

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re: : Chapter 11
:
SEA CONTAINERS LTD, et al :
:
:
Debtor(s), : Bankruptcy No. 06-11156-KJC
: Jointly Administered

Hearing Date: May 28, 2008 @ 9:30 a.m.
Objection Deadline: May 26, 2008 @ 12:00 p.m.¹

**OBJECTION OF THE UNITED STATES TRUSTEE TO MOTION FOR AN ORDER
AUTHORIZING OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF SEA
CONTAINERS, LTD. TO FILE OBJECTION TO DEBTORS' MOTION FOR ORDER
APPROVING SETTLEMENT REGARDING PENSION CLAIMS UNDER SEAL (D.E.
1791)**

Roberta A. DeAngelis, the United States Trustee for Region Three ("UST"), by and through her counsel, objects as follows to the Motion for an Order Authorizing Official Committee of Unsecured Creditors of Sea Containers, Ltd. To File Objection to Debtors' Motion for Order Approving Settlement Regarding Pension Claims under Seal ("Motion", D.E. 1791) as follows:

1. This Court has jurisdiction to hear this Response.
2. Pursuant to 28 U.S.C. § 586, the UST is charged with overseeing the administration of Chapter 11 cases filed in this judicial district. This duty is part of the UST'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 UST has "public interest standing" under 11 U.S.C. § 307, 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 UST as a "watchdog").

¹ Pursuant to Federal Rule of Bankruptcy Procedure 9006 (a), since May 26, 2008 is a legal holiday (Memorial Day), the last day to respond is May 27, 2008 at 12:00 p.m. Terms herein have the same meaning as in the Motion.

3. The UST has standing to be heard with regard on this Response. 11 U.S.C. § 307.

STATEMENT OF FACTS

4. On February 18, 2008, the Debtors filed the Settlement Motion. On February 26, 2008, the Court approved a Confidentiality Stipulation between the Debtors and the objecting parties, permitting discovery, but protecting the disclosure of confidential non-public information. The Committee filed its objection to the Settlement Motion on May 18, 2008 as an attachment to the Motion. The entire pleading, consisting of some seventy plus pages has been filed under seal.

5. Paragraph 5 of the Motion avers that the Committee has filed the Motion out of an abundance of caution, “Although the SCL Committee does not believe that the bulk of information presented actually merits treatment as confidential...” (Motion at page 2, paragraph 5).

6. The UST has consulted with the Committee and has learned that it is only a very small portion of the pleading that the Committee considers to be truly confidential.

7. It is the position of the United States Trustee that the Motion is not supported by the Bankruptcy Code or the Federal Rules of Bankruptcy Procedure.

Sealing Facts Required to be Disclosed Violates the Public Policy of Full Disclosure; 11 U.S.C. Section 107(b) and FRBP 9018 Do not Apply

8. The Supreme Court stated in *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 591 (1978): “It is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents.” Unanimity in the case law demonstrates that there is a common law right of access to judicial proceedings and to inspect judicial records in civil matters. In *Orion Pictures Corp. v. Video Software Dealers Assoc.*, 21 F.3d 24 (Cir. 2 1994), the Court stated the general rule as: “...a strong presumption of public access to

court records...This preference for public access is rooted in the public's first amendment right to know about the administration of justice. It helps safeguard the 'integrity, quality, and respect in our judicial system.'" 21 F. 3d 24, 26 (citations omitted). See also, *In re Continental Airlines*, 150 B.R. 334 (D. De. 1993), where the court noted "...the strong presumption in favor of public access to judicial records and papers...". Accord, *In re Foundation for New Era Philanthropy*, 1995 WL 478841 (E.D. Pa. 1995); *In re Barney's Inc.*, 201 B.R. 703 (Bankr. S.D.N.Y. 1996).

9. In *In re Foundation for New Era Philanthropy*, 1995 WL 478841 (Bankr. E.D. Pa.), the Court examined a request to place under seal the creditor lists required to be filed pursuant to Federal Rule of Bankruptcy Procedure ("FRBP") 1007. The Debtor claimed that it had a need to keep its list of donors anonymous. The Court rejected the request, stating:

"The provision [Section 107(b)] was not intended to save the debtor or its creditors from embarrassment, or to protect their privacy in light of countervailing statutory, constitutional and policy concerns...Full disclosure of bankruptcy records may help insure that the bankruptcy statute is applied effectively in this case...Thus, there are significant public concerns which favor full public access to all documents filed in this case." 1995 WL 478841, 4-5.

10. In the bankruptcy context, limited exceptions to the general rule are contained in the Code and Rules. Bankruptcy Code §107(b) provides as follows:

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.

FRBP 9018 essentially incorporates the substance of Section 107(b), and adds to the type of matters subject to seal, the protection of “...governmental matters that are made confidential by statute or regulation.” This item is not applicable in the present case as governmental matters are not implicated.

11. As exceptions to the common law rule, the burden is on the moving party to show that a request to place documents under seal falls within the parameters of Bankruptcy Code Section 107(b) and FRBP 9018 by demonstrating that: “...that the interest in secrecy outweighs the presumption in favor of access.” *See In re Continental Airlines*, 150 B.R. 334 (D. De. 1993).

The inquiry then is whether or not the matter sought to be placed under seal fits within any of the categories included within either of Section 107(b) or FRBP 9018. There is no showing in the Motion that any of the information sought to be protected falls within any of the enumerated categories. Because the information contained in the Tomlinson Declaration is required to be included in the Schedules, the Debtors cannot demonstrate that any interest in secrecy outweighs the presumption of full access.

12. In *Orion*, supra, Court defined commercial information as: “...information which would cause an ‘unfair advantage to competitors by providing them information as to the commercial operations of the debtor.’” (21 F. 3d 24, 27 (citations omitted)). In that case, the Court determined that Section 107(b) applied to a promotional agreement between the debtor and McDonald’s, because the information in the agreement, if disclosed, could adversely impact the debtor’s ability to negotiate future promotion agreements, thus giving competitors an unfair advantage. . *In re Alterra Healthcare Corp.*, 353 B.R. 66 (Bankr. D. Del. 2006), adopted the *Orion* definition of protectable confidential or commercial information.

13. The identity of a proposed investor and the terms of a Preliminary Proposal Letter seeking a due diligence advance of \$1 million from the debtor was not subject to Section 107(b) protection. *In re Barney's, Inc.*, 201 B.R. 703 (Bankr. S.D.N.Y. 1996). The debtor claimed that this information was commercial information. The Court rejected this contention, restating the definition from *Orion, supra*, and adding the inclusion of information related to the trading of securities. The *Barney's* Court found that neither the potential investor's identity nor the terms of the Preliminary Proposal Letter were subject to protection by either Section 107(b) or FRBP 9018: "The Potential Investor's desire to avoid the professional embarrassment associated with the unsuccessful pursuit of a deal is no basis to grant this motion."

14. In a somewhat related situation, an effort to place the report of a fee examiner under seal pursuant to Section 107(b) or FRBP 9018 was rejected by the Court in *In re Continental Airlines*, 150 B.R. 334 (D. De. 1993). In this case, the District Court found that the Bankruptcy Court had abused its discretion in ordering the report placed under seal and reversed the lower court. The Court rejected any claim of potential scandalous or defamatory possibilities, stating:

"If such legal recommendations and assertions, required to be rendered by statutory and case law authority, were sealed, based on nothing more than the mere possibility that they contain 'defamatory' assertions, the judicial system would be thwarted in its mandated responsibility to supervise litigation expenses...clearly the public's interest in seeing that the judicial mandate to control litigation expenses far outweighs any private interest in secrecy..." 150 B.R. 334, 341.

The Court then quoted directly from the United States' brief:

"[It] is disingenuous...for [appellees] and [their] lawyers to argue that they...should be the sole guardians of the only prejudicial, independent analysis of their attorneys'...conduct. Indeed, it follows without any thought whatsoever that the Court's truth-finding process

(not to mention the efficient administration of the Bankruptcy Code) can only be enhanced by the wide dissemination of the [fee reviewer's] reports..." 150 B.R. 334, 341.

15. The Exhibit the Debtors' seek to seal contains less information than is required to be placed in the Debtors' Schedules.²

16. There was no basis to seal the fee examiner's report from public view in *Continental Airlines, supra*. Likewise here, "...the Court's truth-finding process (not to mention the efficient administration of the Bankruptcy Code)..." (150 B.R. 334, 341) requires full disclosure.

17. Although the Third Circuit has not addressed Section 107(b) or FRBP 9018, it has examined the common law right of public access in the context of confidential settlement agreements. In *Pansy v. Borough of Stroudsburg*, 23 F. 3d 772 (3 Cir. 1994), the news media sought an order challenging the sealing of a settlement agreement in a civil rights case between Stroudsburg and its former police chief. The court reaffirmed the common law rule: "We have previously recognized a right of access to judicial proceedings and judicial records, and this right of access is 'beyond dispute'. (23 F. 3d 772, 780-781). In the absence of provisions or rules like Bankruptcy Code Section 107(b) or FRBP 9018, the Third Circuit adopted a balancing test between the need for confidentiality or privacy and the right to know, concluding: "If a settlement agreement involves issues or parties of a public nature, and involves matters of legitimate public concern, that should be a factor weighing against entering or maintaining an order of confidentiality." (23 F.3d 772, 788).

18. In each of the above cases in which the moving party sought to seal documents to otherwise escape the disclosure requirements of various Bankruptcy Code sections or rules, such as FRBP 1007 in *New Era, supra*, or the fee examiner's report in *Continental Airlines, supra*, the Court

² Schedules have not yet been filed in this case.

rejected the requests. The underlying policies of Sections 107 and FRBP 9018, as enumerated above, compel a finding that the Motion should not be granted, particularly where the moving party has failed to satisfy its burden of proof. The Committee has admitted in the Motion, as set forth above, that it does not consider the vast bulk of the pleading to be confidential. The Settlement Motion itself is germane to the outcome of this entire case and the policy of full public disclosure and access here must prevail. It is the Debtor that has sought the protection of this Court, and in doing so, the Debtor has subjected itself to the policy of full disclosure. There is simply no basis to seal such information.³

19. Furthermore, even if the Debtor could successfully demonstrate that there may be one or more terms of the Exhibit that may be protected under section 107(b) or Rule 9018, the relief granted should be narrowly tailored. *See In re Lomas Financial Corporation*, 1991 WL 21231, at *2 (S.D.N.Y. 1991). Only those portions of the Exhibit that comport with the requirements of either Bankruptcy Code Section 107 or FRBP 9018 should be redacted and sealed. The balance should become part of the public record. As noted by the Committee in the Motion, it agrees that the bulk of the pleading is not confidential.

Conclusion

20. The Bankruptcy Code and Rules place narrow limits upon sealing documents. The Third Circuit has ruled that confidentiality, particularly where there is a public interest, is the exception and not the rule. The requirements of the Bankruptcy Code and Rules express the necessary public interest in this matter requiring full disclosure.

³ The Prepetition Claims Motion is not a critical vendor motion. It is simply a motion that desire to continue to pay vendor claims in the ordinary course based primarily upon the nature of this case as a prepackaged bankruptcy.

21. The United States Trustee leaves the Debtors to their burden on proof, and reserves all discovery rights.

WHEREFORE, the UST respectfully prays this Honorable Court to deny the Motion and for such other relief at law and in equity as this Honorable Court may deem proper.

Respectfully submitted,

Roberta A. DeAngelis
ACTING UNITED STATES TRUSTEE REGION THREE

DATED: May 27, 2008

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