UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Michael S. McManus
Bankruptcy Judge
Sacramento, California

December 23, 2013 at 10:00 a.m.

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1. 11-44723-A-7 ROBERT BROWN MOTION TO
12-2020 KY-2 SEAL
HAWKINS ET AL V. BROWN ET AL 11-15-13 [66]

Final Ruling: This motion was granted by the court previously. Docket 75.

2. 11-44723-A-7 ROBERT BROWN MOTION TO
12-2020 KY-3 APPROVE STIPULATION
HAWKINS ET AL V. BROWN ET AL 11-15-13 [69]

Tentative Ruling: The motion will be denied.

The plaintiffs, Philip and Linda Hawkins, are asking the court to approve a settlement (termed as a stipulation) with the defendant, Robert Brown, who is the debtor in the underlying bankruptcy case. The settlement resolves the claims in the instant adversary proceeding, including the 11 U.S.C. § 523(a)(2)(A) claim, as well as the pending state court action between the parties. The litigation between the parties arose from the defendant's default on a note he executed in connection with the purchase of business assets from the plaintiffs.

The motion will be denied.

No approval is necessary from this court to enter into a settlement that does not involve the bankruptcy estate or does not involve a compromise of a claim under 11 U.S.C. § 727.

Approval nonetheless sought, because the settlement requires the court to enter a judgment against the defendant that is nondischargeable under 11 U.S.C. § 523(a)(2)(A) that is entered under seal.

In other words, the parties are asking the court to enter a "secret" judgment against the defendant that cannot be reviewed by the public.

At least in this instance, the motion does not demonstrate - or even discuss - that the entry of a stipulated judgment against the defendant satisfies 11 U.S.C. § 107(b), which provides that: "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."

"We therefore hold that the party seeking non-disclosure must establish only that the matter is scandalous as that word is commonly understood."

Corporation Sole v. Various Tort Claimants (In re Roman Catholic Archbishop of Portland in Oregon), 661 F.3d 417, 432-33 (9th Cir. 2011). "Under ordinary usage . . . matter is 'scandalous' if it disgraceful, offensive, shameful and the like. There is no requirement that the material be either 'untrue' or 'potentially untrue' or that it be irrelevant or included within a court filing for 'an improper end.'" Roman Catholic Archbishop of Portland at 432.

Further, "[c]ommercial information has been defined as information which would cause 'an unfair advantage to competitors by providing them information as to the commercial operations of the debtor.'" Video Software Dealers Ass'n v. Orion Pictures Corp. (In re Orion Pictures Corp.), 21 F.3d 24, 27 (2nd Cir. 1994)(quoting Ad Hoc Protective Comm. for 1 01/2% Debenture Holders v. Itel Corp. (In re Itel Corp.), 17 B.R. 942, 944 (B.A.P. 9th Cir. 1982)).

"[D]isclosure of [the] information [must] reasonably be expected to cause the [debtor] entity commercial injury." In re Alterra Healthcare Corp., 353 B.R. 66, 75 (Bankr. D. Del. 2006) (quoting In re Northstar Energy, Inc., 315 B.R. 425, 429 (Bankr. E.D. Tex. 2004)). "[T]he court must find that information contained in the sealed [documents] 'is so critical to the operations of the entity seeking the protective order that its disclosure [would] unfairly benefit that entity's competitors.'" Alterra at 75-76 (quoting In re Barney's, Inc., 201 B.R. 703, 708-09 (Bankr. S.D.N.Y. 1996)).

A valid money judgment that is to be entered against the defendant in this proceeding would not be "scandalous or defamatory" for purposes of 11 U.S.C. § 107(b). This judgment would not be defamatory because, in general, statements made in judicial proceedings are absolutely privileged. Also, such a judgment would not be defamatory because it would not be untrue. By definition, the statements in the judgment would be true.

Further, a money judgment entered against the defendant would not be scandalous. Such a judgment would direct the defendant to pay a certain sum of money to the plaintiffs. The motion does not explain what is disgraceful, offensive, or shameful about such a judgment. The judgment would not contain findings of fact or conclusions of law. It would not contain any of the terms of the stipulation between the parties either. The mere fact that the judgment would direct the defendant to pay a sum of money would not be by itself disgraceful, offensive or shameful. If it were, every money judgment would be scandalous under 11 U.S.C. § 107(b).

The nature of the litigation would not make the judgment scandalous either. The fact that this court would enter a judgment pursuant to 11 U.S.C. § 523(a)(2)(A) does not mean that such judgment is automatically scandalous, for purposes of 11 U.S.C. § 107(b).

This court, as all other bankruptcy courts, routinely enters money judgments under 11 U.S.C. § 523(a)(2)(A). Entering a judgment under 11 U.S.C. § 523(a)(2)(A) by itself cannot make the judgment scandalous. Otherwise, all money judgments under 11 U.S.C. § 523(a)(2)(A) would be automatically scandalous for purposes of 11 U.S.C. § 107(b) and all defendants against whom such judgments are entered would be entitled to have those judgments sealed.

More, although 11 U.S.C. § 523(a)(2)(A) implies fraudulent conduct on the part of the party against whom a judgment under § 523(a)(2)(A) is entered, all parties against whom judgments are entered by a judicial tribunal engaged in some type of misconduct. After all, virtually all litigation implicates someone's misconduct.

The question is why the type of misconduct implicated by 11 U.S.C. § 523(a)(2)(A) should warrant a conclusion that a § 523(a)(2)(A) judgment would be disgraceful, offensive or shameful for the defendant. That question is not answered by the motion. The motion does not contain sufficient and admissible facts about the defendant warranting treatment of a § 523(a)(2)(A) judgment against him differently from a § 523(a)(2)(A) judgment against anyone else.

In addition, the court is perplexed about how the plaintiffs intend to enforce the stipulated judgment against the defendant, in the event the defendant defaults under the terms of the settlement agreement. For instance, the recordation of a judicial lien against real property of the defendant would require the recordation with the respective county recorder of an abstract of the judgment against the defendant. Such recordation cannot be in the public record if the judgment is sealed, however.

The court is not persuaded that 11 U.S.C. § 107(b) makes 11 U.S.C. § 523(a)(2)(A) money judgments scandalous under the circumstances of this case.

Finally, the entry of a money judgment against the defendant under 11 U.S.C. § 523(a)(2)(A) is not commercial information. There is no showing that the information in such judgment, *i.e.*, ordering the defendant to pay a sum of money pursuant to 11 U.S.C. § 523(a)(2)(A), "is so critical to the operations of the [defendant] that its disclosure [would] unfairly benefit that [defendant's] competitors." The defendant is an individual. There is no evidence or contention that he is involved in a business enterprise, much less evidence or argument that he has competitors.

As the court cannot seal the judgment to be entered against the defendant under the settlement agreement, the court cannot approve the settlement. Accordingly, the motion will be denied.

3. 13-22534-A-11 SUPPLY HARDWARE, INC. MOTION TO
WSS-5 APPROVE DISCLOSURE STATEMENT
10-30-13 [154]

Tentative Ruling: The motion will be denied.

The debtor asks the court to approve the debtor's disclosure statement filed on October 30, 2013. Docket 154.

The disclosure statement will not be approved because it does not have adequate information and the detail necessary that will permit creditors to make an informed decision regarding the plan. See 11 U.S.C. § 1125(a).

The debtor should correct the deficiencies identified in the opposition of National Cooperative Bank, except for the deficiencies pertaining to plan confirmation. Docket 163. The court will address such deficiencies at the time of plan confirmation. Now, the court is concerned only with the adequate disclosure of information in the disclosure statement. Also, as to the value of NC Bank's collateral, the value of such collateral should be established by a valuation motion. It is not established simply by stating the debtor's opinion of value into the plan and/or disclosure statement.

In addition to the deficiencies identified by NC Bank, the debtor should correct the following deficiencies:

(1) The disclosure statement should identify a deadline for the filing of

objections to proofs of claim.

(2) The disclosure statement should include a table of contents.

(3) The disclosure statement should explain why some of the debtor's property is owned by Tom Carpenter and why that property is deemed to be owned by the debtor and the debtor is paying for it. Also, it should disclose and explain in detail any financial or business relationship between the debtor and the debtor's insiders, including, without limitation, any lease or rental arrangement of the property owned by Mr. Carpenter and disclosure of information about the debt owed to Wells Fargo Bank (when incurred, who incurred it, what is the collateral, history of payments, etc.).

(4) The disclosure statement should explain that insiders are not allowed to vote on the plan.

(5) The disclosure statement should state whether and when the debtor will be seeking to strip off or strip down secured claims. It should identify the claims that will be stripped off or stripped down.

(6) The disclosure statement should explain why insiders are receiving payment on account of large unsecured claims in the form of "100% of the shares of the Debtor." It should state also what dividend the insider claimants are receiving under the plan, when they are granted ownership in 100% of the debtor. Docket 154 at 9.

(7)The disclosure statement should explain how granting ownership of the debtor to the insider claimants on account of their unsecured claims is fair and equitable when non-insider general unsecured claimants are receiving only a 4% dividend over 57-month period, starting only after the insider claimants are granted ownership in the debtor. How is it that paying insider claims before non-insider claims is fair and equitable?

(8) The disclosure statement should address whether paying the insider general unsecured claims, by granting ownership interest in the debtor, unfairly discriminates against the treatment of the non-insider general unsecured claims, given that those non-insider claims are receiving only a 4% dividend over a 57-month period, starting after the insider claims are paid. Docket 154 at 9.

(9) The disclosure statement should explain how the plan is dealing with the absolute priority rule.

(10) The debtor should proofread and correct typos and grammar errors in the disclosure statement.

(11) The disclosure statement should state whether and to what extent the debtor has been current on its post-petition payments to secured creditors. If the debtor has not been making post-petition payments to secured creditors, the disclosure statement should reflect how such arrears will be paid through the plan. The amounts for any such arrears should be stated as well.

(12) The disclosure statement should state whether the debtor has been complying with 11 U.S.C. § 365(d)(5).

(13) The debtor may want to redact bank account and other private information in the exhibits attached to the disclosure statement.

(14) The disclosure statement should disclose what are the potential avoidable transfers for the estate and take the value of such transfers into consideration in the calculations for the liquidation analysis. Docket 154, Ex. E.

(15) The disclosure statement should disclose any payments on account of a pre-petition debt made by the debtor post-petition.

(16) The disclosure statement should state why attorney's fees and depreciation expenses are not taken into account for the calculation of net profit projections.

(17) The disclosure statement should reference the exhibit(s) where financial projections are calculated. Docket 154 at 9-10.

Future versions of the disclosure statement should be accompanied by red/black-lined copies.

4.	12-35168-A-11 TTH-9	GOVERNMENT TECHNOLOGY SOLUTIONS, INC.	MOTION TO APPROVE COMPENSATION OF DEBTOR'S ATTORNEY (FEES $90,646.50, EXP. $540.74) 11-21-13 [189]

Final Ruling: The motion will be dismissed without prejudice.

The notice of hearing is not accurate. It states that written opposition need not be filed by the respondent. Instead, the notice advises the respondent to oppose the motion by appearing at the hearing and raising any opposition orally at the hearing. This is appropriate only for a motion set for hearing on less than 28 days of notice. See Local Bankruptcy Rule 9014-1(f)(2). However, because 28 days or more of notice of the hearing was given in this instance, Local Bankruptcy Rule 9014-1(f)(1) is applicable. It specifies that written opposition must be filed and served at least 14 days prior to the hearing. Local Bankruptcy Rule 9014-1(f)(1)(ii). The respondent was told not to file and serve written opposition even though this was necessary. Therefore, notice was materially deficient.

In short, if the movant gives 28 days or more of notice of the hearing, it does not have the option of pretending the motion has been set for hearing on less than 28 days of notice and dispensing with the court's requirement that written opposition be filed.

5.	13-34541-A-11	6056 SYCAMORE TERRACE	STATUS CONFERENCELLC11-14-13 [1]

Tentative Ruling: None.