UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff, v. KELLEY DRYE & WARREN LLP, Defendant.	No. 10 Civ. 655 (LTS)(MHD)

JOINT SUBMISSION OF DEFENDANT KELLEY DRYE & WARREN LLP AND PLAINTIFF EQUAL EMPLOYMENT OPPORTUNITY COMMISSION CONCERNING DOCUMENTS FILED UNDER SEAL

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Defendant Kelley Drye & Warren LLP ("Kelley Drye" or the "Firm") and Plaintiff Equal Employment Opportunity Commission (the "EEOC") (collectively, the "Parties") submit this joint memorandum of law setting forth their respective positions concerning the continued sealing of certain information contained in documents filed with the Court.

KELLEY DRYE'S PRELIMINARY STATEMENT

Courts frequently recognize that not all information filed in court should be subject to public disclosure. This is particularly true in connection with documents and information filed with procedural motions early in a case, before discovery is complete, which do not relate to the merits of the claims asserted. The EEOC filed this age discrimination action against Kelley Drye accusing the Firm of discrimination in the manner in which it compensates its Life Partners. The nature of the allegations implicates highly confidential and sensitive information which is not generally available to the public, including details concerning the Firm's structure and operation, its Partnership Agreement, the compensation of its Partners, and the Firm's arrangements with and representation of many clients in a variety of matters. The Firm makes significant efforts to protect the confidentiality of this information. However, in order to comply with its discovery obligations the Firm has produced a significant volume of confidential and sensitive information in each of these areas, some of which was filed under seal in connection with the EEOC's motion for Partial Summary Judgement. That information should remain under seal.

In recognition of the sensitive nature of the information to be exchanged in this action the Court entered a Protective Order and an Order authorizing the filing of such information under seal ("the Orders"). Consistent with the Orders the Parties have filed under seal documents containing confidential Firm information, client communications, and client names. This information should remain sealed and/or redacted to prevent competitive and commercial harm to Kelley Drye, and potential harm and embarrassment to its clients, and other third parties.

The EEOC now seeks to render sterile the protection supplied by the Orders by overstating the presumption of access to "judicial documents." The EEOC conflates authority discussing access to documents considered by the court in dispositive post-discovery summary judgment motions, or at trial, with the procedural posture here. In essence it argues that based solely upon its claims -- mere accusations that have yet to be tested -- every document it chooses to file, no matter how private or confidential immediately becomes public information.

The EEOC's motion was a supplement to its earlier motion to strike affirmative defenses under Rule 12(f). The EEOC did not attack the Firm's 19th Affirmative Defense in that motion. Because the time for a 12(f) motion had expired, the EEOC's later motion seeking to challenge the legal sufficiency of the defense had to be filed as a motion for partial summary judgment. The motion did not ask this court to consider the merits of any of its claims. Rather, it argued that damages setoffs could not be asserted as a matter of law because they were unrelated to the discriminatory compensation allegations. The Court's decision did not assess any of the EEOC's claims. An attack on the legal sufficiency of affirmative defenses does not bolster the presumption of access, when there are significant reasons why the documents and information filed under seal should remain under seal. The EEOC maintains that because it made allegations, it is now the self appointed arbiter of what Kelley Drye information should be disclosed to the public. The EEOC is wrong. The debate about public access in this matter is premature.

KELLEY DRYE'S STATEMENT OF RELEVANT FACTS

The EEOC filed its Complaint against the Firm on behalf of Eugene T. D'Ablemont, a Partner in the Firm's New York office, and other unnamed individuals. The Complaint asserts claims for age discrimination and retaliation under the Age Discrimination in Employment Act.

As a Partner, D'Ablemont is privy to highly confidential Firm information, some of which he has provided the EEOC. The Firm also has provided substantial confidential information to the EEOC in discovery based on the EEOC's commitments (which it now seeks

to abandon) to maintain the confidentiality of the information. In light of the need to exchange such information, the Court ordered:

> Documents and information which are maintained by Kelley Drye or by [the EEOC] or . . . D'Ablemont as confidential, are not available to the general public, and the disclosure of which is likely to cause competitive or other commercial harm to Kelley Drye or unduly invade the legitimate privacy interests of any individual may be designated as "CONFIDENTIAL" and . . . treated as confidential in this litigation.
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> [E]ither [P]arty may use information or documents designated as Confidential Information in connection with motion practice, [and] other court filings . . . . [I]f the [P]arties are unable to agree upon a method to protect such Confidential Information, the [P]arty seeking to protect the Confidential Information may apply to the Court for a mechanism to maintain the confidentiality of discovery material designated as Confidential.

The Court subsequently issued an Order further permitting the sealing or redaction of such information in connection with the EEOC's soon-to-be-filed motion for partial summary judgment. On July 25, 2011 the Court issued its decision, and ordered the Parties to make a joint submission setting forth their positions as to the continued sealing of documents and information.

KELLEY DRYE'S ARGUMENT

The presumption of public access to judicial documents is subject to multiple, well-recognized exceptions designed to protect precisely the type of information filed under seal in this matter, particularly where, as here, the documents were filed in support of a non-dispositive motion. *See Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 119-20 (2d Cir. 2006). Under the common law, the Court must weigh the presumption of access against factors that outweigh disclosure. *United States v. Amodeo*, 44 F.3d 141, 146 (2d Cir. 1995) ("*Amodeo I*"); *In re N.Y. Times Co.*, 828 F.2d 110, 116 (2d Cir. 1987). Similarly, the presumption arising under the First Amendment may be overcome "to preserve higher values" provided "the sealing order is narrowly tailored to achieve that aim." *Lugosch*, 435 F.3d at 124.

Well-recognized exceptions to the presumption of public access justify the sealing and/or redacting of: (1) client communications and names; and (2) confidential proprietary Firm

information, including but not limited to information concerning Firm structure, operation, lawyer compensation and finances. Sealing documents containing this information is a narrowly-tailored means of protecting harm to the Firm due to disclosure of the information.

A. A Non-Dispositive Motion Does Not Enhance the Presumption of Access.

The EEOC completely ignores the exception to the presumption of access to judicial records, for "sealed discovery document[s] [attached] to a non-dispositive motion," such that "the usual presumption of the public's right of access is rebutted." *Kamakana v. City & County of Honolulu*, 447 F.3d 1172, 1179-1180 (9th Cir.2006) (*citing Phillips v. General Motors Corp.*, 307 F.3d 1206, 1213 (9th Cir.2002)). The public has less of a need for access to court records attached only to non-dispositive motions because those documents are often "'unrelated, or only tangentially related, to the underlying cause of action.' " *Id.* (*quoting Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 33, 104 S.Ct. 2199, 81 L.Ed.2d 17 (1984)). "[P]ublic policies that support the right of access to dispositive motions . . . do not apply with equal force to non-dispositive materials." *Id.* (*citing Phillips*, 307 F.3d at 1213).

Ignoring this precedent, the EEOC distorts the Second Circuit's holding in *Lugosch* in support of its erroneous assertion that the mere fact that its motion was brought under Rule 56 renders any document it chose to file with its motion a "judicial document" subject to a "strong presumption of public access." In *Lugosh* the Court considered an action in which various media entities sought to intervene in an underlying litigation to gain access to documents filed in connection with the defendant's summary judgment motion. Central to the *Lugosch* Court's conclusion that the documents in that case were subject to a strong presumption of access was the fact that they had been filed in connection with a dispositive motion for summary judgment. The Court emphasized the dispositive nature of the motion, citing the "weight of authority in other circuits" that had reached the same conclusion in connection with documents filed in connection with dispositive motions. *Lugosch*, 435 F.3d 122, *citing* *FTC v. Standard Fin. Mgmt.*

Corp., 830 F.2d 404, 409 (1st Cir.1987) ("relevant documents which are submitted to, and accepted by, a court of competent jurisdiction in the course of adjudicatory proceedings, become documents to which the presumption of public access applies"); *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 252-53 (4th Cir.1988)("[b]ecause summary judgment adjudicates substantive rights and serves as a substitute for a trial, we fail to see the difference between a trial and the situation before us now" (where documents were submitted to the court on a summary judgment motion); *San Jose Mercury News, Inc. v. U.S. District Court*, 187 F.3d 1096, 1102 (9th Cir.1999)("the unbroken string of authorities ... leaves little doubt" that "the federal common law right of public access extends to materials submitted in connection with motions for summary judgment in civil cases prior to judgment."); *See also, In re Continental Illinois Sec. Litig.*, 732 F.2d 1302, 1309 (7th Cir.1984) (where motion to terminate "was designed to (and did) result in the dismissal of claims against several defendants" and "district court was required to make complex factual and legal determinations in a proceeding which has been characterized as a 'hybrid summary judgment motion,' ... the presumption of access applies to the hearings held and evidence introduced in connection with [the party's] motion to terminate"). It was based upon this authority, and the focus upon the dispositive nature of summary judgment motions that the *Lugosch* Court concluded "as a matter of law" the supporting documents were "judicial documents under the common law." Because the EEOC's Rule 56 Motion in this case was not dispositive the *Lugosch* court's holding is inapplicable.

Significantly, the EEOC, in the reply brief it filed in connection with its Rule 56 Motion, readily conceded that "the facts underlying Kelley Drye's setoff claims were not presented by EEOC for the purpose of having this Court determine their merits; rather, they were intended to show the general nature of the components of the Nineteenth Affirmative Defense in order to demonstrate why such setoff claims are improper in this EEOC enforcement action." The factual submissions were not necessary. The EEOC could have rested upon the facts as set forth in the

pleadings in support of its argument. The EEOC's attempt to add flavor to a non-dispositive motion that could otherwise stand on its own belies its assertion that the documents have been transformed into "judicial documents." The submissions should remain sealed.

B. Client Communications And Names Should Remain Sealed

Notwithstanding the EEOC's current position that most of the sealed information should be unsealed, in connection with the EEOC's motion the Parties cooperated, and agreed to file portions of declarations and documents under seal to protect the confidential information from disclosure. Filed under seal was information that: identified Firm clients; connected those clients to particular Firm lawyers, matters and issues; revealed special arrangements among the Firm, its Partners, and Firm clients; and disclosed fees charged to and paid by Firm clients.

Confidentiality is a lynchpin of the attorney-client relationship, more encompassing than just the attorney-client privilege and justifies the sealing and/or redaction of confidential client information from court filings. *See, e.g., NXIVM Corp. v. O'Hara*, 241 F.R.D. 109, 113 n.4 (N.D.N.Y. 2007) (filing motion under seal because it "pertain[ed] to matters that may be cloaked by the attorney-client privilege, the work product doctrine, or possibly provide the basis for other confidentiality claims."); *The Diversified Group, Inc. v. Daugerdas*, 217 F.R.D. 152, 162 (S.D.N.Y. July 30, 2003) (preserving confidential attorney-client communications is "precisely the kind of countervailing concern that is capable of overriding the general preference for public access to judicial records").[1]

When corporations or individuals decide to retain counsel they expect their decision and conversations to remain confidential. Disclosure of such confidences would undoubtedly harm the clients and the Firm's relationship with the clients. Even where actual attorney-client communications are not disclosed, the decision to seek legal advice is a private matter, the

[1] *Keramidas v. Keramidas*, No. 054008820, 2008 WL 4739199, at *3 (Conn. Super. Ct., Middlesex Co. Oct. 7, 2008) ("the important public interest, in preserving client confidences and protecting the attorney-client privilege is the type of interest which overrides the public interest in full access to court files and order the affidavit seal.").

disclosure of which may raise the specter of concern about the individual or corporation seeking counsel and unfairly place that individual or corporation in a negative public light. Client trust is essential to a law firm's success and professional reputation. The disclosure of client names and communications would irreparably damage the trust Kelley Drye has spent years building and place the Firm at a severe competitive disadvantage. Clients retain lawyers who they can trust to keep their confidences. Client names and communications must remain sealed.

C. Confidential Firm Documents Should Remain Sealed And/Or Redacted

Both the EEOC and Kelley Drye filed under seal information that is proprietary business information and not generally available to the public. The information includes: (1) client collections; (2) fee and work arrangements between Firm clients and individual Partners; (3) agreements the Firm has with individual Partners; (4) Methods of partner compensation and the earnings of Partners; (5) Firm strategies for transitioning clients between Partners; (6) the current and previous Partnership Agreements; (7) policy concerning client billing; (10) policy regarding client development allowances and information concerning client development allowances for individual Partners; and (13) policy regarding the provision of legal services for Partners. This information is private, confidential, and the disclosure of this information could leave the Firm at a competitive disadvantage.

The protection of confidential proprietary Firm information justifies sealing. *See Standard Inv. Chartered, Inc. v. Fin. Indus. Regulatory Auth.*, No. 08-4922, 2009 WL 2778447, at **2 (2d Cir. 2009) (regulatory organization's "'interest in protecting confidential business information outweighs the qualified First Amendment presumption of public access.'"); *Go SMiLE, Inc. v. Dr. Jonathan Levine, D.M.D., P.C.*, 769 F.Supp.2d 630, 649-50 (S.D.N.Y. 2011) (granting motion to seal "highly proprietary material concerning . . . marketing strategies, product development, costs and budgeting."); *Sherwin-Williams Co. v. Spitzer*, No. 04-185, 2005 WL 2128938 (N.D.N.Y. Aug. 24, 2005) (ordering the sealing of documents . . . regarding

confidential information such as trade secrets, and commercial and proprietary interests); *Gelb v. AT&T*, 813 F. Supp. 1022, 1035 (S.D.N.Y. 1993) (granting motion to seal documents based upon the "assertion that its competitors who do not now have this information could use it to do [the party] competitive injury . . . ."); *Dawson v. White & Case*, 184 A.D.2d 246, 584 N.Y.S.2d 814 (1st Dep't 1992) (sealing law firm's "financial information concerning [its] partners and clients" because it does not "'facilitate public discussion of policy issues" or serve "any legitimate public concern, as opposed to mere curiosity' . . . to counter-balance the interest of [its] partners and clients in keeping their financial arrangements private") (internal citations omitted); *see also United States v. Amodeo*, 71 F.3d 1044, 1051 (2d Cir. 1995) ("*Amodeo II*") ("[f]inancial records of a wholly owned business . . . and similar matters will weigh more heavily against access than conduct affecting a substantial portion of the public.")

In *D'Ammour v. Ohrenstein & Brown, LLP*, the court found good cause for sealing numerous documents containing a law firm's confidential, non-public information. No. 06-601418, 17 Misc. 3d 1130(A), 851 N.Y.S.2d 68, at 2007 WL 4126386 at *21. The court explained that the firm's interest in maintaining the privacy of these documents, which included "income tax returns, financial statements and reports, and firm agreements and memoranda," outweighed the right of public access to such documents. The firm "ought not to be required to make their private financial information public, merely because they have been named as defendants in a lawsuit, where no substantial public interest would be furthered by public access to that information." *Id.* [2]

[2] The EEOC's reliance on *Bank of America, NA v. Hensley Properties, L.P.*, 2008 WL 2724875 at *6 (E.D. Cal. 2008), in support of its argument that the Firm's Partnership Agreement is not entitled to protection is severely misplaced. In *Hensley* the Court considered a Defendant's request for a "'prophylactic' sealing order as to any documents it designates 'confidential.'" In addition the Court emphasized the fact that the "'private materials' at issue are not 'private materials unearthed during discovery.' Rather, they are documents that were voluntarily handed over to BOA prior to the litigation." Id at *2. Here the Firm is not seeking a "prophylactic" sealing order and the materials are "private materials unearthed during discovery." Similarly, the EEOC's reliance on *Gambale v. Deutsche Bank AG,* 377 F.3d 133, 142 (2d Cir. 2004) concerning compensation information is even more misplaced. In *Gambale* the Court considered defendant's application, after the matter had been settled, to maintain the

For the same reasons, the protection of Kelley Drye's confidential propriety information justifies the sealing and redaction of documents containing such information. Law firms, like Kelley Drye, closely safeguard this information, the disclosure of which will place them at a severe competitive disadvantage and cause irreparable harm.

The legal services industry is a highly-competitive one, and no legal market is as competitive as New York City, where Kelley Drye is headquartered. Law firms do not generally share the type of information that was filed under seal in connection with the EEOC's motion. This particularly rings true today in light of the current economic climate, which has led clients to seek the best and most cost-efficient representation. Similarly, partner recruiting has become a competitive business in its own right, with law firms seeking to attract "brand name" attorneys today more than ever. Firms like Kelley Drye must continually develop strategies to compete and to develop client relationships and secure its partners in light of this market, and every category of documents listed above directly relates to this process.

With access to Kelley Drye's confidential and proprietary information, other firms would be able reap the benefits of the Firm's efforts and time at no cost to them, and undercut Kelley Drye's future business. For example, law firms could: approach Kelley Drye clients; seek to recruit Firm lawyers; copy Firm policies; embark on arrangements with its clients and partners similar to the Firm's; and use the Firm's other confidential information in competition with it. Kelley Drye would have no opportunity to do the same. Client communications and names, and confidential proprietary information should remain sealed and/or redacted.

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confidentiality of documents filed in court in connection with a summary judgment motion. The sole basis for the Defendant's argument was that the Court had no jurisdiction to unseal documents after the case was dismissed. The Court ruled that it had control over Court files and since the defendant had offered no other argument in support of its motion, and had made no effort to rebut the presumption of access, the defendant's motion was denied.

EEOC'S STATEMENT OF THE MATTER

Even assuming that all the documents and information submitted under seal in connection with EEOC's Motion for Partial Summary Judgment as to Defendant's Nineteenth Affirmative Defense have been appropriately labeled as "confidential" for discovery purposes, which EEOC disputes, for the following reasons, the common law and First Amendment right of access to judicial documents in court proceedings, see Lugosch v. Pyramid Co., 435 F.3d 110, 122 (2d Cir. 2006), require that the sealed and redacted documents be unsealed and unredacted, with the exception of information touching on the attorney-client privilege.

Background

In this age discrimination case brought by EEOC against Kelley Drye & Warren ("Kelley Drye" or "Firm"), after the parties had submitted competing versions of proposed Confidentiality Orders for purposes of discovery, on August 16, 2010, Magistrate Judge Dolinger entered his own Confidentiality Order (docket entry # 26), paragraph 12 of which required the parties to confer on a mechanism to maintain confidentiality each time a party sought to use with a motion information that the other party had designated as "Confidential."[3] With respect to its motion for partial summary judgment on Kelley Drye's Nineteenth Affirmative Defense, EEOC intended to attach 12 documents to the Declaration of Charging Party Eugene T. D'Ablemont ("D'Ablemont") that Kelley Drye had produced in discovery and had designated "confidential." As the D'Ablemont Declaration described other documents and information EEOC believed Kelley Drye would consider confidential, EEOC and Kelley Drye engaged in prolonged

[3] In discovery, Kelley Drye has designated every single document it has produced as "confidential." While EEOC disagrees with many of these designations, because Kelley Drye has been producing, and EEOC has been requesting, documents in stages and because there remains a forthcoming potentially substantial production of e-mails, rather than burden the Court with multiple confidentiality disputes, EEOC intends to bring an omnibus motion if the parties are unable to resolve the issue of EEOC's belief that Kelley Drye's blanket confidentiality designations are overbroad.

negotiations on sealing prior to the filing of EEOC's motion. While the parties had divergent views on what should be sealed or redacted from EEOC's submissions, in order to avoid Court intervention, the parties entered into a Stipulation and Order allowing for sealing of documents and redactions of declarations in connection with the anticipated motion, signed by the parties and the Court (docket entry #37), wherein EEOC expressly "reserved the right to challenge the confidentiality designations" of the sealed and redacted documents in the future. While EEOC does not dispute Kelley Drye's general proposition that "confidential proprietary... information" (Kelley Drye portion of this joint submission, hereafter "KD," supra, p. 7) could be subject to sealing upon a showing of "serious injury" from disclosure, Kelley Drye has not met its burden to make such requisite showing concerning the particular sealed/redacted documents at issue. And a review of the nature of such sealed documents shows that in fact Kelley Drye's claims of "irreparable harm" from disclosure (KD, supra, p. 9) are without merit.[4] If Kelley Drye's overbroad view of what should be sealed in this litigation were accepted—including the Kelley Drye partnership agreement provisions that EEOC alleges are discriminatory (D'Ablemont Dec., docket entry # 40, Exh. A), and the evidence of age-based under-compensation caused by this agreement's challenged provisions—this significant, public litigation brought by a governmental entity in the public interest would be improperly shielded from public view.

EEOC'S ARGUMENT

Filed Documents on EEOC's Partial Summary Judgment Motion (Except Information Implicating the Attorney-Client Privilege) Should Be Unsealed Based on the Distinction Between Confidentiality of Documents in Discovery and the Higher Standard for Judicial Documents

1. The Heightened Standard for Sealing Judicial Documents as Compared with Discovery Material

[4] As discussed infra, this is particularly so because EEOC does not dispute that the names of Kelley Drye clients can remain redacted for purposes of EEOC's partial summary judgment motion.

It is firmly established "that documents submitted to a court for its consideration in a summary judgment motion are—as a matter of law—judicial documents to which a strong presumption of access attaches...." Lugosch, supra, 435 F.3d at 121; see also Joy v. North, 692 F.2d 880, 893 (2d Cir. 1982) ("documents used by parties moving for, or opposing, summary judgment should not remain under seal absent compelling reasons"); Prescient Acquisition Group, Inc. v. MJ Pub Trust, 487 F. Supp. 2d 374, 375 (S.D.N.Y. 2007) ("Submissions on a summary judgment motion are entitled to a strong presumption" of access). This right is particularly important in settings, like this matter, where one of the parties is a governmental entity that must litigate in the open to assure the public that it is acting in the public interest. Marisol v. Giuliani, 1997 U.S. Dist. LEXIS 15705, at *10 (S.D.N.Y. Oct. 10, 1997) ("the appropriateness of making court files accessible is accentuated in cases where the government is a party"), citing Federal Trade Comm. v. Standard Fin. Man. Corp., 830 F.2d 404, 410 (1st Cir. 1987); Pansy v. Borough of Stroudsburg, 23 F.3d 772, 785-89 (3d Cir. 1994) (same). Thus, that documents are subject to a protective order for discovery purposes does not mean that the same documents are shielded from public access for purposes of dispositive motions and trial. See In re Parmalat Securities Litigation, 258 F.R.D. 236, 240 (S.D.N.Y. 2009) (documents designated as confidential under protective order governing discovery unsealed after being filed with court for purposes of summary judgment motion); Byrnes v. Empire Blue Cross Blue Shield, 2000 WL 60221 at *1 (S.D.N.Y. Jan. 25, 2000) (contrasting limited public interest in access to discovery with the heightened "public interest in access to the proceedings of the court").

The burden is on the party seeking continued sealing of documents filed in connection to a summary judgment motion to demonstrate a "compelling reason to require that the documents remain under seal" once the court has decided the motion. Gambale v. Deutsche Bank AG, 377 F.3d 133, 142 (2d Cir. 2004). As discussed below, Kelley Drye plainly has failed to meet its

burden to demonstrate the requisite "compelling reasons," Joy v. North, supra and Gambale, supra, for the redactions and sealing of documents.[5]

2. The Partnership Agreements Should Not Be Sealed

While Kelley Drye asserts that its previous and current partnership agreements should remain under seal (KD, p. 7, supra), Kelley Drye does not even attempt to justify such a drastic result that would remove the core of this case from public view.[6] For this case is based on the claim that Kelley Drye's partnership agreement, revised only after EEOC filed suit, expressly discriminated against attorneys age 70 and older who wanted to continue to practice law by forcing them to relinquish their equity interest and authority in the Firm, and then compensating them through discretionary, standardless bonus payments. Other than baldly asserting that that the agreements involve "confidential proprietary Firm information," id., Kelley Drye cites no law and makes no argument to support its claim that revealing the documents at issue would place it "at a severe competitive disadvantage and cause irreparable harm." Id. at 9. In fact, the case law is to the contrary. See Aristotle, Inc. v. NGP Software, Inc., 714 F. Supp.2d 21, 23-24 (D.D.C. 2010) (court unsealed partnership agreement that it relied upon in deciding motion, despite defendant's claims that this would cause economic injury); Bank of America, NA v. Hensley Properties, L.P., 2008 WL 2724875 at *6 (E.D. Cal. July 11, 2008) (defendant's application to seal its partnership agreement because it contained "trade secrets" rejected by

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[5]EEOC agrees with Kelley Drye that information submitted in connection with EEOC's motion that touches on the attorney-client privilege can remain sealed or redacted; and in order to avoid disputes (possibly requiring judicial intervention) as to what does and does not implicate the privilege, this can be fully addressed by EEOC's agreement with Kelley Drye that the redactions of client names in the documents can remain intact in order to insure protection of the privilege. EEOC's agreement that client names contained in the submissions can continue to be redacted does not mean that EEOC believes that at trial such information should be shielded from public access. This issue need not be addressed now.

[6] In fact, EEOC only submitted the allegedly discriminatory portions of the Kelley Drye partnership agreement at issue in this case, not the entire agreement. Kelley Drye not only seeks to keep the partnership agreement sealed but also seeks to maintain numerous redactions to memoranda and declarations that describe the partnership agreement and its operation.

court). Clearly then, Kelley Drye's partnership agreement, and discussions thereof in the declarations and attachments, should be unsealed.

3. As Attorney Compensation Information Is at the Center of this Case and as Kelley Drye Has Not shown Compelling Reasons for Sealing, Compensation Information Should Not Be Sealed or Redacted

Attorney compensation is also a core component of EEOC's allegations, inextricably linked to the discriminatory partnership agreement, discussed above, which caused the under-compensation of D'Ablemont and the other 70-year-old attorneys who exercised their right to continue to practice at the Firm. Again, other than conclusory assertions of harm if attorney compensation information is unredacted/unsealed, Kelley Drye presents neither case law nor compelling reasons why such information so central to this case must remain hidden from public access. In fact, the case law in this Circuit is to the contrary. Gambale v. Deutsche Bank AG, supra, like this matter involved a discrimination case in which compensation charts and compensation histories of defendant's employees, as well as an internal defendant study on diversity of its workforce, were filed under seal in connection with defendant's summary judgment motion. 377 F.3d at 135-36. After defendant's motion was denied and the case settled, the district court unsealed these compensation and other internal bank documents. This decision to unseal was affirmed by the Second Circuit based on the public's right of access to judicial documents. Id. at 138-42.

Nor does the category of redactions involving what Kelley Drye has described as "the [m]ethods of partner compensation" (KD, supra, p. 7)--which primarily involve various paragraphs of and exhibits to D'Ablemont's declarations regarding his compensation that discuss the significance of client revenues to attorney compensation, hardly a law firm compensation factor unique to Kelley Drye (see, e.g., D'Ablemont Reply Declaration, docket entry # 59, ¶11-12)--rise to the level of constituting a "trade secret." See In re Parmalat Securities Litigation, supra, 258 F.R.D. at 244-245. Thus, the redacted/sealed documents involving attorney

compensation and the factors going into compensation decisions should be unsealed and unredacted.[7]

3. The Remaining Categories of Sealed and Redacted Documents Should Be Unsealed and Unredacted

None of the additional categories of documents warrant any sealing or redactions. First, Kelly Drye's concerns with regard to "client collections" and "fee and work arrangements between Firm clients and individual Partners" (KD, supra, p. 7) are fully protected in light of EEOC's agreement to the continued redaction of the names of Kelley Drye clients. In any case, client fee arrangements do not implicate the attorney-client privilege. United States v. Goldberger & Dubin, 935 F.2d 501, 505 (2d Cir. 1991).

The remaining categories of redactions all concern matters that are relevant to the discrimination claim, the disclosure of which simply would not rise to the level of causing "irreparable harm" to the Firm. These issues include Kelley Drye's practices regarding the forced de-equitization and the required transitioning of clients from older attorneys to younger partners (at the heart of this case); its practices on client billing, including how attorneys are credited for client receipts; its practices regarding the calculation of an attorney's client development allowance, and the amount of allowances awarded to certain attorneys (an important area for proof of D'Ablemont's under-compensation); and Firm policies on providing legal services (Id.). Kelley Drye claims that the above categories of information constitute such sensitive, proprietary information that disclosure would "leave the Firm at a competitive disadvantage in the legal services industry" (Id.). Given the volume of sealed documents and redactions in the areas described above, discussing each specifically is beyond the scope of this submission. But EEOC

[7] Kelley Drye implies that continued sealing of such information about its partners (and partnership) is warranted because this concerns "third parties." Id., p. 1. This is erroneous; Kelley Drye, the defendant, is a partnership owned and controlled by its partners. Additionally, such partners may be important comparators for EEOC's claim that D'Ablemont and other Life Partners who continued to practice law after age 70 were under-compensated.

invites the Court to review some of this sealed and redacted information to understand how overblown Kelley Drye's asserted concerns in fact are. See, e.g. D'Ablemont Reply Declaration, docket entry # 59, Exh. 5 (Kelley Drye client allowance policy, presently under seal). It is difficult to imagine how revealing the most basic, typical law firm policies and practices could result in the serious competitive harm asserted by Kelley Drye. As the Southern District held in In re Parmalat Securities Litigation, supra, "the fact that business documents are secret or that their disclosure might result in adverse publicity" does not justify sealing; rather, "[t]he party opposing disclosure must make a particular and specific demonstration of fact showing that disclosure would result in an injury sufficiently serious to warrant protection..." 258 F.R.D. at 244 (emphasis added). Nothing close to the requisite "serious injury" in fact would result from disclosure of the sealed and redacted information (apart from the attorney-client information that is not the source of dispute).

For these reasons, EEOC respectfully submits that the Court should order the unsealing and unredaction of the material submitted in connection with EEOC's summary judgment motion, with the exception of information that implicates the attorney-client privilege (which can be accomplished by the continued redaction of the names of Kelley Drye clients).

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