

PRESIDING OFFICER'S
RULING NO. C2009-1/18

UNITED STATES OF AMERICA
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

Complaint of GameFly, Inc.

Docket No. C2009-1

PRESIDING OFFICER'S RULING
ESTABLISHING SCHEDULING CONFERENCE

(Issued April 27, 2010)

On April 14, 2010, GameFly, Inc. (GameFly) requested the scheduling of a prehearing conference (1) to establish a deadline for discovery by the Postal Service of GameFly's case; (2) to establish a deadline for the filing of the Postal Service's case; and (3) to entertain discussion of appropriate remedies for the Postal Service's failure to produce a large number of e-mails that are allegedly responsive to GameFly's July 31, 2009 discovery requests.¹

¹ Motion of GameFly, Inc., for Scheduling Conference, April 14, 2010, at 1 (GameFly Motion).

In its response filed April 21, 2010, the Postal Service consents generally to the scheduling of a prehearing conference with the stipulation that it be given at least two weeks to prepare.² However, the Postal Service opposes the GameFly Motion “to the extent it requests a conference to consider issues other than the setting of deadlines” *Id.* at 1. Specifically, the Postal Service objects to inclusion on the conference agenda of a discussion of remedies for failure to produce the e-mails sought by GameFly. *Id.* at 2.

On April 26, 2010, GameFly filed a motion for leave to reply to the Postal Service Response together with the proposed reply.³ In its reply, GameFly recounts the history of the dispute over production of the e-mails at issue, asserts that a discussion of that dispute should be included on the scheduling conference agenda, and requests that a deadline for production of the e-mails at issue should be established and enforced.

The GameFly Motion is an outgrowth of an earlier attempt to obtain responses to its discovery requests and, if necessary, sanctions for failing to respond. GameFly Motion at 1. On December 14, 2009, GameFly filed a motion requesting a status conference to consider, among other things, remedies to address the Postal Service’s failure to produce the e-mails previously requested in discovery requests made as early as July 31, 2009.⁴ On January 13, 2010, the Presiding Officer issued a ruling in which he took the request for status conference under advisement; ordered the Postal Service

² See The United States Postal Service Response to Motion of GameFly, Inc. for Scheduling Conference, April 21, 2010 (Postal Service Response). Because of counsel’s involvement in other proceedings, the Postal Service requests that the scheduling conference not be held before May 5, 2010. *Id.* at 3.

³ Motion of GameFly, Inc., for Leave to Reply to Response of the United States Postal Service to Motion for Scheduling Conference, April 26, 2010; and Reply of GameFly, Inc., to Response of the United States Postal Service to Motion for Scheduling Conference, April 26, 2010 (GameFly Reply). The Presiding Officer hereby grants GameFly’s motion for leave to file and accepts the GameFly Reply for filing.

⁴ Motion of GameFly, Inc. to Schedule Status Conference, December 14, 2009, at 6-7.

to file a memorandum addressing certain specific aspects of open discovery questions;⁵ and directed GameFly to file a statement explaining when it expected to close discovery.⁶ The Presiding Officer stated that after reviewing these submissions, he would, if necessary, “schedule a conference limited to addressing any lingering and genuine uncertainties over discovery duties, and potential sanctions for unwarranted failures to provide responses.” *Id.*

The Postal Service and GameFly responded to P.O. Ruling No. C2009-1/15 in filings made February 8 and 9, 2010, respectively.⁷ In its memorandum, the Postal Service reported that only 20 GameFly discovery requests remained outstanding and that it planned to complete its response to those requests within 1 month. Postal Service Memorandum at 1. In its statement, GameFly asserted that the Postal Service had still not produced thousands of pages of e-mails, and that as of February 9, 2010, it still had not received a Postal Service response to the November 4, 2009 revised search terms that GameFly proposed for analyzing Postal Service e-mail databases. GameFly Statement at 2.

On April 12, 2010, 2 days before the filing of the GameFly Motion, GameFly filed its prepared testimony.⁸ It appears that on April 15 and 16, 2010, counsel for GameFly

⁵ Presiding Officer’s Ruling on Motion of GameFly, Inc. to Schedule Status Conference, January 13, 2010 at 9-11 (P.O. Ruling No. C2009-1/15). This ruling directed the Postal Service to briefly describe what it had done to complete its answers; clarify what needed to be done to complete its answers; identify the earliest date by which it could complete its answers, or explain why it was unable to do so; and confirm the date by which it would complete its answers or responses. *Id.* at 9. The Postal Service was also urged to reduce the number of outstanding discovery requests by either responding or by negotiating mutually satisfactory stipulations. *Id.* at 9-10. Finally, the Postal Service was instructed that responses or objections to discovery requests not previously addressed “should be an immediate priority.” *Id.* at 10.

⁶ *Id.* at 10-11. The statement to be filed by GameFly was also to provide an estimate of when it expected to file its direct case and to “identify those particular outstanding discovery requests that are most central to its ability to prosecute its claims. *Id.* at 10.

⁷ Status Memorandum of the United States Postal Service in Response to Presiding Officer’s Ruling No. C2009-1/15, February 8, 2010 (Postal Service Memorandum). Status Statement of GameFly, Inc., February 9, 2010 (GameFly Statement).

⁸ Testimony of Sander Glick for GameFly, Inc., April 12, 2010.

and the Postal Service resumed their discussion of the e-mails referred to by GameFly in its motion.⁹

In an unrelated discovery matter, the Presiding Officer ruled on various Postal Service claims of confidentiality and privilege in a ruling issued April 15, 2010.¹⁰ As part of that ruling, the Presiding Officer ordered GameFly to redact certain information that was ordered to remain under seal from discovery material previously provided to GameFly by the Postal Service subject to protective conditions. *Id.* at 27. The Postal Service was given 5 days to file any objections that it might have to those redactions. *Id.* at 27-28. The latest those objections must be filed is April 29, 2010. *Id.* at 28.

In light of the background to the GameFly Motion, the recent developments discussed above, and the arguments presented by counsel for the parties, the request for a scheduling conference will be granted. Consistent with the Postal Service's request, that conference will be held on May 5, 2010. The parties are directed to be prepared to discuss the status of production of the outstanding e-mails that are the subject of GameFly's discovery requests; a deadline for the production of those e-mails; the deadline for Postal Service discovery of GameFly's direct case; whether a hearing will be required for receipt of GameFly's evidence; the deadline for the filing of the Postal Service's case; any objections the Postal Service may have to the redactions to discovery material served upon it by GameFly as ordered by P.O. Ruling C2009-1/17; and any further procedural matters that parties wish to raise.

⁹ See Postal Service Response at 2, n.2; GameFly Reply at 5.

¹⁰ Presiding Officer's Ruling on Postal Service Claims of Confidentiality and Privilege, April 15, 2010 (P.O. Ruling No. C2009-1/17).

RULING

1. A scheduling conference will be held in the Commission's hearing room at 901 New York Avenue, NW, Suite 200, Washington, DC 20268-0001, beginning at 2:00 p.m. on May 5, 2010.
2. The parties shall be prepared to discuss the status of the production of the outstanding e-mails that are the subject of GameFly's discovery requests and a deadline for producing such e-mails as discussed more fully in the body of this ruling.
3. The parties shall be prepared to discuss the deadline for Postal Service discovery of GameFly's direct case, the need for a hearing to receive GameFly's evidence, and a date for the filing of the Postal Service's case.
4. The parties shall be prepared to discuss any objections that the Postal Service may have to redactions to discovery material that GameFly has been ordered by P.O. Ruling No. C2009-1/17 to serve on the Postal Service.

Dan G. Blair
Presiding Officer