

POSTAL REGULATORY COMMISSION

In the Matter of:)
) Docket No. C2009-1
COMPLAINT OF GAMEFLY, INC.)

Suite 200
Postal Regulatory Commission
901 New York Avenue, N.W.
Washington, D.C.

Volume 1
Thursday, July 23, 2009

The above-entitled matter came on for hearing
pursuant to notice, at 10:02 a.m.

BEFORE:

HON. DAN G. BLAIR, CHAIRMAN
HON. NANCI E. LANGLEY, VICE-CHAIRMAN
HON. TONY HAMMOND, COMMISSIONER
HON. MARK D. ACTON, COMMISSIONER

APPEARANCES:

On behalf of the Complainant, Gamefly, Inc.:

DAVID M. LEVY, Esquire
MATTHEW D. FIELD, Esquire
Venable, LLP
575 Seventh Street, N.W.
Washington, D.C. 20004
(202) 344-4732/344-8281

Heritage Reporting Corporation
(202) 628-4888

APPEARANCES: (cont'd.)

On behalf of the Respondent, United States Postal Service:

KEITH WEIDNER, Esquire
KENNETH N. HOLLIES, Esquire
MICHAEL TIDWELL, Esquire
United States Postal Service
475 L'Enfant Plaza, S.W.
Washington, D.C. 20260-1137
(202) 268-6252

On behalf of the Office of the Consumer Advocate:

EMMETT RAND COSTICH, Esquire
Postal Regulatory Commission
Office of Consumer Advocate
901 New York Avenue, N.W., Suite 200
Washington, D.C. 20265-0001
(202) 789-6833

On behalf of the Intervenor, Douglas F. Carlson:

(No Appearance.)

On behalf of the Intervenor, David B. Popkin:

(No Appearance.)

On behalf of the Intervenor, Time Warner, Inc.:

(No Appearance.)

On behalf of the Intervenor, Valpak Direct Marketing Systems:

(No Appearance.)

On behalf of the Intervenor, Valpak Dealers Association:

(No Appearance.)

P R O C E E D I N G S

(10:02 a.m.)

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3 CHAIRMAN BLAIR: The hearing will come to
4 order. Today's prehearing conference in Docket No.
5 C2009-1 concerns the complaint of Gamefly, Inc.
6 against the Postal Service.

7 For the record, I'm Dan Blair, Chairman of
8 the Postal Regulatory Commission. Joining me on the
9 dais this morning are Postal Regulatory Commissioners
10 Acton, Hammond and Vice Chairman Langley.

11 Before hearing from the Commissioners and
12 the parties, I want to address a few administrative
13 issues. Those in the audience today should be aware
14 that this prehearing conference is being webcast. In
15 an effort to reduce potential confusion for those
16 listening via the webcast, I ask that counsel wait to
17 be recognized before speaking and please identify
18 yourself when commenting.

19 After you're recognized, please speak
20 clearly so that our ceiling microphones may pick up
21 remarks, and I emphasize our ceiling microphones are
22 somewhat sensitive so those in the audience may want
23 to be aware that their comments may be picked up
24 during the webcast.

25 Now to the complaint at hand. Gamefly

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1 claims an unreasonable discrimination and undue
2 preference regarding the processing of its DVD
3 mailers. As a consequence, the Commission determined
4 that it would hear this complaint and issued Order No.
5 235.

6 That order directed the parties to meet and
7 confer to consider the appropriate timeframes for
8 discovery and prepare a joint statement identifying
9 undisputed facts. I want to commend the parties for
10 preparation of this list. By providing this joint
11 statement of undisputed and disputed facts, the
12 Commission will be better able to frame and understand
13 the issues.

14 Further, I'm hopeful this joint statement
15 will prove useful in moving this case along in a
16 timely fashion. This consideration is important since
17 Gamefly's complaint alleges current and continuing
18 harm.

19 I know my fellow Commissioners may want to
20 express their views as well, so at this time I'd like
21 to turn to my colleagues and give them an opportunity
22 to welcome counsel and give opening remarks, so I'll
23 yield to the Vice Chair, Nanci Langley.

24 VICE CHAIRMAN LANGLEY: Thank you, Mr.
25 Chairman. I just want to welcome everyone in

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1 attendance and concur with the Chairman. I don't want
2 to take further time away from our proceeding today.
3 Thank you.

4 CHAIRMAN BLAIR: Thank you, Vice Chairman
5 Langley.

6 I now turn to Commissioner Acton.

7 COMMISSIONER ACTON: I have nothing to add.
8 Thank you, Mr. Chairman.

9 CHAIRMAN BLAIR: Commissioner Hammond?

10 COMMISSIONER HAMMOND: No.

11 CHAIRMAN BLAIR: I appreciate the brevity of
12 everyone's remarks, and we'll move forward in hearing
13 from counsel today. Our next step will be eliciting
14 views today from counsel regarding the establishment
15 of discovery and procedural schedules.

16 At this point I'd like to ask counsel to
17 identify themselves for the record. Will the
18 Complainant, Gamefly, please identify themselves?

19 MR. LEVY: Thank you, Mr. Chairman and
20 members of the Commission. I'm David Levy for
21 Gamefly, Inc., and also for Gamefly is my colleague,
22 Matthew Field, who is sitting immediately to my left.

23 CHAIRMAN BLAIR: Will the Respondent, United
24 States Postal Service, please introduce yourselves and
25 counsel?

1 MR. WEIDNER: Good morning, Mr. Chairman and
2 Commissioners. Keith Weidner for the Postal Service,
3 and with me is Ken Hollies and also Michael Tidwell.

4 CHAIRMAN BLAIR: Any intervenors present in
5 the audience? Douglas Carlson?

6 (No response.)

7 CHAIRMAN BLAIR: David Popkin?

8 (No response.)

9 CHAIRMAN BLAIR: Public representatives?

10 MR. COSTICH: Thank you, Mr. Chairman. Rand
11 Costich for the public representative.

12 CHAIRMAN BLAIR: Thank you, sir.

13 Time Warner?

14 (No response.)

15 CHAIRMAN BLAIR: Valpak Direct Marketing
16 Systems?

17 (No response.)

18 CHAIRMAN BLAIR: ValPak Dealers Association?

19 (No response.)

20 CHAIRMAN BLAIR: Any other parties that
21 counsel wish to be noted today at this time?

22 (No response.)

23 CHAIRMAN BLAIR: As referenced earlier, the
24 parties filed a joint statement outlining both
25 undisputed and disputed facts on July 20. In this

1 statement the parties indicated they could not reach a
2 consensus concerning the length of the period for
3 discovery.

4 At this time I'd like to query the parties
5 whether there have been further attempts to resolve
6 issues between the parties through negotiations and,
7 if so, have any further issues been resolved. Mr.
8 Levy?

9 MR. LEVY: David Levy for Gamefly. Yes, we
10 have conferred further, and we have reached agreement
11 on a proposed schedule which I will recite and then
12 Mr. Weidner will follow up.

13 What we propose is to have a discovery
14 cutoff of September 3, which is six weeks from now,
15 followed by follow up discovery in preparation of our
16 direct case, which will be due on October 1.

17 We do not propose deadlines after that
18 because we recognize and the Postal Service recognizes
19 that the amount of time they will need for their
20 discovery of us and, for that matter, Intervenors
21 might want to take of us will depend on the nature of
22 our case in chief and the extent to which the Postal
23 Service wishes to dispute the evidence we put in.

24 So we're just proposing a September 3 cutoff
25 for initial discovery and an October 1 cutoff filing

1 date for the case in chief.

2 Now, this is with two caveats that we
3 requested and the Postal Service has agreed to. The
4 first is that the discovery, the two cutoff dates, are
5 subject to adjustment if it turns out that they leave
6 us inadequate time to prepare our case despite
7 reasonable aggressiveness and diligence in prosecuting
8 discovery.

9 That escape hatch is to protect us, Gamefly,
10 if for reasons not our fault the discovery takes
11 longer than expected, the Postal Service has trouble
12 finding stuff or responding in a timely fashion, if
13 there is extensive objections and motion practice in
14 which we are substantially upheld, but which produce
15 delay and the like.

16 This escape hatch is also to protect the
17 Postal Service because I want to have the opportunity
18 for them to come to us and say we're going to need
19 more time to respond to your discovery, and I'd like
20 to be able to accommodate that without jeopardizing
21 our own case.

22 The second escape hatch that we have agreed
23 to is that once we get past the September 3 deadline
24 for initial discovery the Postal Service will be
25 flexible about the period within which we must file

1 follow up questions.

2 Given the volume of information that may be
3 produced because of the localized nature of many of
4 the facts, it may very well be that the standard one
5 week deadline for follow up is too short, and the
6 Postal Service has graciously agreed to be flexible in
7 that area.

8 That's all I have to say, and Mr. Weidner
9 has agreed to comment.

10 CHAIRMAN BLAIR: Mr. Weidner?

11 MR. WEIDNER: Yes, Mr. Chairman. I think
12 Mr. Levy accurately relayed our agreement.

13 I will note with respect to our liberal
14 approach to follow up is that we would not object to
15 any follow up on the procedural seven day grounds, but
16 we would reserve our right to object on substantive
17 grounds.

18 With that additional statement, I believe
19 Mr. Levy was completely accurate.

20 CHAIRMAN BLAIR: Public representative, Mr.
21 Costich?

22 MR. COSTICH: The public representative will
23 stick to whatever schedule the Commission adopts.

24 CHAIRMAN BLAIR: We will take this proposal
25 under advisement. I appreciate the ability of the

1 parties to work together to expeditiously proceed
2 through this case.

3 I would ask Mr. Levy, and if you so stated
4 earlier please indulge me, but is it your intention to
5 present evidence in this complaint as well?

6 MR. LEVY: David Levy. Yes, Mr. Chairman,
7 it is our intent.

8 CHAIRMAN BLAIR: Okay. And for the Postal
9 Service, is there any other additional filing
10 requirements or discovery requirements that you
11 anticipate at this time?

12 MR. WEIDNER: Keith Weidner for the Postal
13 Service. No, Mr. Chairman. We do expect to file
14 rebuttal testimony as well.

15 CHAIRMAN BLAIR: I would also ask the same
16 of the public representative.

17 Given that we haven't set the schedule yet,
18 it is kind of hard to answer that question despite
19 your intention.

20 MR. COSTICH: The public representative has
21 no plans at this time to provide testimony.

22 CHAIRMAN BLAIR: I would also ask, given the
23 difficult nature of estimating how much time will be
24 needed for discovery, and I appreciate the estimation
25 that you've done.

1 I would also ask that you keep us informed
2 of any other future agreements, which I would
3 anticipate you do. We will be issuing a response to
4 the proposed schedule.

5 At this time do any other parties wish to be
6 heard from on this issue?

7 MR. LEVY: David Levy. Not on this issue,
8 but I just want to make a Blackberry alert. Somebody
9 in this room has a Blackberry near a microphone.

10 CHAIRMAN BLAIR: I think I am the guilty
11 party. Thank you.

12 Seeing that there has been some agreement as
13 to a proposed schedule, we will take that under
14 advisement. At this point, we greatly appreciate the
15 parties' cooperation.

16 One question I do have to ask. Is it
17 contemplated that discovery will be in written form
18 only, or do you anticipate depositions or other forms
19 of discovery?

20 MR. LEVY: If we do oral discovery
21 depositions, it will be the last and least preferred
22 option for us and I am quite confident for the Postal
23 Service as well.

24 Depositions have the potential to turn into
25 a three-ring circus, as the Commission is painfully

1 aware, and, while not ruling it out entirely, we are
2 going to try to find out what we need through
3 traditional paper discovery.

4 CHAIRMAN BLAIR: Mr. Costich?

5 (No response.)

6 CHAIRMAN BLAIR: At this time we will review
7 your proposed discovery timeline schedule, and the
8 Commission will be reviewing and issuing an order
9 regarding this proceeding in a timely fashion.

10 We appreciate the agreement that you've
11 reached and you've worked out so far, and we hope that
12 this line of communication and working together can
13 continue.

14 I would ask that any participant seeking to
15 extend the procedural schedule please provide a
16 detailed justification in support of their motions for
17 those who are not present.

18 Does counsel have any conflict in the coming
19 months about which the Commission should be aware in
20 choosing potential hearing dates?

21 (No response.)

22 CHAIRMAN BLAIR: Mr. Levy?

23 MR. LEVY: Thank you, Mr. Chairman. The
24 only other comment I suppose I should make for
25 completeness is we are not proposing a date for this,

1 but it is not uncommon in complaint cases for the
2 Complainant to have a round of surrebuttal testimony.

3 At this point we don't know whether we're
4 going to ask for it or not, but I just wanted to note
5 that that is a possibility.

6 CHAIRMAN BLAIR: Mr. Weidner?

7 MR. WEIDNER: The Postal Service feels we
8 can cross that bridge if and when it becomes
9 necessary.

10 CHAIRMAN BLAIR: Okay. Mr. Costich, did you
11 want to make a comment?

12 MR. COSTICH: No. Thank you, Mr. Chairman.

13 CHAIRMAN BLAIR: Does any participant have a
14 procedural matter that they wish to raise with the
15 Commission at this point?

16 (No response.)

17 CHAIRMAN BLAIR: If not, do any of my
18 colleagues up here on the dais wish to offer any
19 concluding observations?

20 (No response.)

21 CHAIRMAN BLAIR: I appreciate the brevity
22 with which you brought here this morning.

23 There being nothing further then we'll be
24 issuing a ruling on the requested discovery request,
25 and the hearing is now adjourned.

1 Thank you very much.

2 (Whereupon, at 10:15 a.m. the hearing in the
3 above-entitled matter was concluded.)

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REPORTER'S CERTIFICATE

DOCKET NO.: C2009-1

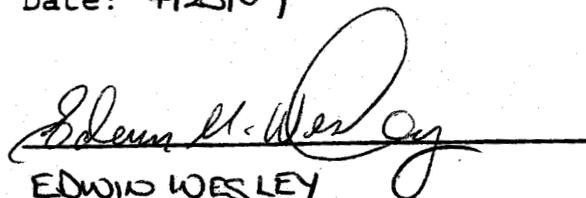
CASE TITLE: COMPLAINT OF GAMEFLY, INC.

HEARING DATE: JULY 23, 2009

LOCATION: WASHINGTON, DC

I hereby certify that the proceedings and evidence are contained fully and accurately on the tapes and notes reported by me at the hearing in the above case before the PRC.

Date: 7/23/09



EDWIN WESLEY

Official Reporter
Heritage Reporting Corporation
Suite 600
1220 L Street, N.W.
Washington, D.C. 20005-4018