

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

COMPLAINT OF GAMEFLY, INC.

)  
)  
)

Docket No. C2009-1

**MOTION OF GAMEFLY, INC.,  
TO SCHEDULE STATUS CONFERENCE  
(December 14, 2009)**

Pursuant to Rules 3001.24 and 3001.25(c), GameFly, Inc. respectfully requests that the Commission schedule an on-the-record hearing to consider appropriate remedies for the Postal Service's failure to respond fully to numerous GameFly discovery requests, many of which have been outstanding for months. In support thereof, GameFly respectfully states as follows:

(1) The Postal Service has been notorious in recent years for its tardiness in responding to discovery in rate and classification cases. See, e.g., Presiding Officer's Ruling No. MC2007-1/5 (May 3, 2007) at 2 (noting Postal Service's "inordinate number of interrogatory responses filed out of time" and the "cumulative negative effect on the discovery process" from this chronic tardiness). This case is no exception. See Presiding Officer's Ruling No. C2009-1/7 (Oct. 7, 2009) (granting Postal Service 17-day extension of deadline for responding to GameFly motion to unseal); Presiding Officer's Ruling No. C2009-1/9 (Oct. 16, 2009) (accepting six sets of Postal Service discovery responses out of time); Presiding Officer's Ruling No. C2009-1/14 (December 7, 2009) (accepting nine sets of Postal Service discovery responses out of time). Within the past

few weeks, however, the Postal Service's progress in working off the backlog of unanswered questions has come to a virtual standstill.

(2) The response deadlines for nine GameFly discovery requests (11, 148, 149, 155, 156 and 221 through 224) have passed without any answer or objection from the Postal Service. Five of the nine discovery requests were filed by GameFly in September or earlier. One was part of GameFly's very first set of discovery requests, filed on July 31, 2009. See Attachment A, *infra*. This failure to respond to discovery is a clear violation of Rules 3001.26(b) and 3001.27(b), which require the Postal Service to answer questions within 14 days absent an objection.

(3) Other GameFly discovery requests have received answers from the Postal Service that are, by its own admission, grossly incomplete. In particular, the Postal Service informed GameFly in mid-September that thousands of emails responsive to GameFly's first set of discovery requests (served on the Postal Service on July 31) had not been produced because the search terms devised by the Postal Service produced too many hits in the Postal Service's centralized email databases. The Postal Service asked GameFly to propose alternative search terms that might retrieve a smaller number of hits. GameFly did so on September 24, 2009. Approximately one month later, the Postal Service informed GameFly that the alternative search terms also produced too many responsive documents for the Postal Service to manage. GameFly proposed revised search terms on November 4, 2009. GameFly has received no further response since then. This delay is also a clear violation of Rules 3001.26(b) and 3001.27(b).

(4) The Postal Service has also repeatedly failed to comply with rulings of the Presiding Officer compelling responses to specific discovery requests over the Postal Service's objections. Presiding Officer's Ruling No. C2009-1/5, issued on September 28, 2009, ordered the Postal Service to provide more information about Netflix-only drop slots in response to GFL/USPS-31. To accomplish this, the Commission directed the parties to meet and confer on the design of an appropriate sample of post offices to survey. "Once the parties identify the reliable sample, the Postal Service shall complete a survey *within fourteen days.*" *Id.* at 19 (emphasis added). In his ruling, the Presiding Officer emphasized the need for expedition: "In all events, there is an overarching concern that progress be made to streamline the completion of discovery so that resolving this case in a timely manner is not in jeopardy." *Id.* at 2. The Postal Service proposed to GameFly in early October that its consultant Christensen Associates draw up a sample for GameFly's review. GameFly promptly agreed to this procedure. Two months later, the Postal Service has produced nothing.

(5) Presiding Officer's Ruling No. C2009-1/5 also ordered the Postal Service to answer all or part of GameFly discovery requests 3(e), 16(e) and (g), and 28. Pursuant to Rules 3001.26(e) and 3001.27(e), the compelled responses were due within seven days of the ruling, or by October 5, 2009. More than two months after the October 5 deadline, GameFly has yet to receive responses to these questions.

(6) Presiding Officer's Ruling No. C2009-1/10, issued on November 4, 2009, directed the Postal Service to respond to all or parts of GameFly discovery requests GFL/USPS-84, 85, 99, 100, 117, 122(i) and (j) and 129. Pursuant to Rules 3001.26(e) and 3001.27(e), the compelled responses were due within seven days, or by

November 11, 2009. A month after the deadline for compelled production, the Postal Service has failed to produce any of these compelled answers.

(7) Absent Commission intervention, there is no reason to believe that the outstanding discovery responses will be filed in the foreseeable future. Within the past few weeks, the flow of information from the Postal Service has slowed to a virtual halt. The Postal Service has answered only five GameFly interrogatories or document requests within the last thirty days, and only one since November 23. The underlying cause of this breakdown appears to be the Postal Service's failure to give its law department adequate resources or support to comply with the deadlines and other rules established by the Commission for the timely exercise of its adjudicative responsibilities. See, e.g., Motion Of The USPS For Late Acceptance Of Its Responses To GFL/USPS-116, 158, 212-213 (November 6, 2009) (asserting that the Postal Service was answering GameFly's discovery requests "as diligently as possible, given current resources"); Motion Of The USPS For Late Acceptance Of Its Response To GFL/USPS-8 (December 11, 2009) (stating that the lateness of a compelled discovery response that was *67 days overdue* resulted from the "press of business" and the failure of various groups within Postal Service headquarters to communicate with each other and the law department sooner). Indeed, by the Postal Service's own admission, its business units have ignored multiple requests from the law department for information needed to answer discovery requests. See, e.g., "USPS Motion For Late Acceptance Of Its Responses To (GLF/USPS-94-95, 102)" (filed November 4, 2009) at 1 (the Business Mail Acceptance group "was unable to free sufficient resources to do the extensive research and processing necessary to derive the requested estimates, a conclusion that was understood only after *repeated follow up inquiries were largely*

*ignored.*”) (emphasis added) To make matters worse, in early November, Keith Weidner, the Postal Service attorney with the primary day-to-day responsibility for responding to discovery in the case, was reassigned to other projects.

(8) Before filing this motion, GameFly made several attempts to determine from the Postal Service when it expected to answer the remainder of the outstanding discovery requests. Postal Service counsel have refused to commit to any delivery schedule for most of the outstanding answers. Email from Kenneth N. Hollies to David M. Levy (Nov. 6, 2009, 6:07 pm Eastern Time) (“We are working at or past the limits of our available resources.”); Email from Kenneth N. Hollies to David M. Levy (Nov. 13, 2009, 9:40 am Eastern Time):

Thank you for that inauspicious reminder. But let me assure you that the stakes so assiduously encapsulated leave me with the GameFly matter just as close to the top of my priority list as the matter was beforehand.

(9) GameFly is not insensitive to the various demands on the resources of the Postal Service, and has refrained until now from making a serious issue of the Postal Service’s chronic delays in discovery. GameFly’s patience, however, has reached an end. Continued delay is seriously prejudicial to the company. At its current mail volume, the difference between the per-piece rate of postage that the Postal Service is charging GameFly, and the lower rate offered Netflix, costs GameFly approximately \$730,000 per month.<sup>1</sup> For a firm the size of GameFly, these are major amounts.

---

<sup>1</sup> GameFly currently pays postage for approximately 1.2 million mailers per month. At \$1.05 in postage per piece, this amounts to approximately \$1.26 million per month. At a one-ounce letter rate of \$0.44 cents per piece, the monthly postage would be reduced to approximately \$530,000 per month. The difference is roughly \$730,000 per month.

(10) Under the circumstances, it is time for the Commission to intervene to enforce its discovery rules and discovery-related Presiding Officer's Rulings in this case. "Without enforcement, the rules are worthless." *Allen v. Interstate Brands Corp.*, 186 F.R.D. 512, 515 (S.D. Ind. 1999). Enforcing compliance with the rules is especially vital when the noncompliant party is another part of the government itself. *United States v. Sumitomo Marine & Fire Ins. Co.*, 617 F.2d 1365, 1370 (9th Cir. 1980). "(T)he public interest requires not only that Court orders be obeyed but further that Governmental agencies which are charged with the enforcement of laws should set the example of compliance with Court orders." *Perry v. Golub*, 74 F.R.D. 360, 366 (N.D. Ala. 1976). In *Sumitomo*, the Ninth Circuit affirmed the district court's imposition of sanctions against the government, and personally against the government's attorney, for failure to obey discovery orders. See *Sumitomo Marine & Fire Ins. Co.*, 617 F.2d 1365. The court concluded that if the government's failure to comply with court orders had been to some extent the result of understaffing, "then perhaps harsh measures will encourage those charged with funding and allocating personnel among the Justice Department's various offices to take ameliorating action." *Id.* at 1370; see also *Vermouth v. Commissioner of Internal Revenue*, 88 T.C. 1488 (June 17, 1987) (affirming sanctions against IRS where IRS failed to file an answer within 60 days from the service of the petition, as required by tax court rules of procedure, and within an additional 60 days permitted by the Court, and where the failure was due to bureaucratic inertia and was not due to circumstances beyond IRS's control).

(11) The remedies that GameFly proposes to discuss at the hearing include the following:

- (a) Preclusion of Postal Service claims or defenses relating to the delinquent discovery responses pursuant to 39 C.F.R. § 3001.25(c).
- (b) Allowing GameFly to file its direct case before the completion of discovery, with the right to supplement that case after GameFly's remaining discovery requests are answered.
- (c) Prescription of temporary rates pursuant to 39 U.S.C. § 3662(c).
- (d) An award of damages or refunds pursuant to 39 U.S.C. § 3662(c) upon the issuance of the Commission's final decision.

### **CONCLUSION**

For the reasons stated above, GameFly requests that the Commission hold an on-the-record hearing to consider appropriate remedies for the Postal Service's failure to respond fully to GameFly's discovery requests.

Respectfully submitted,

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

*Counsel for GameFly, Inc.*

December 14, 2009

**GAMEFLY DISCOVERY REQUESTS  
THAT THE POSTAL SERVICE HAS NOT ANSWERED AT ALL**

(This list does not include questions to which the Postal Service has supplied partial answers but has acknowledged that additional responsive documents are still outstanding.)

Discovery Request Number	Date Requested	Date Answer Due
3 (e)	July 31	<b>October 5</b> (7 days after issuance of Presiding Officer's Ruling No. C2009-1/5)
11	July 31	<b>August 14</b>
16(e); (g)	July 31	<b>October 5</b> (7 days after issuance of POR 5)
21 (re inbound processing)	July 31	<b>October 5</b> (seven days after issuance of POR 5)
28	July 31	POR 5, issued on Sept. 28, ordered USPS to produce information within two weeks after parties met and conferred.
31	July 31	Same as question 28
84	Sept. 18	<b>November 11</b> (7 days after issuance of Presiding Officer's Ruling No. C2009-1/10)
85	Sept. 18	<b>November 11</b> (7 days after issuance of Presiding Officer's Ruling No. C2009-1/10)
99	Sept. 18	<b>November 11</b> (7 days after issuance of Presiding Officer's Ruling No. C2009-1/10)
100	Sept. 18	<b>November 11</b> (7 days after issuance

		of Presiding Officer's Ruling No. C2009-1/10)
117	Sept. 18	<b>November 11</b> (7 days after issuance of Presiding Officer's Ruling No. C2009-1/10)
122(i) and (j)	Sept. 18	<b>November 11</b> (7 days after issuance of Presiding Officer's Ruling No. C2009-1/10)
129	Sept. 18	<b>November 11</b> (7 days after issuance of Presiding Officer's Ruling No. C2009-1/10)
148	Sept. 18	<b>October 2</b>
149	Sept. 18	<b>October 2</b>
155	Sept. 18	<b>October 2</b>
156	Sept. 18	<b>October 2</b>
221	Nov. 23	<b>December 7</b>
222	Nov. 23	<b>December 7</b>
223	Nov. 23	<b>December 7</b>
224	Nov. 23	<b>December 7</b>