

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'S MOTION TO MAINTAIN
ITS DIRECT TESTIMONY UNDER SEAL

(Issued July 16, 2010)

I. INTRODUCTION

On July 7, 2010, the Postal Service filed two motions which, collectively, seek to place its direct testimony under seal.¹ On July 9, 2010, GameFly, Inc. (GameFly) filed its Opposition to the motions of the Postal Service to seal its direct testimony.² For the reasons discussed below, the Postal Service Motions are granted in part.

II. THE POSTAL SERVICE MOTIONS

The Postal Service seeks to maintain the Postal Service's direct testimony under seal and protect it from disclosure to GameFly counsel or any other party "until after the Postal Service has the opportunity to cross-examine GameFly's institutional witness or

¹ Motion and Application of the United States Postal Service for Non-Public Treatment of Materials, July 7, 2010 (Motion for Non-Public Treatment); Motion of the United States Postal Service to Maintain Its Direct Testimony Under Seal, July 7, 2010 (Motion to Maintain Under Seal). The two motions will be referred to collectively as the Postal Service Motions.

² Opposition of GameFly, Inc., to Motions of the Postal Service to Seal Its Direct Testimony, July 9, 2010 (Opposition).

exhaust other remedies.”³ Motion to Maintain Under Seal at 2. The Postal Service contends that unsealing its direct testimony prior to cross-examination of the GameFly institutional witnesses 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.” *Id.* at 2.

The Postal Service alleges further that it has endured a “litany of procedural disadvantages”, including the following: That GameFly has insulated itself “from scrutiny through discovery and adversarial testing of its blatant misrepresentations of the content and meaning of a set of selected internal [Postal Service] communications”; and that this latter practice “violates a clear principle ... from Commission practice and jurisprudence ... that the proponent in a case has the burden of supporting its contentions through actual evidence ... and ... has the responsibility to file all of the testimony on which it intends to rely with its direct case.” *Id.* at 3-4.

III. GAMEFLY’S OPPOSITION

In its Opposition to the Postal Service Motions, GameFly submits that the Postal Service “identifies no legitimate interest that warrants hiding the Postal Service’s testimony from GameFly, and no such interest exists.” Opposition at 1. It contends that “keeping the testimony under seal would inject several weeks of additional delay into this case by bringing GameFly’s discovery ... to a standstill until GameFly is allowed to see the testimony.” *Id.*

³ Subsequent to the filing of the Postal Service Motions, GameFly identified two institutional witnesses that it intends to present for cross-examination. GameFly, Inc., Notice Concerning Institutional Witnesses and Hearing Dates, July 13, 2010. P.O. Ruling C2009-1/26 has scheduled July 28, 2010 as the hearing date for GameFly’s institutional witnesses.

GameFly urges that the Postal Service arguments have three unpersuasive prongs:

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.

Opposition at 2.

GameFly contends that the "first two of these asserted 'rights' do not exist."⁴ While allowing that the third point is "more legitimate," it explains that the alleged right can be "accommodated without stopping this case ... for three weeks." *Id.*

GameFly recognizes that the Postal Service may have a right to submit into the record any relevant and admissible information gained from cross-examining GameFly's institutional witness. *Id.* at 5. GameFly submits that there is a less restrictive way to sustain that right without impeding GameFly's discovery by maintaining direct testimony under seal. *Id.* 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 ..., and (2) the testimony is confined to the specific matters elicited in the cross-examination." *Id.*

⁴ GameFly submits that the Postal Service has no right to conceal defenses prior to cross-examination or to prevent GameFly from rebutting them. GameFly urges that the Postal Service was already "obligated to disclose all of its defenses to GameFly in discovery. *Id.* at 2. It also argues that its discovery requests "'impose a continuing obligation to respond and to provide additional information as it becomes available.'" *Id.* at 3. Moreover, GameFly assails any tactics that permit "trial by ambush." *Id.* at 4. As to rebuttal, GameFly points out that it maintains a right of redirect examination on any defenses raised during cross-examination, and that it may rebut each defense in its surrebuttal. *Id.* Nor may the Postal Service foreclose the possibility that cross-examination on defenses "might elicit answers that the Postal Service does not like." *Id.* at 5.

GameFly concludes that a ruling that grants the Postal Service Motions would prejudice GameFly by delaying this case. *Id.* at 6. It points out that P.O. Ruling C2009-1/24 “specifically ruled that the cross-examination ‘will not be allowed to delay the resolution of GameFly’s claims.’” *Id.*

IV. ANALYSIS

The Postal Service’s requested relief, to maintain its direct testimony “under seal,” is actually an effort to postpone all access by opposing counsel, as though the testimony was filed for *in-camera* treatment.⁵ Other materials filed “under seal” in this case, in contrast, are governed by standard protective conditions that have permitted access by GameFly’s outside counsel for nearly a year.⁶ The Postal Service has not satisfied its burden to show “unusual and exceptional circumstances when good cause is found on the record” for completely excluding all disclosure of its written testimony.⁷

Similarly, Postal Service claims related to fairness and due process are largely without merit. First, the scheduling of GameFly’s institutional witnesses for cross-examination after the filing of the Postal Service’s direct case is a consequence of the Postal Service’s own delay in filing its motion for an institutional

⁵ See 39 CFR 3001.31a(b) (“*In camera treatment of documents and testimony.* Presiding officers shall have authority, but only in those unusual and exceptional circumstances when good cause is found on the record, to order documents or oral testimony offered in evidence whether admitted or rejected, to be placed *in camera.*”).

⁶ See *generally*, Order No. 284, August 21, 2009.

⁷ The Postal Service also fails to adequately address how its citation to 39 U.S.C. 410(c)(4) is controlling in a complaint case filed under 39 U.S.C. 3662.

witness.⁸ That delay occurred notwithstanding the fact that at a May 5, 2010 scheduling conference, the parties were advised of the “need to avoid further unnecessary delays and to proceed to decision with reasonable diligence and dispatch.”⁹ P.O. Ruling C2009-1/22 at 1.

Second, GameFly’s institutional witnesses are not appearing as part of GameFly’s direct case, but in response to a Postal Service request that such a witness be presented to clarify discovery responses. *See, supra*. Consistent with that fact, none of the GameFly discovery responses on which the institutional witnesses will be cross-examined have been offered into evidence by GameFly as part of its direct case. It was the Postal Service that placed those discovery responses into evidence as designated cross-examination pursuant to rule 30(e)(2) of the rules of practice. *See* P.O. Ruling C2009-1/24 at 9.

Third, the possibility that GameFly’s counsel could otherwise select the institutional witnesses specifically to respond to points made by the Postal Service in its rebuttal testimony is moot since these witnesses have been identified without any access to testimony under dispute here. *See* Motion for Non-Public Treatment at 3. This alleged ground for suggesting a denial of due process is also untenable. In all

⁸ On April 12, 2010, GameFly announced its intent to base its case on documents obtained from the Postal Service during discovery and on the testimony of an expert witness, Sander Glick. Omitted from GameFly’s direct case was any mention of an institutional GameFly witness. Following the receipt of GameFly’s responses to the Postal Service’s first two rounds of discovery on May 18 and 25, 2010, the Postal Service, on June 3, 2010, announced for the first time its expected need to cross-examine a currently unidentified GameFly institutional witness. Motion of the United States Postal Service to Modify Schedule, June 3, 2010, at 1. However, it was not until one hour before the hearings began on GameFly’s direct case on June 16, 2010 that the Postal Service filed its motion requesting that an institutional GameFly witness be presented. 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 to Compel).

⁹ The reason offered by the Postal Service for its tardy request was that it had held out hope that the need for an institutional witness would be obviated by further GameFly discovery responses. Motion to Compel at 12. This suggestion is belied by the fact that the demand for an institutional witness sought an opportunity to cross-examine on an unlimited array of matters that went well beyond alleged deficiencies in GameFly’s responses to specific Postal Service discovery requests: “The Postal Service should have the opportunity to cross-examine a GameFly witness on all of the factual allegations and legal conclusions comprising GameFly’s direct case.” *Id.* at 7.

events, as the complainant in this case, GameFly has the right to submit surrebuttal testimony in response to the Postal Service's rebuttal case. This right exists whether or not the Postal Service's rebuttal testimony remains under seal until the conclusion of cross-examination of GameFly's institutional witnesses.

Fourth, the Postal Service asserts that unless the Postal Service Motions are granted GameFly's institutional witnesses and its counsel could prematurely respond to points made by the Postal Service in its rebuttal testimony during cross-examination of GameFly's institutional witnesses.¹⁰ A related concern expressed by the Postal Service is that cross-examination of the GameFly institutional witnesses subsequent to the filing of the Postal Service's rebuttal case might effectively deny the Postal Service the opportunity to respond to any information elicited during such cross-examination. Motion to Maintain Under Seal at 2-3. These concerns regarding the proper order of evidentiary presentations are easily resolved, in part, by providing the Postal Service an opportunity to file supplemental testimony that responds to the cross-examination of GameFly's institutional witnesses. For its part, GameFly recognizes this possibility and has expressed a willingness to include a procedural date in the schedule that will allow the Postal Service the opportunity to supplement its rebuttal case. Opposition at 5-6.

While the problem identified by the Postal Service was created by its tardy request for a GameFly institutional witness, the Postal Service will nevertheless be accorded an opportunity to supplement its rebuttal case if new facts are elicited during cross-examination of the GameFly institutional witnesses, and GameFly will be afforded the opportunity to seek discovery of any supplemental testimony filed by the Postal

¹⁰ See Motion to Maintain Under Seal at 2; Motion for Non-Public Treatment at 3. While there has been no showing to suggest that GameFly's counsel would improperly coach the institutional witness to anticipate the defenses of the Postal Service, there is also no easy way to ensure that GameFly's attorney, while seeking to prepare the institutional witnesses for cross-examination, would be capable of impartially erecting an effective firewall inside his own mind to avoid being influenced by the known testimony that reflects the details of the Postal Service's defenses.

Service. Supplementation of the Postal Service's case will of necessity require a modest extension of the schedule, as set forth in Appendix A.¹¹

Because of the necessary extension in the procedural schedule, an opportunity is presented to resolve the Postal Service's motion for sealing of its rebuttal testimony in a slightly different manner which will not completely deny GameFly access to that testimony pending the completion of cross-examination of its institutional witnesses. The procedure for accomplishing these objectives is described below.

The remaining "litany of procedural disadvantages" cited by the Postal Service are without substance. Complainants, such as GameFly, are not required to present any particular witness, institutional or otherwise, as part of a direct case. As a complainant, GameFly has the right to present whatever direct case it desires in order to support its claims. With that right comes the risk that if GameFly fails to allege necessary facts or to present necessary evidence, its penalty will be the loss of its case. The Postal Service is simply incorrect when it suggests that GameFly will not be required to support its contentions with evidence or that GameFly will be allowed to avoid filing all of the testimony necessary to support its allegations. If GameFly fails to support its contentions with evidence, its claims will fail.

Similarly, the Postal Service's argument that GameFly has avoided "scrutiny through discovery and adversarial testing" of its representations lacks merit. The Postal Service has received responses to three initial rounds of discovery and one round of follow-up discovery.¹² The Postal Service is being accorded the opportunity to cross-examine one or more additional GameFly witnesses. *Id.* at 18. GameFly's case is clearly being subjected to scrutiny and adversarial testing.

¹¹ See Appendix A, *infra*. (modified procedural schedule).

¹² See, e.g., P.O. Ruling C2009-1/24 at 6, n.14.

V. SPECIAL PROTECTIVE CONDITIONS

Neither GameFly's institutional witnesses nor those participating in the preparation for, or presentation of, the GameFly witnesses' cross-examination will be given access to the Postal Service's rebuttal testimony until cross-examination of the GameFly witnesses has concluded. Pending completion of that cross-examination, GameFly employees, consultants, attorneys, or other representatives who are not participating in the preparation for, or presentation of, the GameFly institutional witnesses shall be accorded access to the Postal Service's rebuttal testimony, provided each of those individuals signs a copy of the Special Protective Conditions attached to this Ruling.¹³

These Special Protective Conditions include a certification of agreement to terms to be signed by each eligible person seeking access consistent with standard Commission procedures. The Postal Service will be given 2 working days to object to access by any individual submitting a request for access consistent with 39 CFR 3007.40(c). Individuals given access to the Postal Service's rebuttal testimony shall not reveal the contents of such testimony to anyone who has not signed a certification of agreement. Any documents prepared by those given access to the Postal Service's rebuttal case that refer to the contents of that testimony shall be kept confidential and shall not be revealed to anyone who has not executed the Special Protective Conditions, other than the Commission and the Postal Service. Any documents filed with the Commission prior to the conclusion of cross-examination of the GameFly institutional witnesses that refer to the contents of the Postal Service's rebuttal case shall be filed under seal, with the specific legend "Provisionally Confidential under the Special Protective Conditions – Do Not Post on Web." Upon conclusion of the cross-examination of GameFly's institutional witnesses, the Postal Service's rebuttal

¹³ These less restrictive conditions, while selectively postponing access by GameFly's legal counsel engaged in preparation for, or presentation of, institutional witnesses, permit other associate counsel and personnel access subject to certain terms. Once the provisional ineligibility of the former to attain access ends, the interim efforts of others to develop discovery may be used as the basis for completing GameFly's discovery by all who are engaged on GameFly's behalf without undue disruption.

testimony and all related documents being maintained as confidential or filed under seal pursuant to this Ruling shall be unsealed.

The same restrictions shall apply to the Public Representative and other participants in this proceeding. Any such person obtaining access to this testimony shall be precluded from participating in the cross-examination of GameFly's institutional witnesses.

The foregoing procedures will provide the Postal Service with adequate protections without unnecessarily delaying discovery on the Postal Service's rebuttal testimony. Upon completion of the cross-examination of GameFly's institutional witnesses, those who have previously been denied access to the Postal Service's rebuttal testimony will be given access to such testimony and will have ample opportunity to participate in the conclusion of discovery on that testimony. This minor scheduling adjustment involves delaying final briefs by only a week, consistent with the undertaking to expeditiously complete this proceeding.

RULING

1. The Motion of the United States Postal Service to Maintain Its Direct Testimony Under Seal, filed July 7, 2010, is granted in part, in accordance with the discussion in the body of this Ruling.
2. The Motion and Application of the United States Postal Service for Non-Public Treatment of Materials, filed July 7, 2010, is granted in part, as required under Ruling Paragraph 1.
3. The Postal Service shall refile its direct testimony, entitled USPS-T-1 through USPS-T-4, as unsealed materials immediately following conclusion of the July 28, 2010 hearing.

4. The schedule of this case is modified to reflect certain revised dates and intervals as appropriate, in view of this determination, and as reflected in Appendix A.
5. Each eligible person seeking access consistent with the Special Protective Conditions under Appendix B shall file a motion under 39 CFR 3007.40(a), along with the accompanying certification. The Postal Service will have 2 business days to file any objections or answers after such motion is filed.

Dan G. Blair
Presiding Officer

Appendix A**Procedural Schedule for Docket No. C2009-1**

(July 16, 2010)

Filing of the Postal Service's and participants' direct cases	July 7, 2010
Hearing on cross-examination of GameFly's institutional witnesses (9:30 a.m., Commission's hearing room)	July 28, 2010
GameFly obtains testimony, without restrictions following completion of the hearing	July 28, 2010
Close of Postal Service's leave to file supplemental testimony related to examined institutional witness	August 6, 2010
Close of discovery on the Postal Service's and participants' direct cases	August 16, 2010
Notice of intent to conduct oral cross-examination	August 20, 2010
Hearing on the Postal Service's and participants' direct cases (9:30 a.m., Commission's hearing room)	September 1 (and September 2, if necessary)
GameFly notice of intent to file surrebuttal testimony	September 2, 2010
Filing of GameFly surrebuttal testimony (if requested)	September 13, 2010
Notice of intent to conduct oral cross-examination of surrebuttal testimony	September 15, 2010
Hearing on GameFly's surrebuttal case (9:30 a.m. Commission's hearing room)	September 21, 2010
Filing of initial briefs	September 30, 2010
Filing of reply briefs	October 8, 2010

APPENDIX B**SPECIAL PROTECTIVE CONDITIONS****STATEMENT OF COMPLIANCE WITH PROTECTIVE CONDITIONS
FOR TESTIMONY**

The Postal Service (or a third party) has filed non-public materials identified as

USPS-T-1, Direct Testimony of Nicholas F. Barranca
USPS-T-2, Direct Testimony of Larry J. Belair
USPS-T-3, Direct Testimony of Troy R. Seanor
USPS-T-4, Direct Testimony of Robert Lundahl

in Commission Docket No. C2009-1. The Postal Service requests confidential treatment of the materials (hereinafter “these materials”).

The following protective conditions limit access to these materials identified as testimony by the Postal Service. Each person seeking to obtain access to these materials must agree to comply with these conditions, complete the attached certifications, and provide the completed certifications to the Commission and counsel for the Postal Service.

1. Access to these materials is provisionally limited to a person, as defined in rule 5(f), 39 CFR 3001.5(f), or an individual employed by such person, or acting as agent, consultant, contractor, affiliated person, or other representative of such person for purposes related to the matter identified as docket C2009-1. However, no person either excluded under Paragraph 2 below, or involved in competitive decision-making for any entity that might gain competitive advantage from use of this information shall be granted access to these materials. “Involved in competitive decision-making” includes consulting on marketing or advertising strategies, pricing, product research and development, product design, or the competitive structuring and composition of bids, offers or proposals. It does not include rendering legal advice or performing other services that are not directly in furtherance of activities in competition with a person or entity having a proprietary interest in the protected material.
2. Access to these materials is further provisionally limited so as to exclude each of GameFly’s institutional witnesses, namely Sander Glick and David Hodess, as well as GameFly’s legal counsel who is involved in any witness preparation or presentation for the hearings on July 28, 2010. Other persons excluded from access are any of GameFly’s

representatives or any subordinate personnel or affiliates who are involved in any witness preparation or presentation for the hearings on July 28, 2010. No person granted access to these materials is permitted to disseminate them in whole or in part to any person before the end of hearings on July 28, 2010, except as expressly allowed under P.O. Ruling C2009-1/27 for conducting discovery subject to these protective requirements.

3. On July 28, 2010, at the end of hearings, persons attaining access to these materials shall be permitted to disseminate them in whole or in part to any person, unless otherwise ordered.
4. The duties of each person obtaining access to these materials shall apply to material disclosed or duplicated in writing, orally, electronically, or otherwise, by any means, format, or medium. These duties shall apply to the disclosure of information or excerpts from or parts of these materials.
5. All persons who obtain access to these materials are required to use the same degree of care, but no less than a reasonable degree of care, to prevent the unauthorized disclosure of these materials as those persons, in the ordinary course of business, would be expected to use to protect their own proprietary material or trade secrets and other internal, confidential, commercially sensitive, and privileged information.
6. These conditions shall apply to any revised, amended, or supplemental versions of these materials provided in the matter identified as docket C2009-1.
7. The duty of nondisclosure of each person obtaining access to these materials is continuing except as expressly indicated herein, terminable only by specific order of the Commission, or as specified in paragraph 3.
8. Each person granted access to these materials consents to these and such other conditions as the Commission may approve.
9. Any written materials that describe, quote, or contain materials protected under these protective conditions are also covered by the same protective conditions and certification requirements, and shall be filed with the Commission only under seal with the special legend. Such documents submitted to the Commission as confidential shall remain sealed while in the Secretary's office or such other place as the Commission may designate until the end of hearings on July 28, 2010.

10. If a court or other administrative agency subpoenas or orders production of confidential information which a person has obtained under the terms of this protective order, the target of the subpoena or order shall promptly (within 2 business days) notify the Postal Service of the pendency of the subpoena or order to allow it time to object to that production or seek a protective order.

CERTIFICATION

The undersigned represents that:

Access to these materials provided in the matter identified as docket C2009-1 by the Postal Service has been authorized by the Commission. The cover or label of the copy obtained is marked with my name. I agree to use the information only for purposes of analyzing matters at issue in the matter identified as docket C2009-1 until the end of hearings on July 28, 2010. I certify that I have read and understand the above protective conditions and am eligible to receive access to materials under paragraphs 1 and 2 of the protective conditions. I further agree to comply with all protective conditions and will maintain these materials in strict confidence in accordance with all of the protective conditions set out above.

Name _____

Firm _____

Title _____

Representing _____

Signature _____

Date _____