


ORDERED.

Dated: July 23, 2015


Cynthia C. Jackson
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION
www.flmb.uscourts.gov

In re:

STEPHEN K. CHITWOOD and
RUTH E. CHITWOOD,

Chapter 7
Case No.: 6:11-bk-14441-CCJ

Debtors.

ORDER GRANTING IN PART
UNITED STATES TRUSTEE'S MOTION TO VACATE

This case came before the Court for hearing on February 4, 2015, on the United States Trustee's Motion to Vacate Order Granting Chapter 7 Trustee's Motion to File Paper Under Seal (Doc. No. 35; the "Motion to Vacate"). For the reasons set forth below, the Motion to Vacate is granted in part.

The Chapter 7 Trustee settled the debtor's claim in a products liability action for the benefit of the estate. The settlement agreement requires that its terms remain confidential. Critically, it requires confidentiality "*except as may be necessary . . . to comply with the*

applicable rules of civil procedure, to comply with an order of a court of competent jurisdiction, or to resolve any Liens or Other Interests, bankruptcy or other court proceeding”, provided that “every reasonable effort [be] made to keep such information confidential”.¹ When the Chapter 7 Trustee filed the Motion to Approve Compromise of Controversy, he moved to file the settlement agreement as an exhibit under seal (Doc. No. 32; the “Motion to Seal”). The Court granted the Motion to Seal without notice or a hearing.²

Federal Rule of Bankruptcy Procedure 9018 permits the Court to seal a document without notice. If the Court does so, however, “any entity affected thereby” may move to vacate the order sealing the document.³ Under that Rule and Section 107 of the Bankruptcy Code, the United States Trustee seeks vacatur of the Order granting the Motion to Seal.

Section 107(a) provides that all records of the Bankruptcy Court are “open to examination”, except when an exception under Section 107(b) or (c) applies. Section 107(a) codifies a presumption of public access to court records.⁴ And Section 107(b) carves out an exception; this “exception to the general right of access in section 107(b) is narrow”.⁵ Section 107(b) permits the Court to seal documents to “protect an entity with respect to a trade secret or

¹ (Doc. No. 31, Ex. A ¶ 4.04 (under seal)).

² (Doc. No. 33).

³ Rule 9018 provides, in full:

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 secure 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. If an order is entered under this rule without notice, any entity affected thereby may move to vacate or modify the order, and after a hearing on notice the court shall determine the motion.

⁴ *Gitto v. Worcester Telegram & Gazette Corp. (In re Gitto Global Corp.)*, 422 F.3d 1, 6–8 (1st Cir. 2005); *Ferm v. United States Tr. (In re Crawford)*, 194 F.3d 954, 960 (9th Cir. 1999); *Video Softward Dealers Ass’n v. Orion Pictures Corp. (In re Orion Pictures Corp.)*, 21 F.3d 24, 26–27 (2d Cir. 1994).

⁵ *In re Borders Grp., Inc.*, 462 B.R. 42, 47 (Bankr. S.D.N.Y. 2011); *see also Togut v. Bank of Am., N.A. (In re Anthracite Capital, Inc.)*, 492 B.R. 162, 173 (Bankr. S.D.N.Y. 2013).

confidential research, development, or commercial information” or “protect a person with respect to scandalous or defamatory matter”.

The United States Trustee argues that the settlement agreement does not fall into either category of Section 107(b). At the hearing, the Chapter 7 Trustee relied primarily on the argument that the settlement agreement had to be sealed because that was a condition of the agreement itself.

The Court agrees with the United States Trustee.

Courts will generally refuse to seal a settlement agreement merely because it contains a “no seal, no deal” provision. The public interest in disclosure of court records is too great, and to permit parties to work around the narrow grounds for sealing under Section 107 merely by requiring confidentiality in a settlement agreement would too easily defeat the transparency protected by that provision:

If that were the standard for sealing, every settlement in a bankruptcy case would be sealed whenever a party insisted that a document be sealed. Such a test would remove the need for analysis under § 107 and would directly conflict with the statute, the common law, and the legislative history of § 107.⁶

The takeaway from this is that instead of any *per se* rule permitting or prohibiting the sealing of a settlement agreement, courts focus on the content of the settlement agreement itself.⁷ That is, if the settlement agreement actually contains “commercial information” or is actually “scandalous or defamatory” within the meaning of Section 107(b), then courts would find that the exception applies.

⁶ *Togut*, 492 B.R. at 172–74 (citing *Bank of Am. Nat’l Trust and Savs. Ass’n v. Hotel Rittenhouse Assocs.*, 800 F.2d 339, 346 (3d Cir. 1986) (“Even if we were to assume that some settlements would not be effectuated if their confidentiality was not assured, the generalized interest in encouraging settlements does not rise to the level of interests that we have recognized may outweigh the public’s common law right of access”).

⁷ See, e.g., *In re Food Mgmt. Grp., LLC*, 359 B.R. 543, 562 (Bankr. S.D.N.Y. 2007); *In re Alterra Healthcare Corp.*, 353 B.R. 66, 75–76 (Bankr. D. Del. 2006).

Courts construe “commercial information” and “scandalous and defamatory matter” narrowly. “Commercial information” must concern “commercial operations” disclosure of which would “unfairly benefit [the] entity’s competitors”.⁸ And one definition of “scandalous or defamatory” requires that the material “would cause a reasonable person to alter his opinion of an interested party” and “(1) the material is untrue, or (2) the material is potentially untrue and irrelevant or included within a bankruptcy filing for an improper end”.⁹

Upon review of the settlement agreement the Court finds that none of its content falls within the ambit of Section 107(b). To the contrary, the settlement agreement speaks only in broad terms about the claims being settled and the manner and amount of the settlement, and it often refers to other agreements which, presumably, contain greater detail. Further, because the Chapter 7 Trustee has made every effort to keep the settlement agreement sealed--and because unsealing is at this Court’s direction--the settlement agreement’s confidentiality provision will not be violated.

For the reasons set forth above, it is ORDERED that:

1. The Motion is granted in part.
2. The Chapter 7 Trustee shall file a copy of the settlement agreement on the public docket, redacted to protect any information as required by rule or statute (*e.g.*, HIPAA).

Clerk’s office to serve

⁸ *Alterra Healthcare Corp.*, 353 B.R. at 75–76.

⁹ *Gitto v. Worcester Telegram & Gazette Corp. (In re Gitto Global Corp.)*, 422 F.3d 1, 14 (1st Cir. 2005).