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UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW JERSEY

In re: : Chapter 11
: :
ALUMINUM SHAPES, LLC, : Case No. 21-16520 (JNP)
: :
Debtor. : Hearing Date: November 12, 2021 at 10:00 a.m.
: :

**OBJECTION OF THE UNITED STATES TRUSTEE TO DEBTOR’S
EXPEDITED MOTION TO SEAL**

Andrew R. Vara, United States Trustee for Regions Three and Nine (the “U.S. Trustee”), files this Objection (the “Objection”) to the Debtor’s Expedited Motion to Seal (ECF No. 187) (the “Motion”), and in support of that Objection states as follows:¹

JURISDICTION

1. Under (i) 28 U.S.C. § 1334, (ii) applicable order(s) of the United States District Court for the District of New Jersey issued pursuant to 28 U.S.C. § 157(a), and (iii) 28 U.S.C. § 157(b)(2), this Court has jurisdiction to hear and determine the Motion and this Objection.

¹ Capitalized terms used herein as defined terms and not otherwise defined shall have those meanings ascribed to them in the Motion or in the KEIP/KERP Motion.

2. The U.S. Trustee is charged with overseeing the administration of Chapter 11 cases filed in this judicial district, pursuant to 28 U.S.C. § 586. This duty is part of the U.S. Trustee’s overarching responsibility to enforce the bankruptcy laws as written by Congress and interpreted by the courts to guard against abuse and over-reaching to assure fairness in the process and adherence to the provisions of the Bankruptcy Code. *See In re United Artists Theatre Co.*, 315 F.3d 217, 225 (3d Cir. 2003) (“U.S. Trustees are officers of the Department of Justice who protect the public interest by aiding bankruptcy judges in monitoring certain aspects of bankruptcy proceedings.”); *United States Trustee v. Columbia Gas Sys., Inc. (In re Columbia Gas Sys., Inc.)*, 33 F.3d 294, 298 (3d Cir. 1994) (“It is precisely because the statute gives the U.S. Trustee duties to protect the public interest . . . that the Trustee has standing to attempt to prevent circumvention of that responsibility.”); *Morgenstern v. Revco D.S., Inc. (In re Revco D.S., Inc.)*, 898 F.2d 498, 499 (6th Cir. 1990) (“As Congress has stated, the U.S. trustees are responsible for ‘protecting the public interest and ensuring that the bankruptcy cases are conducted according to [the] law’”).

3. Under section 307 of title 11 of the United States Code (the “Bankruptcy Code” or “Code”), the U.S Trustee has standing to be heard on the Motion and the issues raised in this Objection.

BACKGROUND

4. On August 15, 2021 (the “Petition Date”), the Debtor filed a voluntary petition for relief under chapter 11 of title 11 of the United States Code. *See* ECF No. 1.

5. The Debtor remains in possession of its assets and continues to manage its business as a debtor-in-possession pursuant to sections 1107 and 1108 of the Bankruptcy Code.

6. The U.S. Trustee appointed an Official Committee of Unsecured Creditors on September 1, 2021. *See* ECF No. 77.

7. On October 19, 2021, the Debtor filed this Motion, seeking to seal certain portions of the Debtor's Expedited Motion for Entry of an Order (I) Approving Debtor's Key Employee Retention Plan, (II) Approving Debtor's Key Employee Incentive Plan, and (III) Granting Related Relief (the "KEIP/KERP Motion") including the (i) Declaration of Justin Magner in Support of Debtor's Motion for Entry of an Order Approving Debtor's Key Employee Retention Plan and Debtor's Key Employee Incentive Plan and all exhibits thereto (the "Magner Declaration"), (ii) Declaration of Solomon Rosenthal in Support of Debtor's Motion for Entry of an Order Approving Debtor's Key Employee Retention Plan and Debtor's Key Employee Incentive Plan and all exhibits thereto (the "Rosenthal Declaration" and collectively with the Magner Declaration, the "Declarations"), and (iii) Exhibits 1 and 2 attached to the Proposed Order Approving Debtor's Key Employee Retention Plan and Debtor's Key Employee Incentive Plan (the "Exhibits") (the "Motion to Seal"). *See* ECF No. 187.

8. Also, on October 19, 2021, the Debtor filed the KEIP/KERP Motion seeking authorization to implement the Debtor's Key Employee Retention Plan (the "KERP") and Debtor's Key Employee Incentive Plan (the "KEIP"). The Debtor publicly disclosed that the KEIP covers 4 employees whom the Debtor describes as "insiders," and the KERP covers nine (9) employees whom the Debtor asserts are not insiders but acknowledges at least some may have officer or director titles.

9. The Debtor filed the KEIP/KERP Motion without filing the Declarations and the Exhibits. Without the Declarations and the Exhibits, the Baseline Target, other targets, and the

amounts to be paid to KEIP Participants are not publicly disclosed. In addition, without the Declarations and Exhibits, the amounts to be paid to the KERP Participants are not publicly disclosed.

10. Although the Debtor through the KEIP/KERP Motion discloses the names of the KEIP Participants and the KERP Participants, other than disclosing the titles of two of the four KEIP Participants, the Debtor does not disclose the titles of the KERP Participants or the titles of the remaining two KEIP Participants.

11. Pursuant to the Motion, the Debtor argues that the Magner Declaration and the Exhibits contain confidential research that includes sensitive calculations and computations used by Cowen in designing the KERP and the KEIP. *See* ECF No. 187 at page 5 of 8.

12. In addition, the Debtor argues that the Rosenthal Declaration “contain[s] information with respect to matters that the Debtor believes to be confidential and potentially scandalous and/or defamatory.” *See id.*

13. For the reasons set forth below, the Declarations and the Exhibits should not be sealed.

LEGAL ANALYSIS

14. There is a general right of public access to court records. *See Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 591 (1978); *see also Orion Pictures Corp. v. Video Software Dealers Assoc.*, 21 F.3d 24, 26 (2d Cir. 1994); *In re Continental Airlines*, 150 B.R. 334 (D. Del. 1993).

15. In *Nixon v. Warner Communications, Inc.*, the Supreme Court stated that “[i]t is clear that the courts of this country recognize a general right to inspect and copy public records and

documents, including judicial records and documents.” *Nixon v. Warner*, 435 U.S. at 591. The United States Court of Appeals for the Third Circuit has concluded that there is “a right of access to judicial proceedings and judicial records” that is “beyond dispute.” *See Pansy v. Borough of Stroudsburg*, 23 F. 3d 772, 780-81 (3d Cir. 1994).

16. Section 107(a) of the Bankruptcy Code is “a codification of the common law general right to inspect judicial records and documents.” *See Alterra Healthcare Corp.*, 353 B.R. at 75; *Orion Pictures Corp.*, 21 F.3d at 26. It provides that all papers “filed in a case under this title . . . are public records and open to examination” by the public without charge. *See* 11 U.S.C. § 107(a). “This policy of open inspection, codified generally in Section 107(a) of the Bankruptcy Code, evidences Congress’s strong desire to preserve the public’s right of access to judicial records in bankruptcy proceedings.” *See Orion Pictures Corp.*, 21 F.3d at 26. “[D]ocuments filed in bankruptcy cases have historically been open to the press and general public,” and there is a “strong presumption in favor of public access to judicial records and papers. . . .” *See Alterra Healthcare Corp.*, 353 B.R. at 75; *In re Continental Airlines*, 150 B.R. 334, 341 (D. Del. 1993); *In re Food Mgmt. Group, LLC*, 359 B.R. 543, 553 (Bankr. S.D.N.Y. 2007).

17. A party may invoke a limited exception to public disclosure to protect “an entity with respect to a trade secret or confidential research, development or commercial information.” *See* 11 U.S.C. § 107(b)(1); *accord* Fed. R. Bankr. P. 9018. In addition, a party may invoke another limited exception to public disclosure to protect “a person with respect to scandalous or defamatory matter contained in a paper filed in a case under this title.” *See* 11 U.S.C. § 107(b)(2); *accord* Fed. R. Bankr. P. 9018.

18. Fed. R. Bankr. P. 9018, provides:

On motion or on its own initiative, with or without notice, the court may make any order which justice requires (1) to protect the estate or any entity in respect of a trade secret or other confidential research, development, or commercial information, (2) to protect any entity against scandalous or defamatory matter contained in any paper filed in a case under the Code, or (3) to protect governmental matters that are made confidential by statute or regulation.

See Fed. R. Bankr. P. 9018.

19. In the Third Circuit, a party seeking to seal any part of a judicial record bears the burden of showing (1) that the material is the kind of information that courts will protect and (2) that disclosure will work a clearly defined and serious injury to the party seeking to seal. *See Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059 (3d Cir. 1984); *accord In re Cendant Corp.*, 260 F.3d 183, 194 (3d Cir. 2001). Before sealing the record, the court must be able to articulate the compelling countervailing interests to be protected and make specific findings on the record concerning the effects of the disclosure. *See Publicker*, 733 F.2d at 1072.

20. The moving party also bears the burden of demonstrating “that the interest in secrecy outweighs the presumption in favor of access.” *See Continental Airlines*, 150 B.R. at 340; *accord Food Mgmt. Group*, 359 B.R. at 561; *In re Fibermark, Inc.*, 330 B.R. 480 (Bankr. D. Vt. 2005). To meet this burden, the movant “must demonstrate extraordinary circumstances and compelling need to obtain protection.” *See Food Mgmt. Group*, 359 B.R. at 561 (*citing Orion*, 21 F.3d at 27). Nevertheless, a “court’s ability to limit the public’s right to access remains an extraordinary measure that is warranted only under rare circumstances as ‘public monitoring is an essential feature of democratic control.’” *See In re Anthracite Capital, Inc.*, 2013 WL 1909026, at *3 (Bankr. S.D.N.Y. May 9, 2013) (quotation omitted).

21. Even if a party can successfully demonstrate that some of the evidence may contain material which may be protected under Section 107(b) or Rule 9018, the relief granted should be narrowly tailored. *See In re Lomas Financial Corporation*, 1991 WL 21231, at *2 (S.D.N.Y. 1991).

22. Here, the Debtor argues that the Magner Declaration and the Exhibits “contains and describes Cowen’s process in designing the KERP and the KEIP. This process included confidential research.” *See* ECF No. 187 at page 5 of 8. The Debtor also sets forth that the Magner Declaration contains “sensitive calculations and computations used by Cowen in designing the KERP and the KEIP.” *See id.* However, no explanation is provided as to how this process included confidential research, why the research would be confidential and why such calculations and computations made by Cowen are sensitive.

23. In addition, the Debtor sets forth that the Rosenthal Declaration “contain[s] information with respect to matters that the Debtor believes to be confidential and potentially scandalous and/or defamatory.” *See id.* Again, the Debtor does not provide any evidence as to the scandalous and confidential nature of the “roles certain Employees have within the Debtor and certain Employee’s connections with each other.”

24. At the very least, the Debtor should be required to divulge the Baseline Target, the other targets, and the amounts to be paid to the KEIP Participants. In addition, the Debtor should be required to divulge the titles of each of the KERP Participants and the amounts they are to receive. The process used by the Debtor and Cowen to develop the KERP and the KEIP is separate and apart from disclosing the Baseline Target, the other targets, and the amounts to be paid to the KEIP Participants and the KERP Participants.

25. In addition, any scandalous or defamatory language could simply be redacted instead of sealing an entire document. Here, it appears that the scandalous and defamatory language, if it exists, could just be redacted.

CONCLUSION

For the reasons set forth above, the U.S. Trustee respectfully requests that the Court deny the Motion, and grant such other and further relief as the Court deems just and proper.

Respectfully submitted,

ANDREW R. VARA
UNITED STATES TRUSTEE
REGIONS 3 AND 9

By: /s/ Jeffrey M. Sponder
Jeffrey M. Sponder
Trial Attorney

Dated: November 6 2021