

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

COMPLAINT OF GAMEFLY, INC.

Docket No. C2009-1

**REPLY OF THE UNITED STATES POSTAL SERVICE IN OPPOSITION TO
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**
(October 28, 2010)

On October 21, 2010, GameFly, Inc. filed a motion requesting that the Presiding Officer admit Cross Examination Exhibit GFL-CX-5 into evidence, preclude the Postal Service from challenging GameFly's interpretation of the document, and strike certain passages from the transcript of USPS-T-3 witness Seanor's testimony.¹ GameFly received the document in question, Bates labeled GFL535-542, as part of the thousands of documents produced by the Postal Service in discovery.²

As described below, (1) the Presiding Officer should deny GameFly's motion to strike portions of USPS-T-3 witness Seanor's testimony because witness Seanor's testimony regarding GFL-CX-5 is truthful and accurate, and the Commission's interest in a complete factual record supports inclusion of this

¹ See 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 (the "Motion"), PRC Docket No. C2009-1 (October 21, 2010). All citations in this document are to filings in PRC Docket No. C2009-1 unless otherwise noted.

² Counsel for the Postal Service invited GameFly counsel to review documents, which ranged from email, to handwritten notes, to document drafts and meeting materials. All documents had been collected from postal custodians involved in the decade of attention DVD mail had received within the Postal Service and placed in an office for inspection. GameFly counsel accepted that offer and promptly requested copies of every document. Hence, GameFly counsel was on notice how documents were collected and that no representations were made as to the probity of specific documents.

testimony in the transcript; (2) the Presiding Officer should deny GameFly's request for sanctions precluding the Postal Service from challenging GameFly's interpretation of GFL-CX-5 because the Postal Service has consistently challenged GameFly's unsupported interpretation of GFL-CX-5 and other documents relied upon by GameFly; and (3) the Presiding Officer should deny GameFly's motion to submit GFL-CX-5 into the record because GameFly has not demonstrated that GFL-CX-5 falls under any exceptions to the hearsay rule.

I. Postal Service Witness Seanor's Testimony Regarding GFL-CX-5 Is Truthful and Accurate And Contributes To The Record.

On October 14, 2010, Postal Service witness Troy R. Seanor (USPS-T-3) testified under oath before the Commission. See Tr. 10/1736, et. seq. As part of this oral testimony, witness Seanor stated that, to his knowledge, GFL-CX-5 was never issued, and that if it was issued he would have been aware of it. See Tr. 10/1831. GameFly seeks to strike from the record these answers and related portions of witness Seanor's testimony.

Witness Seanor's entire testimony and his responses to GameFly's cross-examination, including the passages subject to the Motion, are truthful. In fact, GameFly provides no evidence to challenge the truthfulness of witness Seanor's testimony or responses to oral cross-examination provided under oath before the Commission. GameFly seeks to strike witness Seanor's statements, not because they are untruthful, but because they conflict with GameFly's unsupported assumptions regarding GFL-CX-5. Because GameFly has chosen to rely on documents without any sponsorship or authentication, and in its direct

case refused to incorporate its interpretations and conclusions about them in its own testimony, oral cross-examination of witnesses regarding specific documents provides the most accurate insight into the significance of specific documents and makes a valuable contribution to the record. Accordingly, the Presiding Officer should decline to strike witness Seanor's truthful and valuable testimony.

II. The Postal Service Should Not Be Precluded From Continuing To Challenge GameFly's Reliance On Unsupported Interpretations Of GFL-CX-5 And Other Postal Service Documents Produced In Discovery.

The Postal Service has not accepted GameFly's unsupported interpretation of GFL-CX-5 - or its unsupported interpretations of documents in the Memorandum of GameFly, Inc., Summarizing Documentary Evidence and elsewhere - and has consistently challenged GameFly's reliance on its unsupported interpretations of Postal Service documents. See, e.g., Motion of the United States Postal Service to Compel GameFly to Designate a Witness to Sponsor Interrogatory Answers and Interpretations of Postal Service Documents, at 8-12 (June 16, 2010) (describing issues related to GameFly's reliance on unsupported interpretations of unsponsored documents); Direct Testimony of Nicholas F. Barranca on Behalf of the United States Postal Service (USPS-T-1), at 16-22 (July 7, 2010) (same); Response of the United States Postal Service to Motion of GameFly, Inc., to Compel the Postal Service to Answer GameFly Discovery Requests GFL/USPS-225 to 233, 235, at 5-6 (September 21, 2010) (same). Any contrary statements by GameFly are misleading.

It appears that GameFly's main argument to support sanctions against the Postal Service is the allegation that the Postal Service did not inform GameFly about the status of GFL-CX-5 earlier. See Motion at 12. But the issue regarding the status of GFL-CX-5 is arising at this late stage of the proceedings, in part, because of GameFly's conscious decision to rely upon unsponsored and unauthenticated documents.

In attacking the Postal Service's testimony, GameFly relies on the uncertainty surrounding the origin and status of GFL-CX-5, as it evolved during cross-examination. In fact, the Postal Service became aware that there was uncertainty when Postal Service counsel provided GFL-CX-5 to witness Seanor on the day before his oral cross-examination on October 14, 2010.³ Immediately after the discussion with witness Seanor about GFL-CX-5, the Postal Service began consulting employees and other resources in a further effort to shed light on the history and status of GFL-CX-5. See Tr. 10/1783 (describing witness Seanor's October 13 discussions with other employees regarding the status of GFL-CX-5). At this time, the Postal Service has not been able to verify that GFL-CX-5 was ever formally issued by Eastern Area management. Witness Seanor's testimony, however, would support the conclusion that, even if the SOP had been issued by Eastern Area management officials on the date that appears on the document, as an SOP directing conduct within the Eastern Area, it is not known or followed by current management or the facilities within the Eastern

³ GameFly Counsel asked witness Larry Belair (USPS-T-2) about the Postal Service response to GFL/USPS-106, which included a reference to GFL-CX-5. That response itself depended upon inquiries within Operations, including the Eastern Area, whether it had been rescinded (consistent with the interrogatory's content), to which the truthful response was "no".

Area's administrative purview.⁴ GameFly acknowledges the difficulty of ascertaining the status of GFL-CX-5. See Motion at 10-11 (explaining the difficulty of finding employees with knowledge of GFL-CX-5 given that GFL-CX-5 is dated March 2005).

Even though the Postal Service did not question the specific status of GFL-CX-5 at earlier stages of this proceeding, it has consistently challenged and questioned GameFly's reliance on Postal Service documents without specific support, authentication or sponsorship that revealed the status of each. See, e.g., Motion of the United States Postal Service to Compel GameFly to Designate a Witness to Sponsor Interrogatory Answers and Interpretations of Postal Service Documents, at 8-12 (June 16, 2010) (describing issues related to GameFly's reliance on unsupported interpretations of unsponsored documents); Direct Testimony of Nicholas F. Barranca on Behalf of the United States Postal Service (USPS-T-1), at 16-22 (July 7, 2010) (same); Response of the United States Postal Service to Motion of GameFly, Inc., to Compel the Postal Service to Answer GameFly Discovery Requests GFL/USPS-225 to 233, 235, at 5-6 (September 21, 2010) (same).

GameFly describes situations where it asserts, incorrectly, that the Postal Service failed to alert GameFly about the uncertain status of GFL-CX-5. First GameFly argues that the mere production of GFL-CX-5 in response to discovery requests proves that it was issued and in effect. See Motion at 2. But production of a document during discovery – or even admission of a document into the

⁴ Whether the SOP accurately describes mail processing in the Eastern Area is a question of fact which GameFly must establish independently, if it is determined that the SOP does not uniformly control current operations in the Eastern Area, as witness Seanor's testimony would support.

record – does not establish whether a document reflects an effective policy, whether it is a draft or final document, or how it applied in operations.⁵ This is especially true in this docket, as outlined in footnote 2, supra, where many of the documents provided to GameFly were notes, drafts, isolated PowerPoint slides, and staff’s meeting notes, none of which documented official agency action. GameFly acknowledges that the admission of GFL-CX-5 does not prove that it was issued. See id. at 9-10 (a demonstration that GFL-CX-5 “was never formally promulgated, even if well founded, would merely affect the weight rather than the admissibility of the SOP”).

Next, GameFly cites a Postal Service discovery response stating that GFL-CX-5 was not rescinded as evidence that GFL-CX-5 was issued and is in effect. See id. at 3. In this regard, we have consulted Postal Service counsel who was representing the Postal Service during discovery. To his recollection, the discovery response in question reflected the results of inquiries that determined that no specific record that an Eastern Area SOP had been rescinded could be located in the files where such documentation might appear. A lack of rescission does not indicate, however, whether there is a continuously effective SOP or whether a SOP was never issued in the first place. An answer to the additional question of whether definitive proof that the SOP had been issued on

⁵ Effectiveness and applicability were not explicit conditions of the instructions provided in connection with GameFly’s discovery requests: those instructions specified only that responsive documents be in the Postal Service’s custody, possession, or control. First Discovery Requests of GameFly, Inc., to the United States Postal Service (GFL/USPS-1 through -65), at 3 (July 31, 2009). In keeping with the fundamental purpose of discovery, the Postal Service cast a wide net and tried in good faith to provide a broad range of potentially responsive documents to GameFly to inform its case. See id. at 2 (“These data requests are to be construed broadly[.]”). The admission of discovered materials into the evidentiary record against a party requires a greater level of probity, reliability, and relevance, however.

March 3, 2005 exists was not the subject of that inquiry, was not intended to be part of that response, and, as explained above, has yet to be determined definitively. As stated during oral cross-examination of witness Seanor, the pertinent discovery request did not inquire about the issuance of GFL-CX-5, and the cited response does not refer to issuance. See Tr. 10/1833.

GameFly goes on to contend that the Postal Service should have informed it about the status of GFL-CX-5 during motion practice related to a confidentiality issue. See Motion at 3-4. The pertinent issue there concerned the confidentiality of documents and related privilege claims, and did not involve the substance or authenticity of documents. See PRC Order No. 381, Order Affirming Presiding Officer's Ruling C2009-1/12 (January 7, 2010).

Finally, GameFly asserts that the Postal Service's authentication objection at the June 16 hearing did not encompass an objection as to whether GFL-CX-5 was in effect or had ever been issued. See Motion at 5. This assertion fails to recognize the reasons for requiring authentication, which include the determination of whether a document is what a party alleges. Without authentication, the document has no relevance whatsoever. See Bruther v. General Electric Co., 818 F. Supp. 1238, 1240 (S.D. Ind. 1993) ("absent a showing that the evidence is what the proponent alleges, it has no relevance"). The lack of relevance would preclude a particular document from use to support an argument regarding whether the document reflects valid policy, or whether it reflects a draft or final document.

As stated before, GameFly could have avoided the uncertainty regarding the status of GFL-CX-5 if it had sponsored or authenticated the documents upon which it intended to rely. GameFly made an intentional strategic decision to rely on documents without any sponsorship or other support. By making this decision, GameFly, in effect, assumed the risk accompanying incomplete knowledge of and assumptions about documents on which it relied. This risk included the possibility of a future discovery that a document was a draft or was never issued, or that the author of a document had no basis or authority for making a particular statement. Any prejudice resulting from witness Seanor's truthful testimony regarding GFL-CX-5 can be attributed to GameFly's failure to authenticate or sponsor the documents upon which it relies.

As a final argument for sanctions against the Postal Service, which include the preclusion of the Postal Service from continuing to challenge GameFly's reliance on its unsupported interpretation of GFL-CX-5 and the striking of witness Seanor's truthful testimony, GameFly appears to suggest that the Postal Service is guilty of "deliberate obfuscation." See Motion at 15. The Postal Service has not engaged in any conduct that warrants even consideration of sanctions.

The Postal Service agrees with GameFly that "[i]f the discovery process is to have any value, ... [p]arties must be able to operate under the expectation that their adversaries will be honest and forthcoming in their responses." See id. at 15. Unfortunately, GameFly itself has engaged in conduct arguably inconsistent with these principles. For example, GameFly counsel apparently chose not to implement a litigation hold, which choice inevitably and foreseeably resulted in

the conscious destruction of documents relevant to this case. See Tr. 5/914 (explaining that GameFly did not impose a litigation hold upon advice of counsel). This failure has created holes in the record that can never be repaired. Now GameFly attempts to create more holes in the record by striking witness Seanor's truthful and valuable testimony. To preserve the interest in a more complete record, the Presiding Officer should deny GameFly's motion.

III. GameFly Has Not Demonstrated That GFL-CX-5 Is Admissible Evidence.

GameFly has sought to admit into the record numerous documents produced by the Postal Service in discovery, including GFL-CX-5, seemingly on the theory that the mere fact that the records were produced from the Postal Service's custody overcomes any concerns as to reliability or authenticity and entitles them to be cited for the truth of their contents. When confronted, GameFly has tended to parry with a bare citation to the hearsay exception for business records in Federal Rule of Evidence 803(6), while neglecting to mention that this rule requires GameFly to submit sponsoring testimony or a written certification that the records are authentic. See also Fed. R. Evid. 901(a), 902(11).

Moreover, it appears to have escaped GameFly's notice that the hearsay exception for business records requires more than that the records exist within the files of a business. In order to be reliable and therefore meet the federal judiciary's procedural and evidentiary standards, a proponent must first show that the records were

made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation.

Fed. R. Evid. 803(6). GameFly has made no attempt to show, with particularity, that each statement on which it relies as a “business record” meets these or comparable indicia of reliability. E.g., United States v. Lemire, 720 F.2d 1327, 1350-51 (D.C. Cir. 1983); Partido Revolucionario Dominicano (PRD) Seccional Metropolitana de Washington-DC, Maryland y Virginia v. Partido Revolucionario Dominicano, Seccional de Maryland y Virginia, 311 F. Supp. 2d 14, 16-17 (D.D.C. 2004); see also United States v. Kim, 595 F.2d 755, 761 (D.C. Cir. 1979) (“[Regarding hearsay, t]here is no place in scheme of the [Federal] Rules of Evidence for selective waiver of the requirements of particular exceptions.”).

The Postal Service must renew its objections to admissibility, and arguments as to the lack of probative value, of any and all records, including GFL-CX-5, the contents of which GameFly offers for the truth of the assertions therein, for which GameFly has not made a proper foundational showing that the documents truly are authentic and were made in the regular course of business. The burden of supporting one’s wish to admit evidence as reliable, truthful, and authentic must reside with the evidence’s proponent. In fairness to all parties, the bar for this procedural safeguard should not be lowered to a mere scintilla of naked assertions. For the integrity of this and future litigation before the Commission, the Commission should maintain procedural rigor and fairness, and

should not allow GameFly's scorched-earth approach to discovery and evidence to be rewarded by determinations made out of expedient inferences.

IV. Conclusion

For the reasons set forth above, the Postal Service respectfully requests that the Presiding Officer deny the 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.

Respectfully submitted,

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