Docket #0756 Date Filed: 10/28/2024

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	Chapter 11
FISKER INC., *et al.*,[1]	Case No. 24-11390 (TMH)
Debtors.	(Jointly Administered)
	Re: Docket Nos. 300, 659, 683, 717, 718, 719, 720, 721
	Objection Deadline: October 28, 2024 at 4:00 p.m. ET **Hearing Date: November 12, 2024 at 10:00 a.m. ET**

OMNIBUS OBJECTION OF CVI INVESTMENTS, INC. TO SHAREHOLDER LETTER MOTIONS

CVI Investments, Inc. ("CVI"), by and through its undersigned counsel, hereby respectfully submits this omnibus objection to (i) Waverly LeBard's *Motion to Unseal Docket 300* [D.I. 659], and *Motion to Unseal Docket #300* [D.I. 720]; (ii) James Makker's *Motion to Unseal Docket 300* [D.I. 683]; and (iii) Zachary R. Crosta's (together with Waverly LeBard and James Makker, the "Moving Shareholders") *Urgent Review of Proposed Share Cancellation Considering SEC Rule 144 Violations* [D.I. 717], *Urgent Review of Proposed Share Cancellation Considering SEC Rule 144 Violations* [D.I. 718], and *Request for Shareholder Compensation, SEC Investigation, and Unsealing of Docket 300* [D.I. 719] (collectively, the "Letter Motions").[2] These Letter Motions seek to unseal the now-withdrawn *Official Committee of Unsecured Creditors' Objection to the Motion of CVI Investments, Inc. to Convert the Debtors' Cases to Chapter 7* [D.I. 300] (the "Committee's Objection" or the "Objection"), and other miscellaneous relief. In support of this objection, CVI respectfully states as follows:

[1] The debtors and debtors in possession in these chapter 11 cases, along with the last four digits of their respective employer identification numbers or Delaware file numbers, are as follows: Fisker Inc. (0340); Fisker Group Inc. (3342); Fisker TN LLC (6212); Blue Current Holding LLC (6668); Platinum IPR LLC (4839); and Terra Energy Inc. (0739). The address of the debtors' corporate headquarters is 14 Centerpointe Drive, La Palma, CA 90623.

[2] James R. Morocco also filed a *Motion to Unseal Docket 300* [D.I. 721] that was subsequently withdrawn [D.I. 753].

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PRELIMINARY STATEMENT

1. The Letter Motions seeking to unseal a moot and withdrawn motion should be denied because this Court previously considered and denied an identical motion just a month and a half ago, and that decision is law of the case that should not be disturbed. As the Court will recall, on August 19, 2024, a separate shareholder, Luqman Hussain ("Hussain"), filed a *Motion to Unseal Docket Number 300* [D.I. 487] (the "First Unsealing Motion"). Various parties, including the Debtors, CVI, and the Official Committee of Unsecured Creditors (the "Committee"), objected to the First Unsealing Motion based on the confidential designations and the mootness of the Committee's Objection [D.I.s 503, 504 and 505]. The Court then held a hearing on September 9, 2023, at which it heard oral argument on these issues. The Court then denied Hussain's request for relief on September 12, 2024 [D.I. 551] (the "Order Denying Unsealing"). The Court's prior decision is final, and the law of the case doctrine precludes the rehashed requests.

2. The Letter Motions expressly recognize and reference the Order Denying Unsealing, but none of the Moving Shareholders even attempts to argue that anything has changed since it was issued that would justify a different result now. The Letter Motions also invoke the very same arguments presented in the First Unsealing Motion that were already rejected. And the Moving Shareholders had standing and an opportunity to be heard and participate at the prior hearing, but did not do so.

3. In addition to the operation of law of the case, the Court correctly decided this issue previously, and the same reasoning warrants rejection again. The Committee's Objection to CVI's *Motion to Convert Chapter 11 Case to a Case Under Chapter 7* [D.I. 238] ("Motion to Convert"), which the Letter Motions seek to unseal, was filed under seal months ago, on July 26, 2024. The Committee's Objection contained information designated as confidential by the Debtors and CVI, necessitating the filing being under seal. The Committee then withdrew the Objection four days later on July 30, 2024, without the issues having ever been considered by the Court. D.I. 347. Because CVI's Motion to

Convert was resolved and did not go forward, there is no motion and no objection in any real sense to unseal. *See* D.I. 504. The Committee's Objection was moot as of the First Unsealing Motion, the Court properly denied that motion then, and it should deny the Letter Motions for the same reasons now.

4. In fact, there have been changes in circumstances since the Order Denying Unsealing, and those changes weigh even more heavily in favor of denying the Letter Motions. A Plan of Reorganization has been confirmed under chapter 11 of the Bankruptcy Code and is effective. *See Findings of Fact, Conclusions of Law, and Order Approving the Disclosure Statement on a Final Basis, Confirming the Debtors' Joint Chapter 11 Plan of Liquidation, and Granting Related Relief* [D.I. 722] (the "Confirmation Order"); *Notice of (i) Effective Date of Combined Disclosure Statement and Chapter 11 Plan of Liquidation of Fisker Inc. and Its Debtor Affiliates and (ii) Certain Claims Bar Dates* [D.I. 730]. Additionally, as of October 17, 2024, the Committee was disbanded and has no further authority other than for certain discrete specified tasks not relevant here. *See* D.I. 722 at 56. At this juncture, the Committee can no longer appear to defend its reasoning for filing its Objection under seal, nor could it seek to file a separate motion to file under seal in the event that were necessary. For all of these reasons, the requests to unseal the Committee's Objection should be denied.

5. Separately, regarding the other miscellaneous requested relief requested by the various Letter Motions, such requests either conflict with the Plan, cannot be granted by this Court, or lack sufficient allegations. Therefore, this Court should deny the Moving Shareholders' Letter Motions in their entirety.

OBJECTION

6. *First*, the Court should deny the each of the Moving Shareholders' respective requests for unsealing because the relief that they request was previously sought by another shareholder and rejected by this Court, and that prior determination is law of the case. This doctrine requires that once a court decides an issue, the decision applies throughout the case. *See In re Resyn Corp.*, 945 F.2d 1279, 1281

(3d Cir. 1991) ("The doctrine of the law of the case dictates that when a court decides upon a rule of law, that rule should continue to govern the same issues in subsequent stages in the litigation.") (cleaned up) (citations omitted). The Moving Shareholders in their Letter Motions are seeking the same relief sought in the First Unsealing Motion and decided in the Order Denying Unsealing, and they cannot ask that this same matter be relitigated. *See In re The IT Grp., Inc.*, 322 B.R. 729, 736 (Bankr. D. Del. 2005) ("[O]nce an issue has been decided, parties may not relitigate that issue in the same case.") (citation omitted); *Odyssey Partners v. Fleming Co.*, 1998 WL 155543 (Del. Ch. Mar. 27, 1998) ("The law of the case doctrine requires that matters previously ruled upon by the same court should be put to rest.") (citation omitted).

7. The limited exception to the law of the case doctrine for an "extraordinary change in circumstances" is not met here, as the Moving Shareholders have presented no extraordinary circumstances that would support relitigating these issues. *See In re City of Philadelphia Litig.*, 158 F.3d 711, 718 (3d Cir. 1998) (finding that such extraordinary circumstances include (1) availability of new evidence; (2) the announcement of a supervening new law; or (3) that the "earlier decision was clearly erroneous and would create manifest injustice" (citing *Pub. Int. Rsch. Grp. of New Jersey, Inc. v. Magnesium Elektron, Inc.*, 123 F.3d 111, 116-17 (3d Cir. 1997))). The Letter Motions do not attempt to identify any incremental, much less extraordinary, change to merit re-review. To the contrary, the changes since the requests were first made only further support denial, see *infra*.

8. Notably, the Moving Shareholders acknowledge the First Unsealing Motion, and could have participated in the briefing and the hearing regarding that motion, but they did not. The Moving Shareholders suggest in their Letter Motions that they were generally aware of these proceedings. *See, e.g.*, D.I. 659 ("There had been a decision to unseal Docket 300, but then motions were filed to keep it sealed, and until now it has remained sealed and its entry into the public record has been set aside."); D.I. 683 (same); D.I. 720 (same). The Moving Shareholders also advance the same arguments as those

presented in the First Unsealing Motion, which the Court already considered and rejected. And the Moving Shareholders do not identify a reason why they should be permitted to litigate this issue again when they could have weighed in on these matters the first time, which again reenforces that the Court's prior decision should not be revisited.

9. *Second*, even if there were a basis to hear these issues on the merits for a second time, the same reasons compel a rejection again here.[3] The Committee's Objection contained information designated as confidential pursuant to a Non-Disclosure Agreement between the Debtors, the Committee and CVI (the "Confidentiality Agreement") that requires a filing under seal. *See also* Local Rule 9018-1(f). The Motion to Convert in respect to which the Objection was filed never went forward, and the Committee withdrew its Objection prior to the deadline to file a motion to seal (based on the parties reaching a settlement, the terms of which were later disclosed in subsequent filings). This eliminated any controversy regarding the Motion to Convert and obviated any need for access to the sealed filing. *See Valley Health Sys. LLC v. Aetna Health, Inc.*, 2017 WL 44945, at *2 (D. Nev. Jan. 3, 2017) (finding that there was "no need for" documents subject to a pending sealing motion "to remain on the docket" as the parties had resolved the underlying issues); *King & Spalding LLP v. United States Dep't of HHS*, 2020 WL 13968918, at *2 (D.D.C. Apr. 21, 2020) (finding that the "need for public access" was "minimal" as to sealed exhibits after they were withdrawn). This Court previously found these facts compelled rejection of the First Unsealing Motion, and they apply with even greater force now.

10. *Third*, there is even less reason to unseal the withdrawn Objection at this stage than there was before. In the month and a half since the Court originally disposed with this exact issue, this Court held a confirmation hearing and issued the Confirmation Order confirming the Plan. The Plan has been declared effective under chapter 11. The Motion to Convert thus never went forward and will never go

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[3] CVI incorporates by reference its arguments presented in the *Objection of CVI Investments, Inc. to Motion to Unseal Docket Number 300* [D.I. 504] in opposition to the Letter Motions. In addition, the arguments propounded by the Debtors [D.I. 505] and the Committee [D.I. 503] in their previous objections to the First Unsealing Motion apply equally here.

forward—it is now irreversibly moot. Additionally, the Committee no longer exists to file a sealing motion or to object to the unsealing of its Objection. Both the Confirmation Order and the Plan provide that the Committee is automatically dissolved on the Effective Date, with only limited exceptions not applicable here.[4] In other words, and with the Moving Shareholders' delay in seeking this relief, the Committee has now effectively been disbanded and cannot act to defend its own conduct in filing under seal and withdrawing its Objection. All these reasons again support the conclusion that the Letter Motions' requests to unseal should be denied.

11. Finally, the Letter Motions seek other miscellaneous relief that cannot be granted due to the Moving Shareholders' insufficient allegations and/or the Court's inability to order such relief. The Letter Motions contain a request for equitable subordination of CVI's claims, but there is no foundation supplied for this extraordinary remedy at this stage. *See, e.g.*, *In re John Varvatos Enterprises, Inc.*, 2021 WL 4133656, at *5-7 (D. Del. Sept. 10, 2021), *aff'd sub nom. In re John Varvatos Enterprises Inc.*, 2022 WL 2256017 (3d Cir. June 23, 2022) (affirming dismissal of equitable subordination claim where movant failed to allege a connection between the inequitable conduct and the ordering of creditors in the bankruptcy estate); *Bank of N.Y. v. Epic Resorts-Palm Springs Marquis Villas, LLC (In re Epic Capital Corp.)*, 307 B.R. 767, 772, 773 (D. Del. 2004) ("Equitable subordination is an extraordinary remedy which is applied sparingly" and includes a "higher burden of proof" where the movant is not an insider) (citations omitted). They contain a request for deferral of the cancellation of Fisker shares, but that is contrary to the confirmed Plan. D.I. 713 at 40 ("On the Effective Date [or October 17, 2024], all Equity Interests [which includes any right to payment or compensation based upon any such interest] in the

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[4] These provide that the Committee shall only have standing and a right to be heard for the following limited purposes: "(a) requests for payment of Professional Fee Claims for services and reimbursement of expenses incurred prior to the Effective Date, and (b) any appeals of this [Confirmation] Order or other appeal to which the Committee is a party." D.I. 722 at 56. The Letter Motions do not relate to Professional Fee Claims or any sort of appeal, and so are outside the limited scope of the Committee's permission to act.

Debtors shall be deemed automatically canceled, released, and extinguished and shall be of no further force or effect . . . ."). They ask for shareholder compensation, which is also contrary to the terms of the confirmed Plan. *Id.* And they request the initiation of an investigation by the U.S. Securities and Exchange Commission, which is a matter for the Executive Branch and not within the purview of this Court, and notably the SEC is aware of these proceedings and was an active participant before this Court in this case. *In re 1900 M Rest. Assocs., Inc.*, 319 B.R. 302, 316 (Bankr. D.D.C. 2005), *aff'd sub nom. In re 1900 M Rest. Assocs., Inc*, 352 B.R. 1 (D.D.C. 2006) ("A bankruptcy court, as a part of the judicial branch of government, and in the absence of clear legislative authority to do so, ought to be loathe to interfere with the conduct in a bankruptcy case of a unit of the executive branch of government . . . .").

12. CVI hereby joins any other objection that has been filed or that may be filed by any other party in interest to the Letter Motions.

RESERVATION OF RIGHTS

13. CVI reserves all rights, claims, defenses, and remedies, including without limitation, the right to supplement and amend this objection, prior to or at the November 12, 2024, hearing.

CONCLUSION

WHEREFORE, for all foregoing reasons, the CVI respectfully requests that the Court deny the Motion.

Dated: October 28, 2024
Wilmington, Delaware

/s/ Richard M. Beck

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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
FISKER INC., *et al.*,[1]	)	Case No. 24-11390 (TMH)
Debtors.	)	(Jointly Administered)

CERTIFICATE OF SERVICE

I, Richard M. Beck, Esq. of Klehr Harrison Harvey Branzburg LLP, hereby certify that on October 28, 2024, I served a copy of the ***Omnibus Objection of CVI Investments, Inc. to Shareholder Letter Motions*** via CM/ECF upon those parties registered to receive such electronic notifications and upon the parties listed on the attached Service List via electronic mail and certified mail.

/s/ Richard M. Beck
Richard M. Beck (DE Bar No. 3370)

[1] The debtors and debtors in possession in these chapter 11 cases, along with the last four digits of their respective employer identification numbers or Delaware file numbers, are as follows: Fisker Inc. (0340); Fisker Group Inc. (3342); Fisker TN LLC (6212); Blue Current Holding LLC (6668); Platinum IPR LLC (4839); and Terra Energy Inc. (0739). The address of the debtors' corporate headquarters is 14 Centerpointe Drive, La Palma, CA 90623.

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