

Postal Service exercised its opportunity to cross-examine Sander Glick, one of the institutional witnesses identified by GameFly, and it does not seek further cross-examination of Mr. Glick. GameFly has not explained why David Hodess, the President and CEO of GameFly who supervised all GameFly's answers to Postal Service discovery requests, lacks the competency to face cross-examination on his own. To the extent that the unlikely situation exists such that only Mr. Glick, and not Mr. Hodess, has sufficient knowledge to address a response to a discovery request prepared or supervised by Mr. Hodess, the Postal Service requests that GameFly identify the particular response.

The Postal Service seeks clarification of the Presiding Officer's Ruling to ensure that it does not suffer prejudice from the use of this unprecedented procedure. Cross-examination aims to develop the facts of a case and derives its effectiveness from a witness' presence under oath and his inability to consult with others before answering, conditions which encourage truthfulness. In some cases, an adjudicative body will prohibit witnesses from viewing other witnesses' testimony. This practice aims to preserve honesty and shield a witness from the influence of testimony by other witnesses.

The use of a panel in this proceeding raises a heightened threat of prejudice. Mr. Glick is a consultant hired specifically for litigation purposes, and thus has some litigation expertise similar to an attorney. If the Presiding Officer's Ruling allows Mr. Glick and Mr. Hodess to consult before responding to cross-examination, it is likely that Mr. Glick will coach Mr. Hodess based on his experience with litigation, eroding the raw truthfulness that exists as the goal of

cross-examination. Accordingly, the Postal Service requests that the Presiding Officer impose safeguards to prevent Mr. Hodess from consulting with Mr. Glick before responding to cross-examination.

The unexpected and unprecedented nature of this procedural device arises in the context of the unconventional evolution of this contentious complaint proceeding, in which GameFly has sought to avoid sponsorship of its direct case by not filing testimony that justifies the major elements of its complaint and by not sponsoring most of its interrogatory responses. This avoidance has been tolerated, except to the limited extent that GameFly was directed to provide a witness to stand cross-examination of GameFly's unsponsored discovery responses. Even with that concession, however, the Postal Service was expected to take the again unprecedented measure of describing in advance the "lines of questioning" that it intended to follow in cross-examination. GameFly has interpreted this requirement as identification of specific questions, so as to undermine and, in effect, nullify any advantage that cross-examination provides as a procedural mechanism. Now, the appearance of an additional procedural departure in this contentious proceeding has arisen, *sua sponte*, to permit a "team" approach to cross-examination. Notwithstanding the implied justification of procedural efficiency that seems to underlie these developments, the Postal Service believes that they have the effect of undermining its ability to defend itself in the way we have come to expect in proceedings brought pursuant to 39 U.S.C. §3662.

To the extent that the Presiding Officer denies this request for reconsideration or clarification, the Postal Service objects due to the lack of justification for this unprecedented method of cross-examination and the likely prejudice that would result to the Postal Service, and seeks, in the alternative, to cross-examine only David Hodess.

In conclusion, the Postal Service seeks clarification of the Presiding Officer's Ruling; it requests that GameFly identify any response to discovery requests for which Mr. Hodess lacks competency or knowledge to face cross-examination and the reason for his incompetence or lack of knowledge; it requests that the Commission impose safeguards to prevent Mr. Hodess from consulting with Mr. Glick before responding to cross-examination and protect the Postal Service from the prejudice that would arise from this consultation; and, in the alternative, the Postal Service objects to Presiding Officer's Ruling No. C2009-1/31 and seeks to prevent Mr. Glick from participating in the cross-examination panel.

Finally, if this procedural advantage for GameFly is allowed to stand unqualified, the Postal Service observes that equity would encourage similar treatment for Postal Service witnesses who might be allowed to face cross-examination as a panel, subject to the same conditions as GameFly's institutional witness panel in this case. While the Postal Service has reservations about the establishment of this precedent to condition future proceedings under section 3662, otherwise, it would be hard to reconcile the practice being imposed here

with conventional notions of due process typically expected in contentious adjudications.

Respectfully submitted,

UNITED STATES POSTAL SERVICE

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