW_000004007; WF_LBBW_000070403; WF_LBBW_000074566; WF_LBBW:000004636; WF_LBBW 000004637; WF_LBBW_000001464. The remaining documents specifically cited in the Motion either do not reference the CDO or were already produced.

Concerning Bloomberg messages, the defendants contend that the plaintiff's request is untimely and mooted because the defendants already produced "all electronic communications–including to Bloomberg email addresses and instant messages." According to the defendants, the plaintiff "failed to cite a single Bloomberg email or message" within the defendants' search and production parameters "that LBBW has credible reason to believe exists but which Defendants allegedly did not produce." The defendants contend that the plaintiff's request for a "document destruction deposition" should be denied as untimely, and because plaintiff failed to present credible evidence of knowing spoliation.

***Plaintiff's Reply***

The plaintiff asserts that the defendants "ignore the thirty exhibits attached to LBBW's motion to compel which prove the existence of additional relevant documents" and "make no

effort to rebut the testimony of their own witnesses or the numerous admissions in their own documents." According to the plaintiff, the defendants claim that they have produced all the CDS swap documents and that they "are perfectly hedged and acted merely as an intermediary," but the only way to be certain that the defendants produced all swap documents is "to produce the appropriate P&L statements, including those covering the 'proprietary trading book,'" about which the defendants' witnesses testified. Moreover, Massi, on whose declaration the defendants rely in opposing the motion, "needs to be deposed because the evidence cited in his declaration does not support his conclusion, but rather raises more questions." The plaintiff asserts that, to evaluate Massi's declaration, the plaintiff

> needs the list of all GAII CDO investors, the amount invested in each security purchased, and with respect to Defendants Wachovia and Fortis, when they sold any such positions. Plaintiff must be given the opportunity to review the very documents that Defendants' witnesses and emails say reveal the truth about Wachovia's "short positions" – the appropriate P & L documents, including those associated with the "proprietary trading book," and the other documents now put in issue by Massi's declaration.

With respect to the "upfront swap" documents, the plaintiff asserts that, "[i]f they show that Wachovia reimbursed itself for any part of the $5.5 million in equity it retained from GAII through the upfront swap (paid for by investors), then that proves fraudulent conduct," and the plaintiff "is entitled to know."

The plaintiff maintains that "the SEC transcripts are replete with testimony on GAII and matters involving Wachovia's CDO business relevant to structuring and shorting GAII," and the defendants did not specify what "other matters and transactions" the SEC investigation involved. The plaintiff contends that the defendants "are disingenuously clever" when they assert, through Wright's declaration, that they do not have copies of "actual deposition exhibits used by the SEC

during the SEC interviews or testimony," which may be "literally true, but it is entirely deceptive," because

> the SEC could only mark as exhibits documents that Wachovia/Wells Fargo gave them – so obviously they had the documents in question. Moreover, if they don't have the documents in question now, then Barbara Wright's proffered testimony contradicts her prior statement during a Rule 30(b)(6) deposition in this case, asserting that Wells Fargo has retained all documents, correspondence and emails regarding its CDO business, under order of the Department of Justice in 2008.

The plaintiff seeks: (1) all documents used by the SEC as exhibits when it examined a limited number of witnesses: David Boling, James Burke, Dashiel Robinson, Thompson, Yu-Ming Wang and Jennifer Zelnick; and (2) the unredacted version of "PX 72," which was produced during Thompson's deposition after he asserted it existed, "even though counsel had repeatedly said it did not exist." The plaintiff contends that its document request is proper and it is not required to request expressly each document by name.

The plaintiff contends that the defendants must produce "[a]ll executed agreements between defendants (and their affiliated entities) regarding GAII," because the draft agreements they produced are not signed. Moreover, the plaintiff is entitled to all documents regarding the E&Y audit because the plaintiff's Exhibit PX 37, in support of the motion, shows that Wells Fargo retained E&Y to perform an audit and that E&Y began the audit process by collecting documents and interviewing employees. The plaintiff maintains that the defendants have no basis for redacting 9,133 documents for alleged non-responsiveness, and the defendants' assertion of non-responsiveness "begs the question: if the documents were truly non-responsive, why produce them at all?"

The plaintiff asserts that, contrary to the defendants' contention, the defendants did not produce any Bloomberg instant messages or chart, despite evidence that employees used

Bloomberg's instant messaging service. The defendants' contention that they already produced responsive documents is false because their "Exhibit 8 does contain emails that copy individuals with Bloomberg email addresses," but "none of the documents contained in Exhibit 8 are instant messages." The plaintiff contends it deserves to know what happened to all documents because Dashiell Robinson, the defendants' corporate representative on document retention policies, from 2006 to 2007, "admitted that he never reviewed the relevant policies." In an attempt to remedy the defendants' failure to prepare this witness, counsel to Wells Fargo "jumped into the conversation and represented that all documents related to Wachovia's CDO business in 2006 and 2007 were collected and preserved," which is inconsistent with the defendants' position here "that numerous documents do not exist or they are no longer in Defendant's' custody or control." The plaintiff asserts that without a deposition, it is impossible to know the basis for the defendants' conflicting statements, and seeks an opportunity for "a narrow corporate representative deposition on the topic of document retention and a deposition of Barbara Wright, who appears to be at the center of the issue." The plaintiff asserts it made timely discovery requests and the defendants failed to explain why they seek to have the Court deem discovery requests untimely that were served before the December 15th deadline. The defendants' argument that "the contours of the relief sought by LBBW do not perfectly align with the LBBW's pre-motion letters," is "deflecting from the merits of the motion in an attempt to avoid producing documents that are obviously relevant and responsive."

***Legal Standard***

> Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the

> importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.
>
> Fed. R. Civ. P. 26(b)(1).

"On notice to other parties and all affected persons, a party may move for an order compelling disclosure or discovery." Fed. R. Civ. P. 37(a)(1). Motions to compel, pursuant to Fed. R. Civ. P. 37, are left to the sound discretion of the district court. See United States v. Sanders, 211 F.3d 711, 720 (2d Cir. 2000).

***Application of Legal Standard***

Documents Related to the Defendants' Shorting Strategy

The defendants' assertion that the shorting strategy documents are not relevant because "Wachovia was perfectly hedged (as opposed to "short")" in its CDS positions referencing the CDO at issue, is not sufficient to demonstrate lack of relevance of the documents concerning the defendants' alleged shorting strategy. Whether "Wachovia was perfectly hedged (as opposed to "short")" in its CDS positions referencing the CDO at issue is not a matter that can be determined on the motion record before the Court, and it would be premature to make that determination on an incomplete record and at this stage of the litigation. The defendants' reliance on the Grand Avenue offering circular disclosure concerning the initial synthetic securities is also not sufficient to show that the documents concerning the defendants' alleged shorting strategy lack relevance, because what was disclaimed by any relevant disclaimer is a matter at issue in this action, as the assigned district judge noted in determining the motion to dismiss, and cannot be determined on the motion record or at this stage of the litigation. Furthermore, the defendants' position that the plaintiff's request for profit and loss documents concerning swap-related trades is "unnecessary" in light of "Wells Fargo's agreement to produce

the transaction documents themselves, which individually provide the economics of each of Wachovia's positions," without more, is not a valid objection to the plaintiff's request, since the plaintiff is entitled to conduct discovery in the manner it sees fit. The defendants do not contend that they actually produced such documents or demonstrate that producing them would be unduly burdensome, duplicative or expensive. The Court finds that the documents related to the defendants' shorting strategy are relevant and must be produced to the plaintiff.

Documents Related to the SEC Investigation of GAII

The plaintiff's attempt to obtain relevant documents concerning the SEC's investigation of GAII from the SEC, as suggested by the Court, was successful only partly, since the SEC asserted that producing all relevant documents was unduly burdensome. The plaintiff points to the inconsistency between the statements concerning document preservation and production, made by Wright at the deposition of Dashiell Robinson and those made in opposition to the instant motion. The Court finds that the plaintiff is entitled to all documents used by the SEC as exhibits when it obtained the testimony of David Boling, James Burke, Dashiell Robinson, Thompson, Yu-Ming Wang and Jenifer Zelnick. However, it appears from Wright's declaration in support of the defendants' opposition to this motion that Wells Fargo does not have: (i) possession, custody or control of complete transcripts of the testimony given to the SEC; or (ii) copies of the actual deposition exhibits used by the SEC either while it conducted interviews or when it obtained testimony during its investigation. Wright's statement at the deposition of Dashiell Robinson that all documents in connection with the SEC investigation have been preserved appears to be inconsistent with her statement on this motion that Wells Fargo does not have the SEC-related documents, suggesting possible spoliation. Accordingly, the plaintiff may

depose: (1) Wright; and (2) a corporate representative of the defendants on the topic of document retention.

Documents Related to Any Internal Audit by E&Y Related to GAII

The defendants contend that no responsive documents exist concerning the plaintiff's request for documents "pertaining to an alleged Ernst & Young audit of Wachovia's structured products unit," relying on Wright's statement that "no such audit was conducted." However, the plaintiff's document request does not only seek documents related to any audit E&Y "conducted"; rather, it seeks documents involving any audit "arranged, conducted or administered" by E&Y. Upon review of the exhibits submitted on this motion, the Court finds that the evidence shows that Wells Fargo retained E&Y to perform an audit and that E&Y began the audit process. Thus, even if no audit was conducted or completed, ultimately, by E&Y, the plaintiff may obtain documents E&Y collected in initiating the audit and the defendants must produce them to the plaintiff.

Defendants' Agreements Related to GAII

Although the defendants contend that they already produced their agreements regarding GAII, the plaintiff contends that the draft agreements produced are not executed. In its memorandum of law, the plaintiff requested only the agreements between the defendants, but in its reply the plaintiff seeks "[a]ll executed agreements between Defendants (and their affiliated entities) regarding GAII." However, neither the plaintiff's document requests nor its memorandum of law mentions the defendants' "affiliated entities," and the plaintiff failed to explain why it mentioned them in its reply. Thus, the plaintiff is not entitled to any agreement(s)

between the defendants and "their affiliated entities." However, the plaintiff must receive executed versions of all agreements between the defendants regarding GAII.

Unredacted 9,133 Documents and Unredacted PX 72

The plaintiff is correct that non-responsive documents should not have been produced. The plaintiff also notes the discrepancy between the defendants' assertion of the non-responsive nature of the documents produced and the coding of the non-responsive documents as they were produced, one of which, for example, shows Dashiell Robinson as a custodian and mentions GAII, which casts doubt on the asserted non-responsive character of the redacted documents. As no privilege is asserted by the defendants with respect to the redacted 9,133 documents, and they appear to be responsive and relevant to the plaintiff's document requests, they must be produced to the plaintiff unredacted.

The e-mail message, marked as PX 72 and produced during Thompson's deposition, has been redacted by the defendants without any explanation. Having asserted no privilege or explained the reason for redacting this document, the redaction was improper. The defendants must produce an unredacted version of the PX 72 e-mail message to the plaintiff.

Bloomberg's Instant Messages Regarding GAII

The defendants contend that they produced Bloomberg instant messages, relying on their Exhibit No. 8, submitted in the opposition to the motion, which they assert provides "examples of produced emails to Bloomberg addresses." However, the plaintiff requested Bloomberg's instant messages, not e-mail messages to individuals with Bloomberg e-mail addresses, which is what Exhibit 8 demonstrates. Therefore, the defendants must produce Bloomberg instant messages to the plaintiff.

Request for Depositions

Upon review of the record on the motion, the Court is persuaded by the plaintiff's argument that Massi's declaration, including the evidence cited and conclusions made in it, raises relevant issues that need to be explored in connection with the claims and defenses in this action. Therefore, deposing Massi is warranted. As explained above, deposing Wright is also warranted.

***Conclusion***

For the foregoing reasons, the plaintiff's motion to compel, Docket Entry No. 123, is granted. The defendants must: (a) produce the documents as directed in this order, on or before March 31, 2016; and (b) make the deponents available for examination no later than April 29, 2016.

Dated: New York, New York
March 29, 2016

SO ORDERED:

KEVIN NATHANIEL FOX
UNITED STATES MAGISTRATE JUDGE