



sealed portions of pages 10-23 of GameFly's September 3 Response to Opposition of the USPS to Motion to Compel; (3) GameFly's Fourth Discovery Requests to the Postal Service (GFL/USPS-103-106); and (4) the sealed portions on pages 2 and 3 of GameFly's September 21 Motion To Compel (September 21, 2009).

The documents that GameFly seeks to unseal at this time are a small subset of the approximately 79,000 pages of documents (most of them Excel worksheets) that the Postal Service has produced in discovery in this case. The Postal Service has designated virtually all 79,000 pages as confidential.<sup>1</sup> In compliance with paragraph 9 of the Statement of Compliance with Protective Conditions prescribed in Appendix A to Part 3007 of the Commission's rules, GameFly has filed under seal the portions of its subsequent pleadings and follow-up discovery requests that have summarized or quoted from the documents that the Postal Service has designated as confidential. Little if any of the information in the documents, however, appears to qualify for protection under the relevant standards of Order No. 225, the Postal Accountability and Enhancement Act ("PAEA"), or the cases construing Federal Rule of Civil Procedure 26(c) ("F.R.C.P. 26(c)").

Because the Postal Service has not identified what documents it really thinks should be maintained under seal—and why—the fairest and most efficient procedure is for the Commission to issue an order directing the Postal Service and other interested parties to show cause why the documents attached to this motion—other than the

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<sup>1</sup> About 75,000 of those pages are worksheets, or portions of worksheets, from Excel spreadsheets. Approximately 4,000 pages are memoranda, emails and other non-Excel files.

portions identified in Appendix A, *infra*—should remain under seal. GameFly should then have an opportunity to reply.<sup>2</sup>

**I. VIRTUALLY NONE OF THE MATERIAL DESIGNATED AS CONFIDENTIAL BY THE POSTAL SERVICE APPEARS ENTITLED TO NON-PUBLIC TREATMENT.**

**A. The Governing Legal Standards**

The PAEA established the basic standard governing the protection of information designated non-public by the Postal Service. “In determining the appropriate degree of confidentiality to be accorded information . . . the Commission shall balance the nature and extent of the likely commercial injury to the Postal Service against the public interest in maintaining the financial transparency of a government establishment competing in commercial markets.” 39 U.S.C. § 504(g)(3)(A). Moreover, the degree of confidentiality afforded to material produced in discovery in a Commission proceeding shall follow the standards established under Rule 26(c) of the Federal Rules of Civil Procedure. 39 U.S.C. § 504(g)(3)(B).

The Commission implemented Section 504(g)(3) in Order No. 225, 74 Fed. Reg. 30938 (June 29, 2009). With respect to information submitted by third parties to the Postal Service and later filed with the Commission, Rule 3007.33(b) directs the

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<sup>2</sup> GameFly seeks in this motion to unseal only the subset of the documents that GameFly has cited in its pleadings and follow-up discovery requests. GameFly is likely to seek to unseal additional documents as the Postal Service responds to the remainder of the outstanding requests, and after GameFly submits its direct case. A Commission ruling on the present motion should expedite resolution of future requests to unseal additional documents, perhaps even without the Commission’s intervention.

Commission to “balance the interests of the parties based on Federal Rule of Civil Procedure 26(c).” 39 C.F.R. § 3007.33(b).

F.R.C.P. 26(c) permits a court to issue a protective order “for good cause.” Among the permissible orders is an order “requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way.” *Id.* Although F.R.C.P. 26(c) does not define “good cause,” courts have adopted a seven-part test for determining whether protection from public disclosure is warranted:

- (1) The interest in privacy of the party seeking protection;
- (2) Whether the information is being sought for a legitimate purpose or an improper purpose;
- (3) The prevention of embarrassment, and whether that embarrassment would be particularly serious;
- (4) Whether the information sought is important to public health and safety;
- (5) Whether sharing of the information among litigants would promote fairness and efficiency;
- (6) Whether the party benefitting from the order of confidentiality is a public entity or official; and
- (7) Whether the case involves issues important to the public.

*Arnold v. Penn Dep't of Transp.*, 477 F.3d 105, 108 (3d Cir. 2007). The Commission has stated that the rules adopted in Order No. 225 are intended to incorporate this test (Order No. 96 at 3-4), although factors 3 (embarrassment) and 4 (public health) are generally unlikely to play any significant role. Order No. 96 at 4, fn. 5.

To establish “good cause” for the protection of information under Rule 26(c), the party seeking protection “must show that the information sought is a trade secret or other confidential information, and that the harm caused by its disclosure outweighs the need of the party seeking disclosure.” 6-26 MOORE'S FEDERAL PRACTICE – CIVIL § 26.105. Factors generally considered by courts in determining whether information qualifies as a trade secret include “(1) the extent to which the information is known outside the business; (2) the extent to which it is known by employees and others involved in the business; (3) measures taken to guard the information's secrecy; (4) the value of the information to the business or to its competitors; (5) the amount of time, money, and effort expended in development of the information; and (6) the ease or difficulty of duplicating or properly acquiring the information.” *Id.* Additionally, the proponent of protection must show a reasonable expectation of privacy with respect to the information and that the exposure of the information would lead to a legitimate competitive harm, and not just be unpopular. *Id.*

Commercial information that does not rise to the level of a trade secret, but would nonetheless be considered confidential by a reasonable business, may also receive protection under Rule 26(c). This information is entitled to less protection than trade secrets, however, and keeping the information secret requires a greater showing of harm in relation to the public interest. *See Littlejohn v. BIC Corp*, 851 F.2d 673, 685 (3d

Cir. 1988) (“[N]on-trade secret but confidential business information is not entitled to the same level of protection from disclosure as trade secret information.”)

A party seeking protection under these standards “must show good cause by demonstrating a particular need for protection. Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning, do not satisfy the Rule 26(c) test.” *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108, 1121 (3d Cir. 1986). Additionally, “the harm must be significant, not a mere trifle.” *Id.*

These foregoing standards typically have been applied to shield information about a firm from public disclosure when significant competitive injury could result if the firm’s competitors obtained the information. Common examples include information about a firm’s production costs, profit margins, prices (when not posted to the public), sales techniques, manufacturing processes, source code and other proprietary intellectual property, and sales or volume by specific product or geographic location. See 8 WRIGHT, MILLER & MARCUS, FEDERAL PRACTICE & PROCEDURE § 2043 (citing cases).

By contrast, the embarrassment potentially arising from disclosure of information about the performance of public officials or public bodies generally does not constitute good cause for shielding the information from public disclosure. See, e.g., Order No. 96, *supra*, at 4 n. 5; *Flaherty v. Seroussi*, 209 F.R.D. 295 (N.D. N.Y. 2001) (refusing to block public disclosure of videotape of former mayor’s deposition); *Hawley v. Hall*, 131 F.R.D. 578 (D. Nev. 1990); cf. *Nicklasch v. JLG Industries, Inc.*, 193 F.R.D. 570, 573-74 (S.D. Ind. 1999) (potential embarrassment to ski lift manufacturer from disclosure of

reports of prior lift failures was insufficient cause to justify protective conditions against public disclosure).

Moreover, both the Commission and the courts have recognized the strong countervailing public interest in maintaining the transparency of the performance of public officials and public bodies. Order No. 96 at at 4 & n. 5 (noting importance of “fairness” and “public interest” as factors); *Flaherty*, supra, 209 F.R.D. at 300; *Condit v. Dunne*, 225 F.R.D. 113, 119-120 (S.D.N.Y. 2004); see also *New York Times v. Sullivan*, 376 U.S. 254, 305 (“sunlight is the most powerful of disinfectants”) (Goldberg, J., concurring).

Moreover, even information that once was entitled to protection loses that entitlement to protection if the information (1) has lost its sensitivity through the passage of time or (2) has been publicly disclosed elsewhere. *United States v. IBM*, 67 F.R.D. 39, 40 ( S.D.N.Y. 1975).

## **B. The Documents At Issue**

The documents at issue bear on a number of issues that are relevant to this case and matters of public concern under 39 U.S.C. § 403(c). The following are some of the most important points:

**[BEGIN PROTECTED MATERIAL]**

[REDACTED]

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[REDACTED]

**[END PROPRIETARY MATERIAL]**

**C. Application Of The Standards To The Documents**

While the Postal Service's mass designation of its document production may have been a reasonable procedural shortcut, review of the documents suggests few if any colorable grounds under Order No. 225 for continuing to shield any of the documents from public disclosure.

(1) The Postal Service is unlikely to establish any sort of competitive harm from disclosure of its methods of processing DVD mail, or the costs, contribution, processing methods or breakage rates of this mail. DVD mailers are First-Class Mail, a market dominant product.

(2) The information in the documents about Netflix, Blockbuster and other third parties likewise appears to be devoid of competitive or proprietary concerns cognizable under Order No. 225:

- That individual DVD rental companies have made considerable efforts to reduce the breakage of their DVDs by the Postal Service is no revelation; one would expect any rational mailer to do the same.

- The high degree of manual processing received by Netflix is already a matter of public record.<sup>3</sup>
- So are Blockbuster's efforts to obtain a higher degree of manual processing.<sup>4</sup>
- None of the documents appear to reveal information about the costs, volumes or operating methods of Netflix or Blockbuster in a form sufficiently specific and disaggregated to pose a competitive threat to either firm.
- Information about the physical designs of the Netflix and Blockbuster mailer can be readily obtained simply by examining those companies' mailers, which are disseminated in large numbers to the companies' subscribers.
- Whether the Postal Service approved the designs of a given mailer submitted by another company for testing is a fact that the manufacturer of the mailer presumably would be obligated to disclose to potential customers.

(3) The competitive harm must be a present harm. See *Leucadia, Inc. v. Applied Extrusion Technologies, Inc.*, 998 F.2d 157, 167 (3d Cir. 1993) (“[C]ontinued sealing must be based on current evidence to show how public dissemination of the

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<sup>3</sup> See, e.g., Joint Statement of Undisputed and Disputed Facts (July 20, 2009) at ¶¶ 82-84, 87-88, 90-92.

<sup>4</sup> *Id.* at ¶¶ 102-103.

pertinent materials now would cause the competitive harm [they] claim[]." (internal quotations omitted)). The release of Netflix or Blockbuster volumes or expansion plans from several years ago would not create a risk of *present* competitive harm. Any expansion plans would have been realized by now. And as Netflix has grown rapidly over the past several years, it is doubtful that historical information about Netflix volumes would have any relevance to Netflix's operations today.

(4) The public interest in disclosure outweighs any competitive concerns that disclosure might raise here. As noted above, the cases construing Rule 26 consistently hold that the involvement of a public entity heightens the public interest in disclosure and the burden of establishing good cause for concealing information. This is true even when supposedly confidential information concerns a private party. See *FTC v. Standard Financial Management Corp.*, 830 F.2d 404, 412 (1st Cir. 1987) (explaining that the threshold showing for protection of information is "correspondingly elevated" when the public has a "substantial stake and interest" in proceedings involving "matters of significant public concern"). This principle especially holds when the litigation involves alleged wrongdoing by a public entity. See, e.g., *id.* ("It cannot be ignored that this litigation involves a government agency and an alleged series of deceptive trade practices culminating (it is said) in widespread consumer losses"); *Arnold*, 477 F.3d at 110-11 (discussing with approval a decision reversing a lower court decision that "unacceptably downplayed the fact that this case involves public officials and issues important to the public" when granting a protective order).

The presumption in favor of public disclosure is even stronger when the allegation against the government entity is undue discrimination. The prohibition

against undue preferences and discrimination in 39 U.S.C. § 403(c) embodies one of the most enduring bedrock principles of common carrier and public utility regulation. “Individual favoritism” among ratepayers was regarded during the Granger Era of the 1870s and 1880s as the “greatest evil chargeable against” a regulated monopoly, and prohibitions against undue discrimination were codified in Sections 2 and 3(1) of the Interstate Commerce Act from its inception in 1887. See *American Truck Ass’ns v. Atchison, T. & S.F. Ry. Co.*, 387 U.S. 367, 406 (1967) (“secret rebates, special rates to favored shippers, and discriminations . . . led to enactment of the Interstate Commerce Act in 1887”); David Boies and Paul R. Verkuil, *Public Control of Business* 15-24, 254-56 (1977); Solon J. Buck, *The Granger Movement* 11-14, 34 (1913). Section 403(c), like the antidiscrimination provisions of other federal regulatory statutes, is descended directly from Sections 2 and 3(1) of the 1887 Act. The law has been clear for nearly a century that the prohibition against undue discrimination encompasses not only discrimination in pricing, but also the discriminatory provision of more or better service than offered to ratepayers generally. *Davis v. Cornwall*, 264 U.S. 560 (1924); *Chicago & A.R.R. v. Kirby*, 225 U.S. 155 (1912).

The importance of public disclosure is heightened further in this case by the Postal Service’s claim that its own operational needs justify discrimination in favor of Netflix. The public cannot evaluate this defense if correspondence between the Postal Service and DVD mailers, and the Postal Service’s internal analyses of DVD mail processing, remain hidden from public view. Unless this entire proceeding—including the Commission’s final decision on the merits—is conducted under seal, the information must be released to the public at some point. As the information in question is not

competitively sensitive, there is no reason to wait for hearing before removing the non-public status of this information.

For the foregoing reasons, a company that has obtained special treatment by the Postal Service should not be allowed to assert a privacy interest against disclosure of the nature of the preferential treatment or the communications by which the company obtained and maintained the preference. Companies requesting such preferences should understand that the information they submit to the Postal Service to obtain such preferences is likely to be of public interest, and that only the most competitively sensitive of that information is entitled to protection. *See Hartford v. Chase*, 733 F. Supp. 533, 536 n. 5 (D. Conn. 1990) (“Where the parties are private, the right to rely on confidentiality in their dealings is more compelling than where a government agency is involved, as the public has a countering interest in, and thus the claim of access to the conduct of public business by a governmental agency.”)

A case with strong parallels to the present case is *United States v. Ky. Utilities Co.*, 124 F.R.D. 146, 153 (E.D. Ky. 1989). In ordering the public disclosure of information in that case, the court noted the heightened interests in disclosure when “one of the original parties is a public utility accused of illegal antitrust activities which presumably, if they occurred, would have the effect of raising electric rates to the average consumer.” The court further explained, “Obviously, the public has a strong legitimate interest in being informed of the facts of any such activities.” *Id.* Further highlighting the fact that the Federal government was a party to the litigation, the court explained that “[t]he public also has a legitimate concern in evaluating the fairness and wisdom of the federal government's settlement made in this important litigation.” *Id.*

Finally, the possibility that public disclosure of the information would be embarrassing to the Postal Service or to mailers cannot overcome this public interest. *See Republic of Philippines v. Westinghouse Elec. Corp.*, 949 F.2d 653, 663 (3d Cir. N.J. 1991) (“Westinghouse’s memorandum on appeal, which fails to refer to any specific type of competitive harm, also suggests that it is the company’s public image that is at stake. That is not enough to rebut the presumption of access.”) Indeed, some courts have expressed skepticism that the embarrassment factor could ever apply to a corporation. *See Cipollone*, 785 F.2d at 1121 (“As embarrassment is usually thought of as a nonmonetizable harm to individuals, it may be especially difficult for a business enterprise, whose primary measure of well-being is presumably monetizable, to argue for a protective order on this ground . . . to succeed, a business will have to show with some specificity that the embarrassment resulting from dissemination of the information would cause a significant harm to its competitive and financial position.”) Given the public interest in ensuring that the Postal Service complies with 39 U.S.C. § 403(c), mailer information should be shielded from public disclosure only on an overwhelming showing of direct competitive harm.

(5) A final factor that weighs in favor of public disclosures of the documents at issue is the ability of GameFly to litigate this case effectively. GameFly is a relatively small company and lacks a separate cadre of managers who are dedicated to litigation or regulatory affairs. All of GameFly’s senior managers who are knowledgeable about this case are “involved in competitive decision-making” within the meaning of Appendix A to Part 3007 of Order No. 225. Because GameFly competes with Blockbuster in the rental of DVD games, and competes with Netflix in the broader product market for recreational DVDs, GameFly has not designated any of its executives or employees as

reviewing representatives under the protective order. For this reason, overprotection of documents produced in discovery impairs the ability of GameFly's management to consult on strategy with GameFly's outside counsel and consultants. Unsealing the documents that do not merit continued protection would eliminate a needless and unwarranted handicap to GameFly's defense of its interests in this case.

(6) Notwithstanding the foregoing, GameFly proposes that the handful of customer names identified in Appendix A, *infra*, should remain under seal. These items are the names of Postal Service customers other than GameFly, Netflix or Blockbuster. Unlike Netflix, Blockbuster and GameFly, the names of these other customers do not recur frequently in the documents. Although a legitimate case could be made that disclosure of these customer names would not injure those entities, the burden they would incur in responding to this motion is likely to outweigh the inconvenience to GameFly, the Postal Service and the Commission of simply having the other entities' names redacted.

## **II. A SHOW CAUSE ORDER IS THE FAIREST AND MOST EFFICIENT WAY TO RESOLVE THE PROTECTED STATUS OF THESE DOCUMENTS.**

The fairest and most efficient way to resolve the issues raised in this motion is for the Commission to issue an order directing the Postal Service and mailers mentioned in the documents to show cause why particular documents, or particular portions of particular documents, should remain sealed from public access, with a right of reply by GameFly and other interested participants. This additional step is warranted by the failure of the Postal Service to identify the specific documents that it truly believes should be kept under seal, and the particular proprietary concerns that purportedly

warrant this relief. This omission may have been entirely reasonable: the responsive documents were relatively large, the time period for production was relatively short, and the Postal Service probably could not have properly asserted or waived the proprietary concerns of third parties such as Netflix or Blockbuster within the time available.

Nonetheless, this omission has put GameFly in the position of anticipating and responding to a black box. In the ordinary course of events, the Postal Service and any other interested parties would have the initial burden of coming forward and identifying the specific material that they contend should be protected, as well as the legal grounds for this relief. Other parties would then have an opportunity to reply. See Rules 3007.20 through 3007.22; *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108, 1121 (3d Cir. 1986) (under FRCP 26(c), “the burden of persuasion [is] on the party seeking the protective order”). Given that the Postal Service and the third parties identified in the documents produced by the Postal Service have not done so, the fairest course is to require that they make such a threshold showing now for the subset of documents attached to this motion. Then GameFly and other interested participants should be permitted to respond. This procedure, by reducing the number of documents at issue, should also increase the ability of GameFly and the other parties to resolve at least some of the disclosure issues by agreement.

## CONCLUSION

For the foregoing reasons, the Commission should issue an order directing the Postal Service and other interested parties to show cause why the documents identified here, other than the customer names reference in Appendix A, *infra*, should not be unsealed. GameFly should then have an opportunity to reply.

Respectfully submitted,

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**APPENDIX A****CUSTOMER NAMES THAT  
GAMEFLY PROPOSES TO REDACT**

<b>Bates Number</b>	<b>Description</b>
GFL189	Name of potential NSA partner in next-to-last bullet
GFL 216	Names of private firms in last two bullets
GFL 373	Name and address of company that submitted mailer design for testing; trade name of mailer design
GFL505	Names of two customers other than Netflix and Blockbuster listed in the first sentence of the next-to-last paragraph
GFL506	Name of customer in last sentence before signature
GFL511	Name of second customer listed in sixth paragraph.
GFL733, GFL844	Names of DVD rental companies in pie chart (other than Netflix, Blockbuster and GameFly); names of "Top 10 FCM Mailers" in box.
GFL1115	Capitalized name of customer immediately above hand-drawn horizontal line.
GFL1180	Name of 6 <sup>th</sup> customer in list in upper left-hand corner.
GFL7278-79, 7285-87, 7292-95	Names of the firms that submitted mailer designs for testing.

**APPENDIX B**

**DOCUMENTS THAT GAMEFLY PROPOSES TO UNSEAL  
(EXCEPT FOR REDACTIONS IDENTIFIED IN APPENDIX A)**

[FILED UNDER SEAL PURSUANT TO PROTECTIVE ORDER]