

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

COMPLAINT OF CAPITAL ONE
SERVICES, INC.

Docket No. C2008-3

**SECOND APPLICATION OF CAPITAL ONE SERVICES, INC.
FOR AUTHORIZATION TO DEPOSE MICHAEL PLUNKETT
OF THE UNITED STATES POSTAL SERVICE
(April 20, 2009)**

Pursuant to Rule 33(a)-(b), Capital One Services, Inc. (Capital One) hereby renews its requests that the Commission authorize the taking of testimony by deposition of Michael Plunkett, a current employee of the Postal Service and former Manager of Pricing Strategy and Acting Vice President of Pricing. In P.O.R. C2008-3/24 at 4 (September 23, 2008), the Presiding Officer denied without prejudice Capital One's previous Application For Authorization to Depose Michael Plunkett, filed September 4, 2008, stating, "The Application may be refiled and the issues revisited pending the outcome of written discovery."¹

Capital One has been unable to obtain "clear, concise, and non-evasive answers" to its written interrogatories. It has filed follow-up interrogatories for Mr.

¹ The facts alleged and the arguments contained in Capital One's Application for Authorization to Depose Michael Plunkett of the United States Postal Service (September 4, 2008), its Motion for Sanctions under Rule 25(c) (August 28, 2008) and its Supplemental Motion for Sanctions (September 3, 2008), are hereby incorporated by reference and thus will not be repeated in this Application.

Plunkett, but it is unlikely that these interrogatories will result in clarity. For example, Mr. Plunkett's responses to specific questions are couched in generalities and vague concepts:

COS/USPS-16. With respect to the NSA negotiations process, please describe ...

(d) the criteria and decision-making process you used to determine which mailers you would pursue negotiations with and which you would not;

(e) the criteria and decision-making process you used to determine which NSA structures (e.g., cost-savings through electronic returns from UAA coupled with volume incentive discounts or pure "cost-savings) you would pursue.

RESPONSE:

(d) There was not a set point in time where we could determine that a customer was or was not a suitable candidate for NSA negotiations. This generally was done in cooperation with the customer through joint discussion of relevant issues. *[There is no discussion in this response of the requested "criteria" used to determine whether to pursue negotiations (such as historical volumes, type of industry, size of mailer, etc.) other than the broad phrase "relevant issues."]*

(e) As indicated above, upon first inquiry, we would ask customers to complete a mail profile. Once complete, we would discuss the customer's use of USPS services, and attempt to arrive at a common understanding of what form a potential NSA ought to take. *[Again, this response does not provide any of the requested "criteria" and does not even indicate if any criteria were used; instead it refers to broad concepts such as "a common understanding."]*

Another response cries out for follow-up questions:

COS/USPS-17. Have you ever conducted a study or analysis, formal or informal, of the effects of a specific NSA (a) on the NSA applicant's competitors, (b) on competition in the relevant industry of the NSA applicant, or (c) on the relevant marketplace (as that term is used in 39 U.S.C. 3622(c)(10))? If your answer is no, are you aware of and/or have you ever relied upon any such study or analysis? If so, please describe all such studies or analyses.

RESPONSE:

I have not conducted any formal studies of the kind suggested here. *[This response does not answer the question whether Mr. Plunkett has conducted any*

informal studies or analyses.] On the other hand, I am able to judge informally, [emphasis added] that NSAs ought generally to have a minimal impact on the specific industries within which NSA customers operate. For instance, larger companies primarily seek out NSAs, and thus the potential for NSA savings is likely to be small relative to the size of the enterprise – or its total postage spending for that matter. For example, Capital One’s current market capitalization is a little more than \$15B, and many of the companies that they compete with are considerably larger. I believe it is unlikely that an NSA would have a significant competitive impact in that industry. [It is unclear whether Mr. Plunkett's response is intended to serve as the informal analysis that he relied upon. In any event, Mr. Plunkett provides no basis or support of any kind for his belief.]

As was the case with Ms. Lowrance, written interrogatories are no substitute for a deposition. The Postal Service has indicated that "[n]o specific procedures, processes, or proposed responses were developed to respond to mailers requesting an NSA similar to the Bank of America NSA." Decisions on these NSA requests were thus made on an *ad hoc* basis, making the personal knowledge of those who participated in the decisions even more important in this discrimination case. Mr. Plunkett's own statements, such as his response to COS/USPS-16, quoted above, show that indeed the Postal Service's decision making process was *ad hoc*. With no specific criteria or mandated process for making decisions, the only way for Capital One to determine whether a decision was made with the intent to discriminate would be through the oral or written statements of the decision makers. Of course, it would be futile to propound a written interrogatory inquiring whether the individual responder intended to unlawfully discriminate. Aside from contemporaneous documents, which the Postal Service has yet to produce, questions posed orally with the opportunity for immediate follow-up questions are the best avenue for understanding the

motives and factors that influenced decision makers in an *ad hoc* decision making process.

There is no question that Mr. Plunkett has personal knowledge of information relevant to Capital One's discrimination claims: Mr. Plunkett was the key architect of the Postal Service's NSA program. As Manager of Pricing Strategy and Acting Vice President of Pricing, Mr. Plunkett had both day-to-day responsibility for relevant NSAs and overall supervisory authority over all NSAs from the first Capital One NSA in MC2002-2 to his departure on academic leave in late May 2008 (including the Bank of America NSA and the proposed Capital One NSA).

Mr. Plunkett admits that he "was intimately involved in setting NSA strategy, and for overseeing (or participating in) negotiations with customers, and in all other administrative or managerial activities relating to NSAs. In this role I sought and received input from all areas of the USPS....I oversaw the creation of the NSA manual I was involved in NSA process improvements up until my departure on academic leave in May 2008." He also confirms that he was "the lead negotiator for the Postal Service and the senior official with day-to-day responsibility for the Bank of America NSA." He participated in preparation of two key documents, the Bizzotto Presentation of December 10, 2007, and the December 2007 PMG Memo, which are the subject of the Joint Stipulation in this docket, dated December 4, 2008.

The deposition is necessary to prevent undue and excessive expense, burden and delay to the Commission and the parties. Because of Mr. Plunkett's major role in decisions relevant to this case, if his deposition is not taken, Capital One would be forced to request his oral cross-examination at a hearing before all the Commissioners. The Postal Service has not yet identified the witnesses it intends to call, if any. Capital One may thus be required to call Mr. Plunkett as a hostile witness to present its direct case. Given the breadth of his experience and knowledge on the issues raised by the Complaint, formal oral cross-examination at the hearing would likely be an extended and tedious process as Mr. Plunkett is asked to explain numerous documents and to clarify any broad, vague, or evasive responses. A deposition with access to a single Presiding Officer for procedural rulings is a much more appropriate way to conduct discovery and would allow the Commissioners to use their time more efficiently. It would also reduce the costs of other parties, who would otherwise feel obliged to have their counsel attend each day of a hearing before the Commission.

The following information is provided in compliance with Rule 33(b):

Name:

Michael Plunkett
Former Manager, Pricing Strategy (on leave)
United States Postal Service
475 L'Enfant Plaza, SW
Washington, DC 20260-4100

Time and Place:

10:00 AM on the date 10 days after complete production of all relevant documents under COS/USPS-DR-1-38 or such other time thereafter as is convenient to Mr. Plunkett

Presiding Officer for C2008-3
Hearing Room or other location
Postal Regulatory Commission
901 New York Avenue, NW
Washington DC 20268-0000

Request:

To appear for a deposition in Docket No. C2008-3, and to bring all documents wherever located, filed or stored, including e-mails and electronic documents, relating to the issues in the Capital One Complaint, including, but not limited to, any documents he prepared, reviewed, or has on file (hard copy or electronic) that are responsive to Capital One's Document Requests COS/USPS-DR-1-38.

Subject Matter of Testimony:

Negotiations and decisions relating to a Capital One NSA that is similar to the Bank of America NSA and requests from other mailers for an NSA similar to the Bank of America NSA; relevant communications with other Postal Service employees, Bank of America representatives, and Capital One representatives; background and knowledge relating to a memorandum from the Postmaster General to the Board of Governors on the Bank of America NSA and a presentation by Anita Bizzotto to the Board of Governors on the Bank of America NSA, and knowledge and experience relating to key issues in Docket No. C2008-3, including, but not limited to: whether or not Capital One is "similarly situated" to Bank of America; what constitutes a functionally equivalent agreement to the Bank of America NSA; whether the Postal Service unduly discriminated against Capital One; whether the Postal Service granted an undue preference to Bank of America; whether, before or at the time of the Board of Governors' final approval of the Bank of America NSA, Postal Service employees considered the possibility of discrimination arising from the Bank of America NSA; whether, before or at the time of the Board of Governors' final approval of the Bank of America NSA, Postal Service employees considered and/or made a decision relating to whether and how NSAs that were functionally equivalent to the Bank of America NSA would be offered; whether the Postal Service considered the effect on competition and on competitors of the Bank of America NSA.

For the foregoing reasons, Capital One requests that the Commission grant this Second Application for Authorization to Depose Michael Plunkett.

Respectfully submitted,

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