

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

COMPLAINT OF GAMEFLY, INC.

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Docket No. C2009-1

**OPPOSITION OF GAMEFLY, INC.,
TO MOTIONS OF THE POSTAL SERVICE
TO SEAL ITS DIRECT TESTIMONY
(July 9, 2010)**

GameFly, Inc. ("GameFly") opposes the July 7 motions of the Postal Service to block disclosure of its July 7 testimony to GameFly through the last week of July. Motion of the USPS to Maintain Its Direct Testimony Under Seal (July 7, 2010) ("Motion to Seal"); Motion and Application of the USPS for Non-Public Treatment of Materials (July 7, 2010) ("Motion for Non-Public Treatment"). The Postal Service identifies no legitimate interest that warrants hiding the Postal Service's testimony from GameFly, and no such interest exists. Moreover, keeping the testimony under seal would inject several weeks of additional delay into this case by bringing GameFly's discovery of the Postal Service's testimony, preparation for cross-examination, and development of rebuttal testimony to a standstill until GameFly is allowed to see the testimony. The motions should be denied, and the Postal Service's testimony should be disclosed to GameFly, without further delay.

I. THE POSTAL SERVICE HAS NO RIGHT TO CONCEAL ITS TESTIMONY FROM GAMEFLY.

USPS contends that concealing its July 7 testimony from GameFly is necessary to protect the Postal Service's due process rights:

If permitted to review the Postal Service's direct testimony and use it in preparation of its institutional witness, GameFly will have the ability to use cross-examination of the GameFly direct case to rebut the Postal Service's defenses. This would distort accepted doctrines of fairness, allowing the proponent to make its case after assessing the accused party's defenses, and preventing the respondent from obtaining knowledge of the proponent's case before presenting its defense.

Motion to Seal at 2; *accord*, Motion for Non-Public Treatment at 3. To the extent that the Postal Service's reasoning can be discerned, the motions appear to assert three due process "rights": the right to surprise GameFly's witnesses during cross-examination by springing on them one or more defenses that the Postal Service has kept secret from GameFly; the right to prevent GameFly's witnesses from rebutting those defenses; and the right to incorporate the results of the Postal Service's cross-examination into the Postal Service's direct case. The first two of these asserted "rights" do not exist. The third right is more legitimate, but can be accommodated without stopping this case dead in its tracks for three weeks. We discuss each asserted right in turn.

A. The Postal Service Has No Right To Engage In Trial By Ambush.

The Postal Service cites no authority for its supposed due process right to conceal one or more of its defenses from GameFly until the Postal Service springs them on GameFly's witnesses during cross-examination. No such right exists. To the contrary, the Postal Service was obligated to disclose all of its defenses to GameFly in discovery, and is separately obligated to disclose to GameFly before the hearing all defenses that the Postal Service intends to cover in cross-examination.

First, the Commission's discovery rules, 39 C.F.R. §§ 3001.25 through 3001.28, entitled GameFly to compel the Postal Service to disclose what defenses it intended to

assert. The discovery requests served by GameFly on the Postal Service in this case were drafted to flush out all of the defenses that the Postal Service might assert in this case, and to preempt the kind of sandbagging that the Postal Service now seeks to engage in. Moreover, the very first instruction to the discovery requests put the Postal Service on notice that the discovery requests “impose a continuing obligation to respond and to provide additional information as it becomes available.” First Discovery Requests Of GameFly, Inc., To The USPS (GFL/USPS-1 through -65) (July 1, 2009), Instruction 1. If the Postal Service intends to assert any defenses that it has not disclosed to GameFly, the Postal Service in all likelihood has not complied with its obligations in discovery.

Second, Rule 3001.30(e)(3) requires every cross-examining party, including the Postal Service, to file a “notice of intent to conduct oral cross-examination,” at least three working days before the hearing, with “specific references to the subject matter to be examined and page references to the relevant direct testimony and exhibits.” Moreover, a party intending to “question using intricate or extensive cross-references, shall provide adequately documented cross-examination exhibits for the record . . . at least two calendar days (including one working day) before the scheduled appearance of the witness.” *Id.*

Third, Presiding Officer’s Ruling No. C2009-1/24 strengthened these disclosure requirements by ordering the Postal Service to file a notice of intent to conduct cross-examination on July 12, at least two weeks before the hearing, and to include in the notice, “for each GameFly discovery response on which [the Postal Service] proposes to conduct cross-examination, identif[ication of] the *subject matter* and *specific lines of*

questioning that the Postal Service intends to conduct.” *Id.* at 11. Further, “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.” *Id.*

In short, the trial by ambush that the Postal Service seeks to preserve is not a due process right at all, but an illegitimate sandbagging tactic.

B. The Postal Service Has No Right To Prevent GameFly From Rebutting The Postal Service’s Testimony.

The Postal Service’s claim that it should have the right to prevent GameFly’s witnesses from “us[ing] cross-examination of the GameFly direct case to rebut the Postal Service’s defenses” (Motion to Seal at 2) is equally bizarre. First, if the Postal Service raises any of its secret defenses during cross-examination, GameFly’s witnesses are most certainly entitled to “rebut” those defenses in answering the questions. GameFly is also entitled to cover through oral redirect examination any defenses about which the Postal Service has opened the door in cross-examination.

Second, and in any event, GameFly will have an independent right to “rebut the Postal Service’s defenses” in GameFly’s surrebuttal testimony a few weeks later. See Rule 3001.30(e)(1) (“there will be an opportunity . . . for the initial proponent to present surrebuttal evidence”); *accord*, Presiding Officer’s Ruling No. C2009/1-20 (May 7, 2010) (authorizing GameFly to file surrebuttal testimony on August 27, 2010). The Postal Service concedes this. Motion to Seal at 2-3 (“the Commission’s rules confer the right of rebuttal testimony on only the proponent”). In its surrebuttal testimony, GameFly thus will be entitled to rebut the Postal Service’s case—including any of its secret defenses—with more advance preparation, and in a procedural context that allows GameFly, not

the Postal Service, to control the content and organization of the testimony. And the Postal Service will have no right to file testimony responding to that surrebuttal testimony. Under the circumstances, the Postal Service can hardly claim any violation of due process from the possibility that cross-examining GameFly witnesses on the Postal Service's defenses might elicit answers that the Postal Service does not like.

C. The Postal Service's Right To Make Use Of Information Gained From Cross-Examining GameFly's Institutional Witness Can Be Protected By Allowing The Postal Service To Supplement Its Testimony.

The one legitimate interest implicated by the Postal Service's July 7 motions is the Postal Service's right to submit into the record any relevant and admissible information gained from cross-examining GameFly's institutional witnesses. But the sensible way to preserve that right is to allow the Postal Service to supplement its testimony once the transcript of the cross-examination become available. For the reasons explained in previous GameFly pleadings, we believe that the cross-examination topics that the Postal Service seeks to pursue are likely to produce little, if any, material evidence. Nevertheless, GameFly will not oppose the filing of supplemental Postal Service testimony if (1) the filing occurs promptly enough to avoid disrupting the August 18 hearing on the Postal Service's case, and (2) the testimony is confined to the specific matters elicited in the cross-examination.

This procedure will protect the Postal Service's due process rights while allowing GameFly's discovery of the testimony filed by the Postal Service on July 7 to move forward without delay.¹

¹ Indeed, this procedure gives the Postal Service more due process than mailers have received when allowed to engage in cross-examination of the Postal Service after filing *their* last round of testimony. In Docket No. R97-1, for example, the Presiding Officer

II. SEALING THE POSTAL SERVICE'S TESTIMONY UNTIL THE END OF JULY WILL PREJUDICE GAMEFLY BY DELAYING THIS CASE.

The Presiding Officer, while granting the Postal Service's request for cross-examination of a GameFly institutional witness (or witnesses), specifically ruled that the cross-examination "will not be allowed to delay the resolution of GameFly's claims." Presiding Officer's Ruling No. C2009-1/24 at 10. The Postal Service acknowledges that delaying the filing of its testimony would be improper because "this would conflict with the Presiding Officer's stated preference for prompt resolution of this matter and avoidance of further delay." Motion at 6. But keeping the Postal Service's testimony under seal until the end of July would have the same effect.

Under the existing procedural schedule, established in Presiding Officer's Ruling No. C2009-1/20, the period for discovery of the Postal Service's July 7 testimony closes on July 28. Keeping the testimony under seal until the end of July would render the three-week window for discovery completely useless to GameFly, and therefore would require that the July 28 discovery cutoff—and the rest of the procedural schedule—be pushed back accordingly. The resulting prejudicial delay would be the same as if the Postal Service had delayed filing its testimony until the date of unsealing.

ordered an additional day of hearing at the very end of the final round of hearings for cross-examination by the Alliance of Nonprofit Mailers of a Postal Service witness who had sponsored rebuttal testimony based on Postal Service business records that the Postal Service claimed to be unavailable when ANM sought to discover them. The remedy provided to ANM was a ruling requiring the Postal Service to produce a sample of the documents to ANM, followed by an opportunity for ANM to cross-examine the Postal Service witness four days later, followed by an opportunity to cite to the transcript in ANM's post-trial briefs. The Presiding Officer did not suspend the proceedings so that ANM could file supplemental written testimony. R97-1 Tr. 36/19210-11, 19643-46 (March 20, 1998); R97-1 Tr. 37/19870, 19930-20032 (March 30, 1998); R97-1 Op. & Rec. Decis. (May 11, 1998) at ¶¶ 1013-1020.

III. THE POSTAL SERVICE'S LITANY OF GRIEVANCES ABOUT THE "NUMBER OF PROCEDURAL DISADVANTAGES" IT SUPPOSEDLY HAS SUFFERED IS IRRELEVANT TO THE UNSEALING ISSUE.

On pages 3-6 of its Motion To Seal, the Postal Service asserts that sealing of the Postal Service's testimony is appropriate to offset the "litany of procedural disadvantages" that the Postal Service supposedly has suffered from the admission into evidence, without a GameFly sponsoring witness, of documents obtained from the Postal Service in discovery. Motion at 3-6. The Postal Service gains nothing from rehashing this issue.

First, it has nothing to do with the merits of the separate issue now before the Commission—whether the *Postal Service's* testimony should be sealed from GameFly.

Second, the Postal Service has waived any right to challenge the evidentiary status of the discovery documents. During the June 16 hearing, the Presiding Officer ordered the Postal Service, if it wished to preserve its objection to admission of the documents into evidence, to file a motion to strike the documents on or before June 23. Tr. 4/156, lines 14-20; *id.* at 4/666, lines 4-8. The Postal Service did not so.

Third, even if the issue were still open, the admission of the documents without a GameFly sponsoring witness was entirely proper for the reasons previously explained by GameFly. See Answer Of GameFly Inc. To Motion Of The USPS For Another Opportunity To Cross-Examine An Institutional GameFly Witness (June 23, 2010) at 3-8 (discussing issue); Answer Of GameFly Inc. To Motion Of USPS To Postpone Hearing (June 8, 2010) at 4-7 (same). The Commission, in Presiding Officer's Ruling No. C2009-1/24 (at 12), has agreed:

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 Postal Service, if it wishes to claim that GameFly has cited the Postal Service documents inaccurately, selectively, or out of context, is free to advance such claims in its testimony or post-trial briefs. The Postal Service possesses all of the documents that GameFly cited, as well as all of the larger universe of documents that the Postal Service produced to GameFly. But a difference of opinion over what the documents mean does not make them inadmissible.

Respectfully submitted,

David M. Levy
Matthew D. Field
Alexandra Megaris
VENABLE LLP
575 7th Street, N.W.
Washington, DC 20004
(202) 344-4800

Counsel for GameFly, Inc.

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