

**UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF PENNSYLVANIA**

In re:	:	Chapter 13
	:	
NILES C. TAYLOR &	:	
ANGELA J. TAYLOR,	:	
	:	Bankruptcy No. 07-15385-DWS
Debtors.	:	

**UNITED STATES TRUSTEE’S MOTION TO AMEND FINDINGS AND TO
VACATE ORDER ENTERED OCTOBER 21, 2008**

The Acting United States Trustee, Roberta A. DeAngelis, by her undersigned counsel, hereby moves pursuant to Fed.R.Bankr.P 7052(b) for an order amending its findings, or in the alternative, making additional findings that good cause did not exist to support the entry of a protective order in the instant matter, and vacating said Order of October 21, 2008. In support hereof, the United States Trustee avers as follows:

1. On May 1, 2008, this court entered an Order requiring certain individuals to appear before her to address what to the Court appeared to be questionable practices engaged in by attorneys and agents of HSBC. The purpose of the hearing as expressed by this Court in the May 1, 2008 Order were

(1) to address the Objection to HSBC’s claim and (2) to investigate the practices employed in this case by HSBC and its attorneys and agents and consider whether sanctions should issue against HSBC, its attorneys and agents.

This Court expressly invited the United States Trustee (hereinafter “UST”) to appear at the hearing.¹

¹We surmise the Court’s invitation to the UST was based on the statutory role performed by the UST. See *Morgenstern v. Revco*, 898 F.2d 498, 499 (6th Cir. 1990) (Court noting the responsibility of the UST to protect the public interest and ensure bankruptcy cases are conducted according to law.). See also *In re Columbia Gas*, 33 F3d 294 (3rd Cir. 1994).

2. In connection with this Court's Order, the UST undertook to obtain discovery as to the miscommunications and inaccuracies which seemed to permeate this case as to a central third party identified as Fidelity National Information Systems, Inc., now known as Lender Processing Services, Inc., (hereinafter "Fidelity"), and moved before this Court to compel an examination and to provide documents pursuant to Bankruptcy Rule 2004. Fidelity opposed that Motion.

3. The UST and Fidelity reached an interim accord as to a limited number of documents to be produced; however, Fidelity refused to provide the documents without first obtaining a confidentiality order from this Court.

4. The UST and Fidelity were unable to resolve the terms of the confidentiality order² and so informed this Court on October 17, 2008 that such being the case that the UST would press her motion for the Rule 2004 examination which was rescheduled for hearing on October 23, 2008. Upon learning of the impasse, this Court rescheduled the hearing on the motion of the UST to October 21, 2008.

5. At the hearing on October 21, 2008, the UST attempted to press her motion for the Rule 2004 examination, while Fidelity and other interested parties pressed for restrictions (confidentiality) on information sought by the UST.

6. At the time of the hearing, neither Fidelity nor other interested parties presented any basis to carry their burden under Rule 26 of the Federal Rules of Civil Procedure which is

² The Rules and Regulations of the Department of Justice, 28 CFR Part 50, codifies the general policy that, in any civil matter in which the Department of Justice is representing the interests of the United States or its agencies, the Department will not enter into final settlement agreements or consent decrees that are subject to confidentiality provisions. This policy flows from the principle of the openness in government and is consistent with the Department's policy in judicial proceedings, and the Freedom of Information Act. 28 C.F.R. Part 50.23.

incorporated into Rule 7026 of the Federal Rules of Bankruptcy Procedure, which provides in

pertinent part:

“for good cause show, the court...may make an order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.: A party may move for such an order to protect trade secrets “or confidential research, development, or commercial information.” Fed.R.Civ.P. 26(c)(7). The burden is on the movant to show the necessity for a protective order, and courts generally require a particular and specific demonstration of fact as opposed to conclusory or speculative statements. General Dynamics Corp. V. Selb Mfg. Co., 481 F.2d 1204 (8th Cir.1973); Harris v. Amoco Production Co., 768 F.2d 559 (5th Cir.1985); Waelde v. Merck, Sharp & Dohme, 94 F.R.D. 27, 28 (E.D. Mich., 1981); Kiblen v. Retail Credit Co., 76 F.R.D. 402 (E.D.Wash.1977).

7. Instead, Fidelity and other interested parties argued that the protections which they sought were to prevent the Office of the UST, a component of the United States Department of Justice, from sharing the information between its office and the Department of Justice so as not to be used in the development of litigation in other districts, contrary to the case law cited to the Court by the UST.

8. Counsel for the UST argued that the rationale for the restriction, preventing the UST from sharing the information with its sister offices throughout the UST Program, was insufficient cause to enter a protective order under the Federal Rules of Bankruptcy Procedure. (See Transcript, p.7.) Counsel for the UST further expressed that the UST would protect the information from disclosure to third parties but to restrict the Department of Justice’s use of the information internally was anathema to the statutory role Congress vested in the UST. *Id* at 7.

9. Without making any findings of fact, this Court entered its Order restricting the UST’s use of the produced information until such further date that the Court could take up the issue of confidentiality. The sole basis of the ruling was for this Court to press forward with the

examination of a witness scheduled to be held on October 23, 2008.

10. The UST now finds herself, by virtue of the October 21, 2008 Order, virtually incapacitated in connection with this case.

11. By reason of the protective order of October 21, 2008, the UST may be limited in her ability to go forward as:

- (a) The UST cannot communicate with her superiors concerning:
 - i. the progress of her inquiry into this matter; and
 - ii. potential issues regarding Fidelity that may impact similar cases in other jurisdictions; and
 - iii. pursuing possible causes of action.
- (b) The UST is precluded from obtaining legal advice from the Office of General Counsel;
- (c) The UST may be precluded from responding to requests for information requested by Congress;
- (d) The UST may be precluded from performing her statutorily mandated duties, e.g., reporting possible crimes, as mandated by 28 U.S.C. § 586(a)(3)(F); and responding to requests for information pursuant to the Freedom of Information Act.
- (e) The UST is arguably precluded from efficiently and fairly communicating relevant information with 20 other USTs regarding an inquiry into the business practices of a mortgage servicer and a related entity that may impact bankruptcy cases across the nation.

I. *Good Cause Must Exist to Support the Issuance of a Protective Order.*

12. In *Pansy v. Borough of Stroudsburg*, 23 F3d 772 (3rdCir.1994) the Third Circuit held that a party must establish that “good cause” exists to support the entry of a protective order. The Court defined good cause as a showing that disclosure will work a clearly defined, serious, and specific injury to the party seeking closure. *Pansy* at 786 *citing* *Publicker Indus., Inc., v. Cohen*, 733 F2d 1059, 1071 (3rd Cir.1984). Indeed, broad allegations of harm do not support a finding of good cause. *Id.* Furthermore, the burden of establishing confidentiality falls on the party seeking the order and applies to each and every document sought to be protected. *Id.*

13. The Third Circuit has articulated several factors for consideration when determining whether good cause exists to support the issuance of a protective order: (1) whether disclosure will violate any privacy interests; (2) whether the information is being sought for a legitimate purpose or for an improper purpose; (3) whether disclosure of the information will cause a party embarrassment; (4) whether confidentiality is being sought over information important to public health and safety; (5) whether the sharing of information among litigants will promote fairness and efficiency; (6) whether a party benefitting from the order of confidentiality is a public entity or official; and (7) whether the case involves issues important to the public. *Pansy* at 787-791; *See also* *Glenmede Trust Co. v. Thompson*, 56 F3d 476, 483 (3rd Cir.1995).

14. Within one year after *Pansy*, the Third Circuit reaffirmed its strong disfavor of confidentiality orders. In *Glenmede Trust Co., supra.*, the court denied a mandamus request to overturn a trial court’s refusal to place certain documents under a confidentiality order. “Federal courts should not provide a shield to potential claims by entering broad protective orders that prevent public disclosure of relevant information. The sharing of information among current and

potential litigants is furthered by open proceedings.” *Id.* at 485 (emphasis added).

II. Application of Pansy Balancing Test Demonstrates that Good Cause did not Exist to support the issuance of the Protective Order, and That it Should be Vacated.

15. The UST does not assert that certain information regarding Fidelity’s business practices are not a trade secret or otherwise propriety commercial information. Rather, the UST asserts that Fidelity sought the protective order for an improper purpose, *to wit*: to prevent the UST from efficiently pursuing a national inquiry that would potentially impact Fidelity’s business operations. Indeed, whereas any trade secrets revealed by Fidelity in this case are unquestionably protected by the Trade Secrets Act, 18 U.S.C. § 1905 (imposing criminal penalties for the unauthorized disclosure of trade secrets by an officer or employee of the United States), there can be no proper basis for the instant order.

16. Improper purpose notwithstanding, Fidelity cannot maintain that the sharing of the information obtained through discovery in this case by the UST within the United States Trustee Program and the Department of Justice would not promote fairness and efficiency. Indeed, Fidelity is admittedly aware that the United States Trustee Program has undertaken a national inquiry into its business practices -as they may impact the integrity or efficiency of the bankruptcy system. Yet the terms of the present Protective Order would result in 21 separate inquiries into Fidelity by 21 USTs. Moreover, it is presently untenable for Fidelity to maintain that government oversight of financial institutions and their related entities is not an important and vital interest of the public.

Wherefore, the UST respectfully submits that an application of the Pansy balancing test

demonstrates that good cause does not exist for the issuance or maintenance of the instant Protective Order. Indeed, any trade secrets contained in documents produced during discovery in this case are fully protected by the Trade Secrets Act. Accordingly, the UST respectfully requests that the Court issue an Order amending its findings that good cause does not exist to enter a Protective Order and to vacate its Order of October 21, 2008.

Respectfully submitted,

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