

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

In re:

PES HOLDINGS, LLC., *et al.*,¹

Debtors.

Chapter 11

Case No. 19-11626 (KG)

(Jointly Administered)

RE: D.I. 440

**OBJECTION OF THE OFFICIAL COMMITTEE OF
UNSECURED CREDITORS TO THE DEBTORS' MOTION FOR ENTRY
OF AN ORDER AUTHORIZING THE DEBTORS TO FILE UNDER SEAL AN
EXHIBIT TO THE DEBTORS' MOTION FOR ENTRY OF AN ORDER (I)
AUTHORIZING AND APPROVING THE DEBTORS' NON-INSIDER
KEY EMPLOYEE RETENTION PROGRAM AND (II) GRANTING RELATED RELIEF**

The Official Committee of Unsecured Creditors (the "Committee") of PES Holdings LLC, and its affiliated debtors and debtors-in-possession in the above captioned Chapter 11 Cases (collectively, the "Debtors"), by and through its counsel, Brown Rudnick LLP and Elliott Greenleaf, P.C., respectfully submits this objection (the "Objection"), to the *Debtors' Motion for Entry of an Order Authorizing the Debtors to File Under Seal an Exhibit to the Debtors' Motion for Entry of an Order (I) Authorizing and Approving the Debtors' Non-Insider Key Employee Retention Program and (II) Granting Related Relief* [Dkt No. 440] (the "Sealing Motion").² In support of the Objection, the Committee respectfully states as follows:

1. Section 107 of the Bankruptcy Code contemplates a "strong presumption in favor of public access to bankruptcy proceedings and records." *In re Alterra Healthcare Corp.*, 353

¹The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are: PES Holdings, LLC (8157); North Yard GP, LLC (5458); North Yard Logistics, L.P. (5952); PES Administrative Services, LLC (3022); PES Energy, Inc. (0661); PES Intermediate, LLC (0074); PES Ultimate Holdings, LLC (6061); and Philadelphia Energy Solutions Refining and Marketing LLC (9574). The Debtors' service address is: 1735 Market Street, Philadelphia, Pennsylvania 19103.

² Capitalized terms used but not otherwise defined herein have the meanings ascribed to them in the Sealing Motion.

B.R. 66, 74 (Bankr. D. Del. 2006) (citing *In re Northstar Energy, Inc.*, 315 B.R. 425, 428 (Bankr. E.D. Tex. 2004) (stating “[Section] 107(a)’s directive for open access flows from the nature of the bankruptcy process—which is heavily dependent upon creditor participation, and which requires full financial disclosure of debtor’s affairs.”); see also *In re Muma Servs., Inc.*, 279 B.R. 478, 484 (Bankr. D. Del. 2002) (noting Section 107(a)’s prescription for public accessibility in bankruptcy cases); *In re Epic Assocs. V*, 54 B.R. 445, 447 (Bankr. E.D. Va. 1985) (“Section 107(a) creates a presumption in favor of public access to court records filed in bankruptcy cases”).

2. The Sealing Motion requests, nevertheless, protection under Section 107(b), on the basis that Exhibit C of the *Debtors’ Motion For Entry Of An Order (I) Approving The Debtors’ Non-Insider Key Employee Retention Program And (Ii) Granting Related Relief* [Dkt. No 439] (the “KERP Motion”) contains information “necessary to prevent competitors from using the information to recruit away the Debtors’ key employees, or otherwise compete against the Debtors.” Sealing Motion at ¶ 13. In making this request, the Debtors carry an especially heavy burden because: (1) as a general legal proposition, section 107(b) relief is dispensed only sparingly; and (2) as a more specific legal proposition, this type of relief is ill-fitting to cases where the debtor has shut down business operations. See *In re PRS Insurance Group*, 274 B.R. 381 (Bankr. D. Del. 2001) (finding no “business reason” to seal an internal investigation report prepared by a debtor’s employee) (citing *In re Continental Airlines, Inc.*, 150 B.R. 334 (D. Del. 1993) (Bankruptcy Court’s decision to place fee examiner’s report under seal was an abuse of discretion)).

3. Indeed, to fall within section 107(b)’s narrow “commercial information” exception, the party requesting sealing must present evidence that disclosure will result in a

debtor's business competitors obtaining an "unfair advantage." *In re Anthracite Capital, Inc.*, 492 B.R. 162, 178 (Bankr. S.D.N.Y. 2013). It is, in other words, entirely insufficient that the movant shows only that the subject information "relates to [the debtor's] business affairs." *Id.*

4. The Committee opposes the relief requested in the Sealing Motion. There is no legitimate basis for shielding the entirety of the KERP Motion from the public. The Debtors' business is currently non-operational and subject to a sale of all of their assets. In short, there is no "commercial information" in the KERP Motion left to protect at this point.

5. More specifically, the Committee opposes preventing the Committee's members from reviewing the unredacted version of the KERP, limiting review to the Committee's professionals.³ See Sealing Motion at ¶ 8. No members of the Committee are direct competitors of the Debtors, nor are they interested in recruiting away any of the Debtors' employees. Additionally, under the terms of the Confidentiality Agreement, the Committee agreed (i) to treat all proprietary and non-public information received by the Debtors as confidential information ("Confidential Information") that cannot be shared publicly, and (ii) to use Confidential Information solely in their capacity as members of the Committee. Disclosing the sealed information to the Committee members, therefore, would not create an "unfair advantage."

6. Ensuring that the members of the Committee have all relevant and necessary information in the KERP Motion is the only way that the Committee can discharge its statutory and fiduciary duties. See 11 U.S.C. § 1103 (providing the Committee with the ability to

³ Prior to filing, the Debtors provided a draft of the KERP Motion to the Committee as "Highly Confidential Information," which, under the terms of a confidentiality agreement between the Debtors and the Committee (the "Confidentiality Agreement"), limited review of the motion to "professional eyes only." The Committee has made several requests to change the Highly Confidential Information classification to "Confidential Information" to allow for the Committee's members to review the information. To date, the Debtors have refused these requests. Because the Sealing Motion limits disclosure of an unredacted version of the KERP Motion to the Committee's counsel, the Committee views any sealed portion of the KERP as Highly Confidential Information under the terms of the Confidentiality Agreement, necessitating this Objection.

“investigate the acts, conduct, assets, liabilities, and financial condition of the debtor”); *see also In re Kensington Int’l, Ltd.*, 368 F.3d 289, 315 (3d Cir. 2004) (“it is established that a Creditors Committee owes a fiduciary duty to the unsecured creditors as a whole”); *In re Nutritional Sourcing Corp.*, 398 B.R. 816, 836 (Bankr. D. Del. 2008) (“it is true that an official committee of unsecured creditors holds a fiduciary duty to the committee’s constituents”). Currently, without the ability to review the KERP Motion in its entirety, the Committee’s hands are tied.⁴ Open access to the KERP Motion will thus enable the Committee to properly discharge its fiduciary duty and act in the best interests of its creditor constituency.

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⁴ The Debtors’ refusal to provide all KERP information to the Committee’s members is only one of several areas where the Debtors and Committee have not seen eye-to-eye respecting the sharing of information. In addition to the KERP Motion, the Committee has made requests for information, among other things, related to: prepetition insider payments, several regulatory and environmental matters, remaining hydrocarbon removal, and details on the current sale process of the Debtors’ assets. Even in instances where the Debtors have provided information, that information, almost exclusively, has been provided as Highly Confidential Information, limiting the Committee’s professionals from sharing such information to the Committee’s members. While the Committee does not seek to use the forum for this Objection to address all of its concerns related to information sharing, this Objection is a good place to start obviating a systemic issue once and for all.

WHEREFORE, the Committee respectfully requests that the Court (i) deny the relief requested in the Sealing Motion, (ii) allow the members of the Committee full access to an unredacted version of the KERP Motion, and (iii) grant the Committee such other and further relief as is just and proper.

Dated: October 1, 2019

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