

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

COMPLAINT OF CAPITAL ONE  
SERVICES, INC.

Docket No. C2008-3

**MOTION FOR SANCTIONS UNDER RULE 25(c)**  
**AGAINST THE UNITED STATES POSTAL SERVICE**

**(August 28, 2008)**

Commission Rule 25(c) recognizes broad authority to impose “just” sanctions against a participant, officer, or agent who “fails to obey an order of the Commission or the presiding officer to provide or permit discovery pursuant to §§ 3001.26 to 3001.28.” 39 CFR § 3001.26.

Mindful of the serious nature of sanctions for discovery-related misconduct, Capital One is nevertheless compelled to seek sanctions against the Postal Service for the conduct of Mr. Anthony Alverno during the deposition of Ms. Jessica Dauer Lowrance, held on August 27, 2008.

Over the course of the deposition, Mr. Alverno repeatedly flaunted the Commission’s orders regarding the conduct of the deposition, instructed the witness not to answer based on relevancy objections, forced counsel for Capital One to file motions on discovery procedures that the Commission had already made clear, and, in general made it impossible to conduct a fair and orderly deposition.

Among other things, Mr. Alverno, and, by extension, the Postal Service:

- Refused to produce any documents brought to the deposition by Ms. Lowrance until after the conclusion of the deposition, wasting time at the deposition by arguing with counsel and backing down only when Capital One began to draft an emergency motion.
- Disregarded the requirement specified in Ruling No. C2008-3/3 that “Ms. Lowrance must bring all documents from her offices relating to the issues in the Capital One Complaint to the Deposition . . . .” *Id.* at 4.<sup>1</sup>
- Failed to produce an organizational chart or other documents indicating relevant “names and titles” even after the Commission overruled Postal Service objections and concluded that “the names of employees under her direction working on the agreements associated with this case and her chain of command are relevant and may lead to the discovery of admissible evidence.” *Id.* at 2.<sup>2</sup>
- Repeatedly instructed the witness not to answer questions on relevancy grounds, and continued to do so—and threaten to do so—even after the Commission issued Ruling No. C2008-3/5, stating that “objections based on relevance do not raise issues of privilege. The witness shall answer the questions.” *Id.* at 5. This action alone provides grounds for sanctions. Even at the end of the deposition on August 27, counsel threatened to instruct the witness not to answer during the closed session to question outside of her conversations with Niki Howard and related follow up.
- Insisted that counsel and the witness stay to “finish the deposition” on August 27, 2008—ultimately requiring the Hearing Officer to consult with the Presiding Officer—even after the Presiding Officer issued Ruling No. C2008-3/6, which specifically stated that “Ms. Lowrance should appear to continue her deposition at 9:30 a.m. on August 28, 2008.” Mr. Alverno even said that all the counsel could leave if they were tired and “we will stay here” and let the time run. Mr. Alverno also ignored that fact that his own witness was exhausted after a full day.
- After the deposition concluded for the day, suggested he might refuse to agree to allow counsel for Capital One to attend the closed portion of the hearing and ask follow up questions (regardless of Capital One’s offer to

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<sup>1</sup> Although not entirely clear, Capital One learned from the witness that the Postal Service apparently treated the request for all relevant documents from Ms. Lowrance’s “offices” as applying only to the small cubicle where she has worked since returning from maternity leave, thereby excluding numerous relevant documents from Ms. Lowrance’s files located in other offices, including numerous documents that she reviewed in preparation for the deposition. Ms. Lowrance stated that her old office was now occupied by Mr. Greg Dawson and that to obtain her files (including files of Quarterly Business Review with Capital One that included discussions of functionally equivalent NSAs), a request would have to be made to Greg Dawson and not to her.

<sup>2</sup> This failure meant that counsel for Capital One had to spend approximately 20 minutes of precious deposition time painstakingly reconstructing organizational structure through witness testimony.

stipulate that any privilege claims would not be waived) despite Ruling No. C2008-3/4, at 2 (“There is no apparent reason why Capital One can not be represented at any closed portion of the deposition by skilled counsel able to agree to appropriate protective conditions.”) and Ruling No. C2008-3/5, at 2 (“[I]f counsel is present during the closed session, counsel may ask the previously posed question, and may ask any reasonable follow-up.”). When asked how Capital One counsel could ask follow up questions while excluded from the room, Mr. Alverno refused to respond.

- After the deposition concluded for the day, and aware of the Commission’s instructions in Ruling No. C2008-3/5, suggested he still might instruct the witness not to answer certain questions based on relevancy grounds.<sup>3</sup>

Considered independently, even one of these actions suggest a troubling disregard for the Commission’s rules, the time and efforts of other counsel and the witness, and the discovery process generally. When taken as a whole, they show a clear pattern of the kind of obstreperous behavior that routinely triggers discovery sanctions in federal court and other jurisdictions.

Accordingly, Capital One respectfully requests that the Commission impose a “just” sanction on Mr. Alverno and the Postal Service pursuant to Rule 25(c): specifically, Capital One requests that the Commission determine that the Postal Service has waived all objections based on relevance or the deliberative process privilege in the context of this deposition or related document requests. Capital One also requests as at least a partial remedy that the Commission grant at least two additional depositions of the Postal Service employees that were identified by Ms. Lowrance as having essential personal knowledge since Ms. Lowrance will no longer be available and her deposition was made effectively impossible by Postal Service

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<sup>3</sup> On these last two issues, even the Hearing Officer asked Mr. Alverno to clarify so that counsel for Capital One would not have to file yet another motion by 8 AM the next day to enforce rulings/clarifications the Commission had already made clear. Mr. Alverno refused to do so and indicated that he knew that his refusal required Capital One counsel to file two more motions.

counsel.<sup>4</sup> To the extent of the Commission's authority, Capital One also requests that the Postal Service be charged with the costs of the deposition and with attorneys fees related to the deposition and the filing of its numerous Emergency Motions.

Although we recognize that such a sanction represents extraordinary relief, counsel's behavior during the deposition was nothing short of extraordinary, and would draw sanctions and more in any federal court. Such behavior calls for sanctions to deter future disregard for the discovery process and disrespect for the Commission's rules and its orders.<sup>5</sup>

Respectfully submitted,

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Joy M. Leong  
Timothy D. Hawkes  
The Leong Law Firm PLLC  
2020 Pennsylvania Avenue, N.W., Suite 229  
Washington, D.C. 20006  
(202) 640-2590

*Attorneys for Complainant  
Capital One Services, Inc.*

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<sup>4</sup> Capital One will file the necessary applications for these depositions under the Commission rules.

<sup>5</sup> For lack of a better word, Capital One has titled its Emergency Motions as requests for "clarification"; in fact, the Presiding Officer's Rulings have in most cases not required "clarification", but *enforcement* because of Postal Service counsel's refusal to obey the clear language of the Rulings.