

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

COMPLAINT OF CAPITAL ONE
SERVICES, INC.

Docket No. C2008-3

**ANSWER OF CAPITAL ONE SERVICES, INC.
IN OPPOSITION TO THE MOTION OF BANK OF AMERICA
TO LIMIT THE SCOPE OF THE PROCEEDING OR,
IN THE ALTERNATIVE, TO DISQUALIFY COUNSEL**

(REDACTED VERSION)

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September 24, 2008

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(September 24, 2008)

On September 10, 2008, Bank of America Corporation (Bank of America) filed, without warning, an extraordinary 23-page motion,¹ unprecedented in several respects: it is the first “motion to limit the scope of the proceeding” ever filed in a complaint case; it demands that the Commission rule on remedies under 39 U.S.C. § 3662(c) before a determination of noncompliance has been made; and it attempts to coerce another party with an unfounded personal attack on that party’s counsel.² Whatever the intended strategic benefit of filing a surprise motion³ in an already contentious

¹ Motion of Bank of America Corporation to Limit the Scope of the Proceeding or, in the Alternative, to Disqualify Counsel for Complainant Capital One Services, Inc. (September 10, 2008) (Motion).

² Rather than place a telephone call to counsel to explore whether the parties have interests in common, Bank of America uses a public filing to present opposing counsel with an ultimatum: Capital One must refrain from pursuing certain lines of discovery and requesting certain types of relief *or else*—“the scope of this proceeding must be narrowed if Capital One wishes to continue with its existing outside counsel.” Motion at 3 (emphasis added); *see also id.* at 22 (stating that Bank of America will consent to counsel’s continued representation if—and only if—Capital One “were to narrow the scope of remedies sought”).

³ Indeed, counsel for Bank of America, Jennifer Mallon, spoke to counsel for Capital One on the afternoon of September 9, 2008, asking how to obtain a copy of the Lowrance deposition transcript. No notice was given of the Motion to Disqualify, which was filed the next day.

proceeding,⁴ this Motion is not grounded in the facts, the law, or common sense.

Moreover, the timing of the Motion is suspect. Capital One Services, Inc. (Capital One) filed its Complaint—complete with all the language on “undue preference” that Bank of America now finds objectionable—over three months ago. One can only speculate why Bank of America feels compelled to launch such an extraordinary personal attack now, shortly after the Lowrance deposition.⁵

INTRODUCTION

Capital One respectfully requests that the Commission deny the Motion in its entirety for the reasons set forth below:

(1) There is no such thing as a “motion to limit the scope of the proceeding” in a complaint case.⁶

If a party in a complaint case believes “the scope of the complaint . . . should be limited,” Motion at 9, the proper procedure to “preclude a claim” is to file a motion to dismiss that claim. The Postal Service, in fact, already filed a motion to

⁴ The Postal Service and Capital One are in the process of making good faith efforts to reduce the level of contention and to resolve discovery disputes informally. See, e.g., P.O. Ruling No. C2008-3/19, Presiding Officer’s Ruling Granting Consent Motions for Extension of Time (September 16, 2008); P.O. Ruling No. C2008/23, Presiding Officer’s Ruling Granting Motion for Extension of Time (September 19, 2008).

⁵ Bank of America cites the Complaint repeatedly as “evidence” of Capital One’s hostile intent, see, e.g., Motion at 4-5, and seeks to force Capital One and/or the Commission to restrict “the scope of the complaint and the remedy.” *Id.* at 9. In reality, Capital One’s interests are not necessarily adverse to Bank of America’s. After all, Capital One seeks an NSA that uses Bank of America’s NSA as a baseline. To that end, *supporting* Capital One’s efforts to obtain a functionally equivalent NSA would seem to hold far greater promise than using procedural motions to *oppose* it. Bank of America’s NSA would not represent an “undue” preference if it were available to a competitor like Capital One.

⁶ Capital One has reviewed every Complaint case since 1998, and never before has such a motion to limit (or, for that matter, a motion to disqualify counsel) been filed or granted. Commission Rule 196(a)(6) provides the closest analogy: “a proposal for limitation of issues” in proceedings involving functionally equivalent NSAs may be included in the Postal Service’s initial request. 39 C.F.R. § 3001.196(a)(6). That situation is far removed from Bank of America’s Motion.

dismiss all of Capital One's claims, including the claim of "undue preference" that Bank of America finds objectionable, and the Commission denied that motion. See PRC Order No. 92, Docket No. C2008-3 (August 1, 2008). Not only has Bank of America filed too late, but it also has failed to demonstrate that Capital One's Complaint does not meet the Commission's "colorable claim" test for a motion to dismiss.

(2) The Motion improperly seeks to prohibit discovery of information relevant to Capital One's claims.

Bank of America demands that "discovery and testimony should be limited" and that the Commission should "preclude Capital One from inquiring into or otherwise seeking to explore *any matters concerning the Bank of America NSA* [except for matters of public record and the procedures used to assess the Bank's compliance]." Motion at 13 (emphasis added). Commission Rule 25, however, sets the standard for limiting discovery, and that broad standard allows "information which appears reasonably calculated to lead to the discovery of admissible evidence." 39 C.F.R. § 3001.25.⁷ Bank of America does not and cannot contend that Capital One's discovery requests fall short of this standard. In fact, Bank of America's position that further inquiry into the "undue preference" claim may threaten its NSA represents an implicit admission that matters concerning the Bank of America NSA are relevant, or are at least reasonably calculated to lead to the discovery of admissible evidence.

(3) The Motion improperly seeks to restrict the Commission's authority to impose an appropriate remedy.

Bank of America unabashedly demands that the Commission bind itself now as to its future decisions: it claims that the Commission must essentially prejudge

⁷ See also Rules 26 and 27, 39 C.F.R. §§ 3001.26 and 3001.27.

the case and decide now—at the discovery stage and well before the Commission has sufficient information to determine noncompliance—to restrict the scope of remedies that the Commission might choose to impose. This request represents nothing less than a challenge to the Commission’s authority: “[It] would be inappropriate . . . for the reviewing body to issue an order . . . amending the initial agreement Indeed, there is doubt that the Commission has jurisdiction to order such a result.” Motion at 12-13. Bank of America’s demand flies in the face of the express mandate of 39 U.S.C. § 3662(c): “*If the Postal Regulatory Commission finds the complaint to be justified, it shall order that the Postal Service take such action as the Commission considers in order to achieve compliance with the applicable requirements and to remedy the effects of any noncompliance.*” (Emphasis added.)⁸

(4) Bank of America’s surprise personal attack against counsel for Capital One is unwarranted by the facts and cannot be sustained under the law.

The alternative Motion to Disqualify is a collection of general statements and unsubstantiated conclusions. It vastly overstates the nature and scope of Ms. Leong’s work in 2005 for Bank of America and the nature and content of confidential information received by Ms. Leong during that brief engagement. Under District of Columbia Rules of Professional Conduct, the extreme step of disqualification is warranted only if Ms. Leong received confidential information from the company that is

⁸ As the Commission has recognized, the Postal Accountability and Enhancement Act (PAEA) restructured the regulatory scheme to increase the importance of the complaint proceeding. See Docket No. RM2008-3, Notice and Order of Proposed Rulemaking Establishing Rules for Complaints (August 21, 2008) at 2. In the PAEA, Congress gave the Commission broad discretion to determine the appropriate remedy for noncompliance based on the specific facts and circumstances surrounding the noncompliance. At the very least, it would violate the *spirit* of the PAEA for the Commission to bind itself with respect to available remedies long before the record in this case has been completed.

material to this proceeding. As a matter of fact, Ms. Leong received no such information from Bank of America. See Declaration of Joy M. Leong (September 24, 2008). As a matter of law, *even if one assumes Ms. Leong received confidential information* as alleged by Bank of America, that information is *not material* to Capital One's claims under 39 U.S.C. §§ 403(c) and 3622(c)(10).

Moreover, in its rush to attack Capital One, Bank of America has cast aside common sense. The Complaint alleges that the *Postal Service*, not Bank of America, acted unlawfully. Capital One is not interested in Bank of America's three-year-old negotiating strategy, abandoned business plans, or outdated marketing circumstances. It *is*, however, interested in the decisions of the *Postal Service* about functionally equivalent NSAs generally and Capital One's proposed NSA in particular.⁹ In addition, an objective party could discern that Capital One itself might favor preserving the Bank of America NSA as the baseline agreement upon which Capital One's own NSA relies.

Bank of America's Motion represents not only an extraordinary personal attack on counsel for another party but also a subversion of the Commission's procedural rules and an attack on the authority of the Commission itself. The Commission should not countenance this Motion.

⁹ As a mailer, Bank of America could not have had any input into or information about either of these decisions.

ARGUMENT

I. THE MOTION TO LIMIT IS LEGALLY AND PROCEDURALLY IMPROPER.

The Motion disguises the true nature of what Bank of America wants. The first “motion to limit” ever filed in a Complaint proceeding, the so-called “Motion to Limit the Scope of the Proceeding” articulates several different desired outcomes,¹⁰ sprinkled with various ultimatums to Capital One¹¹ and the Commission.¹² Underneath the rhetoric, however, the Motion is really a motion to dismiss, an objection based on relevance, and a request for an early ruling on relief—all rolled into one. Specifically, Bank of America asks the Commission to:

¹⁰ At various points, Bank of America asks that the Commission “narrow the scope of this proceeding and the remedies that [Capital One] may seek,” Motion at 1; limit discovery and testimony “to facts bearing on the fundamental question [of] discrimination,” *id.* at 2; cut off what it characterizes as “an improper collateral attack,” *id.* at 12; recognize that the Commission lacks jurisdiction to impose the remedy that Bank of America disagrees with, *id.* at 13; effectively prejudge that no possible remedy could include a modification—of any kind—to the Bank of America NSA, *id.*; “disqualify [counsel] unless Capital One agrees not to raise any issues concerning the negotiation and approval of the Bank of America NSA or Bank of America’s compliance with the NSA Requirements,” *id.* at 14, 22; and disqualify Capital One’s counsel “[i]f the Commission declines to enter an order limiting the scope of the proceeding and permissible remedy,” *id.* at 14.

¹¹ Bank of America repeatedly addresses Capital One in its Motion. *See, e.g., id.* at 22 (“*If Capital One were to narrow the scope of the remedies sought to exclude any possibility that it will seek to alter Bank of America’s NSA, then the Bank will consent to Ms. Leong’s representation*”)(emphasis added); *id.* (“The ethics issues raised above need not be addressed if *the Complaint is narrowed to expressly preclude the discovery of any evidence or the submission of any claim for relief that could support the rescission . . . of the Bank of America NSA*”)(emphasis added).

If Bank of America wanted to bargain with Capital One, a simple telephone call to Capital One’s counsel would have sufficed, though it would have lacked the dramatic effect of attacking counsel on the public record. It would have, however, spared Capital One the time and expense associated with responding through a public filing and the Commission the time to evaluate the Motion and Answer. The Commission should not condone Bank of America’s use of the filing process to attempt to intimidate Capital One counsel or to leverage publicity to force Capital One into agreeing to its ultimatum. *Accord* Fed. R. Civ. Pro. Rule 11(b) (“By presenting to the court a . . . written motion . . . an attorney . . . certifies that . . . it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation”).

¹² *See, e.g.,* Motion at 21-22 (“Bank of America could apply to the D.C. Office of Bar Counsel to prosecute this ethics case before the Board on Professional Responsibility. Doing so . . . could taint any Commission decision in this matter”).

- Issue an order narrowing the scope of the proceeding to preclude the claim in Capital One’s Complaint that “that the Bank of America NSA gives the Bank ‘an undue preference’. . . . in violation of 39 U.S.C. 403(c).” Motion at 1-2.
- Limit discovery to preclude Capital One from inquiring into or otherwise seeking to explore any matters concerning the Bank of America NSA, except matters in the public record and non-privileged information on the procedures used to assess Bank of America’s compliance with the NSA. *Id.* at 13.
- Limit immediately the remedies available to the Commission to exclude any modification to the Bank of America NSA because the Commission does not have “jurisdiction” to order such a result. *Id.*

None of these requests—however dressed up—warrant action by the Commission. Accordingly, the Motion to Limit the Scope of the Proceeding should be denied.

A. Bank of America cannot disguise an untimely and improper motion to dismiss in the garb of a “motion to limit.”

Bank of America repeatedly asks the Commission to “limit the scope of the proceeding” or to “narrow the scope of the Complaint.” See note 10, *supra* (citing examples). Although Bank of America “takes no position on the merits of Capital One’s claim that it is entitled to an NSA on the same terms as those embodied in the Bank’s NSA,” Motion at 1, it objects to the portion of the Complaint that alleges “that the Bank of America NSA gives the Bank ‘an undue preference.’ **It is that issue, and only that issue, [that] is the impetus for th[e] Motion.**” *Id.* at 1-2 (emphasis added).

Specifically, the Motion references Claim 2 of Capital One’s Complaint (paragraphs 52-55), entitled “The Postal Service Has Granted an Undue or Unreasonable Preference to Bank of America in Violation of 39 U.S.C. § 403(c).” It is Claim 2, and only Claim 2, that Bank of America finds objectionable. See Motion at 2.

This whole argument is nothing more than an improper motion to dismiss¹³ that makes no effort to meet the Commission's standard for such motions, as set out in PRC Order No. 92:

The Commission has previously applied a "colorable claim" standard. See PRC Order No. 1307 at 9. The Commission finds this an applicable standard to apply under section 3662. Under this standard, Capital One does not have to establish undue discriminations as argued in the [USPS] Motion to Dismiss; it only has to establish a colorable claim raising material issues of fact or law for the Commission to initiate a proceeding. Once a colorable claim is established, the complainant is provided an opportunity to develop its case, and the respondent is given an opportunity to refuse the allegations." Order 92 at 4-5.

More importantly, the Commission has already denied a motion to dismiss this claim in the Complaint. On August 1, 2008, Order 92 denied the Postal Service's motion to dismiss all of the claims in the Complaint, including Claim 2: "***The Commission shall hear all issues presented by the Complaint.***" Order No. 92 at 5 (August 1, 2008) (emphasis added). Thus, the matter has been decided, and the Commission should deny Bank of America's demand that it preclude, exclude, or dismiss Capital One's claim of "undue preference or otherwise "limit" or "narrow" the Complaint."¹⁴

¹³ The Commission's Rules do not confer authority on an intervener to file a dispositive motion to dismiss in a Complaint case; it is doubtful that Bank of America has standing to move to dismiss a count in a Complaint filed against the Postal Service. The PAEA's increased emphasis on using the complaint process to ensure transparency weighs against allowing third party interveners to move to dismiss claims against the Postal Service (especially where a Postal Service's motion to dismiss has already failed)—if only to dispense with unnecessary motions that waste Commission resources.

¹⁴ Even if the Motion were not procedurally defective, the Commission should deny the Motion because it misstates the governing law. Bank of America distinguishes between "discrimination" claims and "preference" claims, see Motion at 1-2, and "objective" and "subjective" differences, see *id.* at 2-3, making much ado about these supposed distinctions and arguing that the former categories are legitimate while the latter categories are not. But these are distinctions without differences. In Section 403(c), "undue preference" is the flip side of the "undue discrimination" coin: refusing to provide the same opportunity to a similarly situated mailer can be seen as either an act of discrimination against the second mailer or an act of preference for the first mailer. Similarly, neither Section 403(c) nor any of the authorities Bank of America cites supports a distinction between

B. Capital One’s discovery requests are “reasonably calculated to lead to admissible evidence.”

Bank of America asks for an order that would “preclude Capital One from inquiring into or otherwise seeking to explore *any matters concerning the Bank of America NSA*, except matters in the public record . . . or non-privileged information . . . concerning the procedures used by the Postal Service to assess Bank of America’s compliance with the NSA.” *Id.* at 13 (emphasis added). Bank of America’s attempt to foreclose this entire line of discovery is not a “Motion to Limit,” but simply an objection to Capital One’s discovery requests on grounds of relevance. See Motion at 14 (“[This] restriction is informed by considerations of relevance”). Here again, Bank of America makes this argument without any effort to cite or apply the relevant standard: *Is the requested information “reasonably calculated to lead to admissible evidence?”*

Commission Rule 25, 39 C.F.R. §3001.25.¹⁵

Table 1 below lists each line of discovery that Bank of America deems “objectionable” and addresses its relevance, or potential relevance, to Capital One’s Complaint.

“objective” and “subjective” discrimination along the lines suggested in the Motion. See Motion at 2-3, 10-11. For example, *United Easter Seal Society v. United States Postal Service*, 656 F.2d 754, 760 (D.C. Cir. 1981), does *not* stand for the proposition that a complainant “must first show evidence of differential treatment” to meet some “likeness” prong of a supposed three-part test to establish a claim for discrimination under 39 U.S.C. § 403(c). See Motion at 10 (citing that case for that proposition). Discrimination is, by nature, often subjective, and nothing in § 403(c) or the authorities interpreting it suggests that discrimination claims must be confined to an “objective” comparison of the terms offered customer A to the terms offered customer B.

¹⁵ The Rules do not include any provision authorizing a participant who is not the recipient of the discovery request to object on relevance grounds. Although the Commission has procedures to establish appropriate protective conditions to address the confidentiality concerns of a third party whose information may be produced in the course of discovery requests to the Postal Service, what Bank of America attempts in its Motion is different in kind: it objects on relevance grounds to a discovery request to another party.

TABLE 1

Challenged Discovery	Relevance
<p>“[T]he extensive discovery demands directed toward th[e] issue of [undue preference].” Motion at 2.</p>	<p><i>On its face, Section 403(c) prohibits the Postal Service from granting “an undue preference.” Discovery into whether an “undue preference” was granted here is highly relevant to Claim 2 as well as to the related discrimination claims or, at very least, could lead to admissible evidence.</i></p>
<p>“[A]ny matters concerning the Bank of America NSA, except (1) matters on the public record of the [MC2007-1 proceeding]; or (2) non-privileged information . . . concerning the procedures used by the Postal Service to assess Bank of America’s compliance with the NSA.” Motion at 13.</p>	<p><i>Matters concerning the baseline Bank of America NSA may lead to admissible evidence on issues such as whether Capital One is “similarly situated” and whether there is more benefit to the Postal Service from the first adopter. The Bank of America NSA and the circumstances surrounding it are the starting point (or baseline) for any comparison with a functionally equivalent NSA.</i>¹⁶</p>
<p>“[T]he negotiations between Bank of America and the Postal Service leading up to the Bank of America NSA.” <i>Id.</i> at 3.¹⁷</p>	<p><i>Inquiry into how the Postal Service handled the Bank of America negotiations may reveal whether the Postal Service took into consideration the NSA’s effect on competition or on the marketplace or how it would handle functionally equivalent NSAs. Capital One emphasizes that it is the Postal Service’s actions, not Bank of America’s, that are the subject of its discrimination claims.</i>¹⁸</p>

¹⁶ For example, in order to determine whether Mailer A is “similarly situated” to Mailer B, there must exist a basis for comparison, some criteria on which to judge similarity. In order to evaluate “comparable benefit” between the baseline NSA and the second NSA, one has to know the benefit of the baseline NSA. Even Bank of America agrees with this logic. See Motion at 2. Inquiry beyond the four corners of the Bank of America NSA is proper and necessary.

¹⁷ At least three times, Bank of America erroneously cites POR C2008-3/8 as definitively deciding that inquiries about the Bank of America NSA negotiations are “outside the bounds of the scope stated in [the] Complaint.” Motion at 8; *see also id.* at 13, 17. The plain language of the Ruling, however, makes clear that the Presiding Officer’s restriction was limited to the Lowrance deposition: “Questions concerning the negotiations . . . are not properly addressed *to Ms. Lowrance during this deposition.*” POR C2008-3/8 at 3 (emphasis added). Neither APWU nor Capital One has had an opportunity to address the relevance of questions about negotiations in a context outside the Lowrance deposition.

¹⁸ Capital One challenges the Postal Service’s decision-making process, of which Bank of America, presumably, has no knowledge. Capital One does not seek, and, indeed, has no interest in Bank of America’s negotiation strategy in 2005-2007 or whether Bank of America did anything “inappropriate” in negotiating its NSA. In fact, it would be fair to assume that, as a rational economic entity, Bank of America acted to maximize its own economic and competitive interests. It would have been the Postal Service’s responsibility, not Bank of America’s, to decide how to minimize any potential competitive harm from the NSA.

“[T]he internal deliberations of the Postal Service (and discussions with Bank of America) both before and after the issuance of the Commission decision recommending approval of that NSA.” *Id.* at 13.

Internal deliberations of the Postal Service are highly relevant. The Commission’s Recommended Decision and Order in MC2007-1 and Commissioner Goldway’s concurring opinion warned of the possibility of functionally equivalent NSAs. In the course of approving the Bank of America NSA, the Postal Service may have considered the possibility of functionally equivalent NSAs and made a separate decision to handle future functionally equivalent NSAs in a particular way. Such information would be highly relevant to a discrimination claim. Discrimination may be shown either by a decision to turn away all potential applicants for functionally equivalent NSAs or by a decision to turn away a single similarly situated applicant (such as Capital One). Again, the focus of this issue is the Postal Service, not Bank of America or its NSA.

****[BEGIN MATERIAL UNDER SEAL]****

****[END MATERIAL UNDER SEAL]****

C. The Commission should not limit the remedies available to it under 39 U.S.C. § 3662(c), and Bank of America's attempt to obtain a ruling eliminating a particular remedy is premature.

Bank of America's request that the Commission immediately restrict the scope of available remedies so as not to threaten the Bank of America NSA is inappropriate and premature. The law is clear that the Commission has broad authority to fashion the remedy it sees fit: a remedy that might well include, as Bank of America suggests, see Motion at 12 and note 5, an order requiring the Postal Service to offer an NSA on similar terms to Capital One (a desirable outcome from Capital One's perspective), but that might also, in addition or in the alternative, include any other remedy the Commission considers appropriate to remedy discrimination, undue preference, or any other violation of law.

Indeed, it would be contrary to the letter and spirit of the PAEA for the Commission to bind its hands by categorically ruling out a particular remedy now. As Section 3662(c) provides:

If the Postal Regulatory Commission finds the complaint to be justified, it shall order that the Postal Service take such action as the Commission considers appropriate in order to achieve compliance with the applicable requirements and to remedy the effects of any noncompliance.

Id. (emphasis added).

Discovery has yet to be completed, testimony has yet to be filed, and the Commission has yet to find that the Complaint is justified under 39 U.S.C. § 3662. Yet

Bank of America wants the Commission to jump to a decision about the appropriate remedy for a violation that has not yet been proven. Bank of America even seeks to challenge at this time the Commission's legal authority to impose a particular remedy, a remedy that no party has yet suggested and that Capital One may never seek.¹⁹ At the appropriate time and if the issue should ever arise, Bank of America will have its due process opportunity to argue that it could suffer harm from cancelation of its NSA or that the Commission lacks authority to take such action.²⁰ Now is *not* the time.

In sum, the Commission should reject all three requests in Bank of America's "Motion to Limit": (1) its "motion to dismiss" Claim 2 (undue preference) has already been denied by Order 92; (2) its attempt to preclude discovery of highly relevant information fails to meet the standard of Rule 25; and (3) its effort to artificially bind the Commission with respect to remedies before a finding of violation is woefully premature.

II. BASED ON BOTH THE FACTS AND THE LAW, BANK OF AMERICA'S MOTION TO DISQUALIFY COUNSEL SHOULD BE DENIED.

Bank of America alternatively seeks to disqualify Capital One's counsel. It has asserted that, due to a brief attorney-client relationship in 2005 between Joy Leong, counsel for Capital One, and Bank of America, Ms. Leong must be disqualified from representing Capital One in C2008-3. See Motion at 5-9, 14-22. The argument relies on two provisions of the District of Columbia Rules of Professional Conduct – 1.9 (Conflict of Interest: Former Client) and 1.6 (Confidentiality of Information).

¹⁹ In arguing that Bank of America's motion to preclude cancelation of its NSA as a remedy is premature, Capital One does not waive its right to argue—at the appropriate time—for *or against* cancelation of the Bank of America NSA.

²⁰ "Any Order that required changes in the Bank of America baseline agreement would constitute an improper collateral attack . . . [T]here is doubt that the Commission has jurisdiction to order such a result." *Id.* at 12-13 (emphasis added).

Bank of America's assertions under both provisions rest on the same flawed premise: namely, that, during her representation of Bank of America, Ms. Leong received confidential information from the Bank that is material to this proceeding. As explained below, that foundation simply does not exist. As a factual matter, Ms. Leong received no such information from her former client. See Declaration of Joy M. Leong, C2008-3 (September 24, 2008). As a legal matter, *even assuming* she did receive the confidential information Bank of America alleges, the information is not material to this proceeding.

A. There is no conflict of interest in Ms. Leong's representation of Capital One.

1. The applicable legal standard

Whether Ms. Leong has a conflict of interest in representing Capital One in this matter is judged under District of Columbia Rule of Professional Conduct 1.9, governing the obligations of a lawyer to a former client (in this case, Ms. Leong's obligations to Bank of America):

A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the **same or a substantially related** matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent. (Emphasis added.)

In applying this rule, "[a]ny motion to disqualify counsel faces [an] extraordinarily high burden." *Steinbuch v. Cutler*, 463 F. Supp. 2d 4, 7 (D.D.C. 2006). As the U.S. Court of Appeals for the D.C. Circuit has noted, disqualification is warranted "only rarely." *Koller v. Richardson-Merrell, Inc.*, 737 F.2d 1038, 1056 (D.C. Cir. 1984). "It cannot be a fanciful, unrealistic or purely subjective suspicion of impropriety that requires disqualification." *United States v. Smith*, 653 F.2d 126, 128 (4th Cir. 1981)

(quoted in *Brown v. District of Columbia Board of Zoning Adjustment*, 486 A.2d 37, 48 (D.C. 1984)). Courts and tribunals are particularly reluctant to grant disqualification motions given the prejudice a party may suffer from being denied the counsel of his choice. See generally *Koeller*, 737 F.2d at 1056 (“Except in cases of truly egregious misconduct likely to infect future proceedings, other means less prejudicial to the client’s interest than disqualifying the counsel of her choice are ordinarily preferred”).

Any lesser standard would “encourage time-consuming motions made for purely tactical reasons,” and, further, “permit litigants, unfairly, to avoid the merits of a case by attacking opponent’s counsel instead.” *Brown v. District of Columbia Board of Zoning Adjustment*, 486 A.2d 37, 49 n.16 (D.C. 1984); accord *Freeman v. Chicago Musical Instrument Co.*, 689 F.2d 715, 722 (7th Cir. 1982) (disqualification motions “should be viewed with extreme caution for they can be misused as techniques of harassment”) (quoted in *Brown*).

Even assuming Bank of America’s interests are “materially adverse” to those of Capital One in this proceeding,²¹ the prohibition of Rule 1.9 applies only if this proceeding is “the same or a substantially related” to the matter for which Ms. Leong provided advice to Bank of America in 2005. As discussed below, the two matters are neither the same nor substantially related.

2. Ms. Leong’s prior representation of Bank of America

The factual foundation of Bank of America’s motion to disqualify Ms. Leong is the Declaration of Jody Berenblatt, a Bank of America employee. Ms. Berenblatt’s Declaration, which is mostly a collection of broad statements and

²¹ For reasons stated previously, the interests of Bank of America and Capital One are not necessarily adverse. See *supra* at 2 n. 5 and 5.

unsubstantiated conclusions, vastly overstates the nature and scope of Ms. Leong's work in 2005 for Bank of America and the nature and content of confidential information received by Ms. Leong from Bank of America during her brief representation of the Bank.

The Declaration of Ms. Leong, filed concurrently with this Answer, describes in detail the limited work she did for Bank of America in 2005,²² the work she did not do for Bank of America, and the nature and content of confidential information she received from Bank of America. Ms. Leong explains that she provided counseling to Bank of America on several postal issues pursuant to a small retainer between May and June 2005, at a time when Bank of America was considering seeking an NSA similar to the ones Ms. Leong had worked on for other banks. At that time, Bank of America was in a very early stage of its thinking about NSAs, and Ms. Leong urged it to consider an NSA based on volume incentives. Ms. Leong received little confidential information about Bank of America's mailing practices. That initial engagement ended the first week of July, 2005.

When Bank of America later decided to proceed, it sought competitive bids from outside counsel. In mid-August, Bank of America engaged Ms. Leong's law firm at the time (Sidley Austin Brown & Wood) to provide additional counseling.

²² Under D.C. Rule of Professional Conduct 1.6(e), in filing its Motion to Disqualify, Bank of America has opened the door for Ms. Leong to offer a limited response without violating the attorney-client privilege. However, in order to accord as much confidentiality as possible to her former client, Ms. Leong has revealed only what she believes is absolutely necessary to defeat the Motion for Disqualification. If the Commission determines it needs further privileged information, Ms. Leong is willing to submit further information, with appropriate protective conditions, to respond to the Commission's questions. However, as explained above, the Commission need not engage in an in-depth factual investigation because, *even assuming* Ms. Leong received the confidential information that Ms. Berenblatt's Declaration describes, none of the information Ms. Leong is alleged to have received or could have received is material to the Capital One Complaint, and there are thus no grounds to disqualify Ms. Leong.

However, as acknowledged in Ms. Berenblatt's Declaration, August and September were slow months, and no substantive progress was made before Ms. Leong's participation ended in September. Seventeen months later, Bank of America and the Postal Service finally reached an agreement. Ms. Leong had no connection with PRC Docket MC2007-1 other than as a public observer.

Ms. Leong is confident that whatever confidential information she may have received during this brief period in 2005 has absolutely nothing to do with the issues in this Complaint proceeding. What she does know about the Bank of America NSA was derived from her review of the public record of MC2007-1 and conversations with members of the postal community not employed by or affiliated with Bank of America.

3. The nature of this proceeding

The Complaint in this matter involves allegations that the Postal Service unlawfully discriminated against Capital One, or otherwise violated applicable legal standards under the PAEA. As such, it calls into question the decisions and decision-making processes of the Postal Service, and the Postal Service alone, with respect to the allegedly discriminatory decision not to offer Capital One a similar NSA.²³ It could also involve the broader question of whether and to what extent the Postal Service

²³ Bank of America devotes a full page of its Motion to quoting Capital One's counsel at the Prehearing Conference and Capital One's Emergency Motion of August 26, 2008, which referred to the need to inquire into a "decision" made by the Postal Service. Bank of America apparently leaped to the conclusion that "[t]he decision to which Capital One refers is the Postal Service's decision to enter into the Bank of America NSA." Motion at 7. Actually, as the transcript and pleading make clear, the "decision" at issue was the decision to deny similarly situated mailers, such as Capital One, the same type of NSA.

planned to deal with mailers like Capital One seeking NSAs that were the similar to the NSA offered to Bank of America.

4. Ms. Leong's 2005 representation of Bank of America and this matter are neither the same nor substantially related.

From the foregoing descriptions of Ms. Leong's brief representation of Bank of America in 2005 and of this proceeding, there is no basis whatsoever for disqualification under Rule of Professional Conduct 1.9. Ms. Leong's prior representation of Bank of America and this proceeding are not the "same." As Ms. Leong's Declaration makes clear, her representation of Bank of America in 2005 consisted of a brief counseling engagement concerning postal issues, one of which involved how Bank of America might obtain an NSA. The advice she offered regarding NSAs was largely tied to her experience with volume-incentive NSAs. She was not involved in any proceedings before this Commission on behalf of Bank of America, and she conducted little, if any, substantive negotiations with the Postal Service on Bank of America's behalf.

The Complaint challenges a decision by the United States Postal Service not to offer Capital One the same agreement it offered to Bank of America. This is clearly not the "same" matter as Ms. Leong's work for Bank of America, and Bank of America does not so contend. It does contend, however, that the two matters are "substantially related." Recent (2007) amendments to the District of Columbia Rules of Professional Conduct added the following explanation of "substantially related" to Comment [3] to the applicable Rule 1.9:

Matters are "substantially related" for purposes of this rule if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that **confidential factual information as would normally have been**

obtained in the prior representation would materially advance the client's position in the subsequent matter. (Emphasis added.)

The two representations clearly do not “involve the same transaction or legal dispute,” as Ms. Leong’s representation of Bank of America involved neither a transaction nor a legal dispute—it was a pure counseling engagement. *Accord Brown*, 486 A.2d at 44 (finding that, even though a subsequent litigation involved the same piece of property and related issues, there was no “necessary or direct” relationship between the representations sufficient to warrant disqualification).

Nor is there any “substantial risk” under Rule 1.9 “that confidential factual information as would normally have been obtained in [Ms. Leong’s representation of Bank of America] would materially advance [Capital One’s position in this] matter.”²⁴ *Id.*, Comment [3]. This standard is not met here because nothing that Ms. Leong *learned or could have learned*²⁵ from her prior representation of Bank of America is material to this proceeding. Table 2 below demonstrates that the issues in this matter have nothing to do with any confidential information that Ms. Leong could have learned during her 2005 representation of Bank of America:

²⁴ Bank of America asserts that confidential information that Ms. Leong learned in the course of her 2005 representation could lead to cancelation of Bank of America’s NSA. But Bank of America does not explain why cancelation of its NSA contract would “materially advance” Capital One’s position in this case—how does removal of Bank of America’s baseline NSA “materially advance” Capital One’s claim for a functionally equivalent NSA, which relies upon the baseline Bank of America NSA?

²⁵ This analysis holds true for information such as “the basic framework and structure of the NSA,” 2005 “legal strategies,” 2005 “business plans,” 2005 “marketing strategies,” and 2005 “volume estimates”. See Berenblatt Declaration at 3.

TABLE 2

Current Issues	Comment
<p>Did the Postal Service discriminate against Capital One in declining to offer the same discounts and baselines it offered to Bank of America?</p>	<p><i>This question turns solely on the Postal Service’s actions, intent, and processes vis-à-vis Capital One and Bank of America. It has nothing to do with Bank of America’s internal actions, intent, strategy, or processes.</i></p>
<p>Was the Postal Service somehow justified in discriminating against Capital One because of some characteristic of Capital One that rendered it not “similarly situated” to Bank of America?</p>	<p><i>To determine whether a mailer is “similarly situated” to Bank of America, a set of criteria for comparing the mailer to Bank of America must be applied. The choice of criteria and the application of those criteria would be solely within the control of the Postal Service, not Bank of America.</i></p> <p><i>Nothing in Ms. Leong’s 2005 representation of Bank of America could have provided her insight into the Postal Service’s choice or application of “similarly situated” criteria or how Capital One (not Bank of America) would measure up to those criteria in 2008.</i></p>
<p>Was the Postal Service justified in refusing to offer the same opportunity to Capital One because only one mailer can be the “first adopter”?</p>	<p><i>Most of the Postal Service’s mail processing innovations at the heart of the Bank of America NSA were at a conceptual level in 2005 (some are still at the Beta stage). It is difficult to conceive of confidential information that Bank of America (not the Postal Service) may have had in 2005 that would bear on the incremental benefit between the first and second adopters of these conceptual technologies. Even if Bank of America had such information, it would have no bearing on the Postal Service’s valuation of the incremental benefit. Moreover, any information with respect to technologies considered “cutting edge” in 2005 would be outdated by late 2008. In 2005, it is unlikely that Bank of America would have had confidential information on the value of its NSA as implemented in 2008. Cf. Public Representative Motion to Compel Response to Interrogatory PR/USPS-15 (September 24, 2008) at 4.</i></p>
<p>Could the Postal Service have achieved its same goals in a manner that had less of a competitive impact and/or avoided “harm to the marketplace”?</p>	<p><i>This issue focuses on what alternatives the Postal Service had available or considered, and reexamining issues related to Bank of America that were raised in MC2007-1 would not inform the parties on this issue.</i></p> <p><i>Again, this issue relates to the Postal Service’s actions and not to Bank of America’s actions. No confidential information from Bank of America would have a bearing on how the Postal Service chose to handle competitive issues. In fact, even if Bank of America had acted in a way to further its own competitive interest, which would be</i></p>

	<i>expected from any rational economic entity, it was up to the Postal Service to decide how to minimize any potential competitive impact.</i>
When the Postal Service approved the Bank of America NSA, did it purposefully decide to “shut the door” on all other mailers to avoid further losses of contribution?	<i>Inquiry into a possible Postal Service decision on how to handle future functionally equivalent NSAs focuses on the Postal Service, not Bank of America or its NSA. Bank of America’s efforts to get the best deal possible, its actions, and business information are not relevant to the Postal Service internal decision on how to handle future functionally equivalent NSAs. Moreover, it is highly unlikely that Bank of America would have any information or strategy relating to an internal decision of the Postal Service made in December 2007 or spring 2008, or that such information would have existed in 2005.</i>
Did the Postal Service engage in any other unlawful misconduct?	<i>It is difficult to imagine what factual scenario could give rise to such an issue. In any event, Capital One’s complaint is based on discrimination-related claims and is not intended to cover unknown acts of governmental “misconduct”. Ms. Leong’s representation of Bank of America for a brief period in 2005 could not have resulted in her receiving confidential information on governmental “misconduct” that would have occurred a year or more after her representation had ended. She has no knowledge of any facts that would support such allegations, and there is no reason to believe she has.</i>

Bank of America’s “substantial relationship” argument ignores the passage of time and the general nature of the information exchanged. Comment [3] to Rule 1.9 provides: “Information acquired in a prior representation may have been rendered obsolete by the passage of time, a circumstance that may be relevant in determining whether two representations are substantially related. In the case of an organizational client, general knowledge of the client’s policies and practices ordinarily will not preclude a subsequent representation.” Ms. Leong’s brief counseling engagement with Bank of America ended **17 months** before Bank of America, represented by another lawyer, reached an agreement with the Postal Service on an NSA and filed the NSA in MC2007-1, and **34 months** before

this proceeding began. While the structure of the Bank of America NSA may have been confidential in 2005, it is a matter of public record in 2008. Negotiation and litigation strategy for 2006 (assuming it existed in mid-2005 and Ms. Leong was aware of it) would be outdated and irrelevant in 2008. Volume projections made in 2005 for the following year would be similarly outdated. Even if Ms. Leong had known these kinds of information in 2005 as alleged by Ms. Berenblatt, none of it is material to Capital One's discrimination and thus none of it gives rise to grounds for disqualification.

The facts of the seminal District of Columbia case on "same or substantial relationship," *Brown v. Board of Zoning Adjustment*, 486 A. 2d 37 (D.C. 1984), confirm the conclusion that these matters are not "substantially related.". In that case, two government lawyers represented the Board of Zoning Adjustment (Board) in a proceeding that involved height restrictions affecting the size of a planned development on property located in the District of Columbia. A few years later, after the lawyers resigned from government service, both were retained by the landowner to represent it in a second proceeding before the Board involving the same property. The court held that, even though the representations involved the same property, they were not "substantially related" and there was "no direct relationship" between the various issues. *See id.* at 58. Accordingly, the court found no grounds to disqualify the lawyers or their firm. *Id.*

Howard Hughes Medical Institute v. Lummis, 596 S.W.2d 171 (Tex.Civ.App. 1980), reached the same result. In that case, a law firm served for more than 20 years as counsel for a large charitable foundation, assisted it in obtaining its tax exempt status, and had deep knowledge of the foundation's policies and operations. The law firm later represented a client challenging the validity of a will that left significant assets to the

foundation. The foundation moved to disqualify the law firm on the ground that its former representation of the foundation was substantially related to the probate matter. The court denied the motion, concluding that nothing from the law firm's lengthy prior representation of the foundation would be relevant to the probate matter.

These decisions confirm that Ms. Leong's advice to Bank of America in 2005, is not substantially related to Capital One's discrimination claims in this proceeding and thus does not warrant disqualifying her from representing Capital One.

B. No breach of Ms. Leong's confidentiality obligations to Bank of America will occur in her representation of Capital One in this proceeding.

Ms. Leong recognizes that she has an obligation to preserve the confidentiality of "confidences" and "secrets" as those terms are defined in Rule of Professional Conduct 1.6(b):

"Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate, or the disclosure of which would be embarrassing, or would be likely to be detrimental, to the client."

For the reasons previously explained in the conflict of interest discussion, nothing that Ms. Leong may have learned from Bank of America is material to this proceeding.

Thus, there is no possibility or risk that any confidential information Ms. Leong might have learned during her brief representation of Bank of America in 2005 can be used in this proceeding. Accordingly, Rule 1.6 does not prevent Ms. Leong from representing Capital One in this matter.

In short, neither Rule 1.9 nor Rule 1.6 provides any basis for disqualifying Ms. Leong from representing Capital One in this proceeding: No confidential

information that she learned or could have learned in 2005 is “material” to the issues in this discrimination case.

CONCLUSION

For the foregoing reasons, Bank of America’s Motion to Limit, or, in the Alternative, to Disqualify Counsel should be denied in its entirety.

Respectfully submitted,

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²⁶ Mr. Cohen has been active in the legal ethics activities of the District of Columbia Bar and the Court of Appeals for over 20 years, including current or past service as chair of the Board on Professional Responsibility, co-chair of the Disciplinary System Review Committee, and member of the Committee on Unauthorized Practice. He is an adjunct professor of professional responsibility law at Georgetown University Law Center and previously served in that capacity at George Mason University Law School. He teaches several Continuing Legal Education courses for the District of Columbia Bar each year on professional ethics and malpractice risk management, and chairs Crowell & Moring’s Committee on Professional Responsibility. He is frequently called upon by lawyers and law firms to represent them in litigation and administrative proceedings, and to serve as an expert witness on ethics questions. Mr. Cohen provided advice to Ms. Leong (not Capital One) in the course of her preparation of the Answer and Declaration.