(Cite as: 1998 WL 800110 (Bankr.D.Vt.))

In re Alan C. POWELL and Beth A. Powell, Debtors.

G. Glinka, Esq., Trustee

v.

Howard Bank, N.A. Defendant

No. 97-10274, 97-1085.

United States Bankruptcy Court. D. Vermont.

Oct. 19, 1998.

L.Chalidze, Esq., Of counsel to Miller & Faignant, PC, for Gleb Glinka, Esq., Chapter 7 Trustee for the Estate of Alan and Beth Powell, Plaintiff, ("Trustee").

J.F. O'Neill, O'Neill, Crawford, & Green, for Howard Bank, N.A., Defendant ("Bank").

MEMORANDUM OF DECISION GRANTING IN PART AND DENYING IN PART MOTION FOR

PROTECTIVE ORDER FOR CERTAIN DOCUMENTS

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MEMORANDUM OF DECISION ON MOTION FOR A PROTECTIVE ORDER FOR CERTAIN DOCUMENTS

***1** Bank seeks a protective order prohibiting Trustee from disclosing information contained in its Commercial Banking Policy Manual and audits or reviews performed by Bank's auditors. Bank's Motion For A Protective Order For Certain Documents is granted in part, denied in part.

FACTUAL HISTORY

On June 23, 1998 we ruled from the bench on Trustee's Motion to Compel, granting it in part and denying it in part. Bank has provided the sought after materials, but now seeks a

protective order prohibiting dissemination of materials contained in its Commercial Banking Policy Manual and any audits or reviews of its credit administration and collection practices. Bank's Motion For A Protective Order As To Certain Documents is granted in part and denied in part.

DISCUSSION

In the Second Circuit, the public is afforded access to discovery materials "whenever possible". Westchester Radiological Association P.C., et al, v. Blue Cross/Blue Shield Of Greater New York, Inc., 138 F.R.D. 33, 36 (S.D.N.Y.1991) (citation omitted). "The Second Circuit assumes that discovery cannot be shielded from public view without a showing of good cause." Id., (citing In re Agent Orange Product Liability Litigation, 821 F.2d 139, 147-148 (2d Cir.1987)). Under Federal Rule of Evidence 26(c), the court should look to the facts of the individual case and use its discretion in deciding whether or not to allow disclosure. Gelb v. American Telephone and Telegraph Company, 813 F.Supp. 1022 1034 (S.D.N.Y.1993).

Bank asserts that public disclosure of its audit and review materials would have a "chilling effect" on the candid nature of the audits between Bank and its auditors. We do not agree. The candid relationship's foundation between Bank and its auditors rests upon sound business sense, not upon an evidentiary privilege. "We cooperate fully with Peat Marwick, not only because it makes good business sense, but because we want them to find any deficiencies or issues that exist in our system so that we can fully protect our depositors, our customers, and our shareholders." Affidavit of Richard J. Fitzpatrick, 2. We don't think that Bank will stop being candid (thereby acting contrary to its own "business sense") merely because the information is disclosed to the public, because such candidness is admittedly important to Bank's commercial success.

Bank claims it is likely the public will misconstrue the reports, undermining confidence in its business. "In some of the documents produced, our auditors use language such as 'could lead to'. This language, while standard bank audit practice, may lead some not familiar with bank practices to perceive a problem when in reality there is none." Bank's attitude towards the public is unjustifiably condescending. An informed public, rather than one shielded from the truth, can make its own informed decisions. It is not our job to put a positive spin on Bank's operations by shielding them from public disclosure. Such activities should be left for public relations firms, not courts of law. Further, it is mere conjecture that disclosing the reports will have any effect on the public's perception of the Bank. "(T)he party seeking a protective order cannot rely solely on conclusory statements...it must show specifically that it will indeed be harmed by disclosure." In Re Texaco Inc., 84 B.R. 14, 17 (S.D.N.Y.1988) (citations omitted). We therefore deny Bank's Motion for a Protective Order as to Bank's audits and reports.

***2** Bank also claims that its Banking Policy Manual should not be subject to public disclosure. Unlike its argument regarding the audits and reports, Bank's argument against the disclosure of its Banking Policy Manual relies on specific instances of concrete harm which are likely to result if public disclosure were allowed.

The Policy Manual "is intended to guide all of the commercial banking activities of the Banknorth Group banks..." Affidavit of Charles S. Cherhoniak 1-2. Accordingly, the manual sets out specific criteria for loans, pricing information, and credit limits, among others. Bank contends that this information could be used by another bank in order to lure customers with comparisons of policies and prices.

Based on the facts of this case, we agree with Bank. "(D)efendants' assertion that its competitors who do not now have this information could use it to do competitive injury to the defendants is, on the facts of this case, a sufficient basis to grant defendant's motion to seal at least at this stage of this litigation." Gelb v. American Telephone and Telegraph Co., 813 F. Supp. 1022, 1034 (1993). A competitor, using the pricing and loan information supplied in this manual, could easily contrast its own policies to that of potential customers of Bank. Bank, however, would have no such information regarding its competitors, putting it at a competitive disadvantage. Trustee counters that Bank has not made out a proper case for trade secret protection, but we do not think this is dispositive of the issue before us. [FN1] "As defendants recognize, the exhibits it desires to keep confidential are not 'trade secrets' in the traditional sense, but their potential to do commercial harm and the fact that the information...was quite arguably a part of d efendant(s')...efforts to gain competitive advantage are dispositive to the Court's decision to seal the exhibits..." Gelb v. American Telephone & Telegraph Co., 813 F.Supp. 1022, 1034 (1993). The issue is not whether the materials fall under the topic of "trade secrets", the issue is whether undue harm is likely to occur. Using our discretion and the facts of this case as we presently know them, we find that disclosing this information is likely to cause undue harm to Bank. We grant the Motion For A Protective Order as to the Banking Policy Manual. Our grant is without prejudice if additional facts show our decision to have been improvident.

> FN1. We also note that Federal Rule of Evidence 26(c) explicitly allows for a protective order of trade secrets or commercial information. Therefore, it appears that the drafters of the rule saw a distinction between the two, and allowed for protective orders in both circumstances.

CONCLUSION

For the aforementioned reasons, Defendant's Motion for a Protective Order is granted in part, denied in part. Counsel for Bank to settle an order within Five (5) days.

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