

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK**

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

**ORDER DENYING *EX PARTE* MOTION OF DEFENDANTS AND
CROSS-CLAIMANTS THE TERM LENDERS TO FILE SUBMISSION UNDER SEAL**

Before the Court is the motion dated September 12, 2016 (the “Motion,” ECF Doc. # 724) of certain Term Lender defendants that have cross-claimed against JPMorgan Chase Bank, N.A. (the “Cross-Claimants”)¹ pursuant to section 107(b) of title 11 of the United States Code (the “Bankruptcy Code”), and Rule 9018 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”) for leave to file the *Cross-Claimants’ Submission Regarding JPMorgan’s Privilege Designations* (the “Submission,” ECF Doc. # 723) under seal in redacted form. For the reasons explained below, the Motion is **DENIED**.

¹ The Cross-Claimants are listed in Appendix A to ECF Doc. # 241.

The unredacted Submission shall be filed on ECF within seven (7) days from the date of this Order.

The Cross-Claimants propose redacting one sentence which quotes a document designated “Confidential” under the Amended Agreed Protective Order entered by this Court on April 18, 2016 (the “Protective Order,” ECF Doc. # 489). The language Cross-Claimants propose to redact contains excerpts from an internal JPMorgan Chase Bank, N.A. (“JPMorgan”) discussion about JPMorgan’s relationship with its counsel. The Cross-Claimants seek to use this language to argue that JPMorgan’s privilege log descriptions are “insufficiently specific.” (ECF Doc. # 723 at 4.)

Discovery protective orders are a proper and customary method of facilitating discovery without the necessity of contesting on a document-by-document or individual testimony basis whether confidentiality is appropriately required. While such protective orders customarily include provisions allowing a party to challenge confidentiality designations, those provisions are rarely invoked by the parties. But such protective orders cannot and do not limit the Court in determining whether confidential treatment is appropriate when documents or testimony are proposed to be used in Court, whether in motion practice or during trial.

In limited circumstances, section 107(b) of the Bankruptcy Code empowers a bankruptcy court to seal documents that would normally be available to the public. Section 107(b) states:

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; 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). Bankruptcy Rule 9018 establishes the procedures to invoke section 107(b).

This Court has written on the subject of filing documents under seal pursuant to Bankruptcy Code section 107(b) on several occasions. *See In re Borders Group, Inc.*, 462 B.R. 42 (Bankr. S.D.N.Y. 2011); *In re Food Management Group, LLC*, 359 B.R. 543 (Bankr. S.D.N.Y. 2007). In *Food Management Group*, I discussed at length the proper basis for sealing records in bankruptcy court:

There is a strong presumption and public policy in favor of public access to court records. The right of public access is ‘rooted in the public’s First Amendment right to know about the administration of justice.’ The public interest in openness of court proceedings is at its zenith when issues concerning the integrity and transparency of bankruptcy court proceedings are involved, as they are in this matter.

....

Courts have recognized that § 107 codified the Supreme Court’s Nixon decision in the bankruptcy setting by recognizing the common-law right of public access The plain meaning of § 107(a) mandates that all papers filed with the bankruptcy court are ‘public records’ unless the bankruptcy court ‘decides to protect the information pursuant to the standards set forth in section 107(b)

....

Section 107(b) establishes an exception to the general right of access where under ‘compelling or extraordinary circumstances’ an exception is necessary. However, [i]n most cases a judge must carefully and skeptically review sealing requests to insure that there really is an extraordinary circumstance or compelling need to keep this material private. Adopted by Congress in 1978, § 107 made an important change in the common law regarding public access to bankruptcy court records. It is no longer left to the bankruptcy court to balance the interests of the public and private parties in determining whether to seal records from public view. Under § 107(a), unless a paper filed in a bankruptcy court falls within one of the express exceptions in § 107(b) or (c), it must be open to public inspection. On the other hand, if a paper falls within one of the express exceptions in § 107(b), on the request of a party in interest, the bankruptcy court shall protect a person. The exceptions are more circumscribed than the range of matters that could be protected at common law, but at the same time, protection is required rather than simply left to the discretion of the bankruptcy court.

359 B.R. at 553–54 (internal citations and quotation marks omitted).

Applying the standards outlined above to the Submission, the Court finds that the Submission does not satisfy the requirements for sealing. The Cross-Claimants request that the Submission be sealed for the sole reason that it contains discussion of a document marked “Confidential” under the Protective Order. The Cross-Claimants make no argument that the text proposed to be redacted in the Submission contains either “trade secret[s] or confidential research, development, or commercial information” or “scandalous or defamatory matter.” 11 U.S.C. § 107(b). The Court has reviewed the Submission and finds that it contains neither. Accordingly, the Submission does not satisfy section 107(b)’s requirements for sealing.

For the foregoing reasons, the motion to seal is **DENIED**. The unredacted Submission shall be filed on ECF within seven (7) days from the date of this Order.

IT IS SO ORDERED.

Dated: September 15, 2016
New York, New York

Martin Glenn

MARTIN GLENN
United States Bankruptcy Judge