

PRESIDING OFFICER'S
RULING NO. C2009-1/7

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

Complaint of GameFly, Inc.

Docket No. C2009-1

PRESIDING OFFICER'S RULING
GRANTING MOTION OF THE UNITED STATES POSTAL SERVICE
FOR EXTENSION OF TIME IN WHICH TO REPLY TO
THE MOTION OF GAMEFLY, INC. TO UNSEAL CERTAIN
DOCUMENTS PRODUCED IN DISCOVERY

(Issued October 7, 2009)

On September 25, 2009, GameFly, Inc. (GameFly) filed a motion for an order to show cause why certain documents and information designated as proprietary by the Postal Service should not be unsealed.¹ The Postal Service requests an extension until October 19, 2009, to reply to the GameFly Motion.² On October 6, 2009, GameFly filed a response to the Postal Service Motion.³

The Postal Service seeks additional time to respond to the GameFly Motion because it has "been unable to turn its attention to the arguments presented by GameFly" due to constraints raised by "responding to the large number of discovery

¹ Motion of GameFly, Inc., for Order Directing Interested Parties to Show Cause Why Certain Documents and Information Designated As Proprietary by the Postal Service Should Not Be Unsealed, September 25, 2009 (GameFly Motion).

² Motion of the United States Postal Service for Extension of Time in Which to Reply to the Motion of GameFly, Inc., to Unseal Certain Documents Produced in Discovery, October 2, 2009 (Postal Service Motion).

³ Response of GameFly, Inc., to Motion of United States Postal Service for Extension of Time, October 6, 2009 (Response).

requests ... filed by GameFly.” *Id.* at 2.⁴ It contends the issues raised by the GameFly Motion may affect third parties and may set ground rules for non-public treatment of proprietary documents beyond those immediately at issue. The Postal Service seeks an extension of an additional 17 days from the date its response to the GameFly Motion was due, until October 19, 2009.

GameFly’s Response indicates that “GameFly does not oppose the requested extension,” but advises that “the extension may trigger the need for an extension of the deadline established by Presiding Officer’s Ruling No. C2009-1/3 for the filing of GameFly’s direct testimony.” Response at 1. It explains in some detail why the delay will likely precipitate a motion by GameFly to postpone the current date set for GameFly’s presentation of its case in chief, which is November 2, 2009. *Id.* at 1-2.⁵

Although it is important to resolve this complaint promptly, the GameFly Motion presents the first opportunity to apply the Commission’s newly established standards for the treatment of information identified as confidential. Thus, it is important to allow an adequate opportunity for parties to fully and carefully develop relevant arguments. For that reason, the requested extension of time to permit the Postal Service to file its response by October 19, 2009, is granted, subject to certain requirements.⁶ In the

⁴ It also recognizes that GameFly should be permitted a chance to reply to its forthcoming response to the GameFly Motion. *Id.* at 2, n.1.

⁵ GameFly explains that an over-designation of materials as confidential unduly “bars GameFly’s management from reviewing the documents” and from planning its case in chief. *Id.* at 1. Not only will time be required for counsel to consult with management on unsealed documents, but an extension is likely to be necessary in any event because the Postal Service has neither answered nor objected to a large number of discovery requests (citing more than 25 pending requests). *Id.* at 2.

⁶ The Postal Service shall at least include, for each document it contends must remain sealed, such sufficient support as is ordinarily required for documents that it files under seal in the first instance, pursuant to 39 CFR 3007.21.

interim, it should notify third parties whose proprietary information may be unsealed.⁷ See also, 39 CFR 3007.21(c)(2). Third parties also shall have until October 19, 2009 to respond to the GameFly Motion.

GameFly may submit rejoinders to any replies to the initial GameFly Motion filed by the Postal Service or third parties by October 26, 2009.

RULING

1. The Motion of the United States Postal Service for Extension of Time in Which to Reply to the Motion of GameFly, Inc. to Unseal Certain Documents Produced in Discovery, filed October 2, 2009, is granted, consistent with the body of this Ruling.
2. The Postal Service shall provide effective notice to all potentially affected third parties promptly. The Postal Service, and third parties, shall file their responses to GameFly's Motion for an Order to Show Cause by October 19, 2009.
3. GameFly shall file any rejoinders by October 26, 2009.

Dan G. Blair
Presiding Officer

⁷ See P.O. Ruling C2009-1/4 at 2 ("The Postal Service also is implicitly under a continuing duty to protect the possible interests of affected third parties in the current context. Here, potentially sensitive documents that originated from the Postal Service were filed under seal by a private litigant."). As a result of the GameFly Motion, it became necessary for the Postal Service to provide notice to each third party with a proprietary interest in any of the documents at issue. The Postal Service should notify third parties also that any objections should be filed with the Commission by October 19, 2009, or they will be deemed to be waived.