

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

COMPLAINT OF GAMEFLY, INC.

Docket No. C2009-1

**MOTION OF THE UNITED STATES POSTAL SERVICE TO STRIKE THE REBUTTAL  
TESTIMONY OF SANDER GLICK FOR GAMEFLY, INC.**  
(November 1, 2010)

On October 21, 2010, GameFly, Inc. filed its Rebuttal.<sup>1</sup> This Rebuttal relied almost exclusively on citations to the Christensen Study<sup>2</sup>, the OIG Report<sup>3</sup> and other documents. On October 28, 2010, witness Glick faced oral cross-examination regarding the Rebuttal, during which he confirmed that the Rebuttal reflected the conclusions of the Christensen Study, the OIG Report and other documents produced by the Postal Service.

Witness Glick relies on many documents that are not admissible evidence, including the Christensen Study and the OIG Report. See, e.g., Rebuttal Testimony of Sander Glick for GameFly, Inc. (“Rebuttal”) at 4 (“[t]his fact is supported by evidence that appears in the Christensen Associates reports [and] the United States Postal Service Officer of Inspector General (OIG) report of November 2007...”). GameFly has sought to admit into the record numerous documents produced by the Postal Service in discovery, including the Christensen Study and OIG Report, 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

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<sup>1</sup> Rebuttal Testimony of Sander Glick for GameFly, Inc., PRC Docket No. C2009-1 (October 21, 2010).

<sup>2</sup> The Christensen Report appears on the documents designated GFL1020-1063.

<sup>3</sup> The OIG Report appears on the documents designated GFL685-704.

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. It has not, for example, attempted to demonstrate reliability by explaining how any of the cited records are routinely relied upon during the conduct of its business. The mere fact that an employee may, as a general matter, take notes of meetings, send emails, or draft PowerPoint presentations does not prompt an automatic inference that he or she produced a *particular* set of notes, emails, or presentations as a matter of the Postal Service's *regular* business activity. Nor does it necessarily follow that a given document is close in time to its subject matter, absent some showing to that effect. 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 the Christensen Study and the OIG Report, 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 attempt 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.

In addition to relying on documents that are not admissible evidence, witness Glick makes statements in the Rebuttal that are not supported by any personal knowledge, observation or expertise. The Rebuttal focuses on the mail processing service received by Netflix, the reasons GameFly chooses to argue that the Postal Service provides Netflix this service, and whether the Postal Service offered “the same special processing to GameFly at machinable letter rates.” See Rebuttal at 31. Witness Glick has no personal knowledge of the subjects addressed in the Rebuttal. In

fact, he admits that he has never observed the processing of a Netflix mail piece. See Tr. 3/93; Tr. 11/1983. Throughout the Rebuttal, witness Glick uses legal terms and makes conclusions that are legal argument and not testimony. See, e.g., Rebuttal at 19 (“rational justification”); id. at 28 (same); id. at 10 (witness “informed by counsel” regarding position related to disc breakage). The Rebuttal reflects only interpretations and quotations of documents, and does not reflect any personal knowledge, observation or expertise of the witness.

For example, section II of the Rebuttal addresses the “processing of Netflix returns.” See id. at 2. This section includes argument and extensive citation to documents, but reflects no personal knowledge, observation or expertise of the witness. As stated above, the witness has no basis for offering personal knowledge on the issue of Netflix processing because he has never observed processing of Netflix mail. See Tr. 3/93; Tr. 11/1983.

As another example, the Rebuttal states “[e]ven with full implementation of Mr. Lundahl’s techniques, the resulting DVD breakage rates would still be unacceptably high.” Rebuttal at 13-14 FN 8. Yet witness Glick has no basis for making representations regarding the breakage rate acceptable to GameFly. Oral cross-examination confirmed that neither witness Glick nor GameFly’s institutional witness, GameFly Chief Executive Officer David Hodess, knew the breakage rate GameFly would experience if it mailed at letter rates, or the breakage rate acceptable to GameFly if it mailed at letter rates. See Tr. 5/889-890; Tr. 11/1968-1976.

The Rebuttal relies almost exclusively on citations to the Christensen Study, the OIG Report and other documents produced by the Postal Service, and does not reflect

any personal knowledge or observation of the witness. It is argument and not testimony. Accordingly, the Postal Service respectfully requests that the Presiding Officer strike the Rebuttal Testimony from the evidentiary record.

Respectfully submitted,

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