

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

COMPLAINT OF CAPITAL ONE
SERVICES, INC.

Docket No. C2008-3

**EMERGENCY MOTION OF CAPITAL ONE SERVICES, INC.
TO AMEND DATE OF REQUESTED DEPOSITION TO AUGUST 27, 2008**
(August 25, 2008)

Capital One Services, Inc. (Capital One) files this motion to amend its Application for Authorization to Depose Jessica Dauer Lowrance of the United States Postal Service (August 20, 2008) (Application). The Postal Service has since indicated that Ms. Lowrance's last day as an employee of the Postal Service will be Friday, August 29, 2008.¹ Capital One therefore seeks to change the requested date of the deposition from September 8, 2008, to August 27, 2008.

The new date is necessary because the Postal Service's has represented that Ms. Lowrance "will no longer be able to testify in a hearing or deposition on behalf of the Postal Service after [August 29, 2008], because she will not be an employee of the United States Postal Service." *Id.* at 1. This pronouncement demonstrates the absolute necessity of **deposing** this key witness immediately. Written interrogatories—proposed by the Postal Service in lieu of a deposition—would deprive Capital One of the

¹ Response of the United States Postal Service to Application of Capital One Services, Inc. for Authorization to Depose Jessica Dauer Lowrance (August 22, 2008) (Response) at 1.

opportunity to preserve vital, in-person testimony, and offer no chance for follow up and no ability to obtain meaningful responses if objections are later overruled.²

Ms. Lowrance is an indispensable witness because she was the only other person present at disputed conversations between the Postal Service and Capital One. Her version of these conversations and her credibility can only be probed through the real time give-and-take of a deposition. Moreover, 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.”³ 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. Ms. Lowrance was the “doorkeeper” for NSA requests during much of the relevant time,⁴ and reported directly to Acting Vice President Michael Plunkett. We believe that she has personal knowledge of how requests for NSAs similar to the Bank of America NSA were to be handled and of the *ad hoc* process of how those requests were evaluated.⁵

² As explained more fully below, the Postal Service’s evasive and objection-strewn interrogatory responses to date highlight the need for in-person testimony.

³ Response of the United States Postal Service to Interrogatory of Capital One Services, Inc. (COS/USPS-6) (August 22, 2008).

⁴ Contrary to the Postal Service’s position, Response at 2-3, the fact that Ms. Lowrance is no longer Acting Manager, Pricing Strategy, has no bearing on the value of her testimony. She held that position until late 2007, and, even after that date, continued to work on NSAs until late May 2008. During this latter period, she continued to report directly to Mr. Plunkett about NSAs, and no replacement for Ms. Lowrance was appointed as manager of Pricing Strategy until the summer of 2008. Moreover, The Postal Service cannot substitute its own view of the importance of a witness’ testimony for the Complainant’s and then use that as grounds to oppose the witness’ deposition. If that were so, the Postal Service could avoid all depositions of key factual witnesses by simply asserting they are unimportant and offering up another witness without personal knowledge.

⁵ Capital One is aware of three primary Postal Service employees that have relevant personal knowledge. Unfortunately, one has already left the Postal Service, and another is on academic leave in Boston. The remaining employee is Ms. Lowrance, who will leave the Postal Service on Friday.

The Postal Service's conduct in discovery thus far belies its profession that it is seeking to find "common ground on this time-sensitive matter." In its Response, it explicitly "reserves its rights to object to interrogatories as needed" and asks to set the date for responses on "Ms. Lowrance's last day as a postal employee." Response at 3. That means that if the Postal Service makes broad objections to interrogatories – as it has done in its recent Objections⁶ – it could become impossible to obtain Ms. Lowrance's responses after those objections (or portions of them) are overruled. Complainant would then be deprived of the opportunity to depose a key witness with personal knowledge who played a pivotal role in facts that go to the heart of Capital One's Complaint.

To replace a deposition with written interrogatories without any follow up would reward the Postal Service for its already clear pattern of stonewalling discovery that includes:

- Inaccurate statements about the negotiating history between the parties and the existence of a Non-Disclosure Agreement;
- A legally insufficient Answer that includes a catch-all general denial;
- Vague, overbroad objections to discovery and blanket assertions of unspecified privileges;
- Refusal to provide a single document; and finally,
- A patently inadequate proposal to substitute written interrogatories without any follow up for an in-person deposition to preserve the testimony of a key witness.

To grant the Postal Service's proposal for written interrogatories would effectively reward the Postal Service for failing to disclose the departure of Ms. Lowrance earlier.

⁶ Incredibly, the Postal Service has objected to every single document request on broad grounds of relevance, privilege, commercial sensitivity, and burden. It has refused to provide a single page of a document or even a privilege log to enable the Commission, Capital One, or any other party to evaluate the validity of its privilege claims. See Objection of the United States Postal Service to Document Requests of Capital One Services, Inc. (COS/USPS-DR-1-17) (August 19, 2008).

Capital One's Motion to Strike made clear that it considered Ms. Lowrance a key witness and that it was likely Capital One would need to take her deposition.⁷ The Postal Service had a good faith obligation to inform Capital One of Ms. Lowrance's departure rather than waiting to see if it was discovered on time. In fact, it was only by chance that counsel for Capital One came across the announcement of Ms. Lowrance's departure on the internet and filed the Application for a deposition the same day.

It strains credulity for the Postal Service to take the position that "the issues in this case have not yet been narrowed through the discovery process. Thus, it would be difficult for the Postal Service to adequately prepare Ms. Lowrance to address the potential wide range of issues that might come up at a deposition." The Postal Service has done everything possible to resist narrowing the issues,⁸ and no matter how "difficult" it may be for the Postal Service to prepare Ms. Lowrance, it is even more "difficult" for Complainant to prepare for her deposition without a single document, without specific denials, and without clear statements of positions supported by facts and reasons. In short, if the Postal Service faces any "difficulty" here, that difficulty is of the Postal Service's own making, and Capital One should not be further penalized by the Postal Service's intransigence.⁹

⁷ Motion of Capital One Services, Inc. to Strike a Portion of the Postal Service's Answer and for Clarification of Procedures (August 19, 2008) (Motion to Strike) at 5 ("[T]he parties would have to engage in discovery (most likely in the form of a deposition) to determine what Ms Lowrance in fact said").

⁸ See Motion to Strike at 3-8.

⁹ Capital One has requested that the deposition be scheduled on Wednesday, August 27, 2008, because it anticipates that the Postal Service, consistent with its pattern of making broad objections and refusing to produce documents, may take actions that will delay the deposition. Commencing on Wednesday will give the Commission and all parties two days to resolve disputed issues in an effort to conclude the deposition before Ms. Lowrance leaves the Postal Service.

Prior to the passage of the Postal Accountability and Enhancement Act, 39 U.S.C. §§101 *et seq.*, the Commission had little power to force the Postal Service to engage in full and fair discovery when it chose to stonewall. The Postal Service acts as though that were still true. *But see* 39 U.S.C. § 504(f) (2) and (3).

This deposition is essential to preserve critical testimony that goes to the heart of Capital One's complaint, and, accordingly, we respectfully request the Commission grant this Emergency Motion and the Application and direct that Ms. Lowrance bring with her to the deposition all documents from her offices as described in the Application.¹⁰

Respectfully submitted,

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¹⁰ Documents are an essential part of any deposition, and usually documents are provided well before the deposition so that they may be organized and cataloged. Complainant requests that the Commission provide specific directions to Ms. Lowrance that she bring relevant documents to the deposition (*e.g.*, all of her files, documents and emails relating to Capital One, to requests for NSAs that are functionally equivalent to the Bank of America NSA, and to how functionally equivalent requests were to be handled) or provide them beforehand to avoid delay during the deposition.