IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	:	
	:	Case No. 19-10497 (CSS)
CTI Foods, LLC et al.,	:	
	:	Chapter 11
	:	
	:	(Jointly Administered)
Debtors.	:	**Hearing Date: April 8, 2019 at 2:00 p.m.** **Objection Deadline: April 2, 2019 at 4:00 p.m.**[1]

UNITED STATES TRUSTEE'S OBJECTION TO DEBTORS' APPLICATION FOR AN ORDER AUTHORIZING THE RETENTION AND EMPLOYMENT OF YOUNG CONAWAY STARGATT & TAYLOR LLP AS CO-COUNSEL FOR THE DEBTORS, EFFECTIVE AS OF THE PETITION DATE

In support of his Objection to the Debtors' Application For an Order Authorizing the Retention and Employment of Young Conaway Stargatt & Taylor LLP as Co-Counsel for the Debtors, Effective as of the Petition Date (the "Application"), Andrew R. Vara, the Acting United States Trustee for Region 3 ("U.S. Trustee"), through his undersigned counsel, states as follows:

1. This Court has jurisdiction to hear this Objection.

2. Pursuant to 28 U.S.C. § 586, the U.S. Trustee is charged with the administrative oversight of cases commenced pursuant to chapter 11 of title 11 of the United States Code (the "Bankruptcy Code"). This duty is part of the U.S. Trustee's overarching responsibility to enforce the bankruptcy laws as written by Congress and interpreted by the courts. *See United States Trustee v. Columbia Gas Sys., Inc. (In re Columbia Gas Sys., Inc.),* 33 F.3d 294, 295-96 (3d Cir. 1994) (noting that U.S. Trustee has "public interest standing" under 11 U.S.C. § 307,

[1] The objection deadline was extended by agreement of the parties.

which goes beyond mere pecuniary interest); *Morgenstern v. Revco D.S., Inc. (In re Revco D.S., Inc.)*, 898 F.2d 498, 500 (6th Cir. 1990) (describing the U.S. Trustee as a "watchdog"). The U.S. Trustee's case oversight includes monitoring and commenting upon applications for the employment and compensation of professionals.

3. Pursuant to 11 U.S.C. § 307, the U.S. Trustee has standing to be heard with regard to this Objection.

PRELIMINARY STATEMENT

4. Rigorous compliance with professional retention rules is critical to the integrity and transparency required of the bankruptcy system. Bankruptcy Rule 2014 requires that professionals seeking to be employed under 11 U.S.C. § 327 file a verified statement of "all of the person's connections" to parties in interest. The Debtors seek to employ Young Conaway as their co-counsel, but Young Conaway's connection disclosures are incomplete and do not satisfy the requirements of Rule 2014. Young Conaway fails to name several parties in interest that it previously or currently represents, citing confidentiality concerns on the basis that such parties have confidential relationships with the Debtors. It is not adequate for Young Conaway to simply assert that certain of its connections are confidential, without also seeking leave of Court, pursuant to 11 U.S.C. § 107(b), to file such names under seal.

BACKGROUND

5. On March 11, 2019, the Debtors filed a voluntary petitions for relief under Chapter 11 of the Bankruptcy Code.

6. On March 11, 2019 the Debtors filed their Joint Prepackaged Chapter 11 Plan of Reorganization of CTI Foods, LLC and its Affiliated Debtors (the "Plan"). The hearing on confirmation of the Plan is scheduled for April 18, 2019.

7. The U.S. Trustee has not appointed an official committee of unsecured creditors in this case.

8. On March 18, 2019, the Debtor filed the Application, seeking authority to retain Young Conaway pursuant to Section 327(a) of the Bankruptcy Code.

9. The Declaration of Blake Cleary (the "Cleary Declaration") attached as Exhibit A to the Application describes the review that Young Conaway conducted of its connections with parties in interest in the case.

10. Schedule 1 to the Cleary Declaration is a list of categories of potential parties in interest whose names Young Conaway checked against its client database to identify parties in interest that are or have been represented by Young Conaway.

11. Paragraph 3 of the Cleary Declaration contains a "match list" of parties from Schedule 1 as to whom Young Conaway is engaged to advise or was formerly engaged to advise, which Young Conaway asserts are all unrelated to these Chapter 11 cases.

12. Paragraph 25 of the Cleary Declaration states that with respect to entities categorized as Customer Entities, Young Conaway is or was formerly engaged to advise 33 such parties in interest in matters unrelated to the Debtors. The Cleary Declaration states that while "Young Conaway's representation of the Customer Entities is not confidential, disclosure of the name of the clients would necessarily result in the disclosure of the Debtors' relationship with such entities, which is confidential."

ARGUMENT

A. Statutory Framework

13. Bankruptcy Code Section 327 provides that the trustee or debtor in possession may employ, with court approval, professionals who are disinterested and who do not hold or represent interests adverse to the estate. 11 U.S.C. § 327.

14. Bankruptcy Rule 2014 imposes a complementary duty of disclosure so that courts and parties in interest can determine whether a professional to be employed satisfies section 327's ethical requirements. These statutory provisions, which prohibit conflicting interests in bankruptcy, "serve the important policy of ensuring that all professionals appointed pursuant to section 327(a) tender undivided loyalty and provide untainted advice and assistance." *Rome v. Braunstein*, 19 F.3d 54, 58 (1st Cir. 1994). The disclosures required of professionals "go[] to the heart of the integrity of the bankruptcy system . . . ." *In re Universal Building Products*, 486 B.R. 650, 663 (Bankr. D. Del. 2010) (*quoting In re B.E.S. Concrete Products, Inc*., 93 B.R. 228, 236 (Bankr. E.D. Cal. 1988)). "Because '[t]he objective of requiring disclosure is not so much to protect against prejudice to the estate, but to ensure undivided loyalty and untainted advice from professionals. . . . [L]ack of disclosure in and of itself is sufficient to warrant disqualification, even if in the end there was no prejudice." *In re Byington*, 454 B.R. 648, 657 (Bankr. W.D. Va. 2011) (*quoting Midway Indus. Contractors*, 272 B.R. 651, 664 (Bankr. N.D. Ill. 2001)). Rule 2014 requires that disclosures be sufficiently explicit for a court and other parties to determine whether a professional is disinterested or holds or represents an adverse interest. *In re Lewis Road, LLC*, 2011 WL 6140747, *8 (Bankr. E.D. Va. 2011). An indeterminate statement of "connections with a creditor" does not satisfy Rule 2014. *Id*. at *12. In other words, disclosing the existence of a connection without disclosing the identity of the connection is insufficient. *In*

re Brennan, 187 B.R. 135, 144 (Bankr. D.N.J.), *rev'd on other grounds sub nom, In re First Jersey Securities, Inc.*, 180 F.3d 504 (3d Cir. 1999) ("must also be disclosure of the identities"). Professionals "must disclose all contacts, not pick and choose which to disclose and which to ignore or leave the court to search the record for such relationships." In re Universal Building Products, 486 B.R. at 663. "[C]omplete and candid disclosure . . . is indispensable to the court's discharge of its duty to assure the [professional's] eligibility for employment under section 327(a) . . . ." *In re eToys*, 331 B.R., 176, 189 (Bankr. D. Del. 2005).

15. Bankruptcy Code Section 107 sets forth the legal standard applicable to sealing information that is confidential. See also F.R.B.P. 9018.

B. Young Conaway Must Establish a Record Under Section 107 to the Extent That Names are Withheld as Confidential.

16. The U.S. Trustee acknowledges Young Conaway's assertion that 33 of the "Customers/Customer Contracts" former and current clients are confidential as to the Debtors only, due to agreements the Debtors have with such entities. However, it is not enough to simply designate names as confidential without an accompanying motion to seal. If Young Conaway seeks to treat such names as confidential, it must overcome the presumption of public access and demonstrate that it is appropriate to redact such names from its Application, by filing a motion to seal in compliance with 11 U.S.C. § 107(b), Rule 9018 and L.R. 9018-1(d) ("Any party who seeks to file documents under seal must file a motion to that effect.")

17. Section 107(a) of the Bankruptcy Code provides that all papers "filed in a case under this title . . . are public records and open to examination" by the public. 11 U.S.C. § 107(a). "This policy of open inspection, codified generally in Section 107(a) of the Bankruptcy Code, evidences Congress's strong desire to preserve the public's right of access to judicial records in bankruptcy proceedings." *Video Software Dealers Ass'n v. Orion Pictures Corp. (In*

re Orion Pictures Corp.), 21 F.3d 24, 26 (2d Cir. 1994); *accord In re Alterra Healthcare Corporation*, 353 B.R. 66, 71 (Bankr. D. Del. 2006)("[D]ocuments filed in bankruptcy cases have historically been open to the press and general public.").

18. A limited exception to public disclosure may be invoked to protect "an entity with respect to a trade secret or confidential research, development or commercial information." 11 U.S.C. § 107(b)(1); *accord* Fed.R.Bankr.P. 9018. Specifically, Bankruptcy Rule 9018 provides in pertinent part:

> On motion or on its own initiative, with or without notice, the court may make any order which justice requires (1) to protect the estate or any entity in respect of a trade secret or other confidential research, development, or commercial information, (2) to protect any entity against scandalous or defamatory matter contained in any paper filed in a case under the Code, or (3) to protect governmental matters that are made confidential by statute or regulation.

Fed. R. Bankr. P. 9018.

19. The moving party bears the burden of showing that a request to place documents under seal falls within the parameters of Bankruptcy Code § 107(b) and Bankruptcy Rule 9018 by demonstrating ". . . that the interest in secrecy outweighs the presumption in favor of access." *In re Continental Airlines*, 50 B.R. 334,at 340 (D. Del. 1993); *accord, In re Food Mgmt. Group*, 359 B.R. 543,at 561 (Bankr. S.D.N.Y. 2007); *In re Fibermark, Inc*., 330 B.R. 480 (Bankr. D. Vt. 2005). To meet this burden, the movant "must demonstrate extraordinary circumstances and compelling need to obtain protection." *Food Mgmt. Group*, 359 B.R. at 561 (*citing In re Orion Pictures Corp*., 21 F.3d 24,at 27 (2d Cir. 1994)). A contractual agreement to keep information confidential is not determinative. *See In re Muma Services Inc*., 279 B.R. 478, 485 (Bankr. D. Del. 2002) (if parties could file documents under seal simply because of confidentiality provisions, then Court "would never have control over motion practice" and Section 107 "would be meaningless.").

20. Without a motion to seal, the Court and other parties are unable to review a complete schedule of parties in interest in order to determine that the firm is disinterested and does not hold or represent any interest adverse to the estate.

WHEREFORE, the U.S. Trustee requests that the Court deny the Application unless and until Young Conaway files a schedule of the parties in interest, along with an accompanying motion to seal that demonstrates that sealing is appropriate with respect to the names of parties in interest that it has designated as confidential. The U.S. Trustee hereby reserves his right to respond to any motion to seal and seek any further relief as appropriate.

Respectfully submitted,

ANDREW R. VARA
ACTING UNITED STATES TRUSTEE

By: */s/ Jane M. Leamy*
Jane M. Leamy (#4113)
Trial Attorney
J. Caleb Boggs Federal Building
844 King Street, Suite 2207, Lockbox 35
Wilmington, DE 19801
(302) 573-6491

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