

<b>Netologic Inc., v Goldman Sachs Group Inc.</b>
2016 NY Slip Op 30584(U)
April 5, 2016
Supreme Court, New York County
Docket Number: 600394/2009
Judge: Saliann Scarpulla
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : PART 39

-----X  
NETOLOGIC INC, INVESTARS,

Plaintiffs,

**DECISION/ORDER**  
**Index No. 600394/2009**

-against-

GOLDMAN SACHS GROUP INC, WALL STREET ON  
DEMAND INC, BEVERLY WESTLE

Defendants.

-----X  
HON. SALIANN SCARPULLA, J.:

In this action, plaintiff Netologic, Inc. (“Netologic” or “plaintiff”) moves pursuant to CPLR § 3103 for a protective order related to more than 260 pages of emails that include communications with Andrew Brint (“Brint”), a CPA and Netologic’s accountant, and Scott Williams (“Williams”), an individual working within the public relations field. Plaintiff also moves for a protective order related to 40 pages of emails that include communications with Devanshi Patel (“Patel”), a CPA who was retained in connection with a divorce proceeding involving Netologic’s CEO. Defendant The Goldman Sachs Group, Inc. (“Goldman” or “defendant”) opposes the motion and cross-moves, pursuant to CPLR § 3124 to compel the Brint, Williams, and Patel communications, as well as to compel production of unredacted versions of documents previously ordered to be produced or discussed in plaintiff’s motion and business

communications that are currently listed on plaintiff's privilege log. Defendant additionally requests sanctions against Netologic.

Netologic's claim of privilege over certain documents, and defendant's dispute of that assertion of privilege, has been the subject of a number of status conferences. Relevant here, in a September 30, 2015 conference order, plaintiff was required to produce documents containing communications with Brint or Williams that were previously submitted for *in camera* review. Also, in the order plaintiff was directed to make a motion related to the production of these documents by October 16, 2015. The order also directed plaintiff to produce documents including Patel, redacting non-responsive information related to plaintiff's CEO's divorce, and it ordered that certain redacted documents that were the subject of a September 8, 2015 letter from defendant's counsel be produced by October 9, 2015 or be addressed in any motion that plaintiff would make by October 16, 2015.

In accordance with the September 30, 2015 status conference order, Netologic now moves for a protective order related to the Brint, Williams, and Patel communications. First, Netologic argues that the emails previously submitted for *in camera* review are privileged and therefore may be withheld from production. It additionally argues that the documents are not "material and necessary" as discussed in CPLR § 3101(a). Specifically related to this argument, Netologic points to the fact that the emails in question post-date the filing of this lawsuit and that some of the communications contain sensitive information justifying non-production—information related to the divorce of plaintiff's CEO and Netologic's taxes.

Defendant opposes plaintiff's motion and cross-moves to compel. First, as to the Brint and Williams documents, defendant argues that the Court has already found that these documents are not privileged and therefore the documents should be produced. It also argued that Netologic has no grounds for withholding production of the Patel emails. Second, Goldman argues that Netologic should be compelled to produce unredacted versions of documents Netologic was ordered to produce in a September 30, 2015 status conference order, as well as business communications that are on plaintiff's privilege log. Finally, defendant argues that Netologic should be sanctioned for its conduct during discovery, and it requests the following sanctions: dismissing Netologic's claims, striking Netologic's defenses to Goldman's counterclaims, directing that Netologic produce all documents listed on its privilege log, and/or "a monetary penalty — in an amount sufficient to reimburse Defendant for the costs and fees incurred in attempting to enforce Plaintiff's discovery obligations and attending what should have been unnecessary compliance conferences."

### **Discussion**

CPLR § 3101(a) mandates that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof." The Court of Appeals has stated that "[t]he words, 'material and necessary', are, in our view, to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason." *Allen v. Crowell-Collier Publ'g Co.*, 21 N.Y.2d 403, 406 (1968). Any

protective order issued pursuant to CPLR § 3103(a) “shall be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts.”

The currently viable claims in this action are Netologic’s breach of contract claims based on Netologic’s allegations that “[defendant] breached its duty under the parties’ licensing and distribution agreement (LDA) to engage in ‘commercially reasonable efforts’ to sell plaintiff’s product to Goldman’s own customers” and that “Goldman breached the LDA’s confidentiality provisions.” *Netologic, Inc. v. Goldman Sachs Grp., Inc.*, 110 A.D.3d 433, 433 (1st Dep’t 2013). Additionally, Goldman has two breach of contract counterclaims, alleging that Netologic failed to pay distribution fees as indicated under the LDA and failed to provide defendant with certain financial documentation pursuant to the License and Warrant Purchase Agreement.

*Communications with Brint and Williams*

Determining whether the Brint and Williams communications are “material and necessary in the prosecution or defense of an action,” may obviate the need to analyze the documents for privilege. *See* CPLR § 3101(a). Here, the Brint documents, which post-date the filing of the complaint by at least many months, include discussions regarding documents for McClatchy, who Netologic claims is a “Public Relations firm,” tax issues, a stock plan for employees and a program allowing for stock repurchase, and payroll. None of these discussions are “material and necessary” to either party’s claim or defense to the existing breach of contract causes of action. Similarly, the Williams communications, which post-date the filing of the complaint by at least many months, are

not “material and necessary” to the causes of action or defenses in this case. Merely because a communication concerns this action does not mean that it supports a party’s claims or defenses. Accordingly, Netologic’s request for a protective order over the Brint and Williams communications is granted, and that portion of the September 30, 2015 status conference order that directs the plaintiff to produce the Brint and Williams documents is vacated.

*Communications with Patel*

The Patel documents include discussions about costs, including legal costs, related to this action, a mention of an unrelated Goldman litigation, public relations efforts and a letter-writing campaign, tax issues, and a stock plan for employees. These discussions are not “material and necessary in the prosecution or defense of an action,” and none of the documents contain an assessment of plaintiff’s damages in this litigation. At best, in two identical communications dated from May of 2010, there is a fleeting discussion of Netologic’s profits and losses for 2008, 2009, and perhaps 2010. However, this vague discussion is not “material and necessary” in light of the fact that Netologic has provided its customer sales records through 2014, as well as various other financial documentation. Therefore, Goldman’s cross-motion to compel the Patel emails is denied, and that portion of the September 29, 2015 status conference order which orders the production of the Patel communications with redactions on non-responsive information related to Netologic’s CEO’s divorce is vacated.

### Redacted Documents

In a September 30, 2015 status conference order, plaintiff was ordered to produce certain redacted documents that were the subject of defendant's counsel's September 8, 2015 letter or, should plaintiff not produce those documents, it would address those documents in its motion. Plaintiff has not directly addressed these documents in its motion, and Goldman represents that these documents were not produced. Should the documents previously produced in redacted form be the documents discussed above and found to be not "material and necessary," such as the Patel e-mails, Netologic need not produce those documents in unredacted form. If, however, the redacted documents relate to other communications, such as defendant's exhibit 11—a redacted document, which does not appear to be one of the documents discussed above—then plaintiff is directed to produce those documents by April 30, 2016 in unredacted form.

### Business Communications

In its cross-motion, Goldman requests that Netologic be required to produce "all business communication[s] currently listed on Plaintiff's privilege log." Netologic previously provided Goldman with an affirmation, albeit belatedly, stating that it had undertaken a good faith privilege review. However, as with the redacted documents, Netologic does not discuss these business communications in its opposition to Goldman's motion. Keeping in mind that "business or personal communications" are not privileged and that a document "does not become privileged merely because it was sent to an attorney," should Netologic's privilege log continue to contain non-privileged business communications, those documents should be produced to Goldman. *Rossi v. Blue Cross*

*& Blue Shield of Greater N.Y.*, 73 N.Y.2d 588, 593 (1989); *Spectrum Sys. Intl Corp. v. Chem. Bank*, 78 N.Y.2d 371, 379 (1991). Netologic's production of any non-privileged business communications, if any, must be completed by April 30, 2016. Should plaintiff not have any responsive documents within this category, it will supply Goldman with an affirmation containing that information by April 30, 2016

### Sanctions

In its cross-motion, Goldman also requests a bevy of sanctions ranging from striking the complaint to costs and fees. It seeks these sanctions based on "Plaintiff's willful delay of discovery for almost two years, its repeated failure to comply with Court orders without any justification, its continued attempts to withhold clearly relevant and responsive documents through the assertion of entirely meritless privilege objections, and its false representations to the Court." At at this time, the Court denies Goldman's motion for sanctions without prejudice to renew its motion if, it does not receive by April 30, 2016 documents or an affirmation stating Netologic does has not have any responsive business communications to produce, in accordance with this decision and order.

The parties and I are all disappointed in the lack of progress in this nearly seven year old action. Therefore, this Court orders that all paper discovery be completed by April 30, 2016, and that all depositions be completed by September 30, 2016. The note of issue deadline is extended to December 30, 2016 to accommodate expert discovery prior to the filing of the note of issue. The aforementioned dates shall not be adjourned without prior permission from the Court, which permission will not be granted except upon a showing of unanticipated, emergency circumstances.

In accordance with the foregoing, it is hereby

ORDERED that plaintiff Netologic, Inc.'s motion for a protective order regarding the 32 Andrew Brint and Scott Williams communications, as well as the Devanshi Patel documents, is granted, and the portion of the September 30, 2015 status conference order directing their production is vacated; and it is further

ORDERED that the portion of defendant The Goldman Sachs Group, Inc.'s cross-motion to compel production of the Andrew Brint, Scott Williams, and Devanshi Patel communications which are the subject of plaintiff's motion for a protective order is denied; and it is further

ORDERED that the portion of defendant The Goldman Sachs Group, Inc.'s cross-motion to compel the production, in unredacted form, of redacted documents discussed in defendant's September 8, 2015 letter is granted and production must occur by April 30, 2016, but only if the underlying document is not one that the court has determined need not be produced in this decision and order; and it is further

ORDERED that the portion of defendant The Goldman Sachs Group, Inc.'s cross-motion to compel the production of business communications on Netologic Inc.'s privilege log is granted, and such production must occur by April 30, 2016. Should there be no responsive documents within this category, plaintiff will supply defendant with an affirmation so affirming by April 30, 2016; and it is further

ORDERED that the portion of defendant The Goldman Sachs Group, Inc.'s cross-motion for sanctions is denied without prejudice to renew if it does not receive by April 30, 2016 certain redacted documents in unredacted form, as described above, and

business communications previously listed on Netologic Inc.'s privilege log, or an affirmation stating that no such business communications are left to be produced; and it is further

ORDERED that all paper discovery must be completed by April 30, 2016, all depositions must be completed by September 30, 2016, and the note of issue is extended to December 30, 2016. The aforementioned dates shall not be adjourned without prior permission from this Court; and it is further

ORDERED that counsel are directed to appear for a status conference in Room 208, 60 Centre Street, on June 15, 2016, at 2:15 PM.

This constitutes the decision and order of the Court.

DATE:

4/5/16

  
SALIANN SCARPULLA, JSC