

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

COMPLAINT OF CAPITAL ONE
SERVICES, INC.

Docket No. C2008-3

DECLARATION OF JOY M. LEONG

(September 24, 2008)

I am Joy M. Leong, a member of the Bar of the District of Columbia, and a partner of The Leong Law Firm, PLLC. I represent Capital One Services, Inc. (Capital One) in this proceeding. I make this Declaration in support of Capital One's Answer in Opposition to the Motion of Bank of America to Limit the Scope of the Proceeding or, in the Alternative, to Disqualify Counsel.

1. Around March 30, 2005, I gave a speech at a postal conference held in Scottsdale, Arizona. The subject of my speech was the Postal Regulatory Commission's recent decision to place a "cost-savings cap" on volume incentive discounts in Negotiated Service Agreements (NSAs). I believed that there were very limited opportunities for mailers to undertake additional mail processing activities that would create enough cost-savings for the Postal Service to justify an NSA. Thus, I took the position that, to be viable, NSAs would have to be based on volume incentives and that a cap on volume-incentive discounts tied to shrinking cost-savings amounts would discourage those volume-incentive NSAs.

2. At the conference, I met for the first time Jody Berenblatt of Bank of America. I explained to her my views on volume-incentive NSAs.

3. During that time, as a partner at Sidley Austin Brown and Wood (Sidley), I was heavily involved in the Bank One NSA, MC2004-3, and the HSBC NSA, MC2005-2.

Both of those NSAs included volume-incentive discounts with caps based on the Postal Service's cost-savings from the mailer's switching from hard copy notices to electronic notices for Address Correction Service (ACS) for undeliverable-as-addressed (UAA) mail. I was frequently approached by banks and other mailers seeking to explore NSAs. I also spoke frequently to Postal Service employees about issues relating to volume-incentive discounts and cost-savings caps.

5. Ms. Berenblatt subsequently informed me that Bank of America wanted to retain Sidley for a small fixed fee for limited advice on "postal issues." This would include exploring a volume-incentive NSA. The purpose of this limited engagement could not have been a "pay for performance NSA" (such as the Bank of America NSA in MC2007-1) because such a concept was unknown to me at the time.

6. In fact, I have no personal recollection of using the term "pay for performance" with respect to any NSA prior to 2007 when the Bank of America NSA became public in MC2007-1. As I understand it, a "pay for performance" NSA, as that term was used in MC2007-1, is very different from the inclusion of a cost-savings component (such as electronic ACS for UAA mail) in a volume-incentive NSA.

8. I believe that Larry Buc, a non-lawyer economic consultant who had a pre-existing relationship with Ms. Berenblatt, was separately retained by Bank of America around this time.

9. The Declaration of Ms. Berenblatt acknowledges that a volume-incentive NSA was discussed during this exploratory period. I would like to correct the likely unintentional suggestion in her Declaration that the volume incentive approach was rejected in May or June, 2005 (*i.e.*, "[e]arly on") or that a "pay for performance NSA," such as the one in MC2007-1, was conceived and adopted during this time period. See Declaration of Jody Berenblatt at ¶ 3.

10. During May through July 6, 2005, I discussed several postal issues with Bank of America, including two specific issues totally unrelated to Bank of America's exploration of an NSA. With respect to exploration of an NSA, I believe Bank of America's consultant Larry Buc handled technical matters relating to marketing and mailing operations, as I was mindful that the small fixed fee agreement limited my involvement.

11. Because I left Sidley in late 2006, I no longer have access to time and billing records for my work for Bank of America. To the best of my recollection, from May to July 6, 2005, I estimate that I and another lawyer together spent approximately 20-25 billable hours on postal issues for Bank of America, only one of which involved exploration of an NSA.

12. Although I do not specifically recall obtaining mail volume data from Bank of America and have no record of it, it is possible that at some point I received volume data because we were considering a volume-incentive NSA. However, I would expect 2005 volume data and volume projections made in 2005 to be outdated by now, and mail volume is not a disputed issue in either MC2007-1 or C2008-3.

13. During that period, I was involved in discussions with several banks about the pending postal reform legislation. I recall discussing postal reform issues with Ms. Berenblatt. I also had conversations during this time with Mr. Buc about postal reform issues unrelated to Bank of America.

15. On July 6, I attended a meeting at Bank of America's offices in Charlotte to answer questions of Ms. Berenblatt's management on the procedures involved in obtaining an NSA. One or more representatives of a vendor of Bank of America and Mr. Buc also attended the meeting. I do not recall making and have no record of making a presentation. I do recall discussions on that day of postal issues unrelated to an NSA. I learned after that meeting that no definitive decision was made to proceed with an NSA.

16. After July 6, the fixed fee had been exhausted, and Sidley regarded its postal engagement with Bank of America as having been completed. I did speak to Ms. Berenblatt and Mr. Buc from time to time thereafter, but, after July 6, Bank of America had to decide whether to retain the firm going forward. When asked on two occasions to attend meetings with the Postal Service on behalf of Bank of America, I declined. I believe that Mr. Buc continued to be retained by Bank of America during this period.

17. In mid-July, 2005, Sidley was invited by Jennifer Bennett, an in-house lawyer at Bank of America, to submit a proposal for the Bank's work, and we understood that Bank of America was seeking competitive bids from other outside counsel as well.

18. I recall that Ms. Berenblatt wanted someone from Sidley to attend an introductory meeting scheduled for July 20 with Postal Service employees who worked on NSAs. We were reluctant to have a Sidley lawyer attend because there was no representation in place. As we were unable to get a response from in-house counsel for Bank of America in time, a decision was made that, as a courtesy, someone from Sidley would attend the meeting. I do not recall whether I or another lawyer attended the meeting. I do not recall and have no records of what transpired at the meeting which, in any event, was public, *i.e.*, nothing that occurred at the meeting was confidential.

19. Around August 3, 2005, a draft proposal to Bank of America was prepared by another Sidley lawyer and me. I left for vacation around August 5 and did not return until August 15. I do not recall when I received Bank of America's engagement letter or even if the letter ever crossed my desk. I assume Sidley's proposal was accepted by Bank of America sometime in mid-August.

20. Ms. Berenblatt's Declaration notes a slow down of work in August and September. See Declaration at ¶ 6. During that time, the Postal Service was completing its review of a study by the Christensen Group on the costs to the Postal

Service of UAA mail. The Postal Service could not complete its calculations of the value of any volume-incentive NSA that was functionally equivalent to the Capital One NSA I or, for that matter, any NSA that contained a UAA component until the Christensen study had been internally vetted. Substantive negotiations could not start before then. I also spent the first two weeks of September on another client's matter, working intensively on the Petition to Reopen the Record in the Bank One Reconsideration in MC2004-3, which was filed on September 14. In short, very little substantive work for Bank of America could have been performed by me during this period.

21. Around that same time, I believe Ms. Berenblatt personally may have reached the conclusion that volume-incentive discounts should not be pursued, and her preference to focus on cost-savings through address quality and mail processing was communicated to the Postal Service. I had been asked to report not only to Ms. Berenblatt but also to her supervisor and to an in-house counsel lawyer at Bank of America, but I do not recall ever being informed by these senior executives of a final company decision to abandon volume-incentive discounts.

22. My representation of Bank of America ended around the week of September 12, 2005. After that time, I received no company information from Bank of America and had no knowledge of the status of its NSA until its public filing in 2007. I did not retain any of the Bank of America files when I left Sidley.

23. My current knowledge of the Bank of America NSA is based entirely on the public record in MC2007-1 and communications I have had about the case with members of the postal community. I have not spoken to Ms. Berenblatt, Mr. Buc, or Bank of America's legal counsel in MC2007-1 about this matter for three years. I do not know of any specific information that I learned from my brief representation of Bank of America in 2005 that has informed my representation of Capital One in its discrimination case in C2008-3.

24. Contrary to the unsupported arguments in Bank of America's Motion, I did not ask questions about Ali Ayub at the Lowrance deposition because I had special knowledge regarding Mr. Ayub that I obtained from representing Bank of America. Mr. Ayub was the Postal Service's witness in MC2007-1, and the Postal Service relied heavily upon his testimony in public filings.

25. Similarly, I did not ask questions about Bank of America's read/accept rates at the Lowrance deposition because I had confidential information from Bank of America. In fact, I could not have discussed with Ms. Berenblatt the difference between the system-wide read/accept rates and Bank of America-specific read/accept rates in 2005 because, at that time, I was unaware of how read/accept rates were measured or what the system-wide read/accept rates were.

26. In fact, certain technical terms such as "FAST" and "eDropship" (key components of the Bank of America NSA) were first defined for me by the "Definitions" section in that NSA when it was made public in 2007.

27. In sum, far from being the architect of the Bank of America NSA that was the subject of MC2007-1, I worked for a limited time with Bank of America on several postal matters, one of which involved providing information about NSAs at an exploratory stage:

- a. From May to July 6, 2005, I estimate that I and another lawyer spent a total of approximately 20-25 hours on several issues for Bank of America, only one of which involved exploration of an NSA. That engagement ended on July 6.
- b. From July 6 to mid-August, my law firm participated in a competitive bidding process for Bank of America's work, and did not have an engagement agreement in place.
- c. From mid-August through mid-September, the slow period acknowledged by Ms. Berenblatt, there was little to do with respect to NSAs because the

Postal Service could not move forward until a new study on UAA mail had been vetted.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, this 24th day of September, 2008.

Joy M. Leong