PUBLIC (REDACTED) VERSION

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

COMPLAINT OF GAMEFLY, INC.	)	Docket No. C2009-1

COMMENTS OF GAMEFLY, INC.,
IN RESPONSE TO
PRESIDING OFFICER'S RULING NO. C2009-1/12
(December 9, 2009)

Pursuant to Presiding Officer's Ruling No. C2009-1/12 ("POR-12") at 33, GameFly, Inc. ("GameFly") respectfully submits these comments on the standards and procedures proposed by the Presiding Officer for determining the extent to which documents filed under seal in this case shall be unsealed. The substantive criteria proposed by the Presiding Officer are generally consistent with mainstream precedent under Rule 26(c) of the Federal Rules of Civil Procedure and the appropriate balance of private and public interests in this case.

In applying the standards in this case, however, the Commission should draw appropriate inferences from the failure of the three main putative beneficiaries of continued secrecy—the Postal Service, Netflix and Blockbuster—to make the requisite showing that unsealing of particular documents would result in material commercial injury. Despite repeated and unambiguous directives from the Commission that participants and third parties who seek to keep particular documents under seal must

make such a particularized showing, neither the Postal Service nor Blockbuster—the only two entities who have opposed unsealing any of the documents at issue—has even attempted to make such a showing. The appropriate response to this default is a Commission finding, without further delay, that the objections of the Postal Service, Blockbuster and Netflix to public unsealing of the documents identified in GameFly's September 25 motion have been waived, and the sealed information about those entities should be unsealed forthwith. Allowing the opponents of disclosure to have further opportunities for delay would unfairly injure GameFly and breed contempt for the Commission's rules and orders.

I. THE SUBSTANTIVE STANDARDS PROPOSED BY THE COMMISSION ARE GENERALLY CONSISTENT WITH PRECEDENT UNDER RULE 26(c) OF THE FEDERAL RULES OF CIVIL PROCEDURE.

A. Rule 26(c) Supplies The Relevant Standard Of Decision.

In POR-12, the Presiding Officer correctly noted that "Fed. R. Civ. P. 26(c) appears to be the appropriate legal standard for unsealing and for establishing any customized criteria to apply to the issues in the present case." POR-12 at 19. As the Presiding Officer explained, "[t]his standard entails balancing the interests of the parties, absent some stipulation of the parties that may be condoned by the Commission." *Id*. at 20.

The Presiding Officer's finding on this point is supported by the PAEA and the Commission's implementing rules. With respect to information submitted by third-parties to the Postal Service and later filed with the Commission, Rule 3007.33(b) directs the Commission to "balance the interests of the parties based on Federal Rule of

Civil Procedure 26(c)." 39 C.F.R. § 3007.33(b); *see generally* GameFly Motion for Order Directing Parties to Show Cause (Sept. 25, 2009) ("GameFly Motion") at 3-4. Furthermore, PAEA establishes that the "appropriate" level of "confidentiality" to be given information produced in discovery and "furnished to any party" shall be determined according to Commission "regulations based on rule 26(c) of the Federal Rules of Civil Procedure." 39 U.S.C. § 504(g)(3)(B); *see generally* GameFly Rejoinder (Oct. 27, 2009) at 10, 12-13. The Presiding Officer therefore correctly determined that the standards of F.R.C.P. 26(c), not those found in the Freedom of Information Act or 39 U.S.C. § 410(c)(2), should provide the criteria for determining whether information submitted by the parties to this proceeding is entitled to confidential treatment. POR-12 at 27.

B. Application To Information About DVD Mailers Other Than Netflix And Blockbuster

GameFly generally agrees with the Presiding Officer's approach to information regarding specific DVD mailers other than Netflix and Blockbuster. POR-12 at 20. Because this information is "less central to the unsettled questions of this case," and smaller third-parties do not have appeared to benefit from the preferences received by Netflix and Blockbuster, GameFly consents to continued protection for this information. *Id.* GameFly simply asks that it be allowed to disclose material with the consent of the third-party whose information is at issue, a principle that is recognized in standard protective conditions used in other proceedings.

C. Application To Information About Netflix And Blockbuster

The Presiding Officer correctly held that disclosure of specific information about Netflix and Blockbuster would be governed by 39 C.F.R. § 3007.33(b), and that "[w]hen a third party has a proprietary interest that is cognizable by the Commission, 39 CFR 3007.33(b) converges with the familiar standard of Fed. R. Civ. P. 26(c)(1)(G)." POR-12 at 21. GameFly concurs with the Presiding Officer's holding that this standard warrants limiting protecting to information that is:

> (a) a trade secret; or (b) proprietary commercial information that was (i) generated after November 8, 2007, and (ii) contains one of the limited kinds of content, described below as "highly confidential." The limited kinds of content, protected under (ii) include only (a) strategic business plans, not readily ascertainable elsewhere, that would disclose a material competitive advantage to a rival, or (b) information to which employees of the Postal Service have only limited access that is comprised of one or more of the following: company production data; company security matters; customer lists; company financial data; projected sales data or goals; proprietary market research, or matters relating to mergers and acquisitions.

POR-12 at 24-25.

This decision is generally in line with precedent under F.R.C.P. 26(c). As GameFly discussed in its September 25 Motion and October 27 Rejoinder, courts applying F.R.C.P. 26(c) have generally considered the following factors in determining whether to protect commercial information that is not a trade secret: "(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." GameFly Motion at 5 (quoting 6-26 MOORE'S FEDERAL PRACTICE – CIVIL § 26.105).

Likewise, the Presiding Officer's definition of "highly confidential" information accords with precedent limiting the range of information that is eligible for protection under F.R.C.P. 26(c). Such information includes "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." GameFly Motion at 6 (citing 8 WRIGHT, MILLER & MARCUS, FEDERAL PRACTICE & PROCEDURE § 2043 (citing cases)).

The Presiding Officer's further finding that protection should be limited to materials created after November 8, 2007, is also supported by established precedent under Rule 26(c). *See United States v. IBM*, 67 F.R.D. 39, 40 (S.D.N.Y. 1975) (holding that 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); *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 pertinent materials now would cause the competitive harm [they] claim[]." (internal quotations omitted)).

GameFly respectfully disagrees, however, with the Presiding Officer's inclusion of customer-specific "postal service costs" within the category of "[c]ompany financial data, production data, or market research" treated as highly confidential information. POR-12 at 25. The categories of First-Class Mail at issue in this case are market

dominant, in fact and as a matter of law. Moreover, the First-Class Mail rates charged by the Postal Service for DVD mailers are required to be published in the MCS and the DMM. Consequently—and in contrast to rate agreements for competitive products—there is no reason why disclosure of the Postal Service's costs of serving individual DVD rental companies would inflict any competitive injury on any DVD rental company (or the Postal Service itself). In any event, neither the Postal Service nor Blockbuster has identified any such injury.

D. Application To Information About The Postal Service Itself

The criteria established by the Presiding Officer for determining whether to protect information about the Postal Service itself are also consistent with precedent under Rule 26(c). The Presiding Officer proposed to unseal such information unless it is "either (a) a trade secret; or (b) proprietary commercial information that was (i) written or generated by or on behalf of the Postal Service after November 8, 2007, and (ii) contains one of the limited kinds of content, not readily ascertainable elsewhere, described below as 'highly confidential.'" POR-12 at 28. The Presiding Officer in turn defined "highly confidential" material in as "information to which employees of the Postal Service have only limited access that is comprised of one or more of the following: customer lists; market research; patent applications related to DVD mail or mail piece design; merger or acquisition matters; security matters; or numerical data that solely concerns a competitive service (*i.e.*, production costs, projected sales, total service volumes, methods of allocating costs, etc.), expressed other than as percentages or relative quantitative values equivalent thereto." *Id.*

This definition ensures that only competitively sensitive information will be protected. In doing so, it is in line with established precedent under F.R.C.P. 26(c), as discussed above with respect to mailer-specific information. The further limitation of protection to materials created after November 8, 2007, is also well-supported by precedent, for the reasons discussed above. *See Leucadia, Inc.*, 998 F.2d at 167.

II. IN APPLYING THE STANDARDS IN THIS CASE, THE COMMISSION MUST DRAW APPROPRIATE INFERENCES FROM THE FAILURE OF PROOF BY THE POSTAL SERVICE, NETFLIX AND BLOCKBUSTER, DESPITE AMPLE NOTICE AND OPPORTUNITY TO BE HEARD.

While GameFly generally agrees with the approach outlined in POR-12, the Presiding Officer's proposed standards for terminating non-public treatment of documents made available in discovery to GameFly under protective conditions have one significant omission: they fail to establish appropriate remedies or sanctions when a participant or third party that seeks to keep information under seal flouts a specific directive by the Commission to make the required showing of commercial or competitive injury.

Rule 3007.33 and F.R.C.P. 26(c) impose several specific burdens on the party seeking to block public disclosure of information produced in discovery. As explained in GameFly's October 27 Rejoinder and restated in POR-12, the party seeking to keep information under seal must show that the public disclosure of information would threaten the Postal Service or a third-party with material commercial injury. *See* GameFly Rejoinder at 5 (citing Rule 3007.33(a)-(b)). This requisite showing of commercial injury must be made specifically for *each document* that the Postal Service or third-party wishes to keep under seal. *Id.* at 6. Rule 3007.21(c) requires the Postal

Service's application for non-public treatment to "include a specific and detailed statement setting forth" a variety of information. In Order No. 225, the Commission elaborated on Rule 3007.21(c):

> the "rule requires the Postal Service to identify the material it asserts are non-public and to provide a detailed statement in support thereof, addressing, among other things, the rationale for the claim, including the statutory authority, the nature and extent of any commercial harm, a hypothetical example of such harm, the extent of public protection from public disclosure deemed necessary, and any other factors relevant to the application for non-public treatment.

Order 225 at 12.

The Presiding Officer, when granting the Postal Service's request for a lengthy extension of time to respond to GameFly's September 25 motion to unseal, reiterated that the Postal Service, and any third-parties that wished to keep documents under seal, should provide

> for *each document* it contends must remain sealed, such sufficient support as is ordinarily required for documents that it files under seal in the first instance, pursuant to 39 CFR 3007.21.

Presiding Officer's Ruling No. C2009-1/7 at 2 n.6 (emphasis added).

Despite the extraordinary 17-day extension of time granted by the Presiding Officer, the Postal Service and Blockbuster responded to this directive by ignoring it. As the Presiding Officer subsequently found:

> The Postal Service declined to file descriptions of each document marked confidential though required to by an earlier ruling granting it more time. No other meaningful support was provided either until the Postal Service

> filed its Response in opposition with vague descriptive information on certain classes of documents.

Presiding Officer's Ruling No. C2009-1/12 at 30.[1]

While Blockbuster did file an opposition, that pleading never descended from broad generalizations. Indeed, it appears that Blockbuster's counsel never even bothered to read the documents that Blockbuster is seeking to have the Commission keep under wraps, and instead relied on the Postal Service's summary of the documents in preparing its opposition. As GameFly detailed in its rejoinder, Blockbuster was provided repeated notice and ample opportunity to make the requisite showing, but simply failed to do so. *See* GameFly Rejoinder (October 27, 2009) at 22-23.

This failure of proof cannot be excused on the theory that the obligation to make a document-by-document showing of commercial injury was unknown or not established. While the alternative legal standards advanced by the Postal Service—e.g., the FOIA exemptions—give somewhat less weight than F.R.C.P. Rule 26 does to the offsetting policies favoring disclosure—all of the alternative standards require the party opposing unsealing to make a showing of commercial or competitive injury itself.

The absence of any document-specific showing of competitive injury from disclosure warrants a summary determination that the Postal Service, Netflix and Blockbuster have waived any objection to the unsealing of the documents at issue. In adversarial litigation, failing to make a showing when directed by the tribunal warrants a

[1] Netflix also has made no showing of competitive injury in response to GameFly's requests for unsealing of documents and information. Unlike the Postal Service and Blockbuster, however, Netflix has not sought to block the unsealing of any documents involving the company.

finding of waiver. "Without rules, there is no civility. Without enforcement, the rules are worthless." *Allen v. Interstate Brands Corp*., 186 F.R.D. 512, 515 (S.D. Ind. 1999).

Moreover, the "effectiveness of and need for harsh measures is particularly evident when the disobedient party is the government." *United States v. Sumitomo Marine & Fire Ins. Co.*, 617 F.2d 1365, 1370 (9th Cir. 1980). "(T)he public interest requires not only that Court orders be obeyed but further that Governmental agencies which are charged with the enforcement of laws should set the example of compliance with Court orders." *Perry v. Golub*, 74 F.R.D. 360, 366 (N.D. Ala. 1976). In *Sumitomo*, the Ninth Circuit affirmed the district court's imposition of sanctions against the government, and personally against the government's attorney, for failure to obey discovery orders. *See Sumitomo Marine & Fire Ins. Co.*, 617 F.2d 1365. The court concluded that if the government's failure to comply with court orders had been to some extent the result of understaffing, "then perhaps harsh measures will encourage those charged with funding and allocating personnel among the Justice Department's various offices to take ameliorating action." *Id.* at 1370; *see also Vermouth v. Commissioner of Internal Revenue*, 88 T.C. 1488 (June 17, 1987) (affirming sanctions against IRS where IRS failed to file an answer within 60 days from the service of the petition, as required by tax court rules of procedure, and within an additional 60 days permitted by the Court, and where the failure was due to bureaucratic inertia and was not due to circumstances beyond IRS's control).

In this case, the Presiding Officer recognized the above principles when ordering that "any objections should be filed with the Commission by October 19, 2009, *or they will be deemed to be waived*." Presiding Officer's Ruling C2009-1/7 at 3 n.7 (emphasis

added). POR-12, however, effectively gives the Postal Service, Netflix and Blockbuster an unmerited regulatory mulligan. The ruling calls for another round of comments on the applicable standards, a second Commission decision, further negotiations on individual documents, additional pleadings if disagreements remain, and a third Commission decision. Requests to unseal the balance of the documents produced under seal will call for further rounds of pleadings, negotiations and delay. These additional discovery proceedings will unavoidably delay the entire case, to the Postal Service's benefit.

This delay is likely to inflict substantial injury on GameFly. At GameFly's current mail volume, the difference between the per-piece rates of postage that the Postal Service is charging Netflix, and the higher rates that GameFly must be to achieve **[BEGIN NETFLIX PROPRIETARY]** **[END NETFLIX PROPRIETARY]**, is costing GameFly approximately $730,000 per month in additional postage.[2] Given these facts, it would appropriate for the Commission to find, without further delay, that the objections of the Postal Service, Blockbuster and Netflix to public unsealing of the documents identified in GameFly's September 25 motion have been waived.

[2] GameFly currently pays postage for approximately 1.2 million mailers per month. At $1.05 in postage per piece, this amounts to approximately $1.26 million per month. At a one-ounce letter rate of $0.44 cents per piece, the monthly postage would be reduced to approximately $530,000 per month. The difference is roughly $730,000 per month.

At a minimum, the Commission should rule that the further sealing or unsealing of *all* documents currently filed under seal—not just the subset that was covered in GameFly's September 25 motion—should be resolved during the further proceedings contemplated by the Commission after it issues the final standards. Those proceedings should proceed under an expedited timetable.

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