

PRESIDING OFFICER'S  
RULING NO. C2009-1/24

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

Complaint of GameFly, Inc.

Docket No. C2009-1

PRESIDING OFFICER'S RULING  
GRANTING, IN PART, POSTAL SERVICE MOTION  
FOR INSTITUTIONAL WITNESS

(Issued July 6, 2010)

I. INTRODUCTION

The Postal Service moves to compel GameFly, Inc. (GameFly) to designate a sponsoring witness for answers to discovery and interpretations of Postal Service documents.<sup>1</sup> GameFly opposes the Motion because it would impose upon it a duty to designate a witness for sponsoring documents originally produced by the Postal Service or for clarifying factual contentions on anticipated affirmative defenses.<sup>2</sup> For the reasons discussed below, the Motion is granted, in part.

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<sup>1</sup> Motion of the United States Postal Service to Compel GameFly to Designate a Witness to Sponsor Interrogatory Answers and Interpretations of Postal Service Documents, June 16, 2010 (Motion).

<sup>2</sup> Answer of GameFly Inc. to Motion of the USPS for Another Opportunity to Cross-Examine an Institutional GameFly Witness, June 23, 2010 (Answer).

## II. BACKGROUND

GameFly filed a direct case on April 12, 2010 consisting of the written testimony of Sander Glick and the Memorandum of GameFly, Inc., Summarizing Documentary Evidence (GameFly Memo). The GameFly Memo cited various Postal Service documents and Postal Service discovery responses, all of which were attached to the memorandum. Thereafter, the Postal Service conducted discovery related to GameFly's direct case. The deadline for that discovery was May 25, 2010.<sup>3</sup>

The hearing on GameFly's direct case was held on June 16, 2010. At that hearing, GameFly introduced its direct case into evidence. The direct case consisted of the prepared written testimony of witness Glick,<sup>4</sup> and a compendium of documents cited in the GameFly Memo.<sup>5</sup> In addition, the Public Representative's written cross-examination was received into evidence.<sup>6</sup> The actual submission of the Postal Service's written cross-examination was, by agreement of the parties, delayed until July 2, 2010.<sup>7</sup> During the hearing, the Postal Service conducted oral cross-examination of GameFly witness Glick.

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<sup>3</sup> P.O. Ruling C2009-1/20. Since May 25, 2010, the Postal Service has served follow-up discovery. Follow-Up (Fourth) Discovery Requests of the United States Postal Service to GameFly, Inc. (USPS/GFL-84 through 103), June 17, 2010. Responses to those discovery requests were filed July 1, 2010.

<sup>4</sup> Confidential Testimony of Sander Glick, GFL-T-1. Tr. 4/136-154 (filed under seal). Witness Glick's testimony was duly marked for identification and admitted into evidence. *Id.* at 157.

<sup>5</sup> Tr. 4/157-652 (filed under seal). The documents were identified and admitted into evidence. Tr. 4/157 (filed under seal). The GameFly Memo itself was not admitted into evidence. *See id.* at 155-57.

<sup>6</sup> Designation of Written Cross-Examination PR/GFL-1. Tr. 4/128 (filed under seal).

<sup>7</sup> Tr. 3/120-22. This delay was occasioned by the need to extract certain sensitive materials from the documents to be admitted into evidence and copied into the transcript. On July 2, 2010, the Postal Service filed its written cross-examination. United States Postal Service Designation of Written Cross-Examination, July 2, 2010.

### III. THE POSTAL SERVICE'S MOTION TO COMPEL

Relying upon 39 CFR 3001.30(e)(2) and (e)(3), the Postal Service requests the Presiding Officer to compel GameFly's designation of a witness who can sponsor GameFly's institutional discovery responses with knowledge and can "face oral cross-examination." Motion at 1. The Postal Service adds that cross-examination is also necessary on GameFly interpretations of Postal Service documents set forth in the GameFly Memo. *Id.*

The Postal Service asserts that GameFly has provided institutional answers to the Postal Service's interrogatories and document requests without designating a sponsoring witness. *Id.* It notes that the "rules authorize the treatment of discovery responses as written cross-examination." *Id.* at 1, n.2., citing 39 CFR 3001.30(e)(2).

The Postal Service contends that it "must receive the opportunity to cross-examine a GameFly witness on these materials" to "be able to exercise due process rights to defend itself in this complaint action." *Id.* at 1. It asserts that "[w]ithout submission of properly sponsored testimony establishing the factual legal basis of its case, GameFly's complaint must fail for lack of evidentiary support." *Id.* at 2.

The Motion offers four main contentions. First, the Postal Service seeks cross-examination of a witness on issues related to the institutional responses to discovery requests and interpretations of Postal Service documents cited in the GameFly Memo. *Id.* Second, it asserts that without further testimony from another witness, GameFly fails to address any of the elements of discrimination under 39 U.S.C. 403(c) with evidentiary support. *Id.* at 8. Third, the Postal Service argues that it did not waive its opportunity to cross-examine a GameFly witness because it has recently received responses to discovery that make apparent the need for such cross-examination. *Id.* at 12. Fourth, it contends GameFly has a duty to support its case, despite allegations of Postal Service violations of the filed rate doctrine. *Id.* at 13.

#### IV. GAMEFLY'S ANSWER

In its Answer, GameFly states that the Motion pertains to the cross-examination of an "institutional" GameFly witness about "two different kinds of facts":

(1) "[i]nformation about the Postal Service's own conduct" reflected in documents produced by the Postal Service and entered into evidence at the June 16, 2010 hearing; and (2) facts about GameFly's operations and business concerning whether GameFly is similarly situated to Netflix, and any rational basis for the alleged discrimination.

Answer at 1.

GameFly asserts that the Postal Service's request for an institutional witness is untimely,<sup>8</sup> but that, in any event, it has no duty to produce a witness to sponsor the documentary evidence of discrimination, which GameFly obtained from the Postal Service itself, or to present a witness for cross-examination on legal argument contained in the GameFly Memo. *Id.* at 2. In the second part of its Answer, GameFly maintains that it has already produced an institutional fact witness at the June 16, 2010 hearing, and should not be required to do so again. *Id.* at 9. GameFly further opposes an additional witness because the unresolved issues of fact that were alleged to support the requested relief are irrelevant, immaterial, or cumulative. *See id.* at 10.

Finally, GameFly takes exception to the argument that it destroyed responsive information contrary to its duty to preserve all documents, as is customary in federal practice. GameFly argues even if there was a plausible basis for an objection, the Postal Service failed to indicate why it was likely to be prejudicial in view of the record.<sup>9</sup>

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<sup>8</sup> *See id.* at 3 ("Postal Service...waited more than two months"), citing 39 CFR 3001.1 ("secure just and speedy determination of issues"); and 3001.30(f) ("taking of evidence shall proceed with all reasonable diligence and dispatch").

<sup>9</sup> *See id.* at 24 ("[t]here is no evidence that the document retention policies that were in place prevented GameFly from producing any material, relevant information.").

## V. ANALYSIS

Before turning to the need for cross-examination of an institutional witness on specific matters, consideration must be given to what GameFly asserts is one of two major shortcomings to the Postal Service's request.<sup>10</sup> According to GameFly that shortcoming is the fact that the Postal Service has already had access to an institutional witness, in the person of GameFly witness Glick, and failed to take full advantage of that opportunity. *Id.* at 9.

### A. Witness Glick is Not an Institutional Witness

GameFly points to several factors to support its claim that witness Glick should be considered the institutional witness that the Postal Service has sought to cross-examine. Those factors are: (1) the content of the Postal Service's Notice of Cross-Examination of witness Glick and its Designation of Written Cross-Examination;<sup>11</sup> (2) GameFly's decision not to object to the scope of witness Glick's cross-examination; (3) circumstances allegedly demonstrating witness Glick's competence to appear as an institutional witness; and (4) the nature and scope of the Postal Service's actual cross-examination of witness Glick. *Id.* at 10-12.

Before turning to the factors cited by GameFly, it is important briefly to summarize the background of the dispute over witness Glick's role in this proceeding. In his prepared testimony, witness Glick states that the scope of his engagement by GameFly was "to (1) estimate the difference in the Postal Service's costs of handling Netflix and GameFly DVD mailers, and (2) compare this cost difference to the difference

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<sup>10</sup> In GameFly's view, the second major shortcoming is that the facts that the Postal Service seeks to establish through cross-examination are either irrelevant or have already been conceded by GameFly. *Id.* at 10. This second alleged shortcoming will be discussed *infra*.

<sup>11</sup> United States Postal Service Notice of Intent to Conduct Oral Cross-Examination, June 10, 2010 (Notice of Cross-Examination); and United States Postal Service Designation of Written Cross-Examination, June 10, 2010 (Designation of Written Cross-Examination).

in average postage per piece paid by the two companies.”<sup>12</sup> Consistent with that limited engagement, witness Glick responded to discovery requests of the Public Representative directed at his testimony.<sup>13</sup> At the time of the June 16 hearing, none of the GameFly responses to the Postal Service’s discovery requests identify witness Glick as the person responsible for preparing or supervising the preparation of those responses.<sup>14</sup>

On its face, the Postal Service’s Notice of Cross-Examination of witness Glick lends some credence to GameFly’s assertion. That notice expressly identifies witness Glick as the intended subject of cross-examination and sets forth a list of topics on which witness Glick may be cross-examined.<sup>15</sup> GameFly cites, in particular, the references in the notice to GameFly’s “Complaint”; documents constituting GameFly’s “direct case”; and GameFly’s answers to Postal Service discovery that have been filed prior to the hearing.” Answer at 10.

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<sup>12</sup> Testimony of Sander Glick for GameFly, Inc., GFL-T-1, June 16, 2010, at 1.

<sup>13</sup> Answer of GameFly, Inc. Witness Sander Glick to Public Representative Interrogatory PR/GFL-T1-1, May 25, 2010.

<sup>14</sup> See, e.g., Answers of GameFly, Inc., to USPS Discovery Requests USPS/GFL-1-4, 6-7, 9-38, 40-45, May 19, 2010 (GameFly’s First Set of Answers) (“These answers were prepared under the supervision of David Hodess, CEO of GameFly.”); Answers of GameFly, Inc., to USPS Discovery Requests USPS/GFL-47 through 60, May 25, 2010 (“Except where noted otherwise, these answers were prepared under the supervision of David Hodess, CEO of GameFly.”). Since the June 16 hearing, GameFly has submitted additional discovery responses which identifies Mr. Hodess, not Mr. Glick, as the person who supervised preparation of those responses. Answers of GameFly, Inc., to USPS Discovery Requests USPS/GFL-84 through 103, July 1, 2010.

<sup>15</sup> The subjects of possible cross-examination are described as follows:

The Postal Service anticipates that it will cross-examine Mr. Sander Glick on Mr. Glick’s written direct testimony and the theories of GameFly’s Complaint. Topics will include the contentions set forth in Mr. Glick’s testimony, and GameFly’s factual representations, as discussed in pleadings and documents filed by GameFly during the course of this proceeding. These documents include the Complaint of GameFly, and other documents constituting GameFly’s direct case against the Postal Service. The Postal Service may also question Mr. Glick on GameFly’s answers to Postal Service discovery that have been filed prior to the hearing.” (Footnotes omitted.)

Notice of Cross-Examination at 1.

The Postal Service's general references to GameFly's "Complaint" and "direct case" are consistent with witness Glick's limited engagement in this proceeding. The parameters of his testimony are established by the complaint. His testimony is part of GameFly's direct case. Prudence would dictate that counsel for the Postal Service identify these areas in order to preserve his right to cross-examine the witness on subjects addressed in his prepared testimony. The Postal Service's references to GameFly's complaint and its direct case do not transform witness Glick into an institutional witness.

While the Postal Service's reference in its Notice of Cross-Examination to "GameFly's answers to Postal Service discovery" could, by itself, be read to imply an intent of the Postal Service to treat witness Glick as an institutional witness for GameFly, footnote 3 of the Notice of Cross-Examination reiterates the Postal Service's desire for "a currently unidentified GameFly institutional witness."<sup>16</sup> *Id.* at 2.

Nor is witness Glick an institutional witness simply because some of the Postal Service's cross-examination may have strayed into areas that an institutional witness might otherwise have been expected to address. See GameFly Answer at 11. GameFly cites these as examples of how the Postal Service treated witness Glick as an institutional witness and yet failed to explore other areas that it now seeks to explore with an institutional GameFly witness. *Id.* at 11-12.

Upon closer inspection, however, GameFly cited three instances to support its claim that the Postal Service treated witness Glick as an institutional witness. These instances can be interpreted instead as questions that were not directed at GameFly as an institution. These questions were directly related to witness Glick's prepared testimony, or sought to determine what information sources he reviewed in preparing

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<sup>16</sup> Consistent with footnote 3 of the June 10, 2010 Notice of Cross-Examination, the Motion that is the subject of the instant ruling was filed approximately one hour before the hearing began on June 16, 2010.

his testimony.<sup>17</sup> Even if these questions could somehow be interpreted as institutional questions, their limited number and apparent purposes do not support the conclusion that the Postal Service in fact treated witness Glick as an institutional witness.

Finally, it was not until GameFly filed its Answer that it took the position that witness Glick had been “effectively transformed...into an institutional fact witness as well as the sponsor of his prefiled testimony.” Answer at 11. None of GameFly’s prior pleadings made this suggestion.<sup>18</sup> Nor did GameFly formally present witness Glick as an institutional witness. See Tr. 3/77-92. GameFly nevertheless suggests that witness Glick was competent to appear as an institutional witness because of his participation in GameFly meetings, his exposure to email traffic between GameFly and the Postal Service, his review of GameFly discovery responses, and his discussion of operational issues with senior GameFly management. *Id.* However, these arguments are offered without any record support. The record suggests the opposite, namely, that witness Glick would not have been competent to stand cross-examination as an institutional witness.<sup>19</sup>

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<sup>17</sup> See Tr. 3/107-08 (question regarding why a mailer would decide to mail DVDs as flats was a general question related to postage differences, a subject addressed in the witness’ prepared testimony); Tr. 4/653-55 (filed under seal) (questions regarding Postal Service offerings of manual processing were expressly linked to the witness’ prepared testimony); and Tr. 4/655-57 (filed under seal) (questions regarding the role of breakage and theft in selecting a rate category for DVD mailers that were directed toward establishing the sources of information the witness reviewed in preparing his testimony).

<sup>18</sup> In an earlier answer to a Postal Service motion to change the procedural schedule, GameFly argued extensively against the need for an institutional witness but never suggested that witness Glick might be such a witness. See Answer of GameFly, Inc., to Motion of USPS to Postpone Hearing, June 8, 2010.

<sup>19</sup> See Tr. 3/93 (In preparation for his testimony, the witness reviewed responses of Postal Service to GameFly discovery requests, not the responses of GameFly to Postal Service discovery requests. The witness’ conversations with GameFly employees were not the basis of his testimony; and the witness did not observe any mail processing operations.); and Tr. 4/656-57 (filed under seal) (witness testified that he had not seen a particular GameFly discovery response at the time he prepared his testimony).

B. Oral Cross-Examination of a GameFly Institutional Witness is Appropriate, Subject to Additional Procedural Requirements

Because witness Glick cannot be considered an institutional witness for GameFly, the inquiry must turn to the question of whether the production by GameFly of an institutional witness is justified. That inquiry must begin with a recognition of the particular procedural context in which the Postal Service's request for the opportunity to cross-examine an institutional witness arose.

At the June 16 hearing, the Postal Service stated its intent to offer written cross-examination into evidence pursuant to rule 30(e)(2) of the rules of practice.<sup>20</sup> See Tr. 3/66-69. The written cross-examination was to consist of GameFly responses to Postal Service discovery requests, a list of which has been copied into the transcript. Tr. 4/131-33 (filed under seal). GameFly stated no objection to the introduction of the Postal Service's written cross-examination. Tr. 3/121-22.

Rule 30(e)(3) expressly states that “[o]ral cross-examination will be permitted for clarifying written cross-examination and for testing assumptions, conclusions or other opinion evidence.” In this case, the Postal Service has the right to conduct oral cross-examination permitted by rule 30(e)(3). Accordingly, oral cross-examination of a GameFly institutional witness is ordered with respect to the written cross-examination that the Postal Service identified during the June 16 hearing, as well as any additional written cross-examination designated from among GameFly's July 1, 2010 discovery responses. See note 14, *supra*.

While oral cross-examination is being permitted, the particular facts and circumstances of this proceeding require the imposition of specific limitations and requirements that go beyond those traditionally observed under rule 30(e)(3). The Commission's rules require that a notice of oral cross-examination be filed before oral cross-examination can be conducted. That requirement applies in the current context as well. To satisfy that requirement, the Postal Service must file its notice of intent to

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<sup>20</sup> As noted *supra*, the introduction of that evidence was delayed until July 2, 2010 for reasons not relevant here.

conduct oral cross-examination by July 12, 2010. GameFly will have 7 days from the filing of the Postal Service's notice to designate the witness it will produce for cross-examination and the witness's availability to appear for cross-examination between the dates of July 26 and July 30, 2010.<sup>21</sup>

Rule 30(e)(3) specifies that the notice of oral cross-examination "should include specific references to the subject matter to be examined and page references to the relevant, direct testimony and exhibits." Those requirements are designed to place reasonable limitations on the scope of cross-examination and to give witnesses fair notice of the matters that he or she will be expected to address. Rule 30(f) gives the Presiding Officer the authority to place additional limits on cross-examination "to avoid irrelevant, immaterial, or unduly repetitious testimony."

This case requires additional limits on cross-examination of the type contemplated by rule 30(f). The progress of this case has been unacceptably slow. The cross-examination of GameFly's institutional witness, while necessary, will not be allowed to delay the resolution of GameFly's claims.<sup>22</sup> For that reason, the following additional conditions are being imposed:

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<sup>21</sup> GameFly may designate witness Glick as an institutional witness provided he is competent to answer the subject matters and lines of questions specified in the Postal Service's notice.

<sup>22</sup> In opposing the Postal Service's Motion, GameFly has argued that the request should be denied as untimely. Answer at 1-2. While there is some merit to this argument, it must be acknowledged that at least some of GameFly's discovery responses were not received until shortly before the June 16 hearing and that follow-up discovery responses were not available until July 1, 2010. For those reasons, the Motion is not being denied as untimely.

First, cross-examination of GameFly's institutional witness shall not be permitted with respect to areas covered by the specific grounds presented by the Postal Service and rejected in Section, C., *infra*.

Second, the Postal Service's notice of intent to conduct oral cross-examination to be filed by July 12, 2010, must, for each GameFly discovery response on which it proposes to conduct cross-examination, identify the subject matter and specific lines of questioning that the Postal Service intends to conduct.

Third, in its answer to the Postal Service's notice of intent to conduct oral cross-examination, GameFly shall include any objections that it has to the Postal Service's lines of questioning.

Fourth, in cross-examining GameFly's institutional witness, counsel for the Postal Service shall be expected to link its lines of questioning to specific GameFly discovery responses.

Rulings on objections will be made, as appropriate, at the hearing. The purpose of cross-examination is to test assumptions, conclusions or other GameFly opinion evidence, not to conduct discovery.

#### C. Other Grounds Offered for Requiring an Institutional GameFly Witness

The Postal Service argues that it "should have the opportunity to cross-examine a GameFly witness on all of the factual allegations and legal conclusions comprising GameFly's direct case." Motion at 7. On its face, this claim goes beyond what the Commission's rules of practice allow. Rule 30(e)(1) provides that "[a]ny participant shall have the right in public hearings of presentation of evidence, cross-examination (*limited to testimony* adverse to the participant conducting the cross-examination), objection, motion, and argument." (Emphasis added.) 39 CFR 3001.30(e)(1). The Postal Service had ample opportunity for discovery. Had the Postal Service desired to conduct a broader examination of a GameFly representative, it could have sought to depose such a representative. Cross-examination of a witness during a Commission hearing is not to be used to conduct discovery.

The Postal Service has identified several specific areas which it argues are proper subjects of cross-examination of a GameFly institutional witness. Each is considered below.

1. *Legal conclusions in the GameFly Memo.* The Postal Service seeks to explore through oral cross-examination the basis of GameFly's legal conclusions under section 403(c) in the GameFly Memo, which relate to unfair discrimination claims, defenses, and affirmative defenses. Motion at 7-8. The GameFly Memo has not been entered into evidence. GameFly correctly points out that if such a legal brief had simply been presented after hearings, it would not be obliged to designate a further witness. Answer at 8. In this respect, the Motion is denied.

2. *Factual interpretations of Postal Service documents cited in the GameFly Memo.* The Postal Service also seeks to explore in cross-examination of a further witness the basis of GameFly factual interpretations of Postal Service documents cited in the GameFly Memo. Motion at 8-12.<sup>23</sup> No due process basis for oral cross-examination arises to test the authenticity of documentary evidence produced by the party seeking cross-examination. The GameFly Answer rebuts the risks that concern a lack of authenticity, and asserts the documents are independently credible in view of Federal Rules of Evidence rules 801(d)(2)(D), 803(6) and (8). Answer at 5. The Postal Service has not moved to strike the admission of the documents as evidence into the record through a timely motion. In view of the pleadings and the transcript of the June 16, 2010 hearings, the Postal Service's objections based upon authenticity and hearsay are not persuasive.

The determinations of objections as to documents in the GameFly Memo do not necessarily resolve the question arising when a document cited in the GameFly Memo is also interpreted further in one or more discovery answers filed by GameFly. GameFly

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<sup>23</sup> In this connection, the Postal Service argues that GameFly's heretofore failure to present an institutional witness leaves serious gaps in GameFly's case. See, e.g., Motion at 8-9 (the absence of an institutional witness results in a failure to address the elements of discrimination under 39 U.S.C. 403(c) with evidentiary support). The short answer to this contention is that GameFly is responsible for presenting a *prima facie* case. If the failure to present an institutional witness proves fatal to GameFly's case, it is GameFly that must accept the responsibility for that failure. For that reason, GameFly is not being required to present an institutional witness to address areas that the Postal Service believes should have been addressed as part of GameFly's *prima facie* case.

has the limited duty to provide a witness to explain or clarify its interpretation of documents cited in institutional responses to discovery.

3. *Business decisions at issue in this case, including GameFly's choices related to the design and production of its mailpieces.* During the discovery phase of this proceeding, GameFly objections to certain Postal Service interrogatories related to theft were resolved in P.O. Ruling C2009-1/23. That ruling compelled GameFly to provide supplemental information because of the potential connection between theft, mailpiece design, and mailpiece processing. *Id.* at 4. The Postal Service's Motion seeks leave to conduct cross-examination of an institutional witness "who can explain how the risk of theft or loss influenced the GameFly business decisions at issue in this case, including GameFly choices related to the design and production of its mail pieces, and the nature of mail processing sought and expected from those decisions." Motion at 4-5.

The request is vague and overly broad. It is unclear what "business decisions at issue in this case" the Postal Service has in mind. An institutional witness should stand cross-examination on discovery responses related to theft or loss, to the extent that theft or loss affects mailpiece preparation (both mailpiece design and production) and mail processing. In this connection, GameFly provided responses to Postal Service follow-up discovery requests relating to breakage on July 1, 2010. Since issues of breakage may also affect mailpiece preparation and processing, cross-examination of the witness on the responses to discovery with respect to breakage, as well as to theft and loss is authorized.

4. *GameFly's business and operational costs.* The Postal Service seeks to cross-examine an institutional witness on what GameFly knows about its own business costs, especially given the entry and delivery of a mailer's pieces are allegedly critical elements in providing the service performance a given mailer expects. *Id.* at 5-6. It specifies it is concerned with clarifying GameFly's transportation costs, which were addressed in prior rulings on USPS/GFL-26 and 28. It has not identified any other

discovery answers that require clarification on these points. As to USPS/GFL-26 and 28, the rulings did not require GameFly to produce data on transportation costs that it indicated it lacked, and GameFly was not required to develop new studies. See P.O. Ruling C2009-1/23 at 9.

The Motion presents no new grounds. Thus, the Postal Service has identified no convincing basis to require another witness be designated to testify on the mailer's transportation costs, when an earlier ruling clearly points out that GameFly already represented it does not possess the information, and that requiring "a special study" of the requested transportation costs "would be burdensome and legally unjustified." See *Id.* The grounds asserted by the Postal Service for even more elaborate studies based upon counter-factual hypotheticals of the proximity of GameFly's points of presence are even less persuasive. *Id.*, citing USPS/GFL-28. Cross-examination of an institutional witness on this topic is denied.

5. *Special dedicated mail drops and signage for Netflix.* The Postal Service seeks to conduct further cross-examination on GameFly's direct case on allegedly misleading points asserted by GameFly including certain inferences drawn from incidents where some post offices allegedly have created or maintained special mail drops and signage for Netflix returns. *Id.* at 9-10. The Postal Service may cross-examine on factual contentions or inferences pertaining to mail drops and signage asserted by GameFly to a limited extent. P.O. Ruling C2009-1/6 at 3-5. Such cross-examination shall be limited solely to testing the inferences drawn from record materials by GameFly in its institutional discovery answers.

6. *Composition and prices of its game DVDs compared with video DVDs.* Another basis for the Motion concerns the Postal Service's alleged legitimate need to probe GameFly's knowledge regarding the composition and prices of its game DVDs compared with video DVDs and the degree of likeness of services at issue. *Id.* at 6-7. It appears unlikely that an institutional witness could provide more than GameFly has

already provided in its response on the record. Answer at 22.<sup>24</sup> There is no justification to call a witness merely to reconfirm that GameFly has no further responsive information, where GameFly already indicated it could provide nothing further regardless of the discovery ruling.

7. *The filed rate doctrine.* The Postal Service challenges GameFly's attempt to invoke the filed rate doctrine in support of its claim. Motion at 13-15. More specifically, the Postal Service argues that GameFly has misinterpreted the filed rate doctrine; that the filed rate doctrine does not apply to the circumstances of this case; and that even if the filed rate doctrine did apply, it would not influence the analysis of a discrimination claim grounded on 39 U.S.C. 403(c). *Id.* at 14. The Postal Service seeks to cross-examine an institutional GameFly witness "on the significance of GameFly's arguments related to the filed rate doctrine." *Id.* at 15.

The filed rate doctrine is a legal prohibition of rates or terms of service which vary from rates or service terms set forth in published tariffs. The Postal Service has offered no basis for conducting cross-examination regarding interpretations of legal principles, such as the filed rate doctrine; arguments regarding the applicability of the filed rate doctrine; or the relationship between the filed rate doctrine and section 403(c). These are matters for argument on brief, not matters for cross-examination of an institutional witness. The Motion is denied with respect to the filed rate doctrine.

In sum, oral cross-examination may be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. In the exercise of discretion, I may permit or deny inquiry into additional matters as if on direct examination. Here, the requested relief is denied with prejudice as to overly broad grounds. Accordingly, the Motion is denied as to grounds asserted based upon: (a) legal conclusions in the GameFly Memo; (b) factual interpretations of Postal Service

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<sup>24</sup> See P.O. Ruling C2009-1/23 at 8, citing USPS/GFL-50. During discovery, the Postal Service sought to compel certain further responses or production of documents on a number of areas, without making an adequate showing that the elicited relief would be likely to affect any finding on a material issue of fact.

documents cited in the GameFly Memo, other than any interpretations in GameFly's discovery answers; (c) GameFly's business and operational costs, other than any interpretations in GameFly's discovery answers; (d) the composition and prices of its game DVDs compared with video DVDs; (e) business decisions such as GameFly's choices related to the design and production of its mailpieces unrelated to mail processing, other than any interpretations in GameFly's discovery answers; and (f) the nature of GameFly's mail processing operations.

#### D. Deleted Emails

The Postal Service contends that it should be permitted to conduct cross-examination regarding the documents destroyed in accordance with GameFly's defective document retention policy. *Id.* at 3-4. It submits that the effective date of GameFly's document retention policy was April 30, 2009, after the filing of GameFly's complaint on April 24, 2009. *Id.* It asserts that GameFly anticipated the present litigation considerably earlier than the filing of its complaint. In alleging that GameFly has conceded that it "engaged in spoliation of admissible evidence," the Postal Service cites GameFly's answers to USPS/GFL-41, 43, 44, and 45. It clarifies that these answers state that "[any] other written or electronic communications relating to this issue were created long enough ago to have been deleted in the ordinary course of business pursuant to GameFly's document retention policies." *Id.* The Postal Service submits that this resulted in an "irreversible loss of documents" that it would have received through discovery. *Id.* at 3-4.

GameFly asserts that this claim is unfounded on several grounds. Answer at 23. First, the Commission has never developed document retention requirements akin to ones adopted by the Federal courts, and that costly requirements may be unduly onerous for complainants. *Id.*, citing Fed. R. Civ. P. rules 26 and 37. Second, GameFly did not destroy hard copy documents as a matter of course, and there is no evidence that the document retention policies that were in place prevented GameFly from

producing any material, relevant information. *Id.* at 24.<sup>25</sup> Third, even the most rigorous document retention policy would not have preserved what never existed, and that certain responses are limited since several requests sought responses on matters that GameFly had not studied. *Id.*

The prevailing legal standard commonly followed on issues arising from alleged prejudice due to deleted email messages is set forth as follows: “[a]bsent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.” Fed. R. Civ. P. rule 37(e). Although it is not clear that this rule governs when the relief is not a discovery sanction but instead a right to cross-examine an institutional witness, the Postal Service will be given the benefit of the doubt that it has asserted exceptional circumstances.<sup>26</sup> In this context, notice also may be taken that the Postal Service had instructed GameFly expressly, in its discovery request instructions, that certain details were required in its responses if materials had been lost or destroyed.<sup>27</sup>

GameFly includes within its answers to USPS/GFL-41, 43, 44, and 45, reference to answers to USPS/GFL-1, 4, and 6. The response to request 4 explains that the

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<sup>25</sup> During discovery, GameFly explains that it has produced an enormous volume of responsive documents with more than 750 megabytes of information. *Id.*

<sup>26</sup> Given GameFly’s answers to USPS/GFL-63-64, however, it is likely that the operative date GameFly’s new document retention policy was after either (1) the date that GameFly should have anticipated instituting the present litigation, or (2) the date of the complaint. See, e.g., Answers of GameFly, Inc., to USPS Discovery Requests (USPS/GFL-63 through 83), June 9, 2010 (Public Version) at answer to USPS/GFL-63-64 (Response to USPS/GFL-63 through 83).

<sup>27</sup> First Discovery Requests of the United States Postal Service to GameFly, Inc. (USPS/GFL-1 through 46), May 4, 2010, at 2-4. Instruction 5, that “[i]f a responsive document has been lost or destroyed, or is otherwise unavailable, please follow instruction 12 below. Instruction 12 specified that “[i]f any document responsive to any of these data requests has been destroyed or is otherwise unavailable, please identify and describe: (a) The subject matter and content of the document; (b) All persons involved in the destruction or removal of the document; (c) The date of the document’s destruction or removal; and (d) The reasons for the destruction or other unavailability of the document.” *Id.* at 3-4.

personal archives for two former employees are no longer available.<sup>28</sup> No logs of the deleted messages are available, according to GameFly.<sup>29</sup> An unresolved issue remains as to whether GameFly's personnel can identify or recollect any deleted email or documents, which though not produced, would be responsive to USPS/GFL-41, 43, 44, or 45. Accordingly, this ruling directs that GameFly attempt to identify deleted or lost documents responsive to USPS/GFL-41, 43, 44, or 45. If any are identified, the Postal Service may cross-examine an institutional witness with regard to each one, as may be needed to shed light on the full facts responsive to USPS/GFL-41, 43, 44, or 45.

### RULING

1. The Motion of the United States Postal Service to Compel GameFly to Designate a Witness to Sponsor Interrogatory Answers and Interpretations of Postal Service Documents, filed June 16, 2010, is granted, in part, and denied, in part, as discussed in the body of this Ruling.
2. On or before July 12, 2010, the Postal Service shall file a notice of intent to conduct written cross-examination of a GameFly institutional witness as discussed in the body of this Ruling.
3. Within 7 days of the date on which the Postal Service files its notice of intent to conduct oral cross-examination pursuant to Ruling Paragraph 2, above, GameFly shall identify an institutional witness (or witnesses) to appear and be subject to

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<sup>28</sup> While it is well known that in the ordinary course of business, companies routinely delete email messages and attached files, consistent with applicable law and storage constraints, there are limits for conditional litigation holds that are even noted in GameFly's new document retention policy. GameFly's discovery responses reveal that the most recent modification of mailer design occurred in September 2008. The two individuals who managed these changes (Steve Brown and Jeff Kawasugi) left GameFly in December 2007 and August 2009, respectively, and GameFly did not retain the two employees' files on these matters. See Answers of GameFly's First Set of Answers at answer to USPS/GFL-4. "GameFly did not impose a litigation hold on the files of either Mr. Brown or Mr. Kawasugi", but has reportedly located certain files of Mr. Kawasugi. Response to USPS/GFL-63 through 83 at answer to USPS/GFL-67.

<sup>29</sup> See *e.g., id.* at answer to USPS/GFL 64(e).

oral cross-examination on the portions of discovery responses designated by the Postal Service. The identification shall specify dates during the week of July 26 through July 30, 2010, inclusive, during which such witness (or witnesses) are available to appear for cross-examination.

4. Within 7 days of the date on which the Postal Service files its notice of intent to conduct oral cross-examination pursuant to Ruling Paragraph 2, above, GameFly shall file objections, if any, to the subject matter and lines of questioning specified by the Postal Service in its notice.

Dan G. Blair  
Presiding Officer