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

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

ANSWER OF GAMEFLY, INC. , IN OPPOSITION TO MOTION OF USPS TO STRIKE REBUTTAL TESTIMONY OF SANDER GLICK (GFL-RT-1) (November 3, 2010)

One. Two. Three. Four. Five. Six. Seven. Eight.

Eight times in this case, the Postal Service has tried to keep out of the evidentiary record adverse information from the 2006 Christensen Associates reports, the November 2007 report of the Postal Service's Office of Inspector General, or a variety of other documents generated by the Postal Service and produced by it in discovery.[1] The first four attempts led to four separate rulings

[1] Tr. 3/72-73 (argument of Postal Service counsel); Tr. 4/155-156 (same); Motion of USPS to Compel GameFly to Designate A Witness To Sponsor Interrogatory Answers And Interpretations Of Postal Service Documents (June 16, 2010) at 8; USPS Response to GameFly Motion to Compel (Sept. 21, 2010) at 5; Tr. 7/1374-1376 (hearing on Oct. 5, 2010); Reply Of The USPS 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 (Oct. 28, 2010); Reply of the USPS in Opposition to Motion of GameFly, Inc., to Admit Certain Postal Service Documents Into The Record (Nov. 1, 2010); Reply of the USPS In Opposition to Motion of the Public Representative to Admit Christensen Spreadsheets into Evidentiary Record (Nov. 1, 2010); Motion of the USPS to Strike the Rebuttal Testimony of Sander Glick for GameFly, Inc. (Nov. 1, 2010).

by the Presiding Officer, most recently on October 18, holding that GameFly may use these documents as evidence against the Postal Service *without* a GameFly sponsoring witness.[2] Despite these rulings, the Postal Service has renewed the same objection four more times since then.[3] The renewed objections deserve the same fate as their predecessors. This pleading responds to one of the most recent of these objections: the Postal Service's November 1 motion to strike the rebuttal testimony of GameFly witness Sander Glick (GFL-RT-1).

The main theory of the motion is that (1) Mr. Glick's rebuttal testimony relies on the Christensen Associate reports, the OIG report, and other documents created by the Postal Service and produced by it in discovery; (2) these documents "are not admissible evidence"; and (3) Mr. Glick's testimony is therefore also inadmissible. USPS Motion at 1-3. The Postal Service also faults Mr. Glick for making statements that "are not supported by any personal knowledge, observation or expertise" (*id*. at 3-4) or—in three instances—use "legal terms" or offer "legal argument." *Id*. at 4.

The increasing desperation of the Postal Service's efforts to keep its internal studies and communications out of the record is understandable, for the documents make clear that (1) the Postal Service has been offering Netflix, to a far greater extent than other DVD rental companies, manual processing of DVD return mailers entered at machinable letter rates; (2) automated letter processing, because it subjects DVDs to destructive bending forces, is a service inferior to

[2] Tr. 4/156-157, 666 (Commissioner Blair); Presiding Officer's Rulings No. C2009-1/24, 40 and 41.

[3] *See* n. 1, *supra* (last four pleadings cited).

manual processing; (3) the main reasons for the preferential treatment of Netflix DVD mailers are to minimize Netflix disc breakage and Postal Service equipment jams—not to maximize the Postal Service's efficiency; and (4) the underlying cause of the discrimination was the Postal Service's earlier decision to accept at machinable letter rates Netflix mailpieces that are effectively nonmachinable. On four separate occasions, however, the Presiding Officer has considered and rejected the Postal Service's position on the admissibility of the Postal Service documents and information. To continue relitigating the same issue now—particularly during the short period allotted for briefing a large record—is an abuse of the Commission's processes.

A. The Motion To Dismiss Is Untimely.

The admissibility of the Christensen Associates reports, the OIG Report and other documents produced by the Postal Service and relied on by Mr. Glick in his direct and rebuttal testimony is not a question of first impression. The Presiding Officer has repeatedly overruled the Postal Service's objections to the admission of these documents—and the Postal Service has repeatedly waived its opportunity to challenge these rulings.

During the hearing on June 16, 2010, the Postal Service objected to admission of these Postal Service documents on the ground that GameFly had not offered a sponsoring witness for them. Tr. 3/72-73 (argument of Mr. Hollies); Tr. 4/155-156 (argument of Mr. Mecone); *cf*. Tr. 3/73-76 and 4/155-156 (responsive argument of GameFly counsel); The Presiding Officer, after considering the arguments, provisionally admitted the documents, subject to

reconsideration if the Postal Service moved within one week (i.e., by June 23) to strike the documents from the record. Tr. 4/156-157, 666.

On June 16, the Postal Service also filed a written motion asking that GameFly be compelled to designate a witness to stand cross-examination on, *inter alia*, the "Postal Service documents whose content GameFly does not sponsor."[4] GameFly filed an opposition on June 23.[5] The Postal Service did not, however, seek reconsideration of the Presiding Officer's June 16 ruling on or before the June 23 deadline set by him.

In Presiding Officer's Ruling No. C2009-1/24 (July 6, 2010), Commissioner Blair ordered GameFly to submit an institutional witness to stand cross-examination on how GameFly *interpreted* the Postal Service documents, *but not on the authenticity or credibility of the documents themselves.* POR 24 at 12. He explained:

> No due process basis for oral cross-examination arises to test the authenticity of documentary evidence produced by the party seeking cross-examination. The GameFly Answer [of June 23] rebuts the risks that concern a lack of authenticity, and asserts the documents are independently credible in view of Federal Rules of Evidence rules 801(d)(2)(D), 803(6) and (8). Answer at 5. *The Postal Service has not moved to strike the admission of the documents as evidence into the record through a timely motion. In view of the pleadings and the transcript of the June 16, 2010 hearings, the Postal Service's objections based upon authenticity and hearsay are not persuasive.*

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[4] Motion of USPS to Compel GameFly to Designate A Witness To Sponsor Interrogatory Answers And Interpretations Of Postal Service Documents (June 16, 2010) at 8.

[5] Answer of GameFly to Motion of the USPS For Another Opportunity To Cross-Examine An Institutional GameFly Witness (June 23, 2010).

POR 24 at 12 (emphasis added).

In two subsequent rulings, the Presiding Officer reiterated the admissibility against the Postal Service of unsponsored Postal Service documents of this kind. In Presiding Officer's Ruling No. C2009-1/40 (October 1, 2010), he specifically rejected the Postal Service's contention that "witness testimony is 'the only evidence in the record stating Postal Service processing standards and policies.'" POR 40 at 8 n. 13. He explained:

> The Postal Service views the scope of evidence too narrowly. . . . Even if there were some basis to exclude the documents of record as the Postal Service professes for want of authenticity, a proposition which has repeatedly been denied under the law of the case, the written designations of discovery answers which often refer to the documents further belie the veracity of the Postal Service's argument as to the "only" evidence. [Citations omitted.] *As the objections relating to authenticity do not withstand closer scrutiny, the documents may be presumed to speak for themselves.*

POR 40 at 8 & n. 13 (emphasis added).

Presiding Officer's Ruling No. C2009-1/41 (October 18, 2010) reiterated these points. *Id*. (discussing Tr. 7/1374-1376 and Tr. 8/1556). The precise issue was whether GameFly could move into evidence two Postal Service documents at the October 5 hearing without their authentication by a GameFly witness or by Robert Lundahl, the Postal Service witness whom GameFly cross-examined about the documents. Once again, the Presiding Officer held that documents created in the ordinary course of business and produced by the Postal Service in discovery could be offered against the Postal Service, the producing party, without any further authentication. POR 41 at 2. Commissioner Blair held,

however, that he would entertain a Postal Service motion within seven days to strike the documents, if the Postal Service filed such a motion "along with one or more supporting declarations within the next seven days." *Id*. at 2 & n. 4. The October 25 deadline passed without any such Postal Service filing, and POR 41, like POR 24 and POR 40, became the law of the case.

Undeterred by POR 24, POR 40 and POR 41, the Postal Service has continued repeatedly to dredge up the issue since October 25.[6] The time for reargument, however, has passed. As the Presiding Officer found in POR 40 and POR 41, his rulings constitute the law of the case.

Additionally, the present motion to strike is untimely under Rule 3001.21(c). Rule 3001.21(c) provides that "Motions to strike are requests for extraordinary relief *and are not substitutes for briefs* or rebuttal evidence in a proceeding." 39 C.F.R. § 3001.21(c) (emphasis added). Consistent with the extraordinary nature of this remedy, Rule 3001.21(c) further requires that "All motions to strike testimony or exhibit materials are to be submitted in writing at least 14 days *before the scheduled appearance of the witness*, unless good cause is shown." *Id*. (emphasis added). While the Postal Service obviously could not have moved to strike Mr. Glick's October 21 rebuttal testimony a full 14

[6] Reply Of The USPS 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 (Oct. 28, 2010); Reply of the USPS in Opposition to Motion of GameFly, Inc., to Admit Certain Postal Service Documents Into The Record (Nov. 1, 2010); Reply of the USPS In Opposition to Motion of the Public Representative to Admit Christensen Spreadsheets into Evidentiary Record (Nov. 1, 2010); Motion of the USPS to Strike the Rebuttal Testimony of Sander Glick for GameFly, Inc. (Nov. 1, 2010).

days before the October 28 hearing, the Postal Service has not offered any good cause for not filing its motion at least a few days before the hearing. The central theory of the motion to strike—that the Postal Service documents underlying Mr. Glick's testimony were inadmissible without a sponsoring witness—was a theory that the Postal Service had rehearsed to the Commission repeatedly in previous pleadings. *See* pp. 3-6, *supra*. And Mr. Glick's reliance on the Christensen report in his rebuttal testimony should have been no surprise; he also relied heavily on it in his direct testimony (without any motion to strike by the Postal Service).

B. The Presiding Officer's Previous Rulings Allowing GameFly To Use Unsponsored Postal Service Documents Against The Postal Service Were Correct.

Even if (contrary to fact) the Postal Service's renewed challenge to the admissibility of the Postal Service documents underlying Mr. Glick's rebuttal testimony were properly before the Commission, the Presiding Officer's previous rulings on the issue were correct. The decisive point, which the Postal Service continues to ignore, is that the documents at issue were not merely business records, but *admissions by the Postal Service's employees and agents.* Fed. R. Evid. 801(d)(2) ("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); POR 24 at 12 (citing Fed. R. Evid. Rule 801(d)(2)(D)). Statements by a party's agent or employee are treated as party admissions if they were made during the agency or employment and they relate to a matter within the scope of the agency or employment. Fed.

R. Evid. 801(d)(2)(D). *See also* Fed R. Evid. 803(6); Fed. R. Evid. 803(8); *Barnes v. Owens-Corning Fiberglas Corp*., 201 F.3d 815, 829 (6th Cir. 2000); *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. Jenkins*, 928 F.2d 1175, 1180 (D.C. Cir. 1991); *United States v. Boylan*, 898 F.2d 230, 257 (1st Cir. 1990) (police personnel files were admissible as business records).

These standards apply fully here. All of the documents at issue were created by agents (Christensen Associates and the OIG) or employees of the Postal Service acting within the scope of their agency or employment. The Postal Service has not asserted that the versions of the documents offered into evidence by GameFly or relied on by Mr. Glick were doctored or fabricated in any way. Accordingly, it was entirely appropriate for GameFly—and Mr. Glick—to rely on those documents as evidence of the truth of their contents.[7]

In any event, even if "authentication" of the Christensen and OIG reports were necessary, the Postal Service has supplied it. The Postal Service and several of its individual witnesses have stipulated to or otherwise acknowledged

[7] The Commission decisions cited on pages 6-7 of the Postal Service's November 1 opposition to GameFly's Motion to Admit are all distinguishable from the instant case. Most of the cited decisions involved either an attempt by the Postal Service to use unsponsored studies or data as evidence against the position of a mailer, or an attempt by one intervenor to use Postal Service data against another intervenor or intervenors, rather than the situation here: a mailer using Postal Service-generated data against the Postal Service itself. Moreover, in the instances where the disputed evidence was not admitted outright, the relief awarded in these cases was to require the Postal Service to provide a witness to sponsor the studies at issue—not to strike them. *See, e.g.*, Order No. 772 at 4-5.

the evidentiary value of the most important documents relied on by Mr. Glick in his rebuttal testimony. *See* USPS answers to GFL/USPS-17 and 18 (admitting that the Postal Service used the Christensen and OIG reports to estimate the relative amounts of manual vs. automation letter process received by Netflix and another DVD rental company); USPS response to GFL/USPS-163(c) ("[The Christensen cost models] are the best, and most recent, available cost estimates, as the Christensen study is the only such cost study that has been performed."); USPS response to GFL/USPS-202 (relying on the Christensen report to support claim that the handling of Netflix mail is not identical at all facilities); Tr. 10/17889, 1792-93, 1795 (USPS witness Seanor) (citing Christensen report as support for his position on the efficiency of culling Netflix mail at the point of collection); Joint Statement Of Undisputed And Disputed Facts (July 20, 2009) at ¶¶ 83, 84, 87 (acknowledging the continuing relevance of the OIG report as a benchmark for the amount of manual processing received by Netflix mail). In fact, the Postal Service relied on the cost estimates developed in the Christensen report in its own comments to the OIG in response to the 2007 OIG report. GFL703. Having vouched for the Christensen and OIG reports by relying on them, the Postal Service can no longer object that they lack authentication.

Finally, the Postal Service's opposition to the admission of unsponsored documents produced by an opposing party is selective. The Postal Service itself has relied without a sponsoring witness on documentary evidence discovered from adverse parties in similar circumstances. Indeed, the Postal Service did so in this very case. Except for a limited class of GameFly discovery responses that the Postal Service has chosen to withdraw from designation, the Postal Service

moved into the record the narrative responses, documentary appendices, and library references produced by GameFly in response to virtually every one of the Postal Service's discovery requests.[8] This mass of material includes hundreds of megabytes, and thousands of pages, of GameFly documents and communications. The Postal Service presumably entered the material to enable its use against GameFly. Yet the Postal Service offered no sponsoring witness for any of the material.

C. The Postal Service's Remaining Objections To Mr. Glick's Rebuttal Testimony Are Frivolous.

1. Expert witnesses can rely on facts or data not derived from personal knowledge.

The Postal Service's contention that Mr. Glick's testimony should be stricken because "Witness Glick has no personal knowledge of the subjects addressed in the Rebuttal" demonstrates a basic ignorance of the rules of evidence. Mr. Glick testified for GameFly as an expert witness, not an ordinary fact witness. He was entitled to do so by virtue of his knowledge, skill, experience, training and education in postal costing and related matters, which have repeatedly qualified him to offer opinion testimony on these matters in Commission cases, including Docket Nos. R97-1, R2000-1, and R2006-1. *See* Glick Direct (GFL-T-1) at 1, lines 4-8 (reproduced at Tr. 3/80 and Tr. 4/137; *compare* Federal Rule of Evidence 702 (allowing a witness to offer opinions

[8] *See* USPS Designation of Written Cross-Examination (June 10, 2010); USPS Supplemental Designation of Written Cross-Examination (June 16, 2010); Tr. 3/66-69 (June 16, 2010 hearing); Tr. 4/129-131 (list of items designated by USPS as written cross-examination).

about "scientific, technical, or other specialized" matters if his "knowledge, skill, experience, training, or education" qualify him as an expert in these matters).

Unlike ordinary fact witnesses, who generally must limit their testimony to facts within their personal knowledge, expert witnesses are entitled to base their conclusion on underlying facts that are outside their personal knowledge. WRIGHT & GOLD, FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 6262 (1997) ("Experts are not subject to Rule 602's demand that testimony be based on personal knowledge."); *compare* Federal Rules of Evidence 602 (first sentence) (requiring fact witness to have "personal knowledge of the matter") with *id*. (third sentence) ("This rule is subject to the provisions of rule 703, relating to opinion testimony by expert witnesses.").

Rule 703 specifically provides that the basis of this testimony may be facts or data "perceived by or made known to the expert at or before the hearing." There is *no* requirement that the expert have personal knowledge of these underlying facts. To the contrary, the facts or data relied on by the expert, if "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject . . . need not be admissible in evidence in order for the opinion or inference to be admitted." *Id*. This principle is consistent with not only 40 years of Commission precedent allowing postal cost witnesses to rely on documents for underlying facts, but also general principles of evidence in litigation dating back to the Middle Ages. *See* WRIGHT & GOLD, FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 6261 (1997). Thus, Rule 703 entitled Mr.

Glick to base his testimony on facts he learned through the discovery of Postal Service documents.

Requiring Mr. Glick to base his testimony solely on firsthand personal observations of the processing of Netflix and other DVD mail would not only be an unprecedented departure from this precedent, but it would effectively make expert testimony by intervenors and complainants in rate and classification cases impractical. Such a rule would certainly make Mr. Glick's testimony impossible, given the severe restrictions that the Postal Service has placed on GameFly's access to Postal Service facilities since the filing of GameFly's complaint.[9]

Finally, Postal Service's adherence to the supposed requirement of personal knowledge is selective, to put it mildly. Postal Service witness Barranca acknowledged in response to discovery and cross-examination that his testimony was based largely on documents and other second-hand information provided to him by his Postal Service handlers. Tr. 10/1852, 1854, 1857, 1859. On cross-examination, he was repeatedly vague about the factual bases for many of his claims. Tr. 10/1869-70, 81.

2. The Postal Service's characterization of Mr. Glick's testimony as "legal terms" or "legal argument" provides no basis for striking the testimony.

The Postal Service final objection—that Mr. Glick has used "legal terms" or offered legal argument (Motion to Strike at 4)—is equally nonsensical. The

[9] See USPS Response to GFL/USPS-34 (letter restricting GameFly access to Postal Service facilities).

examples supplied by the Postal Service appear entirely unobjectionable. The first term the Postal Service objects to is "rational justification," which appears twice in Mr. Glick's testimony—both times as *section headings*. The first section heading, on page 19, reads:

> **"III. THE POSTAL SERVICE HAS FAILED TO OFFER ANY RATIONAL JUSTIFICATION FOR DISCRIMINATING BETWEEN NETFLIX AND GAMEFLY ON THE GROUNDS OF EFFICIENCY."**

Glick Rebuttal (GFL-RT-1) at 19 (Tr. 11/1925, Tr. 12/2028). In the section that follows the section heading, Mr. Glick sets forth his opinion that the Postal Service's claims that it is more efficient to manually process Netflix mail do not hold up to scrutiny. He explains that the Christensen study demonstrates that manual processing of Netflix mail is in fact more costly than automated letter processing, and that the operational reason for manually processing Netflix mail is to reduce damage to Netflix discs and avoid other operational problems. This section consists entirely of expert opinion, not legal argument.

Mr. Glick's use of "rational justification" on page 28 of his rebuttal testimony is equally appropriate. The phrase quoted by the Postal Service is also a section heading:

> **"B. There Is No Rational Cost Or Service Justification For The Preference That Netflix Receives."**

Tr. 11/1934; Tr. 12/2037. This section consists primarily of a comparison of the actual cost of handling Netflix returns and the cost of automated letter processing. Here again, his testimony provides expert analysis and opinion to

assist the Commission in evaluating the merits of the parties' claims in this proceeding.

The Postal Service's complaint about Mr. Glick's use of the phrase "I am informed by counsel" is equally frivolous. Motion to Strike at 4; *cf*. Glick Rebuttal at 10 (Tr. 11/1916, 12/2019). Mr. Glick used this phrase precisely to *avoid* giving the impression that he was providing a legal opinion. Before offering his opinion testimony about the effectiveness of Mr. Lundahl's techniques in preventing DVD breakage, Mr. Glick explained why this testimony was relevant. Because he is not a lawyer, and was not seeking to provide a legal opinion, he made clear that he was relying on GameFly counsel's explanation of the relevance of the testimony. Tr. 11/1967. Having provided this background, Mr. Glick then set forth the basis for his opinion that the single factor most responsible for DVD breakage is automated letter processing. This opinion is not a legal opinion; it is an expert interpretation of the factual evidence.

Once again, the Postal Service's fastidiousness about excluding legal references from testimony is selective. The Postal Service's own testimony was larded at least as heavily with references to legal standards. See USPS-T-1 at 11, 16 (Barranca); USPS-T-2 at 20 (Belair); USPS-T-3 at 20 (Seanor); USPS-T-4 at 2 (Lundahl). Unsurprisingly, on cross examination, witnesses Barranca, Lundahl, and Seanor all denied using these terms in a legal manner, explaining that they are unqualified to do so. Tr. 7/1357-58 (Lundahl); 10/1805 (Seanor); 10/1877 (Barranca). By the Postal Service's present logic, these testimonies should be stricken for their inclusion of terms such as "similarly situated" and

"illegal discrimination" that are widely recognized as having specific legal meaning in a discrimination case such as this one.

Needless to say, the Commission has not followed the cramped and formalistic approach of the Postal Service's motion to strike. Rather than strike testimony that could possibly construed as offering a legal opinion, the Commission has exercised its ability to treat facts as facts and argument as argument. The Postal Service offers no reason for departing from this common sense approach here.

CONCLUSION

The Postal Service's Motion to Strike Mr. Glick's rebuttal testimony is wholly without merit, and appears to have been interposed solely for delay. The motion should be denied.

Respectfully submitted,

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