

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

COMPLAINT OF GAMEFLY, INC.

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Docket No. C2009-1

**RESPONSE OF GAMEFLY, INC.,
TO MOTION OF NETFLIX, INC.
FOR ACCESS TO NON-REDACTED PORTION OF
GAMEFLY RESPONSE TO POSTAL SERVICE OPPOSITION
TO GAMEFLY MOTION TO COMPEL
(September 14, 2009)**

GameFly, Inc. ("GameFly") hereby responds to the September 9 motion of Netflix, Inc., for access to the non-redacted portions of GameFly's September 3 response to the August 31 opposition of the Postal Service to GameFly's August 24 motion to compel responses to certain discovery requests. What legitimate interests the request would serve is unclear. Netflix has chosen not to intervene as a party in this case. Moreover, Netflix will be entitled under 39 C.F.R. § 3007.31(b) to notice and opportunity to be heard in opposition to any motion under 39 C.F.R. § 3007.31(a) to terminate the protected status of any Netflix materials that the Postal Service has marked as protected. Nevertheless, GameFly does not object to Netflix's motion for disclosure of the sealed material to Timothy J. May, outside counsel for Netflix. Nor does GameFly object to disclosing to David Hyman, General Counsel of Netflix, the portion of the sealed material that does not concern Blockbuster.

A portion of the sealed material, however, concerns Blockbuster. The Postal Service has identified this material, like the material concerning Netflix, as proprietary. Although GameFly believes that the Blockbuster material—like the Netflix material—

does not warrant continued protection from public disclosure, Blockbuster has not had an opportunity to be heard on this issue, and the Commission has not ruled on it.

If any of the Blockbuster material is ultimately found to merit continued protection, Mr. Hyman's eligibility to gain access to the material under Order No. 225 is unclear. Order No. 225 provides that

[N]o person involved in competitive decision-making for any entity that might gain competitive advantage from use of this information shall be granted access to these materials shall be granted access to these materials. "Involved in competitive decision-making" includes consulting on marketing or advertising strategies, pricing, product research and development, product design, or the competitive structuring and composition of bids, offers or proposals. It does not include rendering legal advice or performing other services that are not directly in furtherance of activities in competition with a person or entity having a proprietary interest in the protected material.

Order No. 225, Appendix A to Part 3007, 74 Fed. Reg. 30938, 30947 (June 29, 2009).

Netflix and Blockbuster are direct competitors in the market for in-home video entertainment. Indeed, Netflix's most recent Form 10-K to the Securities and Exchange Commission describes Blockbuster as one of Netflix's "principal competitors." Netflix Inc. Form 10-K for the Period Ending December 31, 2008 (filed Feb. 25, 2009) at 5-6.¹ This raises a potential issue, because it is not uncommon for in-house general counsel to be involved in competitive decision-making and other business issues as well as the rendering of legal advice.²

¹ GameFly regards both Netflix and Blockbuster as competitors to GameFly in the market for in-home video entertainment. The documents at issue, however, do not contain any material that is proprietary for GameFly.

² GameFly take no position here on whether Mr. Hyman is in fact "involved in competitive decision-making" within the meaning of Order No. 225.

GameFly plans to file a motion to unseal the material later this week. Under the circumstances, we believe that the most prudent course is to limit Mr. Hyman's access to the Blockbuster-related material until Blockbuster has had an opportunity to be heard on (1) GameFly's motion to unseal and (2) Mr. Hyman's right of access to any Blockbuster material at issue that may remain sealed.

Respectfully submitted,

David M. Levy
Matthew D. Field
VENABLE LLP
575 7th Street, N.W.
Washington, DC 20004
(202) 344-4800

Counsel for GameFly, Inc.

September 14, 2009