

PRESIDING OFFICER'S
RULING NO. C2009-1/4

UNITED STATES OF AMERICA
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

Complaint of GameFly, Inc.

Docket No. C2009-1

PRESIDING OFFICER'S RULING
GRANTING CONDITIONAL LIMITED ACCESS
TO DISCOVERY MATERIAL FILED UNDER SEAL

(Issued September 25, 2009)

On September 9, 2009, Netflix, Inc. (Netflix) filed a motion for access to materials filed by GameFly, Inc. (GameFly) under seal (Motion).¹ On September 14, 2009, GameFly filed a response that raises an issue as to the propriety of access by the general counsel of Netflix, a nonparty, to certain documents that concern Blockbuster Inc. (Blockbuster), a rival, which were responsive to discovery and filed under seal.²

GameFly's Response asserts that Netflix's motion to attain access by its general counsel raises "a potential issue" because it is "not uncommon for in-house general counsel to be involved in competitive decision making...." Response at 2. GameFly cites risks because some sensitive materials concern Blockbuster, Netflix's rival.³

¹ Netflix, Inc.'s Motion for Access to the Non-Redacted Answer of GameFly Inc's Opposition of the United States Postal Service to Motion to Compel, September 9, 2009 (Motion).

² Response of GameFly, Inc., to Motion of Netflix, Inc. for Access to Non-Redacted Portion of GameFly Response to Postal Service Opposition to GameFly Motion to Compel, September 14, 2009 (Response).

³ Notably, the relevant language that GameFly cites is also in the conventional protective conditions. GameFly takes no exception to access by outside counsel of Netflix. Nor does it object to access by Netflix's general counsel, except for materials on Blockbuster. *Id.* at 1-2.

GameFly's efforts to assure that the Commission's new confidentiality rules are applied effectively are appreciated.

Analysis of the motion. When the Postal Service requests non-public treatment of documents, it is obliged to identify or arrange to notify persons with proprietary interest in the filed documents if a third party seeks access to them. 39 CFR 3007.21(c)(2). The Postal Service also is implicitly under a continuing duty to protect the possible interests of affected third parties in the current context. Here, potentially sensitive documents that originated from the Postal Service were filed under seal by a private litigant. When Netflix sought access to these documents, it became necessary to provide notice to each third party whose rights might be abridged by the nonparty motion for access, if notice to each third party had not been provided already. In such circumstances, the Postal Service is the most appropriate party to provide such notice as it has a continuing obligation to exercise due diligence to protect sensitive information of mailers. It has a direct relationship with mailers that makes it best able to notify the potentially affected third persons. It is unknown whether Blockbuster or other persons have actually been notified of Netflix's Motion yet.

The Postal Service is hereby directed to promptly notify Blockbuster and other persons with a proprietary interest that certain documents already filed as confidential are sought by attorneys who represent Netflix. The Postal Service shall identify which documents expressly refer to Blockbuster, and provide a brief description for each document, stated in conformity with analogous requirements of 39 CFR 3007.21(c)(3).⁴ As to other persons with a proprietary interest in one or more of the filed documents, the Postal Service shall take parallel measures. *Compare* 39 CFR 3007.40. Where a request arises by an interested person for access, under a set of protective conditions, rule 40 assumes that the Postal Service had filed the sensitive information, and that it would identify parties with proprietary interests in the documents. In this instance, GameFly filed documents under seal, and it cannot be ascertained whether rule

⁴ This notice also shall state that objections to the Motion not filed within 7 days after the date of this ruling are waived. The timely notice must be filed with the Commission as well.

40(b)(1) has been satisfied to ensure that everybody whose data is implicated knows or has been notified. By this ruling, the Postal Service is ordered to notify whoever might have a proprietary interest in one or more of the filed documents subject to the Motion.⁵ The Postal Service shall take immediate steps to notify persons consistent with this ruling, and that notice shall specify that objections are to be filed within 7 days of this ruling. If no timely objections are received as to a document, then access will be provided.

Accordingly, Netflix's motion for access to documents will remain pending until potentially affected third parties have had the opportunity to object and any timely objection is resolved.⁶

Access will be permitted Netflix subject to certain limits and conditions. Netflix attempted to streamline access by signing the stipulated conditions, which contained certain provisions that are not entirely consistent with the Commission's Rules of Practice and Procedure at 39 CFR 3007.1, *et seq.*⁷ Absent objections, Netflix may share access to materials filed under seal, provided however, that it is recognized that certain provisions of the stipulation it executed are deemed to be superseded by the confidentiality rules. To the extent that the stipulation implies, at its preamble, that a document becomes "confidential" in this case without any ruling on its confidentiality status, or that paragraph 14 governs any issues, this ruling further clarifies that these provisions, and any other stipulated ones that are contrary to Order No. 284, are superseded by the confidentiality rules. The Motion is construed as accepting this ruling with all applicable conditions. See Motion at 1.

⁵ This is the first complaint proceeding since the confidentiality rules have been in effect; adding provisions to specifically account for these circumstances appears called for.

⁶ Should a third-party objection be interposed, Netflix may provide written justification for its access within 2 days. *Compare* 39 CFR 3007.40(b)-(d).

⁷ A person seeking access to material filed under seal usually will be required to comply with 39 CFR 3007.40, and to adhere more closely to the Statement of Compliance with Protective Conditions, a suggested template, and the Certification that are appended to the confidentiality rules. Both documents typically should be filed as a notice, which will be posted at www.prc.gov.

RULING

1. The Postal Service shall review redacted portions of the Response of GameFly, Inc., to Opposition of the United States Postal Service to Motion to Compel, filed September 3, 2009, and immediately notify any third party with a proprietary interest in the materials filed subject to protective conditions that attorneys representing Netflix have requested access to those materials.
2. The period for affected third parties to object to Netflix, Inc's Motion for Access to the Non-Redacted Answer of GameFly Inc's Opposition of the United States Postal Service to Motion to Compel, filed September 9, 2009, is extended to 7 days after the date of this ruling.
3. Netflix, Inc's Motion for Access to the Non-Redacted Answer of GameFly Inc's Opposition of the United States Postal Service to Motion to Compel, filed September 9, 2009, is granted subject to objections filed pursuant to this ruling.

Dan G. Blair
Presiding Officer