Bruce Bennett (admitted *pro hac vice*)
JONES DAY
555 South Flower Street, 50th Floor
Los Angeles, CA 90071
Tel: (213) 489-3939
Attorney for Term Loan Lenders* *for certain purposes*

John W. Spiegel (admitted *pro hac vice*)
MUNGER, TOLLES & OLSON LLP
355 South Grand Avenue, 35th Floor
Los Angeles, CA 90071
Tel: (213) 683-9100
Attorney for Term Loan Lenders*

Hearing Date and Time:
November 17, 2016, 10 a.m. EST

[* *The complete list of Term Loan Lenders appears in Appendix A to the Consent Motion to Withdraw [Dkt. 753]; a list of the Moving Term Loan Lenders and additional counsel appear on the signature page*]

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	Chapter 11 Case
MOTORS LIQUIDATION COMPANY, *et al.*,	Case No. 09-50026 (MG)
Debtors.	(Jointly Administered)
MOTORS LIQUIDATION COMPANY AVOIDANCE ACTION TRUST, by and through Wilmington Trust Company, solely in its capacity as Trust Administrator and Trustee,	Adversary Proceeding
	Case No. 09-00504 (MG)
Plaintiff,	
vs.	
JPMORGAN CHASE BANK, N.A., *et al.*,	
Defendants.	

BRIEF OF THE MOVING TERM LOAN LENDERS, IN RESPONSE TO ORDER GRANTING RECONSIDERATION OF MOTION FOR LEAVE TO FILE CORPORATE OWNERSHIP STATEMENTS UNDER SEAL

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

INTRODUCTION

Section 107(b) of the Bankruptcy Code requires a bankruptcy court to protect the "confidential . . . commercial information" of entities. The Moving Term Loan Lenders (identified below under their attorneys' signatures) hereby respond to the Court's direction to brief whether this statutory protection applies to "the names of business entities that own 10% or more of the equity interest in a party to an adversary proceeding." [Adv. Dkt. No. 735, at 2.]

As detailed below, such names are "confidential . . . commercial information" when they reveal "information as to the commercial operations" of an entity. *In re Orion Pictures Corp.*, 21 F.3d 24, 27 (2d Cir. 1994). Applying § 107(b) and similar standards, the Supreme Court, the District Court for the Southern District of New York, this Court, and other courts have in various circumstances protected from disclosure the names of business entities that own 10% or more of the equity interest in a party. *See, e.g.*, *Cont'l Bank Int'l v. City of New York*, 486 U.S. 1001 (1988) (sealing identities of company's owners); Order, *Cantona v. N.Y. Cosmos LLC*, No. 1:15-cv-03852 (S.D.N.Y. July 10, 2015) (Dkt. 19) (Abrams, J.) (same); *In re Arcapita Bank B.S.C.(c)*, No. 12-11076 (Bankr. S.D.N.Y. May 18, 2012) (Dkt. 158) (Lane, J.) (same for bank's investors).

The names of the business entities that own 10% or more of the equity interest in the movants merit the same treatment. Those names reveal information as to the commercial operations both of the Moving Term Loan Lenders (namely, their customers and investment strategies) and of their customers (namely, their investment strategies). This Court should permit the movants to provide these names only to this Court, the Plaintiff (which has received them under a confidentiality agreement, and does not oppose this proposal), and any court-approved parties. *In re Northstar Energy, Inc.*, 315 B.R. 425, 429–30 (Bankr. E.D. Tex. 2004) (approving similar redaction proposal). That will accomplish the purpose of corporate disclosure statements—determining judicial recusal—while preventing unnecessary harm to the movants.

BACKGROUND

The Moving Term Loan Lenders are investment entities that, together with an associated management company, are engaged in the business of investment management. That business involves investing the funds of their investors, who are in the "unique position" of being both "the fund's owners" and its "customers." John Shipman, *Who Owns Your Mutual Fund?*, Wall St. J., May 5, 2003, at R1; *see also* Dkt. 371, ¶ 12 (initial motion).[1]

That business also generally involves "strong" and "severe" competition. *See* John C. Coates IV & R. Glenn Hubbard, *Competition in the Mutual Fund Industry*, 33 J. Corp. L. 151, 180 (2007) ("the market structure and performance of the mutual fund industry is consistent with strong competition among funds"); Harvey R. Miller, *Chapter 11 in Transition*, 81 Am. Bankr. L.J. 375, 392 (2007) ("[H]edge funds are operating in a market of severe competition."). In particular, investment entities "continually compete with one another to retain and attract investors." Inv. Co. Inst., *Competition in the Mutual Fund Business*, 1 (Jan. 2006), http://tinyurl.com/zqvgv9o.

To compete, companies design their investment strategies and corporate organization to meet investor demands regarding returns, investment structure, taxes, and client service. *See* Coates & Hubbard, 33 J. Corp. L. at 163-80 (summarizing trends in industry); J.P.Morgan, *Barriers to Entry*, 1 (Feb. 2015), http://tinyurl.com/jv6aac3 (chronicling regulatory limitations on the riskiness of the investments of insurance companies). Once they have done so and succeeded in attracting investors, and especially when they are funds that are restricted by law or practice from being open to the general public, the funds "have a significant interest in keeping the composition and identity of their investors confidential" from their competitors and others.

[1] All docket number citations are from the Adversary Proceeding docket.

Onnig H. Dombalagian, *Substance and Semblance in Investor Protection*, 40 J. Corp. L. 599, 630 n.192 (2015); *see* Drew Chapman & Andrew Lom, *The Changing Face of Hedge Fund Regulation*, Derivatives, 2010 WL 9940180, at *3 (2010) ("investor names" are "considered highly confidential by advisers"); Jing Li, *Money Under Sunshine*, 17 Fordham J. Corp. & Fin. L. 61, 93 (2012) ("it is unwise to disclose confidential information, such as the identities of investors").

Consequently, the Moving Term Loan Lenders sought in filing corporate disclosure statements to redact the names of investors who own 10% or more of their equity. [Dkt. 371.] Another set of term loan lenders, the Blackrock Funds, similarly moved. [Dkt. 408.] This Court granted the Blackrock Funds' motion [Dkt. 413], but denied the Moving Term Loan Lenders' motion [Dkt. 717]. In granting the Moving Term Loan Lenders' motion for reconsideration, this Court ordered briefing on "whether the names of business entities that own 10% or more of the equity interest in a party to an adversary proceeding are properly deemed 'confidential commercial information' under Bankruptcy Code § 107(b)." [Dkt. 734, at 3, 735.]

ARGUMENT

I. SECTION 107(B)'S PROTECTION OF "CONFIDENTIAL . . . COMMERCIAL INFORMATION" INCLUDES THE NAMES OF OWNERS OF A PARTY TO AN ADVERSARY PROCEEDING WHEN THEY REVEAL "INFORMATION AS TO THE COMMERCIAL OPERATIONS" OF AN ENTITY.

A. Section 107(b) requires the protection of "confidential commercial information."

Section 107(b) of the Bankruptcy Code provides that "[o]n request of a party in interest, the bankruptcy court shall . . . protect an entity with respect to a trade secret or . . . confidential . . . commercial information." 11 U.S.C. § 107(b). This provision, "trac[ing] its origin [to] the Federal Rules of Civil Procedure," Alec P. Ostrow, *My Lips Are Sealed*, 2004 Ann. Surv. of Bankr. Law 7, implements in bankruptcy law the doctrine by which "[c]onfidential business

information has long been recognized as property" that "a court of equity will protect through the injunctive process or other appropriate remedy," *Carpenter v. United States*, 484 U.S. 19, 26 (1987) (also citing FOIA's similar protection, 5 U.S.C. § 552(b)(4), as an example). Its "whole point" is "to protect business entities from disclosure of information that could reasonably be expected to cause the entity commercial injury." *In re Glob. Crossing Ltd.*, 295 B.R. 720, 725 (Bankr. S.D.N.Y. 2003).

Although § 107(b)'s "broad protection," *Orion*, 21 F.3d at 28, extends to any "entity"—both debtors and non-debtors—"ordinarily the policies animating the need for protection of commercial information may have greater force when dealing with non-debtor property," *In re 1031 Tax Grp., LLC*, 2007 WL 1836525, at *2 (Bankr. S.D.N.Y. June 22, 2007) (Glenn, J.). And, unlike other provisions authorizing courts to protect "confidential commercial information," § 107(b) "impose[s] no requirement to show 'good cause' as a condition to sealing confidential commercial information." *Orion*, 21 F.3d at 28; *cf.* Fed. R. Civ. P. 26(c)(1)(G). Rather, "if the information fits [that] categor[y], the court is *required* to protect a requesting interested party and has no discretion to deny the application." 21 F.3d at 27.

Federal Rule of Bankruptcy Procedure 9018 "provides the procedure for invoking the court's power under § 107." Fed. R. Bankr. P. 9018, Adv. Comm. Note. That rule authorizes the court to "make any order which justice requires . . . to protect . . . any entity in respect of a trade secret or other confidential . . . commercial information." Fed. R. Bankr. P. 9018.

B. Unrevealed "information as to the commercial operations" of an entity is "confidential commercial information."

Information fits the category of "confidential commercial information" when it reveals aspects of "the commercial operations" of an entity. *Orion*, 21 F.3d at 27. In *Orion*, the leading case, this Court sealed a licensing agreement between the debtor and McDonald's regarding the

debtor's movie, "Dancing with Wolves," and the District Court affirmed. The Second Circuit also affirmed: It reasoned that "[c]ommercial 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 debtor*.'" *Id.* (internal citation omitted, emphasis added). Revealing the "structure, terms and conditions" of the agreement met that standard, the court held, because doing so would impair the debtor's operations with respect to negotiating similar agreements. *Id.* at 27-28. The court also rejected arguments that the licensing agreement was insufficiently "confidential." Section 107(b), the Second Circuit explained, "[b]y authorizing protection for trade secrets *or* confidential commercial information," is "clear and unambiguous" that confidential commercial information need not "reflect the same level of confidentiality" as a trade secret. *Id.* at 28. It did not matter that "a news release revealed information about the [licensing] transaction" or that the debtor and McDonald's revealed some terms in opposing the motion to unseal their agreement, because not all of the details were revealed. *Id.* at 26, 28.

The *Orion* test is "widely accepted" and applied across the country. Ostrow, 2004 Ann. Surv. of Bankr. Law at 7; *see* 2-107 *Collier on Bankruptcy* (15th ed. rev. 2016). This Court, for example, applied *Orion* when sealing the identity of a non-debtor's property because revealing the identity could affect "ongoing negotiations." *In re 1031 Tax Grp.*, 2007 WL 1836525, at *2 (Glenn, J.); *In re Borders Grp.*, 462 B.R. 42 (Bankr. S.D.N.Y. 2011) (Glenn, J.) (sealing share purchase agreement). Similarly applying *Orion*, the bankruptcy court in *Northstar* allowed a debtor, over the U.S. Trustee's objection, to provide the identities of the potential investors in its oil projects only to the court, the committee of unsecured creditors, and additional parties as approved by the court, because revealing those identities would "expose the heart and soul of the

commercial operations" of the debtor and the identities would "likely be utilized by competing [companies]." 315 B.R. at 429–30.

C. The names of the owners of 10% or more of the equity interest of a party are "confidential commercial information" when they reveal "information as to the commercial operations" of an entity.

In protecting business information, courts routinely have recognized that the names of a party's *owners* are "confidential commercial information" when they reveal "information as to the commercial operations" of an entity. In particular, this Court has recognized that disclosing the names of the owners of investment entities reveals information as to the commercial operations of those or other entities, by permitting those entities to file redacted corporate disclosure statements. *In re Arcapita Bank B.S.C.(c)*, No. 12-11076 (Bankr. S.D.N.Y. May 18, 2012) (Dkt. 158) (Lane, J.) (granting motion of debtor investment bank to redact the names of investors from, among other things, disclosures); *see Wilmington Trust, N.A. v. JPMorgan Chase Bank, N.A.*, No. 7:14-ap-08248 (Bankr. S.D.N.Y. Sept. 24, 2014) (Dkt. 47) (Drain, J.) (same for investment management vehicle); *BOKF, NA v. JPMorgan Chase Bank, N.A.*, No. 7:14-ap-08247 (Bankr. S.D.N.Y. Aug. 7, 2014) (Dkt. 45) (Drain, J.) (same).

And this Court's practice echoes that of the Supreme Court, the District Court for the Southern District of New York, and other courts that routinely have permitted entities to redact the names of their owners from corporate disclosure statements based on parties' concern that those names reveal information as to their or others' commercial operations. *E.g.*, *Cont'l Bank*, 486 U.S. at 1001 (granting motion to file corporate ownership information under seal when petitioner argued that disclosing the identities of its owners would reveal information as to its disclosed subsidiaries); *Mull & Mull, PLC v. Rhone-Poulenc Rorer, Inc.*, 526 U.S. 1081 (1999) (same on parties' assertion of "confidential corporate information"); Order, *Cantona*, No. 1:15-cv-03852 (Dkt. 19) (granting request of privately-held professional soccer club to submit

redacted corporate disclosure statement where club alleged "hyper-competitive environment" where "ownership interests are extremely confidential"); Sealing Order, *Washington v. Carco Group, Inc.*, No. 1:15-cv-2127 (S.D.N.Y. Apr. 29, 2015) (Dkt. 12) (Daniels, J.) (granting motion to seal corporate disclosure statement based on Defendant's contention that corporate family structure is a "closely guarded trade secret").

This practice is as sensible as it is widespread. The purpose of corporate ownership statements like those that Fed. R. Bankr. P. 7007.1 requires is "to help a judge to make an informed decision whether to disqualify by reason of having a financial interest in one of the parties to the adversary proceeding." 10-7007.1 *Collier on Bankruptcy*; *see* S.D.N.Y. LBR 7007.1-1, cmt. Redacted statements still accomplish that purpose, while protecting countervailing confidentiality concerns. Moreover, the reasons for providing that protection are heightened where the information pertains to entities drawn into litigation as defendants, rather than the debtor. *See Northstar*, 315 B.R. at 430 (making the identities of investors available to court-approved parties balances the purposes of an "open bankruptcy process" and the need for confidentiality); *In re 1031 Tax Grp.*, 2007 WL 1836525, at *2 (stating non-debtors may merit greater protection); *Best Odds Corp. v. iBus Media Ltd.*, 2014 WL 5687730, at *1 (D. Nev. Nov. 4, 2014) (Ferenbach, M.J.) (granting motion to file redacted corporate disclosure statement, to prevent strike suits).

This routine practice also follows from the widespread treatment of customer identities and business strategies as "confidential commercial information." Customer identities are widely protected as "confidential commercial information" because they are an important "asset" to commercial operations, and subject to unfair poaching by competitors. *In re A.G. Fin. Serv. Ctr., Inc.*, 395 F.3d 410, 415–16 (7th Cir. 2005); *see Northstar*, 315 B.R. at 429–30. Business

"strategies, techniques, goals and plans" also are widely protected as "confidential commercial information," *Duracell Inc. v. SW Consultants, Inc.*, 126 F.R.D. 576, 578 (N.D. Ga. 1989), "particularly where the disclosing company is engaged in a highly competitive industry and deliberately has shielded such information from its competitors," *N.Y. v. Actavis, PLC*, 2014 WL 5353774, at *3 (S.D.N.Y. Oct. 21, 2014). Such information is a company's "life blood," and subject to unfair copying by competitors. *Duracell*, 126 F.R.D. at 578.[2] In the investment industry, information about owners *is* information about customer identities and business strategies, because firms sell ownership interests to investors. Shipman, Wall St. J., at R1. Accordingly, such information about owners is "confidential commercial information."

II. HERE, DISCLOSING THE NAMES OF THE ENTITIES THAT OWN 10% OR MORE OF THE EQUITY INTEREST IN THE MOVING TERM LOAN LENDERS WOULD REVEAL "INFORMATION AS TO THE COMMERCIAL OPERATIONS" OF AN ENTITY.

The Moving Term Loan Lenders here seek to redact the names of the very type of owners whose identities courts have protected as confidential commercial information. These names are such information, which § 107(b) requires to be protected.

First, the identities of these owners are confidential: The Moving Term Loan Lenders operate in a "highly competitive industry" in which it is settled practice that entities like them not only do not reveal such names but in fact "deliberately . . . shield[] such information from [their] competitors." *Actavis*, 2014 WL 5353774, at *3; *see Orion*, 21 F.3d at 28; *supra*, at pp. 2-3.

[2] For additional authorities on customer identities, see *Hal Wagner Studios, Inc. v. Elliott*, 2009 WL 854676, at *4 (S.D. Ill. Mar. 30, 2009); *In re Faucett*, 438 B.R. 564, 568 (Bankr. W.D. Tex. 2010); *In re Meyrowitz*, 2006 WL 6544093, at *3 (Bankr. N.D. Tex. Oct. 27, 2006); *In re Frontier Grp., LLC*, 256 B.R. 771, 773 (Bankr. E.D. Tenn. 2000); *In re Nunn*, 49 B.R. 963, 965 (Bankr. E.D. Va. 1985); *In re Nortel Networks Inc.*, 2010 Bankr. LEXIS 5218, at *10 (Bankr. D. Del. Dec. 1, 2010); and *In re Nortel Networks Inc.*, 2009 WL 8519749 (Bankr. D. Del. Jan. 14, 2009). For additional authorities on business strategies, see *Fox News Network, LLC v. U.S. Dep't of the Treasury*, 739 F. Supp. 2d 515, 571 (S.D.N.Y. 2010); and *In re Dreier LLP*, 485 B.R. 821, 823–24 (Bankr. S.D.N.Y. 2013) (Bernstein, J.). Some of these cases involve the Federal Rules of Civil Procedure or FOIA, which also use the term "confidential commercial information." Fed. R. Civ. P. 26(c)(1)(G); 5 U.S.C. § 552(b)(4). As noted above, § 107 is derived from the Rules, albeit without a good-cause requirement.

Some defendants do have ownership that is publicly available, but the Moving Term Loan Lenders are not among them. *Compare*, *e.g.*, Strategic Advisers Income Opportunities Fund, http://tinyurl.com/zcbmmy5 (disclosing investment in Defendant Fidelity Advisor High Income Advantage Fund – Class I), *with* Dkt. 368 (disclosing same Defendant's ownership by "Strategic Advisers Income Opportunities Fund").

Second, revealing the identities of the movants' owners would disclose information as to the commercial operations both of the Moving Term Loan Lenders themselves (regarding their customers and strategies) and of the owners (regarding their strategies). With respect to customers, the Moving Term Loan Lenders' owners are their customers. The identities of the movants' investors are thus "assets" to their commercial operations. *See In re A.G. Fin.*, 395 F.3d at 415–16. Indeed, in light of the industry in which the movants operate, their customers' identities are one of their most important assets, the "heart and soul of the commercial operations." *See Northstar*, 315 B.R. at 429–30; *supra* pp. 2-3. Unlike the identities of the owners that other defendants decided to disclose, which consist either of administrative service companies or of very large entities that are customers of numerous investment entities [*see* Dkt. 732, 368], the confidential identities of the Moving Term Loan Lenders' owners are (consistent with the movants' protection of their identities) of the type that would "likely be utilized by competing [companies] to the[ir] detriment." *Northstar*, 315 B.R. at 429–30.

With respect to strategies, disclosing the owners of the Moving Term Loan Lenders would disclose business strategies of both the movants and their owners. The identities of the investors in investment entities such as the Moving Term Loan Lenders bear on the "strategies, techniques, goals, and plans" of those entities. *Duracell*, 126 F.R.D. at 578; *see* Coates & Hubbard, 33 J. Corp. L at 163-80. Revealing the identities of the owners would expose those

strategies. For example, because certain investors can invest only in funds that bear certain risk-profiles, *Barriers to Entry* at 1, disclosing their ownership of a particular fund would reveal how that fund is permitted to invest its money and how it might respond when the riskiness of its investments changes. Moreover, some of the owners whose identities movants seek to redact are not only investors in, but also affiliates of, the Moving Term Loan Lenders, and part of the same family of investment entities. The Moving Term Loan Lenders of course compete for their affiliates' investments too, and thus disclosure of affiliates' identities is disclosure of customers' identities. But it is more than that: Disclosing affiliates' names also would likely reveal the strategies of the investment families in structuring investments, including the structuring of investments for outside investors through feeder funds. For example, because feeder funds are often used to accommodate the tax profiles of foreign and tax-exempt investors, Zachary K. Barnett *et al.*, *Feeder Funds*, Fund Finance Market Rev. 8 (Spring 2016), revealing that a feeder fund is an investor indicates the likely tax strategies of the fund. More broadly, the owner/customers' identities, if disclosed, would reveal *their own* "non-public strategies and financial information," such as their investment positions and strategies. *Actavis*, 2014 WL 5353774, at *3.

Finally, as in *Northstar*, shielding the identities of owners from the public while disclosing them to this Court, as well as the Plaintiff [*see* Dkt. 720, ¶ 19], protects confidentiality concerns while still accomplishing the purpose of ensuring informed recusal decisions. That is all the more true here, where, unlike in *Northstar*, the movants are not debtors.

CONCLUSION

This Court should grant the Moving Term Loan Lenders' motion to file redacted corporate disclosure statements.

Dated: November 9, 2016

Respectfully submitted,

/s/ John W. Spiegel

John W. Spiegel
George M. Garvey
Todd J. Rosen
Matthew A. Macdonald
MUNGER, TOLLES & OLSON LLP
355 South Grand Avenue, 35th Floor
Los Angeles, CA 90071
Tel: (213) 683-9100
Email: john.spiegel@mto.com
Email: george.garvey@mto.com
Email: todd.rosen@mto.com
Email: matthew.macdonald@mto.com

Attorneys for Term Loan Lenders[3]

/s/ Bruce S. Bennett

Bruce S. Bennett
Erin L. Burke
JONES DAY
555 South Flower Street, 50th Floor
Los Angeles, CA 90071
Tel: (213) 489-3939
Email: bbennett@jonesday.com
Email: eburke@jonesday.com

Gregory M. Shumaker
Christopher DiPompeo
JONES DAY
51 Louisiana Avenue, N.W.
Washington, D.C. 20001
Tel: (202) 879-3939
Email: gshumaker@jonesday.com
Email: cdipompeo@jonesday.com

Attorneys for Term Loan Lenders *for certain purposes*[4]

[3] The Moving Term Loan Lenders are: 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 Sankaty High Yield Partners III Grantor Trust as successor in interest to Sankaty High Yield Partners III, L.P.

[4] One of the non-moving Term Loan Lenders, Northern Trust Investments, Inc., as Named Fiduciary to the Central States, Southeast, and Southwest Areas Pension Fund, is represented for all purposes by Munger, Tolles & Olson LLP and not by Jones Day.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on November 9, 2016, a copy of the foregoing was filed electronically with the Clerk of Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

By,

s/ Bruce Bennett
Bruce Bennett