

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

COMPLAINT OF GAMEFLY, INC.

Docket No. C2009-1

**REPLY OF THE UNITED STATES POSTAL SERVICE  
IN OPPOSITION TO MOTION OF GAMEFLY, INC., TO SCHEDULE STATUS  
CONFERENCE**  
(December 22, 2009)

On December 14, 2009, GameFly, Inc. ("GameFly") filed a motion requesting that the Commission schedule a status conference and award damages and other relief to GameFly (the "Motion").<sup>1</sup> The Motion alleges that the Postal Service has not provided adequate responses to GameFly's discovery requests, and that GameFly has suffered harm from the Postal Service's alleged misconduct. The Postal Service respectfully requests that the Commission deny the Motion because 1) the Postal Service continues work on outstanding matters; 2) GameFly repeatedly misstates and mischaracterizes Postal Service responses and responsiveness, when the vast majority of GameFly's excessive discovery requests have drawn the full responses warranted; 3) a status conference could not alter the pace of diligent work on outstanding matters (other than to slow it down) and would accordingly waste Commission and Postal Service resources; and 4) the remedies outlined by GameFly for discussion lack solid legal foundations.

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<sup>1</sup> See Motion of GameFly, Inc. to Schedule Status Conference, December 14, 2009. All citations in this document are to filings in Docket No. C2009-1, unless otherwise noted.

**I. POSTAL SERVICE EFFORTS TO COOPERATE IN THIS MATTER HAVE BEEN EXTENSIVE AND CONTINUING.**

At the outset of this docket, the Postal Service recognized that the scope of information and documents that bear on the Complaint's allegations are broad; it accordingly undertook exceptional measures to minimize the impact on Postal Service operations and resources. The instant GameFly Motion suggests that no amount of cooperation on the Postal Service's part would have satisfied GameFly.<sup>2</sup>

First, the Postal Service reached throughout its organization to identify documentation at Headquarters and in the field from all those who had been involved in consideration of the challenges presented by DVD mailers since they came into existence, with particular focus on the three mailers featured in the Complaint: GameFly, Blockbuster and Netflix. All of these documents were collected in one room and made available to GameFly counsel. He spent a short time reviewing them and demanded copies of everything, subject to appropriate protective conditions. These requests were accommodated.<sup>3</sup> GameFly has responded by filing more finite questions about those documents.

The Postal Service undertook two other efforts to facilitate GameFly's preparation of its direct case. First, it filed an Answer that was unusually forthright as to the Postal Service's view of the Complaint, the issues it presented, and its understanding of recent requests GameFly representatives had made to postal

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<sup>2</sup> The recent modifications to the Federal Rules of Civil Procedure and the Federal Rules of Evidence attempt to accommodate the realization that the information age brings new challenges to civil discovery, and have led to the recognition, and in many venues, the mandate that attorneys cooperate in civil discovery. The Sedona Conference accordingly issued its "Cooperation Proclamation" on October 7, 2008. See, <http://www.discoveryresources.org/technology-counsel/sedona-cooperation-proclamation/>. Cooperation in this docket has, however, tended to be one sided, as explained below.

<sup>3</sup> GameFly counsel Bates stamped all of the documents and delivered a copy back to the Postal Service. This numbering has facilitated discovery.

management. Answer of the United States Postal Service (May 26, 2009). The second effort was the parties' Joint Statement of Undisputed and Disputed Facts (July 20, 2009) that responded to the Commission's directive in Order No. 235 (July 1, 2009).

With the Complaint, Answer, stipulation, and assembled documentation, GameFly already had the ability to present its case. The details and extent of Netflix and Postal Service cooperation to speed Netflix mail through postal operations was demonstrable prior to commencement of discovery, as were the general understandings of the Postal Service's defenses to alleged undue discrimination. Moreover, information regarding other matters was made available to GameFly before discovery commenced, including disagreement between Netflix and the Postal Service, efforts to accommodate the needs and interests of other DVD round trip mailers, options that were considered and rejected, and OIG and Christensen studies of DVD mail. Nevertheless, GameFly's subsequent inquiries delved into issues beyond the essential facts underlying its complaint, including details such as exactly when each senior manager became aware of what.

Despite cooperation with GameFly, disagreements were to be expected, once discovery got under way. In this regard, there have been no surprises.<sup>4</sup> The problems encountered, however, are those the Postal Service did everything in its power to avoid or minimize. Furthermore, modern commentators of e-Discovery would find GameFly's tactics exactly those the revised federal rules were designed to prevent. Nevertheless,

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<sup>4</sup> Whether intentional or not, much of GameFly's discovery has maximized Postal Service difficulties by submitting large numbers of interrogatories together late on Friday afternoons, thus effectively eliminating nearly three of the fourteen days allowed by the rules for responses. Sixty-five were filed late on the afternoon of July 31, 2009; no interrogatories were then filed for four weeks. Even later on the afternoon of Friday, August 28, 2009, GameFly filed 18 more interrogatories. Three weeks later, albeit on Friday morning, 104 more interrogatories were filed. By filing massive numbers of interrogatories on Fridays, GameFly minimized the likelihood that they could be handled in a timely manner.

the Postal Service reaction has continued to be one of cooperation, with motions practice minimized to the extent possible.<sup>5</sup>

## **II. EXCESSIVE DISCOVERY REQUESTS HAVE IMPOSED AN EXCEPTIONAL BURDEN ON POSTAL SERVICE RESOURCES.**

With the advent of the PAEA and the demise of omnibus rate proceedings, the Postal Service has reallocated resources so that it can capitalize upon opportunities the PAEA creates. Yet, the Commission's Rules of Practice and Procedure evolved under pre-PAEA conditions, and expectations derived from that era continue to drive performance expectations in discovery today.

The Postal Service believes that GameFly, not the Postal Service, is responsible for many of the discovery issues arising in this matter. Under any reasonable standard—particularly that applicable to the federal court system—the number of discovery requests filed by GameFly could be judged to be excessive. For example, Federal Rule of Civil Procedure 33(a) limits the number of interrogatories to twenty-five per party, including subparts. This limit reflects recognition of the undue burden and potential for harassment likely to result from unrestrained discovery. See FRCP 33 Advisory Committee Notes, 1993 Amendments. Moreover, although the Federal Rules of Civil Procedure do not bind parties participating in the Commission's complaint process, the Rules were constructed with consideration of the capabilities of private law firms and the Department of Justice – organizations with far greater resources than the Postal Service

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<sup>5</sup> See, e.g., Opposition Of The United States Postal Service To Motion To Compel Of GameFly, Inc. (GFL/USPS-3(e), 4(e), 6(a)-(e) and (g)-(h), 7-8, 14(e), 15, 16(f)-(g), 20-21, 28-29, 31, 41(c)) (August 31, 2009); Response Of The United States Postal Service To Motion Of GameFly, Inc., To Compel The Postal Service To Answer Discovery Requests Gfl/Usps-79-80 (September 24, 2009); and Partial Opposition Of The United States Postal Service To Motion To Compel Of GameFly, Inc.(GFL/USPS-84, 85, 99, 100, 109, 117, 122(e)-(j), 129, 151, AND 152(d)) (October 20, 2009);

Law Department, when viewed in the context of individualized complaints, such as those presented by GameFly.

GameFly has filed more than seven hundred interrogatories (including parts and subparts) – almost thirty times the number of interrogatories allowed by the Federal Rules of Civil Procedure. Especially when viewed in the context of the Postal Service's current financial condition, it is unreasonable to demand that the Postal Service perform above the standard recognized by the Federal Rules of Civil Procedure and applied to more robustly staffed private law firms and the Department of Justice. Many GameFly discovery requests, for example, delve into operational issues during a time when officials need to manage the peak mailing season, in addition to responding to GameFly's requests. In this respect, in his previous rulings, the Presiding Officer has recognized the burdensome and overbroad nature of some of GameFly's discovery requests. See, e.g., POR No. C2009-1/5 (September 28, 2009), at. 6, 8, 10. The Presiding Officer identified a specific burden resulting from the structure of the Postal Service and the need for the Postal Service, in responding to GameFly's discovery requests, to collect information scattered across widespread and numerous retail facilities. See *id.* at 17.

The discovery issues described in the Motion have arisen largely due to GameFly's failure to focus its discovery requests; GameFly's practice is discouraged by the Federal Rules of Civil Procedure. GameFly's approach accordingly causes delay, not any delay or refusal to cooperate by the Postal Service. The Postal Service has already produced thousands of documents for inspection by GameFly, and has made

significant progress in responding to the discovery requests listed in the Motion.<sup>6</sup>

GameFly's requests for email remain a subject of discussion wherein both parties have attempted to improve Boolean searches, thereby winnowing the volume of responsive emails to manageable volumes.<sup>7</sup>

At this time, hundreds of thousands of email messages exceed manageable volumes by a wide margin. The Postal Service has accomplished this, despite the need for cross-functional coordination and consultation and the press of other business, most notably finalization of the Annual Compliance Report and continuing attention to numerous open dockets and preparation for other filings required under the redesigned regulatory framework created by the PAEA. In this context alone, the Presiding Officer should deny the instant motion, and, in light of the Postal Service's diligent efforts and progress, allow the assigned staff to continue working on the responses.

**III. THE POSTAL SERVICE HAS RESPONDED AND MADE EXTENSIVE PROGRESS IN RESPONDING TO THE ALLEGEDLY OUTSTANDING DISCOVERY REQUESTS SUCH THAT A STATUS CONFERENCE COULD ONLY CAUSE MORE DELAY.**

GameFly's request for a hearing will divert already delayed attention to outstanding discovery.<sup>8</sup> In the Postal Service's view, a hearing is not justified and would waste government resources.

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<sup>6</sup> In the Appendix attached to this pleading, the Postal Service responds regarding each question raised by GameFly.

<sup>7</sup> The Postal Service also understood from informal discussion among counsel that searches yielding a million or more email hits perhaps warrant further work before commencing what would be an onerous review of them. However, the attorney responsible for this aspect of the case is not currently available. Consequently, the Postal Service will limit its discussion of those issues in this pleading. Undersigned counsel understands that discussion among the parties of the email requests generating the largest numbers of emails is still ongoing. Perhaps stipulations could be relied upon instead of burdensome review of trivial information.

<sup>8</sup> If the Presiding Officer were interested in learning more about discovery progress than the pleadings allow, he might schedule an informal teleconference, as often occurs in other administrative or judicial proceedings.

The Motion identifies twenty-one allegedly outstanding discovery requests. The Postal Service has responded to some of those identified, and is making progress in responding to the rest. Specifically, the Postal Service has made significant progress on the discovery requests listed in the attached Appendix.

Given the volume, breadth and detail of GameFly's discovery requests, the cross-functional coordination and consultation required to create and review answers amidst the press of the Annual Compliance Report, other business, and now the holidays, exhibits the progress achieved by the Postal Service. Moreover, the Postal Service now anticipates that reasonable resolution of outstanding discovery requests may be attained without the Commission's involvement. Having to prepare for, and participate in, the requested hearing would undermine this potential.

#### **IV. THERE IS NO LEGAL BASIS FOR THE RELIEF REQUESTED IN THE MOTION.**

GameFly has not established a legal foundation for the relief it seeks in the Motion. The remedies it outlines are neither justified, necessary, nor authorized. Specifically, GameFly seeks preclusion of Postal Service claims or defenses, permission to file its direct case before the completion of discovery, prescription of temporary rates, and an award of damages or refunds. GameFly cites statutory authority and case law to support its request for relief, but this authority does not demonstrate its entitlement to the requested relief. Section 3662(c) does not address issues related to discovery, or authorize the prescription of temporary rates or an award of damages or refunds. See 39 U.S.C. § 3662(c) (authorizing the Commission to act where it finds a complaint justified). And, the case law cited by GameFly does not apply to the situation raised in the Complaint. See, e.g., *Vermouth v. Commissioner of*

*Internal Revenue*, 88 T.C. 1488 (1987) (does not deal with discovery); *United States v. Sumitomo Marine & Fire Ins. Co.*, 617 F.2d 1365 (9<sup>th</sup> Cir. 1980) (affirming sanctions against the Government in extremely egregious situation involving 18 month delay by the Government in responding to a court order).

In *Vermouth*, the United States Tax Court considered the IRS' failure to file an answer as required by a court order. *Vermouth*, 88 T.C. at 1488-1491. In its ruling, the Court permitted the IRS to file a late answer, but struck allegations of tax fraud in the answer, and barred the IRS from introducing evidence in support of its tax fraud counts. *Id.* at 1497. Although, as in *Vermouth*, the Postal Service bases its inability to timely respond to a Presiding Officer's ruling on lack of resources and the burden of other business, *Vermouth* deals with an answer to a petition, and not discovery. The Postal Service has filed a complete Answer (discussed supra); it will not be able to assess whether or to what extent its own direct case is warranted until after GameFly files its direct case. So, the remedy applied In *Vermouth* is inapplicable to the current context.

In *Sumitomo Marine & Fire Insurance Company*, the Ninth Circuit affirmed an order barring the Government from introducing evidence on damages and imposed a monetary sanction against a Government attorney after the Government had failed to comply with a discovery order. *Sumitomo Marine & Fire Insurance Company*, 617 F.2d at 1370-1371. Eighteen months after the Court issued the discovery order, the Government had still failed to comply. *Id.* The Court imposed sanctions on the Government only after an egregious delay of eighteen months, a delay suggesting bad faith that far exceeds any alleged delay of the Postal Service in this case. And, as in *Vermouth*, the sanctions levied in *Sumitomo* restricted the Government's ability to make

affirmative claims, and not its ability to defend itself in discovery. So, both cases cited are inapplicable to the current context.

GameFly cannot reasonably show that it should be granted the relief it maintains the Commission can grant without first filing a direct case and then allowing the Postal Service to present its defense. In this regard, GameFly's impatience should not be allowed to become the flawed foundation for Commission action. The Motion should be denied.

Considering the facts and other issues involved with this matter, the relief requested by GameFly is unreasonable and impractical. Filing a direct case before the completion of discovery could lead to public disclosure of many Postal Service documents through publication on the Commission website. It would appear more appropriate to allow time for full exploration of confidentiality issues and avoid accelerating the filing of GameFly's direct case. See Presiding Officer's Ruling No. C2009-1/7 (October 7, 2009), at 2 (recognizing the importance of allowing sufficient time to analyze confidentiality issues due to the absence of precedent for the Commission's new confidentiality standards).

## **V. CONCLUSION**

The Postal Service respectfully requests that the Commission deny GameFly's Motion to Schedule a Status Conference and its request for damages and other relief. The Postal Service concedes that the discovery process has not operated as efficiently as desired, but asserts that this has occurred in large part because of GameFly's excessive discovery requests and the necessary commitment of Postal Service resources to the full range of its legal obligations. As demonstrated by the Postal

Service's extensive efforts on GameFly's behalf, and continued progress in responding to GameFly's discovery requests, the Commission should not intercede in the progress of discovery at this time. The Presiding Officer should deny GameFly's Motion.

Respectfully submitted,

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**APPENDIX: STATUS OF THE POSTAL SERVICE RESPONSES TO  
DISCOVERY REQUESTS GAMEFLY CONTENDS ARE PENDING**

<b>Discovery Request Number</b>	<b>Postal Service Progress</b>
3(e)	The Postal Service filed its response on December 22, 2009.
11	
16(e)	GameFly contends that in POR C2009-1/5 the Presiding Officer ordered the Postal Service to respond to GFL/USPS-16(e). But, POR C2009-1/5 does not address GFL/USPS-16(e) or rule on the Postal Service's August 10, 2009 objection to GFL/USPS-16(e) based on relevance and undue burden. Moreover, GameFly did not move to compel a response to GFL/USPS-16(e). Accordingly, the Postal Service's objection to GFL/USPS-16(e) stands, and no further response to GFL/USPS-16(e) is required.
16(g)	The Postal Service filed its response on December 22, 2009.
21	The Postal Service filed its response on October 22, 2009, in compliance with POR C2009-1/5, showing that Blockbuster and GameFly return mailpieces are handled overwhelmingly in, respectively, the letters and flats mailstreams.
28	No response required. Presiding Officer's Ruling No. C2009-1/5 directs the Postal Service to respond to this Request only if it contests whether "some facilities ... have [dedicated] mail slots," which it does not, despite their existence being contrary to policy.
31	No response required – same as GFL/USPS-28.
84	No response required. The Postal Service chooses not rebut the presumptions described in Presiding Officer's Ruling No. C2009-1/10.
85	No response is required. The Postal Service chooses not rebut the presumptions described in Presiding Officer's Ruling No. C2009-1/10.
99-100, 117, 129	Interrogatories GFL/USPS-99-100 follow upon the response to GFL/USPS-8, about the Business Mail Acceptance assignment of an individual to Netflix. GFL/USPS-117

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Discovery Request Number	Postal Service Progress
	further inquires about an assertion located at Bates number GFL0000033 that BMEU requirement that additional postage be paid when the amounts of the additional postage are later forgiven. Interrogatory GFL/USPS-129 inquires about Bates number GFL000275 which references a supposed Netflix request to bypass the BMEU. These interrogatories were referred to Business Mail Acceptance; and counsel is awaiting responsive materials. Additional efforts will be made to elicit appropriate responses.
122(i)-(j)	Part (i) of interrogatory GFL/USPS-122 ask a very broad question about whether postal officials in four major departments “stated that a major reason for Netflix’s failure to modify its mailpiece to improve its processing characteristics is Netflix’s wish to discourage the Postal Service” from using automated letter sorting machinery, while part (j) requests Postal Service speculation on why Netflix has not modified its mailpiece. POR C2009-1/10 narrowed these requests to an answer to part (j) with (i) limited to the substance of the response to part (j). The Postal Service Law Department is not aware that any client organization has identified a response to part (j), but does plan to conduct a further sweep before responding.
148-49, 155-56	Interrogatories GFL/USPS-148 and -149 inquire about Bates document GFL 0001158, handwritten notes reflecting discussion dated September 29, 2003, while GFL/USPS-155 and -156 focus on an agenda from March 14, and another from September 12, both in 2005. These interrogatories ask relatively straightforward questions. The Postal Service expects that answers will be available shortly.
221-24	These responses are currently being reviewed.