

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF KENTUCKY
ASHLAND DIVISION

IN RE:

APPALACHIAN FUELS, LLC

CASE NO. 09-10343

DEBTOR

ORDER

This matter having come before the Court by the Creditors' Committee's Motion to File Employment Applications Under Seal (Doc. 1337), it is hereby ORDERED that the Committee's motion is DENIED.

By its motion, the Committee seeks to have applications to employ two valuation experts filed under seal. Its reason for seeking this relief is that the Committee does not want to reveal its litigation strategy. Because the applications will not reveal any confidential information, the Committee's motion is denied.

The Committee previously filed a motion to retain certain experts (Doc. 1313). At the November 19, 2010 hearing on the retention motion, the court denied the motion without prejudice and requested that the Committee file individual expert applications (Doc. 1329 and 1330).

The Committee has now filed a motion to permit the filing of the applications under seal. In support of its motion, the Committee submits that filing the proposed applications under seal will allow the Committee to file the applications without revealing litigation strategy or disclosing any privileged information. The Committee claims that disclosure of this information would reveal to potential defendants information about how the Committee approaches cases that have been brought, or which the Committee is preparing to bring. The Committee wants to keep the defendants and potential defendants subject to the adversarial discovery rules, which it claims provide ample mechanisms for parties to obtain this information about each others' experts.

Courts are wary to grant motions to file documents under seal, as they recognize "recognize

a general right to inspect and copy public records and documents, including judicial records and documents.” *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597 (1978). However, “the right to inspect and copy judicial records is not absolute.” *Id.* at 598.

Every court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes. For example, the common-law right of inspection has bowed before the power of a court to insure that its records are not used to gratify public spite or promote public scandal. . . . Similarly, courts have refused to permit their files to serve as reservoirs of libelous statements for press consumption.

Id. (internal citations and quotations omitted). Although courts have been given this supervisory power, “only the most compelling reasons can justify non-disclosure of judicial records.” *In re Gitto Global Corp.*, 422 F.3d 1, 6 (1st Cir. 2005).

In the bankruptcy context, courts follow the general rule that papers filed in a bankruptcy case are of public record. 11 U.S.C. § 107(a). There are, however, exceptions to this rule which are set forth in Bankruptcy Code section 107(b) and Federal Rule of Bankruptcy Procedure 9018.

Pursuant to section 107(b), if a party in interests requests, “the bankruptcy court shall . . . (1) protect an entity with respect to a trade secret or confidential research, development, or commercial information; or (2) protect a person with respect to scandalous or defamatory matter contained in a paper filed in a case under this title.” 11 U.S.C. § 107(b). “Any limitation on the public’s right of access, however, must be viewed as an extraordinary measure that is warranted only under rare circumstances.” 2 COLLIER ON BANKRUPTCY ¶ 107.03 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. rev.).

Rule 9018 sets for the procedures for applying section 107. Rule 9018 permits the court to make any order that justice requires:

1. to protect the estate of any entity with respect to a trade secret, or confidential research, development, or commercial information;
2. to protect any entity against scandalous or defamatory matter contained in any paper filed in any case; or
3. to protect governmental matters that are made confidential by statute or regulation.

Fed. R. Bankr. P. 9018. Bankruptcy courts must “carefully and skeptically review sealing requests

to insure that there really is an extraordinary circumstance or compelling need” to seal the documents at issue. *Video Software Dealers Ass’n v. Orion Pictures Corp. (In re Orion Pictures Corp.)*, 21 F.3d 24, 27 (2d Cir. 1994).

The Committee seeks to have the applications filed under seal in order to protect information related to the Committee’s litigation strategy and litigation plans. It claims that disclosure of the applications would reveal to potential defendants information about how the Committee approaches cases that have been brought, or which the Committee is preparing to bring. These arguments do not fit squarely within any of the three exceptions listed in Rule 9018.

The applications would not reveal scandalous or defamatory matter, and do not involve governmental matters. Only the first exception seems to provide any potential relief, but it would be a significant stretch as the applications do not involve trade secrets and also do not appear to involve confidential research, developments, or commercial information. “The first exception [to Rule 9018] requires a party seeking to limit access to show something more than simply a desire for confidentiality[.]” 2 COLLIER ON BANKRUPTCY ¶ 107.3[a]. Although the Committee alludes to work product and documents prepared in anticipation of litigation, Rule 9018 does not apply to such documents unless they involve confidential research, developments, or commercial information. There appears to be nothing more than a desire by the Committee to keep its employment of experts confidential.

The application to employ Pat Duggins states that he will be employed to review documentation and evidence, to assist in litigation discovery efforts, and to prepare appraisal reports relating to the aircraft at issue in the MST Aviation adversary proceeding. Mr. Duggins specializes in aircraft appraisal, which the Committee claims is a critical issue in the adversary proceeding.

The second application seeks to employ Sharon Desfor as a valuation expert for the MST Aviation adversary proceeding. Ms. Desfor will be employed for the same purposes as Mr. Duggins.

The Committee does not claim that the applications contain any confidential information or developments. All the Committee seeks to keep under seal are litigation strategies. However, the applications do not spell out what the Committee’s strategy may be. All that is clear from the applications is that the Committee seeks to employ two valuation experts to assist in an adversary

proceeding involving a fraudulent transfer of a helicopter. There does not appear to be anything confidential about attempting to value the aircraft at issue. Furthermore, securing valuation experts does not reveal any confidential litigation strategies, especially in a case involving an alleged fraudulent transfer of an asset.

Because the Committee's motion and the applications at issue do not contain confidential information, and therefore do not meet the requirements of Rule 9018, the Committee's motion to file the applications under seal is hereby DENIED.

Copies to:

Allan B. Diamond, Esq.

Matthew B. Bunch, Esq.

United States Trustee

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***The affixing of this Court's electronic seal below is proof this document has been signed by the Judge and electronically entered by the Clerk in the official record of this case.***



**Signed By:**  
**Joseph M. Scott, Jr.**  
**Bankruptcy Judge**  
**Dated: Wednesday, December 08, 2010**  
**(jms)**