UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

HEARING DATE: November 17, 2016
HEARING TIME: 10:00 a.m.

In re

Motors Liquidating Company, f/k/a General Motors Corporation, *et al*.,

Debtor.

Case No. 09-50026 (MG)

(Chapter 11)

MOTORS LIQUIDATION COMPANY AVOIDANCE ACTION TRUST, by and through the Wilmington Trust Company, solely in its capacity as Trust Administrator and Trustee,

Plaintiff

v.

JPMorgan Chase Bank, N.A., *et al*.,

Defendants.

Adv. Pro. No. 09-00504 (MG)

MEMORANDUM OF LAW OF THE UNITED STATES TRUSTEE IN OPPOSITION TO THE REQUEST TO SEAL OF INFORMATION

WILLIAM K. HARRINGTON
UNITED STATES TRUSTEE

By: Brian S. Masumoto
Shannon Anne Scott
Trial Attorneys
201 Varick Street
Room 1006
New York, New York 10014
Tel. No. (212) 510-0500
Fax No. (212) 668-2255

TO THE HONORABLE: MARTIN GLENN
UNITED STATES BANKRUPTCY JUDGE

William K. Harrington, the United States Trustee for Region 2 (the "United States Trustee"), hereby submits this memorandum of law in order to address the issue raised by the Court in its Order Granting Moving Term Loan Lenders' Motion for Reconsideration (the "Order"). [Adv. Dkt. No. 735]. Specifically, in the Order, the Court requested that the United States Trustee address the question of whether the information required to be disclosed pursuant to Rule 7007.1 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules") should be – as asserted by the Moving Term Loan Lenders (as that term is defined below) – deemed "confidential. . . commercial information" under Section 107(b) of title 11 of the United States Code (the "Bankruptcy Code") and hence, filed under seal. While there may be occasions where the information required by Rule 7007.1 may meet the requirements of Section 107(b), in this case and under the facts and record before the Court, there is no basis for allowing the information required to be filed pursuant to Rule 7007.1 to be filed under seal.

I. PRELIMINARY STATEMENT

As this Court aptly observed in In re Food Mgmt. Group, LLC, 359 B.R. 543-55 (Bankr. S.D.N.Y. 2007), section 107 of the Bankruptcy Code reflects Congress' intent to favor public access to papers filed with the bankruptcy court. Rule 7007.1 of the Bankruptcy Rules ("Rule 7007.1") directs nongovernmental corporate parties in adversary proceedings to list those corporations that hold significant ownership interests of over ten percent (10%). The Advisory Committee notes to this rule explain that this rule was promulgated to allow litigants and the court to determine if the court has a conflict with any parties appearing in the adversary. The Moving Term Loan Lenders have failed to demonstrate that disclosing the identity of any

corporations that hold significant ownership interests in the various Moving Term Loan Lenders (that is, the defendants in this adversary proceeding) would amount to the disclosure of confidential commercial information. Further, the mere unsupported assertion by the Moving Term Loan Lenders that if the identities of the corporations with significant interests in the respective defendants to this adversary proceeding were disclosed, could subject the Moving Term Loan Lenders to a competitive disadvantage as those identified corporations could be targeted by competitors of the Moving Term Loan Lenders in an attempt to persuade them to invest in the competitors, is pure conjecture. Consequently, the reasons provided for the sealing of the information required to be provided by Rule 7007.1 is an insufficient basis for the Court to grant the extraordinary relief requested in the Motion.

II. BACKGROUND

A. General Information

1. Motors Liquidation Company f/k/a General Motors Corporation and certain of its subsidiaries (collectively, the "Debtors") filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code on June 1, 2009 (the "Petition Date"), in the United States Bankruptcy Court for the Southern District of New York. [Main ECF. Dkt. No. 1].

2. On June 3, 2009, the United States Trustee for the Southern District of New York appointed the Official Committee of Unsecured Creditors of Motors Liquidation Company f/k/a General Motors Corporation (the "Committee"), pursuant to Section 1102 of the Bankruptcy Code. [Main ECF. Dkt. No. 356].

3. The Committee was granted both standing and authority to pursue claims challenging, *inter alia*, the security interest of lenders to a certain term loan agreement, dated as

of November 29, 2006, as amended by that certain first amendment dated as of March 4, 2009. [Main ECF. Dkt. No. 2529].

4. On July 31, 2009, by the filing of a complaint ("Complaint"), the Committee commenced this adversary proceeding seeking, *inter alia*, to: (i) avoid an unperfected lien: (ii) avoid and recover post-petition transfers; (iii) avoid and recover preferential payments; and (iv) disallow claims of defendants [Adv. Dkt. No. 1].

5. On March 29, 2011, the Court entered an order confirming the Debtors' Second Amended Joint Chapter 11 Plan [Main ECF Dkt. No. 9941], at which time the Motors Liquidation Company Avoidance Action Trust (the "AAT") succeeded to the Committee's avoidance action claims.

6. On May 20, 2015, the AAT filed an amended complaint ("Amended Complaint") to include and add certain defendants in the adversary proceeding [Adv. Dkt. No. 91].

7. On November 16, 2015, certain defendants answered the Amended Complaint [Adv. Dkt. No. 241], including the Moving Term Loan Lenders as defined, *to wit*: Avery Point CLO, Limited; Chatham Light II CLO, Limited; Fidelity Central Investment Portfolios LLC: Fidelity Floating Rate Central Fund; Fidelity Central Investment Portfolios LLC: Fidelity High Income Central Fund 1; Fidelity Central Investment Portfolios LLC: Fidelity High Income Central Fund 2; FIAM Floating Rate High Income Commingled Pool (f/k/a Pyramis Floating Rate High Income Commingled Pool); FIAM High Yield Bond Commingled Pool (f/k/a Pyramis High Yield Bond Commingled Pool); FIAM High Yield Fund, LLC (f/k/a Pyramis High Yield Fund, LLC); Katonah III, Ltd.; Katonah IV Ltd.; Napier Park Distressed Debt Opportunity Master Fund Ltd. (f/k/a CAI Distressed Debt Opportunity Master Fund Ltd.); Nash Point CLO;

Race Point II CLO, Limited; Race Point III CLO, Limited; Race Point IV CLO, Ltd.; and Sankatsixteeny High Yield Partners III Grantor Trust as successor in interest to Sankaty High Yield Partners III, L.P.

8. On January 20, 2016, after this Court granted a requested extension to file the corporate ownership statements required by Bankruptcy Rule 7007.1 and Local Bankruptcy Rule 7007.1-1 (the "Corporate Ownership Statements"), the Moving Term Loan Lenders filed a motion, pursuant to section 107(b) of the Bankruptcy Code and Rule 9018 of the Bankruptcy Rules, for leave to, *inter alia*, redact the names of the business entities that own 10% or more of the equity interests in the Moving Term Loan Lenders, or otherwise reveal the composition of the Moving Term Loan Lenders' owner base, in the Corporate Ownership Statements filed publicly with the Court (the "Motion to Seal") [Adv. Dkt. No. 371].

9. The Motion to Seal was denied on September 1, 2016 [Adv. Dkt. No. 717]. Thereafter, on September 7, 2016, the Moving Term Loan Lenders sought reconsideration of the Court's denial of the Motion to Seal (the "Motion for Reconsideration").

10. The Court granted the Motion for Reconsideration and set the matter down for a hearing date on the merits of the matter – that is, whether the corporate ownership statement for each of the defendants in the adversary complaint amounted to confidential commercial information. Additionally, in the Order, the Court requested that the United States Trustee address the question of whether the names of business entities that own 10% or more of the equity interest in a party in this adversary proceeding may be properly deemed "confidential … commercial information" under Section 107(b) of the Bankruptcy Code. [Adv. Dkt. No. 735] The Moving Term Loan Lenders were directed to answer this same question. Id.

III. ARGUMENT

The Moving Term Loan Lender Should Not Be permitted to File Their Respective Corporate Ownership Statements Under Seal

A. Rule 7007.1 Requires A Corporate Ownership Statement of Any Corporation that Is A Party to An Adversary Proceeding

Rule 7007.1 entitled "Corporate Ownership Statement" provides as follows:

> (a) Required Disclosure. Any corporation that is a party to an adversary proceeding, other than the debtor or a governmental unit, shall file two copies of ***a statement that identifies any corporation, other than a governmental unit, that directly or indirectly owns 10% or more of any class of the corporation's equity interests***, or states that there are no entities to report under this subdivision.

Fed. Rules of Bankr. Proc. R. 7007.1(a) (emphasis added). The rule further provides that the party shall file a supplemental statement promptly upon any change in circumstances that the rule requires the party to identify or disclose. Id., 7007.1(b).

There are few reported decisions concerning the corporate ownership statement filing requirements of Rule 7007.1. However, as noted in GE Money Bank v. McGraw (In re Lewis McGraw and Brenda McGraw), 2007 WL 1076690 *5 (N.D. Ala, Apr 5, 2007), the Advisory Committee Notes explain that Rule 7007.1 was instituted to help litigants and court members determine when a court member had a conflict in a case. See also 9 Collier on Bankruptcy (Matthew Bender 16th Ed.), 7007.1, Overview of Rule 7007.1.

The required disclosures under Rule 7007.1 pertain only to disclosing the identity of a **corporation** that directly or indirectly owns 10% or more of any class of the corporation's equity interests. Thus, the rule does not appear to require the disclosure of the identity of individual owners of the corporation's stock. Id.

The Moving Term Loan Lenders do not object to providing the information required to be disclosed under Rule 7007.1. However, they seek to provide this information under seal, by utilizing the protections afforded under Section 107(b)(1) of the Bankruptcy Code.

B. Legal Standard Of Section 107 of the Bankruptcy Code

Section 107(a) of the Bankruptcy Code provides, in part, that subject to certain limited exceptions:

> a paper filed in a case under this title and the dockets of a bankruptcy court are public records and open to examination by an entity at reasonable times without charge.

11 U.S.C. § 107(a).

As this Court is aware, this policy of open inspection, codified generally in § 107(a) of the Bankruptcy Code, evidences Congress' strong desire to preserve the public's right of access to judicial records in bankruptcy proceedings. In re Dreier LLP, 821, 822 (Bankr. S.D.N.Y. 2013) citing In re Orion Pictures Corp., 21 F.3d 24, 26 (2d Cir. 1994); accord In re Borders Grp., Inc., 462 B.R. 42, 46 (Bankr. S.D.N.Y. 2011) ("[t]here is a strong presumption and public policy in favor of public access to court records"); In re Food Mgmt. Grp., LLC, 359 B.R. 543, 553-55 (Section 107 reflects Congress' intent to favor public access to papers filed with the Bankruptcy Court).

Nevertheless, Section 107(b)(1) of the Bankruptcy Code provides a limited exception to public disclosure that may be invoked to "protect an entity with respect to a trade secret or **confidential research, development or commercial information**." 11 U.S.C. § 107(b).[1] (emphasis added). The exception to the public's general right of access in section 107(b) is

[1] Bankruptcy Rule 9018 defines the procedure by which a party may move for relief under Section 107(b). Fed. R. Bankr. P. 9018.

narrow and "is not intended to offer a safe harbor for those who crave privacy or secrecy for its own sake. Instead, it protects parties from the release of information that could cause them harm or give competitors an unfair advantage." In re Dreier, 485 B.R. at 823. The burden is on the moving party to show that a request to place documents under seal falls within the parameters of Section 107(b). Id.; In re Food Mgmt., 359 B.R. at 561.

"Commercial information" has been defined as information which would cause an "unfair advantage to competitors by providing them information as to the commercial operations" of the requesting party. In re Orion, 21 F.3d at 27 (internal quotations omitted); accord Borders, 462 B.R. at 47. As the Borders Court stated:

> The Court must also find that the redacted information is so critical to the operations of the entity seeking the protective order that its disclosure will unfairly benefit the entity's competitors.

Borders, 462 B.R. at 47-48 (internal quotations, citations and brackets omitted).

C. The Moving Term Loan Lenders Have Not Met Their Burden To Seal the Identity of Any Corporations that Own 10% or More of the Equity Interests in the Moving Term Loan Lenders

The Moving Term Loan Lenders argue that they should be permitted to file the identities of any corporations that own 10% or more of their respective equity under seal. Specifically, they maintain that (i) Rule 7007.1 was designed only to give the Court notice of the corporate owners – not other parties in the case; (ii) granting the Motion would not prejudice any of the parties in this proceeding; (iii) the names of the corporate owners of the equity in the respective defendants (i.e., the investors) is non-public information and the corporate owners have expectations of privacy; and (iv) publishing the names of the corporations that own more than 10% of the equity of each of the respective defendants could subject such owners to harassment

from other funds and the disclosure of such identities "would cause 'an unfair advantage to competitors by providing them information as to the commercial operations of the [party in interest]."[1] [Adv. Dkt. Nos. 371 and 720]. Not one of these arguments is persuasive.

As an initial matter, "there is a strong presumption and public policy in favor of public access to court records." In re Dreier LLP, 821, 822; accord In re Borders Grp., Inc., 462 B.R. 42, 46; In re Food Mgmt. Grp., LLC, 359 B.R. 543, 553-55. The request to seal documents is not lightly granted and as such, will be authorized only where the party seeking the seal is able to meet its burden to show that the narrow parameters of Section 107(b) of the Bankruptcy Code have been met.

Here, the Moving Term Loan Lenders seek to meet this burden by mere assertions which are unsupported and conclusory. The Moving Term Lenders consist of sixteen parties. Some may be related to each other (e.g., Fidelity Central Investment Portfolios and Fidelity High Income Central Fund 2), and others do not appear to be related to any of the other parties (e.g., Nash Point CLO). It is not clear if some or all of these nineteen parties are competitors with each other. Extensive information about each of the defendants is no doubt available on the internet and through filings with the Securities Exchange Commission – although it is not clear if the information about their respective corporate owners/investors is available on the internet or otherwise. However, the Motion to Seal does not contain even one declaration from even one of the sixteen parties. Nor is there a declaration in support of the motion from even one corporation that has significant ownership interests in one of the sixteen parties.

[1] The Moving Term Loan Lenders have also argued in the motion for reconsideration that the seal should be granted because this Court granted a similar request. As was requested in the Order, the United States Trustee will only address the issue of whether the disclosure is of confidential . . commercial information".

The disclosure of business entities that own 10% or more of the equity interests in the Moving Term Lenders reveals basic ownership interests and is unlike revealing a customer's personal proprietary information. Significantly, the rule does not appear to require the disclosure of the identity of an individual owner of 10% or more of the filing company's stock. See 9 Collier on Bankruptcy (Matthew Bender 16th Ed.), 7007.1, Overview of Rule 7007.1.

The requirement of the disclosure of parties appearing in court proceedings is not an unusual requirement. For example, for example, a corporate disclosure statement is required under 26.1 of the Federal Rules of Appellate Procedure ("FRAP"), the rule from which Rule 7007.1 was modelled. FRAP 26.1. Similarly, Rule 2019 of the Bankruptcy Rules requires disclosure of economic interests of parties that are a group of committee of multiple creditors and their counsel. Fed. R. Bankr. P. 2019. And finally, Rule 2015.3(a) requires a debtor to file reports that compile and disclose extensive financial information regarding each entity in which a debtor has a substantial or controlling interest, including balance sheets, descriptions of operations, statements of income, cash flows, and equity changes. Fed. R. Bankr. P. 2015.3(a). These rules not only promote transparency in court proceedings but also promote the avoidance of conflicts of interest. The policy of openness and transparency should not be circumvented by the conclusory assertion that significant ownership interests in a corporate structure constitutes confidential commercial information.

In that same regard, the purpose of the rule is for the court as well as the litigants to determine if the court has a relationship with one of the parties to the adversary proceeding. Keeping this information under seal would prevent other interested parties to the litigation and to the bankruptcy proceedings to consider the disclosures. Likewise, allowing the corporate

ownership interests to be sealed based simply on the Moving Term Loan Lenders' desire to keep the information private for investment purposes would encourage other parties to follow suit, thereby rendering the disclosure under Rule 7007.1 of the Bankruptcy Rules futile.

Equally unavailing is the Moving Term Loan Lenders' argument that the disclosure would place them at a competitive disadvantage. They have not met their burden by naming or identifying any market competitors, nor did they satisfactorily explain who such competitors would be. Likewise, stating that the investors may be solicited upon the filing of the corporate ownership statements is pure conjecture and not a sufficient reason to demonstrate harm and deem information confidential and avoid the mandated disclosure rule.

For all these reasons, the Moving Term Loan Lenders have not met their heavy burden to demonstrate the sealing of the identity of any corporations that own 10% or more of the equity interests in the Moving Term Loan Lenders is warranted under Section 107(b) of the Bankruptcy Code.

WHEREFORE, the United States Trustee respectfully requests that the Court deny the Sealing Motion, and grant such other relief as the Court deems fair and just.

Dated: New York, New York
November 9, 2016

Respectfully Submitted,

WILLIAM K. HARRINGTON
UNITED STATES TRUSTEE

By: /s/ Brian S. Masumoto
Brian S. Masumoto
Shannon Anne Scott
Trial Attorneys
201 Varick Street, Room 1006
New York, New York 10014
Tel. No. (212) 510-0500