UNITED STATES BANKRUPTCY COURT
DISTRICT OF MAINE

In re:	)	
MONTREAL MAINE & ATLANTIC RAILWAY, LTD.	)	**Bk. No. 13-10670** **Chapter 11**
Debtor.	)	

UNITED STATES TRUSTEE'S OBJECTION TO MOTION FOR ENTRY OF AN ORDER AUTHORIZING FILING OF SETTLEMENT AGREEMENTS UNDER SEAL

The United States Trustee, by and through undersigned counsel and pursuant to 28 U.S.C. § 586 and 11 U.S.C. § 307, hereby objects to Chapter 11 Trustee Robert J. Keach's[1] Motion for Entry of an Order Authorizing Filing of Settlement Agreements Under Seal, dated April 21, 2015 (the "Motion to Seal"), as follows:

INTRODUCTION

In the Motion to Seal, the Trustee seeks to maintain the confidentiality of specific settlement amounts to be paid by each of the Released Parties[2] to the Estate of Montreal Maine & Atlantic Railway, Ltd. (the "Estate"). In support of this effort, the Trustee contends that the dollar amounts each of the Released Parties will pay to the Estate further to the Settlement Agreements constitutes "commercial information" which is protected by section 107(b) of the United States Bankruptcy Code. The Trustee argues that the Settlement Agreements contain "no seal, no deal" clauses and if the settlement amounts are disclosed, the Settlement Agreements will become void.

[1] Chapter 11 Trustee Robert J. Keach is hereinafter referred to as "the Trustee."
[2] Unless otherwise defined, the United States Trustee incorporates herein the defined terms set forth in the Motion to Seal.

The Trustee's arguments fail. The information the Trustee seeks to "protect" is not commercial information, and his efforts to do so violate the strong public policy in favor of public access to documents filed with the Bankruptcy Court.

ARGUMENT

"There is a strong presumption and public policy in favor of public access to court records." *Togut v. Deutsche Bank AG, Cayman Islands Branch et al., (In re Anthracite Capital, Inc.),* 492 B.R. 162, 170 (Bankr. S.D.N.Y. 2013). Section 107(a) of the United States Bankruptcy Code (the "Code"), codifying this strong public policy in favor of public access to documents filed in the bankruptcy court, provides that "a paper filed in a case under this title and the dockets of a bankruptcy court are public records and open to examination by an entity at reasonable times without charge." 11 U.S.C. § 107(a).

There are a few narrow exceptions to the public access presumption. The Code authorizes the Court to protect entities "with respect to a trade secret or confidential research, development, or commercial information" and to "protect a person with respect to scandalous or defamatory matter contained in a paper filed" in a bankruptcy case. 11 U.S.C. § 107(b). The Code also permits for the protection of certain personal identifiable information to mitigate, among other things, any undue risk of identity theft. 11 U.S.C. § 107(c).

Notwithstanding the exceptions, "a court's ability to limit the public's right to access remains an extraordinary measure that is warranted only under rare circumstances as 'public monitoring is an essential feature of democratic control.'" *Rivera v. Flores,* 524 B.R. 438, 443 (Bankr. D. P.R. 2015)(citations omitted). The burden is on the movant "to provide the court with specific factual and legal authority demonstrating that a particular document at issue is properly classified as 'confidential' or 'scandalous.'" *In re Anthracite Capital, Inc.,* 492 B.R. at 171

(citing *United States v. Continental Airlines, Inc. (In re Continental Airlines, Inc.),* 150 B.R. 334, 340-41 (D. Del. 1993)). "The moving party bears the burden of demonstrating that the information it is seeking to protect from public view is both commercial and confidential." *Id.* at 177 (citations omitted).

Section 107(b)(1) "is meant to prevent business competitors from seeing confidential business-related information and using that information to the detriment of the movant. *Id*. at 179 (citing *Gowan v. Westford Asset Mgmt. LLC (In re Dreier LLP),* 485 B.R. 821 822-23 (Bankr. S.D.N.Y. 2013)). Commercial information is "information which would cause 'an unfair advantage to competitors by providing them information as to the commercial operations of the [party seeking to seal the information].'" *Id.* at 178.

The Trustee, in support of his contention that the settlement sums to be paid pursuant to the Settlement Agreements constitutes confidential information, argues:

> The Settlement Agreements contain specific dollar amounts to be paid by the Released Parties upon the Plan becoming effective. In the event the Plan does not become effective, the rights of third parties to sue the Released Parties will be restored in full. The Settlement Agreements also contain tolling agreements to preserve such causes of action. In that event, the Released Parties would be severely prejudiced if the amount each was willing to pay in settlement was generally known to future plaintiffs and their counsel.

See Motion to Seal at ¶¶ 12, 13. The information the Trustee seeks to protect is not commercial information. It has no bearing on the Released Parties' business operations and does not give any competitors of the Released Parties' any competitive advantage. Rather, the Trustee seeks to keep private information relating to a settlement, which, if the settlement fails because the information is disclosed, may impact the Released Parties' leverage in future litigation. However, courts have repeatedly rejected this argument as grounds to seal and the Trustee does

not offer a single case which supports his contention that the sums to be paid by the Released Parties constitute commercial information.[3]

In fact, the arguments being advanced by the Trustee in this Motion were rejected by the Southern District of New York in an analogous case. In *Geltzer v. Andersen Worldwide, S.C.*, No. 05 Civ. 3339 (GEL), 2007 WL 273526 (S.D.N.Y. Jan. 30, 2007), the Southern District of New York was presented with a motion to approve a settlement agreement. The parties to the agreement sought to have the Court approve such a motion on a record which included a redacted settlement agreement which omitted the amount of the settlement at issue. The Court denied the motion. In so doing, it characterized the argument advanced in support of the motion - that "public disclosure [of the settlement amount] would enable other claimants against Andersen to determine how much Andersen is currently willing, and able, to pay in respect of the Trustee's claim, thereby potentially undercutting Andersen's negotiating leverage with such claimants" – as ***"a wan excuse for impinging on the public's right of access to judicial documents."*** *Andersen Worldwide,* No. 05 Civ. 3339 (GEL), 2007 WL 273526, at * 4 (emphasis added).

Likewise, in the case of *In re Anthracite Capital, Inc.*, the Southern District of New York declined to grant a motion to seal certain documents, including, among others, a settlement agreement. In so doing, the Court not only considered, and rejected, arguments that the information the parties sought to seal was "scandalous," "defamatory," and "confidential and commercial," *In re Anthracite Capital, Inc.*, 492 B.R. at 179, but also the fact that the settlement

[3] The Trustee cites to *In re Dana Corp.*, 412 B.R. 53 (S.D.N.Y. 2008), which is distinguishable and which does not support the Trustee's position. In *Dana Corp.*, no party was attempting to seal a settlement agreement. The propriety of the order sealing the agreement was not on appeal. *In re Dana Corp.*, 412 B.R. at 59. Rather, what was on appeal was whether the *Dana* Court had sufficient evidence before it (a redacted agreement) when it approved the settlement pursuant to Fed. R. Bankr P. 9019. *Id.* at 59-60.

agreement contained a "no seal, no deal" provision. *Id.* at 173 - 74. In declining to use this provision as grounds for sealing the settlement agreements at issue, the Court stated:

> If ["no seal, no deal" provisions] 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.

Id., at 173.

Other courts that have considered the same issues before this Court have likewise declined to seal settlement agreements. *See In re Dreier LLP*, 485 B.R. at 822-23 ("The 'commercial information' exception is not intended to offer a safe harbor for those who crave privacy or secrecy for its own sake. Instead, it protects parties from the release of information that could cause them harm or give competitors an unfair advantage"); *Osborne v. American Express Travel Related Serv's Co., Inc. (In re Global Vending, Inc.),* Bankruptcy No. 04-23562-BKC-JKO, Adversary No. 05-2417-JKO, 2006 WL 1679732, * 3 (Bankr. S.D. Fla. May 16, 2006)(discussing and dismissing both a "no seal, no deal" provision and the argument that the settlement sum is commercial information in support of request to seal under section 107(b)).

It is clear that the information the Trustee seeks to protect in this case – the settlement sums – is not commercial information. Consequently, well-settled public policy and the clear wording of section 107 of the Code mandate that the Motion to Seal be denied.

RESPONSE REQUIRED BY D. ME. LBR 9013-1(f)

As his specific response to each of the allegations contained in the Motion to Seal, the United States Trustee states as follows:

1. Paragraph 1 of the Motion to Seal contains conclusions of law to which no response is required.

2. Paragraph 2 of the Motion to Seal contains conclusions of law to which no response is required.

3. Admitted.

4. Admitted.

5. The United States Trustee lacks personal knowledge or information about the allegations contained in paragraph 5 of the Motion to Seal.

6. Admitted.

7. No response is required to paragraph 7 of the Motion to Seal.

8. No response is required to paragraph 8 of the Motion to Seal.

9. Paragraph 9 of the Motion to Seal contains conclusions of law to which no response is required.

10. Paragraph 10 of the Motion to Seal contains conclusions of law to which no response is required.

11. Paragraph 11 of the Motion to Seal contains conclusions of law to which no response is required.

12. Denied.

13. The terms of the Settlement Agreements speak for themselves. The United States Trustee denies the remaining allegations contained in paragraph 13 of the Motion.

14. Denied.

15. Paragraph 15 of the Motion to Seal contains conclusions of law to which no response is required. Answering further, the United States Trustee denies that *In re Dana Corp.*, supports the relief requested by the Trustee in the Motion to Seal.

16. Denied.

17. No response is required to paragraph 17 of the Motion to Seal.

CONCLUSION

WHEREFORE, the United States Trustee requests that the Court deny the Motion to Seal and such further and other relief as the Court deems just and proper.

Dated at Portland, Maine this 11th day of June, 2015.

Respectfully submitted,

WILLIAM K. HARRINGTON
UNITED STATES TRUSTEE

By: /s/ Jennifer H. Pincus
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CERTIFICATE OF SERVICE

I, Jennifer H. Pincus, being over the age of eighteen and an employee of the United States Department of Justice, U.S. Trustee Program, hereby certify that on June 11, 2015, I electronically filed the forgoing Objection of the United States Trustee to Motion for Entry of Order Authorizing Filing of Settlement Agreements Under Seal which was served upon each of the parties set forth on this Service List via U.S. mail, postage prepaid, on June 11, 2015. All other parties listed on the Notice of Electronic Filing have been served electronically.

Dated at Portland, Maine this 11th day of June, 2015.

/s/ Jennifer H. Pincus

Service List:

N/A