UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Lifeway Foods, Inc. Plaintiff, v. Edward Smolyansky and Ludmila Smolyansky, d/b/a Pure Culture Organics, Inc., Defendants.	)	Case No. 1:24-cv-02601 Judge Jorge L. Alonso Magistrate Judge Jeffrey T. Gilbert

DEFENDANTS' MOTION FOR RECONSIDERATION OF ORDER GRANTING PLAINTIFF'S EMERGENCY MOTION FOR PROTECTIVE ORDER AND FOR AWARD OF ATTORNEYS' FEES

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In this trade secrets case, Plaintiff Lifeway Foods, Inc. previously obtained a protective order preventing Defendants from issuing subpoenas to four Lifeway customers that sell Lifeway's alleged "trade secret" kefir formula under their own labels. Defendants sought to establish that Lifeway's purported trade secrets were shared with third parties and not kept secret by them. Lifeway's central claim in its Emergency Motion for Protective Order was that these White Label Customers "do not know Lifeway's trade secret formula, nor do they have insight into the procedures Lifeway uses to keep them secret." (ECF No. 18 at 2.) Lifeway even claimed that the ***only*** information available to the customers was the same "information consumers can obtain from the product label." (ECF No. 18-1 at ¶ 9.) In support of these contentions, Lifeway relied upon declarations from its Chief of Staff, Jason Burdeen, and two other Lifeway employees. Based on those declarations and Lifeway's arguments premised on them, the Court granted Lifeway's Emergency Motion for Protective Order. Defendants understood the Court's reasoning and did not appeal the ruling.

However, at his May 1, 2024 deposition, Mr. Burdeen admitted in his individual capacity and as Lifeway's corporate representative that those Declarations were false and that the White Label Customers do in fact know the primary aspects of Lifeway's alleged trade secret formula. Specifically, he admitted that the key paragraphs in his original declaration in support of Lifeway's Motion (ECF No. 18-1) and his second declaration attached to Lifeway's Reply (ECF No. 25-1) regarding what is shared with third parties were untrue. Thus, all the key statements in both Lifeway's Motion and Reply citing them were also untrue. (*See* ECF Nos. 18, 25.) Lifeway chose to not take remedial steps to alert Defendants or the Court that the key factual averments in its declaration and filings were false, but rather waited to see whether Defendants would challenge Mr. Burdeen's declarations during his deposition and force him to admit they were false.

Lifeway now takes the opposite position as it took in its Emergency Motion for Protective Order and contends that its most sensitive trade secrets—secrets ***so sensitive*** that Lifeway designated

the documents it shares with third parties as "Attorneys' Eyes Only" and thus unable to be shared with Defendants, even though Lifeway has alleged that Defendants already know and use them—are in fact shared with these third parties. In order to maintain its position that these are trade secrets, Lifeway must now also assert that the information remains confidential because of the extensive measures those third parties take to ensure their secrecy. This highlights the importance of the third-party discovery the Court previously prohibited based on Lifeway's false representations that these third parties had no trade secret information. In addition, Mr. Burdeen's deposition testimony and Lifeway's document production confirm that Lifeway does not have confidentiality agreements in place with all of its White Label Customers, and that the confidentiality agreements that do exist contain substantial exceptions. Mr. Burdeen also admitted that Lifeway does not know the steps these third parties take to ensure the secrecy of this information, if any.

This newly discovered evidence and change in Lifeway's position—which directly contradict Lifeway's assertions in its Motion and were not previously accessible to Defendants—warrant reconsideration of the Order granting Lifeway's Emergency Motion for Protective Order and an order awarding Defendants their attorneys' fees for contesting Lifeway's Motion.

BACKGROUND

I. Procedural History

On April 1, 2024, Lifeway filed suit against Defendants Edward and Ludmila Smolyansky—former Lifeway employees and board members—alleging that Defendants violated the Defend Trade Secrets Act by misappropriating Lifeway's trade secret kefir formula. (ECF No. 1, ¶¶ 53-62.) Lifeway alleged that its "ratio of the[] kefir cultures in each product, and their proportions to other ingredients, are among the most valuable trade secrets Lifeway maintains" and that "[a]ccess to the formulas are on a need-to-know basis, with only select employees having access to them." (*Id.* ¶¶ 25, 27.) Lifeway moved for a temporary restraining order (ECF No. 4), which was denied with respect to the trade

secret claim (ECF No. 23). The Court entered an expedited discovery schedule, under which document discovery concluded on April 25 and all other discovery shall be completed by May 10. (ECF No. 16.) A preliminary injunction hearing is scheduled for May 29. (*Id.*)

II. Plaintiff's Emergency Motion for Protective Order

While Defendants will show that they have not misappropriated Lifeway's formula, they also intend to defeat Lifeway's claim by establishing that Lifeway's kefir formula is not a trade secret because Lifeway has not made reasonable efforts to keep it secret. Central to this defense are the facts establishing that Lifeway shares significant information about its product formulas and ingredient ratios with "White Label Customers"—brands that sell Lifeway's products under their own labels—and that those White Label Customers do not, in turn, keep confidential Lifeway's information. Defendants notified Lifeway that they intended to subpoena four White Label Customers for short Rule 30(b)(6) depositions to develop this evidentiary record.

Lifeway filed its Emergency Motion for Protective Order ("Motion") to prevent Defendants from issuing those subpoenas. (ECF No. 18.) In its Motion, Lifeway argued that the subpoenas would serve no purpose because "the customers that Defendants seek to subpoena for deposition do not know Lifeway's trade secret formula, nor do they have insight into the procedures Lifeway uses to keep them secret." (*Id.* at 2.) In support of its position, Lifeway submitted the Declaration of its Chief of Staff, Jason Burdeen. (ECF No. 18-1.) Mr. Burdeen's Declaration contained the following statements, made under penalty of perjury:

> 6. Lifeway does not disclose to its White Label Customers any facet of its trade-secret formulas for making Lifeway's kefir products (including for the kefir the White Label Customers sell under their own private labels). That is, Lifeway does not provide the White Label Customers with any of the secret ratios of ingredients to make Lifeway's kefir, nor does Lifeway provide the White Label Customers the secret formula to heat and cool those ingredients to derive the perfect formulation or the secret PH levels necessary to achieve Lifeway's unique kefir products.
>
> 8. ***The White Label Customers do not know the trade secrets at issue here and have no insight into the procedures Lifeway uses to keep them secret.***

9. All Lifeway provides to its White Label Customers is a list of ingredients and nutritional information—all information consumers can obtain from the product label.

(*Id.* ¶¶ 6, 8-9 (emphasis added).) In opposing Lifeway's Motion, Defendants explained that based on their knowledge gained during their time at Lifeway, these assertions were untrue. (ECF No. 21 at 4.) In its Reply, Lifeway doubled down on these statements, providing new declarations from Mr. Burdeen and two other Lifeway employees (ECF Nos. 25-1, 25-2, 25-3) and arguing again that "Lifeway's White Label Customers are not provided and do not know any facet of Lifeway's trade-secret formulas for making Lifeway's kefir products." (ECF No. 25 at 5.) Mr. Burdeen's second Declaration stated:

5. And while Edward may "believe" that certain statements in my declaration are false, ***I know all of the statements in my April 10, 2024 declaration to be true.***

6. For example, I know—based on my supervision of the production function of Lifeway—that White Label Customers are not provided and do not know Lifeway's trade-secret formula for making Lifeway's kefir products (including for the kefir the White Label Customers sell under their own private labels). That is, Lifeway does not provide the White Label Customers with the secret ratios and processes for creating its kefir: the ratios of ingredients to the various cultures and the processes to heat and cool those ingredients to derive the perfect formulation or the PH and viscosity levels necessary to achieve Lifeway's unique kefir products.

8. Lifeway only provides nutritional and ingredient information to White Label Customers to satisfy their concerns over product safety and nutritional value. And all of that information is similar to what consumers see on the product label. ***In no circumstance does Lifeway ever provide its White Label Customers with its trade secret formula.***

(ECF No. 25-1, ¶¶ 5-6, 8 (emphases added).) The Court granted Lifeway's Motion at a hearing held on April 16, 2024. (ECF No. 27.)

III. Newly Discovered Evidence regarding Information Shared with White Label Customers

On May 1, 2024, Defendants deposed Mr. Burdeen in his individual capacity and as Lifeway's corporate representative. Lifeway designated Mr. Burdeen as its representative on every topic for which it agreed to be deposed, including Topic No. 4: "All information and processes relating to the ingredients in Your kefir and how You make kefir that has been shared with White Label Customers

that sell kefir made by You." (Ex. 1, Lifeway Resp. to Not. of Rule 30(b)(6) Dep. at 4.) At deposition, Mr. Burdeen for the first time revealed—in both his personal capacity and as Lifeway's corporate representative—that several of the statements in his Declarations were inaccurate and that Lifeway shares some of its purported trade secrets with White Label Customers. (*See* Ex. 2, J. Burdeen Dep. Tr. at 50-70.)[1] Specifically, Mr. Burdeen testified (on behalf of himself and Lifeway) that Lifeway provides the amounts of ingredients and ratios of ingredients in its products with White Label Customers, and that Lifeway considers this information to be part of its trade secrets:

[redacted]

(*Id.* at 54:22-55:1.)

[redacted]

(*Id.* at 60:21-24.)

[redacted]

(*Id.* at 59:15-21.)

Mr. Burdeen's deposition testimony regarding information shared with White Label Customers is consistent with documents that Lifeway produced a few days earlier, which include

[1] Defendants have attached as Exhibit 2 the relevant portions of the rough transcript of Mr. Burdeen's deposition, as the final transcript is not yet available. Defendants have filed it under seal based on counsel for Lifeway's statements designating all of Mr. Burdeen's testimony as "Confidential" or "Attorneys' Eyes Only," though Defendants do not agree with these designations. To avoid unnecessary disputes over sealing, however, Defendants have included in the publicly available portions of its filings only statements containing the same level of detail regarding Lifeway's purported trade secrets as are contained in Lifeway's public filings in support of its Emergency Motion for Protective Order (ECF Nos. 18, 18-1, 25, 25-1, 25-2, 25-3).

screenshots of the White Label Customer portals. These portals include ingredient lists, ingredient ratios (including for culture strains), the composition of the cultures, PH and viscosity targets, as well as the identities of Lifeway's ingredient suppliers. (*See, e.g.*, Exs. 3-4, Portals (Lifeway_PCO-0000584; Lifeway_PCO-0000642).)[2]

IV. Newly Discovered Evidence regarding Confidentiality Agreements

Lifeway's document production also confirms that Lifeway does not, in fact, have confidentiality agreements in place with all of its White Label Customers. Defendants requested copies of "[a]ll agreements and policies applicable to third parties, including but not limited to . . . Private Label Customers, related to keeping secret the formulas of Your Products . . ." (Ex. 5, Lifeway Resp. to RFPs at RFP No. 3.) Lifeway agreed to provide all responsive agreements and policies currently in effect. (*Id.*) However, Lifeway did not produce any confidentiality agreements with [redacted]—two of the four White Label Customers Defendants seek to subpoena.

The White Label Customer agreements Lifeway did produce contain significant exceptions and loopholes. For example, the confidentiality provision in the agreement between Lifeway and the White Label Customer identified in Exhibit 6 does not require this White Label Customer's employees with access to Lifeway's information to sign confidentiality agreements, and specifically excludes from covered confidential information anything that was previously known to this White Label Customer, is in the public domain, is learned from a third party, or is independently developed by this White Label Customer. (Ex. 6, Lifeway_PCO-0000283 at § 10.) Mr. Burdeen testified that he [redacted]

[2] Defendants have also filed these documents under seal based on Lifeway's "Attorneys' Eyes Only" designation, with which Defendants do not agree. These portals shown in these documents are described publicly herein at the same level of specificity as provided in the Declarations of Ms. Morgan and Ms. Held (ECF Nos. 25-2, 25-3).

[redacted] (Ex. 2, J. Burdeen Dep. Tr. at 135:2-10; 136:7-137:11.)

Furthermore, while Mr. Burdeen stated in his Declaration that "[e]ach of the contracts with the White Label Customers requires that Lifeway maintain the confidentiality of the fact that Lifeway is the manufacturer and source of the grocer's private label products" (ECF No. 18-1, ¶ 13), this provision is not included in all of the contracts Lifeway produced. (*See, e.g.*, Ex. 6, Lifeway_PCO-0000283.) Moreover, while Lifeway claimed one of the White Label Customer agreements contained such a provision that is quoted in Paragraph 12 of its Motion for Leave to File Under Seal, Defendants have been unable to locate this agreement in Lifeway's productions. (*See* ECF No. 24, ¶ 12.)

Lifeway's document production also undermines Lifeway's prior submissions to the Court regarding the confidentiality agreements it has in place. For example, Lifeway's Motion for Temporary Restraining Order stated that Lifeway has "enter[ed] into confidentiality agreements with only a select few employees having access to its trade secrets" (ECF No. 5 at 10 (citing ECF No. 5-1 ¶ 17, which does not address confidentiality agreements)), yet in response to Defendants' request for production of such agreements it only produced agreements for ***three employees***—none of whom were Mr. Burdeen. (*See* Ex. 5, Lifeway Resps. to RFPs at RFP No. 2.)

V. Newly Discovered Evidence regarding the Basis for Lifeway's Trade Secret Claim

In Mr. Burdeen's Declaration accompanying Lifeway's Motion, he stated that the secret "ratios" and "formula" at issue in this case are the same ones that Defendant Edward Smolyansky "boasted he misappropriated in a June 16, 2023 text message to me." (ECF No. 18-1, ¶ 7.) This is the same text message that Lifeway quoted in its Complaint and Motion for Temporary Restraining Order. (*See* ECF No. 1 at ¶ 32; ECF No. 5 at 4.) Defendants have repeatedly pointed out that Lifeway has not provided a copy of this text message to the Court with any of its filings. (*See* ECF No. 15 at 11; ECF No. 21 at 3.) When Lifeway finally produced the text, it become apparent why not: the quotes in

Lifeway's filings omitted words that completely altered its meaning:


ES Ed Smolyansky <847[redacted]> 6/17/2023, 4:03 AM
Terrible lighting. Still tired from surgery but [redacted] says hello. And he gave baby Michael the necklace you yelled at me for years about. Full circle so you don't need to worry. It's back in the rightful place.
Image: ~_Library_SMS_Attachments_d8_08_E241E419-5B99-447E-BDF7-DEB3A298DFCB_IMG_5994.jpeg (4 MB)
ES Ed Smolyansky <847[redacted]> 6/17/2023, 4:05 AM
I bought the secret formula from [redacted] also. Shhhh don't tell anyone. Top secret project.

(Ex. 7, Lifeway_PCO-0000138.) In this text, Defendant Edward Smolyansky did not say he bought ***Lifeway's*** "secret formula"—rather he jokingly said he bought the "secret formula" made by his friend who owns the culture company that supplies Lifeway with its cultures and culture blends.

As revealed at Mr. Burdeen's deposition, [redacted]. (Ex. 2, J. Burdeen Dep. Tr. at 78:1-80:7.) Lifeway's corporate representative further admitted that [redacted]. (*Id.* at 85:1-10.)

VI. Additional Evidence Undermining Lifeway's Trade Secret Claim

Because Lifeway designated a substantial portion of its document production "Attorneys' Eyes Only," counsel for Defendants have been forced to rely on third-party publications of Lifeway's process to form the basis for communications with their clients. These sources are readily available, however, because Lifeway routinely allows film crews into its facilities. Counsel for Defendants have found several broadcasts of Lifeway's facility online including, for example, those shown in the

screenshots below of live television programs filmed inside Lifeway's production plant and broadcast to the Chicago metropolitan area. In these clips, Lifeway's "secret" process is at least partially revealed, including the sequences of the process, the measuring of ingredients, and the room where the "secret ingredients" are stored.[3]

[3] The images below are taken from https://wgntv.com/video/around-town-lifeway-foods/8871505/ (first image); https://wgntv.com/video/around-town-lifeway-foods/8871342/ (second image); and https://www.youtube.com/watch?v=3_FY4vD76Bg (third image).

Most importantly, the clips also repeatedly show the recording charts on the tanks that measure the time and temperature of each stage of the purportedly trade secret process. These recording charts are the same document that Lifeway has produced in this case as documenting its "secret process of heating and cooling," which Lifeway marked as "Attorneys' Eyes Only" so that Defendants are not allowed to see it.[4]

[4] https://www.youtube.com/watch?v=3_FY4vD76Bg.

LEGAL STANDARD

Any interlocutory order "may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities." Fed. R. Civ. P. 54(b). Motions for reconsideration are an appropriate vehicle "to present newly discovered evidence." *Caisse Nationale de Credit Agricole v. CBI Indus., Inc.*, 90 F.3d 1264, 1269 (7th Cir. 1996) (quoting *Keen Corp. v. Int'l Fid. Ins. Co.*, 561 F. Supp. 656, 665 (N.D. Ill. 1982)). "To support a motion for reconsideration based on newly discovered evidence, the moving party must 'show not only that this evidence was newly discovered or unknown to it until after the hearing, but also that it could not with reasonable diligence have discovered and produced such evidence [during the pendency of the motion].'" *Id.* (quoting *Engelhard Indus., Inc. v. Research Instrumental Corp.,* 324 F.2d 347, 352 (9th Cir. 1963)) (alteration in original).

ARGUMENT

I. Reconsideration Is Appropriate Based on the Newly Discovered Evidence Contradicting Mr. Burdeen's Declarations.

A. Mr. Burdeen's Admissions that His Declarations were False and that Lifeway Shares its Trade Secret Formula with Third Parties Justify Reconsideration.

The Court should reconsider its order granting Lifeway's Emergency Motion for Protective Order and allow Defendants to issue subpoenas to the four White Label Customers based on the newly discovered evidence that Lifeway does share several of its purported trade secrets at issue in this case with White Label Customers and that Lifeway does not know what measures they take to keep Lifeway's information confidential. (*Compare* ECF No. 18 at 2 ("[T]he customers that Defendants seek to subpoena for deposition do not know Lifeway's trade secret formula, nor do they have insight into the procedures Lifeway uses to keep the formula secret") *with* Ex. 2, J. Burdeen Dep. Tr. at 54:22-55:1 ("Q: [redacted] A: [redacted]") *and id.* at 135:2-10 ("Q: [redacted]

[redacted] [Objection] A: [redacted] [redacted]").

This information was revealed to Defendants through the testimony at Mr. Burdeen's May 1, 2024 deposition and documents produced by Lifeway on April 25, 2024. Defendants could not with reasonable diligence have discovered this evidence any sooner, as it was in the exclusive custody of Lifeway (and the White Label Customers that Defendants were not permitted to subpoena). Even under the expedited discovery schedule, there was no mechanism by which Defendants could have obtained deposition testimony or documents from Lifeway between the filing of Lifeway's Motion on April 11 and the April 16 hearing. In fact, Defendants issued discovery requests seeking related information from Lifeway less than 24 hours after Lifeway filed its Motion. Therefore, reconsideration of the Court's order is appropriate based on this newly discovered evidence that goes to the heart of Lifeway's Motion for Protective Order. *See Webster Bank, N.A. v. Pierce & Assocs., P.C.*, 2018 WL 704693, at *3-5 (N.D. Ill. Feb. 5, 2018) (granting reconsideration of order denying motion to compel where party's corporate representative made admissions at deposition that directly contradicted party's position in briefing the motion); *MSTG, Inc. v. AT & T Mobility LLC*, 2011 WL 841437, at *1-2 (N.D. Ill. Mar. 8, 2011) (granting motion to reconsider order denying motion to compel based on newly discovered evidence).

Mindful of the Court's consideration of the potential harm alleged in Lifeway's Motion, Defendants have proposed a narrowed list of topics that they believe is appropriate for depositions of the White Label Customers. (*See* Ex. 8, Proposed Subpoena Rider.) To further minimize the burden on these White Label Customers and avoid additional depositions, in the cover letter to the subpoena that Defendants would include, Defendants suggest a short affidavit in lieu of a deposition. (*Id.*)

While Mr. Burdeen apparently stands by the accuracy of the portions of his Declarations regarding the potential harm the subpoenas could cause, the Court should not give weight to those

assertions—or any testimony from Mr. Burdeen—because the record evidence undermines Mr. Burdeen's credibility and reveals that he doesn't know what he doesn't know about Lifeway's relationships with its White Label Customers or its trade secrets. It speaks volumes about the merits of Lifeway's claims that it selected Mr. Burdeen as its sole corporate representative, notwithstanding its knowledge of the above. Moreover, as the collective owners of 30% of Lifeway's stock, Defendants would bear greater damage than anyone if Mr. Burdeen's concerns of harm were real—but they aren't.

B. Lifeway's Disclosure of its Purported Trade Secrets to Numerous Third Parties Makes Defendants' Request for Narrow Third-Party Discovery Appropriate.

Reconsideration is also warranted because Lifeway has abandoned the positions it took in its Motion for Protective Order and now asserts the opposite. Since the April 16, 2024 hearing on Lifeway's Motion for Protective Order, fact discovery and Defendants' investigation have revealed: (1) Lifeway discloses its trade secrets with White Label Customers, as addressed above; (2) the text message that Lifeway described as showing that Defendant Edward Smolyansky obtained Lifeway's formula actually states that he purchased a formula from a third party; and (3) Lifeway frequently permits film crews to broadcast its production operations. Based on this newly discovered evidence, it appears Lifeway's claim is that its product is based on trade secret ingredients manufactured by a third party, which Lifeway then shares with other third parties (and occasionally broadcasts on television), but Defendants are not entitled to third-party discovery due to potential harm that is only supported by the declarations of Mr. Burdeen, who has already had to recant multiple statements submitted to this Court under penalty of perjury. Thus, not only do third parties have clearly relevant information regarding what steps, if any, are taken to keep Lifeway's trade secrets confidential, but Defendants cannot take Lifeway's discovery responses, documents, and witnesses at their word.

In contrast, Defendants have been as transparent as possible throughout discovery in any attempt to swiftly bring an end to this litigation. To that end, Defendants have produced more than 900 documents, including all email and text message communications between Defendants and (i) the

cultures supplier used for Pure Culture Organics, or (ii) the third-party manufacturer that made the test batch of Pure Culture Organics kefir served at the Expo West trade show. These documents indisputably show that Pure Culture Organics uses different ingredients sourced from different suppliers, different cultures, different ratios, and a different manufacturing process—for example, the fermentation time used for Pure Culture Organics was approximately half the fermentation time Lifeway uses.[5] Nonetheless, Lifeway has put on its blinders and ignored the clear evidence that Pure Culture Organics products were made with different ingredients through a different process—*i.e.*, there has been no misappropriation. Thus, Defendants are left with no choice but to vigorously defend this claim on the basis that Lifeway's formula is not actually a trade secret in order to dissuade Lifeway from continuing to pursue this non-meritorious lawsuit at great expense to both parties.

II. Defendants Should Be Awarded Their Attorneys' Fees in Connection with Lifeway's Motion for Protective Order and this Motion.

Defendants incurred $13,561 in attorneys' fees for the briefing and hearing on Lifeway's Motion for Protective Order, and additional fees in connection with preparing this Motion for Reconsideration. (*See* N. Callahan Declaration at ¶ 10.) Pursuant to Federal Rule of Civil Procedure 37(a) and the Court's inherent power to fashion sanctions, Defendants request that the Court order Lifeway to pay these fees because Lifeway's Motion was based on false evidence. *See United States v. Petersen Sand & Gravel, Inc.*, 806 F. Supp. 1346, 1362 (N.D. Ill. 1992), *on reconsideration* (Nov. 9, 1992) (awarding attorneys' fees to third-party defendant in connection with successful motion for reconsideration where third-party plaintiff made false representations in connection with summary judgment motion). The need for the prior motion practice would have been obviated had additional due diligence been conducted prior to filing the Motion for Protective Order, and the instant Motion could have been avoided had Lifeway taken remedial measures once the error was discovered. Lifeway

[5] *See* https://lifewaykefir.com/faq/ ("Lifeway Kefir contains 12 live and active probiotic cultures and is fermented for 14-18 hours after pasteurization.").

should be required to bear the attorneys' fees imposed on Defendants as a result of Lifeway's Motions based upon false statements.

CONCLUSION

For the forgoing reasons, Defendants respectfully request that the Court grant Defendants' Motion for Reconsideration of Plaintiff's Emergency Motion for Protective Order Barring Defendants' Rule 30(b)(6) Subpoenas to Plaintiff's Customers, award Defendants their attorneys' fees for litigating Plaintiff's Motion for Protective Order and the instant Motion for Reconsideration, and grant any other relief that this Court deems just and proper.

Pursuant to Local Rule 37.2, Defendants state that they consulted with counsel for Plaintiff in good faith via email and videoconference/telephone on May 2 and May 3, 2024, but the parties were unable to resolve the issues raised herein.

Dated: May 6, 2024

Respectfully submitted,

LUDMILA SMOLYANSKY AND EDWARD SMOLYANSKY

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CERTIFICATE OF SERVICE

I, Nicholas Callahan, hereby certify that on this 6th day of May, 2024, I caused a copy of the foregoing **DEFENDANTS EDWARD SMOLYANSKY AND LUDMILA SMOLYANSKY'S MOTION FOR RECONSIDERATION OF ORDER GRANTING PLAINTIFF'S EMERGENCY MOTION FOR PROTECTIVE ORDER BARRING DEFENDANTS' RULE 30(b)(6) SUBPOENAS TO PLAINTIFF'S CUSTOMERS AND FOR AWARD OF ATTORNEYS' FEES** to be served via e-filing on all counsel of record.

/s/ Nicholas H. Callahan