



3. GameFly seeks to unseal – and therefore to post on the Commission’s website – many documents containing proprietary information that Blockbuster has provided to the Postal Service. The Postal Service has notified Blockbuster that GameFly seeks to unseal the following documents, among others:

- a. Confidential communications between the Postal Service and Blockbuster reviewing Blockbuster’s business, including the company’s customer-service issues and operational goals;
- b. Confidential, internal Postal Service presentations and communications regarding the processing of Blockbuster mailpieces and postal revenues generated from Blockbuster;
- c. Confidential communications discussing the manner and locations for processing Blockbuster’s mailpieces;
- d. Confidential information about Blockbuster’s plans for distribution centers;
- e. A confidential study examining the costs incurred by the Postal Service in handling Blockbuster’s mailpieces; and
- f. Confidential meeting notes reflecting discussions about Blockbuster’s business practices.

4. In determining whether to publicly disclose non-public materials in which a third party has a proprietary interest, the Commission is required to balance the interests of the parties based on Federal Rule of Civil Procedure 26(c). Rules of Practice, Rule 33(b). This balancing test weighs one party’s interest in unsealing the documents against the other party’s interest in keeping them confidential. *See, e.g.,*

*Chicago Tribune Co. v. Bridgestone/Firestone, Inc.*, 263 F.3d 1304, 1313 (11th Cir. 2001) (per curiam) (setting out the test under Rule 26(c)(7)).

5. GameFly has offered no legitimate reason for unsealing Blockbuster's proprietary business information. Blockbuster's interest in keeping the materials confidential is clear. Blockbuster deals with the Postal Service as a commercial partner, and the company reasonably expects the Postal Service to maintain the confidentiality of its sensitive business information. If the Postal Service cannot do so, then Blockbuster and the Postal Service cannot have a full, open and successful business relationship.

6. GameFly relies on "[t]he public interest in disclosure" in seeking to unseal the documents. GameFly's Motion to Unseal at 14. But such a general policy proposition cannot outweigh Blockbuster's specific interests – the company's interest in maintaining the confidentiality of its proprietary information as well as its interest in a continuing business relationship with the Postal Service.

7. GameFly also asserts that the protective measures impair its ability to present its case. *Id.* at 17-18. GameFly's representatives have full access to all materials produced by the Postal Service in this case, including materials containing Blockbuster's proprietary information. Blockbuster has not sought to withhold any documents from GameFly. The restrictions in place to protect Blockbuster and other companies' proprietary information have not hindered GameFly in prosecuting its case against the Postal Service.

8. GameFly admits that its true purpose in seeking to unseal the documents is to allow "the public" to evaluate GameFly's case against the Postal Service.

GameFly's Motion to Unseal at 15 ("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."). This purpose is illegitimate. The Postal Regulatory Commission, not the public, is to decide the merits of GameFly's case. 39 U.S.C. § 3662(a) & (c).

9. Furthermore, the Commission includes an officer responsible for representing "the interests of the general public." 39 U.S.C. § 505. That officer has access to the documents under seal. Therefore, there is no legitimate goal served by allowing Blockbuster's proprietary information to be disclosed to the public generally. Blockbuster's confidential information should not be unsealed in order to be misused as part of a public relations strategy by GameFly. Certainly, GameFly's desire to put the dispute before the public does not outweigh Blockbuster's interest in maintaining the confidentiality of its commercial information.

10. Blockbuster clearly has a strong interest in maintaining the confidentiality of its sensitive business information. The documents GameFly seeks to unseal include information about the company's postal expenditures – information Blockbuster legitimately seeks to protect from disclosure to its competitors. Similarly, Blockbuster seeks to maintain the confidentiality of information concerning issues with mail processing and handling, so as to avoid the commercial harm that may result from widespread dissemination of such information. Other materials GameFly seeks to unseal include information about Blockbuster's unique mailpiece as well as the company's business plans and goals.

11. If these materials were sought under the Freedom of Information Act (“FOIA”), the Postal Service would be unable to disclose them. The Act’s Exemption 4 was designed in part to “protect[] persons who submit financial or commercial data to government agencies from the competitive disadvantages which would result from its publication.” *National Parks & Conservation Ass’n v. Morton*, 498 F.2d 765, 768 (D.C. Cir. 1974). The exemption protects from disclosure “trade secrets and commercial or financial information obtained from a person and privileged or confidential.” 5 U.S.C. § 552(b)(4). This type of information is categorically protected from disclosure if it was voluntarily submitted to the government and is not the type of information the submitter would customarily disclose to the public. *Critical Mass Energy Project v. Nuclear Regulatory Comm’n*, 975 F.2d 871, 880 (D.C. Cir. 1992) (en banc); *National Parks*, 498 F.2d at 770. Blockbuster submitted the information in question to the Postal Service voluntarily. And, for the reasons set out above, the company does not normally disclose this type of information to the public.

12. Furthermore, Blockbuster regularly shares other proprietary information with the Postal Service, in the context of their business relationship. If any confidential information Blockbuster submits to the Postal Service is subject to public disclosure, then Blockbuster may determine it cannot submit such information to the Postal Service in the future. For example, Blockbuster is subject to the Video Privacy Protection Act, 18 U.S.C. § 2710. In accordance with the Act, Blockbuster discloses limited customer information to the Postal Service in the “ordinary course of business.” *Id.* § 2710(b)(2)(E). If any “personally identifiable information” (as defined in § 2710(a)(3)) is disclosed to unauthorized recipients, Blockbuster may be liable for liquidated

damages of at least \$2,500, punitive damages, attorneys' fees and other litigation costs, and other relief. *Id.* § 2710(c)(2).

13. As another example, Blockbuster regularly shares its "Customer Reported Issue" ("CRI") reports with the Postal Service. CRI reports contain extremely detailed data, by zip code, of customer-service issues encountered by Blockbuster. The reports are valuable to Blockbuster, and they are also valuable to the Postal Service. It is Blockbuster's understanding that the Postal Service uses these reports to address any service issues. Blockbuster's data, then, assists the Postal Service in providing better mail service for all its customers, not just Blockbuster. The company will be extremely reluctant to provide this sort of information in the future, if the Postal Service is unable to ensure that it can maintain the confidential nature of these reports. The United States Court of Appeals for the District of Columbia Circuit recognized the submitter's concern – and the concomitant risk to the Government – thirty-five years ago: "Unless persons having necessary information can be assured that it will remain confidential, they may decline to cooperate with officials and the ability of the Government to make intelligent, well informed decisions will be impaired." *National Parks*, 498 F.2d at 767.

14. In sum, GameFly's general proposition that there is a public interest in disclosure does not outweigh the potential harms to Blockbuster here – both the specific harm wrought by the disclosure of sensitive business information and the general harm done to the business relationship between Blockbuster and the Postal Service.

Respectfully submitted,

s/Adrianne L. Goins

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