

UNITED STATES OF AMERICA  
POSTAL REGULATORY COMMISSION  
WASHINGTON, DC 20268-0001

Complaint of GameFly, Inc.

Docket No. C2009-1

PRESIDING OFFICER'S RULING  
GRANTING, IN PART, AND DENYING, IN PART,  
GAMEFLY'S MOTION ON GFL-CX-5

(Issued November 4, 2010)

I. INTRODUCTION

GameFly, Inc. (GameFly) moved to admit a document marked GFL-CX-5 into evidence during rebuttal hearings on October 14, 2010. Tr. 10/1864. GFL-CX-5 purports to reflect a Standard Operating Procedure (SOP) for the Eastern Area. The Postal Service objected to its admission due to lack of authenticity after one of its witnesses testified that this document was probably never issued.<sup>1</sup> GameFly was directed to put its motion in writing and the Postal Service was permitted 7 days to respond. *Id.* at 1847.

On October 21, 2010, GameFly filed its motion to retain GFL-CX-5 in evidence and to preclude any denial of the truth and effectiveness of its contents.<sup>2</sup> The Postal Service filed its reply in opposition on October 28, 2010.<sup>3</sup> The objections to admission

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<sup>1</sup> *Id.* at 1787 (witness Seanor testified, "I have no knowledge of it ever being issued."); *see also id.* at 1831.

<sup>2</sup> 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 21, 2010 (GameFly Motion).

<sup>3</sup> 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 (Postal Service Reply).

of GFL-CX-5 are overruled and the exhibit is admitted into evidence. GameFly's other requests for relief, are denied.

## II. BACKGROUND

GameFly's Motion references an eight-page document produced by the Postal Service, entitled "Processing Netflix Mailings" with a header that reflects "US Postal Service Eastern Area" and "Standard Operating Procedure SOP# 05-05-4 March 3, 2005," as well as a handwritten notation in the upper right-hand corner "Rescinded." GFL-CX-5 (GFL535 - 542). The document was produced from the Postal Service's records during discovery. GameFly Motion at 1-2.

### A. GameFly Motion

GameFly seeks a proper disposition of its motion in light of the earlier admission of the document into evidence.<sup>4</sup> GameFly frames its Motion, therefore, to "retain" the document "in evidence." *Id.* at 1-2. It further traces the document to the materials provided in response to GFL/USPS-26, which sought SOPs including ones continuing in effect after January 1, 2007. *Id.* at 2.

GameFly explains that the Postal Services' answer to GFL/USPS-106 stated that "[t]he reference to the Eastern Area SOP being rescinded was an error." *Id.* at 3. Viewing this clause in the context of a related part of that answer as to the Pacific Area SOP, which truly was issued and took effect before it was rescinded, GameFly asserts that the answer is faulty:

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<sup>4</sup> *Id.* at 2, citing Tr. 4/321-28; see also Tr. 4/156 ("prepared to rule that we will allow them into evidence...pending a motion...to strike....")

[t]he 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.

*Id.*

GameFly contends that until hearings, the Postal Service impliedly conceded that the Eastern Area SOP had been issued, by indicating that the SOP was never rescinded. Moreover, despite ample opportunity to supplement its answer to GFL/USPS-106 to that effect, the Postal Service did not state before hearings, that the Eastern Area SOP may have never taken effect. *Id.* at 5.

GameFly urges that the Eastern Area SOP is already part of the record and the Postal Service should be barred from now seeking to reopen the Presiding Officer's decision to admit the document. GameFly also disputes that the proposed exhibit's evidentiary value is tied to the issuance of the document, even if issuance could be disputed still (or even if its non-adoption could be established beyond any speculation). It indicates that:

[t]he 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.

*Id.* at 9.

GameFly argues that the factual support to show that this SOP was never issued is so thin that it is speculative. *Id.* at 10. It recounts that this disputed SOP is consonant with evidence of other SOPs and guidelines produced in discovery. *Id.* at 11, citing USPS Response to GFL/USPS-106(c); Tr. 9/1653, 1708. It also urges that witness Seanor's

testimony that the SOP was never issued should be stricken, along with related remarks of counsel. *Id.* at 5.

GameFly suggests the Postal Service should be barred from disputing the effectiveness of the Eastern SOP as a sanction for failing to timely cure the untrue implication of its previous discovery answer on it. GameFly identifies the Federal practice standard for sanctions for a failure to supplement a misleading answer. Federal Rules of Civil Procedure rule 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.” *Id.* at 13, citing *Lab. Skin Care, Inc. v. Ltd. Brands, Inc.*, 661 F. Supp. 2d 473, 477 (D. Del. 2009). GameFly claims that the “surprise” revelation that the SOP’s issuance was contested at hearing was neither “justified” nor “harmless.” *Id.* at 14. Instead, GameFly was prejudiced since “GameFly had no opportunity to investigate” the claim through additional interrogatories. *Id.* Such “obfuscation defeats the purpose of the discovery process” and the Postal Service should be precluded “from denying that the Eastern Area SOP remains in effect in any subsequent filings.” *Id.* at 15.

#### B. Postal Service Reply

The Postal Service opposes GameFly’s Motion, seeks to exclude the document marked GFL-CX-5 from evidence, and takes exception to the points raised in the motion. Postal Service Reply at 1-2. It counters that the Presiding Officer should deny GameFly’s requests: (1) to strike portions of witness Seanor’s testimony regarding GFL-CX-5 because they are truthful and accurate, and ensure a complete transcript and factual record; (2) for sanctions precluding the Postal Service from challenging GameFly’s interpretation of GFL-CX-5 because it has been unsupported and consistently challenged; and (3) to admit GFL-CX-5 into the record because GameFly has not shown that GFL-CX-5 falls under any exceptions to the hearsay rule. *Id.*

Witness Seanor stated under oath “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.”

*Id.* at 2. The Postal Service adds that GameFly seeks to strike truthful statements because they conflict with GameFly's unsupported assumptions, and that GameFly cannot object if its oral cross-examination on documents produced in discovery produces "accurate insights" that contradict its assumptions. *Id.*

The Postal Service urges that it should not be precluded from continuing to challenge insupportable interpretations of Postal Service documents produced in discovery, including GFL-CX-5. While it concedes that at this time, the Postal Service has not been able to verify whether GFL-CX-5 was ever formally issued by management, it is clear from witness Seanor's testimony that it "is not...followed..." *Id.* at 4. It notes that GameFly has the duty to independently establish if the "SOP accurately describes mail processing in the Eastern Area..." especially after the testimony indicates that the subject SOP "does not uniformly control" such current operations. *Id.* at 5, n.4.

The Postal Service denies that its discovery response to interrogatory 106(b) is faulty.<sup>5</sup> The mere production of a document, it adds, "does not establish" that it "reflects an effective policy."<sup>6</sup> The Postal Service argues that "[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." *Id.*

Federal standards, according to the Postal Service, require that the proponent of evidence show that the record is reliable and authentic before it may be admitted as a business record.<sup>7</sup> It contends that GameFly has not shown that GFL-CX-5 is admissible evidence. *Id.* at 9-10, citing Fed. R Evid. 803(6). The Postal Service renews its

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<sup>5</sup> The Postal Service adds that the "pertinent discovery request did not inquire about the issuance of GFL-CX-5, and the cited response does not refer to issuance." *Id.* at 7, citing Tr. 10/1833.

<sup>6</sup> *Id.* at 6 ("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.")

<sup>7</sup> It submits that without authentication by GameFly, the document lacks relevance. *Id.* at 7. It further contends that it has "not engaged in any conduct that warrants even consideration of sanctions" and that GameFly's charge of 'deliberate obfuscation' is without merit. *Id.* at 7-8.

objections to admissibility citing case law, and urges that GameFly has not satisfied the applicable evidentiary standard by showing the reasons the document may be relied on. *Id.* at 10.

### III. ANALYSIS

#### A. GFL-CX-5 is Admissible

The Postal Service is correct that not all documents that appear to be business records necessarily have sufficient indicia of reliability for admissibility in Federal court cases. However, this document appears to be trustworthy at least as a draft SOP written internally and produced from files maintained in the ordinary course of business. During discovery, the Postal Service conceded that the processing at some locations remains consistent with what was said in the SOP documents.<sup>8</sup>

GameFly correctly supports admissibility of GFL-CX-5 due to (a) the prior waiver of objections, and (b) admissibility of business records that are admissions or statements against interest.<sup>9</sup> First, the Postal Service is barred from reopening the decision to admit the Eastern Area SOP into evidence during the hearing on June 16, 2010.<sup>10</sup> The Postal Service does not refute the waiver point. Second, even if the admission was subject to reconsideration, P.O. Ruling C2009-1/24 was decided correctly. The Postal Service's evidentiary objections on authenticity are not persuasive as they neglect that the documents are Postal Service business records that were also offered as admissions against interest. *Id.*; *see, e.g.*, GFL536.

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<sup>8</sup> See Responses of the United States Postal Service to Discovery Requests of GameFly, Inc. (GFL/USPS-104, 106(a)-(d), 107, 111-115, 119-120, 122(a)-(d), 123-128, 131-132, 134-37, 139, 142-143, 146-147, 150, 152(a)-(c), 153, 157, 159-160, and 163-69), October 2, 2009, response to GFL/USPS 106(c) (under seal).

<sup>9</sup> See 39 CFR 3001.31(a); 39 CFR 3001.31(h) which states "[t]he presiding officer shall rule on the admissibility of evidence and otherwise control the reception of evidence so as to confine it to the issues in the proceeding."

<sup>10</sup> GameFly Motion at 6, "Tr. 4/321-328; POR 24 at 2 n. 5, *id.* at 12." In P.O. Ruling No. C2009-1/24, the Presiding Officer confirmed that the documents were identified and admitted into evidence.

The GameFly Motion amply recounts the law of the case under P.O. Ruling Nos. C2009-1/24, 40, and 41 and submits that these rulings are consistent with federal practice. *Id.* at 8 and citations. The Postal Service has provided no genuine basis for doubting that the document is at a minimum an authentic Postal Service draft on “Processing Netflix’s Mailings”, which was duly created by the Postal Service in the ordinary course of business and maintained in the Postal Service’s files. *Id.* at 9, citing Tr. 10/1784.

Even if reconsideration were justified, the Postal Service’s excessive reliance on rule 803(6) for qualified business records in isolation, is unavailing. It ignores the actual finding in P.O. Ruling C2009-1/24 that these materials were admitted over the objections as to authenticity and hearsay, in view of pleading that cited “Federal Rules of Evidence rules 801(d)(2)(D), 803(6) and (8).” See P.O. Ruling C2009-1/24 at 12; see *also* Tr. 3/74. Admissions against interest by a party-opponent are not necessarily excluded under rules on hearsay.<sup>11</sup> SOPs that are routinely generated by the Postal Service at the Area level may contain admissions and be maintained as records of business activity. See, e.g., “Pacific Area DVD SOP.pdf” (Bates number GFL527-34); see *also* Fed. R. Evid. 801(d)(2)(D).

Upon a review of the record, it appears that it will minimize confusion to allow the admission of GFL-CX-5. The Postal Service’s answer to interrogatory 106 and witness Seanor’s statements can then be reviewed, and appropriate weight may be accorded to the content of all three of these items in view of the present record. The transcript of the redirect examination of witness Seanor shows why the issues remain vital:

BY MR. MECONE:

Q Mr. Seanor, Commissioner Langley asked you a question about the Eastern Area SOP. To your knowledge, was that SOP ever issued?

A No.

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<sup>11</sup> See Fed. R. Evid. rule 803(6), and Committee Notes; *compare* rules 804(b)(3) and 807.

Q If it was issued, would you have been aware of it?

A Yes.

MR. MECONE: The Postal Service would just like to note for the record that we recently obtained information regarding this document that indicates that it was not issued, it never issued, and we will update...if we receive information that states otherwise....

Tr. 10/1831.

Sustaining the objections could improperly leave only the Postal Service's incomplete discovery answer and the testimony without the antecedent document in the record. Without something more, risk concerning authenticity does not warrant modification of the earlier dispositions admitting the document into the record as evidence. In light of the confusion engendered by the Postal Service's answer to GFL/USPS 106, GFL-CX-5 is retained in evidence and the Postal Service's objections are denied.

**B. All Other Relief Sought By GameFly Is Denied**

During this case, GameFly has often relied on the prospect that the documents produced by the Postal Service in discovery may be presumed to speak for themselves, despite the risk that their proper context and import may be contested. The Postal Service asserts that: "[t]his 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." Postal Service Reply at 8.

GameFly has not shown with the requisite specificity that appreciably before the October 14, 2010 hearing, Postal Service counsel discovered information that required disclosure that the disputed SOP had probably not been issued. GameFly can not secure sanctions or evidentiary inferences simply because just prior to the hearing the Postal Service became aware of surprising information that suggested the document labeled Eastern Area SOP never actually was issued.

GameFly's request for further relief of equitable estoppel or sanctions, without some clear showing of the Postal Service's unclean hands or deceptive conduct, is not

well supported.<sup>12</sup> GameFly argues that even though “[t]he Postal Service knew for months...that GameFly intended to rely on the Eastern Area SOP”, its opposing counsel “deliberately chose not to disclose its material change of position to GameFly” before GameFly’s counsel cross-examined witness Seanor on it. GameFly Motion at 13. However, Postal Service counsel indicates that he actually knew of information tending to indicate that no such SOP ever issued for less than 2 days, not weeks or months.

While the duty to supplement answers to ensure they are correct and complete is a continuing one, the record lacks a convincing showing that the Postal Service flouted that duty.

#### RULING

1. 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, filed October 21, 2010, is granted, in part.
2. GFL-CX-5, GFL535 – 542, previously admitted in volume 4 of the transcript, is retained in evidence. All other requested relief is denied.

Dan G. Blair  
Presiding Officer

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<sup>12</sup> GameFly urges that “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.” *Id.* at 12, citing P.O. Ruling C2009-1/40 at 6, and Fed. R. Civ. P. 26(e).