

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

<i>In re:</i>	:	Chapter 11
	:	
ETOYS, INC., <i>et al.</i> ,	:	Case No. 01-00706 (MFW)
	:	
Debtors.	:	Jointly Administered
	:	
	:	Hearing Date: 9/19/13 at 10:30 a.m.
	:	Objection Deadline: 9/5/13 at 4:00 p.m.

UNITED STATES TRUSTEE’S OBJECTION TO MOTION OF POST-EFFECTIVE DATE COMMITTEE TO FILE UNDER SEAL (I) PORTIONS OF MOTION FOR APPROVAL OF SETTLEMENT AGREEMENT AMONG POST-EFFECTIVE DATE COMMITTEE, PLAN ADMINISTRATOR AND GOLDMAN, SACHS & CO., (II) THE SETTLEMENT AGREEMENT AND (III) THE FEE APPLICATION OF THE PEDC’S SPECIAL COUNSEL (D.I. 2508)

In support of her Objection to the Motion of the Post-Effective Date Committee to File Under Seal (i) Portions of its Motion for Approval of the Settlement Agreement Among the Post-Effective Date Committee, the Plan Administrator and Goldman, Sachs & Co., (ii) the Settlement Agreement and (iii) the Fee Application of Special Counsel (the “Seal Motion”), Roberta A. DeAngelis, United States Trustee for Region 3 (“U.S. Trustee”), by undersigned counsel, avers:

1. This Court has jurisdiction to hear this Objection.

2. Under 28 U.S.C. § 586, the U.S. Trustee is charged with overseeing the administration of Chapter 11 cases filed in this judicial district. 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, 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”).

3. Under 11 U.S.C. § 307, the U.S. Trustee has standing to be heard on this Objection.

BACKGROUND

4. The Debtors filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code on March 7, 2001. The U.S. Trustee appointed an Official Committee of Unsecured Creditors on March 20, 2001.

5. On November 1, 2002, the Court entered an order confirming the Debtors’ liquidating plan of reorganization. The plan created the roles of a Post-Effective Date Committee (“PEDC”) and Plan Administrator.

6. As set forth in the Seal Motion, the PEDC commenced a civil action against Goldman, Sachs & Co. (“Goldman Sachs”) in the state courts of New York, asserting claims in connection with a pre-petition initial public offering of eToys, Inc. stock.

7. The PEDC, the Plan Administrator, and Goldman Sachs have entered into a settlement of the civil action, subject to the Court’s approval of the parties’ settlement agreement.

8. The PEDC asserts that the proposed settlement agreement requires that its terms be kept confidential, and further requires that the PEDC, in seeking the Court’s approval of the settlement, “take all reasonable steps to ensure that the Confidential Settlement Terms are not publicly disclosed.” The PEDC further asserts that the redacted information is “confidential sensitive information that another party could use for a wrongful purpose,” and accordingly requests authority to file the settlement agreement with all of the material terms redacted, and to

make similar redactions to the motion to approve the settlement and to the fee applications of all counsel representing the estate and the PEDC in the litigation.

9. The U.S. Trustee notes that the PEDC does not assert in the Seal Motion that confidentiality is a condition of the settlement agreement, only that the PEDC must take all “reasonable steps” to ensure that the terms are not disclosed.

ARGUMENT

10. The U.S. Trustee questions the necessity of sealing portions of the subject settlement agreement, the motion to approve the settlement, and the fee applications of counsel. The U.S. Trustee further questions whether any portion of the settlement agreement contains “confidential sensitive information that another party could use for a wrongful purpose.” The U.S. Trustee respectfully submits that upon reviewing the material terms of the settlement agreement, the Court should find that the material terms of the settlement are neither “sensitive information” nor subject to “use for a wrongful purpose.”

11. The Supreme Court stated in *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 591 (1978), that “[i]t 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).

12. In the bankruptcy context, the right of public access is prescribed by the Bankruptcy Code, with only limited exceptions. Section 107 provides in pertinent part that “except as provided in subsections (b) and (c) of this section and subject to section 112, 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). Limited exceptions to the general rule of full public access are contained in 11 U.S.C. §§ 107(b)¹ and (c)(not pertinent in this matter), as well as in FED.R.BANKR.P. 9018.² However, the burden is on the moving party to show that a request to place documents under seal falls within the parameters set forth in Section 107(b) and FED.R.BANKR.P. 9018 by demonstrating “that the interest in

¹11 U.S.C. § 107(b) provides:

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.

²Fed.R.Bankr.P. 9018 provides:

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. 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.

secrecy outweighs the presumption in favor of access.” See *In re Continental Airlines*, 150 B.R. 334 (D. De. 1993).

13. 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 FED.R.BANKR.P. 1007. The debtor claimed that it needed 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 at 4-5.

14. In *Orion, supra*, the 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 *Orion*, the Court found a request by a dealer association for a promotional agreement between the debtor and McDonald’s to be subject to Section 107(b) because the information sought to be obtained could adversely impact the debtor’s ability to negotiate future promotion agreements, giving the debtor’s competitors an unfair advantage.

15. This Court addressed the propriety of sealing settlement agreements in *In re Alterra Healthcare Corp.*, 353 B.R. 66 (Bankr. D. Del. 2006). In *Alterra*, this Court found that the potential impact a settlement might have on other litigation was not cause to seal the settlement and that the public’s right of access to the terms of the settlement outweighs the harm to the parties of disclosing the settlement terms. The PEDC fails to address *Alterra* and how that decision affects the Seal Motion.

16. Parties in interest have a right under Section 1109b) to comment on or object to the terms of the settlement, but the Seal Motion seeks to impair that right by concealing those terms. Thus, the right to object to the settlement is illusory – nobody may object to the terms of the settlement if those terms are kept secret.

17. The PEDC has not articulated an adequate basis for redacting the material terms of the agreement in the motion seeking approval of the settlement and in the related fee applications. The Seal Motion should therefore be denied.

18. The U.S. Trustee leaves the PEDC to its burden on the merits and reserves her discovery rights.

WHEREFORE the U.S. Trustee requests that this Court issue an order denying the Seal Motion and/or granting such other relief that this Court deems appropriate.

Respectfully submitted,

ROBERTA A. DeANGELIS
UNITED STATES TRUSTEE

Dated: September 3, 2013

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