Lehman Bros. Intl. (Europe) (in administration) v AG Fin. Prods., Inc.
2016 NY Slip Op 30187(U)
January 11, 2016
Supreme Court, New York County
Docket Number: 653284/2011
Judge: Marcy S. Friedman

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 60

PRESENT: Hon. Marcy Friedman, J.S.C.

LEHMAN BROTHERS INTERNATIONAL (EUROPE) (in administration),

Plaintiff,

– against –

AG FINANCIAL PRODUCTS, INC.,

Defendant.

Index No.: 653284/2011

DECISION/ORDER

In this action, plaintiff Lehman Brothers International (Europe) (in administration) (LBIE) alleges that defendant AG Financial Products, Inc. (Assured Guaranty) breached contracts and the implied covenant of good faith and fair dealing governing a series of credit default swaps (the transactions) between the parties. By order dated June 18, 2013, this court referred LBIE's motion to compel discovery, and Assured Guaranty's cross-motion to strike allegedly confidential information, to a Special Referee to hear and report. Special Referee Jeremy Feinberg issued a Report and Recommendation on the motions, dated August 22, 2014 (Report). LBIE moves to confirm the Report in part and to reject the Report in part, pursuant to CPLR 4403. In opposition to LBIE's motion, Assured Guaranty also seeks to confirm the Report in part and to reject it in part.

Background

The allegations of the complaint and the undisputed facts are summarized at length in this court's decision and order, dated March 12, 2013, determining a motion to dismiss. (38 Misc 3d

1233[A], 2013 WL 1092888.) In brief, the parties entered into 37 credit derivative transactions governed by a common contract, the ISDA Master Agreement, dated as of April 7, 2000. (Complaint, ¶ 1.) After LBIE entered into bankruptcy administration, Assured Guaranty exercised its contractual right to terminate the transactions. (Id., ¶¶ 2, 22.) LBIE alleges, among other things, that Assured Guaranty breached its contractual obligations and acted in bad faith by "improperly calcula[ting] the termination payment" for the 28 transactions it terminated on July 23, 2009.[1] (Id., ¶¶ 5, 27.) As the non-defaulting party, Assured Guaranty had the contractual right to determine the Early Termination Date. (Id., ¶¶ 15, 27.) The contract required Assured Guaranty first to calculate the early termination payment in accordance with "Market Quotation" and a defined "Second Method." Market Quotation was "an amount determined on the basis of quotations from Reference Market-makers." (Id., ¶¶ 16-18.) The contract permitted Assured Guaranty to use the alternative Loss methodology to calculate the early termination payment if a Market Quotation "'cannot be determined or would not (in the reasonable belief of the party making the determination) produce a commercially reasonable result.'" (Id., ¶ 19, quoting Master Agreement, § 14.) As further alleged by LBIE, Assured Guaranty represented that it could not obtain bids from at least three Reference Market-makers. Assured Guaranty therefore took the position that it could not use the Market Quotation method and instead applied the Loss method. (Complaint, ¶ 29.)

[1] LBIE also terminated nine transactions in December 2008. This court's prior order dismissed LBIE's cause of action for breach of the implied covenant of good faith and fair dealing based on these transactions. (2013 WL 1092888 at *5.)

According to Assured Guaranty, its counsel retained several non-party consultants – Zolfo Cooper LLP (Zolfo), ZAIS Solutions, LLC (ZAIS), General Re-New England Asset Management, Inc. (NEAM), and KPMG LLP (KPMG) – before Assured Guaranty's July 2009 termination of the transactions. As attested by Assured Guaranty's Managing Director for Risk Management, in May 2009 Assured Guaranty, in consultation with its U.K. counsel, Denton Wilde Sapte LLP (Denton), decided to conduct settlement negotiations with LBIE before terminating the transactions, in an effort to avoid litigation. (Aff. Of Michael DiRende In Support Of Def.'s Cross-Motion [DiRende Aff.], ¶ 7 [Scheinkman Aff., App. 12].) Around this time, Assured Guaranty engaged U.S. counsel, Alston & Bird LLC (Alston), "in connection with the Transactions and potential related litigation. . . ." (Id., ¶ 8.) "At the request of counsel," Assured Guaranty's Managing Director contacted Zolfo, a financial restructuring firm, to negotiate with LBIE's bankruptcy administrator "so as to avoid litigation." (Id., ¶ 9.) The Zolfo retainer agreement, dated June 16, 2009 (Ex. 1 to DiRende Aff.), confirms that Zolfo "have, at the request of the Company [Assured Guaranty entities] been retained by its legal advisers, Denton Wilde Sapte LLP (DWS) to assist them in advising the Company on a settlement of all claims and liabilities and/or contemplated litigation between: (a) the Company and LBIE; and (b) the Company and LBHI [Lehman Brothers Holdings Inc.] in respect of the Master Agreement and the Guarantee (the Services)." (See also Declaration of Eduardo Viegas [a Director at PricewaterhouseCoopers LLC, acting for LBIE in administration] In Support Of Pl.'s Motion To Compel, ¶¶ 4-8 [Scheinkman Aff., App. 8] [stating that at least by July 2009, Zolfo acted on behalf of Assured Guaranty in discussions with LBIE to settle outstanding credit default swaps].) On or about July 21, 2009, Denton also retained KPMG on behalf of Assured Guaranty "for the

design, delivery and settlement of an auction process for the sale of certain Credit Default Swaps" held by Assured Guaranty. (Retention Letter between Denton and KPMG, App. 1 [annexed as Ex. 6 to DiRende Aff.]. See also DiRende Aff., ¶¶ 17-18.)

On or about June 8, 2009, Alston retained ZAIS "to provide consulting services . . . for the purposes of evaluating litigation claims arising out of and providing legal advice related to [] certain credit default swap agreements between Assured [Guaranty] and [LBIE]." (Retention Letter between Alston and ZAIS, at 1 [annexed as Ex. 4 to DiRende Aff.]. See also DiRende Aff., ¶ 16.) On or about July 21, 2009, Alston executed a retention letter with NEAM, also "to provide consulting services . . . for the purposes of evaluating litigation claims arising out of and providing legal advice related to [] certain credit default swap agreements between Assured [Guaranty] and [LBIE]." (Retention Letter between Alston and NEAM, at 1 [annexed as Ex. 5 to DiRende Aff.]. See also DiRende Aff., ¶ 16.)

On or about July 7, 2009, in the course of the settlement negotiations, LBIE and Zolfo executed a non-disclosure agreement (NDA). This agreement provides that the "communications in connection with this Agreement shall be considered settlement negotiations" pursuant to applicable federal and state law, including CPLR 4547. It further provides: "As such, to the fullest extent pursuant to the foregoing authority, such communications shall be privileged and confidential and inadmissible in any judicial or non-judicial proceeding for any purpose." (NDA, § 2.3 [annexed as Ex. 3 to DiRende Aff.].) The NDA forms the basis for Assured Guaranty's cross-motion to strike.

During discovery, LBIE moved to compel Assured Guaranty to produce all communications with or copied to the above consultants. (Notice of Motion [Scheinkman Aff.,

App. 2].) Assured Guaranty withheld these documents based on the attorney-client privilege or on the attorney work product and trial preparation privileges.

As to the attorney-client privilege, LBIE contended that the presence of the non-attorney consultants on communications between attorney and client vitiated the claim of privilege. In particular, LBIE argued that the consultants' participation was not "necessary" for the effective communication of legal advice from attorney to client, and that the privilege was otherwise inapplicable because the consultants were not acting as "agents" of counsel to facilitate the provision of legal advice to Assured Guaranty. (Pl.'s Memo. Of Law In Supp. Of Pl.'s Motion to Compel at 3, 9-12, 16-17 [Scheinkman Aff., App. 3].) LBIE claimed that Zolfo was engaged instead to facilitate the settlement of the outstanding transactions with LBIE as part of a "housekeeping exercise" before Assured Guaranty's books were consolidated with those of a company it had acquired. (Id. at 5-6, 11.) LBIE further claimed that NEAM and ZAIS were engaged to advise on the valuation of, and to calculate a termination amount for, the July 2009 transactions (id. at 16), while KPMG was retained to "manage the valuation process." (Id.) As to the work product and trial preparation privileges, LBIE argued that any materials created by the consultants were not developed in anticipation of litigation, which was not imminent at the time of the retention, and were not created primarily for litigation purposes. (Id. at 13-15, 17-18.)

In opposition, Assured Guaranty contended that all of the communications involving the consultants were subject to the attorney-client privilege, as all consultants were acting as Assured Guaranty's or its counsels' agents. Assured Guaranty also argued that this privilege applies not only where a consultant provides "necessary" expertise, but also where the consultant acts as the

client's or counsel's agent and the communication is made in confidence, principally to assist the attorney in providing legal advice. (Def.'s Memo. Of Law In Support Of Cross-Motion at 9-10, 14 [Scheinkman Aff., App. 10].) As to the consultants' specific roles, Assured Guaranty contended that its U.K. counsel, Denton, retained Zolfo in the summer of 2009 to act as its agent in connection with negotiations to settle claims and/or contemplated litigation between Assured Guaranty and LBIE regarding the credit default swaps, prior to their termination. (Id. at 10-11.) According to Assured Guaranty, its U.S. counsel, Alston, retained ZAIS and NEAM to assist it with settlement negotiations and potential litigation, based on these consultants' expertise in complex financial analysis and valuation. (Id. at 15.) Denton allegedly retained KPMG to act as Denton's agent in advising Assured Guaranty about the legal requirements for the Market Quotation auction required by the parties' agreement. (Id. at 16.) Finally, Assured Guaranty contended that litigation was anticipated in the summer of 2009 and that any communications with the consultants were therefore protected as work product and trial preparation materials. (Id. at 17-20.)

The Special Referee's Report and Recommendation

The parties appeared before Special Referee Feinberg and submitted supplemental letter briefs. (Report at 2-5 [Scheinkman Aff., App. 1]; Letter Briefs [Scheinkman Aff., App. 17-22].) In addition, counsel stipulated to a subset of 58 documents for in camera review. (Scheinkman Aff., App. 19.) After reviewing the documents, the Special Referee found that the work product and trial preparation privileges should apply to the Zolfo, ZAIS, and NEAM documents. (Report at 26-27, 29.) With respect to the KPMG documents, the Special Referee found that "[t]here is no indication in the materials reviewed in camera of any litigation-related purpose," and

recommended that they be produced. (Id. at 30-31 [emphasis omitted].) The Special Referee further found that Zolfo, ZAIS, and NEAM were acting as agents of Assured Guaranty's counsel and that their communications were protected by the attorney-client privilege. (Report at 33-36.) However, the Special Referee recommended that the attorney-client privilege not be extended to the KPMG documents as "none of these [documents] actually reflects or gives any indication of legal advice. Rather, taken as a whole, a better read of the KPMG documents indicates that it was KPMG's advice that was being sought and provided regarding the conduct and results of the post-termination auction process." (Report at 36.) Finally, the Special Referee recommended that Assured Guaranty's cross-motion to strike confidential settlement negotiations based on the NDA be denied. (Id. at 17, 20.)

The Relief Requested on the Instant Motion

On this motion, LBIE moves to confirm the portions of the Report that recommended the production of KPMG documents and the denial of Assured Guaranty's motion to strike. (Pl.'s Memo. Of Law In Supp. at 9-10.) LBIE moves to reject the portion of the Report that recommended that the Zolfo, ZAIS, and NEAM documents be withheld from production.

More particularly, LBIE contends that the Special Referee misapplied the leading New York case, People v Osorio (75 NY2d 80 [1989]), on the application of the attorney-client privilege where third-parties are present at or involved in attorney-client communications. LBIE asserts that the Special Referee mistakenly held that under Osorio, the attorney-client privilege applies to communications made to agents of an attorney or client if the communications were "helpful," as opposed to "necessary," to the provision of legal advice. (Id. at 11-13.) As it did before the Special Referee, LBIE also contends that Zolfo, ZAIS, and NEAM were providing

business services to Assured Guaranty, and that their documents are not protected by the work product or trial preparation privileges. (Id. at 16-21.)

Assured Guaranty seeks to confirm the portions of the Special Referee's Report that held that the Zolfo, ZAIS, and NEAM documents are protected by the work product and trial preparation privileges as well as the attorney-client privilege. (Def.'s Memo. Of Law In Opp. at 11-21.) As to the attorney-client privilege, Assured Guaranty asserts that the Special Referee applied the correct legal standard – namely, whether the communication with a third-party agent of counsel was "necessary or highly useful in facilitating the provision of legal advice." (Id. at 18-19.) Assured Guaranty also seeks to reject the portion of the Special Referee's Report that recommended that its cross-motion to strike be denied. (Id. at 21-23.) Further, Assured Guaranty seeks to reject the Special Referee's recommendation that the KPMG documents be produced, asserting that KPMG was retained by Assured Guaranty's U.K. counsel to assist counsel in advising Assured Guaranty on its contractual obligations with respect to the Market Quotation process. (Id. at 24.)[1]

Discussion

It is well settled that a "trial court is afforded broad discretion in supervising disclosure and its determinations will not be disturbed unless that discretion has been clearly abused. The deference afforded to the trial court regarding disclosure extends to its decision to confirm a referee's report, so long as the report is supported by the record." (Those Certain Underwriters

[1] Although Assured Guaranty did not formally move to confirm in part and reject in part the Special Referee's Report, LBIE has not objected to the court's consideration of this request by Assured Guaranty for relief.

at Lloyds, London v Occidental Gems, Inc., 11 NY3d 843, 845 [2008] [internal quotation marks and citation omitted] [reviewing reference made pursuant to CPLR 3104].)

The court first addresses the application of the attorney-client privilege to the communications involving the third-party consultants that LBIE seeks.[2] In People v Osorio (75 NY2d 80, supra), the Court of Appeals restated the general rule that "communications made . . . in the known presence of a third party are not privileged." The Court held, however, that

> "[a]n exception exists for statements made by a client to the attorney's employees or in their presence because clients have a reasonable expectation that such statements will be used solely for their benefit and remain confidential. Similarly, communications made to counsel through a hired interpreter, or one serving as an agent of either attorney or client to facilitate communication, generally will be privileged. [¶] The scope of the privilege is not defined by the third parties' employment or function, however; it depends on whether the client had a reasonable expectation of confidentiality under the circumstances."

(Id. at 84 [internal citations omitted].) While Osorio involved a third-party translator rather than expert, the Court relied in support of its holding upon United States v Kovel (296 F2d 918 [2d Cir 1961]), which remains perhaps the leading federal case on the applicability of the attorney-privilege to communications involving third-parties. There, the Second Circuit held that a tax law firm's client's communication with an accountant, who was an employee of law firm, could be privileged if "the communication [were] made in confidence for the purpose of obtaining legal advice from the lawyer." (Id. at 922.) The Court reasoned:

> "Accounting concepts are a foreign language to some lawyers in almost all cases, and to almost all lawyers in some cases. Hence the presence of an accountant,

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[2]The Special Referee initially considered whether the communications sought by LBIE were subject to the attorney work product and trial preparation privileges (Report at 22-31), and, in the alternative, whether such communications were protected by the attorney-client privilege. (Report at 31-36.) In their briefing before the Special Referee, the parties treated the attorney-client privilege as the initial issue. (Pl.'s Memo. Of Law In Supp. at i [Scheinkman Aff., App. 3]; Def.'s Memo. Of Law In Opp. at i [Scheinkman Aff., App. 10].) This court will do so as well.

> whether hired by the lawyer or by the client, while the client is relating a complicated tax story to the lawyer, ought not destroy the privilege, any more than would that of the linguist in the second or third variations of the foreign language theme discussed above [involving use of translators]; the presence of the accountant is necessary, or at least highly useful, for the effective consultation between the client and the lawyer which the privilege is designed to permit."

(Id.)

Relying on Osorio, Courts have applied the attorney-client privilege to "communications of 'one serving as an agent of either attorney or client.'" (Hudson Ins. Co. v M.J. Oppenheim, 72 AD3d 489, 489-490 [1st Dept 2010] [applying privilege to documents generated by forensic accountant retained by defense counsel, and quoting Robert V. Straus Prods. v Pollard, 289 AD2d 130, 131 [1st Dept 2001], which, in turn, quoted Osorio, 75 NY2d at 84]. Accord MBIA Ins. Corp. v Countrywide Home Loans, Inc., 93 AD3d 574, 574 [1st Dept 2012] [where "plaintiff submitted evidence, including retainer agreements, showing that its counsel retained consultants to help provide legal advice to plaintiff with respect to potential legal claims against defendants," Court held, quoting Hudson, that attorney-client privilege was applicable and "extend[ed] to documents generated by consultants retained by counsel 'to assist in analyzing or preparing' for anticipated litigation"]; Gama Aviation Inc. v Sandton Capital Partners, L.P., 99 AD3d 423, 424 [1st Dept 2012] [rejecting "assertion that the [attorney-client] privilege was waived because the communications were copied to, sent to, or authored by [the] third-party," where the third-party was acting as agent of the represented party and that party "had a reasonable expectation that he [the third-party] would keep the communication confidential"]. See generally Stroh v General Motors Corp., 213 AD2d 267, 268 [1st Dept 1995] [quoting Osorio (75 NY2d at 84) for proposition that communications made to counsel through an agent of the client to facilitate communication generally will be privileged, and holding that daughter's presence in discussions with elderly mother's counsel did not destroy the privilege, where

daughter "selected the law firm to represent [the mother], transported her to the law office, and put her sufficiently at ease to communicate effectively with counsel"].)

Osorio and Kovel do not state, nor do the above cases, that the attorney-client privilege will attach to third-party communications only where the participation of the third-party is "necessary" in order to facilitate the provision of legal advice. There is, however, authority to that effect. (See e.g. Doe v Poe, 244 AD2d 450, 451 [2d Dept 1997], affd on other grounds 92 NY2d 864, 867 [1998] [affirming Appellate Division on alternative holding that the communications were not protected by the attorney-client privilege "inasmuch as [the third-party, an attorney] attended the meetings in a nonrepresentative capacity"]; IDX Capital, LLC v Phoenix Partners Group LLC, 2009 WL 2440286 [Sup Ct, NY County, Aug. 4, 2009, Index No. 102806/07 [holding that the attorney-client privilege applies where "the third party's involvement was 'nearly indispensable or served some specialized purpose in facilitating attorney-client communications,'" and that the disclosures at issue to a third-party investment bank were not "necessary for the client to obtain informed legal advice," where the third-party was hired by the client, prior to the client's retention of counsel, to assist it with negotiations for a possible business combination]; Bolton v Weil Gotshal & Manges, LLP, 2005 WL 5010333 [Sup Ct, NY County, Aug. 14, 2005, Index No. 602341/03]; McNamee v Clemens, 2013 WL 6572899, *5-6 [US Dist Ct, ED NY, Sept. 18, 2013, Index No. 09 CV 1647 (SJ)], motion to amend denied 2014 WL 1338720 [US Dist Ct, ED NY, Apr. 2, 2014]; National Educ. Training Group, Inc. v SkillSoft Corp., 1999 WL 378337, *4 [US Dist Ct, SD NY, June 10, 1999, Index No. M8-85 (WHP)] [quoted above in IDX Capital].)

Here, even assuming that the communications involving the consultants must have been necessary to facilitate Assured Guaranty's attorneys' provision to it of informed legal advice, the

court finds that the record supports the Special Referee's findings that the communications involving Zolfo, ZAIS, and NEAM are protected by the attorney-client privilege, while those involving KPMG are not.

The Special Referee reviewed the sample set of documents agreed to by the parties and made the following findings. With respect to the Zolfo documents, the Special Referee found that "the sample set demonstrate[d] that Zolfo was providing assistance to Denton in conveying legal advice to its client AGFP [Assured Guaranty]" and that "the communications show that there was ongoing interplay between Denton, Zolfo and AGFP over the decisions that Denton had to advise AGFP about in attempting to settle or litigating the underlying dispute with LBIE." (Report at 33-34.) With respect to the ZAIS and NEAM documents, the Special Referee found that the documents in the sample set demonstrated that "each of these consultants was providing assistance and guidance that assisted counsel's ability to advise AGFP; specifically they provided information about the valuation issues that were relevant to the settlement talks with LBIE or might ultimately be relevant if litigation ensued." (Id. at 35.) Further, based on the retention letters and the documents, the Special Referee rejected LBIE's claim that ZAIS and NEAM were not acting as the agents of Assured Guaranty. (Id. at 35-36.)

The court can discern no basis on which to disturb the Special Referee's findings based on his in camera review of the documents and the retention letters. As the Court of Appeals has held, "whether a particular document is or is not protected is necessarily a fact-specific determination, most often requiring in camera review." (See Spectrum Sys. Intl. Corp. v Chemical Bank, 78 NY2d 371, 378 [1991] [internal citation omitted].) The Special Referee carefully recorded his findings as to the content of the documents based upon his review. (Compare NAMA Holdings, LLC v Greenberg Traurig LLP, 133 AD3d 46, 60 [1st Dept 2015]

[declining to affirm the trial court's order directing the production of allegedly privileged documents, and remanding the matter for an in camera review, where "the special referee did not review a single document in camera, despite being instructed by the motion court to conduct an item-by-item review"].) As to the retention letters, they do not, without more, establish that these three consultants were acting as agents of counsel to facilitate their provision of legal advice. (See Spectrum Sys. Intl. Corp., 78 NY2d at 379-380 ["a court is not bound by the conclusory characterizations of client or counsel that the retention was for the purpose of rendering legal advice"].) They do, however, provide support for that finding, given their stated purpose of engaging the consultants to assist the attorneys in connection with settlement or anticipated litigation, and the timing of the retentions in close proximity to the renewed settlement negotiations with LBIE.

The Special Referee also considered the evidence submitted by LBIE to show that the consultants were engaged for business purposes, rather than to facilitate the attorneys' provision of legal advice. In a well-reasoned decision, which the court accepts, the Special Referee concluded that the NDA between Zolfo and LBIE did not preclude his consideration of such evidence in assessing Assured Guaranty's claim of privilege. (Report at 12-20.) After considering LBIE's evidence in its entirety (id. at 20), the Special Referee nevertheless concluded that the privilege applied to the Zolfo, ZAIS and NEAM documents.

The record supports this conclusion. In support of its claim that the consultants performed business services, LBIE relies heavily on the following statement in a "discussion document," presented by Zolfo to LBIE's administrators in July 2009: Assured Guaranty is undertaking "an internal housekeeping exercise as a result of the acquisition of FSA, which completed on 1 July 2009. Due to the negative connotations associated with holding open

positions with LBIE and to clear this issue before consolidating FSA and [Assured Guaranty's] systems, [Assured Guaranty] would like to settle the trades promptly." (Declaration of Paul Copley [an LBIE administrator], ¶ 9 and Ex. E to Copley Declaration [Scheinkman Aff., App. 5]; Pl.'s Memo. Of Law In Supp. at 14.) Contrary to LBIE's apparent contention, this document does not refer exclusively to settlement or closing of open swap transactions, as opposed to the settlement of a legal claim. (Pl.'s Reply Memo. Of Law at 7.) Review of the document as a whole confirms that it referenced the termination provisions of the ISDA Master Agreement and discussed global settlement options.

The court further holds that in light of the complexity of the financial instruments and the importance to Assured Guaranty's exercise of its contractual rights of a sophisticated understanding of the market for such instruments, any requirement that the services of financial consultants be "necessary" to the effective provision of legal advice is satisfied. The reasoning of the Kovel Court in holding that the attorney-client privilege may apply to an accountant's services to a lawyer representing a client in an accounting matter is equally applicable to the services of the financial consultants here. Complex financial instruments "are a foreign language to some lawyers in almost all cases, and to almost all lawyers in some cases. Hence, the presence of the [financial consultants] . . . ought not destroy the privilege." (See Kovel, 296 F2d at 922.)

In holding that the Zolfo, ZAIS, and NEAM documents are protected by the attorney-client privilege, the court is mindful of the "concern[] that the attorney-client privilege not be used as a device to shield discoverable information." (See Spectrum Sys. Intl. Corp., 78 NY2d at 379.) Here, however, the court is satisfied that Assured Guaranty met its burden of proving each

element of its claim based on the attorney-client privilege. (See generally id. at 377; Matter of Priest v Hennessy, Jr., 51 NY2d 62, 69 [1980].)

As the court will affirm the Special Referee's findings that these documents are protected by the attorney-client privilege, it need not, and does not, reach the possible additional protections of the work product and trial preparation privileges.

Finally, the court holds that the KPMG documents are not protected by the attorney-client, work product, or trial preparation privileges. After reviewing the sample set, the Special Referee found that "none of these [documents] actually reflects or gives any indication of legal advice" and that KPMG's advice "was being sought and provided regarding the conduct and results of the post-termination auction process." (Report at 36.) In claiming privilege, Assured Guaranty merely asserts that KPMG was in fact assisting Denton and that a different firm ultimately conducted the auction. (Def.'s Memo. Of Law In Opp. at 24.) These assertions are not sufficient to disturb the Special Referee's findings, which are supported by the record.

It is accordingly hereby ORDERED that the motion of plaintiff LBIE to confirm in part and to reject in part the Special Referee's Report and Recommendation is granted solely to the extent of (1) confirming the Special Referee's recommendation that the KPMG documents should be produced, and (2) confirming the Special Referee's recommendation that Assured Guaranty's cross-motion to strike allegedly prejudicial material be denied; and it is further

ORDERED that the application of Assured Guaranty to confirm in part and reject in part the Special Referee's Report and Recommendation is granted solely to the extent of confirming the Special Referee's recommendation that the Zolfo, ZAIS, and NEAM documents are subject

to the attorney client privilege and should not be produced.

This constitutes the decision and order of the court.

Dated: New York, New York
January 11, 2016

MARCY FRIEDMAN, J.S.C.