

Before the
POSTAL REGULATORY COMMISSION
WASHINGTON, D.C. 20268-0001

Complaint of GameFly, Inc.

Docket No. C2009-1

COMMENTS OF THE PUBLIC REPRESENTATIVE
ON PRESIDING OFFICER'S RULING 12
(December 9, 2009)

The Public Representative offers the following comments on POR 12, filed November 18 2009. That ruling resolved questions raised in Gamefly's motion for an order to show cause and proposed criteria for removing protective conditions from documents that are not currently available to the public.¹ The ruling also "certifies this question to the commission." *Id.* The Public Representative favors the proposed standards, with specific areas of concern where caution may be necessary, as explained below.

I. Proposed Test

The ruling proposes to break the documents into three groups and apply a specific standard to each discrete group of documents. The group definitions are as follows (*id.*):

If the documents contain information identified with one or more DVD mailers other than Netflix or Blockbuster, then that information will continue to be extended non-public treatment under an effective agreement of the parties.

If the document contains information specific to Netflix or Blockbuster, then the Commission will apply the balancing test of Fed. R. Civ. P. 26(c) for private litigants.

If the documents contain no specific information concerning one or more DVD mailers, then it will be evaluated under Fed. R. Civ. P. 26(c) for the

¹ Presiding Officer's Ruling on Motion to Show Cause why Certain Documents Should not be Unsealed November 18, 2009 (Ruling) at 2

Postal Service, a public agency, which provides both market dominant and competitive services.

The Presiding Officer further analyzes each group of documents. The first set of documents will have the strongest protection applied, as it has already been subject to an agreement between the parties. The parties have agreed that material concerning mailers other than Gamefly, Netflix and Blockbuster will be filed by the Postal Service only in redacted form.

The second set of documents will be viewed under the lens of both 39 CFR 3007.33 and Fed. R. Civ. P. 26(c) for private litigants. The proposed standard is further explained on page 24, where the ruling states:

The proposed criteria will unseal information, unless it is either (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 (footnote omitted).

The ultimate goal of this standard is to “ascertain if competitors of Netflix or Blockbuster who gained access to this information could use it to better position their products in the marketplace while, at the same time, undercutting the position which the DVD mailer in question has established through the investment of both time and money. This proposed criteria will disfavor continued protection, except when appreciable justifications arise, including maintenance of reasonable protection measures”²

The standards proposed for documents that contain only information from the Postal Service are the least clear cut of the group. The Postal Service and Gamefly have argued that different standards apply, and several different regulations can be

² Ruling at 26 (footnotes omitted)

seen as competing to govern the standard. The ruling states that “under the proposed sets of criteria below, a genuine need for confidentiality must be shown by the Postal Service. Only if it can show that the harm caused by its public disclosure outweighs the need of the party seeking public disclosure, does the burden shift to GameFly to show the designation under seal is unjustified” *Id.* at 19. The Ruling proposes to use Fed. R. Civ. P. 26(c) for the Postal Service, which is construed as the broadest applicable standard, allowing the most customization and balancing of competing factors. These factors will be very similar to those for the group two documents, with the additional factor concerning competitive products. *Id.* at 29.

II. Analysis

In general, the proposed standards are adequate. At the heart of discrimination cases is the documentary evidence of decisions made and not made. The Postal Service has promulgated many arguments concerning its behavior, and in order to prove or disprove that their arguments are aligned with their actions there must be an evidentiary record. In order to maintain public faith, this case must not be decided behind closed doors. While there are certainly documents that contain highly confidential information that can affect the competitive market for DVD round trip mailers, proving the importance of maintaining confidentiality should be straightforward under the proposed rubric. For documents that concern the Postal Service alone, Fed. R. Civ. P. 26(c) should be used to unseal evidence that will build the evidentiary record while not harming the Postal Service’s competitive position. As the postal products at the heart of this dispute are market dominant products, the burden is, and should be, on the Postal Service to show how the unsealing documents will harm its ability to continue to offer the products.

An area of concern is documents with both Group 2 and Group 3 characteristics. The Commission may want to divide certain documents into sections before applying the separate tests. Documents where the Postal Service comments on Netflix or Blockbuster material may contain material confidential under group 2 but not group 3, and vice versa.

III. Summary

The public representative endorses the proposed tests for determining what materials should be unsealed.

Respectfully submitted,

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