

Filed at 11 O'clock & 44 min.
A.M.

Date: 3-23-90

IN THE UNITED STATES BANKRUPTCY

FOR THE

SOUTHERN DISTRICT OF GEORGIA
Savannah Division

IN RE:)	Chapter 11 Case
)	Number <u>85-40639</u>
DONALD E. AUSTIN)	
)	
Debtor-in-Possession)	

ORDER

The United States Trustee filed a motion to convert this Chapter 11 proceeding to a proceeding under Chapter 7 of the Bankruptcy Code. Subsequently, debtor-in-possession, Donald E. Austin (hereinafter referred to as "Debtor"), filed a notice to take the deposition of the United States Trustee by and through an individual designated to testify on behalf of the United States Trustee. The debtor requested the testimony of the United States Trustee on eleven (11) topics¹ and requested four (4) categories

¹The debtor requested testimony of the United States Trustee on the following topics:

1. The grounds or bases upon which the United States Trustee relies in his Motion for Order Converting Debtor's Chapter 11 Case to Chapter 7;
2. Receipt and handling of the Debtor-in-Possession's Operating Reports;
3. The Debtor-in-Possession's income tax liability and the status of his income tax returns from 1985 to the present;
4. The Debtor's and/or the Debtor-in-Possession's federal post

of documents² from the United States Trustee. The United States

Trustee, by and through counsel, moved to quash the debtor's

petition taxes in

respect to Rose Marine, Inc., Mercury Appliances and Electronics, Inc. and Diamond Manufacturing Company, Inc.;

5. The status and amounts of quarterly fees due the United States Trustee from the Debtor-in-Possession for the second and third quarters 1989;

6. Any alleged continuing loss to or diminutions of the estate of the Debtor;

7. Any absence of a reasonable likelihood of rehabilitation of the Debtor;

8. Any inability of the Debtor or Debtor-in-possession to effectuate a plan or reorganization;

9. Any unreasonable delay by the Debtor that is allegedly prejudicial to creditors;

10. Any non-payment by Debtor of any fees or charges required under Chapter 123 of Title 28, United States Code;

11. Any and all other grounds upon which the United States Trustee seeks, or will seek, conversion of the Debtor's Chapter 11 case to Chapter 7.

²The debtor requested documents in the following categories:

(a) Any and all Operating Reports filed or attempted to be filed by the Debtor-in-Possession;

(b) Any and all documents relating to the Debtor or Debtor-in-Possession's income or employer tax liabilities, or the returns therefor;

(c) Any and all documents relating to quarterly fees paid by or due from the Debtor-in-Possession to the United States Trustee;

(d) Any and all other memoranda, correspondence, or documents, in whatever form, relating to the grounds upon which the United States Trustee bases his Motion to Convert, or which the United States Trustee intends to introduce at the hearing on said motion.

discovery efforts and for a protective order.

The United States Trustee may raise and may appear and be heard on any issue in any case or proceeding under title 11 of the United States Code. 11 U.S.C. §307. The United States Trustee, therefore, would be a party to a proceeding on an issue raised by the United States Trustee. A motion to convert or dismiss a case under Title 11 would be a contested matter. Bankruptcy Rule 9014. The United States Trustee is, therefore, a party to this motion to convert the debtor's Chapter 11 case to a case under Chapter 7.

The United States Trustee contends that Bankruptcy Rule 7004(b)(4) and (5) requires that service on the United States, or its agencies and officers, must be perfected by service on the United States Attorney General, the United States Attorney for the district in which the action is brought, and on the officer or agency involved in the action. While the United States Trustee is correct about the service requirements of Rule 7004, the rule does not apply to service of discovery requests. The plain language of the rule provides stringent guidelines for the service of process and summons in a newly filed action, not for service of a discovery request. Bankruptcy Rule 7030 which governs depositions upon oral examinations only requires that all parties to an action be given reasonable notice of the deposition. The United States Trustee received such notification.

The United States Department of Justice has promulgated certain regulations which must be followed by its employees when a

request for testimony or documents is made. 28 C.F.R. 16.21 et seq. The rules require the attorney in the Department of Justice who is in charge of a case in which the United States is a party

to reveal and furnish to any person . . . either during or preparatory to a proceeding, such testimony, and relevant unclassified material, documents, or information secured by any attorney, or investigator of the Department of Justice, as such attorney shall deem necessary or desirable to the discharge of the attorney's official duties: Provided, such an attorney shall consider, with respect to any disclosure, the factors set forth in 16.26(a) of this part: and further provided, an attorney shall not reveal or furnish any material, documents, testimony, or information when; in the attorney's judgment, any of the factors specified in 16.26(b) exists, without the express prior approval by the assistant Attorney General in charge of the division responsible for the case or proceeding, the Director of the Executive Office For the United States Trustee (hereinafter referred to as "the EOUST"), or such person's designee.

28 C.F.R. 16.23(a).

The trustee has made no contention or showing that the matters set out in section 16.26(b)³ on which no disclosure may be made are

³28 C.F.R. 16.26(b) provides:

(b) Among the demands in response to which disclosure will not be made by any Department official are those demands with respect to which any of the following factors exist:

(b) (1) Disclosure would violate a statute, such as the income tax laws, 26 U.S.C. 6103 and 7213, or a rule of procedure, such as the grand jury secrecy rule, F.R.Cr.P., Rule 6(e),

(b) (2) Disclosure would violate a specific regulation,

(b) (3) Disclosure would reveal classified information, unless appropriately declassified by the originating agency,

present in the testimony or documents the debtor seeks, and therefore, the prior approval of an assistant Attorney General or of the director of the EOUST is not required.

The United States Trustee, however, should consider the two factors set out in section 16.26(a) when deciding whether to provide the testimony and documents the debtor seeks. First, the United States Trustee should determine if such disclosure is appropriate under the rules of procedure governing the case. The United States Trustee has cited no procedural rule which would bar disclosure of the testimony or documents requested by the debtor,

and the court knows of no such rule.

Secondly, the United States Trustee should determine whether the disclosure sought is appropriate under the relevant substantive law concerning privilege. The United States Trustee contends that the testimony and documents sought by the debtor are

(b) (4) Disclosure would reveal a confidential source or informant, unless the investigative agency and the source or informant have no objection,

(b) (5) Disclosure would reveal investigatory records compiled for law enforcement purposes, and would interfere with enforcement proceedings or disclose investigative techniques and procedures the effectiveness of which would thereby be impaired,

(b) (6) Disclosure would improperly reveal trade secrets without the owner's consent.

protected by the deliberative process privilege or executive privilege. This privilege is designed to prevent injury to the quality of agency decisions by relieving fears that any written comments made during the deliberative and decision-making process would be made public. N.L.R.B. v. Sears Roebuck & Co., 421 U.S. 191, 95 S.Ct. 1504, L.E. 2d (1975). In order to qualify for such a privilege, the testimony or documents sought must relate to comments or work done before any agency makes a decision and must have been made during the deliberative process. *Id*; Formaldehyde Institute v. Dept. of Health and Human Services, 889 F.2d 1118 (D.C. Cir. 1989). The debtor, however, seeks no predecisional memoranda or correspondence, but only memoranda and correspondence on which the United States Trustee bases the motion to convert the debtor's Chapter 11 case, not intra-agency memoranda or correspondence between agency officials deliberating whether to bring such a motion to dismiss.

Correspondence and memoranda prepared by an attorney for the United States Trustee in contemplation of litigation which set forth the attorney's theory of the case and his litigation strategy

would be protected from disclosure by the attorney work-product rule just as such material would be protected if the privilege were applied to private parties. NLRB, supra. The debtor, however, appears to seek no such testimony or documents from the United States Trustee which set forth the attorney's theory of

the case or his litigation strategy. The debtor's notice merely requests that the trustee provide the debtor with information which will be introduced at the hearing in support of the motion to convert. The debtor is entitled to have all relevant information disclosed unless such information is protected by privilege,⁴ and the debtor does not appear to seek any testimony or information which would be protected by the privileges set out by the United States Trustee. The debtor has provided the United States Trustee with a statement setting forth a summary of the testimony sought as required by 28 C.F.R. §16.23(a). No basis exists on which to deny the debtor's request to depose the United States Trustee.

For the above reasons, it is hereby ORDERED that the motion of the United States Trustee to Quash and/or for protective order to stay discovery is denied.

JOHN S. DALIS
UNITED STATES BANKRUPTCY JUDGE

⁴The United States Supreme Court has noted,

"Modern instruments of discovery serve a useful purpose, as we noted in Hickman v. Taylor. They together with pretrial procedures make a trial less a game of blind man's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent."

United States v. Proctor & Gamble Co., 356 U.S. 677, 78 S.Ct. 983, 2 L.E. 2d 1077 (1958).

Dated at Augusta, Georgia
this 23rd day of March, 1990.