UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

-v-

No. 10 Civ. 655 (LTS)(MHD)

KELLEY DRYE & WARREN LLP,

Defendant.

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MEMORANDUM ORDER

The Equal Employment Opportunity Commission ("EEOC") brought this age discrimination action against Kelley Drye & Warren ("Kelley Drye" or "Firm") on behalf of Eugene T. D'Ablemont, a partner in Kelley Drye's New York office, and other unnamed individuals. On March 29, 2011, the parties entered into a stipulation allowing documents to be filed under seal in connection with EEOC's motion for partial summary judgment, which the Court so-ordered. (Stipulation and Order for the Filing Under Seal of Documents Marked "Confidential", Mar. 29, 2011, ECF No. 37.) EEOC filed its motion on May 30, 2011 (Motion for Partial Summary Judgment to dismiss Nineteenth Affirmative Defense, Mar. 30, 2011, ECF No. 38), and the Court issued its decision on July 25, 2011. (Memorandum Order, July 25, 2011, ECF No. 70.) Before the Court is parties' Joint Memorandum of Law responding to this Court's Order directing the parties to show cause as to why the documents submitted in connection with EEOC's summary judgment motion should not be unsealed and/or unredacted. The Court has reviewed carefully the parties' submission and, for the following reasons, a subset of the documents at issue is to be unsealed.

## DISCUSSION

There is a strong presumption of public access to judicial documents and proceedings that is rooted in both the common law and the First Amendment. See Lugosch v. Pyramid Co. of Onondaga, 435 F.3d 110, 119-120 (2d Cir. 2006). Under the common law, the Court must determine the weight of the presumption of access and "balance competing considerations against it." United States v. Amodeo, 71 F.3d 1044, 1050 (2d Cir. 1995). The First Amendment presumption of public access may be overcome "if specific, on the record findings are made demonstrating that closure is essential to preserve higher values and is narrowly tailored to serve that interest." Lugosch, 435 F.3d at 120 (quoting In re New York Times Co., 828 F.2d 110, 116). While both the common law and the First Amendment provide a presumption of public access, "[t]he common law does not afford as much substantive protection to the interests [in access to judicial documents] as does the First Amendment," Lugosch, 435 F.3d at 124 (citing Rushford v. New Yorker Magazine, Inc., 846 F.2d 249, 253 (4th Cir. 1988)).

To determine whether the First Amendment presumption of access attaches to sealed documents, a reviewing court must first determine whether the documents are judicial documents. Lugosch, 435 F.3d at 120. A document is a judicial document when it passes either prong of the "logic and experience" test, which asks whether the document has "historically been open to the press and general public," Hartford Courant, 380 F.3d 83, 92 (quoting Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 8 (1986)), or whether "public access plays a significant positive role in the functioning of the particular process in question." Id. Alternatively, a document is deemed "judicial" if the document is "derived from or [is] a necessary corollary of the capacity to attend the relevant proceedings." Lugosch, 435 F.3d at

120 (quoting Hartford Courant, 380 F.3d at 93).

Once a document is classified as a judicial document, the First Amendment presumption of access may still be overcome by a showing that the requested sealing is narrowly tailored to preserve "higher values." Lugosch, 435 F.3d at 120 (quoting In re N.Y. Times Co., 828 F.2d 110, 116 (2d Cir. 1987). Although the term has not been comprehensively defined, courts have identified particular examples of "higher values." See e.g., Lugosch, 435 F.3d at 125 (the attorney-client privilege); United States v. Aref, 533 F.3d 72, 83 (2d Cir. 2008) (national security); United States v. Amodeo, 71 F.3d 1044, 1050 (2d Cir. 1995) (law enforcement interests and the privacy of innocent third parties); Pal v. N.Y. Univ., No. 06 Civ. 5892(PAC)(FM), 2010 WL 2158283, at *1 (S.D.N.Y. May 27, 2010) (sensitive patient information). The party seeking to maintain the judicial documents under seal bears the burden of showing that higher values overcome the presumption of public access. DiRussa v. Dean Witter Reynolds Inc., 121 F.3d 818, 826 (2d Cir. 1997).

Kelley Drye argues that the documents at issue are not judicial documents because they were not filed in connection with a dispositive motion for summary judgment but rather, are sealed discovery documents attached to a non-dispositive motion. See Kamakana v. City & County of Honolulu, 447 F.3d 1172, 1179-80 (9th Cir. 2006) (finding an exception to the presumption of access to judicial records for sealed discovery documents attached to non-dispositive motions)[1]. Kelley Drye's premise is erroneous - the documents under seal *were* filed in connection with a dispositive summary judgment motion, and the Second Circuit in Lugosch has held that "there exists a qualified First Amendment right of access to documents submitted to

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[1] Kamakana confirmed that "the strong presumption of access to judicial records applies fully to dispositive pleadings, including motions for summary judgment and related attachments." 447 F.3d at 1179.

the court in connection with a summary judgment motion." 435 F.3d 110, 124. However, not all of the documents filed under seal in the instant action are automatically deemed judicial documents. Rather, the judicial documents are only those upon which the Court relied in deciding the EEOC's motion for partial summary judgment.

The motion for partial summary judgment addressed Kelley Drye's nineteenth affirmative defense, which sought a setoff of any damages to which D'Ablemont may be entitled based on 1) payments to him by third parties; 2) allegedly excessive client development funds provided to him; and 3) the value of certain legal services he received from Kelley Drye. In determining this motion, the Court relied on the following documents (the "Judicial Documents"): relevant provisions of the Kelley Drye Partnership Agreement (Declaration of Eugene T. D'Ablemont, Exh. A (hereinafter "D'Ablemont Decl."); Declaration of John M. Callagy, Exh. A (hereinafter "Callagy Decl.")); copies of two retainer agreements between Kelley Drye partners and their clients (D'Ablemont Decl., Exh. B); a memorandum, dated December 14, 2000, from D'Ablemont to the firm, requesting a bonus in addition to direct compensation from clients (D'Ablemont Decl., Exh. C); agreements between Kelley Drye and other partners, indicating that these partners could receive direct payments from clients in addition to receiving compensation from Kelley Drye (D'Ablemont Decl., Exhs. D - H); a memorandum, dated February 22, 2000, from the firm to D'Ablemont, explaining that it was not firm policy to allow a partner to retain direct compensation from clients and still receive additional compensation from the firm (Callagy Decl., Exh. B); a memorandum, dated March 12, 2001, from D'Ablemont to the firm, arguing that he should receive a bonus payment from the firm in addition to direct compensation from clients (D'Ablemont Decl., Exh. I); the firm's Client Development Allowances policy (Reply Declaration of Eugene D'Ablemont, Exh. 5)

(hereinafter "D'Ablemont Reply Decl.); a memorandum from D'Ablemont to the firm regarding his client development allowance for the year 2000 (D'Ablemont Reply Decl., Exh. 6); an accounting of D'Ablemont's client development allowances for the years 2007 to 2009 (D'Ablemont Reply Decl., Exh. 7); excerpts from manuals setting forth the firm's policy of providing partners limited legal services for free (Callagy Decl., Exhs. E - F); and a memorandum, dated July 18, 2008, from the firm to D'Ablemont, agreeing to write off the bill for legal services provided to one of Mr. D'Ablemont's relatives. (D'Ablemont Decl., Exh. L; Callagy Decl., Exh. I.)

The other documents filed under seal but not relied upon are not "derived from or a necessary corollary of the capacity to attend the relevant proceedings," and are therefore not judicial documents to which the First Amendment presumption of access attaches. See Lugosch, 435 F.3d at 120 (quoting Hartford Courant, 380 F.3d at 93).

As the party seeking to maintain the Judicial Documents under seal, Kelley Drye bears the burden of demonstrating what "higher values" overcome the presumption of public access and justify sealing. DiRussa, 121 F.3d at 826. Kelley Drye argues that confidential firm documents should remain sealed because disclosure of such information could leave Kelley Drye at a competitive disadvantage. While "courts may deny access to records that are 'sources of business information that might harm a litigant's competitive standing,'" In re Parmalat Securities Litigation, 258 F.R.D. 236, 244 (quoting Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 598 (1978)), the party seeking to keep documents under seal "must make a particular and specific demonstration of fact showing that disclosure would result in an injury sufficiently serious to warrant protection; broad allegations of harm unsubstantiated by specific examples or articulated reasoning fail to satisfy the test." Id.

Kelley Drye claims that the release of its confidential material will put it at an economic disadvantage in the competitive legal market, as other firms would be able to approach Kelley Drye clients, seek to recruit Kelley Drye lawyers, copy Kelley Drye policies, and embark on arrangements with their clients and partners similar to the arrangements Kelley Drye has in place. Although business information need not be a "trade secret" in order to remain sealed or redacted, it is helpful to consider trade secret law "in determining whether information is sufficiently valuable and secret to afford an actual or potential economic advantage over others." Id. at 245 (internal quotations omitted). Courts routinely apply the following six factors when determining the existence of a trade secret:

> "(1) the extent to which the information is known outside of [the] business; (2) the extent to which it is known by employees and others involved in [the] business; (3) the extent of measures taken by [the business] to guard the secrecy of the information; (4) the value of the information to [the business] and [its] competitors; (5) the amount of effort or money expended by [the business] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others."

Id. Other than the conclusory allegation that the material under seal is "highly confidential," Kelley Drye has failed to provide facts sufficient to establish that the Judicial Documents satisfy these six factors. Rather, most of the Judicial Documents are either specific to Mr. D'Ablemont's situation (and consequently unlikely to place Kelley Drye at a broad competitive disadvantage), or formulaic recitations of firm policies and procedures that can hardly be unique in the legal industry. See id. at 248 (denying motion to seal when defendants made "only vague and conclusory showings of the economic value of the information contained in any particular document" and failed to "demonstrate that the disclosure of any of the . . . documents at issue would reveal information that is not commonly known in the trade and that would cause a specific and significant harm to [defendants]"); cf. GoSMiLE, Inc. v. Dr. Jonathan Levine,

D.M.D., P.C., 769 F. Supp. 2d 630, 649-50 (S.D.N.Y. 2011) (granting defendant's motion to seal when documents contained "highly proprietary material concerning the defendants' marketing strategies, product development, costs and budgeting."); D'Amour v. Ohrenstein & Brown, LLP, No. 601418/2006, 2007 WL 4126386, at *21 (S.D.N.Y. Aug. 13, 2007) (finding good cause to seal a law firm's "income tax returns, financial statements and reports, and firm agreements and memoranda" particularly because "the tax returns include[d] schedules pertaining to [the firm's] individual partners, some of whom are no longer associated with [the firm] and are not parties to this litigation."). Kelley Drye has proffered no evidence that the Judicial Documents it wishes to maintain under seal are of such a highly proprietary or personal nature.

Kelley Drye has not made " a particular and specific demonstration of fact" that the disclosure of any of the Judicial Documents would "result in an injury sufficiently serious to warrant protection," Parmalat, 258 F.R.D. at 244, and so has failed to establish that its concerns of competitive disadvantage rise to the level of "higher values" sufficient to overcome the First Amendment presumption of access.

Kelley Drye also argues that the protection of client communications and names is a "higher value" that outweighs the presumption of access. The preservation of attorney-client confidentiality is a well-recognized exception to the presumption of access. See, e.g., The Diversified Group, Inc. v. Daugerdas, 217 F.R.D. 152, 162 (S.D.N.Y. 2003) (preserving the confidentiality of attorney-client communication is "precisely the kind of countervailing concern that is capable of overriding the general preference for public access to judicial records") (internal quotations omitted). However, any request for sealing must be narrowly tailored to achieve its aim of preserving the higher value at issue. Lugosch, 435 F.3d at 120, 124. Accordingly, while the Court agrees that any client information in the Judicial Documents should

remain confidential, wholesale sealing of the Judicial Documents is unnecessary, particularly in light of the EEOC's agreement to the continued redaction of all information that implicates the attorney-client privilege.

## CONCLUSION

For the foregoing reasons, the Court finds that Kelley Drye has not shown cause as to why certain documents submitted in this action under seal should remain under seal. Kelley Drye is hereby directed to file on the ECF system, under a cover sheet bearing the case caption and labeled "Documents Filed Pursuant to March 2, 2012 Order of the Court," copies of the following documents, redacted only to the extent necessary to conceal client names and other client-identifying information implicating the attorney-client privilege: Exhibits A through I, and L attached to the Declaration of Eugene T. D'Ablemont (docket entry no. 43); Exhibits A, B, E, F, and I attached to the Declaration of John M. Callagy (docket entry no. 54); and Exhibits 5 through 7 attached to the Reply Declaration of Eugene T. D'Ablemont (docket entry no. 60). The documents must be filed by March 19, 2012.

Dated: New York, New York
March 2, 2012

LAURA TAYLOR SWAIN
United States District Judge