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

FUND.COM INC., Plaintiff,	Index No. 650321/2012
-against-	Motion Sequence No. 008
ADVISORSHARES INVESTMENTS, LLC, et al., Defendants.	**AFFIRMATION OF BERNARD J. GARBUTT III IN RESPONSE TO THE ORDER TO SHOW CAUSE AND IN OPPOSITION TO PLAINTIFF'S MOTION TO VACATE THE SEALED ORDER**

BERNARD J. GARBUTT III, an attorney duly admitted to practice before the courts of this State, affirms, under penalty of perjury, as follows:

1. I am a partner with the law firm of Morgan, Lewis & Bockius LLP ("Morgan Lewis"), attorneys for AdvisorShares Investments, LLC ("ASI") in the above-referenced action, which has been closed since October 26, 2015. Dkt.# 427. I am fully familiar with the facts and circumstances of this action as they relate to this affirmation. I base this affirmation upon my personal knowledge and my review of the file maintained by my firm relating to this action, as well as all prior proceedings had and papers filed herein, my review of publicly available documents, the discovery that has been conducted in this action, and my personal participation in the settlement process described below.

2. I submit this affirmation according to the so-ordered "Order to Show Cause" issued by Justice Oing on December 23, 2016 (Dkt.# 438), and in opposition to the "Affirmation of Jeffrey Chubak," dated December 22, 2016 (Dkt.# 435, the "Chubak Aff."), and the "Memorandum of Law in Support of Receiver's Motion to Vacate Sealing Order," dated December 22, 2016 (Dkt.# 437, the "Receiver's Memo," and all papers collectively, the

"Receiver's Motion").

PROCEDURAL MATTERS

3. At the outset, I note that neither Storch Amini PC ("Storch"), nor Jeffrey Chubak ("Chubak"), counsel for the purported receiver, have filed a notice of appearance in this action, and thus their ability to even lodge the Receiver's Motion is questionable. Counsel for the receiver should be forced to appear and declare on whose behalf they are appearing.

4. I also note that Storch asserts that a Thomas Braziel ("Braziel") has been appointed as the receiver (the "Receiver") for Fund.com Inc. ("Fund"). However, the only evidence of this fact is an uncertified copy of an "Order Granting Default Judgment And Appointing Receiver." Dkt.# 436. Thus, whether Braziel has in fact been appointed the receiver of Fund by a court of competent jurisdiction is also questionable.

5. Without conceding whether Storch or Chubak have properly appeared herein (or on whose behalf they have appeared), and without conceding that Braziel has in fact been appointed as the Receiver for Fund, ASI responds to the Receiver's Motion as follows.

BACKGROUND OF THE SETTLEMENT

6. As the Court is well aware, this case was filed on February 1, 2012 (Dkt.# 1), and was a hard fought and contentious litigation, involving extensive motion practice and discovery. Indeed, there were 425 docket entries for this case before it was settled.

7. Given the protracted nature of this case, at the Court's suggestion, the parties appeared before the Court for a settlement conference on August 6, 2015. Dkt.# 425. The Court is well aware of matters concerning the settlement discussions given Your Honor's personal involvement. The August 6, 2015 settlement conference was attended by counsel and party representatives, and lasted several hours. Several aspects of a potential settlement were

discussed.

8. Subsequently, the parties appeared again before the Court about settlement on August 12, 2015. Dkt.# 426.

9. The parties also had a teleconference with the Court about settlement on October 22, 2015 at 4:00 p.m.

10. From August 2015 until Saturday October 24, 2015 (over two months), the parties actively negotiated the terms and conditions of a potential settlement. Like the litigation, the settlement negotiations were hard fought and contentious.

11. The parties appeared for a hearing before the Court on October 26, 2015 at 11:30 a.m. to finalize the settlement, and obtain the Court's approval of same. After that hearing, the Court approved the settlement, so-ordered a "Stipulation And Order Of Dismissal With Prejudice And Bar Order," dated October 26, 2015 (Dkt.# 427), and entered an order that "the stipulation of settlement dated 10/26/15 is designated as confidential and upon the application of the parties **<u>for good cause shown</u>** the stipulation of settlement is sealed." Dkt.# 428 (the "Sealing Order") (emphasis added).

12. During the settlement negotiation process and through to the execution of the confidential settlement agreement between Fund and ASI (the "Confidential Settlement Agreement"), the confidentiality of all of the settlement terms and conditions, and the sealing of the Confidential Settlement Agreement (and the Sealing Order), were, to ASI, material and mandatory terms and conditions of any potential settlement. Without the inclusion of such confidentiality and sealing terms and conditions, ASI would not have settled this case.

ARGUMENT

13. The Receiver's Motion should be denied for several reasons. **First**, the Receiver has not shown that the Court's so-ordering of the Confidential Settlement Agreement (which itself contains a confidentiality provision) or the Court's sealing of the Confidential Settlement Agreement: (a) were not based upon good cause shown; or (b) were not proper exercises of the Court's discretion. **Second**, the confidentiality of all of the settlement terms and conditions, and the sealing of the Confidential Settlement Agreement (and the Sealing Order), were, to ASI, material and mandatory terms and conditions of any potential settlement. Without the inclusion of such confidentiality and sealing terms and conditions, ASI would not have settled this case. ASI bargained for this confidentiality and sealing, **and Fund agreed**. The Receiver merely stands in the shoes of Fund (he is not a third party), and is bound by the Confidential Settlement Agreement and Fund's obligations under the Confidential Settlement Agreement. The Receiver cannot renege on that agreement merely because the Receiver voluntarily assumed what he claims are some obligations that the Receiver now argues are purportedly at odds with the Sealing Order. **Third**, in any event, the Receiver is pursuing the wrong remedy for its alleged problem.

14. Alternatively, if the Court is inclined to grant the Receiver any relief at all, the most appropriate relief would **not** be to unseal the Confidential Settlement Agreement. The most appropriate relief would be to very narrowly amend the confidentiality provision of the Confidential Settlement Agreement to allow the Receiver to disclose only the very specific information about the settlement that may actually be required under the statute and rules the Receiver cites (not the broad, discretionary disclosure ability the Receiver seeks). As explained below, the information required to be reported by the Receiver under the statute and rules he

cites is very limited, and does not require the unsealing of the Confidential Settlement Agreement.

The Receiver Has Not Shown That The Court Did Not Exercise Proper Discretion In Approving The Confidential Settlement Agreement And Sealing That Agreement

15. As the party challenging the Sealing Order, the Receiver has the burden of demonstrating that there was not good cause to seal the Confidential Settlement Agreement, and that there is some public interest in having the Confidential Settlement Agreement unsealed. See e.g., Dawson v. White & Case, 584 N.Y.S.2d 814, 815 (1st Dep't 1992) (affirming sealing order because plaintiff failed to "demonstrate a relevant public interest in disclosure"). The Receiver has not met his burdens.

16. Rather, the Receiver has merely argued that there was no good cause to seal the Confidential Settlement Agreement, contrary to the determination already made by the Court after Your Honor's personal involvement in four hearings and conferences about the settlement (on August 6, August 12, October 22, and October 26, 2015), and the filing of the Confidential Settlement Agreement. Sealing Order, Dkt.# 428.

17. Without disclosing its contents, generally speaking, the Confidential Settlement Agreement contains, among other things, confidential and commercially sensitive business information about the finances and capital structure of ASI, the disclosure of which would harm ASI's competitive standing. See Schron v. Grunstein, 41 Misc. 3d 1207(A), *3, 977 N.Y.S.2d 670 (Sup. Ct. N.Y. Cty. 2013) ("[W]hen the public seeks access to 'business information which might harm a litigant's competitive standing, and the determination of whether access to such records is appropriate is best left to the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the particular case"). This is but one

example of the good cause that formed the basis for Your Honor's entry of the Sealing Order, after four hearings and conferences.

The Receiver Stands In The Shoes Of Fund, Which Agreed To
The Confidentiality Provision In The Confidentiality Agreement
***And* The Sealing Of That Agreement, And Cannot Now Renege On That Agreement**

18. As described in detail above, the confidentiality of all of the settlement terms and conditions, and the sealing of the Confidential Settlement Agreement (and the Sealing Order), were, to ASI, material and mandatory terms and conditions of any potential settlement. These terms and conditions were not afterthoughts or late-stage requests; rather, they were always integral to any settlement, and are explicitly included in the Confidential Settlement Agreement itself.

19. Significantly, the confidential business information contained in the Confidential Settlement Agreement is not otherwise publically available and relates to, among other things, confidential and commercially sensitive business information about the finances and capital structure of ASI. Without the inclusion of the confidentiality and sealing terms and conditions, ASI would not have agreed to settle this case. ASI bargained for this confidentiality and sealing, **and Fund agreed**.

20. The Receiver merely stands in the shoes of Fund (he is not a third party), and is bound by the Confidential Settlement Agreement and Fund's obligations under the Confidential Settlement Agreement. A receiver is appointed for a limited purpose and is a successor to the company for which it is appointed and the Receiver must act in a manner consistent with the obligations of Fund. See Chubak Aff., at Exh. 1, Order Granting Default Judgment and Appointing Receiver, ¶ 4.

21. Fund agreed to the confidentiality provision of the Confidential Settlement

Agreement and to the Sealing Order, which was entered by the Court after four hearings and conferences.

22. The Receiver's Motion fails to account for this fact and takes the posture of a third-party intervening into the case, instead of acknowledging that the Receiver stands in the shoes of Fund.

23. Moreover, the detailed terms of litigation settlement agreements are typically private, confidential, and not filed with or approved by the Court. ASI and Fund bargained for the Confidential Settlement Agreement to be so-ordered by the Court, and to be filed under seal. After four hearings and conferences, and for good cause shown, the Court so-ordered the Confidential Settlement Agreement, containing all of the detailed terms of the settlement, and had it filed under seal. Had the parties not agreed to do so, there would be nothing for the Receiver to unseal. Thus, as successor to Fund (and standing in its shoes), the Receiver would be bound by the confidentiality provision in the Confidential Settlement Agreement and still could not disclose the information the Receiver now claims he is purportedly obligated to report under the statute and rules he cites as a result of his voluntarily assumption of those purported obligations.

24. In contrast to the Receiver's argument against the sealing of confidential settlement agreements, even when both parties agree to confidentiality, one of the cases cited in the Receiver's Memo specifically states that if a party files an agreement separately from other documents and seeks a sealing order at the time of filing, as was done in this case, such a sealing can be properly granted. See Receiver's Memo, at 2. In Applehead Pictures LLC v. Perelman, the defendant requested, but the trial court did not grant, a "wholesale sealing of motion papers," where the defendant annexed agreements containing confidentiality provisions to the defendant's

motion papers. Applehead Pictures LLC v. Perelman, 913 N.Y.S.2d 165, 174 (1st Dep't 2010). The court stated that "good cause, in essence, boils down to . . . the prudent exercise of the court's discretion." Id. (citations omitted). Significantly, although the wholesale seal was denied, the court stated that "[a]s a practical matter if [defendant] had filed those documents separately, and sought a limited order requesting that the confidentiality of those documents be maintained, such relief could appropriately have been granted. Since [defendant] chose to annex all three documents . . . without first seeking a sealing order, we conclude that the court properly exercised its discretion . . . ." Id. at 193 (citations omitted).

25. The Receiver also cited Gryphon Domestic VI, LLC v. APP International Finance Co. in which the defendant objected to the sealing order sought by the plaintiffs. 814 N.Y.S.2d 110, 114 (1st Dep't 2006). In that case, unlike here, the sealing order sought would have restricted access to certain documents only to defendant's counsel-of-record. Id. at 112. The court reversed the sealing order because the party seeking the seal was doing so to "retain an advantage over the other party when such sealing prevents counsel from fully discussing with their clients all of the relevant information in the case so as to properly formulate a defense to the action against them." Id., at 114. That is certainly not the case here where the settlement occurred, and the parties agreed to the Confidential Settlement Agreement and the sealing of that agreement, more than a year ago.

26. The cases cited by the Receiver implying that the public has a right to access to the Confidential Settlement Agreement are inapposite as no public interest has been alleged or shown. See Receiver's Memo, at 2.

The Relief The Receiver Seeks Is Broader Than That Necessary To Address The Alleged Conflict Between The Confidentiality Provision Of The Confidential <u>Settlement Agreement And His Voluntarily-Assumed Purported Legal Obligations</u>

27. The central and only argument of the Receiver's Motion is that he requires relief from the confidentiality provision of the Confidential Settlement Agreement to address a purported conflict between compliance with that provision and his purported legal obligations as Receiver. Chubak Aff., at ¶ 6. Yet, the Receiver seeks to unseal the Confidential Settlement Agreement in its entirety, rendering the confidentiality provision moot and circumventing a material and mandatory component of the settlement bargained for by ASI, **<u>and agreed to by Fund</u>**.

28. Prior to the filing of Receiver's Motion, the relief requested by the Receiver was significantly narrower in scope.

29. On November 30, 2016 at 3:20 p.m., Chubak emailed me to advise that Braziel had been appointed receiver of Fund. In pertinent part, Chubak requested that ASI "consent to the modification of the confidentiality provisions in Section 16 and 35 [in the Confidential Settlement Agreement] (and the related NDA), so as to permit the receiver to comply with his statutory obligations."

30. On December 7, 2016 at 12:01 p.m., Chubak emailed me, copying my colleague Ariel Gursky, attaching a proposed amendment to the confidentiality provision of the Confidential Settlement Agreement that he stated "permits the receiver to fulfill his statutory responsibilities." The proposed amendment read in relevant part:

> Notwithstanding anything to the contrary herein, the confidentiality provisions of Section 35 hereof and the NDA and Confidentiality Stipulation, made applicable by Sections 16-17 hereof, shall not apply to Thomas Braziel, as receiver of FUND, **<u>solely to the extent noncompliance with such provisions is required in order for the receiver to achieve compliance with 8 Del. C. § 294 and Delaware Chancery Court Rules 151(2) and 161-62.</u>**

(emphasis added).

31. The Receiver's proposed amendment, although on its face appears to be aimed at his legal obligations as receiver, is overly broad and would allow the Receiver significant latitude and subsequent unfettered discretion in interpreting what previously sealed, confidential information he was required to disclosure pursuant to the statutory provision and rules cited by the Receiver. Moreover, the proposed amendment would not allow ASI any oversight of, or for that matter insight into, what information the Receiver contemplates disclosing.

32. On December 13, 2016, my colleague Ms. Gursky discussed with Mr. Chubak, counsel for the Receiver, what specific pieces of information the Receiver believed he was obligated to disclose that conflicted with the terms of the Confidential Settlement Agreement. Tellingly, Mr. Chubak refused to provide the specific pieces of information or any limitations to the Receiver's desired disclosures, merely citing examples and referring generally to the rules and statutes that govern receiverships. See Exh. "1" hereto, Affirmation of Ariel Faith Gursky ("Gursky Aff."), at ¶ 3.

33. Consistent with Chubak's prior email communications, the Chubak Aff. also articulates the Receiver's "Need for Relief" (id. at ¶ 6) in terms of relief from the confidentiality provision's prohibitions on the disclosure of information, information the Receiver argues he is required to disclose under Delaware Chancery Court Rules 151(2), 161, and 162 and Section 294 of the Delaware Code. Chubak Aff., at ¶ 6; see also id. at ¶¶ 2-5. Put another way, the Receiver continues to seek relief for the sole purpose of purportedly complying with the Receiver's purported legal obligations.

34. Inexplicably, however, the Receiver has now made a motion to unseal the Confidential Settlement Agreement in its entirety, a remedy that has consequences that far

exceed what is required under the statutory provision and rules cited by the Receiver in the above-described communications and affirmation. Chubak Aff., at ¶ 1; Receiver's Memo, at 1-3. The Court should not grant the Receiver this broad remedy.

35. The Receiver does not need to unseal the Confidential Settlement Agreement, nor does he need to disclose all of the details of the Confidential Settlement Agreement. The Receiver's legal obligations, to the extent they allegedly conflict with the provisions of the Confidential Settlement Agreement, to which Fund agreed and now the Receiver is bound, do not trump the confidentiality bargained for by ASI.

36. The Receiver's Motion referred to four legal obligations for which the Receiver allegedly would need to disclose information otherwise protected by the confidentiality provision of the Confidential Settlement Agreement. Chubak Aff., at ¶¶ 2-5; Exh. "2" hereto (excerpts from the Rules of the Court of Chancery of the State of Delaware); Exh. "3" hereto (excerpt from Title 8: Corporations of the Delaware Code. containing the text of the cited rules). In summary, those provisions merely require the Receiver to disclose the amount of money received or due, when that money was received or is due, and from whom that money was paid or is expected to be paid. Nothing in the law cited requires the Receiver to provide information or context around the funds received and nothing requires that, for funds received pursuant to an agreement, the agreement be made publically available.

Alternatively, If The Court Is Inclined To Grant The Receiver Any Relief, The Most Appropriate Relief Here Would Be To Narrowly Amend The Confidentiality Provision

37. On January 4, 2017, after the Receiver filed this motion, my colleague Ms. Gursky discussed a limited amendment to the confidentiality provision of the Confidential Settlement Agreement with Receiver's counsel via telephone that would allow the Receiver to disclose only those pieces of information that are absolutely necessary for the Receiver to

comply with the Receiver's narrow legal obligations and that would delineate the nature of those obligations: disclosing the amount of money received or due, when that money was received or is due, and from whom that money was paid or is expected to be paid. Unlike the Receiver's proposal, excerpted above, the proposed amendment discussed would limit the Receiver's ability to broadly construe its legal obligations beyond the absolute baseline requirements, thereby minimizing the damage to ASI's bargained-for confidentiality. ASI did not request any consideration for providing the Receiver with this relief, despite the fact that ASI bargained for, and considered essential, the confidentiality of the entire Confidential Settlement Agreement. As of January 9, 2017, counsel for the Receiver has not responded to this proposal. See Gursky Aff., at ¶ 4.

38. If the Receiver is truly legally required to make certain disclosures, relief from the confidentiality provision of the Confidential Settlement Agreement should be narrowly tailored to permit only the disclosure required to meet the minimum legal obligations of the Receiver as described above and discussed with Receiver's counsel. The Court need not unseal the Confidential Settlement Agreement.

39. Based upon the foregoing, the Court should deny the Receiver's Motion in its entirety.

Dated: New York, New York
January 9, 2017

/S/

BERNARD J. GARBUTT III