

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

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

**REPLY OF GAMEFLY, INC.
TO REQUESTS OF THE USPS
FOR DISPOSITION OF COMPLAINT
(June 2, 2009)**

GameFly, Inc. (“GameFly”), respectfully replies to portions of two pleadings filed by the Postal Service on May 26, 2009: (1) the Postal Service’s Motion for Partial Dismissal of Complaint, and (2) certain portions of the Postal Service’s Answer, to the extent that it seeks summary Commission dismissal of GameFly’s complaint without full discovery, without a hearing, or without any further consideration of the case on the merits.¹ The Postal Service’s pleadings underscore the seriousness of the discrimination that is the core of this case. The pleadings also confirm that GameFly’s complaint and the Postal Service’s answer raise material disputed issues of fact that are likely to require full-blown discovery and a hearing on the merits to resolve.

(1) The heart of GameFly’s complaint is a claim of discrimination. The Postal Service is offering two other DVD mailers – Netflix and Blockbuster –

¹ To the extent that the complaint rules do not entitle GameFly to file such a reply as a right, GameFly has separately filed a motion for leave to file this pleading.

manual processing of their DVDs at one-ounce letter rates, while refusing to offer the same terms to GameFly. To avoid unacceptably high breakage of its DVDs, GameFly must pay extra postage to mail them as flats – and reinforce its mail pieces with protective cardboard inserts that require the payment of a second ounce of postage. This disparity in treatment between GameFly, on the one hand, and Netflix and Blockbuster, on the other hand, constitutes undue discrimination. Complaint at ¶¶ 48-51.

(2) The Postal Service, while insisting that it “has no current practice of manually culling incoming DVDs” addressed to Netflix and Blockbuster, and denying that “any ‘large percentage’ of inbound movie DVDs are processed manually,” admits that “some” manual culling of DVDs being returned by consumers to Netflix and Blockbuster “may occur” as a result of “local mail processing” decisions. Answer at ¶¶ 35 and 37. GameFly believes that this manual processing of inbound Netflix and Blockbuster mailers is far more extensive than the Postal Service admits. GameFly also believes that, whether the Postal Service headquarters has explicitly approved this manual processing, has given tacit acquiescence to manual processing, or is unaware of the practice, the manual processing is discriminatory, and the extent of the discrimination is a material issue of fact. The possibility that explicit authorization of manual processing of inbound Netflix and Blockbuster DVDs may have occurred at the area or local level rather than at headquarters simply means that discovery of the extent of these practices must be answered by area and local employees rather than by headquarters employees alone. The Postal Service may not shield

discriminatory practices from discovery by hiding behind its offices in the field. In light of the November 2007 OIG report cited by GameFly (Complaint at ¶¶36), and the more recent direct observations by GameFly personnel of the systematic culling of GameFly and Blockbuster DVDs at various postal mail processing facilities, the extent to which the Postal Service is still giving manual processing to inbound Netflix and Blockbuster DVDs is a question of fact that cannot be resolved without discovery or a hearing.

(3) The Postal Service asserts that the disk breakage experienced by GameFly is caused not by discrimination, but by GameFly's failure to use DVD mailers that are tall enough to be rejected by the Postal Service's automated letter sorting equipment. Answer at ¶¶19 (next-to-last sentence), 22, 23, 26 and 34 and pp. 22-23. The facts are to the contrary. GameFly is prepared to submit evidence that it tested a number of alternative mailer designs that relied on height rather than internal protectors to reduce the rate of DVD breakage. The tests revealed that a mailer height of even eight inches was insufficient to solve the breakage problem. The resulting DVD breakage rate – 2.5 percent – was approximately *double* the breakage rate of DVDs in mailers with the protective insert that GameFly now uses. Furthermore, the taller mailer now advocated by the Postal Service would exceed the 6.125" maximum allowed height for letters (DMM 101.1.1.b) by at least 30 percent, and thus would be ineligible for letter rates. Moreover, an eight-inch unreinforced DVD mailer, the tallest piece that would be practical for GameFly to produce, would still be heavy enough, even without reinforcement or a protective insert, to require the payment of the two-

ounce flats rate—the same rate of postage that GameFly now pays for a mailer with a protective insert. A taller mailer thus would not remedy the real problem: the preferential treatment that enables Netflix and Blockbuster to achieve acceptably low breakage rates with a one-ounce letter-shaped mailpiece that has *neither* a protective insert nor is eight inches in height, but withholds the same option for GameFly, and forces GameFly to incur unacceptably high breakage rates unless it pays two-ounce flats postage. To suggest that GameFly is somehow at fault for failing to devise a technological fix for the Postal Service's discrimination adds insult to injury.

(4) GameFly believes that it has provided the relevant results concerning the engineering tests of alternative mail piece designs. *Cf.* Answer at ¶¶20. However, GameFly is also willing to respond to reasonable discovery requests. This issue illustrates why it would have been helpful and constructive for the Postal Service to respond to GameFly's repeated requests to try to resolve the company's grievances without filing a complaint.

(5) At several points in its Answer, the Postal Service asserts that the remedies proposed by GameFly in its complaint and previous communications with the Postal Service have been mutually inconsistent, and that GameFly has acted improperly by failing to propose a single optimum solution to the breakage problem. Answer at ¶¶38, 39 and pp. 21-22 and 24-25.² GameFly has deliberately refrained from specifying a single means to this end in order to

² Despite the Postal Service's suggestion to the contrary, GameFly recognizes that no operational solution can be implemented with 100 percent compliance. What GameFly seeks is not unattainable perfection, but nondiscriminatory processing of its pieces at nondiscriminatory prices.

respect the Postal Service's desire for flexibility in running its own operations. That GameFly proposed a variety of alternative possible solutions during 15 months of meetings and communications with the Postal Service reflects not inconsistency by GameFly, but the company's desire to search for a constructive solution despite the Postal Service's failure to respond with acceptable price terms. Needless to say, GameFly's earlier settlement proposals are no longer on the table – not only because the Postal Service has forced GameFly to incur the costs of litigation, but also because the company has learned of the extent of the Postal Service's preferential processing of Netflix and Blockbuster DVDs. Now, GameFly expects nothing less than full equality.

(6) The Postal Service argues in its Motion for Partial Dismissal of Complaint that 39 U.S.C. §404(b), one of the substantive provisions that GameFly cites in support of its complaint, may not be considered in a complaint proceeding under 39 U.S.C. §3662(a) because Section 404(b) is not one of the substantive provisions cited in Section 3662(a). But Section 3662(a) specifically incorporates 39 U.S.C. §401(2), which authorizes the Postal Service to “adopt, amend, and repeal such rules and regulations as it deems necessary to accomplish the objectives of this title.” The gist of this complaint is that the Postal Service has adopted a *de facto* rule authorizing the hand-processing of Netflix and Blockbuster DVDs while providing automated processing to similarly situated GameFly DVDs, and that this rule is “inconsistent with this title” – including 39 U.S.C. §404(b), a section of Title 39 that forbids unreasonable rates and classifications. In addition, Section 3662(a) incorporates 39 U.S.C. §101(d),

which states that "Postal Rates shall be established to apportion the costs of all postal operations to all users of the mail on a fair and equitable basis." Charging GameFly higher rates for a lower level of service flies in the face of this provision. By operation of Sections 401(2) and 101(d), the substantive standard of Section 404(b) thus is clearly justifiable in a complaint filed under Section 3662(a).

CONCLUSION

The Postal Service's May 26 Answer and Motion for Partial Dismissal of Complaint merely confirm that this case raises substantial and material issues of fact. The Commission should hear this case under its procedures for full-blown complaints, and allow discovery and an evidentiary hearing to the extent required to resolve the disputed issues of fact.

Respectfully submitted,

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June 2, 2009