SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49M

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WHITE OAK COMMERCIAL FINANCE, LLC,

Plaintiff,

- v -

EIA INC., ELECTRONIC INTERFACE ASSOCIATES, INC., EIA DATACOM, INC., EIA ELECTRIC, INC., GEORGE ENGEL LIC, LLC, YOLANDA DELPRADO, ALEXANDRA ENGEL, DAVID ENGEL, GEORGE ENGEL, MATTHEW ORENT, ANDREEA ORENT, CHARLES SCHWAB & CO., INC. (A NOMINAL DEFENDANT), ADP TOTALSOURCE, INC. (A NOMINAL DEFENDANT), 1861 ACQUISITION LLC (A NOMINAL DEFENDANT), GREAT MIDWEST INSURANCE COMPANY (A NOMINAL DEFENDANT), and SOFIA ENGEL,

Defendants.

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INDEX NO. 650346/2023

MOTION DATE 07/27/2023, 08/04/2023

MOTION SEQ. NO. 008, 010

DECISION + ORDER ON MOTION

HON. MARGARET A. CHAN:

The following e-filed documents, listed by NYSCEF document number (Motion 008) 176, 177, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 244
were read on this motion to/for ORDER OF PROTECTION.

The following e-filed documents, listed by NYSCEF document number (Motion 010) 237, 238, 239, 240, 241, 242, 248
were read on this motion to/for SEAL.

Plaintiff White Oak Commercial Finance, LLC (White Oak) brings this action, as amended on May 15, 2023, alleging causes of action for, *inter alia*, breach of contract, fraudulent misrepresentation, fraudulent conveyance, and tortious interference with contract (NYSCEF # 102). Presently before the court is a motion by defendants EIA Inc., Electronic Interface Associates, Inc., EIA Datacom, Inc., EIA Electric, Inc. (collectively, Borrowers), Yolanda DelPrado, Alexandra Engel, George Engel, Matthew Orent, AnDreea Orent, and Sofia Engel (collectively, the Individual Defendants, and together with Borrowers, Defendants) seeking a protective order and sanctions against White Oak in connection with White Oak's alleged improper access and dissemination of attorney-client communications found on Borrowers' email system (NYSCEF # 176). White Oak opposes the motion.

Also before the court is White Oak's motion, by order to show cause, to seal certain documents submitted in connection with its opposition to Defendants' motion for a protective order and sanctions (NYSCEF # 240). Although the motion is unopposed, Defendants indicate that, should the court grant any part of their motion for a protective order, then the court should also grant White Oak's sealing application (NYSCEF # 248).

For the following reasons, Defendants' motion is granted in part and White Oak's motion to seal is granted.

Background

The court assumes the parties' familiarity with the factual background of this matter, which this court has repeatedly and thoroughly recounted at various points throughout the course of this litigation (*see, e.g.* NYSCEF #s 163, 167, 251, and 252). Below, the court provides a summary of the relevant procedural history that preceded the currently pending motions.

White Oak commenced this action on January 17, 2023, asserting various causes of action stemming from alleged breaches of a Revolving Credit and Security Agreement, dated November 12, 2020, between Borrowers and White Oak (the Credit Agreement) (NYSCEF # 1). The next day, on January 18, 2023, White Oak filed a motion, by order to show cause, for a preliminary injunction, order of seizure, turnover order, and temporary restraining order against defendants to protect its interests in, and prevent the dissipation of, various collateral contemplated by the Credit Agreement[1] (NYSCEF # 41 – the First PI Motion).

The parties were able to partially resolve the First PI Motion by Stipulation and Order, dated January 27, 2023 (NYSCEF # 69 – Stipulation). As part of the Stipulation, Defendants granted White Oak "full and unimpeded access to and to take possession of . . . any Collateral . . . including, but not limited to, Borrowers' books and records (both computerized and hard copy), service records, bank records, and account payable and receivable records relating to any Collateral" (*id.* ¶ 2). In connection with this granting this access, Defendants agreed to (1) "take all necessary steps to permit and grant White Oak access to any and all cloud-based software or services . . . where Borrowers' electronic books and records are stored," (2) "fully cooperate and assist White Oak . . . in accessing, cataloguing, inventorying and taking possession of the Collateral," and (3) "cause a person with knowledge to meet White Oak . . . at a mutually convenient time to grant White Oak access to all

[1] Under Section 4.1 of the Credit Agreement, Borrowers granted White Oak with a priority lien and security interest in, *inter alia*, Borrowers' accounts, inventory, and general intangibles, including customer lists, books, records, computer information, software, records, and data (*see* NYSCEF # 103 § 4.1). Pursuant to Section 9.1 of the Credit Agreement, in the event of a default, White Oak could "[t]ake control over Borrowers' books and records" and "[w]ith or without court order . . . enter any or all of Borrowers' premises and take possession of the Collateral" (*id.* §§ 9.1[e]-[f]).

Collateral (including, without limitation, all electronic records stored on cloud-based software)" (*id.* ¶¶ 2 [a]-[c]). As part of the Stipulation, Defendants "reserve[d] all rights and defenses without limitation" (*id.* ¶ 10).

Between January 2023 and February 2023, following the entry of the Stipulation, the parties began taking steps to grant White Oak access to Borrowers' email server (the Email Server)—including coordinating with Borrowers' cloud hosting provider, Cloud 9—and to ensure preservation of these records (*see* NYSCEF #s 227, 231, 233). The parties also coordinated payment of invoices for the Email Server and related cloud hosting services to accomplish this goal (*see* NYSCEF #s 228-231; NYSCEF # 225 – Amato aff ¶ 9). Neither the issue of privileged communications contained within the Email Server, nor the waiver of any such privilege, was raised by the parties or their attorneys during this time (*see* Amato aff ¶ 10).

Later, on May 18, 2023, White Oak filed its emergency order to show cause for an order of attachment, preliminary injunction, and temporary restraining order, against defendants Matthew Orent and AnDreea Orent (the Orents) (NYSCEF #s 120 – the Second PI Motion). As part of the Second PI Motion, White Oak submitted an email communication between certain of the Individual Defendants and Borrowers' former counsel, Kamini Fox, Esq. (Attorney Fox), concerning issues related to the present litigation (*see* NYSCEF #s 122). On May 22, 2023, Defendants' current counsel, Obermayer Rebmann Maxwell & Hippel LLP, flagged White Oak's potential violation of the attorney-client privilege to the court as part of its letter opposition submission on behalf of the Orents (NYSCEF # 132 at 9-10). That same day, during oral arguments, Defendants' counsel again flagged this privilege issue to the court, and the court directed Defendants to make a formal application (NYSCEF # 234 at tr 17:14-21:1). Defendants then filed the present motion on July 26, 2023 (NYSCEF # 176).

Discussion

I. Defendants' Motion for a Protective Order and Sanctions (MS008)

Defendants seek a protective order from this court (1) directing White Oak to cease and desist reviewing and using any of Defendants' attorney-client communications located in the Email Server and to destroy all copies and notes of any attorney-client emails discovered in the Email Server and (2) declaring that the attorney-client privilege has not been waived (NYSCEF # 177 – MOL at 1). Defendants also seek the imposition of sanctions against White Oak and its counsel (*id.* at 11). The propriety of a protective order and sanctions, however, turns on whether certain communications from the Email Server filed by White Oak in this litigation are, in fact, privileged attorney-client communications (*see* NYSCEF #s 122, 232), as well as whether Defendants waived any such privilege by turning over the Email Server.

The court addresses these issues below.

A. The At-Issue Communications Involving Attorney Fox Are Privileged

The court first addresses the question of whether certain communications contained on the Email Server are privileged. Defendants argue that two at-issue communications involving Attorney Fox (*see* NYSCEF # 122, 323), which were obtained and subsequently disclosed by White Oak, are plainly privileged communications because they involve communications of legal advice to Borrowers' directors, officers, and employees (*see* MOL at 6; NYSCEF # 244 – Reply at 1-3). White Oak counters that Defendants have not established that either of the communications from the Email Server are privileged, explaining that Attorney Fox was only counsel to Borrowers at the time and that there is no proffered testimony or evidence establishing that she was representing any of the Individual Defendants (*see* NYSCEF # 235 – Opp at 7).

It is well settled in New York that the attorney-client privilege, as codified in the CPLR, shields from disclosure confidential communications between an attorney and client made for the purpose of obtaining legal advice (CPLR 4503 [a] [1]). The attorney-client privilege is limited to communications—not underlying facts—and the communications must be "made 'for the purpose of facilitating the rendition of legal advice or services, in the course of a professional relationship'" (*see Spectrum Sys. Intl. Corp. v Chem. Bank*, 78 NY2d 371, 377-378 [1991] ["The communication itself must be primarily or predominantly of a legal character"]).

Corporations, like any other clients, may avail themselves of the protections of the attorney-client privilege (*see Rossi v Blue Cross & Blue Shield of Greater N.Y.*, 73 NY2d 588, 591-592 [1989]). Consequently, the privilege also extends to communications between a corporation's employees and agents and its counsel that are rendered "for the purpose of providing legal advice to the corporation" (*see Stock v Schnader Harrison Segal & Lewis LLP*, 142 AD3d 210, 216 [1st Dept 2016]; *Rossi*, 763 NY2d at 591-592). In all cases, the burden of establishing any privilege falls on the party asserting it (*see Liberty Petroleum Realty, LLC v Gulf Oil, L.P.*, 164 AD3d 401, 404 [1st Dept 2018]). And whether a particular document is or is not protected by the attorney-client privilege is necessarily "a fact-specific determination" (*Spectrum Sys.*, 78 NY2d at 378, citing *Rossi*, 73 NY2d at 592-593).

Here, a review of the at-issue communications filed by White Oak indicates that they are privileged in nature (*see* NYSCEF # 122, 323). In each of these communications, Attorney Fox is providing legal advice related to the litigation to her client, Borrowers, by communicating with certain of the Individual Defendants, presumably in their capacity as directors, officers, and/or employees of Borrowers (*see generally* NYSCEF # 102 ¶¶ 112, 14-16 [identifying the Individual Defendants as "director[s]," "officer[s]," and/or "employee[s]" of Borrowers]). Given the content of these emails, it is evident that the parties to the email chain had intended and

expected that the correspondence would remain confidential and protected to ensure effective representation of Borrowers on sensitive legal topics and strategy (*see Spectrum Sys.*, 78 NY2d at 377).

To be sure, as White Oak notes, these Individuals Defendants were, during this period, either represented by their own counsel in connection with the litigation or appearing *pro se* in connection with executing the Stipulation, while Attorney Fox only represented Borrowers (*see* Stipulation at 6-7). But these fact, alone, do not disturb the privileged nature of these communications because the privilege at issue ultimately belongs to Borrowers (*see Upjohn Co. v United States*, 449 US 383, 394-395 [1981] [holding that communications made by company's employees to company's counsel regarding matters within the scope of the employee's corporate duties were "protected against compelled disclosure" by company]).

B. Defendants Did Not Waive the Attorney-Client Privilege

The more pressing issue underlying Defendants' application for a protective order is whether Defendants waived the attorney-client privilege attached to the emails located in the Email Server when White Oak received access it. For reasons set forth below, Defendants have not waived the attorney-client privilege notwithstanding Borrowers' turnover of the Email Server to White Oak.

The general rule in New York is that "[d]isclosure of a privileged document generally operates as a waiver of the privilege" (*N.Y. Times Newspaper Div. of N.Y. Times Co. v Lehrer McGovern Bovis*, 300 AD2d 169, 172 [1st Dept 2002]; *accord Siras Partners LLC v Activity Kuafu Hudson Yards LLC*, 157 AD3d 445, 446 [1st Dept 2018] ["By disclosing to a third party by email certain advice given to them by counsel, defendants waived the attorney-client privilege as to other documents pertaining to that advice"]). To avoid such an outcome, the party asserting a privilege over a document must show that (1) "the client intended to maintain the confidentiality of the document," (2) "reasonable steps were taken to prevent disclosure," (3) "the party asserting the privilege acted promptly after discovering the disclosure to remedy the situation," and (4) "the parties who received the documents will not suffer undue prejudice if a protective order against use of the document is issued" (*N.Y. Times Newspaper*, 300 AD2d at 172, citing *Mfrs. & Traders Trust Co. v Servotronics, Inc.*, 132 AD2d 392, 398-400 [4th Dept 1987]).

Here, the crux of White Oak's position is that Defendants abandoned any claim of privilege over attorney-client communications when it granted White Oak "full and unimpeded access to and to take possession of," *inter alia*, the Email Server without any "carve out, exception, restriction, or reservation of rights" in the Credit Agreement and the Stipulation (Opp at 3-4, 8-11, citing NYSCEF # 47 §§ 4.1, 9.1 and Stipulation ¶ 2). This is an overreaching—and frankly alarming—contention. As courts have routinely held in similar situations, an agreement to broadly provide for the access to records does not, in turn, create an unfettered right

to review and rely upon privileged communications and documents contained therein (*see, e.g. JP Morgan Chase & Co. v Indian Harbor Ins. Co.*, 98 AD3d 18, 25-26 [1st Dept 2012] [holding that "cooperation clauses in [] insurance policies did not operate as waivers of plaintiff's attorney-client and work-product privilege"]; *Gulf Ins. Co. v Transatlantic Reins. Co.*, 13 AD3d 278, 278 [1st Dept 2004] [holding that contract provision requiring "access to records" did not constitute a "blanket waiver of [] privileges under all circumstances"]; *United States Fire Ins. Co. v Phoenix Assur. Co. of N.Y.*, 1992 NY Misc LEXIS 709, at *7 [Sup Ct, NY County, Aug. 7, 1992] [Moskowitz, J.], *affd* 193 AD2d 559 [1st Dept 1993] [holding that the "attorney-client privilege was not waived by the promise of open 'records' alone"]; *see also BlackRock Allocation Target Shares: Series S Portfolio v Wells Fargo Bank, Natl. Assoc.*, 2017 WL 953514, at * [SD NY, Mar. 9, 2017] ["It is implausible that a sophisticated entity like Wells Fargo would allow a boilerplate books and records provision providing for inspection to serve as a generalized waiver of attorney-client privilege"]; *Travelers Cas. & Sur. Co. v Century Indemn. Co.*, 2011 WL 5570784, at *2 [D Conn, Nov. 16, 2011, Civ. No. 3:10CV400 (WWE)] [rejecting argument that a party was "contractually entitled to privileged materials under [an] access to records clause" that provided for "free access to the books and records of the Company at all reasonable times"]). And nothing in the record otherwise indicates that Defendants intended (explicitly or implicitly) to relinquish the protections of the attorney-client privilege by merely agreeing to the inclusion of broadly worded books and records provisions in the Credit Agreement or the Stipulation (*cf. N. River Ins. Co. v Phila. Reins. Corp.*, 797 F Supp 363, 369 [D NJ 1992] [concluding that, "absent more explicit language," a contractual provision requiring a reinsured entity to "provide its reinsurer with all documents or information in its possession that may be relevant to the underlying claim adjustment and coverage determination" did not operate as blanket waiver over the confidentiality of the reinsured entity's consultations with its attorney]). Accordingly, any "full and unimpeded access" to the Email Server that Borrowers may have conferred to White Oak does not, and cannot, serve as a basis to conclude that Defendants waived the protections of the attorney-client privilege.

White Oak separately argues that Defendants waived the attorney-client privilege by turning over the Email Server and taking no action or preventative measures to maintain the confidentiality of potentially privileged communications. To support this position, White Oak chiefly relies on *Bras v Atlas Constr. Corp.* (153 AD2d 914 [2d Dept 1989). White Oak's contention—and its reliance on *Bras*—is misplaced. The defendant in *Bras* inadvertently produced certain documents created in anticipation of litigation that contained sensitive admissions that defendant had communicated to its counsel (*id.* at 725). The counsel had screened defendant's files prior to the release of documents, but, as the counsel conceded, the deployed screening procedures merely excluded personal communications between counsel and defendant without any other procedure to check for material that might have been prepared for litigation (*id.* at 724-25). As a result, while the Second

Department agreed that the at-issue documents might be viewed as materials prepared for litigation, it nevertheless concluded that defendant had waived any privilege by failing to exercise due diligence in preventing their release (*id.* at 724). Notably, the defendant in *Bras* had produced the at-issue documents during the discovery phase of the proceedings and not pursuant to a broad, pre-discovery contractual turnover provision (*see id.* at 725).

Here, by contrast, Borrowers turned over the *entirety* of the Email Server prior to the onset of discovery because the Stipulation required them to do so (Stipulation ¶ 2). Given the Stipulation's mandate, this turnover took place without the benefit of reviewing any of the correspondence contained in the Email Server (*see* NYSCEF #s 227, 231-33). Certainly, in retrospect, it may have been prudent for Attorney Kamini to implement some sort of screening procedure prior to turning over the Email Server to White Oak. Nonetheless, the record supports a fair conclusion that Borrowers and Attorney Fox were acting with the understanding that White Oak would be retaining the Email Server for preservation purposes and that Borrowers would have an opportunity to locate and review those records with White Oak at a later date (*see* NYSCEF # 233; Stipulation ¶ 2 [c]). Thus, Defendants' failure to deploy any screening procedures prior to turning over the Email Server does not undercut their attorney-client privilege claims or their contention that disclosure of privileged communications was inadvertent.

White Oak otherwise contends that a waiver of the attorney-client privilege occurred because Defendants failed to take prompt action to remedy their inadvertent disclosure. The court disagrees. As a review of the docket and record establishes, the first time Defendants became aware of White Oak's review of the Email Server, as well as its reliance on privileged communications, was upon the filing of the Second PI Motion on May 18, 2023. Defendants' current counsel then raised this issue with the court via letter opposition on May 22, 2023, as well as during oral arguments held that same day (*see* NYSCEF # 132 at 9-10; NYSCEF # 234 at tr 17:14-21:1). Therefore, as the record establishes, Defendants did, in fact, take prompt action by raising the privilege issue with the court within four days of discovering the disclosure (*see Mfrs. & Traders Trust Co.*, 132 AD2d at 400 [concluding that party took prompt action by initiating proceedings within two business days after discovery of inadvertent disclosure]; *Campbell v Aerospace Prods. Intl.*, 37 AD3d 1156, 1157 [4th Dept 2007] [concluding that attorneys promptly asserted privilege "within a day of discovery of inadvertent disclosure"]). Although Defendants subsequently filed their motion two months after the court directed them to do so (NYSCEF # 176), this litigation has not moved forward in any meaningful way during this period. Nor is there any suggestion that White Oak detrimentally relied on Movant's delay in formally raising their privilege claims through this motion. Therefore, this two-month gap is not a proper basis to conclude that Defendants waived any claims to the attorney-client privilege. And the sole case to which White Oak cites does not suggest otherwise (*see Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 162 AD2d 577, 578 [2d Dept 1990] [concluding that

defendant failed to exercise due diligence and reasonable care to protect confidentiality of documents by failing to raise privilege issue for approximately 10 months after documents had been used in depositions and by not moving for a protective order until nearly two years after learning that confidential documents were being relied upon by opposing counsel]).

Finally, a determination that Defendants did not waive the attorney-client privilege will not unduly prejudice White Oak. To start, as noted above, this lawsuit is still in its infancy, and discovery has not yet even commenced. Moreover, as Defendants note, advice of counsel is not at issue in this matter, and White Oak has not relied on any of the at-issue privileged communications to litigate the ultimate merits of its case (*see* MOL at 9-10; Reply at 5). To avoid this conclusion, White Oak argues that it has "already relied on the email communications in its application for a preliminary injunction and order of attachment against the Orents" (*see* Opp at 11). But the court, in granting White Oak's Second PI Motion, did not rely on any of the privileged communications to reach its determination (*see* NYSCEF # 163 at 8-10), nor was that ruling a final merits determination (*see generally Bingham v Struve*, 184 AD2d 85, 88 [1st Dept 1992] ["A judicial determination regarding likelihood of success on the merits does not . . . amount to a pre-determination of the issues"]). In any event, a determination that Defendants' did not waive its attorney-client privilege by turning over the Email Server will not prevent White Oak from discovering and relying upon relevant information it needs to litigate the merits of its case (*cf. Mfrs. & Traders Trust Co.*, 132 AD2d at 400, citing *In re Grand Jury Investigation of Ocean Transp.*, 604 F2d 672, 674 [DC Cir 1979] [observing that prejudice has been found to exist if, after inadvertent disclosure, a party had been relying on documents and using them to elicit testimony]).[2]

At bottom, Defendants have met their burden of establishing that they did not waive any claims to the attorney-client privilege when Borrowers granted White Oak access to the Email Server. Accordingly, as further delineated below, Defendants are entitled to a protective order over the contents of the Email Server.

C. A Protective Order Against White Oak Is Warranted

Pursuant to CPLR 3103, the court may "make a protective order denying, limiting, conditioning or regulating the use of any disclosure device . . . to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts" (CPLR 3103 [a]). This includes an order suppressing disclosure that "has been improperly or irregularly obtained" in prejudice of a party's "substantial right" (*id.* 3103 [c]). Here, the court concludes that a protective

[2] White Oak also posits that if the court grants Defendants' application for a protective order, it will have to review nearly 1.14 million documents in the Email Server with no ability to ascertain whether any of the communications contained therein are privileged (Opp at 11). But, as explained below, White Oak should not and will not be the arbiter of Defendants' claims to privilege, and thus its concerns regarding the burden of a privilege review are without merit.

order is warranted to safeguard Defendants' attorney-client privilege and prevent improper usage of privileged communications in this litigation moving forward. The scope of the court's protective order will be as follows:

1. White Oak and its counsel shall be prohibited from further accessing or relying on any attorney-client communications that it or its counsel has discovered and/or reviewed on the Email Server to date, including any privileged documents that White Oak has publicly filed on the docket (*see* NYSCEF # 122).

2. White Oak and its counsel shall destroy any copies and notes related to any documents that may potentially be covered by Defendants' attorney-client privilege and that, to date, have been discovered and/or reviewed by White Oak or its counsel on the Email Server.

3. White Oak and its counsel will be precluded from any further review or usage of the contents of the Email Server unless, consistent with the terms of Paragraph 2 of the Stipulation, White Oak and its counsel work with the EIA Defendants (as defined in the Stipulation) to "locat[e] and review[] books and records and Collateral" and otherwise provide Defendants' counsel an opportunity to screen for privileged communications.[3]

D. Sanctions Are Not Warranted

In addition to a protective order, Defendants also seek the imposition of sanctions against White Oak. Defendants primarily rely on counsel's failure to notify Defendants of their receipt of privileged communications or otherwise seek a ruling from the court prior to using the privileged communications as part of the Second PI Motion (*see* MOL at 10-11; Reply at 6-7). Based on these apparent violations, Defendants seek "reasonable attorney's fees and costs associated with [their] motion" (MOL at 11; Reply at 7). White Oak retorts that, because there was no carve out in the Stipulation for privilege or any other limit on White Oak's use of email communications found on the Email Server, it did not know, or had no reason to know, that any privileged communications were being inadvertently included (Opp at 12).

[3] To be clear, precluding White Oak from any further review or usage of the contents of the Email Server will not prejudice its position in this litigation, as, to reiterate, discovery has not even commenced. Indeed, the court has yet to hold a preliminary conference or set a discovery schedule, and there is no indication the parties have propounded or responded to discovery demands. There is, as a result, ample time for both White Oak and Defendants to use any and all available discovery devices under the CPLR to uncover materials that are material and necessary to their claims and defenses.

It is true that the New York Rules of Professional Conduct does require White Oak's counsel to notify opposing counsel of its discovery of inadvertently disclosed privileged materials (*see* 22 NYCRR § 1200 at 4.4 [b]). But, notwithstanding the court's conclusion regarding White Oak's flawed position on waiver, the court accepts White Oak's counsel's affirmation that he had no reason to know or believe that the disclosure of attorney-client communications was inadvertent given the terms of the Credit Agreement and the Stipulation (Amato aff ¶ 16). After coupling this representation with the scope of the above-referenced protective order, the court declines to impose any sanctions (monetary or otherwise) on White Oak or its counsel at this time.

In sum, Defendants' motion is granted in part to the extent that it seeks a protective order against White Oak in connection with the Email Server, and the motion is denied to the extent that it seeks sanctions against White Oak and its counsel.

II. White Oak's Motion to Seal (MS010)

In conjunction with its opposition to Defendants' motion for a protective order and sanctions, White Oak moves by order to show cause to seal certain materials submitted in support of its opposition. Specifically, White Oak seeks to seal (1) the unredacted version of the Affirmation of John P. Amato in Opposition to Defendants' Motion for a Protective Order and Sanctions, dated August 4, 2023 (NYSCEF # 225), (2) the unredacted copy of Exhibit 6 to the Amato affirmation (NYSCEF # 232), and (3) the unredacted copy of White Oak's Memorandum of Law in Opposition to Defendants' Motion for a Protective Order and Sanctions (NYSCEF # 235). There is no opposition to the motion. In fact, Defendants request that, in the event the court grants any portion of their motion for a protective order, it should grant White Oak's motion to seal (NYSCEF # 248).

Under New York law, there is a presumption that the public is entitled to access to judicial proceedings and court records (*Mosallem v Berenson*, 76 AD3d 345, 348 [1st Dept 2010], citing *Mancheski v Gabelli Group Capital Partners*, 39 AD3d 499, 501 [2d Dept 2007]). The public's right to access, however, is not absolute (*Danco Labs. v Chem. Works of Gedeon Richter*, 274 AD2d 1, 8 [1st Dept 2000]), and courts are empowered to seal or redact court records pursuant to section 216.1 (a) of the Uniform Rules for Trial Courts upon a showing of "good cause" (22 NYCRR 216.1 [a]). At the same time, "[c]onfidentiality is clearly the exception, not the rule" (*Matter of Hoffman*, 284 AD2d 92, 93-94 [1st Dept 2001]), and the party seeking to seal court records has the burden to demonstrate compelling circumstances to justify restricting public access (*Mancheski*, 39 AD3d at 502). Here, as explained above, the redacted information at-issue in White Oak's motion concerns confidential attorney-client privileged communications. Accordingly, there is good cause for an order sealing the above-referenced documents (*see Matter of Beiny*, 132 AD2d 190, 217 [1st Dept 1987]).

White Oak's motion to seal is granted.

Conclusion

For the foregoing reasons, it is hereby

ORDERED that Defendants' motion for a protective order and sanctions (MS008) is granted in part to the extent granting Defendants a protective order against White Oak; and it is further

ORDERED that White Oak and its counsel are (1) prohibited from further accessing or relying on any attorney-client communications that it or its counsel has discovered and/or reviewed on the Email Server to date, including any privileged documents that White Oak has publicly filed; (2) directed to destroy any copies and notes related to any documents that may potentially be covered by Defendants' attorney-client privilege and that, to date, have been discovered and/or reviewed by White Oak or its counsel on the Email Server; and (3) precluded from any further review or usage of the contents of the Email Server unless, consistent with the terms of Paragraph 2 of the Stipulation and Order, dated January 27, 2023 (NYSCEF # 69), White Oak and its counsel work with the EIA Defendants (as defined in the Stipulation) to "locat[e] and review[] books and records and Collateral" and otherwise provide Defendants' counsel an opportunity to screen for privileged communications; and it is further

ORDERED that White Oak's motion to maintain under seal (i) the unredacted version of the Affirmation of John P. Amato in Opposition to Defendants' Motion for a Protective Order and Sanctions, dated August 4, 2023, located at NYSCEF # 225, (ii) the unredacted copy of Exhibit 6 to the Amato affirmation, located at NYSCEF # 232, and (iii) the unredacted copy of White Oak's Memorandum of Law in Opposition to Defendants' Motion for a Protective Order and Sanctions, located at NYSCEF # 235, is granted; and it is further

ORDERED that the Clerk of the Court is directed, upon service upon the Clerk of a copy of this decision and order with notice of entry, to seal the unredacted documents at NYSCEF #s 225, 232, and 235; and it is further

ORDERED that thereafter, or until further order of the court, the Clerk of the Court shall deny access to the unredacted version of these documents (NYSCEF #s 225, 232, and 235) to anyone (other than the staff of the Clerk or the court) except for counsel of record for any party to this action, any party, and any representative of the counsel of record for a party upon presentation to the County Clerk of written authorization from said counsel and appropriate identification; and it is further

ORDERED that service upon the Clerk of the Court shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County

Clerk Procedures for Electronically Filed Cases (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh).

This constitutes the decision and order of the court.

11/27/2023
DATE

MARGARET A. CHAN, J.S.C.

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