

**Loreley Fin. (Jersey) No. 3 Ltd. v Merrill Lynch**

2019 NY Slip Op 31519(U)

May 26, 2019

Supreme Court, New York County

Docket Number: 652732/2011

Judge: Andrea Masley

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREA MASLEY PART IAS MOTION 48EFM

Justice

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INDEX NO. 652732/2011

LORELEY FINANCING (JERSEY) NO. 3 LIMITED, LORELEY FINANCING (JERSEY) NO. 18 LIMITED, LORELEY FINANCING (JERSEY) NO. 28 LIMITED,

MOTION DATE

Plaintiff,

MOTION SEQ. NO. 009 010 011

- v -

MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED, MERRILL LYNCH INTERNATIONAL INCORPORATED, MERRILL LYNCH & CO., INCORPORATED, 250 CAPITAL LLC, COUNTRYWIDE ALTERNATIVE ASSET MANAGEMENT INC., COUNTRYWIDE SECURITIES CORP., ALPHA MEZZ CDO 2007-1, CORP., ALPHA MEZZ CDO 2007-1, LTD, AURIGA CDO, LTD, AURIGA CDO, LLC, BANK OF AMERICA CORP., MORGAN STANLEY & CO. INCORPORATED, MORGAN STANLEY & CO. INTERNATIONAL LIMITED, MORGAN STANLEY CAPITAL SERVICES INCORPORATED.,

DECISION AND ORDER

Defendant.

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Masley, J.:

The following e-filed documents, listed by NYSCEF document number (Motion 009) 313, 314, 315, 316, 317, 353, 356

were read on this motion to/for SEAL

The following e-filed documents, listed by NYSCEF document number (Motion 010) 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 352, 357, 358, 359, 360, 361, 364, 370, 373

were read on this motion to/for SEAL

The following e-filed documents, listed by NYSCEF document number (Motion 011) 348, 349, 350, 351, 362, 363

were read on this motion to/for SEAL

Plaintiffs Loreley Financing (Jersey) No. 3 Limited, Loreley Financing (Jersey) No. 18 Limited, and Loreley Financing (Jersey) No. 28 Limited (Loreley 28) commenced this action arising out of the subprime mortgage crisis. Plaintiffs allegedly purchased notes in connection with two collateralized debt obligations (CDOs), Auriga and Alpha Mezz. (NYSCEF Doc. No. 8 at ¶ 1.) Auriga was allegedly designed by non-party

Magnetar Capital LLC (Magnetar). (*Id.* at ¶ 2.) Plaintiffs claim that defendants Merrill Lynch, Pierce, Fenner & Smith Incorporated, Merrill Lynch International Incorporated, and Merrill Lynch & Co., Inc., and Merrill Lynch & Co., Inc. (collectively, Merrill) knew that the subprime residential mortgage-backed securities designated for inclusion by Magnetar in the Auriga CDO were more likely to default than their credit ratings suggested. (*Id.* at ¶ 4.) Nevertheless, Merrill concealed this information to induce investing in Auriga, and represented that the collateral was investment grade. (*Id.* at 5, 6.) Plaintiffs now assert causes of action for rescission based on fraud, common law fraud, conspiracy to defraud, fraudulent conveyance, and unjust enrichment against the above captioned defendants. (NYSCEF Doc. No. 8 at ¶¶ 240, 251, 261, 287, 289.)

Motion Sequence Number 009

In motion sequence number 009, nonparty IKB Deutsche Industriebank AG (IKB) moves to seal and redact Merrill's memorandum of law in support of Merrill's motion for summary judgment (*see* NYSCEF Doc. No. 229) and certain exhibits filed at NYSCEF Doc. No. 298, 296, 269, 294, 244 and 273. (NYSCEF Doc. No. 353 at 1; NYSCEF Doc. No. 316 at 2; NYSCEF Doc. No. 315 at 1.) IKB or its former subsidiary acted as Loreley 28's investment advisor. (NYSCEF Doc. No. 316 at 2.) As the investment advisor, IKB performed diligence on Auriga and recommended it to Loreley 28. (*Id.*) With respect to this action, IKB produced documents and individuals for depositions. (*Id.*) IKB now maintains that to the extent that these documents and deposition transcripts, appended to Merrill's motion for summary judgment, contain employee names, contact information, and other personal data, they should be redacted. (NYSCEF Doc. No. 315) None of the parties to this action oppose. (*see e.g.* NYSCEF Doc. No. 356.)

Section 216.1(a) of the Uniform Rules for Trial Courts empowers courts to seal documents upon a written finding of good cause. It provides:

“(a) Except where otherwise provided by statute or rule, a court shall not enter an order in any action or proceeding sealing the court records, whether in whole or in part, 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 the parties. Where it appears necessary or desirable, the court may prescribe appropriate notice and an opportunity to be heard.

(b) For purposes of this rule, ‘court records’ shall include all documents and records of any nature filed with the clerk in connection with the action. Documents obtained through disclosure and not filed with the clerk shall remain subject to protective orders as set forth in CPLR 3103 (a).”

Judiciary Law § 4 provides that judicial proceedings shall be public. “The public needs to know that all who seek the court’s protection will be treated evenhandedly,” and “[t]here is an important societal interest in conducting any court proceeding in an open forum.” (*Baidzar Arkun v Farman-Farma*, 2006 NY Slip Op 30724[U], \*2 [Sup Ct, NY County 2006] [citation omitted]). The public right of access, however, is not absolute. (*see Danco Lab, Ltd. v Chemical Works of Gedeon Richter, Ltd.*, 274 AD2d 1, 8 [1st Dept 2000]).

The “party seeking to seal court records bears the burden of demonstrating compelling circumstances to justify restricting public access” to the documents. (*Mosallem v Berenson*, 76 AD3d 345, 348-349 [1st Dept 2010] [citations omitted]). Good cause must “rest on a sound basis or legitimate need to take judicial action.” (*Danco Labs.*, 274 AD2d at 9). Agreements to seal are insufficient as such agreements

do not establish “good cause.” (*MBIA Ins. Corp. v Countrywide Home Loans, Inc.*, 2012 NY Slip Op 33147[U], \* 9 [Sup Ct, NY County 2012]).

In the business context, courts have sealed records where trade secrets are involved or where the disclosure of documents “could threaten a business’s competitive advantage.” (*Mosallem*, 76 AD3d at 350-351 [citations omitted]). Additionally, the First Department has affirmed the sealing of records concerning financial information where there has not been a showing of relevant public interest in disclosure of the financing. (*see Dawson v White & Case*, 184 AD2d 246, 247 [1st Dept 1992].) For instance, in *Dawson v White & Case*, the First Department stated that the plaintiff appellant failed to show “any legitimate public concern, as opposed to mere curiosity, to counter-balance the interest of defendant’s partners and clients in keeping their financial arrangement private.” (*Id.* [internal quotation marks and citation omitted]).

Upon review, good cause exists to redact the employee names, contact information, and other personal data from 296, 269, 294, 244 and 273. (*See In re: Credit-Based Asset Servicing and Securitization LLC*, 2014 WL 7177629 n2 [SD NY Bankr, December 9, 2014][redacting names of nonparties]; NYSCEF Doc. No. 373 at 38.) To the extent that this information is also provided in the memorandum of law, filed at NYSCEF Doc. No. 298, good cause exists to redact that as well.

#### Motion Sequence Number 010

In motion sequence number 010, Merrill moves to (1) redact NYSCEF Doc. Nos. 240, 242, 243, 244, 246, 247, 248, 249, 250, 251, 252, 253, 255, 267, 269, 270, 271, 273, 279, 282, 283, 285, 286, 288, 289, 290, 291, 292, 293, 294, 295, and 296 (2) redact NYSCEF Doc. Nos. 301, 303, 304, 305, 307, 308, 309, and 310 and (3) redact NYSCEF Doc. Nos. 298 and 312. (NYSCEF Doc. No. 352 at 2.) Merrill asserts that the

documents it seeks to redact contain Merrill's business strategy for structuring, collateralizing, and marketing Auriga. (NYSCEF Doc. No. 346 at 4.) For instance, one deposition transcript contains a discussion concerning Merrill employees strategizing about negotiating pricing levels with a potential investor. (NYSCEF Doc. No. 246.) Other documents contain non-public discussions with Auriga's collateral manager concerning Merrill's approaches to structuring, pricing, and marketing structured products. Additionally, certain documents contain discussions with potential investors about how Auriga should be structured, collateralized, and priced. (NYSCEF Doc. No. 270.) Merrill also argues that certain expert reports and deposition testimony that quote such documents should also be redacted.

Despite Loreley 28's argument that disclosure of these decade old documents will not impact Merrill's present day business, good cause exists to redact the numbers and business strategies in these documents. (NYSCEF Doc. No. 373 at 32-33.) Indeed, disclosure of these numbers, together with Merrill's strategy for structuring, collateralizing and marketing structured products, could threaten its competitive advantage. As Merrill noted at oral argument, "the fact that Merrill was engaging in this type of negotiations with the customers is just as relevant to Merrill today as it was in 2006." (*Id.* at 19.) Moreover, "Merrill has a business interest in current and future customers, not seeing prior negotiations that it had with what could be the same customers back in 2006 or other customers." (*Id.* at 14.) Accordingly, the numbers and Merrill's business strategies shall be redacted.

Motion Sequence Number 011

In motion sequence number 011, non-party Magnetar moves to redact NYSCEF Doc. Nos. 247, 248, 309, 243, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338,

344, and 345. (NYSCEF Doc. No. 351.) Magnetar is a private alternative investment manager that invested in CDOs, such as the Auriga CDO, on behalf of its Funds. In connection with this action, the parties here subpoenaed Magnetar for its relevant trading records, CDO-related documents, internal strategic investment discussions and related e-mail correspondence. (NYSCEF Doc. No. 349 at ¶ 4.) Magnetar now asserts that these documents contain Magnetar's private trading information, financial information, and business strategies. Because these documents include specific trading and position information as well as how Magnetar's investors gained from Magnetar's strategic trading decisions to invest in various CDO's, good cause exists to redact the documents. Disclosure of such information could threaten Magnetar's competitive advantage, and in any event, Magnetar and its investors have an interest in keeping their financial arrangements private. Accordingly, good cause exists to redact Magnetar's trading information, financial information, and business strategies.

Pursuant to, and in accordance with, Rule 216, having determined that good cause exists for the redacting of NYSCEF Doc. Nos. 240, 242, 243, 244, 246, 247, 248, 249, 250, 251, 252, 253, 255, 267, 269, 270, 271, 273, 279, 282, 283, 285, 286, 288, 289, 290, 291, 292, 293, 294, 295, 296, 298, 301, 303, 304, 305, 307, 308, 309, 310, 312, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 344, and 345 as detailed in this decision, and the grounds having been specified, it is now accordingly,

ORDERED that motion sequence number 009 is granted to the extent that the parties shall redact all references to employee names, contact information, and other personal data from NYSCEF Doc. Nos. 298, 296, 269, 294, 244 and 273 and any memorandum of law that references such information: and it is further

ORDERED that motion sequence number 010 is granted to the extent that the parties shall redact the numbers and Merrill's business strategies from NYSCEF Doc Nos. 240, 242, 243, 244, 246, 247, 248, 249, 250, 251, 252, 253, 255, 267, 269, 270, 271, 273, 279, 282, 283, 285, 286, 288, 289, 290, 291, 292, 293, 294, 295, and 296 (301, 303, 304, 305, 307, 308, 309, 310, 298, and 312; and it is further

ORDERED that motion sequence number 011 is granted to the extent that the parties shall redact private trading information, financial information, and business strategies from NYSCEF Doc. Nos. 247, 248, 309, 243, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 344, and 345; and it is further

ORDERED that Merrill is directed to re-file 240, 242, 243, 244, 246, 247, 248, 249, 250, 251, 252, 253, 255, 267, 269, 270, 271, 273, 279, 282, 283, 285, 286, 288, 289, 290, 291, 292, 293, 294, 295, 296, 298, 301, 303, 304, 305, 307, 308, 309, 310, 312, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 344, and 345 in redacted form within 10 days of the date of this decision. Future submissions containing or referencing confidential information, as outlined in this decision, shall likewise be redacted prior to being filed publicly in NYSCEF; and it is further

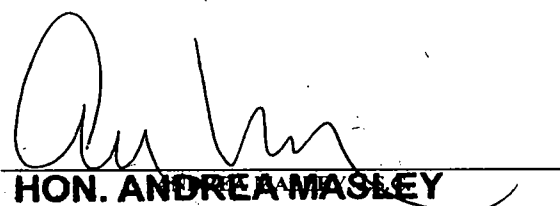
ORDERED that the County Clerk, upon service on him of a copy of this order, is directed to **unseal this action** and accept NYSCEF Doc. Nos. 240, 242, 243, 244, 246, 247, 248, 249, 250, 251, 252, 253, 255, 267, 269, 270, 271, 273, 279, 282, 283, 285, 286, 288, 289, 290, 291, 292, 293, 294, 295, 296, 298, 301, 303, 304, 305, 307, 308, 309, 310, 312, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 344, and 345 in redacted form; and it is further

ORDERED that NYSCEF Doc. Nos. 240, 242, 243, 244, 246, 247, 248, 249, 250, 251, 252, 253, 255, 267, 269, 270, 271, 273, 279, 282, 283, 285, 286, 288, 289, 290,

291, 292, 293, 294, 295, 296, 298, 301, 303, 304, 305, 307, 308, 309, 310, 312, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 344, and 345 shall also be filed in unredacted form and sealed. Until further order of the court, the County Clerk shall deny access to the unredacted documents to anyone (other than the staff of the County Clerk or the court) except for counsel of record for any party to this case, a party, and any representative of counsel of record for a party upon presentation to the County Clerk of written authorization from the counsel; and it is further

ORDERED that this order does not authorize sealing or redacting for purposes of trial.

5/26/19  
DATE

  
HON. ANDREA MASLEY

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: