

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

---

WILMINGTON TRUST COMPANY, AS  
TRUSTEE,

Index No. 653357/2011

PLAINTIFF,

-AGAINST-

DAVID BONDERMAN, ET AL.,

DEFENDANTS.

---

**PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF ITS  
MOTION TO SEAL CERTAIN INFORMATION AND DOCUMENTS**

Plaintiff Wilmington Trust Company, as indenture trustee (the "Plaintiff"), submits this memorandum of law in support of its Motion to Seal Certain Documents and Information (the "Motion").

**INTRODUCTION**

On July 19, 2019, Plaintiff filed its Memorandum of Law in Opposition to (I) Movant's Motion to Dismiss for Lack of Personal Jurisdiction and (II) Defendants' Motion to Dismiss the Amended Complaint on Grounds Other Than Lack of Personal Jurisdiction [Doc. No. 536] (the "Opposition") and accompanying Affirmation of Douglas E. Spelfogel [Doc. No. 537] (the "Affirmation"). As required by the Stipulation and Order of Confidentiality so-ordered by the Court [Doc. No. 319] (the "Confidentiality Agreement"), Plaintiff redacted certain portions of the Opposition (the "Redactions") and sealed certain exhibits attached to the Affirmation (the

“Sealed Exhibits”) that cited to, relied on or disclosed “Confidential Information” as defined in the Confidentiality Agreement and designated as such by the parties thereto, including Plaintiff and the above-captioned defendants herein (the “Defendants” and together with Plaintiff, the “Parties”).

In particular, the Sealed Exhibits include reports prepared by Plaintiff’s experts and a transcript from the deposition of one of those experts, including:

- **Exhibit 9** – Expert Report of Ian Ratner dated November 9, 2018;
- **Exhibit 10** – Expert Rebuttal Report of Ian Ratner dated April 12, 2019;
- **Exhibit 11** – Expert Report of Michal Spindler dated November 9, 2019;
- **Exhibit 12** – Expert Rebuttal Report of Michael Spindler dated April 12, 2019;
- **Exhibit 20** – Transcript of the deposition of Marc Thewes taken on June 27, 2019;
- **Exhibit 31** – Expert Report of Harold Furchtgott-Roth dated November 9, 2018;
- **Exhibit 32** – Expert Rebuttal Report of Harold Furchtgott-Roth dated April 12, 2019;
- **Exhibit 60** – Expert Report of John Finnerty dated November 9, 2018;
- **Exhibit 84** – Expert Report of Marc Thewes dated April 12, 2019;
- **Exhibit 113** - Expert Rebuttal Report of John Finnerty dated April 12, 2019.

Meanwhile, the Redactions cite to or heavily rely on the Sealed Exhibits or other Confidential Information.

Pursuant to the Confidentiality Agreement, the Redactions and Sealed Exhibits are to be unredacted/unsealed by Plaintiff seven (7) days after they are filed subject to a motion by a Party seeking that such information and documents be sealed. Doc. No. 319 ¶ 12. By its Motion, Plaintiff respectfully submits that good cause exists under Section 216.1 of the Uniform Rules of

the New York State Trial Courts (“N.Y.C.R.R.”) to seal the Redactions and Sealed Exhibits. In particular, the Sealed Exhibits include expert reports and testimony that involved the review and analysis of thousands of pages of documents including documents that have been ordered confidential in other proceedings, sensitive financial information, and certain business and proprietary information that has been deemed Confidential Information in this case pursuant to the Confidentiality Agreement and which Plaintiff has a legal obligation to keep confidential, and the release of which may harm the Parties or related third parties. While Plaintiff is continuing to review the Sealed Exhibits and Redactions to determine if any may be disclosed in an unredacted filing, in an abundance of caution, and given the large volume of information to review and short window of time provided to file the instant Motion, Plaintiff requests that such information be sealed pending its further review and determination.<sup>1</sup>

Accordingly, for the reasons described further below, Plaintiff requests that the Court order that the Redactions and Sealed Exhibits be sealed.

### **BACKGROUND**

On August 10, 2017, the Court so-ordered the Confidentiality Agreement. The Confidentiality Agreement protects from disclosure Confidential Information in the form of “trade secrets, proprietary business information, competitively sensitive information, or other information a Party is required by an applicable law to maintain as confidential. . . .” Doc. No. 319 ¶ 3(a). The Confidentiality Agreement provides that any party “who seeks to file with the Court (i) any deposition transcripts, exhibits . . . or other documents which have previously been designated as compromising or containing Confidential Information, or (ii) any pleading, brief or memorandum which reproduces, paraphrases or discloses Confidential Information shall file the

---

<sup>1</sup> Plaintiff reserves all rights to further amend the Motion based on its continuing review.

document, pleading, brief, or memorandum ... in redacted form until the Court renders a decision on any motion to seal ... *Id.* ¶ 12(a). The Confidentiality Agreement further provides that if a Party “fails to move to seal within seven (7) days of the Redacted Filing, the Party (or, as appropriate, nonparty) making the filing shall take steps to replace the Redacted Filing with its corresponding unredacted version. *Id.*

Pursuant to the terms of the Confidentiality Agreement, on July 19, 2019, Plaintiff filed the Opposition with the Redactions and the Affirmation with the Sealed Exhibits.

### ARGUMENT

Section 216.1 of the N.Y.C.R.R. permits this Court to issue an order sealing court records upon a written finding of “good cause.” N.Y.C.R.R. § 216.1(a). To determine whether good cause exists, “the court shall consider the interests of the public as well as of the parties.” *Id.* Good cause exists here to seal the Redactions and Sealed Exhibits.

Pursuant to the Confidentiality Agreement, Confidential Information includes all Documents and Testimony designated as confidential. Doc. No. 319 ¶ 3(a). In addition, all depositions are presumptively treated as Confidential Information (*Id.* ¶ 8) and any expert reviewing and opining with respect to Confidential Information must comply with and is bound by the Confidentiality Agreement. *Id.* ¶ 7. Here, the information and documents that Plaintiff requests the Court seal include expert testimony, expert reports and citations/references to such testimony and reports that are presumptively confidential pursuant to the Confidentiality Agreement and highly sensitive to the Parties and this ongoing litigation.

Specifically, the expert reports and testimony involved the review and analysis of thousands of pages of documents including documents that have been ordered confidential in other proceedings, sensitive financial information, and certain business and proprietary

information that has been deemed Confidential Information in this case pursuant to the Confidentiality Agreement and which Plaintiff has a legal obligation to keep confidential. Indeed, the public release of the Confidential Information without protections or notice to the third parties may not only violate the Confidentiality Agreement, but could be extremely prejudicial to the Parties and related third parties given the sensitive nature of certain financial, proprietary and other non-public information that may be involved. As described above, Plaintiff is continuing to review the Sealed Exhibits and Redactions to determine if any may be disclosed in an unredacted filing, but in an abundance of caution, and given the large volume of information to review and the short window of time provided to file the instant Motion, Plaintiff requests that such information be sealed pending its further review and determination. This would also allow Plaintiff time to consult with Defendants regarding certain specific Confidential Information.

Moreover, there is no compelling public interest in disclosing the Confidential Information and in any case, any such interest is outweighed by the harm to the Parties here. Accordingly, good cause exists to order that the Redactions and Sealed Exhibits be sealed in order to enforce and maintain the confidentiality provided for under the Confidentiality Agreement. *See Doe v. Szul Jewelry, Inc., et al.*, 2011 WL 3565831 (N.Y. Sup. N.Y. Cnty 2011) (upholding confidentiality agreement between private litigants where disclosure would harm a party's reputation and the public had no significant interest in having access to the records submitted in the case).

**CONCLUSION**

For the reasons set forth above, Plaintiff respectfully requests that the Court grant the Motion and seal the Redactions and Sealed Exhibits described above pursuant to N.Y.C.R.R. § 216.1, along with such other and further relief as the Court deems appropriate.

Dated: July 26, 2019  
New York, New York

By: /s/ Douglas E. Spelfogel  
Peter N. Wang  
Douglas E. Spelfogel  
Richard J. Bernard  
Derek L. Wright  
Alissa M. Nann  
FOLEY & LARDNER LLP  
90 Park Avenue  
New York, New York 10016  
Tel: (212) 682-7474  
Fax: (212) 687-2329  
Email: pwang@foley.com  
dspelfogel@foley.com  
rbernard@foley.com  
dlwright@foley.com  
anann@foley.com

*Attorneys for Plaintiff Wilmington Trust  
Company*