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VIA E-FILING AND HAND DELIVERY

Honorable Marcy S. Friedman
New York Supreme Court,
Commercial Division, Part 60
60 Centre Street, Courtroom 248
New York, NY 10007

RE: *In re application of Wells Fargo Bank, National Association, et. al.*, Index No. 657387/2017 (the "Article 77 Proceeding").

Dear Justice Friedman:

Nover Ventures, LLC ("Nover") submits this opposition to HBK Master Fund L.P. ("HBK"), Olifant Fund, Ltd., FFI Fund Ltd., and FYI Ltd.'s (the "Olifant Funds," collectively with HBK, "Movants") request to modify the Court's February 13, 2018 Scheduling Order (the "Scheduling Order"), entered after briefing and two separate hearings, for the improper purpose of providing other investors in this Article 77 proceeding ("Parties") access to their competitors' trade secrets. Movants' request is, at bottom, an attempt to re-litigate this already-decided issue for no legitimate purpose. For the reasons set forth below, the Court should continue to safeguard the proprietary, confidential, and commercially sensitive nature of Nover's holdings information and maintain the protections promulgated in the Scheduling Order.[1]

Procedural History

In February, the Parties sought to negotiate an agreed scheduling order, but were unable to do so, in part, because of Nover's objection to providing information relating to its holdings to other investors—even on an outside counsel's eyes only basis—because the information "is

[1] Axonic Capital LLC joins in Nover's opposition to HBK's request to modify the confidentiality provisions in the Court's Order.

proprietary[,] confidential[,] commercially sensitive information that contains trade secrets that investors very clearly guard and do not want other investors in the same space to know. . . . " *See* So-Ordered Transcript of Feb. 9, 2018 Hearing, NYSCEF Doc. No. 193 at 5:13-17. The Parties submitted a joint letter regarding their positions and the Court held two telephonic hearings on the form and level of disclosure required. *See id.* at 12:4-13:1; Joint Letter, NYSCEF Doc. No. 192; Transcript of Feb. 13, 2018 Hearing, NYSCEF Doc. No. 278 ("Feb. 13, 2018 Hearing Tr."). At the conclusion of the hearings, the Court entered the Scheduling Order requiring that certain information relating to the Parties' holdings ("Holdings Information") be provided to external counsel on an "outside attorneys' eyes only" basis. Scheduling Order, at ¶ 2. Such information was to be exchanged solely for the purposes of briefing standing. *See, e.g.*, Feb. 13, 2018 Hearing Tr. at 37:24-38:13.

Prior to these proceedings, Movants raised the specter that they may want to share Holdings Information with their clients. Although Movants had the full and fair opportunity to argue for the sharing of Holdings Information with their clients during these proceedings and prior to the entry of the Scheduling Order, they failed to do so. Feb. 13, 2018 Hearing Tr. at 37:13-15, 37:22-23.[2] *See* Notice of [Proposed] Agreed Scheduling Order, NYSCEF Doc. No. 187 at 1.[3] Notably, counsel for Movants attended both the February 9 and February 13 telephonic hearings. *See* NYSCEF Doc. No. 246. Counsel for HBK, in fact, actively participated in the proceedings regarding the Scheduling Order, representing that HBK "agree[s] to the [Institutional Investors' form of] scheduling order" and "the scope of disclosure." *See* Feb. 13, 2018 Hearing Tr. at 12:23-13:13. Indeed, Movants not only failed to argue that the Holdings Information be shared with the Parties themselves, they expressly ***agreed*** with the terms of a Court Order prohibiting them from being so shared. *See* NYSCEF Doc. No. 187.

Accordingly, the instant dispute is not—as Movants try to frame it— about the form of a Protective Order,[4] but rather Movants' desire to re-litigate the protections already afforded the

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[2] "Are there any other issues on which any of the counsel wishes to be heard before I give you a ruling on the remaining issues? . . . . Does anyone have anything before I give you the ruling? I'm not hearing anything."

[3] That notice states, "Separately, several parties reserve their rights to make a further application to the Court to permit the information being shared pursuant to paragraph two of the proposed order to be shared with their clients on a confidential basis for use in this action."

[4] As a general matter, Nover does not object to the use of the model protective order for future discovery, if necessary.

Holdings Information under the Scheduling Order. Movants do not meet the standard relating thereto and the relief requested, in any event, should be denied.

Movants' Request Is Procedurally Improper and the Information Sought Irrelevant

Given that Movants' request seeks to modify the terms of a previously-entered Court Order, Movant's request is, in effect, a motion affecting a prior order, which must comply with Civil Practice Law and Rules 2221. To be entitled to relief from a scheduling order under CPLR 2221, the motion must: (i) identify itself as a motion for leave to reargue; (ii) seek relief within 30 days of the prior order, and (iii) identify the fact or law overlooked or misapprehended by the Court. *See* CPLR 2221. Because Movants do not meet any of these criteria, there is no basis to modify the Scheduling Order and their relief, on that basis alone, should be denied.

Nor have Movants articulated any need—or basis whatsoever—to share Nover's trade secrets with the Parties—*i.e.* its competitors. In ordering the exchange of the Holdings Information, the Court emphasized that the reason for the disclosure was to assist in identifying and understanding the types of indirect interests that the investors hold so that the issues may be efficiently briefed and to avoid the issuance of advisory opinions. *See* Feb. 13, 2018 Hearing Tr. at 37:24-38:13. With the standing motion briefing now complete, and oral argument scheduled for Monday, those needs no longer exist. Nor did Movants identify any other legitimate reason or need for the Holdings Information. Movants only argument was that, without knowing exactly what "an opponent's holdings are . . . Respondents cannot accurately calculate the settlement value for a trust." Movants' Letter at 4. But of course the purpose of this proceeding is the administration and distribution of funds under the transaction agreements, not settlement. Moreover, their underlying assertion is incorrect. All that Respondents need to calculate the settlement value for a trust is their ***own*** holdings. Their desire to have access to other investor's holdings is merely an attempt to gain a competitive advantage.[5]

The Scheduling Order Properly Protects Holdings Information

Nover's Holdings Information constitutes a trade secret. *See Mann ex rel. Akst v. Cooper Tire Co.*, 33 A.D.3d 24, 31 (1st Dep't 2006) ("[A] trade secret exists where there is a . . .

[5] A Party, of course, may always voluntarily share its Holdings Information with another Party for settlement purposes.

compilation of information . . . used in one's business . . . which gives [one] an opportunity to obtain an advantage over competitors who do not know or use it." (internal quotation marks omitted)). While the Securities and Exchange Commission requires institutional investment managers (like the Institutional Investors) to disclose their quarterly portfolio holdings, it does not require private investors, such as Nover, to publicly disclose theirs. The confidential treatment Nover and others are afforded with respect to their Holdings Information allows them to build positions in investments, spread their trades over a longer period of time, and protect their strategies from free-riders. The confidential nature of Nover's Holdings Information is not only a hallmark of private investment, it is necessary to maintain its competitive advantage over its competitors, including Movants. Indeed, as noted above, Movants admit their motive for seeking the information from Nover is to try to gain a competitive edge in this proceeding.[6]

Nover's Holdings Information, if disclosed, would provide insight to its investment strategy, including interests in specific types of assest at a given time, which is the firm's stock-in-trade and comparative advantage in its business. This investment strategy was developed through internal analyses, the disclosure of which could threaten its place in the marketplace. Thus, as Nover has steadfastly maintained throughout this proceeding, its Holdings Information is proprietary, confidential, and should not be disclosed to other persons appearing herein—its competition.

Notably, the Movants barely contest otherwise—quizzically implying that the Holdings Information is somehow known outside the business. *See* Movants' Letter at 4 ("[A]ny person with an understanding of RMBS trusts can intuit generally what each Respondent holds based on the positions taken in this action."). This assertion is at odds with the request to disclose Holdings Information to the Parties themselves. It is axiomatic that if everyone already had the Holdings Information, there would be no need for Nover to provide the information.

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[6] Given that the Court requested a short letter response, Nover specifically requests the opportunity for full briefing on the merits and to provide evidence supporting same should the Court not deny Movants' request based upon the short letter briefing provided.

Orders Limiting Disclosure to Outside Attorneys' Eyes Only Are Not Uncommon

Defendants are incorrect that "Outside Counsel Eyes Only" is an extraordinary relief. Protective orders limiting the disclosure of sensitive commercial information only to outside counsel are commonplace and widely endorsed by New York law. "The disclosure of confidential information on an [outside] 'attorneys' eyes only' basis is a routine feature of civil litigation involving trade secrets. . . . The purpose of this form of limited disclosure is to prevent a *party* from viewing the sensitive information while nevertheless allowing the party's *lawyers* to litigate on the basis of that information." *In re The City of New York*, 607 F.3d 923, 935-36 (2d Cir. 2010) (citing Fed. R. Civ. P. 26(c)(1)(G)). "[Outside] 'attorneys eyes only' orders have been upheld in order to protect the confidentiality of trade secrets obtained in the course of discovery[.]" *Bernstein v On-Line Software Int'l*, 232 A.D.2d 336, 337 (1st Dep't 1996) (endorsing arbitration panel confidentiality order "which restricted access to the material to outside counsel and the experts retained by the parties").[7] The Court has discretion to make a protective order limiting or conditioning the use of any disclosure device. CPLR 3103(a). "Its discretion in such matters is broad[.]" *Krygier v. Airweld, Inc.*, 176 A.D.2d 701, 701 (2d Dep't 1991).

In conclusion, outside attorneys eyes only protection is necessary and appropriate when sensitive business information is to be disclosed in an action between competitors. *See Bernstein*, 232 A.D.2d at 337; *In re The City of New York*, 607 F.3d at 935. Nover is substantively entitled to this protection, Movants did not object to it in the first instance, and Movants have not met their burden to reargue or modify the Court's Scheduling Order.

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[7] The Movants' assertion that limiting disclosure of sensitive business information to outside counsel only is rare or disfavored is principally premised on distinguishable cases holding that court records—not discovery materials—should rarely be sealed. These cases hold that judicial proceedings should be public for the sake of transparency and constitutional guarantees under the First and Sixth Amendments to the Federal Constitution and therefore have no application to the confidentiality of materials exchanged between private parties in discovery. *See Mosallem v. Berenson*, 76 A.D.3d 345, 348 (1st Dep't 2010); *Gryphon Domestic VI, LLC v. APP Int'l Fin. Co., B.V.*, 28 A.D.3d 322, 324 (1st Dep't 2006). Movants' authorities that address discovery between parties are inapposite and distinguishable because the discovery materials sought to be protected were not, as is the case here, trade secrets and proprietary business information to be shared with a competitor. *See SNI/SI Networks LLC v. DIRECTV, LLC*, 132 A.D.3d 616, 617 (1st Dep't 2015) (parties were not business competitors); *Matter of Hofmann*, 284 A.D.2d 92, 94 (1st Dep't 2001) ("the mere fact that embarrassing allegations may be made . . . is not a sufficient basis for a sealing order"); *Am. Stock Transfer & Trust Co., LLC v. Alliance Advisors, LLC*, Index No. 104249/2011, 2014 WL 477364, at *1 (Sup. Ct. N.Y. Cty. Feb. 3, 2014) (information at issue not shown to be trade secrets); *Tradewell, Inc. v. Am. Sensors Elecs., Inc.*, No. 96 CIV. 2474 DAB, 1997 WL 79867, at *1 (S.D.N.Y. Feb. 25, 1997) (disclosing party contractually obligated to share the information).

Respectfully submitted,

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