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

CORTLANDT STREET RECOVERY CORP., and WILMINGTON TRUST COMPANY, Plaintiffs, – against – DAVID BONDERMAN, et al., Defendants.	Index No. 653357/2011 Justice Marcy S. Friedman Part 60 (Motion Sequence No. 019)

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' CROSS-MOTION TO SEAL CERTAIN DOCUMENTS IN CONNECTION WITH MOTIONS TO DISMISS THE AMENDED COMPLAINT

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Defendants respectfully submit this memorandum of law in support of their cross-motion to seal six exhibits submitted by plaintiff Wilmington Trust Company ("WTC") in support of its opposition to defendants' motions to dismiss the amended complaint (the "Opposition Brief") in the above-captioned action. (Motion Sequence No. 018).

PRELIMINARY STATEMENT

In connection with its Opposition Brief, WTC annexed 113 exhibits to the affirmation of its attorney. Of these, WTC filed approximately 60 exhibits under seal. WTC has moved to continue to seal 10 exhibits, consisting of the deposition transcripts and unsworn expert reports of certain of its designated experts in this action.

Defendants do not take a position on WTC's request, and by this cross-motion respectfully request that the Court enter an order sealing an additional six exhibits (the "Exhibits"). The Exhibits are all complete copies of the deposition transcripts of current and former employees of private equity firms TPG and Apax, and contain competitively sensitive business information or other non-public information that would likely be detrimental to defendants' businesses if publicly disclosed. As a result, pursuant to Section 216.1 of the Uniform Rules for the New York State Trial Courts (the "Uniform Rules"), good cause exists to seal the Exhibits.

STATEMENT OF FACTS

On July 19, 2019, WTC filed the Opposition Brief. In connection with the Opposition Brief, WTC filed an Affirmation of Douglas E. Spelfogel (the amended version of which is filed as NYSECF No. 652) (the "Spelfogel Aff."), which annexed 113 exhibits. WTC filed certain of those 113 exhibits publicly, and filed placeholder pages for over 60 exhibits that are documents or deposition transcripts designated as "Confidential Information" or that referenced

"Confidential Information," as defined in the Stipulation and Order of Confidentiality entered in this action (NYSECF No. 319) (the "Confidentiality Order").

On July 26, 2019, WTC moved to seal ten of its confidential exhibits, consisting of the deposition transcripts and unsworn expert reports of its designated experts. (NYSECF Nos. 649, 650). Defendants do not take a position regarding the continued sealing of the ten exhibits identified by WTC in its motion to seal.

Defendants now cross-move to seal the Exhibits, which consist of unexcerpted copies of the deposition transcripts of (i) Apax witness Giancarlo Aliberti, dated December 12, 2017 (Spelfogel Aff. Ex. 7, NYSECF No. 544), (ii) TPG witness Vincenzo Morelli, dated July 25, 2018 (Spelfogel Aff. Ex. 23, NYSECF No. 560), (iii) TPG witness Matthias Calice, dated December 8, 2017 (Spelfogel Aff. Ex. 49, NYSECF No. 585), (iv) TPG witness David Bonderman, dated October 12, 2018 (Spelfogel Aff. Ex. 61, NYSECF No. 596); (v) Apax witness Salim Nathoo, dated December 7, 2017 (Spelfogel Aff. Ex. 68, NYSECF No. 603); and (vi) Apax witness Frank Ehmer, dated July 24, 2018 (Spelfogel Aff. Ex. 70, NYSECF No. 605). All of these deposition transcripts were designated by TPG and/or Apax counsel as Confidential pursuant to the Confidentiality Order.[1]

The Exhibits all contain non-public, confidential and sensitive information concerning, among other things, TPG and Apax's business operations and internal practices and procedures. Defendants have an interest in protecting this confidential and proprietary information.

[1] Defendants reserve their right to move to strike any of the exhibits cited by WTC in its opposition to the motion to dismiss, including the Exhibits. WTC's citations to the deposition transcripts in its Opposition Brief are irrelevant and plainly inappropriate on a pre-answer motion to dismiss.

Disclosure of this confidential business information would likely be detrimental to defendants' businesses and serves no public interest.

Moreover, none of the deponents whose deposition transcripts are at issue on this cross-motion are residents of New York (or, for the most part, the United States), and the three individual party deponents have all moved to dismiss this action on the grounds of personal jurisdiction. Mr. Aliberti is a citizen of Italy residing in London, and a former member of Apax Partners LLP, a limited partnership registered under the laws of England. (NYSECF No. 521 ¶¶ 1-2). Dr. Calice is citizen of Austria residing in Madrid, Spain, and is a former member of TPG Europe LLP, a limited liability partnership organized under the laws of the United Kingdom, which is not a party to this action. (NYSECF No. 527 ¶¶ 1, 16). Mr. Morelli, a non-party to this action, resides in Europe and is a former member of TPG Europe LLP. Mr. Bonderman resides in Texas and is the Chairman and a founder of TPG. (NYSECF No. 528 ¶¶ 1, 6). Messrs. Nathoo and Ehmer, both non-parties to this action, are members of Apax Partners LLP and reside in London. The confidential testimony provided by these individuals should remain confidential.

ARGUMENT

New York recognizes that information may be protected from disclosure by an order of the Court, where, as here, disclosure may be harmful to a party and the disclosure would not serve a legitimate public purpose. The public's right to access documents in a litigation is not absolute, and pursuant to 22 NYCRR § 216.1(a), a court is empowered to seal court records "upon a written finding of good cause." In determining whether there is good cause, the court should "weigh[] the interests of the public against the interests of the parties." *Mancheski v. Gabelli Grp. Capital Partners*, 39 A.D. 3d 499, 502 (2d Dep't 2007). In finding good cause to seal documents, the Court "presupposes that public access to the documents at issue will likely

result in harm to a compelling interest of the movant, and that no alternative to sealing can adequately protect the threatened interest." *Mancheski*, 39 A.D. 499 at 502.

Good cause "boils down to . . . the prudent exercise of the court's discretion" and a case-by-case analysis is warranted. *Mancheski*, 39 A.D. 499 at 502. (citations omitted). "[C]onfidentiality is, in certain circumstances, necessary in order to protect the litigants . . . ." *Matter of Twentieth Century Fox Film Corp.*, 190 A.D.2d 483, 486 (1st Dep't 1993). The Court has discretion to balance the interests of the parties, the public, and the justice system in determining whether to restrict access to documents but in that analysis, "[w]hen the balance favors confidentiality, confidentiality should be provided." *Id.* at 486.

Here, the public does not have any discernible interest in the non-public business interests and confidential information of the private equity firms involved in this litigation that is discussed in the referenced transcripts. *See, e.g.*, *Feffer v. Goodkind, Wechsler, Labaton & Rudoff*, 152 Misc. 2d 812, 815 (Sup. Ct. N.Y. Cty. 1991), *aff'd*, 183 A.D.2d 678 (1st Dep't 1992) (the court found minimal public interest in the firm's internal finances). Indeed, New York courts have consistently found good cause to seal "sensitive proprietary and business information" under 22 NYCRR § 216.1 where, as here, there is "no countervailing public interest that would be furthered by their disclosure." *See, e.g.*, *Jetblue Airways Corp. v. Stephenson*, 932 N.Y.S. 2d 761, at *6 (Sup. Ct. N.Y. Cty. Nov. 22, 2010) (good cause to seal exhibits containing "sensitive proprietary and business information" where "[t]he parties ha[d] an interest in protecting these documents and there [wa]s no countervailing public interest that would be furthered by their disclosure"), *aff'd*, 88 A.D. 3d 567 (1st Dep't 2011); *D'Amour v. Ohrenstein & Brown, LLP*, 851 N.Y.S. 2d 68, at *21 (Sup. Ct. N.Y. Cty. Aug. 13, 2007); *see also Cohen v. S.A.C. Capital Advisors, LLC*, 815 N.Y.S. 2d 493, at *8 (Sup. Ct. N.Y. Cty. Jan. 3, 2006)

(finding good cause to seal "sensitive proprietary and business information . . . where there [wa]s no countervailing public interest that would be furthered by their disclosure").

As referenced above, the testimony reflected in the deposition transcripts contained in the Exhibits constitutes sensitive proprietary and business information. The Exhibits discuss, among other things, the inner workings and corporate structure of private equity companies that are non-public, which information is intended to be kept confidential. Good cause exists for sealing the Exhibits because the public has no compelling interest in having access to the information described in the Exhibits.[2]

CONCLUSION

For the foregoing reasons, defendants respectfully request that the Court seal the Exhibits.

Dated: August 9, 2019
New York, New York

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[2] This is especially true where the overwhelming majority of the information contained in the Exhibits was not cited to in the Opposition Brief. Indeed, WTC only relies on very limited portions of the deposition transcripts in the Opposition Brief. Accordingly, the public has no interest (let alone a compelling one) in having access to the complete transcripts of the depositions of these non-resident witnesses.

CERTIFICATION

Pursuant to Commercial Division Rule 17, I certify that this computer-generated memorandum of law was prepared using Microsoft Windows and Microsoft Word. The total number of words in this memorandum of law, inclusive of point headings and footnotes and exclusive of the caption, signature block, this certificate of compliance, or any authorized addendum is 1,410 words.

By: */s/ Michelle G. Bernstein*
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