

POSTAL REGULATORY COMMISSION

In the Matter of:)
)
COMPLAINT OF GAMEFLY, INC.) Docket No.: C2009-1

Suite 200
Postal Regulatory Commission
901 New York Avenue, N.W.

Washington, D.C.

Volume 2
Wednesday, May 5, 2010

The above-entitled matter came on for a prehearing conference, pursuant to notice, at 2:02 p.m.

BEFORE:

- HON. RUTH Y. GOLDWAY, CHAIRMAN
- HON. Nanci E. LANGLEY, VICE CHAIRMAN
- HON. MARC ACTON, COMMISSIONER
- HON. DAN G. BLAIR, COMMISSIONER
- HON. TONY L. HAMMOND, COMMISSIONER

APPEARANCES:

On Behalf of United States Postal Service:

JAMES MECONE, Esquire
KENNETH N. HOLLIES, Esquire
United States Postal Service
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Washington, D.C. 20260
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On Behalf of Gamefly, Inc.:

DAVID M. LEVY, Esquire
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APPEARANCES: (Cont'd.)

Also Present:

EMMETT RAND COSTICH, Public Representative
Postal Rate Commission
901 New York Avenue, N.W., Suite 200
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1 discovery, receive the direct and rebuttal evidence of
2 the parties, and complete briefings by each party
3 without further delay. I know that my fellow
4 Commissioners share my concern in this regard.

5 At this point, I would like to yield to my
6 fellow Commissioners for any opening remarks, and I
7 will begin with the Vice Chair of the Commission, Mr.
8 Hammond.

9 VICE CHAIRMAN HAMMOND: Thank you. I know
10 as the presiding officer in this case that you have
11 kept up continually with the proceedings, and you have
12 put a lot of effort into moving it along, and it has
13 been quite helpful I know.

14 I do want to point out though as with
15 previous complaint cases, there can be a tendency
16 toward delay if the Commission allows it, and it has
17 now been over one year since this case was originally
18 filed.

19 So I would like to remind the parties that
20 the Commission, I believe, has the responsibility to
21 act at some point and hope that you would keep on
22 realistic timeframes in order for us to be able to
23 proceed with due consideration. And again thank you
24 for all that you have done to keep this case moving
25 along.

1 COMMISSIONER BLAIR: Thank you, Mr. Hammond,
2 and I want to welcome our Chairman of the Commission
3 today, Mrs. Goldway, and if you have any opening
4 remarks for us.

5 CHAIRMAN GOLDWAY: No, I am just happy to
6 see the hearing leadership to you for this case and
7 have a little break for myself. Thank you.

8 COMMISSIONER BLAIR: Thank you, Madam
9 Chairman. Commissioner Langley.

10 COMMISSIONER LANGLEY: Thank you. I think
11 that Vice Chairman Hammond made some very good points,
12 and so I am interested in listening today, and I may
13 have comments at the end. Thank you.

14 COMMISSIONER BLAIR: Commissioner Acton. If
15 not, we will proceed. On January 7th, 2010, Order
16 Number 381, established target dates for applying the
17 criteria for in sealing documents previously made
18 available only under protective conditions.

19 On January 13th, 2010, Presiding Officer's
20 Ruling 15 took under advisement Gamefly's earlier
21 motion for a status conference for unresolved
22 discovery issues. Gamefly renewed its motion for a
23 scheduling conference on April 14th, 2010, and Ruling
24 18 granted that request.

25 Today, we will be eliciting views from

1 counsel on three main areas. First, the Postal
2 Service has the opportunity to raise any objections
3 that it has to the redactions to discovery materials
4 provided by Gamefly on April 20th, 2010.

5 The materials were redacted by Gamefly and
6 shared with the Postal Service slightly later than
7 they originally ordered in Ruling 17, but this does
8 not affect the Postal Service's allotted interval for
9 review.

10 Should anyone need to specifically reference
11 the contents of materials still subject to non-public
12 treatment, please seek leave to do so in advance so
13 that we may continue to protect non-public
14 information.

15 We will defer any such discussion to the end
16 of this conference. After we have dealt with all
17 topics that do not require a specific reference to
18 non-public materials, we will take a short recess and
19 then reconvene an in camera session, with only those
20 who have signed appropriate non-disclosure agreements
21 present.

22 Second, we will consider the views of
23 parties on issues that concern outstanding emails that
24 are the subject of Gamefly's earlier discovery
25 requests, as well as related potential deadlines for

1 the production still under way.

2 Third, counsel for parties will be asked to
3 express their views regarding deadlines for discovery
4 of Gamefly's evidence, and for the filing of the
5 Postal Service's case.

6 Now we will move to the topic of redactions
7 under the Presiding Officer's Ruling Number 17.
8 Gamefly reportedly delivered to the Postal Service on
9 April 28th proposed redactions to discovery materials
10 pursuant to Ruling 17.

11 Ruling 19 clarified that such delivery was
12 without prejudice to the Postal Service's allowed
13 interval for review. Mr. Hollies understands that the
14 Postal Service filed objections this morning. Is this
15 correct?

16 MR. MECONE: James Mecone for the Postal
17 Service. Yes, it was filed this morning.

18 COMMISSIONER BLAIR: Do you plan to file any
19 additional objections today?

20 MR. MECONE: No, we do not.

21 COMMISSIONER BLAIR: And would you please
22 characterize for us present and those listening today
23 the objections that the Postal Service raised?

24 MR. MECONE: The objections were based on
25 Gamefly's failure to redact some of the personal

1 identification information, and failure to comply with
2 some of the Commissioner's -- parts of the
3 Commissioner's order.

4 COMMISSIONER BLAIR: Do you want the
5 discussion to be in closed session?

6 MR. MECONE: I am not sure if we are going
7 to need a discussion. I spoke with opposing counsel
8 earlier, and he consented to the redactions.

9 COMMISSIONER BLAIR: Mr. Levy, do you care
10 to respond?

11 MR. LEVY: David Levy for Gamefly. We
12 received the Postal Service's document stating that it
13 wanted additional redactions this morning, and I have
14 looked at it, and the additional redactions are fine
15 with Gamefly. So there is no dispute.

16 COMMISSIONER BLAIR: So are all objections
17 waived at this point?

18 MR. MECONE: James Mecone for the Postal
19 Service. We would just like to raise one more issue.
20 Some of the redactions, some of the people's names
21 whose names needed to be redacted, there were no
22 pseudonyms for those people. So we just requested
23 that we create a few new pseudonyms for those people.

24 MR. LEVY: It may be that we will simply
25 redact them and not have pseudonyms, which was an

1 option, and Presiding Officer's Ruling 17 gave us.
2 The number of names that appear to be unidentifiable
3 is relatively small, and if we can't figure them out,
4 I will talk with Mr. Mecone and see if we can puzzle
5 it out, and if we can't, we will just leave the person
6 unidentified.

7 COMMISSIONER BLAIR: Okay. Well, we will
8 proceed at this point, and for any specific redacted
9 documents upon which the resolution, any unresolved
10 objection remains, no public disclosure will be
11 permitted, except for the following determinations.

12 And, Mr. Levy, do you expect to file any
13 revised versions of Gamefly testimony to incorporate
14 reference to documents obtained during discovery.

15 MR. LEVY: Yes, because we filed additional
16 documents, and we obtained additional documents, and
17 which we relied on in our April 12th direct case, or
18 our direct case-in-chief, we deliberately held back
19 moving to unseal until we had a ruling on our
20 September 25th motion.

21 And we intend to proceed with those
22 remaining documents in the near future, as well as to
23 move to unseal portions of the April 12th memorandum,
24 entitled, "Memorandum of Gamefly", summarizing
25 documentary evidence.

1 With the Commission having ruled in
2 Presiding Officer's Ruling 17, and particularly
3 Appendix A, I think we now have quite a detailed road
4 map on to what needs to be redacted and what can go
5 open.

6 And I am optimistic that this process will
7 work a lot faster. We intend to provide to Postal
8 Service counsel a draft of the redacted and unsealed
9 material to them for review, and assuming that this
10 goes quickly, that should limit any further need to
11 resort to the Commission. I don't think we will have
12 to go for the kind of protracted thing that we did
13 before.

14 COMMISSIONER BLAIR: Does the Postal Service
15 have anything else that they would like to add to
16 that?

17 MR. MECONE: No, that sounds reasonable.

18 COMMISSIONER BLAIR: Okay. Well, once we
19 receive the motions, the Presiding Officer will give
20 them due consideration, and I will make a ruling, an
21 appropriate ruling in the appropriate timeframe.

22 At this point, I would like to go to
23 Gamefly's discovery request as to email messages. And
24 on December 14th, 2009, Gamefly filed a motion
25 requesting a status conference to consider among other

1 things remedies to address the Postal Service's
2 failure to produce the emails previously requested in
3 discovery requests, and specifically a request filed
4 on July 31, 2009.

5 On January 13th of 2010, Ruling 15 indicated
6 that the request for a status conference would e taken
7 under advisement pending further development of the
8 record. In response to Ruling 15, Gamefly filed a
9 statement on the status of its discovery on February
10 9th, 2010.

11 Although Gamefly did not seek to extend the
12 October 5th, 2009 cutoff for its discovery, it
13 reserved its rights to attain a completion of several
14 pending discovery requests, including one seeking
15 responsive email messages.

16 While amending the cost of its opponent's
17 delays, it anticipated little followup discovery once
18 the emails were produced. Gamefly recently filed its
19 direct testimony on April 12th, 2010, without the
20 benefit of email production.

21 Most of the discovery documents other than
22 email were produced initially under protective order,
23 and then ordered unsealed under Order Number 381.
24 Some remaining issues on confidentiality and privilege
25 were resolved in Rule 17 on April 15th, 2010,

1 especially to the extent of redactions for continuing
2 non-public treatment.

3 That ruling was followed by Presiding
4 Officer's Ruling 18, which set this scheduled hearing
5 and directed the parties to be prepared to discuss
6 email production in response to discovery. Between
7 April 14th and the 26th of this year, the parties
8 exchanged filings on the motion of Gamefly for a
9 scheduling conference.

10 In these submissions the parties indicated
11 that discovery responses for emails had stalled, and
12 they disputed what really was appropriate in light of
13 the Postal Service's failure to produce emails.

14 Mr. Levy, is it correct that Gamefly still
15 has not received any reasonable assurances from the
16 Postal Service that production of responsive emails
17 will be completed by an acceptable date?

18 MR. LEVY: No and yes, and let me explain.
19 On April 15th, a day or so after we filed our request,
20 our latest request for a status conference, I received
21 from Postal Service counsel a revised list of Boolean
22 search terms for searching their database of emails, a
23 centralized database.

24 And we have agreed to the terms that they
25 have proposed, so that the only thing that stands in

1 the way of getting the emails is the Postal Service
2 running the search terms against our database. I
3 think the best thing to do now is to set a date for
4 when that will happen.

5 COMMISSIONER BLAIR: Can you explain what
6 you meant by Boolean search terms?

7 MR. LEVY: B-O-O-L-E-A-N. It is like Lexis
8 or Westlaw, where you have a bunch of nouns, and you
9 can enter proximity terms like end or within three,
10 the same kind of logic as I understand from the Postal
11 Service is used by their software for searching their
12 own electronic database. So if you have used Lexis or
13 Westlaw, it is the same kind of logic.

14 COMMISSIONER BLAIR: Would the Postal
15 Service care to respond to that?

16 MR. MECONE: Well, first I think it is
17 important to clarify the Commissioner's
18 characterization of what the Postal Service has
19 produced. The Postal Service has produced tens of
20 thousands of documents, and some of those are actually
21 emails, we believe, that contain a lot of the same
22 information as emails that opposing counsel is
23 seeking.

24 I can tell you where we are right now. We
25 ran the searches that were contained in the emails

1 from April 15th and April 16th. We are in the process
2 of transferring those emails on to a disk, and then
3 putting them on a computer to allow opposing counsel,
4 or someone from opposing counsel's firm to review the
5 documents and inspect them.

6 MR. HOLLIES: Excuse me, this is Ken Hollies
7 for the Postal Service. I have an update that my co-
8 counsel was not aware of on this front. The law
9 department has recently had the honor of seeing its
10 computer support functions taken over by the
11 Information Technology Section of the Postal Service.

12 And that has resulted in an imposition of
13 some standards that we had not previously encountered.
14 This afternoon, I spoke with a manager in IT about
15 this particular topic. The plan that we had
16 originally made for trying to make it possible for
17 counsel to take a look at the email that has been
18 generated by these latest boolean strings has now been
19 blessed.

20 And so we are prepared to go forward with
21 that. The 46 thousand approximately emails that are
22 responsive have not undergone a privilege review at
23 this point. As such, we would be making them
24 available to counsel for Gamefly on what would be
25 often understood as a quick peek look.

1 We don't think there is a whole lot of
2 content there, at least that's not privileged. We
3 have not conducted a privilege review, but we have
4 learned that a good number of the documents are to and
5 from attorneys. There is certainly the potential for
6 that to arise.

7 But as Mr. Mecone said a moment ago, we
8 don't expect that email to have anywhere near the
9 probative content than what has already been provided,
10 and at this point, we however are going to let counsel
11 for Gamefly make that determination on his client's
12 behalf.

13 So we may have some challenges yet, and
14 hopefully we can work through these just between the
15 parties as to what might be privileged there, but we
16 think that we can make this review able to begin as
17 soon as tomorrow.

18 MR. LEVY: I'm perfectly agreeable to the
19 quick peek protocol where we get everything and that
20 does not constitute a waiver of the Postal Service's
21 right to assert privilege or a right to object to it.
22 That's a perfectly sensible time saver. I'm not sure
23 I heard exactly how this is going to be produced.
24 Given the late date, I think what we'd like to see are
25 CD-ROMs with the material. You know, when we received

1 the other documents, we, at our own expense, and this
2 is not normally something done by the discovering
3 party, at our own expense we hired a vendor to
4 transcribe everything into PDFs, we loaded the PDFs
5 onto disks, we had them Bates numbered, normally the
6 producing party does that, and we gave a set of that
7 to the Postal Service so they have the entire universe
8 of documents that we received Bates numbered. I think
9 that given how long this has taken we'd like to
10 receive the output of the search on CD-ROMS in PDF or
11 some other commonly used format.

12 COMMISSIONER BLAIR: As of this point, since
13 this is new information, there is no date agreed upon,
14 is that correct, for production?

15 MR. HOLLIES: I believe that was literally
16 Mr. Levy's first time that he had heard that. Our
17 plan was, consistent with the rules of practice, to
18 make those available for inspection, and, for that
19 purpose, our plan is to provide a computer on which
20 that can be done on postal premises.

21 COMMISSIONER BLAIR: So, Mr. Levy, are you
22 maintaining that you still need these responsive
23 emails?

24 MR. LEVY: Yes. We have no idea what's in
25 them. In general, what the Postal Service has done so

1 far is to ask named individuals or departments to
2 search their local files. What is now about to be
3 produced, we hope, are documents in a central
4 warehouse, or data warehouse, or server. In all
5 likelihood, a lot of that will duplicate what we've
6 already received, but it is not uncommon for the
7 central warehouse to have documents that have through
8 the passage of time or people leaving the company been
9 deleted from the local hard drives or files. So we
10 don't expect that this is going to be a waste of time.

11 In any event, we don't know until we
12 actually receive it. Again, I think that normally the
13 protocol would be to, an appropriate means would be
14 for us to go down and look at it, but given the
15 passage of time, I think we would like the
16 accommodation of having it so that we can look at the
17 CDs on our own premises with our own legal assistants
18 rather than having them cluster around a computer at
19 the Postal Service. The additional time needed to
20 burn a CD if you already have the files is not great.
21 I mean, we know that because we've produced Bates
22 numbered CDs for the Postal Service.

23 COMMISSIONER BLAIR: A response?

24 MR. HOLLIES: We've made our offer. We
25 believe that it is consistent with the rules of

1 practice. We have no intention of interfering with
2 Mr. Levy or whoever he cares to undertake the review.
3 We recognize that there might be a legitimate reason
4 for him not to have postal people watching him and
5 learning, therefore, what his conclusions are about
6 what's important or what's not, but we believe that
7 what we have proposed is consistent with our interests
8 in preserving the privileged materials and it's
9 consistent with a very common way of proceeding
10 forward in *E* discovery today and that's what we have
11 arranged.

12 COMMISSIONER BLAIR: Well, can we get a time
13 estimate as to when you think you can produce these
14 documents?

15 MR. HOLLIES: I believe we can make them
16 available for inspection tomorrow.

17 COMMISSIONER BLAIR: That seems rather
18 timely. I'd just like to hear from counsel.

19 MR. LEVY: Again, I mean, tomorrow, given
20 the amount of time, the incremental delays, obviously
21 minimal. Again, normally what I do in discovery when
22 I'm a receiving party is I get the documents and I put
23 them on a system or put them in notebooks and I look
24 at them with staff in my offices. Counsel is correct
25 that normally one has the option of designating come

1 and look at our stuff at our offices, but normally
2 that entails going to somebody's offices, looking at
3 the documents, picking out the ones you want, and
4 we'll probably want to simply take, given the ease of
5 copying onto a CD, all of them so we can look at them
6 at our convenience at our facilities.

7 Given the minimal additional cost of their
8 putting them on a CD, and given the delay that this
9 would avoid at this late date, I think this additional
10 stuff is not an unreasonable one to ask in the
11 particular circumstances of this case. We're talking
12 about downloading a file and burning it on a CD. It's
13 something that we've done for them and it doesn't take
14 that long. If they do it for us, it would save us a
15 lot of time.

16 COMMISSIONER BLAIR: Is there an objection
17 from the Postal Service in providing it in that media
18 or format?

19 MR. HOLLIES: We are concerned about
20 releasing physical control of sensitive material. I
21 can certainly take this up with my superiors, but the
22 plan that we had is the one that you heard a moment
23 ago.

24 MR. LEVY: If, under their procedure they
25 would also be relinquishing physical control of

1 sensitive material, that's inherent in the process.
2 The difference is under the process we're asking for
3 we're not going to be injecting an additional amount
4 of delay.

5 COMMISSIONER BLAIR: Well, at this point it
6 sounds that the parties are still at a -- will there
7 be additional motions or what can the presiding
8 officer expect at this point? It appears to me that
9 there seems to be some resolution yet to be made
10 regarding the medium that this is going to be put on,
11 so I'd like to
12 -- you're asking that the Postal Service put this on a
13 CD-ROM or other medium that you can review this from
14 your office?

15 MR. LEVY: That's correct. I guess to
16 really make this clear, then I make that as a motion
17 right now.

18 COMMISSIONER BLAIR: Okay. With that
19 motion, I'm agreeable to that motion. If you have an
20 objection to that, I'd ask that you file an
21 explanation stating those objections by this Friday.

22 MR. LEVY: I would ask that the Commission,
23 by whichever way it rules on the method of production,
24 establish a date by which it's to be accomplished. If
25 it's open-ended, that just is an invitation for

1 further delay.

2 COMMISSIONER BLAIR: Appreciate the
3 suggestion. We'll certainly take that under
4 advisement. Just regarding clarifications of the
5 status of discovery, it's my understanding that a
6 series of discovery requests were made by GameFly that
7 sought emails related to the processing of DVDs.
8 Discovery requests of this nature were made as long
9 ago as last July. Mr. Levy, am I correct on this?

10 MR. LEVY: That is correct.

11 COMMISSIONER BLAIR: And, as I could tell,
12 the Postal Service did not interpose objections to
13 those discovery requests, am I correct?

14 MR. LEVY: They interposed some objections
15 which were ruled on by the Commission quite some time
16 ago.

17 COMMISSIONER BLAIR: Obviously, a great deal
18 of time has passed since those requests were initially
19 filed, and during this time there have been sporadic
20 attempts to find search terms that would identify a
21 manageable quantity of emails, so, according to the
22 pleadings, efforts were made to resolve this impasse
23 in April and a new set of search terms were agreed to
24 on April 16. Is this correct?

25 MR. LEVY: That's correct.

1 COMMISSIONER BLAIR: And it appears that
2 approximately 25 questions, some of which have several
3 subparts, were agreed to. Mr. Hollies, were these
4 searches run by the Postal Service?

5 MR. MECONE: James Mecone for the Postal
6 Service. Yes.

7 COMMISSIONER BLAIR: And do you have a
8 record of how many hits resulted?

9 MR. MECONE: It's approximately 50,000.

10 COMMISSIONER BLAIR: And according to the
11 discussion that we've just went through, you'll be
12 providing that information hopefully by Friday, unless
13 you file an objection to that, is that correct?

14 MR. MECONE: I understood the objections
15 were due Friday.

16 COMMISSIONER BLAIR: Yes.

17 MR. MECONE: Okay.

18 COMMISSIONER BLAIR: Mr. Levy, do you have
19 any further comments on that?

20 MR. LEVY: No, I do not, Mr. Chairman.

21 COMMISSIONER BLAIR: Okay. Thank you. I
22 understand that we'll certainly take all of these
23 responses into our consideration. It's our intent to
24 move forward with this complaint. I'm glad to see
25 that there is some effort on the part of the Postal

1 Service at resolving this issue, and I hope that the
2 parties can find common ground and proceed on the
3 discovery request that we've just discussed. The
4 final part on this is discussing the subsequent
5 procedure steps. Another part of the context for
6 resolving this issue and completing this case in a
7 timely fashion relates to the Postal Service's plans.
8 Mr. Mecone or Mr. Hollies, the Postal Service filed 46
9 discovery requests to GameFly last night. How much
10 time do you expect to need for discovery on that
11 testimony?

12 MR. MECONE: We expect to need about six
13 weeks.

14 COMMISSIONER BLAIR: Why six weeks?

15 MR. MECONE: Well, GameFly filed 11 rounds
16 of discovery requests, as well as over 700
17 interrogatories, which include subparts. The Postal
18 Service did not anticipate needing as much discovery.
19 We think six weeks is reasonable.

20 COMMISSIONER BLAIR: When were these 46
21 discovery -- they were filed with GameFly last night.
22 How long was the preparation for these?

23 MR. MECONE: Yes. The direct case I think
24 was filed April 12, so since April 12.

25 COMMISSIONER BLAIR: Well, does GameFly have

1 a response as to the six weeks that the Postal Service
2 anticipates?

3 MR. LEVY: Yes. David Levy. We think
4 that's too long, and let me explain why. There's
5 really a fundamental asymmetry in the parties'
6 positions. The documents and information needed to
7 resolve the disputed issues in this case reside almost
8 entirely with the Postal Service. They're in the
9 possession of the Postal Service. If you think about
10 what are the main issues that are in dispute in this
11 case, to name their three biggies: Has the Postal
12 Service, in fact, given different treatment to GameFly
13 versus Netflix, and, to a lesser extent, Blockbuster?

14 Second of all, does the automated letter
15 processing cause unacceptably high rates of disk
16 breakage or is disk breakage the fault of GameFly?
17 Third, is the special treatment given to Netflix, or
18 the alleged special treatment, or the alleged forms of
19 special treatment, are they justified by any cost
20 savings or operational needs of the Postal Service
21 that are not discriminatory? The answers to those
22 issues rest primarily, or if not exclusively, in
23 information in the Postal Service's possession. We
24 had to do extensive discovery because that was the
25 only way that we could get at the truth of the facts

1 underlying the Postal Service's claims on these
2 issues, and we believe that the discovery, which
3 certainly was extensive, was productive and
4 successful.

5 I will not go into details, but if you look
6 at our April 12 memorandum, which we filed under seal,
7 I think you'll see that on issue after issue the
8 Postal Service's claims and defenses in this case
9 were, at least in our view, refuted, or, to some
10 extent, rebutted by documents and information that we
11 obtained from the Postal Service in discovery. The
12 Postal Service's need for discovery, by contrast, is
13 quite limited. It already has the key documents.
14 They're its documents. The key witnesses on its
15 operational needs and costs are its employees. They
16 have control of their company's own information. The
17 Postal Service has been on notice for months of our
18 theory of the case, and in a number of our pleadings
19 we gave fairly extensive road maps to what our
20 arguments were going to be.

21 We weren't very subtle about it. The Postal
22 Service has known for a long, long time what documents
23 we were likely to rely on because they were the Postal
24 Service's documents. It produced them. Finally,
25 there's a sort of a countervailing public policy that

1 argues against delay. As one of the Commissioners
2 noted, two weeks ago was the first anniversary of the
3 filing of our complaint in this case. The Commission
4 has, and I think appropriately so, encouraged members
5 of the public to use the complaint process if they
6 have serious grievances with the Postal Service, but
7 if this kind of delay goes on, and we may have already
8 reached that point, interested parties are not going
9 to want to use the complaint remedy.

10 It will essentially be dead because people
11 -- and I've talked with people who had problems with
12 the Postal Service. It is viewed as the complaint
13 remedy in light of this case. The Capital One case is
14 increasingly viewed as sort of a money pit where you
15 file a complaint and you get bogged down and nothing
16 happens, whether fairly or unfairly. So, for all of
17 those reasons, I don't think that six weeks is
18 necessary given the fact that the Postal Service has
19 had our case and has had its documents for a long,
20 long time. I think a couple of weeks would be
21 sufficient. They've already filed 46 questions, and I
22 assure the Commission we will not take the same amount
23 of time to respond to them as the Postal Service took
24 to respond to our first set of questions.

25 COMMISSIONER BLAIR: Mr. Levy, how long do

1 you think it will take for you to complete your
2 client's direct case?

3 MR. LEVY: We have completed it, unless we
4 find something in the forthcoming emails that causes
5 us to want to supplement it. In all likelihood, we
6 will either do a supplemental filing or we'll file the
7 material, we'll use the material in cross-examination
8 or in our rebuttal case. We do not want to have the
9 procedural deadlines delayed on account of the
10 discovery that we're about to receive.

11 COMMISSIONER BLAIR: So you said your direct
12 case is completed?

13 MR. LEVY: Yes. Subject to the
14 qualification I gave.

15 COMMISSIONER BLAIR: Okay. Thank you. Does
16 any other participant expect to file discovery in this
17 case? Recognize the public representative. You want
18 to identify yourself?

19 MR. COSTICH: Rand Costich for the public
20 representatives. We do have some discovery that we
21 will have ready next week to file with GameFly.

22 COMMISSIONER BLAIR: I would just urge you
23 to do it sooner rather than later as so that we move
24 as quickly as practicable on this case. So I would
25 appreciate you notifying the Commission and the

1 presiding officer of your intent to do so.

2 MR. COSTICH: Thank you.

3 COMMISSIONER BLAIR: Mr. Hollies, does the
4 Postal Service expect to want to conduct oral cross-
5 examination on the GameFly testimony?

6 MR. HOLLIES: That's not clear at this
7 point. We have not made a decision one way or the
8 other. I would like to respond briefly to Mr. Levy's
9 statement of his case. It's a little disturbing to me
10 that he thinks that GameFly has already put the Postal
11 Service's direct case in and dismissed it successfully
12 from the case, all without our having an opportunity
13 to do so. It's nice that Mr. Levy sees the case in
14 terms of three simple issues, as he puts it. I think
15 that the case also, however, revolves around the
16 similarities or dissimilarities of particularly
17 Netflix and GameFly, their business models, and how
18 they mail and how they deal with what happens to their
19 materials in the mail.

20 Those are perfectly appropriate topics for
21 us to inquire into. This is a difficult time at the
22 Postal Service, and that's been really the source of
23 the delay. There's been difficulty in getting
24 coordination cross-functionally, there's been
25 difficulty in getting attention at all of the levels

1 of management that we need to. As everybody in this
2 room knows, the Postal Service is struggling in some
3 ways, and the financial struggles also impact the
4 resources that are available to this litigation team.
5 The questions that were filed yesterday were fairly
6 broad. I think they open up some areas that have not
7 previously been explored.

8 We are not done even with questions in those
9 areas, but we did want to get started as quickly as we
10 could. You asked Mr. Mecone how long, or at least he
11 responded in terms of how long it took us to get this
12 far. We have not been sitting back on our heels. We
13 have been working this case since the direct case was
14 filed. There is a lot of other activity, yes, but we
15 have made a lot of progress in trying to get the
16 Postal Service's position distilled out of the various
17 departmental views and we now see that that is formed
18 itself as our affirmative discovery and we intend to
19 build a direct case on that discovery. We don't know
20 exactly what we're going to say yet. We don't have
21 the answers to the questions from GameFly yet. These
22 are necessary components of, in this instance, the
23 Postal Service's due process rights, and we believe
24 that we should be afforded an opportunity to make the
25 case.

1 COMMISSIONER BLAIR: So you don't know at
2 this point if you're going to be conducting oral
3 cross-examination, is that correct?

4 MR. HOLLIES: We do not.

5 COMMISSIONER BLAIR: Second question I have
6 then is do you expect to want to file rebuttal
7 testimony?

8 MR. HOLLIES: Yes. We will have a direct
9 case.

10 COMMISSIONER BLAIR: And when do you expect
11 the testimony to be ready for filing?

12 MR. HOLLIES: This is a topic that Mr.
13 Mecone has taken up with other of our leaders.

14 MR. MECONE: We think that will also take
15 six weeks from the close of discovery. There are
16 some, a lot of local decisionmakers involved with the
17 case, and, you know, there's 60,000 employees, or
18 600,000 employees in the Postal Service. Not all of
19 those people are involved, but there's a wide range of
20 people and it will take some time to coordinate them,
21 as well as right now we're in the middle of discovery
22 for the five day service change, so we think six weeks
23 from the close of discovery.

24 COMMISSIONER BLAIR: I would just urge you
25 to take under advisement the opening statements you

1 heard here today. When was this case initially filed
2 again?

3 MR. MECONE: April 2009.

4 COMMISSIONER BLAIR: And we're fast
5 approaching June of 2010, so I would urge that,
6 understanding the resource allocation challenges you
7 face, that other organizations face the same thing as
8 well, and that we'll certainly take your concerns
9 under advisement, but at this point I detect a
10 sentiment on the Commission that we need to proceed in
11 order to give adequate due process to all those
12 parties involved. So we'll certainly take these
13 discussions under advisement, but there is a
14 frustration, at least on my part, and, I understand,
15 on Commissioner Hammond's part as well, that we
16 proceed quickly. So at this point I'd like to yield
17 to any other Commissioners if you have any questions
18 of the parties involved. Commissioner Langley?

19 COMMISSIONER LANGLEY: Thank you. I, too,
20 am frustrated by the length of time, but I also
21 understand, especially the mention of cross-
22 functionality and trying to get the attention of the
23 appropriate people. I think it's unfortunate that you
24 have to do that in the sense that it is delaying
25 what's happening. A question I have really is on *E*

1 discovery. It's a very general question and I don't
2 know enough about it, but it was an issue that came up
3 during the Cap One case, it's coming up now.

4 Are there specific protocols that the Postal
5 Service follows when responding to discovery, such as,
6 you know, discovery of the emails. I know it's a very
7 valuable tool now, and with the internet, and with
8 other electronic and mobile communications, *E*
9 discovery is going to be more and more important, so
10 the usability to various counsels will be key. Do you
11 have somebody within the Postal Service who sets
12 protocols so that this can be accomplished in a
13 reasonable manner?

14 MR. HOLLIES: That covers a lot of
15 territory.

16 COMMISSIONER LANGLEY: I'm sorry.

17 MR. HOLLIES: Let me see if I can provide
18 responses of the kind that you're looking for. When
19 this case was filed we instituted hold notices. That
20 is, we used a system internal to the Postal Service.
21 It's one that's been widely shared with the Federal
22 Bar, and it's basically an email-based system of
23 checks and follow-ups so that we asked at first that
24 all of the custodians we could identify as having been
25 involved in the somewhat questionable history of DVD

1 round trip mailing in the last eight years so that
2 they could preserve their things, make sure that they
3 did not throw them away, that they were available to
4 us, and, in fact, that was the foundation for the
5 collection that we made, the documents that Mr. Levy
6 came in, looked at for a bit and said he'd take them
7 all, which we did provide at that point.

8 That system works fairly well. I think we
9 have seen proof of that by the range of documents that
10 Mr. Levy's case is built upon. There is a different
11 process that has also been discussed publicly so I
12 think I can get into it here, and that has to do with
13 the repository of email that the Postal Service keeps.
14 Thanks to the wonderful benefit the Postal Service has
15 of being a defendant in numerous class-action
16 lawsuits, the need to bring the Postal Service into
17 the 21st Century with ESI was recognized, first,
18 because of those kinds of cases.

19 So the general counsel and the chief
20 technology officer had a meeting in which it was
21 agreed we need to do something, and that was what led
22 to a cross-functional team that is actually part of
23 IT. It has been created to, among other things,
24 support Postal Service ESI litigation needs, and
25 primarily your question recognizes email, which tends

1 to be at the base or at the core of how things happen
2 these days. At this point, however, that particular
3 functional area is very strapped for resources, like
4 everybody else. I believe at the last monthly meeting
5 there were several tens of cases that had not been
6 processed.

7 This is not a good thing for the Postal
8 Service. This case has been, and it was through the
9 auspices of that office that we were able to go back
10 and pick up the trends, the state of the ESI searches,
11 the email searches that stalled when they should not
12 have. It was only today that I got enough information
13 to be able to tell you what I am today, that is, that
14 we have a collection of email that was responsive to
15 the last set of searches that were proposed between
16 the parties. So is that?

17 COMMISSIONER LANGLEY: Perfect. Thank you
18 for the education.

19 COMMISSIONER BLAIR: Mr. Levy?

20 MR. LEVY: Thank you, Mr. Chairman. Let me
21 just add a couple of comments. Electronic discovery
22 has become widespread in litigation, both civil and
23 criminal. The processes that Mr. Hollies has just
24 described are sort of standard processes for use by a
25 company that's faced with a demand for emails because

1 not only in this case, but in many cases, emails can
2 often be at the core of what happened. It's an
3 expensive process, but it's also often you find
4 smoking guns, or even where there isn't wrongdoing,
5 you often find a lot of relevant evidence.

6 One of my other practices, and my
7 colleagues', is to represent big mailers that are the
8 subject of investigations by the Postal Inspection
9 Service for failure to comply with various mail
10 preparation requirements. We get hit with email
11 requests by the Postal Service or the Postal
12 Inspection Service, and I can tell you that if we got
13 hit with an email request on July 31, 2009 and we were
14 here today in May of 2010, there would be no sympathy
15 by the postal inspectors by our claims that our
16 clients had inadequate resources. Everybody these
17 days has inadequate resources.

18 The only other point I want to add is that
19 Mr. Hollies said the case revolves around the
20 similarities and dissimilarities between GameFly and
21 Netflix. If you look at their discovery, that seems
22 to be where they're planning to go, but a lot of those
23 asserted distinctions are ones that were raised in the
24 joint stipulation statement of undisputed and disputed
25 facts of July 20, 2009 that are now surfacing in these

1 discovery requests that we received last night. These
2 aren't issues that appeared for the first time when we
3 filed our case in chief in mid-April. I mean, these
4 are things that the Postal Service had notice of and
5 there's no reason why they need six weeks to flesh
6 them out with discovery.

7 COMMISSIONER BLAIR: Well, in light of the
8 discussion that we've had here today, I appreciate
9 Commissioner Langley's input, as well as the other
10 Commissioners, I think that we do have a sound basis
11 on which to proceed. Before I go about the
12 resolution, I would like to just check again. There
13 is no need for us to go to an in camera inspection of
14 any documents following this proceeding, is that
15 correct?

16 MR. LEVY: Correct, as far as I'm concerned.

17 COMMISSIONER BLAIR: Okay.

18 MR. MECONE: Yes.

19 COMMISSIONER BLAIR: Thank you very much.
20 Postal service representative noted that there is no
21 need either. Throughout the case the presiding
22 officer and the Commission has allowed parties to try
23 to resolve the issues through negotiation. I
24 appreciate the parties' continued efforts to work
25 together to help the Commission's complaint process

1 works smoothly. In light of the information we've had
2 here today, I will allow one more week for the parties
3 to try and resolve issues related to discovery and
4 electronic communications. If no agreement is reached
5 by close of business May 12, 2010, GameFly may file a
6 proposed order setting forth the relief that it
7 considers appropriate.

8 The Postal Service will have seven days
9 after such filing to file any opposition. The Postal
10 Service opposition may include any objections it has
11 to producing the identified information. If the
12 Postal Service claims the relief drafted by GameFly
13 would be unreasonably burdensome or expensive, it must
14 provide specific details of the burden and expenses
15 involved. GameFly will have seven days to respond to
16 the Postal Service's opposition. If the Postal
17 Service objects on grounds of burden or expense,
18 GameFly is to explain why the burden or expense is
19 reasonable in light of the value of the information
20 sought and the procedural status of this case. I will
21 take these filings under advisement and promptly issue
22 my ruling. In a separate contemporaneous ruling, I
23 will schedule the next procedural dates in this case.
24 Before we conclude, are there any questions?

25 MR. LEVY: David Levy. Mr. Chairman, if I

1 heard correctly, the Commission plans to issue two
2 rulings through you. One is a ruling on this series
3 of pleadings and the other is a procedural schedule.

4 COMMISSIONER BLAIR: That's correct.

5 MR. LEVY: Then let me, if I may, just add
6 one thing, and this is my fault for not raising it
7 before. I didn't comment on what I felt was an
8 appropriate interval between the discovery cut off and
9 the Postal Service's case in chief. We think that one
10 month, not six weeks, would be an appropriate period.
11 That's the same interval that the parties originally
12 contemplated between the cut off of GameFly's
13 discovery and the filing of GameFly's case. Although
14 that was extended several times, that one month
15 interval was kept until the period when the procedural
16 dates were simply suspended.

17 COMMISSIONER BLAIR: I'd like to hear from
18 the Postal Service on this.

19 MR. MECONE: I think we initially said six
20 weeks. We request six weeks.

21 COMMISSIONER BLAIR: Well, we'll certainly
22 take the parties' views under advisement when we issue
23 our further procedural ruling. Appreciate knowing of
24 this at this point. Are there any additional matters
25 any party wishes to raise at this time?

1 (No response.)

2 COMMISSIONER BLAIR: If not, for the record,
3 I didn't ask everyone to identify themselves first, so
4 could we go ahead and do what we should have done at
5 the beginning so we'll just have a good record of it.
6 I'll ask the Postal Service parties to identify
7 themselves.

8 MR. MECONE: James Mecone and Kenneth
9 Hollies for the Postal Service.

10 MR. LEVY: David Levy for GameFly. Sitting
11 here with me is Sander Glick, our consultant, who is
12 not a lawyer.

13 COMMISSIONER BLAIR: And the public
14 representative?

15 MR. COSTICH: Rand Costich for the public
16 representative. With me is John Klingenberg, who is
17 not a lawyer.

18 COMMISSIONER BLAIR: Okay. Well, thank you
19 very much. Before we conclude, any other further
20 comments from the Commission?

21 (No response.)

22 COMMISSIONER BLAIR: Well, I appreciate your
23 attendance, and forbearance and understanding as we
24 went through some of these difficult procedural
25 aspects, but I think these were important. I think

1 one thing to underscore is the Commission's patience
2 is being tried with how long this has been taking
3 place, and so we would urge both parties to come to
4 resolution and proceed quickly with the remainder of
5 this case. So at this point, this concludes today's
6 hearing and scheduling conference, and we are now in
7 adjournment.

8 (Whereupon, at 2:51 p.m., the hearing in the
9 above-entitled matter was concluded.)

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REPORTER'S CERTIFICATE

DOCKET NO.: C2009-1
CASE TITLE: Complaint of GameFly Inc. Prehearing
Conference
HEARING DATE: May 5, 2010
LOCATION: Washington, D.C.

I hereby certify that the proceedings and evidence are contained fully and accurately on the tapes and notes reported by me at the hearing in the above case before the United States Postal Regulatory Commission.

Date: May 5, 2010

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