SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ALEXANDER TISCH** **PART** **18**

Justice

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HANNAH KIM,

Plaintiff,

- v -

WHITE & CASE, LLP, CAROL GRAJEDA, RITA MASINO,

Defendants.

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INDEX NO. 154446/2020

MOTION DATE 10/06/2021

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (in camera) 37, 50-53, 68-69 and (Motion 003) 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 96, 97, 98, 99, 100, 101, 102, 103, 108, 109

were read on this motion to/for ORDER OF PROTECTION & IN CAMERA REVIEW .

In this action, plaintiff asserts claims under the New York City Human Rights Law (NYC HRL) for pregnancy discrimination, gender discrimination, disability discrimination, hostile work environment, retaliation, failure to accommodate, constructive discharge, and failure to pay wages and benefits in violation of the New York Labor Law.

Plaintiff was employed as a legal assistant with defendant White & Case LLP (the firm) from 2013 through 2020 in the firm's Financial Restructuring & Insolvency (FRI) Group. In the fall of 2019, the firm audited plaintiff's overtime hours and expense requests (the Audit), which resulted in a report dated November 26, 2019 (the Report or Audit Report). During plaintiff's deposition, defense counsel questioned her about 3 pages from the Report; prior to that time, plaintiff was unaware of its existence. While the entire 96-page Report was subsequently exchanged, it contained many redactions based on alleged privilege and objections as to relevance. Those redactions are presently before the Court for an in camera review pursuant to

the order dated July 14, 2021 (see NYSCEF Doc No. 37 [directing parties to submit the Report in camera accompanied by letter briefs]).

Additionally, in June of 2021, plaintiff served her second set of document demands related to the Audit, the Report, including a request for the underlying raw data documents (e.g., receipt[s] plaintiff submitted to the firm for reimbursement). By response dated July 20, 2021, defendants objected to the demands and withheld responsive documents based on relevance and privilege. After conference with the Court on August 15, 2021, defendants were directed to produce responsive documents or move for a protective order (see NYSCEF Doc No. 70). Upon the foregoing documents, it appears that defendants elected to move for a protective order rather than produce the documents.[1]

CPLR § 3101 (a) requires "full disclosure of all evidence material and necessary in the prosecution or defense of an action." "The words, 'material and necessary', are . . . 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 Pub. Co., 21 NY2d 403, 406 [1968]; see Forman v Henkin, 30 NY3d 656, 661 [2018]). "This statute embodies the policy determination that liberal discovery encourages fair and effective resolution of disputes on the merits, minimizing the possibility for ambush and unfair surprise" (Spectrum Sys. Intl. Corp. v Chemical Bank, 78 NY2d 371, 376 [1991]).

[1] The Court does not consider the supplemental letters and exhibits filed as NYSCEF Doc Nos. 101-103 and 108-109, which are in violation of 22 NYCRR § 202.8-c. Although defendants' reply memorandum stated that they "intend[ed] to produce additional non-privileged documents related to the audit" (NYSCEF Doc No. 96 at 14), the record before the Court does not suggest documents were produced by the time the motion was marked submitted, nor at the time of the in camera submissions.

I. Purpose & Relevance

While defendants claim that they intend to only use three pages of the Report for impeachment purposes, it cannot be seriously disputed that the entire Report is subject to disclosure under a rule of completeness (*see generally* Guide to New York Evidence, § 4.03, citing *Rouse v Whited*, 25 NY 170 [1862]). Additionally, it cannot be said that the facts pertaining to the Audit, or its Report, should be limited to impeachment purposes only, as if they weren't relevant to the claims and defenses in this action.

Defendants first contend in the in camera submission, related to the redactions in the Report, that the redacted material should not be disclosed on the grounds of privilege and that disclosure of the redacted portions is irrelevant to the plaintiff's claims. Curiously, however, in their motion, they argue that the Audit Report and the underlying documents are entirely irrelevant (with or without redactions). However, they already produced the entire report (subject to redactions, to be determined by the Court, *infra*), mooting the issue before the Court of its relevance in terms of whether it should be withheld from disclosure as irrelevant to the claims in this case. Their arguments in the motion are essentially addressing the merits of the plaintiff's claims relative to this discovery;[2] however, none of this is currently before the Court. To the extent that it should be considered, the Court finds that the Audit and its Report clearly meets the standard of "material and necessary" set forth *supra*. This is so particularly in light of the Brightman matter, cited by both parties, which states that an assessment of a retaliation claim under the NYC HRL should "be made with a keen sense of workplace realities" and that "the 'chilling effect' of

[2] Defendants contend that the Audit or the Audit Report is not relevant to plaintiff's retaliation or constructive discharge claims because plaintiff did not know about the Audit, and/or because of the timing of the Audit, and state, e.g., "that she does not have a viable retaliation claim" (NYSCEF Doc No. 96, defendants' reply mem at 6).

particular conduct is context-dependent" (Brightman v Prison Health Serv., Inc., 108 AD3d 739, 739-40 [2d Dept 2013]).

II. Attorney-Client Privilege

CPLR 3101 permits a party to withhold privileged matter, which is absolutely immune from discovery (CPLR § 3101 [b]; Spectrum, 78 NY2d at 376-377). The attorney-client privilege is one such matter, which is embodied in CPLR § 4503. It "states that a privilege exists for confidential communications made between attorney and client in the course of professional employment" (id. at 377). It is defined under the common law as follows:

> (1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived (Vincent C. Alexander, Practice Commentaries, McKinneys Cons Laws of NY, Book 7B, C4503:1, quoting 8 J. Wigmore, *Evidence* § 2292, at 554 [McNaughton rev. 1961] [internal quotations omitted]).

"[T]he burden of establishing any right to protection is on the party asserting it; the protection claimed must be narrowly construed; and its application must be consistent with the purposes underlying the immunity" (Spectrum, 78 NY2d at 377).

"The communication itself must be primarily or predominantly of a legal character" (id. at 378). "For the privilege to apply when communications are made from client to attorney, they 'must be made for the purpose of obtaining legal advice and directed to an attorney who has been consulted for that purpose'" (Rossi, 73 NY2d at 593, quoting Matter of Bekins Record Stor. Co., Inc., 62 NY2d 324, 329 [1984]). "By analogy, for the privilege to apply when communications are made from attorney to client--whether or not in response to a particular request--they must be made for the purpose of facilitating the rendition of legal advice or services, in the course of a professional relationship" (Rossi, 73 NY2d at 593).

Defendants redacted portions of the Report that set forth (1) names of the firm's clients; (2) matter names indicating the nature of the legal work the firm provided to its client; (3) descriptions of tasks or documents identifying the specific work performed for clients; and (4) client-matter numbers.

"[I]t has generally been held that the client's name, in and of itself, is not privileged, as it is considered to be neither confidential nor a communication" (Matter of D'Alessio v Gilberg, 205 AD2d 8, 10 [2d Dept 1994]; Bank Brussells Lambert v Credit Lyonnais (Suisse), 220 F Supp 2d 283, 288 [SDNY 2002] ["It is well-established in the Second Circuit that a client's identity is not protected by the attorney-client privilege"]). "An attorney may claim privilege regarding a client's identity only if there are 'special circumstances'" (Bank Brussells Lambert, 220 F Supp 2d at 288, quoting United States v Goldberger & Dubin, P.C., 935 F2d 501, 505 [2d Cir 1991]), and/or "'where disclosure might be inappropriate [as] inconsistent with the trust and duty assumed by an attorney'" (Matter of D'Alessio, 205 AD2d at 10-11, quoting Matter of Jacqueline F., 47 NY2d 215, 221 [1979]).

The Court finds that defendants failed to meet their burden of demonstrating that the clients' names here, in this employment discrimination action, meet the extraordinary circumstances that justify redacting a client's identity (see, e.g., Bank Brussells Lambert, 220 F Supp 2d at 288; cf. Matter of D'Alessio, 205 AD2d at 11-12 [where an attorney's disclosure of a client's "identity would reveal his possible involvement in a crime in connection with [a fatal hit-and-run] accident, which is the precise situation for which he sought legal advice"]).

Although defendants claim that disclosure may reveal "the specific situation for which a client sought legal advice" and that some of the FRI Group's clients and work "are not matters of public record" (NYSCEF Doc No. 50), defendants failed to differentiate which clients or matters

are not public and, more importantly, failed to submit any proof of the same to warrant justification of the privilege by, e.g., attorney affirmation or any other proof (see NYSCEF Doc Nos. 50, defendants letter brief for in camera; 76 and 97, Garland affirmations in support of motion sequence no. 3 [solely introducing exhibits]). The same result applies with respect to the second and third categories of redactions, which are the client matter names and descriptions of tasks or documents, which purport to identify the nature of the work the firm provided to its clients.

While defendants contend that "correspondence, bills, ledgers, statements, and time records [that] reveal the motive of the client in seeking representation, litigation strategy, or the specific nature of the services provided, such as researching particular areas of law, fall within the privilege" (Riddell Sports Inc. v Brooks, 158 FRD 555, 560 [SDNY 1994], quoting Clarke v American Commerce National Bank, 974 F2d 127, 129 [9th Cir 1992] [internal quotation marks omitted]), the Court finds that defendants failed to meet their burden demonstrating the same (see, e.g., Riddell Sports Inc., 158 FRD at 560; Diversified Group, Inc. v Daugerdas, 304 F Supp 2d 507, 513-14 [SDNY 2003]). With respect to matter names, the Report "merely identif[ies] the titles of some of the transactions. They provide no additional details regarding the nature of the legal services provided" and, therefore, "they are not privileged" (Diversified Group, Inc., 304 F Supp 2d at 514).

To be sure, at least one of the redactions for the description of legal work performed for a client states "Responses and Objections to RFAs, RFPs and Rogs" — which is clearly not a communication, nor does it appear to elicit any confidences the client may have had in terms of the motive for seeking representation or strategy (see NYSCEF Doc No. 51 at p 13).[3] Indeed, as

[3] Although the defendants' privilege log states "work-product," none of the parties' papers address that privilege.

plaintiff points out, much of the work pertained to litigation matters where the firm's representation of a specific client was public. If any of the matters were not public, such that revealing the redacted information would "betray clients' expectations" as to the confidential or privileged nature of the legal representation by the firm, then defendants should have explicitly demonstrated the same. They had two opportunities to do so via the in camera submission and in support of their motion.[4]

Finally, the Court finds that the last category of redactions concerning client or matter numbers cannot be considered as attorney-client communications because there is no way to decipher the client's identity or particular matter, and the Court fails to see any potential harm from their disclosure on this record.

Because the Court finds that defendants failed to satisfy their burden on privilege, it need not address the parties' arguments regarding at-issue waiver.

III. Document Demands

Defendants' response to plaintiff's second set of document demands dated July 20, 2021 sets forth the requests and responses as follows:

> **Document Request No. 1:** All documents, including electronic communications, pertaining to or related to any internal audit for Plaintiff, whether the audit was solely related to Plaintiff or included other employees, at any time during her employment with White & Case.
>
> **Objection and Response to Request No. 1**: Defendants object to this request on the grounds that it is vague, ambiguous, overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence, particularly because White & Case intends to use only the following pages from the Internal Audit HK Project: WC-et-al_002481- 83. Defendants further object to this request to the extent that this request seeks the production of documents protected from disclosure by the attorney-client privilege and/or the attorney work

[4] The Court notes that the parties entered into a stipulation and protective order for the production and exchange of documents and testimony, which appears to address "confidential business information" (see NYSCEF Doc No. 300). The parties did not reference the stipulation and order and, therefore, the rulings made herein should not be construed to have any affect on the same.

product doctrine, and Defendants affirmatively assert all such privileges. Subject to and without waiving the foregoing objections or any General Objection, White & Case will produce nonprivileged documents, to the extent they exist, concerning the three pages identified above.

Document Request No. 2: All documents, including electronic communications, pertaining to or related to any request for an internal audit for Plaintiff, whether the audit was solely related to Plaintiff or included other employees, at any time during her employment with White & Case.

Objection and Response to Request No. 2: See Objection and Response to Request No. 1, which is incorporated herein by reference.

Document Request No. 3: All original documents, receipts, records, time entries, and any other original sources from which the Internal Audit most recently produced by Defendants as WC-et-al_002388 through WC-et-al_002483 purports to rely upon.

Objection and Response to Request No. 3: See Objection and Response to Request No. 1, which is incorporated herein by reference (NYSCEF Doc No. 86).

In light of the Court's findings above that the Audit and entire Report are relevant and should be disclosed without redactions, the Court finds that defendants' motion for a protective order on the underlying documents of the Report is denied.

First, to the extent the response would encompass the privilege issues addressed above, i.e., the corresponding client names, matter names, or descriptions of legal work set forth in the Report, the Court has found that they are not privileged. Additionally, it is well settled that the privilege is limited to communications, and not the underlying facts (Spectrum, 78 NY2d at 377, citing Upjohn Co. v United States, 449 US 383, 395-396 [1981]). Thus, the underlying raw data in the Report may not necessarily be considered privileged either.

But because the Court has not reviewed the proposed responsive documents, the motion is denied without prejudice in the event that a cognizable basis for asserting the privilege reveals itself in the course of the exchange. The parties may contact chambers after they meet and confer on any disputed issue.

As for the futility of exchanging the underlying "raw" data that defendants argue is already embedded within the Report, the Court finds that plaintiff is still entitled to the "raw data" to meaningfully defend herself against the alleged receipt alteration, which is an allegation that defendants have made against her with respect to her credibility (see generally Matter of New York City Asbestos Litig., 109 AD3d 7, 14 [1st Dept 2013] ["As the court found, principles of fairness . . . require more complete disclosure, and GP should not be allowed to use its experts' conclusions as a sword . . ., while at the same time using the privilege as a shield by withholding the underlying raw data that might be prone to scrutiny by the opposing party and that may affect the veracity of its experts' conclusions"]).

Accordingly, it is hereby ORDERED that defendants shall exchange the unredacted Audit Report within 20 days from entry of this order; and it is further

ORDERED that defendants' motion is denied; and it is further

ORDERED that defendants shall provide a supplemental response and exchange responsive documents to plaintiff's second set of demands within 20 days from entry of this order. This constitutes the decision and order of the Court.

3/14/2022
DATE

ALEXANDER TISCH, J.S.C.

CHECK ONE:		CASE DISPOSED		[X]	NON-FINAL DISPOSITION		
		GRANTED	[X] DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE