

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

COMPLAINT OF GAMEFLY, INC.

Docket No. C2009-1

ANSWER OF THE UNITED STATES POSTAL SERVICE
(May 26, 2009)

Pursuant to 39 C.F.R. § 3001.84,¹ the United States Postal Service hereby submits its Answer to the enumerated paragraphs of the Complaint of Gamefly, Inc., filed in the above-captioned docket on April 23, 2009.

1. This paragraph of the Complaint is not an assertion of fact, but asserts a legal conclusion that the Complaint filed in this docket falls within the jurisdiction of the Postal Regulatory Commission to review complaints under 39 U.S.C. § 3662. Accordingly, no answer is necessary. However, insofar as an answer is required, the Postal Service denies that all of the Complaint falls within the jurisdiction of the Commission established by section 3662.

¹ The April 23, 2009 Complaint in this docket was filed nearly three weeks before the May 11, 2009, effective date for the Commission's adoption of 39 C.F.R. Part 3030, pertaining to Complaints, and Part 3031, pertaining to Rate or Service Inquiries. See 74 *Fed Reg* 16734 (April 10, 2009) and PRC Docket No. RM2008-3, Order No. 195 (March 24, 2009). Accordingly, notwithstanding the amendments to 39 U.S.C. § 3662 wrought by the Postal Accountability And Enhancement Act, Public Law 109-435, 120 Stat 3218 (December 20, 2006), the Postal Service files this Answer under the terms of the Commission's rules in effect at the time that the Complaint was filed – 39 C.F.R. Part 3001, Subpart E, Rules 81 through 87.

2. The Postal Service admits the characterization of the Complaint reflected in this paragraph's first sentence; moreover, the Postal Service notes that Complainant's mailpieces are First-Class Mail flats containing games while the mailpieces of other DVD² mailers identified in the Complaint are First-Class Mail letters primarily containing movies. The paragraph's second sentence consists only of legal conclusions to which no answer is required. However, insofar as an answer to the second sentence is required, the Postal Service denies the allegations that the rates and services it offers to customers who use First-Class Mail to send and receive DVDs violate 39 U.S.C. §§ 401(d), 403(c), 404(b) and/or 3622(b)(8).

3. This paragraph of the Complaint is not a statement of fact, but consists of an asserted legal conclusion that the Complaint filed in this docket falls within the jurisdiction of the Postal Regulatory Commission to review complaints under 39 U.S.C. § 3662. Accordingly, no answer is required. However, insofar as an answer is required, the Postal Service denies that all of the Complaint falls within the jurisdiction of the Commission established by section 3662.

4. This paragraph of the Complaint consists of the names and addresses of counsel for Complainant to whom communications are to be directed and, as such, requires no answer.

² The acronym "DVD" is variously known as a "digital versatile disc" or a "digital video disc." For purposes of the instant Complaint, DVDs contain games playable on any of a range of game consoles or movies. The physical properties of the two kinds of DVDs are different, with movies tending to be thinner discs.

5. Respondent lacks sufficient knowledge, information or documentation that permits it to form a belief as to the first sentence's allegation identifying where Complainant is incorporated, although publicly available information on the internet seems to provide un-authenticated support for this allegation. Respondent admits that Complainant is headquartered in California.

6. Respondent admits generally that Complainant operates a business that rents video games to consumers who use a variety of gaming platforms. However, Respondent lacks sufficient information to form a belief as to the second sentence's allegations regarding Complainant's relative status in the industry or the exact set of gaming platforms Complainant supports.

7. Respondent admits generally the allegations in this paragraph describing Complainant's business model, and the terms of its offer, based upon its website. To the extent any further response is warranted, Respondent denies the allegations of this paragraph.

8. Respondent admits generally the allegations set forth in this paragraph as consistent with its understanding of the business model operated by Complainant. To the extent any further response is warranted, Respondent denies the allegations of this paragraph.

9. Respondent admits the allegations set forth in this paragraph.

10. Respondent admits the allegations set forth in this paragraph of the Complaint.

11. Respondent admits the allegations set forth in this paragraph of the Complaint.

12. Respondent admits the allegations set forth in this paragraph of the Complaint, but expressly denies any implication that no significant differences exist between the DVD mailing envelopes utilized by Complainant and those utilized by other businesses in the DVD mailing industry. Respondent admits that its copy of the Complaint contains attachments that appear to show the outer and inner DVD mailing envelopes used by Complainant.

13. Respondent lacks sufficient knowledge or information with which to form a belief as to the allegations set forth in this paragraph of the Complaint; such allegations are accordingly denied. However, Postal One data show an average of 380,000 pieces per month entered by Gamefly over the last three months.

14. Respondent lacks sufficient knowledge or information with which to form a belief as to the allegations set forth in this paragraph of the Complaint; accordingly, Respondent denies the allegations in this paragraph.

15. Respondent admits that *USPS News Link*, an online communications channel operated by its Corporate Communications department that transmits messages internally to postal managers nationwide, contained a July 2, 2008, article under the caption, "*Let the Games Begin*," that this paragraph accurately quotes. Respondent denies that *USPS Newslink* is used by USPS Corporate Communications to disseminate information to external, non-postal entities, such as print news publishers or electronic news broadcasters. Respondent otherwise denies that this paragraph accurately characterizes the *Link* article.

16. Respondent admits the allegation in the first sentence of this paragraph, insofar as it implies that the total weight of some lightweight mailing envelopes containing movie DVDs can be less than one ounce; Respondent also affirmatively alleges that such mailpieces are routinely processed in the automation letters mail stream. Respondent admits the second sentence of this paragraph, but only insofar as it asserts that Complainant has experienced breakage of DVDs that have, at one time, been mailed; Respondent affirmatively alleges that all DVD mailers receive from the mail some DVDs that have incurred damage sometime after mailers prepared outbound pieces for mailing. Respondent admits that it is possible for a DVD mailer to use lightweight, flimsy and/or poorly designed envelopes, and to enclose inserts that provide inadequate protection to prevent the DVD inside from suffering damage during acceptance, processing and/or delivery by the Postal Service. Respondent denies the second sentence of this paragraph, insofar as it implies that postal acceptance, processing and/or delivery is the proximate cause of all, a majority of, or a significant

portion of overall DVD damage, including that which results from DVDs that are more brittle or less flexible than the typical contents of such mail; mail piece design elements such as mailing envelopes and/or insufficiently protective inserts; the degree of care (or lack thereof) exercised by Complainant's customers in handling and using DVDs obtained via the mail; or by Complainant's employees processing DVDs, preparing outgoing mailpieces or opening return mailpieces.

17. Respondent denies the allegation in this paragraph. According to the Postal Service's records, its test results did not indicate breakage of GameFly's DVDs. The joint testing in December 2007 and April 2008 by Postal Service and Gamefly personnel occurred on automation equipment used to process collection mail (inbound to Gamefly) including the Dual Pass Rough Cull (DPRC). The tests were designed to determine what envelope size would be successfully culled from the letter mail stream for diversion into the flat mail stream. The Postal Service's longstanding suggestion that Gamefly increase the height of its mail piece to improve its ability to be extracted as a flat is still valid. The Postal Service admits that GameFly has shared some data indicating that returned pieces have a breakage rate between one and two percent.

18. Respondent lacks sufficient knowledge or information with which to form a belief as to the allegations set forth in this paragraph of the Complaint.

19. Respondent lacks sufficient knowledge or information with which to form a belief as to the basis for the first sentence's claim of a November 2002 decision to insert

cardboard protectors into its DVD mailers. With respect to the second sentence of this paragraph, Respondent lacks sufficient knowledge or information with which to form a belief as the degree to which this practice reduced Complainant's DVD breakage or breakage for which mail acceptance, processing and/or delivery could have been the proximate cause; allegations in the second sentence are accordingly denied. With regard to the third sentence, Respondent lacks sufficient knowledge about the weight of the mail piece with and without the insert to form an opinion; as such, all three sentences are denied. Notwithstanding these denials, Respondent admits the allegation in the third sentence of this paragraph, but only insofar as it can be read to assert that, depending on the protector chosen by a DVD mailer such as Complainant at its discretion, (a) the weight of a DVD mailpiece containing a DVD and protector could be less than or equal to one ounce -- or more, and (b) a DVD mailer such as Complainant could design a mailpiece that exceeds the dimensions that determine qualification for letter-shaped mailpiece prices, but which fall within the dimensions for flat-shaped mailpiece prices. Respondent denies the third sentence of this paragraph, insofar as it could be interpreted as asserting that Respondent requires DVD mailers such as Complainant to design mailpieces that weigh more than one ounce, or to utilize flat-sized envelopes instead of letter-sized envelopes. Respondent affirmatively pleads that its advice to Gamefly over many years on how its mail piece design could be improved to raise the percentage of pieces mechanically culled as a flat. Moreover, Respondent asserts that Gamefly told Respondent that it made the decision to design a piece that exceeded one ounce so that it would be less likely to be processed as a letter.

20. Respondent admits the allegations in the first and second sentences in this paragraph of the Complaint, with the following two exceptions: 1) according to Postal Service records at Engineering, the work with GameFly began in October 2007 and 2) Respondent lacks sufficient information with which to form a belief as to the elements of Complainant's apparent motivation for testing mailpiece designs. Respondent also lacks sufficient information with which to form a belief as to the truth of the assertion in the third sentence, inasmuch as the raw data collected from machine runs during testing in December 2007 and April 2008 were recorded by Complainant's representative during the tests, were not shared with Respondent's test coordinator then for validation, and have not been provided to Respondent despite a subsequent request for the data.

21. Respondent lacks sufficient knowledge or information to form a belief as to the allegations set forth in this paragraph of the Complaint regarding the basis for Complainant's decision to continue using cardboard protective inserts; accordingly, to this extent, it is denied. Respondent admits that Complainant now uses a cardboard insert in its mailpieces.

22. Respondent denies the allegation insofar as it implies that the Postal Service is intentionally breaking GameFly DVDs or that it is intentionally avoiding processing the pieces in the flats processing stream. Respondent has shared data with Complainant which show that the envelope sizes that would be culled automatically

from letter stream and entered into the flat mail stream. The data also showed that mail pieces of the size or very close to the size of the envelopes that Complainant currently uses would typically not be extracted as a flat. Respondent lacks sufficient knowledge or information to form a belief as to whether there has been any change in the degree of breakage of DVDs mailed by GameFly that were formerly mailed in flats envelopes and that are now mailed in flat envelopes bearing the markings referenced in this paragraph. Respondent lacks sufficient knowledge or information to form a belief as to whether mail acceptance, processing, and/or delivery are the proximate cause of any breakage, or change in the degree of breakage, or whether any such breakage, or change in the degree of breakage is attributable to: DVDs that are more brittle than those previously or commonly used; lightweight mailing envelopes and/or insufficiently protective inserts; the degree of care (or lack thereof) exercised by Complainant's customers in handling and using Complainant's DVDs; or by Complainant's employees processing DVDs, preparing outgoing mailpieces or opening return mailpieces.

23. Respondent admits the first sentence in this paragraph. With regard to the second sentence, Respondent's records regarding the testing do not contain information on breakage. Respondent admits that Complainant presented its data to Respondent which indicated that the inclusion of the protective insert reduced the breakage rate. Regarding the third sentence, Respondent lacks knowledge about the weight of the mail piece without the insert referenced in the Complaint. In a 2008 presentation Complainant showed Respondent data indicating that a cardboard insert alone did not cause a piece to be greater than one ounce. Complainant's information

indicated that the size of the mailpiece could also cause it to weigh more than one ounce even if it did not have the insert. Respondent denies the fourth sentence of this paragraph, insofar as it may imply that damage owing to the following is caused by the Postal Service: 1) postal acceptance, processing and/or delivery is the proximate cause of all, a majority of, or a significant portion of overall DVD breakage; 2) breakage resulting from DVDs that are more brittle or less flexible than the typical contents of mail; 3) the design of the mailing envelopes and/or insufficient protective inserts that the Postal Service has not approved; 4) the degree of care (or lack thereof) exercised by Complainant's customers in handling and using DVDs obtained via the mail, and the return envelope in which DVDs are returned; or 5) Complainant's employees processing DVDs, preparing outgoing mailpieces or opening return mailpieces.

24. Respondent admits that the Office of the Inspector General has been involved in numerous investigations involving Gamefly mailpieces, and that arrests have been made. However, because data are not kept in a manner that would permit ready confirmation or disconfirmation regarding the number of arrests related to the theft of Gamefly pieces and when they took place, Respondent cannot confirm and must therefore deny the accuracy of those details. Respondent must also deny the allegations set forth in the first sentence of this paragraph of the Complaint that loss of Complainant's DVDs in the mailstream occurs at a "substantial" rate and that the all loss from theft is caused by postal employees or contractors. Without disputing or downplaying the seriousness of the allegations in the third and fourth sentences of this paragraph of the Complainant, Respondent lacks sufficient information with which to

form a belief as to the precise number of employees or contractors arrested in connection with accusations of theft of Complainant's DVDs from the mailstream in total or for the year 2007 through today. Respondent admits the allegation in the fifth sentence of this paragraph..

25. In response to the first sentence of this paragraph, Respondent admits that Complainant's decision to mail two-ounce pieces instead of one-ounce pieces, and its decision to mail flat-sized envelopes instead of letter-sized envelopes, each has the effect of increasing Complainant's per-piece mailing costs; Respondent also admits that depredation of mail pieces in transit increases Complainant's cost of doing business. All other allegations in the first sentence are otherwise denied. Respondent admits that the second, third and fourth sentences of this paragraph, and the accompanying footnote, reflect prices applicable to the mailing of First-Class Mail letters and flats. Respondent lacks sufficient knowledge or information with which to form a belief as to the allegation set forth in the fifth sentence of this paragraph concerning per-trip costs attributable to the loss or theft of DVDs in the mailstream; Respondent also lacks sufficient knowledge or information with which to form a belief as to the allegation in the sixth sentence of this paragraph concerning per-trip costs attributable to breakage of DVDs; finally, Respondent lacks sufficient knowledge or information with which to form a belief as to the allegation in the seventh sentence of this paragraph concerning average cumulative costs to Complainant. The fifth, sixth and seventh sentences are accordingly denied.

26. Respondent admits the allegation in this paragraph of the Complaint.

Respondent pleads affirmatively that Complainant has chosen not to follow the advice Respondent has provided to Complainant regarding mailpiece improvements that would better serve Complainant's preference that its mail be processed in the flat mail stream.

27. Respondent admits the allegation in this paragraph of the Complaint

28. Respondent admits the allegation in this paragraph of the Complaint.

29. Respondent admits the allegation in this paragraph of the Complaint.

30. Respondent admits the allegations in this paragraph of the Complaint.

31. Respondent lacks sufficient knowledge or information with which to form a belief as to the allegations in this paragraph. Accordingly, they are denied.

32. Respondent admits that Gamefly sought a reduced postage rate as alleged in this paragraph of the Complaint except that Respondent lacks sufficient knowledge or information about Gamefly's motivation in asking for a pricing alternative. However, Gamefly did not explain why the only DVD round trip mailer who entered mail in the form of a First-Class Mail two-ounce flat either warranted special consideration on its own or as one of a larger group of DVD mailers or how either such arrangement would avoid problems of undue discrimination.

33. Respondent admits the allegations in this paragraph of the Complaint.

34. Respondent denies the allegations in this paragraph, except to admit that it has not provided the pricing alternatives that Complainant sought. As stated in response to paragraphs 17 and 22, above, Respondent has conducted tests on Complainant's mailpieces to determine the ideal size for extracting a mailpiece successfully from the letter mail stream and entering it into the flat mail stream. Respondent has informed Complainant of the results of those tests. Since the size of these pieces continues to be less than ideal, the pieces are often not mechanically extracted from the letter mail stream. To increase the rate at which these pieces are then manually diverted to the flat stream, Respondent has sent frequent communications to the field directing that these pieces be run on flat sorting machines. Respondent also lacks sufficient knowledge or information with which to form a belief as to whether Complainant uses DVD mailpieces that meet the optional standards for discs in automation letter-sized mailpieces that are published in Domestic Mail Manual 201.3.3.

35. In response to the first sentence of this paragraph, Respondent admits that there is a non-zero risk of breakage, when DVDs are mailed in lightweight envelopes, as they are accepted, processed and/or delivered by Respondent, and that any such breakage has likely been experienced by all mailers of such DVD mailpieces. Regarding the second sentence, Respondent does not currently have a practice of

manually culling out the DVD mailpieces of Netflix and Blockbuster; their mail is routinely processed in the automated letters mailstream. However, Respondent admits that some manual culling of DVDs being returned from customers may occur in local mail processing by personnel at the AFCS; bypassing automated processing is motivated by an interest in getting all mail processed during the available window so as to meet service standards and would accordingly apply to a lot of mail that is otherwise capable of being processed on automated equipment. Moreover, Respondent denies that all or a significant majority of outbound DVD mail pieces (from the mailer to the customer) are manually processed; outbound pieces are consistently processed on automation.

36. Respondent admits that the identified OIG report exists. However, it studied only inbound DVD mailpieces processed in the letter mailstream, not Complainant's inbound or outbound flat mailpieces. That OIG report addressed a period in 2007 that no longer describes current mail processing policy. DVD mailpieces for other mailers, such as the largest movie DVD providers, are today typically processed in the automation letters mailstream, which conforms to current policy.

37. Respondent denies the allegations in the first sentence of this paragraph of the Complaint, since the Respondent has no current practice of manually culling incoming DVDs. Respondent admits that some culling of the incoming DVDS (returns from customers) may, however, occur despite the change in policy. As indicated in response to paragraph 36, above, manual culling – which can include DVDs – does

occur. Moreover, Respondent denies that all or any significant volume of outgoing DVD mail pieces (from the mailer to the customer) are processed manually. Respondent lacks sufficient knowledge or information with which to form a belief as to the allegations in the second sentence of this paragraph; while Gamefly representatives have proven capable of accessing mail processing areas normally closed to the public, Respondent denies that such representatives ever had an opportunity to conduct a quantitative study of mail processing operations nationwide; Respondent accordingly denies that any “large percentage” of inbound movie DVDs are processed manually.

38. Respondent denies the allegation that Complainant wants its mail processed manually, which it alleges are the terms and conditions offered to Blockbuster and Netflix (see Complaint, paragraphs 35-37.) Complainant has specifically and repeatedly requested that its pieces be processed on the AFSM 100, as reflected in mailpiece endorsements beneath the return address of each mailpiece. See *e.g.*, Attachments A and B to the Complaint. Complainant has worked extensively with Respondent’s personnel to increase the percentage of pieces that are processed on the AFSM 100. So, notwithstanding words in the Complaint to the contrary, Respondent firmly understands that Complainant wants to reduce the amount of manual handling its DVD flat mailpieces receive. Respondent further denies that the processing of movie DVD mailpieces in the letter stream define any useful standard against which the processing of Complainant’s flat mailpieces should be compared.

39. Respondent lacks sufficient knowledge or information with which to form a belief as to the allegations set forth in the first and second sentences of this paragraph those allegations are accordingly denied. Respondent lacks sufficient knowledge or information with which to form a belief as to the allegation in this paragraph's third sentence regarding the nature and extent of competition between Complainant and "a rival that is larger and longer established." Respondent denies this allegation together with the allegation in the third sentence that it gives "preferential treatment" to this rival. Respondent lacks sufficient knowledge or information with which to form a belief as to the allegation in this same sentence that this rival "enjoys a substantial cost advantage in the distribution of its DVDs to consumers" Respondent pleads affirmatively that the mailing practices of a DVD mailer who enters pieces at the one-ounce First-Class Mail automation letters price provides no useful comparison to Complainant's practice of entering DVD mail as two-ounce First-Class Mail single-piece flat price. Moreover, the fact that the former would incur lower postage costs than the latter accurately reflects the real differences in mailpiece characteristics which are properly reflected in the postage charged respective pieces. These inherent differences between outbound piece characteristics also inhere to the inbound pieces.

40. This paragraph consists of Complainant's declaration of intent to support the allegations in the foregoing paragraphs with documentary evidence and testimony. While no answer should be required, if one is Respondent denies paragraph 40..

41. This paragraph consists of Complainant's declaration of intent to seek evidence related to nine bulleted subject areas from Respondent through discovery. No answer seems to be required, although a denial is nonetheless supplied.

42. This paragraph consists of Complainant's declaration of its right to seek additional discovery as justified by further developments in this proceeding. No answer is deemed to be required, although a denial is nonetheless supplied.

43. Respondent admits the allegation in this paragraph of the Complaint.

44. Respondent admits the allegations in the first sentence of this paragraph, insofar as it asserts that multiple meetings were held involving postal personnel from late 2007 through the end of 2008 to discuss matters raised by Complainant. It is unclear from the face of the Complaint which matters alleged by Complainant constitute the "problems" referenced in this paragraph for which neither "solution" nor "settlement" were proposed by Respondent. Respondent denies the second sentence in this paragraph, insofar as it asserts or implies that Respondent has not considered Complainant's concerns or has never communicated potential solutions in response to matters brought to its attention.

45. Respondent admits the allegation in the first sentence of this paragraph of the Complaint, except to the extent that it implies that a specific settlement proposal was submitted by Complainant. Respondent denies the allegation in the second

sentence of this paragraph, insofar as it implies that there was no response to counsel for Complainant, or that Postal Service counsel has not met face-to-face, and has not discussed the gravamen of this Complaint with Complainant's counsel on more than one occasion.

46. In response to this paragraph of the Complaint, Respondent admits: that on March 23, 2009, counsel for Complainant transmitted to Postal Service counsel a draft complaint comprising the essential elements of the instant Complaint; that the draft was accompanied by an ultimatum for the Respondent to make a concrete proposal for processing Complainant's DVDs on terms and conditions specified by Complainant; that on March 26, 2009, counsel for Complainant communicated to Postal Service counsel the intent to submit the draft complaint to the General Counsel of the Postal Service, consistent with the terms of 39 C.F.R. § 3030.10(a)(9); that Postal Service counsel responded by suggesting that Complainant's counsel wait, pending ongoing discussions within the Postal Service concerning Complainant's grievances; and that, subsequently, on March 27, 2009, counsel for Complainant transmitted electronically a letter and draft complaint dated March 26, 2009, to General Counsel for the Postal Service.

47. In response to this paragraph of the Complaint, Respondent admits that, by letter dated March 26, 2009, transmitted electronically on March 27, 2009, counsel for Complainant submitted a draft complaint to the Postal Service's General Counsel, and thereby communicated to the Postal Service an ultimatum for the Postal Service to submit to Complainant a concrete proposal for processing Complainant's DVD mailers

on terms and conditions specified by Complainant. Respondent further admits that no such proposal has been communicated by it to Complainant.

48. Respondent incorporates its responses to paragraphs 1-39 by reference.

49. The allegations set forth in this paragraph of the Complaint argue for, or state, conclusions of law to which no response is deemed to be necessary. To the extent that a response is required, Respondent denies the allegations in this paragraph. Respondent specifically denies that complainant has ever sought or requested that its outgoing (to customers) or incoming (from customers) mail should be processed manually. Furthermore, the Postal Service does not have a policy of manually processing mail entered by other large DVD mailers for delivery to or from its customers.

50. Respondent incorporates its responses to paragraphs 1-39 by reference.

51. The allegations set forth in this paragraph argue for, or state, conclusions of law to which no response is deemed to be necessary. To the extent that a response is required, Respondent denies the allegations in this paragraph. The Postal Service specifically denies that mail entered as First-Class Mail two-ounce automation flats should always be processed other than as an automation flat, and that mail entered as First-Class Mail single-ounce automation letters should always be processed other than

as an automation letter. The Postal Service further denies the converse, that is: that First-Class Mail single-ounce automation letters must always be processed in the automation letters mailstream; and that First-Class Mail automation flats must always be processed in the automation flats mailstream. Further, Respondent denies that Complainant, a mailer of First-Class Mail automation flats is similarly situated to mailers of First-Class Mail automation letters.

52. Respondent incorporates its responses to paragraphs 1-39 by reference.

53. The allegations set forth in this paragraph argue for, or state, conclusions of law to which no response is deemed to be necessary. To the extent that a response is required, Respondent denies the allegations in this paragraph.

54. Respondent incorporates its responses to paragraphs 1-39 by reference.

55. The allegations set forth in this paragraph argue for, or state, conclusions of law to which no response is deemed to be necessary. To the extent that a response is required, Respondent denies the allegations set forth in this paragraph.

56. This paragraph of the Complaint constitutes a request that the Commission hold hearings in this matter and constitutes a prayer for specific relief at the conclusion of such hearings. No response is deemed to be necessary. To the

extent that a response is required, Respondent denies that Complainant is entitled to a hearing, or to the requested relief, or to any relief whatsoever.

57. This paragraph of the Complaint constitutes a prayer for specific relief and the assertion of Complainant's right to request additional relief. No response is deemed to be necessary. To the extent that a response may be required, Respondent denies that Complainant is entitled to the requested relief, or to any relief whatsoever.

Postal Service Position Regarding Docket No. C2009-1 Complaint

The Postal Service has incorporated discussion of the Complaint's merits, or the lack thereof, in response to respective enumerated paragraphs, above. In short, the Complaint lacks merit and fails to articulate grounds for any relief. Complainant seems to believe that problems of its own making can somehow be solved by the Postal Service when, in fact, they cannot – at least not without incurring costs that would be a disservice to all other mailers.

With respect to the four causes of action that Complainant raises, the Postal Service position is as follows:

Count I, styled as "Unlawful Discrimination Among DVD Mailers," alleges that the Postal Service has violated section 403(c) through its failure to provide manual processing of Complainant's mail. Flawed as this count is, Gamefly's own interaction with the Postal Service has sought a different outcome; this count also fails because it relies upon a false analogy.

In extensive and ongoing interaction with the Postal Service on all levels, Gamefly has sought to reduce the manual processing of its mail; its entire focus is to obtain automated handling upon the AFSM 100 for the purpose of harvesting Confirm scans. Indeed, Gamefly has three points it raises with postal officials. Process Gamefly mail on the AFSM 100 (while avoiding the DBCS which it claims damages pieces), assist Gamefly in identifying locations of employee theft (which the Postal Service has been and continues to do) and increase the percentage of pieces getting Confirm scans. Gamefly's business relies upon Confirm scans to identify where in the system pieces are stolen (where was its last scan?) and upon the first scan of an inbound piece, it ships a customer's next preferred game.

Count I depends upon unexamined assumptions to argue that all DVD round trip mailers are members of a protected class, such that each must be treated the same by the Postal Service. In fact, other DVD mailers use single-ounce letter rates, with essentially all outbound pieces handled on letter automation, and most inbound pieces handled the same. Gamefly instead uses flats rates, and two-ounce mail pieces. The differences in mail processing operations are substantial. While most letters can be processed on flats equipment, only some flats can be processed on letter equipment: this last category is exactly where Gamefly's pieces hit the system. The best way of to get flats out of letter automation is to make them tall enough. Despite years of Gamefly having gotten this message from postal employees, inbound Gamefly mail is not extracted as a flat automatically from the DPRC (the first piece of equipment most inbound collection mail encounters) because it is not tall enough. Especially when the

piece folds on a horizontal axis (which it has a tendency to do), it is easily within the boundaries of what letter processing equipment can handle.

The other major flaw in Count I is the assertion that other DVD mailers are provided expedited or manual handling. An OIG report did conclude, early in FY 2008, that the Postal Service was providing manual handling without assessing a nonautomation surcharge. The Postal Service built on that experience such that today letter size DVD mailpieces consistently run on letter automation equipment. This is true for both outbound and inbound pieces, although less consistently so when inbound. Official policy is not to handle such inbound pieces manually, although some of it is handled that way as previously explained.

Count I accordingly fails because all DVD mailers are not equal. Gamefly could get the inbound flats automation handling it wants by changing its mailpiece, and Gamefly in fact receives at least similar handling as other DVD mailers, after allowing for processing stream distinctions.

Count II, styled as “Unlawful Discrimination Among Flats Mailers,” fails for similar reasons. This count amounts to a claim that if flats automation rates are paid, flats automation handling must be provided.³ The Postal Service has never endorsed such a novel concept nor, to its knowledge, has the Commission. Indeed, the history of automated mail processing is one in which the versatility of any processing flow improves over time to expand the range of what it can handle. And once again, Gamefly’s choice of mailpiece design impacts where it gets processed. In short, Gamefly seeks a particularized sequence of mail processing operations, most but not all

³ Indeed, Gamefly would not prefer just any flats processing, but only on the AFSM 100, a machine that is not available everywhere.

automated, to get processing that minimizes handling (and the opportunity to steal), maximizes Confirm scans, and minimizes damage. The Postal Service cannot reasonably promise that mail will follow a single path through mail processing, and Gamefly should not be allowed to impose such an unworkable promise on the Postal Service through the complaint process.

With respect to inbound pieces, the design of Gamefly's piece is such that the piece will not be automatically diverted from the letter mail stream and to the flats mail stream. The mail piece shape and design is such that processing personnel would not necessarily conclude that it is a flat. The Postal Service has worked extensively on increasing the amount of mail that is manually diverted to the flats processing stream. Regardless of these efforts, an attempt to ensure the processing of flat-rated pieces on letter automation machines is not an appropriate basis for a section 403(c) claim.

Count III, styled as "Failure to Provide Reasonable And Equitable Rates and For DVDs Entered at First-Class Rates For One-Ounce Flats," is a close variation of Count II, citing §404(b) rather than §403(c). In essence, this Count claims that the Postal Service requires Gamefly to pay a second-ounce rate as a condition of obtaining flats processing, but then processes mail on letters equipment. One obvious flaw with this argument is its (logical but legally cognizable) inconsistency with Gamefly's Count II claim that it is not getting the flats processing for which it has paid. The automated processing of Gamefly's inbound pieces receive is a function of the logic – based on size, shape, and stiffness – that must be applied to each piece. Each logic gate is binary and can be set only one way, but as pieces approach a decision threshold, one cannot predict with one hundred percent accuracy how a given piece will flow. Gamefly

can meet one or more of its primary goals, but has been unable to force a single preferred flow path with its mailpiece design, so it asks the Commission to do so instead.

Count IV, styled as “Failure To Provide Reasonable And Equitable Rates and For DVDs Entered at First-Class Rates For Flats,” simply repeats elements of Counts II and III. The gist of it is once again that Gamefly is not getting the flats processing that it would prefer with its current mailpiece design, again citing §404(b).

Section 404(b) does not appear within the list of sections in title 39 over which the Commission has complaint jurisdiction.

Complainant has failed to state a claim upon which relief can be granted. There is no statutory or other basis for prescribing a specific processing path for Complainant’s mail, and such an effort would be untenable. Furthermore, there is no basis to prescribe a specific rate for these types of pieces. Finally, the Postal Service opposes both unbridled discovery and a hearing and believes that the issues need to be considered carefully. The Postal Service urges the Commission to decline this opportunity to specify one particular processing path for one mailer’s DVD flats.

WHEREFORE, the Postal Service, having provided an Answer in this matter, urges that the Commission consider whether its consideration of this matter continues to be warranted.

Respectfully submitted,

UNITED STATES POSTAL SERVICE

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