

D-1-GN-18-001835

NEIL HESLIN and
SCARLETT LEWIS
Plaintiffs

vs.

ALEX E. JONES and
FREE SPEECH SYSTEMS, LLC,
Defendants

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IN DISTRICT COURT OF

TRAVIS COUNTY, TEXAS

261st DISTRICT COURT

D-1-GN-18-001842

LEONARD POZNER and
VERONIQUE DE LA ROSA
Plaintiffs

vs.

ALEX E. JONES and
FREE SPEECH SYSTEMS, LLC,
Defendants

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IN DISTRICT COURT OF

TRAVIS COUNTY, TEXAS

345th DISTRICT COURT

DEFENDANTS' EMERGENCY MOTION FOR ENFORCEMENT OF PROTECTIVE ORDER DATED DECEMBER 2, 2021

Defendants, Alex E. Jones and Free Speech Systems, LLC, file this their *Emergency Motion for Enforcement of Protective Order dated December 2, 2021* to **protect the confidential medical records of certain Sandy Hook Plaintiffs in the Connecticut Litigation**, as well as other confidential, attorney client privileged, and work product protected documents, inadvertently sent to Plaintiffs.

Introduction

On July 22, 2022, Defendants sent a file transfer link to Plaintiffs intended to contain a folder of text messages and other documents previously produced by

Defendants' in the Lafferty Matter ("the Lafferty Production"). The file transfer link, however, inadvertently gave Plaintiffs access to dozens of other folders as well, including confidential documents, such as the **medical records of Sandy Hook Parents who are Plaintiffs in the Connecticut litigation** and other documents subject to various privileges, including attorney-client and work product.

Plaintiffs' counsel brought the matter to Defense counsel's attention the day the link was sent, writing:

On Fri, Jul 22, 2022 at 11:24 PM Mark Bankston <mark@fbtrial.com> wrote:

I forwarded this email to my paralegal to download this production. He asked me to take a look because it was a huge amount of material he was downloading, and he wanted me to verify that he needed to download all of it. I looked through the directories and they seem to contain a lot of confidential information, such as depositions and records relating to the Lafferty plaintiffs, and material which appears to be work product or confidential. My assumption is now that you did not intend to send us this? Let me know if I am correct.

Mark Bankston

Kaster Lynch Farrar & Ball, LLP

Defense counsel responded:

Federico Reynal <areynal@frlaw.us>

Sat, Jul 23, 2022 at 6:06 AM

To: Mark Bankston <mark@fbtrial.com>

Cc: Bill Ogden <bill@fbtrial.com>, "jmagliolo@frlaw.us" <jmagliolo@frlaw.us>

Thank you Mark, there appears to have been a mistake in the file transfer. I'm trying to get you the Lafferty production. Please disregard the link and I will work on resending.
Andino

It is now apparent that Plaintiffs' counsel did not "disregard the link", but has reviewed and used documents he acknowledged defendants "did not intend to send" and appeared to be "work product or confidential." Defendants, therefore, seek Emergency relief pursuant to Rule 193.3 and the Court's Protective Order.

EVIDENCE IN SUPPORT OF MOTION

Defendants, Alex E. Jones and Free Speech Systems, LLC offer the following documents, attached hereto and incorporated herein by reference as if set forth in full, in support of their Motion for Emergency Protective Order:

DESCRIPTION	EXHIBIT NO.
Order on Motion for Protective Order of Confidentiality dated December 2, 2021, in Cause No. D-1-GN-001835; <i>Neil Heslin v. Alex E. Jones, et al</i> ; In the 261 st District Court of Travis County; and Cause No. D-1-GN-18-001842; <i>Leonard Pozner, et al v. Alex E. Jones, et al</i> ; In the 345 th District Court of Travis County, Texas.	1
Emails dated July 22, 2022, between Andino Reynal and Mark Bankston	2

Defendants respectfully request that this Court take judicial notice of Exhibit 1 pursuant to Rule 201 of the Texas Rules of Evidence.

FACTS IN SUPPORT OF MOTION

On December 2, 2021, this Honorable Court entered its *Order on Motion for Protective Order of Confidentiality* (“Confidentiality Order”). See, Exhibit 1, *Order on Motion for Protective Order of Confidentiality*, dated December 2, 2021, attached hereto and incorporated herein by reference as if set forth in full. The Court adopted the *Protective/Confidentiality Order* entered in Cause No. D-1-GN-18-006623; *Scarlett Lewis v. Alex E. Jones, et al*.

The Protective Order provides in relevant part as follows:

1. This Protection/Confidentiality Order governs all discovery, ***and all information disclosed, produced, or submitted by any party to another party*** in connection with this lawsuit during the course of discovery.

Exhibit 1 to Exhibit 1, p. 1, ¶1.

3. Discovery includes [...] other documents exchanged between the parties for the purpose of sharing information regarding the facts of the case.

Id.

The Confidentiality Order further provides as follows:

11. In the event a Producing Party inadvertently fails to mark a confidential document as “CONFIDENTIAL” or “ATTORNEYS’ EYES ONLY,” that Producing Party or any Party may: (1) notify counsel of record for every other Party in writing specifically identifying the material, and (2) provide a replacement copy of the document(s) marked “CONFIDENTIAL” or “ATTORNEYS’ EYES ONLY.”

Id., p. 3, ¶11.

Should any party wish to contest the designation of any document, the Confidentiality Order provides:

14. Any Party may contest the designation of any document [...] as “CONFIDENTIAL” or “ATTORNEYS’ EYES ONLY” by requesting in writing that the Producing Party change the designation. If the Parties are unable to reach an agreement on the designation of such challenged documents within five (5) business days, the Party challenging the designation may at any time thereafter seek an order to alter the status of the challenged designation.

Id., p. 4, ¶14.

The Confidentiality Order further provides:

Until any dispute over designation is ruled upon by the presiding Judge, the designation will remain in full force and effect, and the documents [...] will continue to be accorded the confidential treatment required by this Protective Order.

Id.

On July 22, 2022, the paralegal for Counsel for Defendants emailed Plaintiffs’ counsel a link. Defendants’ Counsel believed the link contained text messages and other documents that Defendants had previously produced to Plaintiffs in the Lafferty Matter currently pending in Connecticut. (the “Lafferty Production”). Exhibit 2, *Email exchanged dated July 22, 2022, between Counsel for Defendants and Counsel for Plaintiffs*, attached hereto and incorporated herein by reference as if set forth in full.

On the same day, Mark Bankston, Counsel for Plaintiffs, emailed Andino Reynal, Counsel for Defendants, alerting him to the fact “I looked through the directories and they seem to contain a lot of confidential information [...] and material which appears to be work product or confidential. My assumption is now that you did not intend to send us this? Let me know if I am correct.” *Id.*

In response thereto, Reynal instructed Bankston that “there appears to have been a mistake in the file transfer. [...] Disregard the link and I will work on resending. *Id.*

On August 3, 2022, Counsel for Defendants learned, for the first time, that Bankston neither deleted nor disregarded the link sent in error. Rather, despite realizing just from “reading the directories” that they contained confidential, privileged and work product documents, he chose to violate various privileges, including the attorney-client privilege and work-product privilege, and invade third parties’ privacy by opening the individual files and reading them, subsequently knowingly using confidential information in the cross-examination of Defendant Jones.

ARGUMENT AND AUTHORITIES

A. Defendants’ Production of Confidential, Privileged, and Work Product protected documents Plaintiffs was Involuntary and, as such, subject to the “Snap Back” provision of Rule 193.3(d) of the Texas Rules of Civil Procedure.

Rule 193.3(d) of the Texas Rules of Civil Procedure provides in relevant part as follows:

A party may preserve a privilege from written discovery in accordance with this subdivision.

[...]

(d) **Privilege not waived by production.** A party who produces material or information without intending to waive a claim of privilege does not waive that claim under these rules or the Rules of Evidence if--within ten days or a shorter time ordered by the court, after the producing party actually discovers that such production was made--the producing party amends the

response, identifying the material or information produced and stating the privilege asserted. If the producing party thus amends the response to assert a privilege, any party who has obtained the specific material or information must promptly return the specified material or information and any copies pending any ruling by the court denying the privilege.

Tex. R. Civ. P. 193.3

An inadvertent production of privileged information is considered involuntary. See Tex. R. Civ. P. 193.3(d); *In re Living Ctrs.*, 175 S.W.3d 253, 260 (Tex.2005); *In re Certain Underwriters at Lloyd's London*, 294 S.W.3d 891, 906 (Tex.App.—Beaumont 2009, orig. proceeding); *In re Monsanto Co.*, 998 S.W.2d at 921 n.2. Parties and nonparties may rely on TRCP 193.3(d)—known as the “snap-back provision”—to assert a claim of privilege after inadvertent production of their own privileged documents. *In re Certain Underwriters*, 294 S.W.3d at 904–05; see *In re City of Dickinson*, 568 S.W.3d 642, 649 (Tex.2019).(1)

The purpose of the snap-back provision in TRCP 193.3(d) is to reduce costs and risks in large document productions. Tex. R. Civ. P. 193 cmt. 4. The provision focuses on the **intent to waive** the privilege, **not on the intent to produce** the information or material. *In re Christus Spohn Hosp. Kleberg*, 222 S.W.3d 434, 439 (Tex.2007); *Warrantech Corp. v. Computer Adapters Servs.*, 134 S.W.3d 516, 524–25 (Tex.App.—Fort Worth 2004, no pet.); Tex. R. Civ. P. 193 cmt. 4. A party who does not diligently screen documents before producing them does not waive a claim of privilege. *In re Christus Spohn Hosp. Kleberg*, 222 S.W.3d at 439; *Warrantech Corp.*, 134 S.W.3d at 525; *In re AEP Tex. Cent. Co.*, 128 S.W.3d 687, 693 (Tex.App.—San Antonio 2003, orig. proceeding); Tex. R. Civ. P. 193 cmt. 4.(2)

A party may claim a privilege on information that it inadvertently produced by following the snap-back provision in TRCP 193.3(d). See Tex. R. Civ. P. 193 cmt. 4 (snap-

back provision in TRCP 193.3 overrules *Granada Corp. v. First Ct. of Appeals*, 844 S.W.2d 223 (Tex.1992), on inadvertent production).

B. Plaintiffs use of the confidential and privileged information violates the spirit, if not the actual letter, of this Court's Protective Order.

This Court's *Protective Order* in the instant litigation follows the spirit and intent of Rule 193.3 of the Texas Rules of Civil Procedure. The Protective Order provides that, in the event a Producing Party inadvertent fails to mark a confidential document as "CONFIDENTIAL" or "ATTORNEYS' EYES ONLY," that Producing Party or any Party may: (1) notify counsel of record for every other Party in writing specifically identifying the material, and (2) provide a replacement copy of the document(s) marked "CONFIDENTIAL" or "ATTORNEYS' EYES ONLY."

While the documents produced via the link provided to Bankston were not marked either "CONFIDENTIAL" or "ATTORNEYS' EYES ONLY," the documents were clearly confidential as acknowledged by Bankston. See, Exhibit 2. Reynal clearly indicated to Bankston that "there [was] a mistake in the file transfer. [...] Please disregard the link and I will work on resending." *Id.*

Although Bankston has had ample opportunity to contest Defendants' assertion of confidentiality of the documents contained in the file transfer, Bankston has violated Rule 193.3(d) of the Texas Rules of Civil Procedure and this Court's Confidentiality Order by not deleting the link to the file transfer pending any ruling by this Court denying the privileges which he acknowledged applied to the documents contained in the link.

Defendants Alex E. Jones and Free Speech Systems, LLC respectfully requests that this Court ORDER Plaintiffs to:

1. Delete the link erroneously sent to Plaintiffs;

2. Return to Defendants all hard copies of all documents contained in the link;
3. Permanently seal all exhibits from the link entered into evidence in the instant litigation;
4. Afford Defendants the opportunity to provide a replacement copy of responsive document(s) marked "CONFIDENTIAL" or "ATTORNEYS' EYES ONLY" pursuant to paragraph 11 of the Confidentiality Order; .and
5. Such other and further relief, both at law and equity, to which Defendants may show themselves justly entitled.

Respectfully submitted this 4th Day of August, 2022,

Respectfully submitted,

THE REYNAL LAW FIRM

/s/ F. Andino Reynal

F. Andino Reynal

TBN: 24060482

areynal@frlaw.us

917 Franklin, Suite 600

Houston, Texas 77002

Telephone: (713) 228-5900

Facsimile: (844) 270-0625

**ATTORNEYS FOR
DEFENDANTS**

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been served pursuant to Rule 21 of the Texas Rules of Civil Procedure through the electronic filing system on the 4th day of August, 2022.

/s/ F. Andino Reynal

F. Andino Reynal