

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
FORT LAUDERDALE

In re:	:	
	:	Case No.: 04-23562-BKC-JKO
GLOBAL VENDING, INC., et al.,	:	
	:	Chapter 7
Debtors.	:	
_____	:	
	:	
LESLIE S. OSBORNE, Trustee,	:	
	:	
Plaintiff,	:	
	:	
v.	:	Adv. Pro. No.: 05-2417-JKO
	:	
AMERICAN EXPRESS TRAVEL RELATED	:	
SERVICES COMPANY, INC.,	:	
	:	
Defendant.	:	
_____	:	

**ORDER DENYING TRUSTEE’S *EX PARTE* MOTION SEEKING
AUTHORIZATION TO FILE SETTLEMENT AGREEMENT UNDER SEAL,
GRANTING OTHER RELIEF, AND SETTING HEARING**

This adversary proceeding came on for hearing on May 15, 2006, on the Trustee’s *ex parte* motion (the “Motion”) for order authorizing Trustee to file under seal settlement agreement with American Express Travel Related Services Company, Inc. (“AmEx”) [CP 31], which was filed by the

Trustee at the same time as the Plaintiff's motion (the "Compromise Motion") to approve compromise of controversy with AmEx [CP 30].¹ In the Motion, the Trustee seeks authorization to file the settlement agreement between the Trustee and AmEx under seal rather than as a publicly-available filing. The complaint in this adversary proceeding seeks to recover allegedly avoidable transfers which exceed \$900,000 in amount.

The right of public access to judicial records is well established in American jurisprudence as a matter of common law. *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597-599 (1978). That right is subject at common law to restrictions which may be imposed by a court to prevent access "where court files might have become a vehicle for improper purposes." *Id.* At 598.

The right of public access to bankruptcy court records and files is codified in 11 U.S.C. § 107, which provides (in the version applicable to this case, which was filed before the adoption of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005):

- (a) Except as provided in subsection (b) of this section, a paper filed in a case under this title and the dockets of a bankruptcy court are public records and open to examination by an entity at reasonable times without charge.
- (b) 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.

¹The Compromise Motion was filed only in this adversary proceeding and not in the main case, and was served only on the Trustee, his counsel, counsel for AmEx, and the Office of the United States Trustee. This is of course inadequate service on parties in interest as required by Fed.R.Bankr.P. 9019(a).

Although the Motion is somewhat vague, counsel for the Trustee and AmEx told the Court at oral argument that AmEx insists upon confidentiality because the company is a significant target for the recovery of preferential transfers made by debtors in the run-up to their bankruptcy filing. AmEx claims that the amount it pays in the settlement of such actions is confidential business information, and that disclosing its settlement with the Trustee here will harm its business. Indeed, AmEx has told the Trustee and the Court that it will not go forward with the settlement if the amount it pays is publicly disclosed. The Trustee, meanwhile, simply advises the Court that the amount involved would be significant to the case, and that the Trustee has no choice but to accede to AmEx's demands.

When asked by the Court, counsel for AmEx could not point to a single case in which a bankruptcy court had granted such a motion holding that the terms of a settlement between a trustee and an avoidance action defendant could be sealed, let alone one in which AmEx had obtained the relief it seeks to obtain here. AmEx has instead referred the Court to three cases which it suggests support the requested relief. None of the cases is directly on point, although they provide a helpful framework for the analysis of the Trustee's Motion.

In *Video Software Dealers Association v. Orion Pictures Corp.*, 21 F.3d 24 (2d Cir. 1994), the court permitted the debtor Orion Pictures to seal all documents relating to its promotional agreement with McDonald's Corporation involving the distribution of video cassettes of the movie *Dances with Wolves*. The plaintiff/appellant's members had bought some 500,000 copies of the movie from Orion Pictures at \$72 per copy, \$64 more per copy than McDonald's was selling them for as part of its promotion agreement with the debtor. Understandably miffed, the video dealers sought full access to the documents between the debtor and McDonald's. The bankruptcy court reviewed the documents *in camera* and determined that they contained confidential commercial information. The District Court and Second Circuit affirmed. The Second Circuit defined "confidential commercial information" as

information which would cause “an unfair advantage to competitors by providing them with information as to the commercial operations of the debtor,” quoting *Ad Hoc Protective Committee for 10 ½% Debenture Holders v. Intel Corp.*, 17 B.R. 942, 944 (9th Cir. BAP 1982). The Bankruptcy Court in *Orion Pictures* found that the licensing agreement and other documents involving McDonald’s “renders very likely a direct and adverse impairment to Orion’s ability to negotiate favorable promotional agreements * * *, thereby giving Orion’s competitors an unfair advantage.” The Second Circuit concluded that these findings were sufficient to overcome the strong presumption in 11 U.S.C. § 107(a) in favor of open records, and that confidential commercial information did not need to rise to the level of a trade secret to be entitled to protection.

Similarly, the court in *Bergen Brunswig Corporation v. IVAX Corporation*, 1998 WL 113976 (S.D. N.Y. 1998) found that the disclosure of an unconsummated merger agreement and related documents to plaintiffs in an unrelated Florida class action brought against IVAX would make public IVAX’s plans relating to possible future merger or acquisition targets, thereby giving its competitors an unfair business advantage. In so finding, the district court held that the common-law presumption in favor of open court records had been overcome and that the documents should be kept under seal.

Finally, AmEx relies upon *In re Hemple*, 295 B.R. 200 (Bankr. D. Vt. 2003), which provides an excellent discussion of factors which are relevant to a bankruptcy court’s analysis of whether a settlement between a chapter 7 trustee and state court tort defendants should be kept confidential. The *Hemple* court started with the basic proposition that § 107 requires that, “absent compelling circumstances all documents filed in bankruptcy cases should be available to the public,” subject to the consideration of various relevant factors, depending on the specifics of the case. The *Hemple* factors are the following:

(1) the necessity of the settlement to the viability of the bankruptcy case; (2) whether the confidentiality provision is truly essential to the settlement, *i.e.*, whether the settlement would be withdrawn if the confidential provision were not honored; (3) whether the creditors have been notified of the request for approval of the settlement without disclosure of the amount or terms of settlement, and, if so, whether any objection was interposed; (4) if there has been an objection to the request to file the agreement under seal, whether the objection demonstrates harm to the public's need to know; (5) whether the creditors will clearly benefit from the settlement notwithstanding a lack of access to the specific terms of that settlement; (6) whether the debtor will suffer irreparable harm if the settlement agreement is not filed under seal; (7) whether the parties would be able to keep the terms of the settlement confidential in the absence of a bankruptcy filing; (8) whose interests are being protected by allowing the filing of the settlement agreement under seal and whether there is any negative impact either on the estate or in the treatment of other interested parties in the case; (9) what is the likelihood of other parties actually obtaining the details of the agreement if it is not filed under seal; (10) whether the document needs to be kept under seal permanently or some shorter time period could suffice.

Because the trustee's motion in *Hemple* provided no demonstration that any of these factors were present, the court denied the motion without prejudice to refile the motion "with specific assertions addressing the above referenced factors, as well as any other factors which the parties believe are relevant in this instance."

AmEx advised the Court that the settlement would be withdrawn if the confidentiality it seeks were not honored, the second of the *Hemple* factors. This Court finds the threat to withdraw from a settlement if its terms are made public to be more akin to the playing of a game of chicken by adolescents than it is to the resolution of a commercial dispute by a sophisticated business entity. It is exceedingly distasteful. Moreover, the Court is hard pressed to understand how the amount AmEx would pay under the settlement of the avoidance action here would shed light on "confidential commercial information" or give its competitors an unfair business advantage. On its face and as argued at the hearing on May 15, 2006, the Motion fails to persuade the Court that the settlement's terms should be kept sealed.

The Motion does not satisfy the exceptions to the general rule that all documents in bankruptcy cases are to be available to the public. Accordingly, the Motion will be denied. But because the Motion does not address the *Hemple* factors in a meaningful way and because no parties in interest were given notice of the hearing on the Motion, the denial will be without prejudice to the filing in the main case of an amended Motion which addresses the *Hemple* factors and any other factors which the parties believe are relevant here, and which gives parties in interest an opportunity to comment on the requested relief. Because the relief sought by the Trustee has implications for the public's right to access to the records of this Court, the Court requests the Office of the United States Trustee to participate in the hearing on an amended Motion. Accordingly, it is

ORDERED that the Motion is denied, without prejudice to the Trustee's right to file an amended Motion consistent with the provisions hereof within ten days of the entry of this Order. Any such amended Motion shall be filed in the main case, shall be served on the revised service list in this case, shall attach the settlement agreement between the Trustee and AmEx under seal, and shall be filed on negative notice pursuant to the provisions of Local Rule 9013-1(D). The Court will hold a hearing on any such amended Motion on **July 10, 2006** at 11:00 a.m. in Courtroom 308, United States Courthouse, 299 E. Broward Blvd., Ft. Lauderdale, FL 33301.

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Copy provided to

Phillip M. Hudson, III, Esquire

Mr. Hudson is instructed to serve a copy of this Order on the revised service list in the main case and to file a certificate of service.

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