

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

COMPLAINT OF GAMEFLY, INC.

Docket No. C2009-1

MOTION OF THE UNITED STATES POSTAL SERVICE TO MODIFY SCHEDULE
(June 3, 2010)

The United States Postal Service ("Postal Service") respectfully requests that the Presiding Officer reschedule the date of the hearing on GameFly's direct case, currently scheduled for 9:30 a.m. on Thursday, June 17, 2010. The multiple outstanding objections and discovery requests, as well as the Postal Service's expected need to cross-examine a currently unidentified GameFly institutional witness, support moving the hearing to a future date. In addition, the Postal Service has encountered certain conflicts in staffing.¹

The Postal Service regrets the circumstances and timing of its need to move for relief on this matter. The Postal Service expected to be able to work around the current schedule by relying on co-counsel to conduct cross-examination of the one identified GameFly witness, whose written, direct testimony is relatively narrow in relation to the issues raised by GameFly's discrimination complaint. In this regard, GameFly has chosen to rely on narrow direct testimony of one witness who does not work directly for GameFly, as well as an unusual pleading styled as a memorandum. This pleading

¹ Lead counsel for the Postal Service has a personal conflict, as he will be unavailable and out of the country from June 17, 2010 to June 25, 2010 due to his wedding and honeymoon. Unexpectedly, it now appears that co-counsel's duties in the currently-pending service change proceeding (Docket No. N2010-1), and his responsibilities related to discovery in City of San Francisco v. USPS, No. 09-1964 JSW (N.D. Cal.), will conflict with the current hearing date. Maintaining the hearing date as scheduled will seriously interfere with the Postal Service's ability to defend itself effectively in this complaint action.

presents argument supported by numerous documents obtained through discovery which currently do not have evidentiary status.

Furthermore, at the time the schedule was established, the Postal Service did not have the benefit of numerous institutional answers to its own discovery requests to GameFly. As explained further below, the answers the Postal Service received have created the expectation that it will need to test the responses and inquire further under cross-examination. Until the resolution of an outstanding motion to compel, as well as possible action on pending or future objections to additional follow-up discovery, the Postal Service will not have the information necessary to determine specifically what additional hearing time it will need. Moreover, some consideration will have to be given to the manner in which the Postal Service might be able to conduct cross-examination on GameFly's essentially institutional responses. At this time, however, the Postal Service anticipates that it will need to conduct cross-examination of a competent witness, and that arrangements for a hearing will have to be made later.

The Postal Service filed three sets of discovery requests² and two requests for admissions.³ GameFly objected to twenty-two of these discovery requests.⁴ The Postal Service filed a motion to compel responses to fourteen of these discovery requests.⁵

² First Discovery Requests of the United States Postal Service to Gamefly, Inc. (USPS/GFL-1 through 46) (May 4, 2010); Second Discovery Requests of the United States Postal Service to Gamefly, Inc. (USPS/GFL-47 through -62) (May 11, 2010); Third Discovery Requests of the United States Postal Service to Gamefly, Inc. (USPS/GFL-63 through -83) (May 26, 2010).

³ First Request for Admissions of the United States Postal Service to Gamefly, Inc. (May 11, 2010); Second Request for Admissions of the United States Postal Service to Gamefly, Inc. (May 26, 2010).

⁴ See Objections of Gamefly Inc. to USPS Discovery Requests (USPS/GFL-5, 8, 12, 15-18, 25, 26, 28, 38, 39 and 46) (May 14, 2010); Objections of Gamefly, Inc., to USPS Discovery Requests (USPS/GFL-49-51, 54, 57, and 59-62) (May 21, 2010).

⁵ See Motion of the United States Postal Service to Compel Responses to Discovery Requests (USPS/GFL-5, 8, 16, 26, 28, 38, 39, 46, 49, 50, 51, 52(e), 54, and 60) (May 28, 2010).

The deadline to file a response to the motion to compel is June 3, 2010⁶, and GameFly will have seven days from the Presiding Officer's ruling on the motion to compel to file any compelled responses. See 39 C.F.R. §§ 3001.26(e) and 3001.27(e).

The Postal Service filed its third set of discovery requests on May 26, 2010.⁷ The deadline for responses to this set of discovery requests is June 9, 2010, with any objections due on June 4, 2010. See 39 C.F.R. §§ 3001.26 and 3001.27. If GameFly files objections, the Postal Service will have fourteen days from the filing of those objections to file a motion to compel, and GameFly will have seven days to respond. See id.

If it becomes necessary for the Postal Service to file follow-up interrogatories, this could extend discovery another month.

As described above, if the hearing occurs on the current date the Postal Service will have, at best, a week to review and analyze a substantial number of GameFly's interrogatory responses. Even under the best case scenario, the Postal Service will have no opportunity to obtain answers to any follow-up interrogatories. And, if GameFly files objections, it is likely that the Postal Service will not obtain responses to its third set of discovery requests or any follow-up interrogatories. Due to the current pace of discovery, maintaining the current hearing date will preclude Postal Service efforts to create a completely developed evidentiary record essential to its due process rights explore the basis of GameFly's complaint and mount an effective defense.

⁶ See Presiding Officer's Ruling Establishing Procedural Deadlines for Presenting Unresolved Discovery Disputes to the Presiding Officer (May 21, 2010).

⁷ Third Discovery Requests of the United States Postal Service to Gamefly, Inc. (USPS/GFL-63 through -83) (May 26, 2010).

Maintaining the current hearing date will also cause complications related to the Postal Service's expected cross-examination of a currently unidentified institutional witness.⁸ Based on the Postal Service's review of GameFly's institutional discovery responses, it has identified a significant number of issues for cross-examination. It is unlikely that GameFly's scheduled witness, Mr. Glick, a consultant hired by GameFly in connection with the litigation, has requisite knowledge of the subjects addressed in the institutional discovery responses to face cross-examination on these topics. An adequate exploration of GameFly's discovery responses will require the cross-examination of an institutional witness with personal knowledge of the internal operations of GameFly.

Unfortunately, there is no simple solution to this situation. The Postal Service appreciates fully the need for reasonable, timely progress in this proceeding. Because of the uncertainty of future discovery against GameFly, as described above, it is not possible at this time to identify an optimal schedule that will meet all of the parties' and the Commission's needs. The Postal Service, however, believes it could balance most of the competing considerations raised by the circumstances if the hearing on GameFly's direct testimony, including any cross-examination of a witness that must be offered by GameFly to stand cross-examination on its institutional discovery responses, is rescheduled during the week of June 28.

As a much less desirable alternative, the Postal Service would seek to reschedule the hearing on Mr. Glick's testimony to June 14 or 15. June 16 would work,

⁸ Due to the outstanding issues in this matter, and the likelihood that the parties will not resolve these issues before June 17, 2010, the Postal Service believes that it is more feasible to push the hearing date into the future. But, if GameFly can expedite its discovery responses and identify an institutional witness, the Postal Service is open to a discussion about holding the hearing before June 17, 2010.

as well, although the Commission has currently scheduled a technical conference for that date. If this option is elected, however, the Postal Service must emphasize that it will likely move for an additional hearing date in the future to deal with GameFly's institutional responses. Given the status of discovery, as explained above, it would be very difficult to determine the Postal Service's needs for cross-examination of an additional GameFly witness, and to prepare for it, if the hearing on Mr. Glick's testimony were to take place on June 17, as currently scheduled, or before on June 14, 15 or 16. In those circumstances, the Postal Service will probably need to plead for additional hearing time in order to satisfy its due process needs and conduct a reasonably effective defense.

The Postal Service appreciates if the hearing schedule is moved back there may be a need to push back the rest of the schedule, but the Postal Service does not believe that a commensurate modification will be necessary to accommodate the issues raised above.

Respectfully submitted,

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