

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

COMPLAINT OF GAMEFLY, INC.

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Docket No. C2009-1

**MOTION OF GAMEFLY, INC., TO STRIKE RESPONSES OF
UNITED STATES POSTAL SERVICE TO ORDER NO. 381
OR, IN THE ALTERNATIVE, FOR LEAVE TO FILE REPLY
(February 9, 2010)**

Pursuant to Rule 3001.21(b), GameFly, Inc. (“GameFly”) moves to strike the Response and Privilege Log filed by the Postal Service on January 28, 2010, in response to Order No. 381 (collectively “USPS Response”), or, in the alternative, for leave to reply to the two pleadings.¹ The USPS Response is a flagrant violation of Order No. 381 and Presiding Officer’s Ruling No. C2009-1/12 (“POR 12”).

The two decisions directed the parties to communicate in an attempt to resolve (or at least narrow) these issues *before* presenting them to the Commission for resolution. Despite repeated requests from GameFly, however, the Postal Service disclosed virtually nothing about the bases for its privilege claims before January 28. The 135 pages of pleadings filed by the Postal Service on January 28 advance a welter of new arguments for continuing to keep sealed many of the documents that GameFly moved to unseal on September 25,

¹ GameFly is filing its reply with the Commission separately today.

2009, more than four months ago. Moreover, the Postal Service's crude sandbag is merely the latest in a series of acts of disregard for the Commission's orders concerning the unsealing issue.

The most appropriate sanction in these circumstances is to strike the Postal Service's pleadings, and to hold that the Postal Service has waived any claim to further protection for the documents at issue. At a minimum, GameFly is entitled to respond to the arguments belatedly presented by the Postal Service.

BACKGROUND

A. The Commission Rulings Before Order No. 381, And The Postal Service's Disregard For Those Rulings.

To appreciate the seriousness of the Postal Service's actions, a bit of history is in order. GameFly filed its request for the unsealing of the documents at issue on September 25, 2009, more than four months ago.² GameFly accompanied the motion with an appendix reproducing all of the documents at issue. The documents were Bates-numbered at GameFly's own expense—a burden normally assumed by the party responding to discovery (here, the Postal Service).

The Commission's rules of practice normally allow adverse parties seven days to respond to motions to unseal documents. Rule 3007.31(b), 39 C.F.R. § 3007.31(b). The brevity of this period reflects the expectation that the party

² 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).

who marks documents as protected will have determined, before making such a designation, that the documents merit such protection under the Commission's standards. See Rules 3007.20 through 3007.22.

In response to the September 25 motion, however, the Postal Service asked the Commission to extend the response period by 17 days—i.e., to October 19. The Presiding Officer, while granting this extraordinary request, emphasized that the Postal Service's response should 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.

Presiding Officer's Ruling No. C2009-1/7 at 2 n.6 (emphasis added). “[A]ny objections should be filed with the Commission by October 19, 2009, *or they will be deemed to be waived.*” *Id.* at 3 n.7 (emphasis added).

The Presiding Officer's reference to Rule 3007.21 was of particular significance. Rule 3007.21(c) requires specific and detailed showings of injury for each document that a party seeks to keep under seal. In Order No. 225 (at 12), the Commission explained that

the “rule requires the Postal Service to identify the material it asserts are non-public and to provide a detailed statement in support thereof, addressing, among other things, the rationale for the claim, including the statutory authority, the nature and extent of any commercial harm, a hypothetical example of such harm, the extent of public protection from public disclosure deemed necessary, and any other factors relevant to the application for non-public treatment.

Despite the unambiguous tenor of Order No. 225 and POR-7, the Postal Service made no attempt in its October 19 response to justify its claims of confidentiality in terms of the particular documents that the Postal Service sought to keep secret. As the Presiding Officer later noted:

The Postal Service declined to file descriptions of each document marked confidential though required to by an earlier ruling granting it more time. No other meaningful support was provided either until the Postal Service filed its Response in opposition with vague descriptive information on certain classes of documents.

Presiding Officer's Ruling No. C2009-1/12 ("POR 12") at 30 (November 18, 2009).

In POR-12, the Presiding Officer gave the Postal Service a *further* "chance to provide the requisite support for claims of continuing protection for the documents in question." Order No. 381 at 19. "By allowing further comments, [POR 12] also provided the Postal Service and interested private parties with a second chance to elaborate on any justification for continued protection." Order No. 381 at 2. The Presiding Officer added that, after an opportunity for comment on the standards proposed in POR 12, and the issuance of a Commission order reviewing POR 12 in light of the comments,

the parties will be directed to jointly identify which information must remain sealed. For any materials of a status that remains unsettled, the parties are directed to *identify the disputed information and file further support. The burden of justifying protection continues to reside with the party substantively asserting it.*

POR 12 at 32 (emphasis added). The Presiding Officer admonished the Postal

Service that, before any document may remain under seal, “a genuine need for confidentiality must be shown by the Postal Service.” POR 12 at 19. “The party seeking to maintain the confidentiality of its materials must make a *particularized showing* of the need for continued secrecy if the documents are to remain under seal.” *Id.* at 19 n. 35 (emphasis added).

B. Order No. 381 And Its Aftermath

Order No. 381, issued on January 7, 2010, upheld the standards proposed in POR 12 in nearly all respects. The Order also set a deadline of January 28 for the parties to make a good faith attempt to reach agreement the application of the standards established in the Order to the documents at issue and, if negotiations left the status of any document unresolved, to file a request for relief, “presented with appropriate support to the presiding officer.” Order No. 381 at 20-21. The Commission again emphasized that the Postal Service bore the burden of justifying the continued sealing of any document. *Id.* at 20.

Order No. 381 gave the Postal Service three weeks to comply with its obligations. Yet from January 7, the date when Order No. 381 issued, to January 20, the Postal Service communicated nothing to GameFly regarding the unsealing issue.

On or about January 20, GameFly contacted the Postal Service, reminded it of the January 28 deadline, and requested that the Postal Service identify the particular documents (if any) that the Postal Service still sought to keep sealed in the wake of Order No. 381, and the reasons that the Postal Service intended to

offer any such requests, so that the two parties could comply with the January 28 deadline without a last-minute train wreck. On the following day, January 21, Postal Service sent GameFly by email a list of several hundred Bates-numbered pages that the Postal Service stated it still wanted to keep under seal.³ The Postal Service still provided no information, however, identifying the particular items on those pages that the Postal Service claimed to be confidential, or the legal and factual grounds for those claims.

GameFly and the Postal Service met at Postal Service Headquarters the next day, January 22. At the meeting, GameFly asked the Postal Service to provide the missing information, and Postal Service counsel agree to provide more information.⁴

The only additional information produced by the Postal Service before the January 28 filing deadline was a document log produced on January 25 (reproduced as Attachment B to GameFly's January 28 Notice Concerning Unresolved Privilege Issues). The additional information in this privilege log consisted of four conclusory labels that the Postal Service inserted next to the Bates number range for each document: "Third Party Confidential Information,"

³ Confidentiality Log produced by USPS on January 21, 2010 (reproduced as Attachment A to Notice of GameFly Concerning Unresolved Confidentiality Issues (January 28, 2010).

⁴ The Postal Service's statement that it "discussed confidentiality issues" with GameFly on January 22 (USPS Response at 2) is misleading. The confidentiality-related discussion at the meeting consisted of little more than GameFly's request for more information, and the Postal Service's commitment to provide more information.

“Blockbuster Confidential Information,” “Trade Secret,” and “Deliberative Process Privilege.”

On January 27, in an effort to protect the interests of third-party customers of the Postal Service despite the Postal Service’s failure to do so, GameFly sent the Postal Service a list of the specific references in these documents to private parties other than Netflix and Blockbuster. GameFly expressly agreed to the redaction of this information. GameFly stated, however, that it would not agree to further redactions without more information from the Postal Service about the grounds for its confidentiality and privilege claims. The Postal Service did not respond to this communication.

At approximately 4:19 pm on January 28—about one hour after GameFly filed its response to Order No. 381—the Postal Service filed its Response and Privilege Log. The 135-page Postal Service filing offered a welter of additional arguments for keeping particular documents under seal. The bulk of the document, including the specific discussion of specific documents, was filed under seal. GameFly’s counsel did not receive the confidential portions until the following morning.

ARGUMENT

When the Commission ordered GameFly and the Postal Service to confer to resolve their disputes over the Postal Service’s claims of confidentiality, the Commission could only have assumed that the Postal Service would make some attempt to justify its claims. Instead, the Postal Service refused to show its hand,

ignored GameFly's requests to do so, and waited until the time for negotiation had passed to reveal its arguments.

The only adequate remedy for the Postal Service's continuing pattern of disregard for the Commissions orders is to strike the Postal Service's January 28 pleadings from the record and, except for the items that GameFly has agreed to redact, to grant GameFly's Motion to Unseal without qualification. See *Siems v. City of Minneapolis*, 560 F.3d 824 (8th Cir. 2009) (upholding dismissal of complaint with prejudice where complainant exhibited "a pattern of intentional delay" culminating in failure to cooperate in preparing a joint scheduling order); *Garden City Boxing Club v. Godinez*, 2009 WL 914632 (D.Nev. 2009) (same); *Cowan v. Rocky Mountain Steel Mills*, 2008 WL 2998164 (D. Colo. 2008) (same); *Jones v. Smith*, 99 F.R.D. 4 (M.D. Pa. 1983).

It is conventional in these circumstances for the aggrieved party to move in the alternative for an opportunity to respond to the arguments belatedly advanced by the Postal Service. GameFly hereby makes such an alternative request, which is the minimum relief required by due process. We emphasize, however, that an opportunity to respond will not cure the continuing injury suffered by GameFly as a result of the Postal Service's continuing pattern of delay. Under the circumstances, striking the Postal Service's January 28 pleadings is the fairer remedy.

CONCLUSION

For the foregoing reasons, GameFly requests that the Commission strike the January 28 Response and Privilege Log filed by the Postal Service in response to Order No. 381, or, in the alternative, allow GameFly to reply to the two pleadings

Respectfully submitted,

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