

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re:

FAH LIQUIDATING CORP. (f/k/a
FISKER AUTOMOTIVE HOLDINGS,
INC.), *et al.*,

Debtors.

Chapter 11

Case No. 13-13087 (KG)

(Jointly Administered)

EMERALD CAPITAL ADVISORS CORP., in
Its Capacity as Trustee for the FAH
Liquidating Trust,

Plaintiff,

v.

BAYERISCHE MOTOREN WERKE
AKTIENGESELLSCHAFT,

Defendants.

Adv. Pro. No. 15-51898 (KG)

Hearing Date: January 29, 2020 at 9:30 a.m. (ET)

Objection Deadline: January 6, 2020 at 4:00 p.m. (ET)

**MOTION OF TRUSTEE FOR ENTRY OF AN ORDER PURSUANT
TO SECTION 107(b) OF THE BANKRUPTCY CODE, BANKRUPTCY
RULE 9018 AND LOCAL RULE 9018-1(d), PERMITTING TRUSTEE
TO FILE PORTIONS OF A SETTLEMENT AGREEMENT AND
MUTUAL RELEASE UNDER SEAL**

By this Motion (the "Motion"), Emerald Capital Advisors Corp., in its capacity as trustee (the "Trustee") of the FAH Liquidating Trust (the "Trust") established in the chapter 11 cases of FAH Liquidating Corp. (f/k/a Fisker Automotive Holdings, Inc.) and FA Liquidating Corp. (f/k/a Fisker Automotive, Inc.) (together, the "Debtors"), seeks the entry of an order, substantially in the form attached hereto as **Exhibit A** (the "Proposed Order"), pursuant to sections 105(a) and 107(b) of title 11 of the United States Code (the "Bankruptcy Code"), Rule 9018 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), and Rule 9018-1(d) of the Local Rules

of Practice and Procedure of the United States Bankruptcy Court for the District of Delaware (the “Local Rules”), authorizing the Trustee to file under seal the Settlement Agreement and Mutual Release (the “Settlement Agreement”) by and between the Trustee and Bayerische Motoren Werke Aktiengesellschaft (“BMW AG”), attached to the *Motion of Trustee for an Order Pursuant to Rule 9019 of the Federal Rules of Bankruptcy Procedure Approving Settlement Agreement and Mutual Release with Bayerische Motoren Werke Aktiengesellschaft* (the “9019 Motion”). In support of this Motion, the Trustee respectfully represents as follows:

JURISDICTION AND VENUE

1. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334(b), and the *Amended Standing Order of Reference from the United States District Court for the District of Delaware* dated as of February 29, 2012. This is a core proceeding pursuant to 28 U.S.C. § 157(b). Pursuant to Local Rule 9013-1(f), the Trustee consents to the entry of a final order by the Court in connection with this Motion to the extent that it is later determined that the Court, absent consent of the parties, cannot enter final orders or judgments in connection herewith consistent with Article III of the United States Constitution.

2. Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

3. The statutory and legal predicates for the relief requested herein are sections 105(a) and 107(b) of the Bankruptcy Code, Bankruptcy Rule 9018 and Local Rule 9018-1(d).

BACKGROUND

4. On November 22, 2013, the Debtors each filed voluntary petitions for relief under Chapter 11 of Title 11 of the Bankruptcy Code in this Court.

5. On July 28, 2014, this Court entered an order confirming the *Debtors’ Second Amended Joint Plan of Liquidation Pursuant to Chapter 11 of the Bankruptcy Code (with Technical Modifications)* (the “Plan”). The “Effective Date” of the Plan was August 13, 2014.

6. Under the Plan, “the Debtors reserve[d] and, as of the Effective Date, assign[ed] to the Liquidating Trust, any and all [estate] Causes of Action, including without limitation any actions specifically enumerated in the Plan Supplement,” including “any actions . . . against Bayerische Motoren Werke Aktiengesellschaft or its affiliates and representatives.”

7. The Trustee, on behalf of the Liquidating Trust, filed various claims against BMW AG, as detailed in the adversary proceeding captioned: *Emerald Capital Advisors Corp. v. Bayerische Motoren Werke Aktiengesellschaft*, Adv. Pro. No. 15-51898 pending in the United States Bankruptcy Court for the District of Delaware (the “Action”). Namely, prior to the Petition Date (as defined below), the Debtors had made certain transfers to BMW AG (the “Transfers”). The Trustee demanded return of the Transfers. BMW AG disputes that it is liable to the Liquidating Trust for the Transfers.

8. By memorandum opinion [Adv. Docket 39] and order [Adv. Docket 40] dated June 13, 2017, the Court dismissed Count IV of the Liquidating Trust’s complaint in the Action and Counts I, III and IV of the complaint, other than as to a claim for \$793,761.87 (the “Remaining Claims”). By memorandum opinion [Adv. Docket 145] and order [Adv. Docket 146] dated August 26, 2019, the Court entered summary judgment on Count V of the complaint in the Action.

9. The Parties agreed to mediate the Remaining Claims before the Honorable Joan N. Feeney (Ret.). Following a mediation session with Judge Feeney on November 7, 2019, the Parties reached agreement on the terms of a settlement of the claims asserted in the Action, and later documented those terms in the Settlement Agreement.

10. Contemporaneously herewith, the Trustee filed the 9019 Motion to obtain Court approval of the Settlement Agreement. The Settlement Agreement contemplates, *inter alia*,

BMW AG's payment of a certain amount (the "Settlement Amount") to the Trust in exchange for, *inter alia*, the release set forth in the Settlement Agreement. Contemporaneously with this Motion, pursuant Local Rule 9018-1(d), the Trustee is filing as a publicly viewable document a copy of the Settlement Agreement with the Settlement Amount redacted.

11. The Settlement Agreement requires that the Parties maintain the confidentiality of the Settlement Amount.

12. As explained in further detail below, the Parties believe that the Settlement Amount is sensitive information that should remain confidential. For these reasons, the Trustee seeks authority to file under seal the unredacted Settlement Agreement.

RELIEF REQUESTED

13. By this Motion, the Trustee seeks the entry of the Proposed Order, substantially in the form attached hereto as **Exhibit A**, authorizing the Trustee to file the unredacted Settlement Agreement under seal.

BASIS FOR RELIEF REQUESTED

14. Section 107(b) of the Bankruptcy Code provides bankruptcy courts with the authority to issue orders that will protect entities from potential harm that may result from the disclosure of certain confidential information. Specifically, section 107(b) provides in part that:

On the request of a party in interest, the bankruptcy court shall, and on the bankruptcy court's own motion, the bankruptcy court may . . . protect an entity with respect to a trade secret or confidential research, development, or commercial information

11 U.S.C. § 107(b). In addition, under section 105(a) of the Bankruptcy Code, the Court may "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions" of the Bankruptcy Code. 11 U.S.C. § 105(a).

15. Bankruptcy Rule 9018 sets forth the procedures by which a party may move for relief under section 107(b) of the Bankruptcy Code, and provides that “[o]n motion or on its own initiative, with or without notice, the court may make any order which justice requires . . . to protect the estate or any entity in respect of a trade secret or other confidential research, development, or commercial information” Fed. R. Bankr. P. 9018. Local Rule 9018-1(d) additionally provides, in relevant part, that “[a]ny party who seeks to file documents under seal must file a motion to that effect.” Del. Bankr. L.R. 9018-1(d).

16. As set forth above, the Settlement Agreement requires the Trustee to keep the Settlement Amount confidential, although the Trustee is permitted to disclose the Settlement Amount to the Court and counsel for the United States Trustee. Accordingly, the Trustee seeks to file the unredacted version of the Settlement Agreement under seal to protect the Trust’s and BMW AG’s right to maintain the Settlement Amount as confidential. Safeguarding such confidentiality advances the interests of the Trust and BMW AG considerably by permitting the Trust to reach a mutually-acceptable settlement of the Remaining Claims and, at the same time, protects BMW AG from the public disclosure of the amount BMW AG was willing to pay to resolve the contested litigation, which information could be subject to use by others in an attempt to disadvantage BMW AG in unrelated litigation.

17. The relief requested herein will not cause undue prejudice to any parties in interest. To ensure that the key constituencies in these cases receive adequate disclosure, the Trustee has provided, or will provide, unredacted copies of the Settlement Agreement to the Court and the U.S. Trustee on a confidential basis and subject to Local Rule 9018-1. The Trustee submits that the foregoing provides sufficient safeguards to ensure that the relief requested in this Motion will not adversely affect the interests of parties to these cases while

protecting the legitimate interest of the Parties in keeping sensitive commercial information from the public's view.

18. For the reasons set forth above, the Trustee believes that good cause exists for the Court to grant the relief requested herein and that approval of this Motion is necessary and appropriate.

NOTICE

19. Notice of this Motion will be given to: (a) the United States Trustee for the District of Delaware; (b) counsel to BMW AG; and (b) all parties that have requested or that are required to receive notice pursuant to Bankruptcy Rule 2002. The Trustee submits that, under the circumstances, no other or further notice is required.

NO PRIOR REQUEST

20. No prior motion for the relief requested herein has been made to this or any other court.

WHEREFORE, the Trustee respectfully requests the entry of the Proposed Order, in substantially the form attached hereto as **Exhibit A**, granting the relief requested herein and such other and further relief as is just and proper.

Dated: December 23, 2019

SAUL EWING ARNSTEIN & LEHR LLP

/s/ Lucian B. Murley

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*Counsel to Emerald Capital Advisors Corp., as
Trustee for the FAH Liquidating Trust*

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re:

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Debtors.

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Plaintiff,

v.

BAYERISCHE MOTOREN WERKE
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Defendants.

Adv. Pro. No. 15-51898 (KG)

Hearing Date: January 29, 2020 at 9:30 a.m. (ET)

Objection Deadline: January 6, 2020 at 4:00 p.m. (ET)

NOTICE OF MOTION

PLEASE TAKE NOTICE that on December 23, 2019, the Trustee of the FAH Liquidating Trust filed the *Motion of Trustee for Entry of an Order Pursuant to Section 107(b) of the Bankruptcy Code, Bankruptcy Rule 9018 and Local Rule 9018-1(b), Permitting Trustee to File Portions of a Settlement Agreement and Mutual Release under Seal* with the United States Bankruptcy Court for the District of Delaware (the “Bankruptcy Court”).

PLEASE TAKE FURTHER NOTICE that objections, if any, to the entry of an order approving the Motion must be (a) in writing and served on or before **January 6, 2020 at 4:00 p.m.** (prevailing Eastern Time) (the “Objection Deadline”); (b) filed with the Clerk of the United States Bankruptcy Court for the District of Delaware, 824 Market Street, 3rd Floor, Wilmington, Delaware 19801; and (c) served as to be received on or before the Objection Deadline by the undersigned attorneys for the Trustee.

PLEASE TAKE FURTHER NOTICE THAT A HEARING ON THE MOTION WILL BE HELD ON JANUARY 29, 2020, AT 9:30 A.M. (PREVAILING EASTERN TIME) BEFORE THE HONORABLE KEVIN GROSS AT THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF DELAWARE, 824 MARKET STREET, 6th FLOOR, COURTROOM #3, WILMINGTON, DELAWARE 19801.

PLEASE TAKE FURTHER NOTICE that only objections made in writing and timely filed and received, in accordance with the procedures above, will be considered by the Bankruptcy Court at such hearing.

IF YOU FAIL TO RESPOND IN ACCORDANCE WITH THIS NOTICE, THE BANKRUPTCY COURT MAY GRANT THE RELIEF REQUESTED IN THE MOTION WITHOUT FURTHER NOTICE OR HEARING.

Dated: December 23, 2019

SAUL EWING ARNSTEIN & LEHR LLP

/s/ Lucian B. Murley

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*Counsel to Emerald Capital Advisors Corp., as
Trustee for the FAH Liquidating Trust*

EXHIBIT A

Proposed Order

**IN THE UNITED STATES BANKRUPTCY COURT
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In re:

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Defendants.

Adv. Pro. No. 15-51898 (KG)

Related to Docket No. _____

**ORDER PURSUANT TO SECTION 107(b) OF THE BANKRUPTCY
CODE, BANKRUPTCY RULE 9018 AND LOCAL RULE
9018-1(b), PERMITTING TRUSTEE TO FILE PORTIONS OF A
SETTLEMENT AGREEMENT AND MUTUAL RELEASE UNDER SEAL**

Upon the motion (the “Motion”)¹ of Emerald Capital Advisors Corp., in its capacity as trustee (the “Trustee”) of the FAH Liquidating Trust (the “Trust”) established in the chapter 11 cases of FAH Liquidating Corp. (f/k/a Fisker Automotive Holdings, Inc.) and FA Liquidating Corp. (f/k/a Fisker Automotive, Inc.), for entry of an order, pursuant to sections 105(a) and 107(b) of the Bankruptcy Code, Bankruptcy Rule 9018, and Local Rule 9018-1(b), authorizing the Trustee to file portions of the Settlement Agreement under seal; and upon consideration of

¹ Capitalized terms used in this Order but not otherwise defined herein shall have the meanings ascribed to such terms in the Motion.

the Motion; and upon the record of the hearing on the Motion, if any; and this Court having jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334 and the *Amended Standing Order of Reference* from the United States District Court for the District of Delaware, dated February 29, 2012; and this Court having found that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2); and this Court being able to issue a final order consistent with Article III of the United States Constitution; and this Court having found that venue of this proceeding and the Motion in this District is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409; and due and proper notice of the Motion having been given; and it appearing that no other or further notice of the Motion is required; and the Court having determined that it may enter a final order consistent with Article III of the United States Constitution; and this Court having found that good and sufficient cause exists for the relief granted by this Order,

IT IS HEREBY ORDERED THAT:

1. The Motion is GRANTED as set forth herein.
2. Pursuant to Bankruptcy Code section 107(b), Bankruptcy Rule 9018 and Local Rule 9018-1(d), the Trustee is authorized to file under seal the unredacted version of the Settlement Agreement, and file as a publicly viewable document the Settlement Agreement with the Settlement Amount redacted.
3. To the extent any party files any responsive pleadings to the 9019 Motion, such party shall redact the Settlement Amount from its pleadings.
4. The terms and conditions of this Order shall be immediately effective and enforceable upon its entry.
5. The Trustee is authorized and empowered to take all actions necessary to implement the relief granted in this Order.

6. This Court shall retain jurisdiction with respect to all matters arising from or relating to the interpretation or implementation of this Order.