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Fund.com Inc.*

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

FUND.COM INC.,
Plaintiff,

- against -

ADVISORSHARES INVESTMENTS, LLC,
et al.,
Defendants.

Index No. 650321/2012

Assigned to: Singh, J. (Part 45)

Mot. Seq. No. 008

**MEMORANDUM OF LAW IN SUPPORT OF
RECEIVER’S MOTION TO VACATE SEALING ORDER**

Thomas Braziel, as receiver of Fund.com Inc., submits this memorandum of law in support of his motion to restore this action to the calendar and vacate the order, dated October 26, 2015 and entered October 27, 2015, sealing the *Confidential Settlement Agreement and So-Ordered Stipulation*, so ordered on October 26, 2015 (the “Settlement”).

BACKGROUND

The above-referenced sealing order [Doc. No. 428] provides, in its entirety, as follows:¹

Pursuant to the parties stipulation and order for the production of confidential information, dated October 24, 2013 the stipulation of settlement dated 10/26/15 is designated as confidential and upon the application of the parties for good cause shown the stipulation of settlement is sealed.

ORDERED that the Clerk of the Court shall file the stipulation of settlement dated 10/26/15 by seal.

The protective order, entered October 24, 2013 [Doc. No. 43], in turn, permits the parties to designate as confidential certain documents exchanged and information revealed during the course of discovery.

On November 29, 2016, the Delaware Chancery Court entered an order appointing Thomas Braziel as receiver of Plaintiff. (Affirmation Ex. 1.) The receiver is required by Delaware law to make certain disclosures. (*Id.* at ¶¶2-5.) The Settlement’s confidentiality provisions, however, purport to prohibit the receiver from making those disclosures, and Defendants have refused to consent to relief from those provisions absent the receiver’s acceptance of unreasonable conditions. (*Id.* at ¶¶6-7.)

ARGUMENT

Section 216.1(a) of the New York Uniform Rules for Trial Courts states the circumstances under which a court may order its records sealed:

¹ Documents filed in this action are cited by NYSCEF document number, as permitted by CPLR 2214(c).

[A] court shall not enter an order ... sealing the court records ... except upon a written finding of good cause, which shall specify the grounds thereof. In determining whether good cause has been shown, the court shall consider the interests of the public as well as of the parties.

The sealing order should be vacated for two reasons. First, good cause to seal the settlement is lacking. It is well established sealing is only permitted to serve “compelling objectives, such as when the need for secrecy outweighs the public’s right to access, e.g., in the case of trade secrets.” *Applehead Pictures LLC v. Perelman*, 80 A.3d 181, 191-92 (1st Dep’t 2010). Court records may not be sealed merely on consent of the parties. *Id.* See also *Gryphon Dom. VI, LLC v. APP Int’l Fin. Co., B.V.*, 28 A.D.3d 322, 324 (1st Dep’t 2006) (First Department “has been reluctant to allow the sealing of court records even where both sides to the litigation have asked for such sealing”); *Matter of Hofmann*, 284 A.D.2d 92, 94 (1st Dep’t 2001) (citing George F. Carpinello, *Public Access to Court Records in Civil Proceedings: The New York Approach*, 54 Albany L. Rev. 93, 108-10 (1989)) (“while there is a strong public interest in encouraging the settlement of private disputes, conclusory claims of the need for confidentiality of settlement agreements are insufficient to seal a record”); *Guardino v. Graco Children’s Prods. Inc.*, 50 Misc.3d 645, 649 (Sup. Ct. Suffolk Co. Nov. 24, 2015) (“The parties interest in keeping the details of their settlement confidential do not constitute good cause”). Indeed, Paragraph 6 of Your Honor’s individual rules provides court filings “will not be sealed merely on the ground that they are subject to a confidentiality agreement,” citing section 216.1, and further provides “sealing must be requested by motion, or by letter if the request is made on consent or by stipulation.” Putting aside noncompliance by the parties’ respective counsel of record with Your Honor’s individual rules (no motion or letter requesting sealing was ever filed), the public record is devoid of evidence establishing good cause.

Second, the sealing order does not specify the grounds for the relief provided therein, as required by section 216.1(a), and instead simply refers to the protective order. That is insufficient to justify keeping the Settlement under seal because the protective order by its terms only governs documents and information exchanged during the course of discovery (§1), not the Settlement, and further, contemplates that only “Confidential Information” will be filed under seal (§12), a term defined as follows (§3(a)), and which plainly does not cover the Settlement:

“Confidential Information” shall mean all Documents and Testimony, and all information contained therein, and other information designated as confidential, if such Documents or Testimony contain trade secrets, proprietary business information, competitively sensitive information, or other information the disclosure of which would, in the good faith judgment of the party designating the material as confidential, be detrimental to the conduct of that party’s business or the business of any of that party’s customers or clients.

Vacatur of the sealing order is permitted by CPLR 5015(a). *Crain Commc’ns, Inc. v. Hughes*, 74 N.Y.2d 626, 628 (1989).

CONCLUSION

The receiver respectfully requests that the Court grant the relief sought herein and such other relief as the Court deems appropriate.

Dated: December 22, 2016

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