UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, et al., *Plaintiffs* v. AMERICAN EXPRESS CO., et al., *Defendants*	No. 10-CV-04496 (NGG) (RER)

MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION REGARDING PROCEDURES FOR THE TREATMENT OF CONFIDENTIAL INFORMATION AT TRIAL

June 9, 2014

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PRELIMINARY STATEMENT

Only a few weeks before trial commences, American Express ("Amex") has chosen to present Plaintiffs and the Court with a sweeping proposal to seal the majority of the trial record. In essence, Amex asks for an advisory opinion that certain broad, vaguely defined categories of information should be sealed, and then seeks the discretion to determine for itself what specific exhibits it will seal in whole or in part. Amex even insists that many of its contracts containing the anticompetitive restraint at the heart of this case should be sealed from public view. Amex's vague proposal falls far short of the Second Circuit legal requirements and, from a practical standpoint, would force a largely secret trial. With a few exceptions, Amex's motion should be denied.

The Department of Justice recognizes a vital public interest in open judicial proceedings and has a general affirmative duty to oppose their closure, with limited exceptions.[1] Public access to court proceedings and records provides a necessary measure of accountability for courts and enhances public confidence in the administration of justice. The importance of transparency is heightened in this case because the federal government and seventeen states seek to enjoin a practice that has harmed millions of merchants and nearly every American consumer.

At the same time, as antitrust enforcers, Plaintiffs recognize that litigants have a legitimate interest in protecting business information that could significantly harm a party's competitive standing if it were disclosed publicly. This interest is particularly clear in the case of third parties who are not alleged to have engaged in unlawful conduct.

In the Second Circuit, courts have balanced these competing interests by recognizing a qualified presumption of public access to judicial proceedings and documents, including trial

[1] *See* 28 C.F.R. § 50.9 Policy With Regard to Open Judicial Proceedings.

exhibits. To overcome that presumption, a moving party bears the burden to identify the specific information that it seeks to seal from public access, and it must make a specific factual showing that disclosure would result in an injury sufficiently serious to warrant protection.

In most respects, Amex has failed to meet this burden. Amex has proposed to seal or redact information from thousands of trial exhibits, but has done little to clarify specifically what portions of those documents it proposes to seal. Many of Amex's proposals do not even identify the particular exhibits at issue, and instead authorize Amex to redact vaguely defined categories of information from any trial exhibit. Moreover, for many of its proposals, Amex has failed to make an appropriate factual showing of competitive injury sufficient to enable the Court to make specific, on-the-record findings that sealing is warranted.

If granted, Amex's proposal could easily lead to redaction—if not outright sealing—of most of the trial exhibits in this case. Such an outcome would not only infringe the public's right to access judicial proceedings, but would also create enormous logistical challenges for the presentation of evidence at trial. Indeed, Amex's proposal could require the Court to render its decision largely on the basis of evidence sealed from public view. Accordingly, as described in Appendix A, which has been filed under seal, Plaintiffs oppose significant elements of Amex's proposal.

At the same time, Plaintiffs do not oppose the narrowly tailored sealing of Amex's truly competitively sensitive information. As described in Appendix A, Plaintiffs do not oppose Amex's request to the extent that it seeks to seal key financial terms (such as discount rates or marketing funds) in current merchant contracts, certain non-public financial statements Amex produced in discovery, or Amex's agreements with issuing banks and co-brand partners. For other categories of information, Amex's motion simply asks the Court to give general guidance

on confidentiality, wait for the parties to meet and confer, and return at some future date, burdening the Court again to make further rulings on specific documents and specific redactions. The time for Amex to bring specific requests to seal documents was June 2. Its proposal falls short, and should be denied.

STATEMENT OF FACTS

On January 24, 2014, the Court entered a stipulated Pretrial Scheduling Order that outlined a three-step procedure for addressing objections to the public disclosure of trial exhibits. On May 16, 2014, pursuant to the parties' stipulation, the Court extended the deadline to file motions objecting to public disclosure of potential trial exhibits to June 2, 2014.

On May 29, 2014—several months after the Court entered the Pretrial Scheduling Order and just days before the filing deadline for its confidentiality motion—American Express sent the Government a proposed Stipulation and Agreement regarding the treatment of confidential information at trial. Bonanno Decl. Ex. 1. Amex did not provide any declarations or sample exhibits in support of its proposal. Bonanno Decl. ¶ 3. This was Amex's first and only proposal on this topic. Bonanno Decl. ¶ 4.

On the same day, the parties met and conferred regarding Amex's proposal. Bonanno Decl. ¶ 5. On May 30, 2014, the United States informed Amex that Plaintiffs did not agree to Amex's May 29, 2014 proposal. Bonanno Decl. Ex. 2. At that time, Plaintiffs acknowledged that certain limited redactions of Amex's confidential information are likely warranted and offered to review proposed redactions to specific documents, should Amex provide them. *Id.* Amex then filed its motion.

LEGAL STANDARD

I. THERE IS A STRONG PRESUMPTION OF PUBLIC ACCESS TO TRIAL PROCEEDINGS AND EXHIBITS

Courts have long recognized a strong presumption of public access to judicial documents and proceedings, which is rooted in both the common law and the First Amendment. *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 119-20 (2d Cir. 2006); *Veleron Holding, B.V. v. Morgan Stanley*, 2014 WL 1569610, at *6 (S.D.N.Y. Apr. 16, 2014) (there is both a common law and a First Amendment presumption of public access to trial exhibits).

A. The Common Law Presumption

As the Second Circuit has explained, the common law presumption of access to judicial documents and proceedings is necessary to ensure a measure of accountability for federal courts and to ensure public confidence in the administration of justice. *United States v. Amodeo*, 71 F.3d 1044, 1048 (2d Cir.1995) ("Amodeo II").[2]

The common law presumption of public access extends to all judicial documents, which include papers and documents filed with a court that are "relevant to the performance of the judicial function and useful in the judicial process." *See United States v. Amodeo*, 44 F.3d 141, 145 (2d Cir. 1995) ("Amodeo I"). Trial exhibits are entitled to an "especially strong" presumption of public access. *See Amodeo II*, 71 F.3d at 1049; *In re NBC Universal, Inc.*, 426 F. Supp. 2d 49, 54 (E.D.N.Y 2006) (trial exhibits sit at the high-end of the continuum of presumption of access accorded to judicial documents).[3] In the Second Circuit, this heightened

[2] Moreover, on practical level, the sealing of court records creates mechanical and logistical problems, imposes substantial burdens on the clerk's office, and inflicts a costly burden on the judicial system. *In re Orion Pictures Corp.*, 21 F.3d 24, 26 (2d Cir. 1994).

[3] In contrast, the presumption is far weaker for documents submitted in connection with motions that do not call for a determination of the parties' substantive rights. *In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig.*, 2013 WL 3531600, at *2 (S.D.N.Y. July 12, 2013).

presumption attaches to all trial exhibits, without regard to whether the court relies upon them in rendering its ultimate decision. *See Lugosch*, 435 F.3d at 123 (rejecting suggestion that documents not relied upon by the court might receive a lesser presumption).

When considering a request to seal an exhibit, a court must balance the importance of public access against competing considerations. *Lugosch*, 435 F.3d at 120. Countervailing factors that courts consider "include but are not limited to the danger of impairing law enforcement or judicial efficiency and the privacy interests of those resisting disclosure."[4] *Id.* (internal quotations omitted). Before granting a sealing request, courts "must carefully and skeptically review [the] request[] to insure that there really is an extraordinary circumstance or compelling need." *Encyclopedia Brown Prods., Ltd. v. Home Box Office Inc.*, 26 F.Supp.2d 606, 611 (S.D.N.Y. 1998) (quoting *In re Orion Pictures Corp.*, 21 F.3d at 27).

B. The First Amendment Presumption

In addition to the common law right of access, the public also has a "qualified First Amendment right to attend judicial proceedings and to access certain judicial documents." *Lugosch*, 435 F.3d at 120 (quoting *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 91 (2d Cir. 2004)). The presumption under the First Amendment attaches to trial exhibits and other judicial documents that are submitted to the court for use in rendering a substantive decision on the merits. *N.Y. Civil Liberties Union v. N.Y. City Transit Auth.*, 684 F.3d 286, 298 (2d Cir. 2012) ("[T]he First Amendment guarantees a qualified right of access not only to criminal but also to civil trials and to their related proceedings and records"); *Lugosch*, 435 F.3d at 121; *Green*

[4] Courts have found that the legitimate interests of innocent third parties "should weigh heavily" when balancing the public's right to access against private interests. *Amodeo II*, 71 F.3d at 1050; *United States v. Martoma*, 2014 WL 164181, at *6 (S.D.N.Y. Jan. 9, 2014) ("[A]lthough courts consider the defendant's privacy interest, it is generally the privacy interests of innocent third parties that weigh heavily in a court's balancing equation." (alterations and internal quotation marks omitted)).

Mountain Chrysler Plymouth Dodge Jeep v. Crombie, 2007 WL 922255, at *4 (D. Vt. March 23, 2007). Once the First Amendment right of access attaches, "continued sealing of the documents may be justified only with specific, on-the-record findings that sealing is necessary to preserve higher values and only if the sealing order is narrowly tailored to achieve that aim." *Lugosch*, 435 F.3d at 124.

II. HIGHLY CONFIDENTIAL INFORMATION MAY BE SEALED WHERE PUBLIC DISCLOSURE WOULD CAUSE A SIGNIFICANT COMPETITIVE HARM

A. The Moving Party Bears The Burden To Show That Disclosure Would Result In A Clearly Defined And Serious Competitive Harm

Courts have recognized that highly confidential business information can, under certain circumstances, overcome both the common law and First Amendment presumptions of public access to judicial documents. *See Nixon v. Warner Commc'ns., Inc.*, 435 U.S. 589, 598 (1978) (recognizing that courts may refuse to permit their files to be used "as [a] source[] of business information that might harm a litigant's competitive standing"); *Standard Inv. Chartered, Inc. v. Fin. Indus. Regulatory Auth., Ind.*, 347 F. App'x 615, 616-17 (2d Cir. 2009) (First Amendment presumption was overcome where trial court made specific findings that disclosure would subject party to financial harm and cause significant competitive disadvantage); *Encyclopedia Brown*, 26 F.Supp. 2d at 608-09, 614 (common law presumption overcome where information "would give [defendant's] competitors a bargaining advantage in negotiating with [its supplier]"); *In re Parmalat Securities Litigation*, 258 F.R.D. 236, 244 (S.D.N.Y. 2009).

Not all confidential business information, however, can be shielded from public access. The fact that business documents are secret, or that their public disclosure might result in adverse publicity, does not automatically warrant a sealing order. *Parmalat*, 258 F.R.D. at 244. The moving party must prove that disclosure would "work a clearly defined and very serious injury."

Encyclopedia Brown, 26 F.Supp.2d at 613 (internal quotations marks omitted). Vague and conclusory allegations of competitive harm will not suffice. *Id*. Broad allegations of harm unsubstantiated by specific examples or articulated reasoning fail to satisfy the test. *Parmalat*, 258 F.R.D. at 244.

B. It Is Not Sufficient To Establish That Business Information Constitutes A Trade Secret

In determining whether information is so competitively sensitive that it should be sealed, courts have looked to trade-secret law for guidance. And in some cases, trade secrets have satisfied the criteria for sealing under the law. *See Richmond Newspapers Inc. v. Virginia*, 448 U.S. 555, 600 n.5 (1980) ("The preservation of trade secrets, for example, *might* justify the exclusion of the public…") (emphasis added); *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1073 (3d Cir. 1984) ("[A]n interest in safeguarding a trade secret *may* overcome a presumption of openness.") (emphasis added). Classification of business information as a trade secret, however, is neither necessary nor sufficient to overcome the presumption of public access. The Supreme Court has recognized that, just as there is no absolute right to public access, there is no absolute right to protect trade secrets from disclosure. *Fed. Open Mkt. Comm. of Fed. Reserve Sys. v. Merrill*, 443 U.S. 340, 362 (1979); *see also Green Mountain*, 2007 WL 922255, at *5. Rather, as with other confidential commercial information, the party seeking to seal a trade secret from public access has the additional burden to show "that disclosure would harm movant's competitive position and that the asserted harm outweighs the presumption of public access." *Encyclopedia Brown*, 26 F.Supp. 2d at 613.[5]

[5] We note that a number of the cases Amex relies upon to justify sealing its documents are trade secret disputes that do not involve questions of public access to judicial proceedings or documents. *See. e.g., Webcraft Techns., Inc. v. McCaw*, 674 F.Supp. 1039 (S.D.N.Y. 1987) (trade secret misappropriation); *Inflight Newspapers, Inc. v. Magazines In-Flight, LLC*, 990 F.Supp. 119 (E.D.N.Y 1997) (Sherman Act).

C. Where Possible, The First Amendment Dictates Redaction Rather Than Wholesale Sealing Of Trial Exhibits

To overcome the First Amendment presumption of access, an order sealing trial exhibits must be "narrowly tailored." *See Lugosch*, 435 F.3d at 124; *In re New York Times Co.*, 828 F.2d 110, 116 (2d Cir. 1987). If possible, this First Amendment requirement may be satisfied by narrow redaction of protectable information rather than sealing of entire documents. *Standard Inv. Chartered v. NASD*, 2008 WL 199537, at *9 (S.D.N.Y. Jan. 22, 2008) (denying request for wholesale sealing of documents in favor of redaction); *United States v. Huntley*, 943 F.Supp. 2d 383, 386 (E.D.N.Y. 2013) ("Where possible, limited redaction instead of wholesale sealing of court documents should be considered in order to adequately safeguard First Amendment values.").

D. Under the First Amendment Framework, Amex Cannot Determine The Scope Of Proper Redactions On Its Own

Under the Second Circuit's First Amendment framework, trial exhibits may be sealed or redacted only on the basis of "specific, on-the-record findings that sealing is necessary to preserve higher values," and the sealing order must be "narrowly tailored to achieve that aim." *Lugosch*, 435 F.3d at 124.

To facilitate the necessary review, the moving party needs to identify with particularity the documents that it seeks to seal and the specific information in those documents that it proposes to shield from public access. *Prescient Acquisition Grp, Inc. v. MJ Publ'g Trust*, 487 F. Supp. 2d 374, 375 (S.D.N.Y. 2007) (requiring party seeking to maintain documents under seal to "identify with particularity (i.e. page and line) the precise information … which the party maintains should be kept under seal" and to "demonstrate[e] the particular need for sealing the information.").

It is not enough, as Amex has done in many instances, to offer broad descriptions of information that it seeks to be entitled to redact at its discretion from any trial exhibit. The authority to determine the information to be redacted cannot be delegated to a party. *Amodeo I*, 44 F.3d at 147 ("While we think that it is proper for a district court, after weighing competing interests, to edit and redact a judicial document in order to allow access to appropriate portions of the document, we consider it improper for the district court to delegate its authority to do so."); *see Vasquez v. City of New York*, 2012 WL 4377774, at *3 (S.D.N.Y Sept. 24, 2012) ("[T]here does not seem to be room in this analysis to defer to the consent of the parties because the rights involved are the rights of the public.").

CONCLUSION

Trial is scheduled to commence in less than one month. Given the scope of the information that it seeks to seal, Amex's decision to wait until the eleventh hour to advance a proposal for the treatment of its confidential information has placed the parties and the Court in a difficult position. The solution is not, however, to relax the presumption of public access and grant Amex's request to seal thousands of documents that lie at the core of this case.

Plaintiffs are not opposed to the narrow sealing of Amex's truly confidential information. Moreover, in light of the volume of potential trial exhibits, Plaintiffs acknowledge that a categorical approach may be appropriate, and to the extent that Amex has clearly identified the particular information that it seeks to seal and has established that it meets the Second Circuit criteria to overcome the presumption, Plaintiffs have agreed that sealing may be appropriate.

For most categories, however, Amex's motion fails to meet the Second Circuit's procedural and substantive standards for sealing of trial exhibits. A fundamental problem with Amex's proposal is that in many instances it moves to seal vague categories of information

without clearly identifying the information that it seeks to seal or even identifying the particular exhibits in which such information is purportedly located. Without a concrete understanding of *what* information Amex seeks to seal, it is impossible to reach the conclusion that Amex has met its burden to establish that disclosure of *that* information would cause it significant competitive harm. Plaintiffs accordingly request that most of Amex's categorical requests be rejected.

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Respectfully submitted,

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