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

COMPLAINT OF GAMEFLY, INC.	)	Docket No. C2009-1

**MOTION OF GAMEFLY, INC.
TO RETAIN CROSS EXAMINATION EXHIBIT GFL-CX-5 IN EVIDENCE
AND TO PRECLUDE THE POSTAL SERVICE FROM DENYING THE
TRUTH AND EFFECTIVENESS OF ITS CONTENTS**

Pursuant to Presiding Officer Blair's invitation during the hearing for the cross examination of United States Postal Service ("Postal Service") Witness Troy R. Seanor on October 14, 2009 (Tr. 10/1847), GameFly, Inc. ("GameFly") submits this motion concerning the proper disposition of GameFly cross-examination exhibit GFL-CX-5. The exhibit is an eight-page document produced by the Postal Service in response to a GameFly discovery request and Bates numbered by GameFly as GFL535-GFL542. The document appears on its face to be a Standard Operating Procedure ("SOP") # 05-05-4, issued by the Postal Service's Eastern Area on March 3, 2005, to govern the processing of Netflix mail by the Postal Service facilities within the Eastern Area. When GameFly moved to admit the exhibit into evidence as a cross-examination exhibit at the October 14 hearing, the Postal Service objected on the asserted grounds that that the document had not been authenticated and, in fact, had never been officially promulgated by the Postal Service. Tr. 10/1783, 1831, 1846.

For the reasons explained here, the exhibit—the same document that the Commission admitted into evidence five months ago (at Tr. 4/321-28) as part of GameFly's direct case—should remain in evidence. Moreover, the Postal Service should be estopped from disputing the truth of the contents of the document, including its effectiveness as a Standard Operating Procedure. Consistent with this, the Commission should strike the portion of the oral testimony of Postal Service Witness Troy R. Seanor that the document in question "was never issued" (Tr. 10/1783, 1787, 1831), as well as the statements to similar effect by Postal Service attorney James Mecone (Tr. 10/1831, 1833, 1846.

BACKGROUND

The document in question materialized in this case on August 14, 2009, when the Postal Service made it available for review in response to GameFly discovery request GFL/USPS-26. GFL/USPS-26 asked for

> all directives, guidance, handbooks, instructions, manuals, notices, rules, SOPs, standards and similar communications issued by Postal Service ***Area*** offices to district, local, or other subordinate employees since January 1, 2007 (or issued before that date but maintained in effect for any period since then)

regarding the manual processing of Netflix return mail (underlining added for emphasis; boldface and italics in original). Because GFL-CX-5 is dated March 1, 2005, the only logical inference from its production was that the document had been "issued before [January 1, 2007] but maintained in effect for [some] period since then." If the document had not been in effect for at least some period after January 1, 2007, it would not have been responsive to GameFly's request.

Because the document, like a similar SOP for the Pacific Area also produced by the Postal Service, contained a handwritten notation "RESCINDED" in the upper right-hand corner of the first page, GameFly served a follow-up interrogatory, GFL/USPS-106, that asked when and why the Eastern and Pacific Area SOPs were rescinded. In response, the Postal Service stated that "[t]he reference to the Eastern Area SOP being rescinded was an error." The Pacific Area SOP, by contrast, "was rescinded on December 5, 2007, due to increasing volume from other DVD vendors being received and processed." The natural import of these statements was that the Eastern SOP, like the Pacific SOP, had been in effect for at least some period. At no point in this answer, or in any other answer, did the Postal Service state that the Eastern Area SOP had never been issued.

On September 25, 2009, GameFly filed a motion to show cause why documents filed under seal by the Postal Service, including the Eastern SOP, should not be unsealed. 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 (Sept. 25, 2009). The Postal Service responded to this motion on October 19, 2009, and GameFly filed a rejoinder to the Postal Service's motion on October 26. In that rejoinder, GameFly specifically referred to documents numbered GFL 527-5, which include the Eastern Area SOP, and set forth its arguments as to why these documents should be unsealed.[1] After extensive motion practice, the Commission issued

[1] Rejoinder of GameFly, Inc. to Oppositions of the United States Postal Service and Blockbuster, Inc. to Motion of GameFly, Inc. to Unseal Certain Documents

criteria for the protection of documents and directed the parties to review all of the documents at issue and resolve any outstanding privilege claims. Order No. 381 at 21 (Jan. 7, 2010). The Postal Service, after reviewing the documents, chose not to seek continued protection of the Eastern Area SOP.[2] At no point during the motion practice and the subsequent negotiations did Postal Service suggest that the Eastern Area SOP had never been issued.

On April 12, 2010, GameFly included the Eastern Area SOP in its compendium of Postal Service documents filed as part of GameFly's direct case. GameFly also specifically cited the Eastern Area SOP in GameFly's Memorandum Summarizing Documentary Evidence ("GameFly Memorandum") on the same date. GameFly Memorandum at ¶¶ 59-60. GameFly also submitted and discussed the Pacific Area SOP and the fact that it had been rescinded. *Id*. at ¶ 60. GameFly also submitted and cited numerous district-level SOPs that were modeled on the Pacific and Eastern area SOPs. *Id*. at ¶ 61. These actions made clear that GameFly intended to rely on the information contained in these documents as support for its case. Despite this notice, however, the Postal

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and Information Designated as Proprietary by the Postal Service at A-14 (Oct. 26, 2009).

[2] *See* Notice of GameFly, Inc. Regarding Unresolved Privilege Issues at 4-5 (Jan. 28, 2010) (explaining that the Postal Service sent GameFly a list of materials it wished to maintain under seal on January 21 (which did not include the Eastern Area SOP) and that the parties discussed the documents on January 22); The United States Postal Service Response to Presiding Officer's Order No. 381 (Jan. 28, 2010) (noting that GameFly and the Postal Service discussed the documents on January 22, 2010); Public (Redacted) Versions of Documents Covered by Presiding Officer's Ruling No. C2009-1/17 (May 10, 2010) (filing a version of the Eastern Area SOP with the names and telephone numbers of individuals redacted).

Service never indicated that the Eastern Area SOP was no longer effective, or never had taken effect.

At the hearing on June 16, 2010, GameFly moved to admit into evidence all the documents cited in the GameFly Memorandum, including the Eastern Area SOP. Tr. 4/155, 321-28. The Postal Service objected on the same grounds that the Postal Service now offers against admitting GFL-CX-5—that the documents had not been properly authenticated. Once again, however, the Postal Service offered no suggestion that the Eastern Area SOP was no longer effective, or never had taken effect. Tr. 3/72, 4/155.

Presiding Officer Blair ordered that the Eastern Area SOP and other documents be transcribed into the record and admitted into evidence, subject to the right of the Postal Service to file a motion within one week to strike the documents from the record. Tr. 4/666. The Postal Service never filed such a motion, and the documents—including the Eastern Area SOP—were admitted into evidence. POR-24 at 2 fn. 5, 12. The Eastern Area SOP appears in the record at pages 321-28 of Volume 4 of the transcript.

The Postal Service filed its written testimony on July 6, 2010. Although three of the Postal Service's four witnesses (Messrs. Barranca, Belair and Seanor) disputed the extent to which the Postal Service requires manual processing of Netflix return mailers, none of the witnesses suggested that the Eastern Area SOP was no longer effective—let alone that it had never been effective.

The Postal Service's first challenge to the weight and evidentiary status of the Eastern Area SOP did not occur until the hearing on October 14, 2010. When counsel for GameFly confronted Postal Service witness Seanor with the SOP during cross-examination, he insisted that he had never seen the document until the previous day, when Postal Service lawyers had shown it to him. Tr. 10/1783-84. While conceding that the document appeared to be a Postal Service document maintained in the custody of the Postal Service, Mr. Seanor disputed that the SOP had ever been issued. Tr. 10/1784, 1787. And the Postal Service objected to admission of this document on the ground that no evidentiary foundation established that the SOP had actually been issued. Tr. 10/1846.

ARGUMENT

I. THE EASTERN AREA SOP IS ALREADY PART OF THE RECORD, AND THE POSTAL SERVICE IS BARRED FROM SEEKING TO REOPEN THE PRESIDING OFFICER'S DECISION TO ADMIT THE DOCUMENT.

A. The Commission Admitted The Eastern Area SOP Into Evidence At The June 16 Hearing, And The Postal Service Is Barred From Reopening This Decision.

The most immediate defect in the Postal Service's objection to admission of the Eastern Area SOP as a cross-examination exhibit is that the *same* document was admitted into evidence during the June 16th hearing as part of GameFly's direct case. See Tr. 4/321-328; POR-24 at 2 n. 5, *id.* at 12. The admission of the document was neither uncontested nor inadvertent. The Postal Service objected to the admission of the Eastern SOP, along with the other documents cited in the GameFly Memorandum, on the grounds that they had not

been authenticated by a sponsoring witness. Tr. 3/72, 4/155. After hearing argument by both sides, the Presiding Officer ordered that the documents be transcribed into the record and admitted into evidence, subject to the right of the Postal Service to file a motion within one week to strike the documents from the record. Tr. 4/666. The Postal Service, however, never filed such a motion, and the documents—including the Eastern Area SOP—thus were admitted into evidence. The Eastern Area SOP appears in the record at Tr. 4/321-28.

In Presiding Officer's Ruling No. C2009-1/24, the Presiding Officer held that the Postal Service, by failing to submit a timely motion to strike any of the documents proffered by GameFly during the June 16 hearing, had waived its right to further challenge the admission of these documents. POR-24 at 2 fn. 5; *id*. at 12. The Postal Service did not seek administrative review of POR-24 by the full Commission. The ruling thus constitutes the law of the case, barring further litigation of the issue.

B. Even If The Evidentiary Status Of The Eastern Area SOP Were Properly Open To Reconsideration, Presiding Officer's Ruling No. C2009-1/24 Was Decided Correctly.

Even if the admissibility of the Eastern SOP were properly before the Commission now, the Presiding Officer's decision to admit the Eastern Area SOP into evidence was correct. The Presiding Officer has ruled repeatedly in this case that Postal Service business records and communications produced by the Postal Service in discovery may be offered into evidence against the Postal Service as admissions or business records without a witness to sponsor the documents. In addition to POR-24, the Presiding Officer has overruled the

Postal Service's objections to admission of such documents on two additional occasions. In POR-40, the Presiding Officer explained that "[t]he Postal Service views the scope of admissibility too narrowly" and that "[d]ocuments produced in the ordinary course of business tend to be admissible." POR-40 at 8. The Presiding Officer further noted that the proposition that the documents of record in this case should be excluded on the grounds of authenticity "has repeatedly been denied under the law of the case." *Id*. at 8 n.13.

In POR-41, the Presiding Officer again overruled the Postal Service's objection to the authenticity of a document that it produced in discovery. POR-41 at 2. Once again, the Presiding Officer pointed out that documents created in the ordinary course of business and produced by a party in discovery typically do not require any further authentication.

These rulings are consistent with precedent under the Federal Rules of Civil Procedure, a fact that is noteworthy given the more stringent standards of admissibility generally followed by federal courts. *See* Fed. R. Evid. 801(d)(2)(D) ("a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship" is not hearsay if offered against the party); Fed R. Evid. 803(6); Fed. R. Evid. 803(8); *United States v. Lavalley*, 957 F.2d 1309, 1314 (6th Cir. 1992) (letters from commander of military base were admissible as business records); *United States v. Boylan*, 898 F.2d 230, 257 (1st Cir. 1990) (police personnel files were admissible as business records).

The Postal Service has offered no factual ground for departing from Commission and court precedent here. On cross-examination, Mr. Seanor admitted that he had previously received a copy of the document offered as GFL-CX-5 from a Postal Service attorney, and that custody of the document came to him from the Postal Service. Tr. 10/1784. The Postal Service does not—and cannot—suggest that the document was not produced by the Postal Service, or that it is some type of forgery.[3] In short, the Postal Service has provided no credible basis for doubting that the document is authentic—that is, that it was created by the Postal Service in the ordinary course of business and maintained in the Postal Service's files.

Further, the Postal Service's belated speculation that the Eastern Area SOP was never formally adopted would not constitute a ground for excluding the document from evidence *even if the speculation were correct*. The Eastern Area SOP would have evidentiary value even if it had never been officially adopted. Apart from serving as an operative regulation, the Eastern Area SOP also has evidentiary value as evidence of the tendency of Postal Service operating officials to give Netflix DVDs manual processing and other special treatment, and the motive for that tendency: a desire to reduce the disk breakage and jams caused by automated letter processing of Netflix DVDs. Accordingly, the Postal Service's speculation that the Eastern Area SOP was never formally

[3] Similarly, while the Postal Service does not know who wrote "Rescinded" on the document, it has provided no information suggesting that this notation was made by someone outside of the Postal Service. Nor did it state this ground for objection to the admission of the Pacific Area SOP, which has an identical handwritten notation. *See* GFL 527.

promulgated, even if well founded, would merely affect the weight rather than the admissibility of the SOP.

Furthermore, the factual support for the Postal Service's speculation that the Eastern Area SOP was never issued is thin. The support consists of: (1) Mr. Seanor's statement that he had not seen the Eastern Area SOP until Postal Service lawyers showed it to him the day before the hearing (Tr. 10/1783); (2) his statement that he "inquired with a few people last night and nobody could produce this" (Tr. 10/1783); (3) his assertion, supposedly formed from conversations with other Postal Service employees the day before the hearing, that the Postal Service's statement in response to GFL/USPS-106 really meant that the SOP had not been rescinded because "I seriously doubt and I have no knowledge of it ever being issued" (Tr. 10/1787); and (4) Mr. Mecone's assertion that the Postal Service "recently obtained information regarding this document that indicates that it was not issued." Tr. 10/1831. In other words, the Postal Service's basis for contending that the SOP had never been issued was that Mr. Seanor had never seen it, a few employees could not locate it the night before the hearing, and the Postal Service has received some unspecified "information" that the SOP had not been issued. What this "information" is, and whether it consists of more than Mr. Seanor's unfamiliarity with the document, are unknown.

Moreover, since the Eastern Area SOP is dated more than five years before Mr. Seanor's conversations about it took place, and there is no indication that the employees Mr. Seanor talked to were even in a position to see this

document when it was issued, the inability of a handful of acquaintances of Mr. Seanor to determine the provenance of the document on short notice proves nothing.

Finally, the likelihood that the Eastern Area SOP is reflective of Postal Service management policy is underscored by the similarity between the SOP and the vast majority of other SOPS and similar guidelines produced by the Postal Service in discovery and submitted by GameFly into evidence in this case. The terms of the Eastern Area SOP are identical to those of the Pacific Area SOP, which was issued two days before the Eastern Area SOP. *See* GFL527-534 (dated March 1, 2005). This document was admitted into evidence along with the other documents supporting the GameFly Memorandum, and Postal Service Witness Belair acknowledged on cross-examination that that the Pacific Area SOP had been in effect. POR-24 at 12; Tr. 9/1652. Additionally, a number of SOPs or similar directives issued at the District level prescribe many of the same mail-handling procedures described in the Eastern Area SOP. *See* GameFly Memorandum at ¶¶ 59-61 (citing and discussing SOPs issued by multiple levels of the Postal Service). The Postal Service has not disputed the authenticity of these SOPs, or asserted that they have been rescinded. In fact, the Postal Service has confirmed that, whether the Eastern Area SOP was issued or not, "current processing practices for Netflix's in-bound pieces in these two areas are substantially similar to those described in the Pacific and Eastern Area SOPs." USPS Response to GFL/USPS-106(c); Tr. 9/1653, 1708. Additionally, the Christensen study and the Office of Inspector General Report confirmed this statement with detailed findings that the Postal Service processed

Netflix mail substantially as described in the Eastern Area SOP. Thus, the tenor of the Eastern Area SOP is consistent with the overwhelming weight of the other evidence in this case.

II. THE POSTAL SERVICE SHOULD BE BARRED FROM CHALLENGING THE EFFECTIVENESS OF THE EASTERN AREA SOP AS A SANCTION FOR THE POSTAL SERVICE'S FAILURE TO PROVIDE TIMELY NOTICE THAT IT PLANNED TO REPUDIATE ITS PREVIOUS DISCOVERY RESPONSES CONCERNING THE SOP.

The Commission should go further, however, than simply overruling the Postal Service's objection to the admission of GFL-CX-5. As a result of the Postal Service's failure to give GameFly earlier notice of the Postal Service's belated challenge to the effectiveness of this document before the October 14 hearing, the Postal Service should be estopped from disputing the effectiveness of the SOP, and the Commission should strike from the record Mr. Seanor's and Mr. Mecone's statements that the Eastern Area SOP was never issued.

Rule 37(c) of the Federal Rules of Civil Procedure authorizes a court to sanction a party that "fails to provide information or identify a witness as required by Rule 26(a) or 26(e)." Fed. R. Civ. P. 37(c); *see also* 6 MOORE'S FED. PRACTICE 3D § 26.132. F.R.C.P 26(a) provides for initial disclosures of information; Rule 26(e) requires a party to supplement or correct previous answers to interrogatories. As the Presiding Officer explained when applying the requirement of F.R.C.P. 26(e) in POR-40, "new material information that comes to the attention of a responding party must be produced when necessary to ensure the production to the opposing party of 'complete' information." POR-40 at 6.

The Postal Service knew for months before the October 14 hearing that GameFly intended to rely on the Eastern Area SOP. Moreover, the Postal Service clearly recognized the importance of the document—a fact evidenced by the actions of Postal Service counsel to make sure that Mr. Seanor reviewed the document as part of his witness preparation before the hearing. And the Postal Service was aware before tendering Mr. Seanor for cross-examination on October 14 that that the Postal Service was poised to repudiate several key discovery responses that it had provided to GameFly earlier in the case. Yet the Postal Service deliberately chose not to disclose its material change of position to GameFly—not even as an oral notice of errata at the outset of Mr. Seanor's appearance on the stand—until GameFly counsel happened to raise the issue during cross-examination of Mr. Seanor.

As a sanction for such a failure to supplement or disclose information, F.R.C.P. 37(c)(1) provides that the party withholding information may not use the withheld information "to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless." In determining whether a failure to supplement was "substantially justified or is harmless," courts evaluate factors such as "(1) the importance of the information withheld; (2) the prejudice or surprise to the party against whom the evidence is offered; (3) the likelihood of disruption of the trial; (4) the possibility of curing the prejudice; (5) the explanation of the failure to disclose; and (6) the presence of bad faith or willfulness in not disclosing the evidence." *Lab. Skin Care, Inc. v. Ltd. Brands*, Inc., 661 F. Supp. 2d 473, 477 (D. Del. 2009).

In finding a failure to disclose "neither justified nor harmless" in *Laboratory Skin Care*, the court pointed solely to the fact that defendants disclosed the information for the first time in their motion for summary judgment. *Id.* at 479. Likewise, in the present case, the Postal Service did not reveal its information about the Eastern Area SOP until Mr. Seanor was on the stand. This late revelation came despite repeated notice—from the GameFly Memorandum, Mr. Glick's prepared testimony, and discussion of SOPs in at least two previous hearings—that GameFly intended to rely on the information contained in the Eastern Area SOP in building its case. Because this revelation came well after the close of discovery, GameFly had no opportunity to investigate the Postal Service's claims through additional interrogatories. Moreover, because GameFly counsel was in fact in the middle of cross-examining a Postal Service witness at the time of the revelation, GameFly could not even prepare for cross-examination on this topic. GameFly was therefore significantly prejudiced by this surprise revelation. Additionally, the Postal Service provided no explanation of why it failed to disclose this information, and it is even unclear how long it has possessed this information. In short, the Postal Service's belated revelation was in no sense "harmless," as GameFly had prepared for cross-examination in reliance on the Postal Service's representations that the Eastern Area SOP was still in effect. Nor was it "justified": the Postal Service had ample opportunity to investigate the circumstances surrounding the Eastern Area SOP during the more than one year that passed between the Postal Service's answer to GFL/USPS-106 and the October 14 hearing.

Thus, under F.R.C.P. 37(c), the Postal Service would be precluded from using any information suggesting that the Eastern Area SOP is no longer in effect in any motion, hearing, or trial in federal court. The Commission should take a similar approach by striking this information from the transcript of these proceedings and precluding the Postal Service from denying that the Eastern Area SOP remains in effect in any subsequent filings.

If the discovery process is to have any value, parties must be entitled to rely on the information produced by the opposing party in response to discovery requests. Parties must be able to operate under the expectation that their adversaries will be honest and forthcoming in their responses. Allowing parties to obscure the truth with carefully wordsmithed responses and deliberate obfuscation defeats the purpose of the discovery process, which is to fully set forth the underlying facts of the case and avoid exactly the sort of surprise revelations at issue here. While surprise witnesses and last-minute revelations might make for exciting television, they have no place in a proper hearing before a real-life regulatory body. The Commission, therefore, should rule that the Postal Service is estopped from denying both the admissibility and evidentiary import of GFL-CX-5. The Commission should consequently admit this document into evidence and strike from the record Witness Seanor's and Mr. Mecone's statements that this document was never issued.

CONCLUSION

For the foregoing reasons, GameFly cross-examination exhibit GFL-CX-5 should be admitted into evidence, and the Postal Service should be barred from disputing the effectiveness of the Eastern Area SOP.

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