

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

COMPLAINT OF GAMEFLY, INC.

Docket No. C2009-1

**REPLY OF THE UNITED STATES POSTAL SERVICE IN OPPOSITION TO 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 17, 2010)

On September 25, 2009, GameFly, Inc. filed a motion requesting that the Commission unseal various documents that have been produced by the Postal Service in discovery under protective conditions.¹ After further submissions² from the Postal Service, Blockbuster, and GameFly, the Presiding Officer issued Ruling (POR) No. 12, which proposed a three-category framework for determining appropriate standards by which to unseal information in the relevant documents, pursuant to 39 U.S.C. § 504(g)(3)(B), 39 C.F.R. § 3007.60, and Federal Rule of Civil Procedure 26(c).³ POR 12 also certified the matter to the Commission for a final order. The Commission largely accepted POR 12 in Order No. 381 (January 7, 2010) and required the Postal Service and GameFly to discuss and attempt to reach agreement regarding the confidential documents with respective responses to Order No. 381 then due within twenty-one

¹ See 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). All citations in this document are to filings in Docket No. C2009-1, unless otherwise noted.

² Third Party Blockbuster's Opposition to GameFly's Motion to Unseal Certain Documents (October 19, 2009); Opposition of the United States Postal Service to the Motion of GameFly, Inc. to Unseal Certain Documents Produced in Discovery (hereinafter "Postal Service Opposition") (October 19, 2009); Rejoinder of GameFly, Inc., to Oppositions of the United States Postal Service and Blockbuster Inc. to Motion of GameFly, Inc. to Unseal Certain Documents and Information Designated as Proprietary by the Postal Service (hereinafter "GameFly Rejoinder") (October 25, 2009).

³ Presiding Officer's Ruling (No. C2009-1/12) on Motion to Show Cause Why Certain Documents Should Not Be Unsealed (November 18, 2009).

days. The Order also directed the Postal Service to provide specific information in support of each privilege claim.

The Postal Service invited counsel for GameFly to its offices to discuss confidentiality issues and related matters, and the parties met on January 22, 2010. The Postal Service had prepared to conduct an in-depth, document-specific discussion of the confidentiality issues in the hope that the parties could identify those documents that would remain in dispute. At the meeting counsel for GameFly informed Postal Service attorneys that he did not have sufficient knowledge of the documents to discuss confidentiality issues on a document-specific basis. The parties briefly discussed their positions on the deliberative process privilege, thereby confirming continued and consistent disagreement as to its appropriate scope. In response to a request made by counsel for GameFly, on January 25, 2010 the Postal Service further provided a chart setting forth its justifications for confidentiality on a document-specific basis.

On January 28, 2010, the Postal Service and GameFly filed respective responses to Order No. 381.⁴ On February 9, 2010, GameFly filed a motion to strike (the “Motion”) the Postal Service Response, or in the alternative, for leave to file a reply, and the reply itself. GameFly argues that the Postal Service Response did not comply with Order No. 381, that the Postal Service did not comply with the Commission’s instructions regarding the parties’ attempts to resolve the confidentiality dispute, and—in effect—that the Postal Service should not be allowed to argue its position to the Commission unless it had first shared every bit of its argument with GameFly. Specifically, GameFly contends that the Postal Service delayed initiating discussion of

⁴ The United States Postal Service Response to Order No. 381 (January 28, 2010); Notice of GameFly, Inc. Concerning Unresolved Privilege Issues (January 28, 2010).

confidentiality with GameFly, and that it did not provide enough information for GameFly to properly understand the Postal Service's confidentiality arguments.

As described below, GameFly's contentions do not comport with the facts. The Postal Service Response complies with Order No. 381 and provides the information requested by the Commission. The Postal Service also acted in full accordance with Order No. 381 in attempting to resolve—and resolving—the confidentiality issues to the full extent it was possible to do so.

GameFly does not describe the behavior of the Postal Service – or GameFly – accurately. Before the meeting to discuss the confidentiality issues, the Postal Service unilaterally agreed to unseal 24 documents, a fact that was communicated to GameFly. The Postal Service arrived at the January 22nd meeting with GameFly prepared to discuss confidentiality issues on a document-specific basis.⁵ The in-depth, document-specific discussion expected by the Postal Service did not occur due to the admitted lack of preparation by GameFly's counsel, something the Postal Service could not remediate.

Although GameFly contends that the Postal Service's alleged failure to provide information made GameFly incapable of understanding the Postal Service's confidentiality justifications, GameFly possessed the disputed documents for months, was generally aware of the Postal Service's positions, and not later than January 25 knew exactly which justification(s) applied to which documents. As such, GameFly could easily have filed in its initial notice all the material that appears in the further response it now seeks leave to file (especially since the reply does little more than

⁵ See Attachment A to GameFly's January 28 Notice (email to GameFly counsel identifying those documents the Postal Service wanted to remain confidential and why, plus confirmations of the January 21 meeting time and location).

criticize Postal Service arguments regarding each document). Based on GameFly's arguments in its earlier pleadings, the exchange at the January 22nd meeting, plus further elaboration by the Postal Service upon its document-specific grounds provided the next business day to GameFly, the Postal Service filed its Response to Order No. 381 based on the firm understanding that resolution of the confidentiality issues would require the Commission's *in camera* inspection of the documents. Nothing filed since the parties January 28 replies to Order No. 381 in any way calls this expectation into question.

The Postal Service respectfully requests that the Commission deny the Motion because the Postal Service's January 28 Response complies with Order No. 381 and does not warrant a further reply from GameFly.

I. THE POSTAL SERVICE'S JANUARY 28 RESPONSE PRESENTS PRIVILEGE CLAIMS WITH APPROPRIATE SUPPORT TO THE COMMISSION IN COMPLIANCE WITH ORDER NO. 381.

Order No. 381 directs that "[w]ithin 21 days, all privilege claims related to documents subject to pending GameFly motions to unseal shall be discussed by GameFly and the Postal Service and be resolved, or if resolution is impossible, presented with appropriate support to the presiding officer." Order No. 381 at 12. This is only and exactly what the Postal Service has done. GameFly's motion to strike the Postal Service January 28 Response depends upon an inaccurate premise: while that motion claims 1) the Postal Service Response "advance[s] a welter of new arguments," and 2) the Postal Service "disclosed virtually nothing" about its privilege claims (Motion at 1), GameFly's procedurally improper attempt to reply to the Response consists only of information and argument that GameFly could have put in its own reply to Order No.

381.⁶ GameFly knew exactly what documents were at issue and needed no information from the Postal Service to understand what was at issue in each. GameFly's unwarranted position should be recognized for what it is, with its motion to strike denied and its motion for leave to file an unauthorized reply also denied. Every point of the reply could have, and should have been included in GameFly's own response to Order No. 381.

Addressing privilege claims, the Commission ordered that "no privilege claim may be raised to the presiding officer without: (i) the previously directed compliance with 39 CFR 3007.21(c) on a document-specific basis; (ii) a complete privilege log that identifies the subsequent decision at issue; and (iii) verification that the document is concurrently or was previously submitted to the Commission to permit *in camera* inspection under 39 CFR 3001.31(a)." *Id.* at 17. As described below, the Postal Service Response complied with each of these Order No. 381 specifications.

A. The Postal Service Provided the Information Requested by the Commission in Order No. 381.

Order No. 381 directs the Postal Service to take four specific actions: (1) meet with GameFly to discuss documents subject to pending GameFly motions to unseal; and for outstanding privilege claims, (2) provide justification to the Presiding Officer by addressing the requirements of CFR 3007.21(c) on a document-specific basis; (3) provide the Presiding Officer with "a complete privilege log that identifies the subsequent decision at issue"; and (4) produce the documents to the Commission for *in camera* inspection.

⁶ This failure by GameFly to connect even one fact from the Postal Service Response that was supposedly withheld from GameFly to its renewed argument in the unauthorized reply itself essentially disregards the Commission's rules and processes. The disconnection also demonstrates why GameFly's motion to strike and motion for leave to reply to the Response should accordingly be denied *in toto*.

With respect to required action (1), on January 22, 2010, Postal Service attorneys met with GameFly counsel to discuss the application of the confidentiality criteria established by Order No. 381. Although this meeting did not facilitate as much progress as hoped – partially due to the lack of preparation by GameFly counsel – the limited discussion revealed that it was unlikely the parties would reach an agreement on any additional documents.⁷

The Postal Service Response to Order No. 381 satisfies required actions (2), (3) and (4). In its Response, the Postal Service addressed the 39 CFR 3007.21(c) factors⁸ on a document-specific basis. Concurrent with its Response, the Postal Service provided a complete privilege log identifying the subsequent decision at issue for each document, and copies of each disputed document for the Commission's *in camera* review.

Because the Postal Service acted by providing information as specified by Order No. 381, its Response complied with the Order. The Commission should deny GameFly's Motion to Strike the Postal Service Response. Any other result would be both unfair and unfounded given GameFly's inaccurate representations.

B. The Motion Mischaracterizes the Postal Service's Actions and Omits GameFly's Failures and Own Lack of Preparation.

GameFly severely mischaracterizes Postal Service conduct when it refers to it as

⁷ Prior to the meeting, the Postal Service agreed to unseal 24 documents. In earlier filings GameFly consented to allow redactions to protect third party information. See, e.g. Comments of GameFly, Inc., in Response to Presiding Officer's Ruling No. C2009-1/12, December 9, 2009, at pg. 3. GameFly confirmed this consent on January 27, 2010, agreeing to redactions on 27 pages and the complete sealing of 1 document.

⁸ In general, the factors can be described as follows: (1) rationale for non-public treatment; (2) contact identification; (3) description; (4) identification of commercial harm; (5) hypothetical harm; (6) extent of protection; (7) length of time for protection; and (8) other.

a “crude sandbag” (Motion at 2). The Postal Service set up the January 22nd meeting to discuss confidentiality issues and held it at its offices. Prior to this meeting the Postal Service voluntarily identified the documents for which it sought continued confidentiality, agreeing to unseal 24 out of the approximately 101 documents at issue. See Attachment A to Notice of GameFly, Inc., Concerning Unresolved Privilege Issues (January 28, 2010).

GameFly’s Motion fails to explain how GameFly counsel’s inadequate preparation contributed to the ineffectiveness of the January 22nd meeting to resolve confidentiality issues. Postal Service attorneys had prepared to participate in an in-depth, document-specific discussion so as to permit identification of those documents that remained in dispute and thus would require Commission review. But, upon initiation of the discussion on confidentiality, GameFly counsel announced that he was not prepared to discuss confidentiality on a document-specific basis. He explained that he intended to review the documents the following weekend, and requested that the Postal Service provide the general basis for confidentiality on a document-specific basis. The Postal Service provided this information on the next business day. See Attachment B to Notice of GameFly, Inc., Concerning Unresolved Privilege Issues (January 28, 2010).

GameFly’s assertion that “the Postal Service disclosed virtually nothing about the bases for its privilege claims before January 28” is plainly inaccurate as shown by the Attachments to its January 28 Notice and confirmed by the actual content of its argument. GameFly counsel had access to the relevant documents for months, and had ample opportunity to review the documents for privilege and confidential

information, or at the very least to obtain enough familiarity with the documents to participate in a discussion of confidentiality issues. In this context, his inadequate preparation for the January 22nd meeting cannot be overlooked.

Despite the ineffectiveness of the January 22nd meeting, the Postal Service recognized a fundamental disagreement, confirmed by the pleadings and discussions involving the Postal Service and GameFly, that would require the Commission's *in camera* review to resolve the confidentiality issues. GameFly repeatedly asserted its position regarding the deliberative process privilege and other confidentiality issues, and the Commission's later orders did not change these positions. See, e.g., 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), at pgs. 12-18 (asserting GameFly's position that documents would cause no competitive harm to the Postal Service or third-parties, and that other interests supported unsealing of documents); Rejoinder of GameFly, Inc. to Oppositions of the United States Postal Service and Blockbuster Inc. to Motion of GameFly, Inc., to unseal Certain Documents and Information Designated as Proprietary by the Postal Service (October 26, 2009), at pgs 2-3, 24-30 (arguing that documents contained no commercially sensitive information, unsealing would not have effect of chilling speech within the Postal Service, and deliberative process privilege did not apply), 21-22 (contending that unsealing of documents would not harm Blockbuster), 30-32 (stating that other interests, including interest of public, supported unsealing of documents).

GameFly had sufficient information—through access to the relevant documents and awareness of the Postal Service positions in its pleadings—to understand Postal Service positions on a document-specific basis even before January 25, and there is no indication that the Postal Service possessed any new and important information.⁹

In addition to providing the Commission with the information it requested, the Postal Service made a good faith effort to cooperate with GameFly in resolving the confidentiality issues. GameFly substantiates no legal or factual basis for striking the Postal Service Response, hence the Commission should deny GameFly's motion in its entirety.

C. Legal Precedent Does Not Support Striking the Postal Service Response.

As described above, the Postal Service Response to Order No. 381 fully complies with that Order and provides the information requested by the Commission. But even if it did not, it would not be appropriate to strike the Response. The legal decisions cited by GameFly repeatedly state that “[d]ismissal with prejudice is an ‘extreme sanction’” and “should be sparingly exercised.” *Siems v. City of Minneapolis*, 560 F.3d 824, 826 (8th Cir. 2009); *Jones v. Smith*, 99 F.R.D. 4, 5 (M.D. Penn. 1983) (“dismissal with prejudice ... is a harsh sanction, to be resorted to only in extreme cases”). And in these cases, the parties who had their responses stricken acted in egregious noncompliance or blatantly ignored the orders of the decision-making body. See, e.g., *Siems*, 560 F.3d at 825-826 (affirming dismissal with prejudice after plaintiff's

⁹ GameFly repeatedly refers to the “welter of new arguments” contained in the Postal Service Response to Order No. 381. But the response merely applies the justifications earlier provided to GameFly to specific documents. Because GameFly had access to the documents and Postal Service positions on each, it had all the information it needed to anticipate the arguments made in the Postal Service Response.

counsel failed to respond to court's repeated messages and warnings, and where plaintiff "violated every part of the Court's Order"); *Garden City Boxing Club v. Godinez*, 2009 WL 914632 (D. Nev. 2009) (recommending striking of complaint and answer where defendant failed to appear for hearings and conferences and did not file initial disclosures or respond to discovery requests).

This matter does not resemble in the slightest the situations in the cases cited by GameFly. The Postal Service has responded to requests by GameFly and the Commission. Even where the Postal Service has failed to meet deadlines, it has explained its lack of timeliness and communicated with GameFly and the Commission in advance. The Commission has consistently recognized that unique burdens on the Postal Service will occasionally excuse untimeliness, and these unique burdens did not apply in the cases cited by GameFly.

II. THE POSTAL SERVICE RESPONSE TO ORDER NO. 381 DOES NOT WARRANT A RESPONSE BY GAMEFLY.

The Commission's rules do not provide GameFly with a right to respond to the Postal Service Response to Order No. 381. In issuing that Order, the Commission sought to conclude the copious briefing of the confidentiality issue. It intended that the parties would resolve the remaining issues themselves, "or if resolution is impossible," to resolve the issue itself through *in camera* review. It did not intend for the parties' responses to invite a new round of briefing, as this would directly conflict with the Order's aim at finality.

GameFly's motion and further reply constitute respective examples of GameFly's tendency to seek opportunities to file responses that are unauthorized under the Commission's procedural rules. See, e.g., Response of GameFly, Inc., to Opposition of

the United States Postal Service to Motion to Compel (September 3, 2009); Reply of GameFly, Inc., to “Response” of Netflix to GameFly Comments on Presiding Officer’s Ruling No. C2009-1/12 (December 23, 2009). Such efforts and the motions practice they generate waste resources and needlessly delay the proceedings.

Accordingly, the Commission should deny GameFly’s motion to strike or for leave to file a reply.

III. CONCLUSION

For the reasons set forth above, the Commission should deny both the Motion to strike and the alternative of filing (or having the Commission consider) GameFly’s reply to the Postal Service Response to Order No. 381.

Respectfully submitted,

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