

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

COMPLAINT OF GAMEFLY, INC.

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Docket No. C2009-1

**STATUS STATEMENT OF GAMEFLY, INC.
(February 9, 2010)**

GameFly, Inc. respectfully submits this statement in response to Presiding Officer's Ruling No. C2009-1/15 (January 13, 2010) ("POR 15"). POR 15 directed GameFly to file a statement that

addresses the earliest reasonable time for closing discovery. In this context, the phrase "closing discovery" is intended to denote ending the phase of discovery in this case when requests to the Postal Service on new topics or for new information or materials is permitted. It is not intended to signify the foreclosure of follow up questions to recent or pending answers.

Id. at 10. POR 15 also asked GameFly to "estimate when it expects to be able to present its direct case, and identify those particular outstanding discovery requests that are most central to its ability to prosecute its claims." *Id.*

GameFly expects that it will be able to finish preparing its direct testimony within two to three weeks after the Commission issues a final decision on GameFly's September 25 motion for unsealing of documents. It is quite likely that GameFly will move to unseal additional documents relied on in its direct case. GameFly does not intend to seek such further relief, however, until after the direct case is filed.

GameFly considers discovery to have closed, in the sense meant by POR 15, on October 5, 2009. See P.O. Ruling C2009-1/3 at 2 (September 4, 2009) (establishing cutoff date of October 5, 2009); Presiding Officer's Ruling No. C2009-1/11 (Nov. 9, 2009) (leaving discovery cutoff unchanged, but suspending rest of procedural schedule). GameFly does not seek an extension of the October 5 cutoff.

The Postal Service now has filed at least a partial answer to all but a handful of GameFly's discovery requests.¹ But the Postal Service has still not produced thousands of emails responsive to GameFly's very first set of discovery requests. Those requests were served on the Postal Service on July 31, 2009, more than six months ago. The Postal Service acknowledged to GameFly in September 2009—more than three months ago—that it had not produced the emails 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 yield 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. The Postal Service has provided no further response since then. See Motion Of Gamefly, Inc., To Schedule Status Conference (December 14, 2009) at 2.

GameFly anticipates that little follow-up discovery will be necessary once the outstanding emails are produced. Moreover, the economic costs to GameFly from continuing delay in this case are large enough that GameFly is willing to file its direct

¹ The exceptions are GFL/USPS-117, parts of 129, and 155-156.

testimony before receiving the long overdue responses, provided that GameFly has the right to supplement its direct testimony once the responses are filed. But the Commission needs to set a deadline for the responses, and enforce it. “Without enforcement, the rules are worthless.” *Allen v. Interstate Brands Corp.*, 186 F.R.D. 512, 515 (S.D. Ind. 1999).²

Respectfully submitted,

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

Counsel for GameFly, Inc.

December 14, 2009

² The Postal Service has tried to excuse its tardiness in discovery on the theory that GameFly’s discovery requests were excessive. But the bulk of the overdue responses involve GameFly’s *initial* discovery requests, filed more than *six months ago*. Moreover, these grossly overdue answers involve questions to which the Postal Service did not object, or did not object successfully. Nor may the Postal Service excuse its tardiness by reference to Rule 33 of the Federal Rules of Civil Procedure, which limits the number of interrogatories that a party may file in civil cases without leave of the court. See Reply Of The USPS In Opposition To Motion Of Gamefly, Inc., To Schedule Status Conference (December 22, 2009) at 2, 4-5. The Federal Rules impose no default limit on the number of *document requests*—which most of GameFly’s discovery requests were. See Fed. R. Civ. P. Rule 34. Moreover, if this case had been litigated under the Federal Rules, the Postal Service would have been required to produce much of the documentary information sought by GameFly at outset of the case, “without awaiting a discovery request.” See Fed. R. Civ. P. Rule 26(a)(1).