IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MARYLAND
**(Baltimore Division)**

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| In re<br><br>TMST, INC., f/k/a THORNBURG MORTGAGE, INC., *et al.*<br><br>Debtors | Bankruptcy Case: 09-17787-DWK<br><br>Chapter 11 |

# THE UNITED STATES TRUSTEE'S OPPOSITION TO:

**"[CHAPTER 11] TRUSTEE'S MOTION FOR LEAVE (I) TO PUBLICLY FILE REDACTED FORM OF SETTLEMENT AGREEMENT BETWEEN, AMONG OTHERS, THE TRUSTEE AND COUNTRYWIDE HOME LOANS, INC. AND BANK OF AMERICA CORPORATION, AND (II) TO FILE UNDER SEAL COMPLETE FORM OF SETTLEMENT AGREEMENT AND EXHIBITS THERETO, WITH RESPECT TO THE TRUSTEE'S MOTION FOR APPROVAL OF THE SETTLEMENT AGREEMENT"**

The United States Trustee for Region Four, which includes the District of Maryland, files this Opposition to the Chapter 11 Trustee's "Motion For Leave (I) To Publicly File Redacted Form Of Settlement Agreement Between, Among Others, The Trustee And Countrywide Home Loans, Inc. And Bank Of America Corporation, And (II) To File Under Seal Complete Form Of Settlement Agreement And Exhibits Thereto, With Respect To The Trustee's Motion For Approval Of The Settlement Agreement" (the "Motion to Seal").

## BACKGROUND

According to the Motion to Seal, the Chapter 11 Trustee, along with other plaintiffs, entered into a Settlement Agreement with the following parties (hereinafter referred to as "Defendants"): Countrywide Financial Corporation, Countrywide Home Loans, Inc., Bank of America, N.A. and Bank of America Corporation. According to the Chapter 11 Trustee, the Settlement Agreement resolved litigation between these parties that is vaguely described in paragraph 6 of the Motion to Seal.

According to the Chapter 11 Trustee, the Defendants requested that the Settlement Agreement include a confidentiality provision that prohibits the parties, as well as their various representatives from disclosing "the terms set forth in [the] Settlement Agreement, including the amounts paid by Country wide to the Trust pursuant to this Settlement Agreement."

The Chapter 11 Trustee also represented that the Defendants requested that he omit the following information from any document he publicly files with the Court (including, apparently, any motion to approve the Settlement Agreement):

(i) the specific mortgage loans at issue;

(ii) the amount of consideration that the Defendants will pay under the Settlement Agreement;

(iii) the reference in ¶¶2-3 of the Settlement Agreement to the number of loans being repurchased or for which a "make whole" payment will be made.

Thus, apparently acting on behalf of the Defendants, the Chapter 11 Trustee seeks the extraordinary authority to file a motion to approve a settlement agreement under seal,

thereby unfairly precluding creditors and other interested parties from analyzing the Settlement Agreement to determine whether or not to object to its approval.

## LEGAL ARGUMENT

### A. Sealing the Settlement Agreement Would Be Contrary to Law and Violate The Public's Congressionally Mandated Right to Monitor Court Actions.

Section 107(a) of the Bankruptcy Code provides that "*paper[s] filed in a case under this title ... are public records* and open to examination by an entity at a reasonable time without charge." (Emphasis added.) Thus, an order such as one sought by Defendants, that runs contrary to the express dictates of Congress, is an extraordinary remedy to be granted in only the most limited, exceptional and compelling circumstances. *In re Analytical Sys., Inc.*, 83 B.R. 833, 835 (Bankr. N.D. Ga. 1987); *In re EPIC Assoc. V*, 54 B.R. 445, 448 (Bankr. E.D. Va. 1985). Indeed, it is well-settled that settlement agreements are not generally the type of document that is subject to protection from public scrutiny under § 107. *See, e.g., Getlzer v. Andersen Worldwide, S.C.*, Case No. 05-3339, 2007 WL 273526 at 3 (S.D.N.Y. 2007); *In re Alterrra Healthcare Corp.*, 353 B.R. 66, 77 (Bankr. D. Del. 2006); *Analytical Sys.*, 83 B.R. at 836; *see also In re Oldco M Corp.*, 466 B.R. 234, 238 (Bankr. S.D.N.Y. 2012) ("[s]ettlements are entitled to no greater protection than any other request for relief from bankruptcy courts.")

The Defendants, through the Chapter 11 Trustee, rely upon § 107(b) of the Bankruptcy Code as the basis for this extraordinary relief. Section 107 requires the Court to protect any "trade secret or confidential research, development or commercial

information." Despite the fact that it is Defendants' burden to demonstrate the information they seek to hide from public scrutiny meets one of the three categories set forth in § 107(b), *see In re Oldco M Corp.*, 466 B.R. 234, 237 (Bankr. S.D.N.Y. 2012), the Motion to Seal lacks any explanation as to how any of the information Defendants seek to protect constitutes a "trade secret or confidential research, development or commercial information." The reason, of course, is because none of the information Defendants seek to protect falls into those criteria. To the contrary, the information Defendants seek to protect is (i) the terms of an agreement to settle litigation, (ii) the loans at issue in the settlement agreement and (iii) the amounts Defendants are paying to settle the litigation. None of this constitutes a "trade secret or confidential research, development or commercial information."

Defendants (through the Chapter 11 Trustee) do not indicate which criteria of § 107(b) they believe the Settlement Agreement constitutes, but presumably it is the commercial information prong because clearly the information is not a "trade secret" or any "research" or "development." *See Geltzer*, 2007 WL 273526 at *3 (holding that the trade secret, research and development prongs of § 107(b) "manifestly do not apply" to agreements settling litigation). However, the information is clearly not "commercial information" as defined by § 107(b) either.

"Commercial information is information which would result in 'an unfair advantage to competitors by providing them information as to the commercial operations of the [party]." *Alterra Healthcare*, 353 B.R. at 75 (quoting *In re Orion Pictures Corp.*, 21 F.3d 24, 27-28 (2d Cir. 1994). Moreover, to constitute protectable commercial

information, the information must be "so critical to the operations of the entity seeking the protective order that its disclosure will unfairly benefit the entity's competitors." *Id.* at 76 (quoting *In re Barney's, Inc.*, 201 B.R. 703, 708-09 (Bankr. S.D.N.Y. 1996)). In order to be protected, disclosure of the information must be reasonably expected to cause the proponent of secrecy commercial injury. *Id.*. at 75. Mere embarrassment or harm to the company's reputation due to settling litigation is not such an injury. *Analytical Sys.*, 83 B.R. at 836.

The Defendants are in the business of banking and mortgage lending. The terms of a settlement agreement have absolutely nothing to do with Defendants' business.

A review of cases addressing these types of requests in the context of settlement agreements makes clear that Defendants' request is utterly lacking in merit. In *Geltzer v. Andersen Worldwide, S.C.*, *supra*, for example, a Chapter 7 trustee brought a malpractice claim against an accounting firm. The trustee and the accounting firm settled the claim but, when requesting the court approve the settlement, the parties sought to keep the amount of the settlement secret from the public.[1]

In denying the request to place the settlement agreement under seal, the Court first noted that this is an "extraordinary request," contrary to the "presumption of access" to judicial proceedings and to documents over which the court is requested to "invoke its powers." 2007 WL. 273526 at *2. As the Court recognized, when it invokes its powers, it should do so subject to public accountability and scrutiny - "an essential feature of

[1] The parties offered to allow the Court to review the amount of the settlement "*in camera* and outside the presence of any creditors or other non-parties to the [Settlement Agreement]." 2007 WL 273526 at *2.

democratic control." *Id.* When the Court is asked to issue rulings based on facts hidden from the public, the "public can hardly make an independent assessment of the facts underlying a judicial decision, or assess the judicial impartiality or bias." *Id.*

The Court then determined that attempting to characterize the terms of a settlement agreement as confidential commercial information "constitutes a rather remarkable and untenable redefinition of 'commerce.'" *Id.* Commercial information constitutes data such as names of clients where disclosure might allow a competitor to solicit and recruit them away. *Id.* However:

> The terms of the instant settlement have to do only with the instant litigation, and have nothing to do with the competitive business operations of the debtor or of Andersen, in any normal sense of the words. If the Trustee's definition were accepted, then not only would any paper filed by Andersen in the course of litigation likely constitute secret "commercial information," but secrecy under this exception would also extend to any of countless cases involving a business entity actively defending civil suits for damages.

*Id.*

Like the Defendants here, the parties in *Geltzer* failed to cite any case in which the size of a settlement was kept confidential as "commercial information" and the Court was unable to find one either. *Id.* The United States Trustee is similarly unaware of any case in which a court has found the amount of a settlement constitutes "commercial information." To the contrary, as the *Geltzer* Court recognized, the amount of a settlement is a "critical factor in the ability of the public to monitor the appropriateness of the Court's decision" in approving or disapproving the settlement agreement. Thus:

> The sealing request here goes to the very core of the "constitutionally embedded presumption of openness in judicial proceedings." Only the most "compelling circumstances" could overcome the strong presumption in favor of public availability of such a document.

*Id*. at *4.

Similarly, in *Alterra Healthcare*, *supra*, the argument that the terms of a settlement agreement constituted confidential "commercial information" was rejected:

> The Court concludes that the information in the settlements is not confidential commercial information. It does not relate to the Reorganized Debtor's commercial operations nor does it unfairly advantage competitors.

353 B.R. at 76.

The parties then tried to argue that disclosure of the amounts paid in settlement might unfairly prejudice the parties in subsequent litigation. The Court remained unpersuaded:

> The Reorganized Debtor argues that if the unsettled claimants are privy to the settlement amounts, the claimants will use this information as leverage to force higher settlements in their respective cases. An unfair advantage to a tort claimant (creditor) of a debtor, however, does not create an unfair advantage to its market competitors.

*Id.*

## B. Any Personally Identifiable Information (If Any Exists) Should Be Kept Confidential.

One of the items Defendants have requested be kept secret is "the specific mortgage loans at issue (set forth at Schedule A and Schedule B to the Settlement

Agreement)." The United States Trustee has not seen Schedule A and Schedule B, so she does not know the manner in which the loans are identified on those schedules. Because the Defendants have not argued that these schedules should be kept secret because they contain personally identifiable information that might subject individuals to undue risk of identity theft pursuant to 11 U.S.C. § 707(c), the United States Trustee assumes those schedules do not contain any such personally identifiable information.

However, to the extent there is personally identifiable information contained in these schedules or elsewhere in the Settlement Agreement, the United States Trustee does believe that that information should be redacted. Again, however, based on the information available to the United States Trustee at this time, it does not appear that this is an issue.

## CONCLUSION

Defendants seek extraordinary relief that is contrary to the basic principles of the American judicial system. Yet, they have provided no factual or legal basis that would allow the Court to grant such extraordinary relief. Thus, the Court should deny the Motion to Seal.

Respectfully Submitted,

Dated: February 22, 2013

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United States Trustee, Region Four

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 22nd day of February 2013, a copy of the foregoing opposition was filed electronically in the United States Bankruptcy Court for the District of Maryland and, according to the Court's CM/ECF system, the following persons received electronic service thereof:

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