

CIRCUIT CLERK
IN THE CIRCUIT COURT OF NICHOLAS COUNTY, WEST VIRGINIA
NICHOLAS COUNTY, WV
BUSINESS COURT DIVISION
2018 DEC -6 A 10:38

MICHAEL D. HARLOW,

Plaintiff,

v.

Civil Action No. 17-C-149

PRESIDING JUDGE: JAMES H. YOUNG, JR.

EASTERN ELECTRIC, LLC,

Defendant.

AGREED PROTECTIVE ORDER

By signing this Agreed Protective Order ("Protective Order"), the parties, by their respective counsel, have agreed to be bound by its terms and to request its entry by the presiding judge. It is hereby **ORDERED** as follows:

I. DISCOVERY PHASE

A. If a party or an attorney for a party has a good faith belief that certain information, documents or other materials (including voice recordings and digital information) subject to disclosure pursuant to a discovery request or otherwise produced in connection with this civil action, are confidential and should not be disclosed other than in connection with this action and pursuant to this Protective Order, the party or attorney making such disclosure or production shall mark each such document or other material as "**CONFIDENTIAL.**" To the extent it is practical to do so, the designating party must designate for protection only those parts of material, documents, items, or oral or written communications that qualify – so that other portions of the material, documents, items, or communications for which protection is not warranted are not swept unjustifiably within the ambit of this Protective Order. Mass, indiscriminate, or routinized designations are prohibited. If it comes to

a designating party's attention that information or items that it designated for protection do not qualify for protection, that designating party must promptly notify the other party that it is withdrawing the mistaken designation.

B. If a party or an attorney for a party disputes whether a document or other material should be marked "**CONFIDENTIAL**," the parties and/or attorneys shall attempt to resolve the dispute between themselves. If they are unsuccessful, the party or attorney designating the relevant document or other material as "**CONFIDENTIAL**" shall file and serve a motion to retain confidentiality within seven (7) days of the initial notice of challenge. Each such motion must be accompanied by a competent declaration affirming that the movant has complied with the meet and confer requirements imposed in this paragraph. Failure by the designating party to file and serve such a motion including the required declaration within seven (7) days shall automatically waive the confidentiality designation for each challenged designation. In addition, the challenging party may file a motion challenging a confidentiality designation at any time if there is good cause for doing so, including a challenge to the designation of a deposition transcript or any portions thereof. Any such motion must be accompanied by a competent declaration affirming that the movant has complied with the meet and confer requirements imposed herein. The burden of persuasion in any such challenge proceeding shall be on the designating party. Unless the designating party has waived the confidentiality designation by failing to file a motion to retain confidentiality as described above, all parties shall continue to treat the material in question as confidential until the court rules on the challenge.

C. No party or attorney or other person subject to this Protective Order shall distribute, transmit, or otherwise divulge any document or other material which is marked "**CONFIDENTIAL**" pursuant to this Protective Order for discovery produced in connection with this civil action, or the

contents thereof, except in accordance with this Protective Order. Court personnel are not subject to this Protective Order while engaged in the performance of their official duties.

D. Subject to Section III, any document or other material which is marked **"CONFIDENTIAL"** pursuant to this Protective Order for discovery produced in connection with this civil action, or the contents thereof, may be used by a party, or a party's attorney, expert witness, consultant, or other person to whom disclosure is made, only for the purpose of this action. Nothing contained in this Protective Order shall prevent the use of any document or other material which is marked **"CONFIDENTIAL,"** or the contents thereof, at any discovery deposition taken in this action or at a future hearing or trial in this action (provided that such information or document otherwise constitutes admissible evidence under the West Virginia Rules of Evidence).

E. If a party or attorney wishes to disclose any document or other material which is marked **"CONFIDENTIAL"** pursuant to this Protective Order for discovery produced in connection with this civil action, or the contents thereof, to any person actively engaged in working on this action (e.g., expert witness, paralegal, associate, consultant), the person making the disclosure shall do the following:

1. Provide a copy of this Protective Order to the person to whom disclosure is made;
2. Inform the person to whom disclosure is made that s/he is bound by this Protective Order;
3. Require the person to whom disclosure is made to sign an acknowledgment and receipt of this Protective Order;
4. Instruct the person to whom disclosure is made to return any document or other material which is marked **"CONFIDENTIAL"** pursuant to this Protective Order for discovery produced in connection with this civil action, at the conclusion of the case, including notes or memoranda made from **"CONFIDENTIAL"** material, to the party or outside counsel for whom such person is employed;

5. Maintain a list of persons to whom disclosure was made and the **"CONFIDENTIAL"** materials which were disclosed to that person; and

6. Subject to Section III, at the conclusion of the action, gather the **"CONFIDENTIAL"** materials, copies thereof, and related notes and memoranda, and return them to the party or attorney who originally disclosed or produced them, with a certificate of compliance with the terms of this Protective Order.

7. Subject to the other terms of this Protective Order including but not limited to Section III: (a) documents unintentionally produced during this litigation without designation as **"Confidential"** that do not pertain to information that Plaintiff is entitled to pursuant to W. Va. Code § 31B-4-408 may be retroactively designated as **"CONFIDENTIAL"** by providing the other party with a list describing the previously produced documents (e.g., bates numbers) or by producing new copies of such documents labeled **"CONFIDENTIAL"** and shall be treated appropriately from the date written notice of the designation is provided to the receiving party; (b) documents produced during this litigation by Defendant prior to entry of this Protective Order that do not pertain to information that Plaintiff is entitled to pursuant to W. Va. Code § 31B-4-408, and which have been stamped as **"Confidential,"** shall be treated as **"Confidential"** for purposes of this Protective Order from the date of production thereof; (c) documents produced prior to entry of this Protective Order by Sustainable Modular Management pursuant to a subpoena dated August 10, 2018 that do not pertain to information that Plaintiff is entitled to pursuant to W. Va. Code § 31B-4-408 shall be treated as **"Confidential"** for purposes of this Protective Order from the date of production thereof; (d) documents produced by Brookfield Power New York and Collins Harwood Company in response to subpoenas from Plaintiff dated August 10, 2018 (with the Sustainable subpoena collectively hereafter **"Subpoenas"**), as modified by Order Resolving Defendant's Motion to Quash Subpoenas entered contemporaneously herewith, that do not pertain to information that Plaintiff is entitled to pursuant to W.V. Code § 31B-4-408 shall be treated as **"Confidential"** for purposes of this Protective Order from

the date of production thereof, and (e) documents unintentionally produced during this litigation that are protected from discovery by the attorney client and/or attorney work product privileges, upon timely written identification of same with accompanying written verification, will be returned to the producing party.

II. POST-DISCOVERY PHASE

If any party or attorney wishes to file, or use as an exhibit or as evidence at a hearing or trial, any **"CONFIDENTIAL"** document or material, s/he must provide reasonable notice to the party that disclosed or produced the document or material. The parties and/or attorneys shall then attempt to resolve the matter of continued confidentiality by (a) removing the **"CONFIDENTIAL"** marking, or (b) creating a mutually acceptable redacted version that suffices for purposes of the case. If an amicable resolution proves unachievable, the parties and/or attorneys may present the issue to the court for resolution. The proponent of continued confidentiality will have the burden of persuasion that the document or material should be withheld from the public record. Nothing herein prevents filing of any information marked as **"CONFIDENTIAL"** pursuant to this Protective Order under seal in the subject civil action, affects the admissibility of such information at hearing or trial, or abridges the rights of any person to seek judicial review or to pursue other appropriate judicial action with respect to any ruling made by the Court concerning the issue of the status of such information.

III. EXCEPTIONS TO THE PROTECTIVE ORDER

A. Confidential information for purposes of this Protective Order does not include information that: (i) is already in the receiving party's possession at the time of production during discovery in the subject civil action as shown by credible evidence; (ii) before or after it has been produced to the receiving party pursuant to discovery in the subject proceeding, enters the public domain, not as a result of any illegal action or illegal inaction of the receiving party; (iii) is approved for release by written authorization of the disclosing party; (iv) is disclosed to the receiving party by a third party not in violation of any obligation of confidentiality, except in response to the Subpoenas

as modified by the Court's Order Resolving Defendant's Motion to Quash Subpoenas and the documents produced in response thereto referenced in Section I, Paragraph E, Section 7 to the extent that same do not pertain to information that Plaintiff is entitled to pursuant to W.V. Code § 31B-4-408; (v) is independently developed by the receiving party without reference to confidential information of the disclosing party produced during discovery in the subject civil action; and/or (vi) receiving party is already entitled to pursuant to West Virginia Code § 31B-4-408.

B. Notwithstanding anything stated herein to the contrary, nothing in this Protective Order is intended or shall be construed or deemed to restrict, waive, release or otherwise alter the rights of the parties hereto (or those of any successors, heirs, or like parties) that are provided pursuant to the West Virginia Limited Liability Company Act (including but not limited to West Virginia Code § 31B-4-408) or other applicable law, including but not limited to any such right to obtain, retain or use information they would otherwise be entitled to receive regardless of the pendency of this action.

IV. MISCELLANEOUS

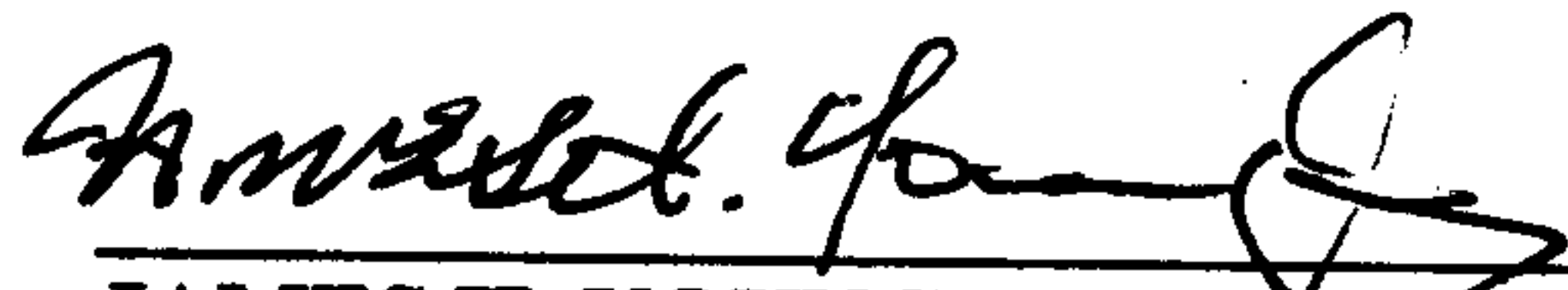
A. Any party to this civil action (or other person subject to the terms of this Protective Order) may ask the Court, after appropriate notice to the other party to this civil action, to modify or grant relief from any provision of this Protective Order.

B. Entering into, agreeing to, and/or complying with the terms of this Protective Order shall not: (i) operate as an admission by any non-designating person that any particular information marked "**CONFIDENTIAL**" contains or reflects trade secrets, proprietary, confidential or competitively sensitive business, commercial, financial or personal information; or (ii) prejudice in any way the right of any party (or any other person subject to the terms of this Protective Order) to seek at any time a determination by the Court of whether any particular information marked "**CONFIDENTIAL**" pursuant to this Protective Order should be subject to protection as "**CONFIDENTIAL**" information under the terms of this Protective Order (e.g., a party does not

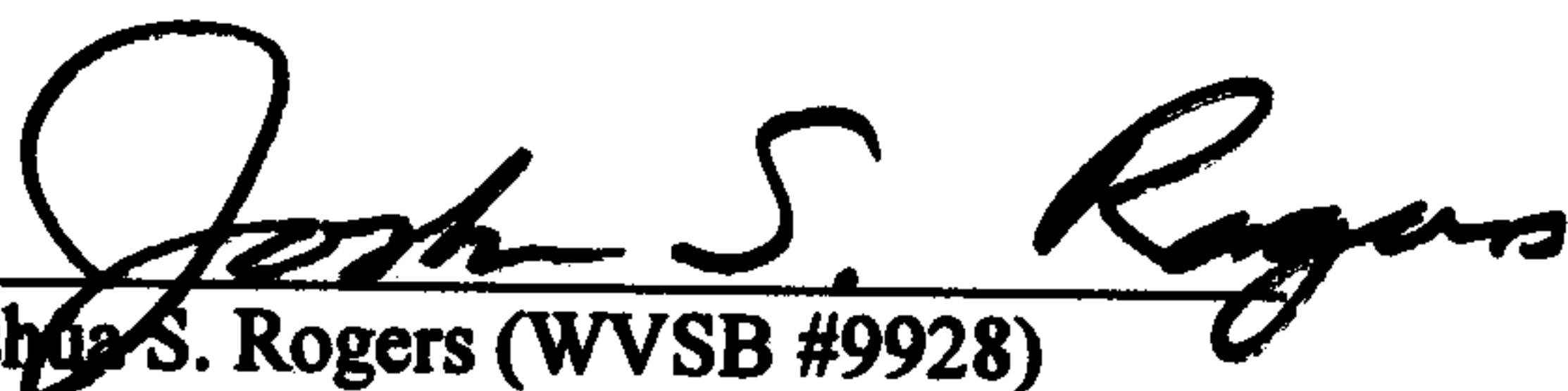
waive its right to challenge a confidentiality designation by electing not to mount a challenge promptly after the original designation is disclosed).

C. Any information that may be produced by a non-party witness in discovery in this civil action pursuant to subpoena or otherwise may be designated by such non-party as "CONFIDENTIAL" under the terms of this Protective Order, and any such designation by a non-party shall have the same force and effect, and create the same duties and obligations, as if made by one of the undersigned parties hereto. Any such designation shall also function as a consent by such producing non-party to the authority of the Court in the subject civil action to resolve and conclusively determine any motion or other application made by any person or party with respect to such designation, or any other matter otherwise arising under this Protective Order.

ENTER this 3 ^{RECEIVED} day of November, 2018


JAMES H. YOUNG, JR., PRESIDING JUDGE

Jointly Agreed to and Submitted by:



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12/6/18
CS



TWENTY-FOURTH JUDICIAL CIRCUIT

WAYNE COUNTY, WEST VIRGINIA

POST OFFICE BOX 68

WAYNE, WEST VIRGINIA 25570

JAMES H. YOUNG, JR.

Judge

Telephone

304-272-6332

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December 4, 2018

Debbie Facemire, Circuit Clerk
Nicholas County Courthouse
700 Main Street
Summersville, West Virginia 26651

RE: Michael D. Harlow vs. Eastern Electric, LLC, Civil Action No. 17-C-149

Dear Ms. Facemire:

Please find enclosed an original Agreed Protective Order in the above-referenced matter, along with a self-addressed envelope in order that a time-stamped copy can be returned to me. **Please mail copies to all attorneys of record in this matter.** For your convenience, I have also enclosed a list of the attorneys of record in this matter. I would also request that you mail a copy to Judge Paul T. Farrell.

If you need anything further, please contact me.

Sincerely,

A handwritten signature in cursive script that reads "Diana Fields".

Diana Fields
Secretary

Enclosures

2018 DEC -6 A 10:37
CIRCUIT CLERK
NICHOLAS COUNTY, WV

Michael D. Harlow vs. Eastern Electric, LLC, Business Court Case, Civil Action No. 17-C-149, Nicholas County

Counsel for Plaintiff:

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Resolution Judge:

***Honorable Paul T. Farrell
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Business Court Division

***West Virginia Supreme Court of Appeals
Berkeley County Judicial Center
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