

BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, D.C. 20268-0001

COMPLAINT OF CAPITAL ONE
SERVICES, INC.

Docket No. C2008-3

REQUEST FOR PRE-HEARING CONFERENCE

The Bank of America Corporation respectfully requests that the Presiding Officer schedule a Pre-Hearing Conference to consider (i) the Motion of Bank of America to Limit the Scope of the Proceeding or in the Alternative, to Disqualify Counsel (“Motion”) filed September 10, 2008, (ii) the Answer of Capital One Services, Inc. (“Answer”), filed September 24, 2008, and (iii) the Response of the Postal Service (“Response”) also filed September 24, 2008.

We make this somewhat out-of-the-ordinary request because we are convinced that an on-the-record pre-hearing conference – in which all the parties may address the issues raised in our Motion and in Capital One’s Answer – is likely to be the most efficient means of bringing the issues raised by our Motion to closure. We would have preferred to avoid this additional step. However, Capital One’s Answer¹ – or at least the redacted version – simply does not deal with the issues that we have raised. A Pre-

¹ Capital One’s counsel evidently filed the unredacted version of its Answer under seal, but did not either seek a protective order nor serve Bank of America’s counsel with a full version. As a result, Counsel for Bank of America has applied to the Commission for an Order to secure access to the version of the Answer filed under seal. We also have not yet had access to the transcript of the second day of the Lowrance deposition, despite the Commission Order granting our application for access. We ask that the Pre-Hearing Conference be scheduled after we have been afforded a reasonable opportunity to review both of those documents.

Hearing Conference affords the most effective means of enabling the Presiding Officer to understand what is at stake and exactly what the positions of the parties are.

The key topics that need to be discussed at the Pre-Hearing Conference are the following:

First, what exactly is Capital One's position as to the substantive law of discrimination that governs this proceeding? In our Motion, we have set forth the tests that the Commission must apply when it adjudicates this case; and those tests obviously govern both the permissible scope of discovery and the possible remedies. Motion at 9-13. We also have pointed out that several of the Commission's rulings on the permissible scope for discovery are consistent with those tests. Id. at 8-9, 13.

Capital One's answer is conspicuously silent on the question of governing law. It does not address the cases we have cited or offer any other statement of its views as to how the Section 403(c) is to be applied. Is this a concession that Bank of America's statement of the applicable law is correct? Or is it Capital One's view that the established body of law defining the elements of unreasonable discrimination are somehow irrelevant to proceedings before the Postal Regulatory Commission and that the Commission is free to reach a purely "subjective" conclusion (Answer at 9, fn. 14) as to the matters at issue before it? If the latter, why?

It would be difficult, if not impossible, for the Presiding Officer to reach a reasoned determination on the Bank's Motion without an understanding of exactly what Capital One considers to be the governing standards.

Second, what exactly is Capital One's position as to the scope of the relief that it seeks? In its Answer, Capital One is equivocal at best. On the one hand, it insists that it

only seeks an NSA that is the functional equivalent of a Bank of America NSA. Answer at 2, n.5. Yet, it also insists that it is entitled to pursue its claim that the Bank of America NSA results in an “undue preference” to that company. Id. at 12-13. Moreover, the Answer states specifically that “ ... it would be contrary to the PAEA for the Commission to bind its hand categorically ruling out a particular remedy now.” Id. at 12. Indeed, Capital One expressly reserves the right to argue for “cancelation [sic] of the Bank of America NSA.” Id. at 13, n.19. It is very difficult to read this statement as anything other than a claim that Capital One does seek to have, possibly as an alternative remedy, a Commission determination that the Bank of America NSA is unduly preferential and therefore unlawful. How does Capital One reconcile the two inconsistent positions? How is the supposed right to seek cancellation of the Bank of America NSA to be reconciled with the doctrine of claims and issue preclusion summarized in the Postal Service Response? Response at 2-3. If the claim of undue preference is not meant to be a collateral attack, then what exactly is it that Capital One – which bears both the burden of proof and the burden of persuasion – proposes to prove under the undue preference claim?

Third, in light of Capital One’s silence as to the applicable legal standards and its internally inconsistent position as to the scope of relief that it seeks, what exactly is Capital One’s position with respect to the permissible scope of discovery? Capital One states that the internal deliberations of the Postal Service and discussions with Bank of America both before and after the issuance of the Commission’s decision on the Bank of America NSA, are relevant. Answer at 10-11. It bases this claim on the speculation that the Postal Service “may have considered the possibility of functionally equivalent NSAs”

and “made a separate decision to handle future functionally equivalent NSAs in a particular way.” *Id.* at 11. How does Capital One (and its counsel) reconcile the extraordinary scope of discovery which it has sought² with the very narrowly framed purpose unveiled for the first time in Capital One’s Answer?

In particular, how does Capital One reconcile its formulation of the purpose of discovery as set forth in its Answer with its failure to ask – during the first day’s deposition of Ms. Lowrance – whether she knew of any documents concerning the formulation of Postal Service policy with respect to functionally equivalent NSAs? Rather, the deposition is replete with questions about the actual negotiation of the Bank of America NSA and the details of *that* Agreement. Nor are we able to identify any of the other discovery requests made by Capital One that specifically seek or refer to the question that Capital One now asserts as the basis for its claim that the negotiations between the Bank of America and the Postal Service are relevant.

The Commission cannot reach a reasoned decision on Bank of America’s Motion and Capital One’s Answer without a clear understanding of which of the two mutually incompatible approaches to discovery Capital One now believes to be applicable.

* * * * *

Bank of America would vastly prefer not to have to pursue the alternative remedy – disqualification of counsel – set forth in its Motion. Indeed, as we have pointed out in that Motion, the question of conflict of interest can be mooted if the proceeding is confined within the bounds of applicable law. Motion at 9-13, 22-23. Capital One could have, but for reasons known only to itself, declined to make a plain, unambiguous statement that it does not seek to challenge the Bank of America NSA, that its discovery

² Partially detailed in our Motion at 4-5, n. 2; *id.* at 7-8.

is not aimed at that goal and that its proposed remedy does not seek a holding that the Bank of America NSA is preferential and therefore unlawful. Unfortunately, therefore, its evasive position does not cure the adversity that impelled Bank of America to raise the conflict issue in the first instance. Bank of America will not rely upon Capital One's occasional representation that it is not seeking to make a collateral attack on the Bank of America NSA when its arguments and, more importantly, its actions, are inconsistent with its claim of disinterest.

We continue to hope and trust that further examination of the disqualification question can be averted. However, if there cannot be closure on the permissible scope of the proceeding and the remedy sought, then we will be constrained to ask the Presiding Officer to schedule a subsequent hearing on the disqualification issue: Ms. Leong's claim that she was not significantly involved in the Bank of America NSA is contradicted by the facts that we are prepared to present at a hearing through documents and witnesses.

For these reasons, we maintain that an on-the-record Pre-Hearing Conference represents the most efficient means of resolving these issues fairly and promptly. It bears repetition – as we stated at the outset of our Motion – that Bank of America takes no position on the merits of Capital One's claim that it is entitled to an NSA on the same terms as those embodied in the Bank of America NSA. Motion at 1. All that we seek, as we stated in the Motion, is that the Commission “narrow the scope of the proceeding and the remedies ... in order to conform to the legal limits” applicable to the Capital One claim; and by doing so “avoid the necessity to resolve an ethical conflict issue that would otherwise be presented ...” *Id.* at 1. Bank of America therefore respectfully requests that a Pre-Hearing Conference be scheduled as expeditiously as possible after its counsel has

been provided with access to the unredacted version of Capital One's Answer and the closed transcript of the Lowrance deposition.

Respectfully submitted,

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