

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

IN RE: CINEMEX HOLDINGS USA, INC., Debtor.	CASE NO. 20-14696-LMI (Previously Jointly Administered Under Case No 20-14695-LMI) CHAPTER 11
--	--

KHAN PARTIES' MEMORANDUM OF LAW
IN SUPPORT OF REQUEST TO RETAIN CONFIDENTIALITY
OF CERTAIN COMMERCIAL INFORMATION AND EXHIBITS

The Khan Parties, by and through their undersigned counsel, hereby submit their *Memorandum of Law in Support of Request to Retain Confidentiality of Certain Commercial Information* (the "Memorandum"), and state as follows:

BACKGROUND:

1. On October 4, 2021, the Court issued, under seal, its *Memorandum Opinion on Objection to the Khan Parties' Claims* [ECF No. 244] (the "Opinion").
2. The Court provided a copy of the Opinion to counsel for the parties, who were then advised that the Opinion would remain under seal, but not indefinitely, unless the parties requested that the Opinion should remain under seal and, if so, for what period of time.
3. Thereafter, counsel for the Khan Parties and the Debtors informed the Court of their clients' respective positions as to whether the Opinion should remain under seal; however, neither the Khan Parties nor the Debtors requested the unsealing of any *exhibits* filed or submitted in connection with the Trial.
4. On October 15, 2021, the Court entered the *Order Setting Briefing Schedule Regarding the Khan Parties' Request the Court's Memorandum Opinion (ECF #244) Remain Under Seal* (the "Briefing Order"), which afforded the Khan Parties five (5) days to file a

memorandum of law as to why the Opinion *and all submitted exhibits* should remain under seal, (and the Debtors seven (7) days thereafter to respond in opposition).

RELIEF REQUESTED

5. The Khan Parties request that (a) purchase or bid pricing contained in the Opinion be redacted and/or remain under seal, and (b) all exhibits filed under seal remain under seal.¹

ARGUMENTS AND AUTHORITY IN SUPPORT OF RELIEF REQUESTED

A. Exhibits Should Remain Sealed

6. In following local procedure, the Khan Parties and the Debtors each filed motions for leave to file unredacted versions of exhibits under seal (*see* ECF Nos. 48 and 56). Thereafter, the Court entered orders granting the parties' motions (*see* ECF Nos. 111 and 112) (the "Sealing Orders").

7. In entering the Sealing Orders, the Court, provided, in part, the following:

The unredacted version of the Exhibits shall be maintained under seal even after the administrative closing of this case, provided, however, any party in interest has the right to seek leave of the Court to have the unredacted version of the Exhibits unsealed subject to the right of the Debtors and the Khan Parties or any other person to oppose such request.

See ECF No. 112, p.2, ¶4 (similar language is included in ECF No. 111, p.2, ¶3).

8. In e-mails provided to the Court on October 13, 2021, neither counsel for the Khan Parties nor counsel for the Debtors requested the unsealing of any *exhibits* filed in connection with

¹ If the Court is inclined to unseal any exhibits, the Khan Parties request a further opportunity to specifically identify any exhibits to remain under seal. At a minimum, the Khan Parties believe and submit that the confidential information memorandum ("CIM"), which contains vast commercial information, the non-binding and binding offers from the Debtors, funds flow calculation (which relates to purchase price calculation), expert reports and supporting schedules, deposition transcripts and exhibits containing commercial information, bank and lessor payoffs, and the EPAs (as defined herein), including any drafts of the foregoing, should remain under seal.

the Trial or filed any motion requesting the unsealing of any such *exhibits*.

9. The Khan Parties respectfully submit that no exhibits filed under seal should be unsealed. However, if the Court is inclined, for whatever reason, to unseal any exhibits, then the Khan Parties request a further opportunity to identify those exhibits which qualify as “commercial information,” as such is defined and interpreted under section 107(b) of the Bankruptcy Code.²

B. The Opinion Should Be Redacted, Amended, and/or Remain, In Part, Under Seal

10. The Khan Parties submit that the Opinion should remain, in part, under seal, or be amended to eliminate, or redact any references to currency/dollar amounts. By way of example, in paragraphs 8, 21, and 23 of the Opinion, the Court references the non-binding offer, binding offer, and purchase price amounts.

11. When entering the Equity Purchase Agreements (collectively, the “EPAs”), the Debtors agreed that neither the Preliminary Purchase Price, Purchase Price nor Final Purchase Price would be disclosed without the prior written consent of Mr. Khan. *See* EPAs, Section 10.2. Additionally, Section 10.4 of the EPAs further provides, in part, that, prior to closing, the Debtors shall treat and hold as confidential all non-public information concerning the business and affairs of the companies and businesses.³

12. Unsealing the Opinion (or sealed exhibits) to disclose any bid (non-binding or binding), purchase pricing, EPAs, CIM, expert reports and supporting financial information, funds flow and purchase price calculations, and bank/lessor payoff information would reveal or disclose

² *See also* note 1, *supra*.

³ On June 10, 2020, the Court also entered the *Confidentiality Agreement and Stipulated Protective Order* [ECF No. 288], which provided a mechanism to designate information confidential (or highly confidential), provided a mechanism for parties to object to any such designations (which, in this case, neither party did), and further provided that the protective order “survive termination of the Case or any related Contested Matter.”

commercial information that would potentially prejudice the Khan Parties. For example, in the event the Khan Parties reenter the market to sell the businesses or equity, the release of this type of information in the public domain could prejudice the Khan Parties in their negotiations and dealings with third parties.

13. Respectfully, there simply is no need to disclose this type of commercial information, and other alternatives exist. For example, the Opinion could be redacted, remain under seal, or amended to eliminate specific dollar amounts or pricing.

14. Section 107 of the Bankruptcy Code⁴ provides, in part, the following:

On request of a party in interest, the bankruptcy court shall, and on the bankruptcy court's own motion, the bankruptcy court may –

(1) protect an entity with respect to a trade secret or confidential research, development, or commercial information . . .

See 11 U.S.C. § 107(b)(1)⁵.

15. “As a threshold matter, by its terms, the protections afforded in section 107(b)(1) do not just extend to a debtor. Rather, a bankruptcy court may ‘protect an *entity* with respect to . . . commercial information.’” *In re: Borders Group, Inc.*, 462 B.R. 42, 48 (Bankr. S.D.N.Y. 2011) (emphasis in original). Thus, the Khan Parties qualify for protection under section 107(b).

16. Furthermore, “[o]nce a court determines that a party in interest is seeking protection of information that falls within one of the categories enumerated in section 107(b), ‘the court is required to protect a requesting party and has no discretion to deny the application.’” *Id.* at 47 (quoting *In re: Orion Pictures Corp.*, 21 F.3d 24, 27 (2d Cir. 1994)).

⁴ 11 U.S.C. §§ 101 *et seq.*

⁵ This Memorandum is filed at the direction of the Court in accordance with the Briefing Order. If necessary, the Khan Parties request that the Court consider this Memorandum a request to redact under section 107(b)(1) of the Bankruptcy Code, which extends to the Opinion and exhibits filed under seal and identified herein.

17. “[C]ommercial information” includes “information which would cause “an unfair advantage to competitors by providing them with information as to the commercial operations of the debtor [entity seeking protection]”” *Id.* at 47 (quoting *Orion Pictures*, 21 F.3d at 28 (citing *Ad Hoc Protective Comm. For 10 1/2 % Debenture Holders v. Intel Corp. (In re Intel Corp.)* 17 B.R. 942, 944 (9th Cir. B.A.P. 1982)). At least one court held that “the meaning of ‘commercial information’ extends beyond the requirement that such information will give any entity’s competitors an unfair advantage. (internal citation omitted). Rather, the term includes situations where a bankruptcy court may *reasonably determine* that allowing such disclosure would have a ‘chilling effect on [business] negotiations” *Id.*

18. The information which the Khan Parties seek to protect is precisely the type of information contemplated under section 107(b) of the Bankruptcy Code and the cases cited herein. The redaction of such information will not have any detrimental effect on the public interest and the Opinion will not be impacted by redaction or by leaving exhibits sealed.

WHEREFORE, the Khan Parties respectfully request that the Court (a) leave exhibits filed under seal, and (b) redact from the Opinion the type of information identified in this Memorandum or amend the Opinion to eliminate specific dollar amounts, as well as granting any other further relief that the Court may deem just and proper.

DATED: October 19, 2021

SEESE, P.A.
101 N.E 3rd Avenue, Suite 1270
Fort Lauderdale, FL 33301
Telephone: (954) 745-5897

By: /s/ Michael D. Seese
Michael D. Seese (FBN 997323)

Attorneys for the Khan Parties