



topic from this document does not constitute an admission that the topic is not relevant to this proceeding.

The parties have discussed a discovery schedule, but could not reach a consensus concerning the length of the period for discovery. The parties agreed to address this issue at the prehearing conference.

**A. GameFly And Its Business**

1. GameFly is a company engaged in the online rental of video games.
2. GameFly is incorporated in Delaware.
3. GameFly is headquartered in Los Angeles, California.
4. GameFly was founded in 2002.
5. GameFly offers more than 6,000 titles for rental.
6. The game DVDs offered for rental by GameFly are formatted for the Playstation 3, Playstation 2, PSP, Xbox 360, Xbox, Wii, GameCube, Nintendo DS and GameBoy Advance.
7. GameFly charges subscribers by the month, not by the game. For a flat monthly fee, a GameFly subscriber may rent as many games as desired up to a maximum of four games at any one time, and play them as long as desired, with free shipping, no due dates and no late fees.

8. As of this date, a monthly subscription price of \$15.95 a month (plus any applicable state or local tax) allows a subscriber to rent one game at a time from GameFly. A monthly subscription price of \$22.95 a month (plus tax) allows a subscriber to rent two games at a time. A monthly subscription price of \$29.95 a month (plus tax) allows a subscriber to rent three games at a time. A monthly subscription price of \$36.95 (plus tax) allows a subscriber to rent four games at a time.

9. When the subscriber returns a game to GameFly, GameFly mails to the subscriber the next game previously chosen by the subscriber.

10. Subscribers also have the option of buying most games, rather than returning them.

11. Consumers subscribe to GameFly, and maintain and update lists of desired games, through the company's web site, [www.gamefly.com](http://www.gamefly.com).

12. GameFly also sells used video games.

13. Most of the games rented and sold by GameFly are recorded on DVDs. Other games are recorded on media contained in plastic cartridges; such games are beyond the scope of this Complaint, which relates to the handling of DVD mail.

14. GameFly competes with other DVD video game by mail rental companies with similar business models (e.g., Gamerang and GottaPlay); weekly rental companies (e.g., Blockbuster and Hollywood); and sell-through vendors (e.g., GameStop, Best Buy, Target and Toys R Us).

**B. GameFly's Mailing Practices**

15. GameFly distributes its video game DVDs to subscribers via First-Class Mail entered as single-piece flats.

16. GameFly currently enters these mailings at Postal Service facilities in Los Angeles, Pittsburgh, Tampa, and Austin, the four cities where GameFly has shipping centers.

17. GameFly pays the outbound postage for its DVD mailings to rental subscribers and purchasers at the time of mailing.

18. Rental subscribers return video game DVDs to GameFly in preaddressed reply mailers via First-Class Mail Business Reply Mail.

19. GameFly pays the postage and fees for inbound DVD mailings through a Business Reply Mail account with the Postal Service.

20. GameFly uses a two-way DVD mailer. The outer face of the mailer is addressed to the subscriber. To use the mailer for the return trip, the subscriber tears off the outer face to reveal an inner face with the BRM indicia and a GameFly mailing address.

21. In June 2009, GameFly mailed approximately 633,000 DVDs to its subscribers, and received approximately 569,000 DVDs in return mail from its subscribers.

22. GameFly's monthly mail volume has increased by approximately 120 percent from July 2006 to June 2009, a compounded annual growth rate of 30 percent.

23. In July 2008, shortly after GameFly opened its distribution center in Austin, Texas, the Postal Service published an article in its daily employee newsletter, excerpted below, discussing GameFly's use of the Postal Service:

LET THE GAMES BEGIN

Austin's service lures company

GameFly may be a relatively new company, but it's using an old idea—getting USPS to help it grow.

Company founders modeled the video game rental company on Netflix, the movie rental-by-mail mogul. Like Netflix, pre-paid postage on all GameFly's rentals is included with membership.

GameFly just opened its fourth distribution center – this one in Austin, TX. Why Austin? One of the company's co-founders recently told a reporter that “the city's excellent U.S. Postal Service facility” was a big factor.

Los Angeles-based GameFly stocks and mails about 6,000 game titles from distribution centers in L.A., Pittsburgh, PA, Tampa, FL, and – now – Austin. Grand Theft Auto IV, Mario Kart Wii, Call of Duty 4 and Halo 3 are currently the most-requested games.

USPS News Link (July 2, 2008) (italics in original changed to underlining).

24. GameFly uses Confirm scans on both the outbound and return trips. The receipt of a Confirm scan for a return piece enables Gamefly to determine that a subscriber's game is en-route, and on that basis GameFly sends the next game to the subscriber. This allows GameFly customers to receive games more quickly than if GameFly waited to mail the next game until the return piece arrived at one of the four GameFly shipping centers.

**C. DVD Breakage**

25. A DVD is small and light enough such that certain providers of online DVD rental services are currently mailing movie DVDs in a lightweight mailer with the combined mailpiece qualifying as a one-ounce letter.

26. *GameFly contends that video game DVDs in lightweight mailers can also be mailed as one-ounce letters.*

27. DVDs enclosed in lightweight mailers, when processed on Postal Service processing equipment, can experience breakage.

28. *GameFly contends that the rate of breakage of DVDs in lightweight mailers, when processed on Postal Service automated letter process equipment, is substantial, and can be as high as five percent per return trip.*

29. *GameFly contends that a new video game DVD costs GameFly as much as \$50 to purchase.*

30. The occurrence of DVD breakage depends on numerous factors.

31. Some amount of the DVD breakage experienced by GameFly is due to mishandling by GameFly customers.

32. *The Postal Service contends that some amount of the DVD breakage experienced by GameFly is due to mishandling by GameFly employees.*

33. *The Postal Service contends that: (a) DVDs may have different characteristics (e.g., DVDs vary in their thickness); (b) a DVD containing a video game*

*is generally thicker than a DVD containing a movie, which is thicker than a blank DVD sold to consumers; and (c) thicker DVDs are less flexible and heavier.*

34. *GameFly disputes that videogame DVDs and movie DVDs differ significantly in thickness, weight or flexibility. GameFly also disputes that any differences in the thickness, weight or flexibility of DVDs account for the difference in the breakage rates of DVD mailers that receive automated processing vs. DVD mailers that receive manual processing.*

35. *The Postal Service contends that the occurrence of DVD breakage can depend on the number of “rental cycles” an individual DVD has experienced (i.e., the number of times the DVD has been entered by a DVD mailer into the mail stream, processed on the outbound leg, delivered, handled by the DVD mailer’s customer, mailed by the customer, and processed on the return leg).*

36. *GameFly contends that the extent of automated letter processing of a DVD mailer by the Postal Service is the most important determinant of the rate of breakage of DVDs sent through the mail.*

37. *GameFly contends that the avoidance of automated letter processing of DVD return mailers by the Postal Service—with no change in the physical attributes of the DVD, its handling by the employees and customers of the DVD rental company, and the average number of mailing cycles per DVD—can reduce the average DVD breakage rate from approximately five percent per return trip to less than one percent per return trip.*

**D. Design of GameFly's Mailers**

38. Since 2002, GameFly has tested a number of mailer designs, with a goal of reducing the breakage rate of its DVDs, particularly inbound DVDs from consumers, in Postal Service automated sorting equipment.

39. GameFly and the Postal Service have tested a number of mailer designs with a goal of increasing the chances that the mail piece is successfully diverted to the flats stream by Postal Service mail processing equipment.

40. *GameFly contends that none of these means has achieved an acceptable rate of breakage at an acceptable cost.*

41. GameFly has requested automated flats processing of its DVD mailers in the past.

42. Pieces that are manually culled do not receive Confirm scans.

43. *The Postal Service contends that automated flats processing has been important to GameFly because of its desire to receive Confirm scans.*

44. *The Postal Service contends that GameFly has in the past requested automated flats processing in lieu of other types of processing, including manual processing.*

45. *GameFly contends that it has requested automated flats processing because of (a) the high rate of DVD breakage caused by automated letter processing, and (b) the failure of the Postal Service to offer GameFly manual culling and high priority manual processing of DVDs mailed at letter rates—i.e., the service offered to Netflix.*

*GameFly, while agreeing that Confirm is a useful ancillary service, denies that GameFly's business model relies on Confirm scans, or that the availability of Confirm scans has been the reason for GameFly's use of automated flats processing. GameFly further contends that it would abandon its request for automated flats processing—and Confirm service—if the Postal Service offered GameFly manual culling and high priority manual processing of DVD return mailers entered at letter rates on terms comparable to those currently offered to Netflix.*

46. *GameFly contends that simply paying the rates for flat-shaped First-Class Mail (with flats paying more postage than similar weight letters since implementation of the rates established in Docket No. R2006-1), and marking the mailers with warnings such as “**FIRST-CLASS MAIL FLAT**” and “**PROCESS ON AFSM-100**” were insufficient to avoid a high rate of breakage.*

47. *GameFly contends that increasing the height of the mailer to eight inches, without a cardboard protective insert, did not reduce the breakage rate to acceptable levels.*

48. *GameFly includes a cardboard protective insert in its mailer. The combined weight of the DVD and the mailer and protective insert used by GameFly exceeds one ounce, thus requiring the payment of postage for a two-ounce First-Class Mail flat.*

49. *GameFly contends that the cardboard insert, when inserted in the mailer, is thick enough to cause its culling or diversion from automated letter processing.*

50. The Postal Service has proposed that GameFly use mailers at least 8.5” in height, suggesting that this would ensure that the pieces are mechanically culled to the flats mailstream before arriving at the AFCS. Flats machines do not have the multiple turns that letter sorting equipment has.

51. *According to GameFly, a DVD mailpiece at least 8.5” in height with sufficient stiffness not to fold over would exceed one ounce in weight, and thus would require the payment of postage for a two-ounce First-Class flat.*

52. The Postal Service acknowledges that an 8.5” tall mailpiece with sufficient stiffness not to fold over may well exceed one ounce.

53. *GameFly contends a DVD mailer at least 8.5” in height would not reduce breakage to the same extent as GameFly’s current “shorter” mailer with a protective insert.*

54. *GameFly contends that the production of a DVD mailer 8.5” or more tall would be difficult or infeasible.*

55. *The Postal Service contends that: (a) the mailer currently being used by GameFly is configured such that the placement of the DVD on the return trip leaves a floppy portion at the bottom of the mail piece; (b); this floppy portion can fold up during processing; (c); this can hinder processing; and (d) the GameFly mail piece is a “fletter,” in that Postal Service mail processing personnel may view it as having the characteristics of a letter.*

**E. Loss Of GameFly DVDs In Transit**

56. In addition to breakage, GameFly DVD mailers have experienced loss in transit. The Office of Inspector General and the Postal Inspection Service have, with the assistance of GameFly, undertaken vigorous efforts to control the problem.

57. OIG/Postal Inspection Service investigations have led to the arrest of a number of Postal Service employees and contractors for alleged theft of GameFly DVDs at a number of Postal Service facilities. Many of these arrests have occurred since the beginning of 2007.

58. These enforcement initiatives have reduced, but not eliminated, losses from theft.

59. Some loss also occurs as a result of fraud by GameFly customers.

**F. GameFly's Mailing Costs**

60. At the time of the Complaint, the postage for a DVD mailer entered as a First-Class Mail single-piece one-ounce letter was \$0.42. On May 11, 2009, the rate increased to \$0.44.

61. At the time of the Complaint, the postage for a DVD mailer entered as a First-Class Mail single-piece one-ounce flat was \$0.83. On May 11, 2009, the rate increased to \$0.88.

62. At the time of the Complaint, the postage for a DVD mailer entered as a First-Class Mail single-piece two-ounce flat was \$1.00. On May 11, 2009, the rate increased to \$1.05.

63. In addition to postage, GameFly incurs additional costs for loss, theft and breakage of DVDs. Some of this breakage, loss, and theft occurs between mailing and delivery (i.e., while being handled by the Postal Service), and some occurs for other reasons, including action by GameFly customers.

**G. Postal Service Handling Of Netflix DVD Mail**

64. Netflix, Inc. (“Netflix”) also engages in the DVD rental by mail business. Netflix offers its subscribers movies rather than video games.

65. Netflix uses a two-way DVD mailer. The outer face of the mailer is addressed to the subscriber. To use the mailer for the return trip, the subscriber tears off the outer face to reveal an inner face addressed to Netflix.

66. Netflix distributes its DVDs to subscribers by First-Class Mail.

67. Netflix mails its DVDs to subscribers at the presorted letter rates within First-Class Mail.

68. Netflix pays the postage for these mailings at the time of mailing.

69. Subscribers return the DVDs to Netflix in preaddressed reply mailers via First-Class Mail Permit Reply Mail (“PRM”).

70. Round-trip DVDs are returned to Netflix as one-ounce letters at a rate of 44 cents in postage, i.e., the one-ounce single-piece letter rate.

71. Netflix pays the postage for these return mailings.

72. According to information on Netflix's website, it currently has 58 distribution centers.

73. In 2002, Netflix submitted samples of its DVD mailpieces for testing by the Postal Service's Engineering Department.

74. On or about June 11, 2002, the Postal Service's Engineering Department evaluated the Netflix DVD mailpieces.

75. *The Postal Service contends that its Engineering Department concluded on June 11, 2002, that the outbound Netflix DVD mailpieces were processed without problems, but that processing problems were encountered on the inbound Netflix DVD mailpiece. According to the Postal Service, the letter concluded that the mailer was not automation-compatible.*

76. *GameFly contends that the Postal Service's Engineering Department concluded on or about June 11, 2002, that the Netflix DVD mailpieces were too rigid or fragile to be machinable.*

77. On or about June 17, 2002, Netflix sent an email to Anita Bizzotto, then Chief Marketing Officer of the Postal Service, and George Laws, Manager Letter Mail Technology, asking for a review of the conclusions of the Engineering Department.

78. By letter dated June 24, 2002, Sherry Freda, then Manager of Mailing Standards of the Postal Service (and a subordinate of Ms. Bizzotto), advised Netflix that (a) the outbound Netflix DVD mailer was automation-compatible, and (b) the return DVD mailer was "machinable," although "not completely automation-compatible."

79. Postal Service processing operations in the field often manually cull Netflix return DVD mailers from the automated letters mailstream for manual processing. Some portion of Netflix return mail is processed in the automation mailstream.

80. *GameFly contends that since 2002, the Postal Service has had a pattern and practice of offering mail service to Netflix on terms more favorable than the terms offered to other DVD rental companies, and that there continues to be an understanding between the Postal Service and Netflix that its DVD mailers will continue to receive manual culling at the point of induction, and diversion to high-priority manual processing.*

81. *The Postal Service contends that mail processing decisions concerning the automated or manual handling of Netflix DVD return mail are made locally based on determinations as to what makes the best sense in the local mail processing environment, and that processing decisions to remove Netflix mail from automated operations ensure the overall efficiency of mail processing operations, based on the characteristics of Netflix mail (such as the density of its volume).*

82. The Postal Service does not require Netflix to pay a nonmachinable surcharge.

83. A report by the Postal Service's Office of Inspector General in November 2007 found that Postal Service employees "manually process approximately 70 percent of the approved First-Class [Mail] two-way DVD return mailpieces from one DVD rental company because these mailpieces sustain damage, jam equipment and cause missorts during automated processing." USPS Office of Inspector General, Audit Report No. MS-

AR-08-001, *Review of Postal Service First-Class Permit Reply Mail* (November 8, 2007), cover letter from Tammy L. Whitcomb, Deputy Assistant Inspector General for Revenue and Systems, at 1; *accord*, OIG Report at 4 & n. 3.

84. The unnamed DVD rental company to which the OIG report referred was Netflix.

85. *GameFly contends that the manual culling of Netflix return DVD mailers at the point of induction, and their diversion to high-priority manual processing, have remained standard practice.*

86. *The Postal Service contends that Headquarters policy is to allow local officials to determine whether to process Netflix DVD returns on processing equipment or manually.*

87. The Postal Service acknowledges that manual culling of Netflix return DVD mailers has continued since the issuance of the OIG Report. See also paragraph 79.

88. Area and District officials of the Postal Service are aware of these decisions to manually process Netflix return mailers.

89. *GameFly contends that Area and District officials of the Postal Service have explicitly mandated or encouraged the manual culling and processing of Netflix return DVD mailers.*

90. Headquarters officials of the Postal Service have been aware that the manual culling and processing of Netflix return DVD mailers has often occurred since November 2007. See also paragraph 79.

91. Netflix pays neither flats prices nor a second-ounce charge. As a result, the postage per piece incurred by Netflix for Permit Reply Mail is less than half the two-ounce flats postage incurred by GameFly (\$1.05 as compared to \$0.44).

92. Since 2007, Postal Service Engineering has concluded that seven two-way DVD mailers submitted by several companies other than Netflix were operationally nonmachinable. These mailers were of similar size, weight, and construction to the Netflix two-way DVD mailer determined by Postal Service Mailing Standards in 2002 to be machinable.

#### **H. Postal Service Handling Of Blockbuster DVD Mail**

93. Blockbuster Inc. (“Blockbuster”) also engages in the DVD movie rental by mail business; it also recently began offering DVD video games as well.

94. Blockbuster uses a two-way DVD mailer for mailings of movie DVDs. The outer face of the mailer is addressed to the subscriber. To use the mailer for the return trip, the subscriber tears off the outer face to reveal an inner face addressed to Blockbuster. Blockbuster also uses a two-way DVD mailer for video games.

95. Blockbuster distributes its DVDs to subscribers by First-Class Mail.

96. Blockbuster mails its DVDs to subscribers at presorted First-Class Mail rates.

97. Blockbuster pays the postage for these mailings at the time of mailing.

98. Subscribers either return the DVDs to Blockbuster in preaddressed reply mailers via First-Class Mail Qualified Business Reply Mail (“QBRM”), or return the DVD by hand-delivery to a Blockbuster retail store.

99. Prior to June 2008, Blockbuster mailers that were returned in the preaddressed reply mailers through the mailstream were paid via First-Class Mail Business Reply Mail.

100. Round-trip movie DVDs are returned to Blockbuster as one-ounce letters that pay the High Volume QBRM rate of 42.4 cents.

101. Blockbuster pays the postage and QBRM fees for these return mailings.

102. On or about February 23, 2006, Blockbuster formally asked the Postal Service to “immediately implement manual culling and processing of inbound mail pieces for Blockbuster Online” to mitigate the “persistent damage to mailer contents and longer mail duration rates as judged against comparable mailings.”

103. Blockbuster also requested in subsequent communications that its return pieces not receive automated processing.

104. *Gamefly contends that the reason offered by the Postal Service to Blockbuster for denying its requests was that no other Postal Service customer was receiving such manual processing. Gamefly further contends that, with respect to Netflix, this statement was false.*

105. *The Postal Service contends that the basis for its declination of requests from Blockbuster that its return pieces be handled based on a nationwide policy of*

*manual processing was that any decision to manually process such pieces was a local decision and that Headquarters would not issue a blanket national policy overriding local decision-making with regard to the manual or automated handling of DVDs. The Postal Service contends that this position was consistent with its position concerning the handling of Netflix DVD return mail.*

106. *GameFly contends that since 2006 the Postal Service has provided manual culling and processing to an increasing share of Blockbuster's inbound mail volume. GameFly contends that the manual culling of a large share of Blockbuster return DVD mailers at the point of induction, and their diversion to high-priority manual processing, have remained common practice since November 2007. GameFly contends that manual culling and high-priority manual processing of a large share of Blockbuster DVD mailers continues to be explicitly encouraged, mandated or approved by area and district officials of the Postal Service. GameFly contends that Headquarters officials of the Postal Service have acquiesced in or affirmatively approved of the manual culling and high-priority manual processing of a large share of Blockbuster DVD mailers since November 2007.*

107. *The local practice in many instances was to manually process Blockbuster return pieces.*

108. *The Postal Service contends that Blockbuster was advised in 2008 that the switch to QBRM would result in automated processing of its return pieces in order for postage to be assessed. However, some level of manual handling may still be occurring based on local decision-making as to the most efficient processing path for those pieces.*

109. *GameFly contends that automated processing of DVD reply mailers to obtain piece counts for assessing postage can be performed in a manner that produces lower breakage rates than does normal automated letter sorting.*

110. Blockbuster does not pay a nonmachineable surcharge on its return pieces.

111. Until recently, neither Netflix nor Blockbuster offered video game DVDs for rental. On February 11, 2009, however, Blockbuster announced that it was implementing a pilot program expanding its DVD rental service to include, for select customers, video games in the second quarter of 2009. Blockbuster stated that its goal was to have this offering be available nationwide sometime in the second half of this year.

112. As a result of this initiative, GameFly now faces direct competition from a company that is larger in revenues and mail volume (when including movie DVDs), and longer established.

#### **I. Discussions between GameFly and the Postal Service**

113. GameFly and the Postal Service have had multiple meetings and telephone calls since late 2007 in an effort to find a mutually satisfactory solution to GameFly's concerns.

114. On October 4, 2007, GameFly met in L'Enfant Plaza with representatives of the Postal Service's Operations, Engineering and Mailing Standards groups, and met separately with the Office of Inspector General.

115. On December 19, 2007, GameFly had multiple meetings in L'Enfant Plaza with representatives of the Postal Service's Operations, Engineering, Mailing Standards and Pricing Groups.

116. In December 2007, GameFly and Postal Service Engineering tested a variety of mailer configurations at the USPS facility in Merrifield, Virginia, in an effort to design a mail piece that would be mechanically culled by USPS equipment out of the letter mailstream and into the flats mailstream.

117. Further tests were performed in April 2008, with Postal Service Engineering and GameFly participating.

118. On September 10, 2008, GameFly had separate meetings in L'Enfant Plaza with the representatives of the Postal Service Operations, Engineering and Mailing Standards groups, and with the Pricing group.

119. From July 2007 to July 2008, GameFly performed "live mail" tests of multiple mailer configurations. These tests were performed without the involvement of Postal Service Engineering.

120. Beginning in December 2007, GameFly asked the Postal Service to offer in the alternative a reduced rate for round-trip DVD mailers, or a niche classification that would avoid the need to pay a two-ounce flats rate for qualifying DVD mailers.

121. In December 2008, GameFly requested that the Postal Service waive the additional ounce rate for GameFly pieces as part of the general price changes that were ultimately approved in Docket No. R2009-2 and implemented by the Postal Service in

May 2009. GameFly made these requests at meetings with the Postal Service's current Manager, Pricing Strategy; the previous Manager, Pricing Strategy; and David Shoenfeld, the Postal Service's then-Senior Vice President, Mailing Services. GameFly stated to Mr. Shoenfeld that the company was proposing this relief as an interim, not ultimate, solution.

122. The Postal Service declined to include any of the pricing and classification proposals suggested by GameFly in the price and classification changes filed by the Postal Service with the Commission in May 2008 in Docket No. R2008-1, in May 2009 in Docket No. R2009-2, or in any other docket.

123. In a number of meetings and communications, GameFly asked the Postal Service to provide processing of GameFly DVD mailers on the AFSM 100 automated flats sorter. GameFly personnel also requested AFSM 100 processing at meetings with various Postal Service field officials at the National Postal Forum in May 2009.

124. *The Postal Service contends that GameFly specifically requested AFSM 100 processing in preference to manual processing, and that GameFly's stated reasons for preferring AFSM 100 processing were to enable GameFly to receive Confirm scans, reduce the amount of breakage, and reduce the amount of theft.*

125. *GameFly contends that it requested AFSM 100 processing because the Postal Service had not offered GameFly manual culling and high priority manual processing of DVD return mailers entered at letter rates. GameFly further contends that it would accept culling and manual processing of DVD return mailers entered at letter*

*rates on terms comparable to those currently offered to Netflix, in preference to AFSM 100 automated processing, if given the option.*

126. Beginning in January 2009, counsel for GameFly and counsel for the Postal Service engaged in email and telephone exchanges to discuss GameFly's concerns.

127. On March 23, 2009, GameFly counsel and Daniel J. Foucheaux, Jr., Chief Counsel, Pricing and Product, for the Postal Service, discussed this matter by telephone. Gamefly sent an email to Mr. Foucheaux requesting a meeting by April 22, 2009 to resolve or settle the issues stated in this complaint. A draft of GameFly's Complaint was attached to the email. Paragraphs 2, 34-40 and 47 of the draft complaint stated that, unless GameFly's grievances were resolved, GameFly intended to challenge as unduly discriminatory the Postal Service's practice of offering Netflix and Blockbuster, but not GameFly, manual culling and processing DVD mailers entered at letter rates.

128. On March 26, 2009, Gamefly sent an email to Mr. Foucheaux notifying him it was going to file a letter with Mary Anne Gibbons, General Counsel of the Postal Service, in conformance with the complaint rules that had been recently promulgated in Docket No. RM2008-3. In an email response, Mr. Foucheaux confirmed receipt of this email on March 26, 2009, and also stated that "There is some movement internally (a meeting has been scheduled). I have no idea where it will go, but it could lead to something." The Postal Service did not further respond to the email.

129. Also on March 26, 2009, GameFly sent a letter to Mary Anne Gibbons, the Postal Service's General Counsel, requesting a meeting by April 22, 2009 to resolve or settle the issues stated in GameFly's draft Complaint. The letter stated that the

complaint would be filed on April 23, 2009 unless the Postal Service submitted to GameFly by April 22 a “concrete proposal for processing GameFly DVDs on terms and conditions offered to two large DVD mailers, Netflix and Blockbuster.” A draft of the Complaint was attached to the letter. Paragraphs 2, 35-39, 41 and 47 of the draft complaint stated that, unless GameFly’s grievances were resolved, GameFly intended to challenge as unduly discriminatory the Postal Service’s practice of offering Netflix and Blockbuster, but not GameFly, manual culling and processing DVD mailers entered at letter rates.

130. Neither Ms. Gibbons nor any other employee of the Postal Service submitted the proposal requested by GameFly, or otherwise responded to the May 26 letter, by the close of business on April 22, 2009.

131. GameFly filed its Complaint on the following day, April 23, 2009.

**J. GameFly Requests For Relief**

132. GameFly asks in this proceeding that the Commission order the Postal Service to offer GameFly’s DVD mailers processing on terms and conditions substantially identical to those offered to Netflix.

133. Alternatively, GameFly is willing to accept the establishment of alternative terms and conditions of service that yield a comparably low rate of DVD breakage and theft at comparable rates of postage, if the Postal Service and GameFly can reach agreement on such terms.

Respectfully submitted,

David M. Levy  
Jennifer T. Mallon  
Matthew Field  
VENABLE LLP  
575 7th Street, N.W.  
Washington, DC 20004  
(202) 344-4800  
[dlevy@venable.com](mailto:dlevy@venable.com)

**Counsel for Complainant,  
GameFly, Inc.**

UNITED STATES POSTAL SERVICE  
By its attorneys:

Daniel J. Foucheaux, Jr.  
Chief Counsel, Ratemaking  
Kenneth N. Hollies  
Keith Weidner

475 L'Enfant Plaza West, S.W.  
Washington, D.C. 20260-1137  
(202) 268-3083, Fax -3084  
[daniel.j.foucheaux@usps.gov](mailto:daniel.j.foucheaux@usps.gov)

July 20, 2009