

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

COMPLAINT OF GAMEFLY, INC.                    )  
  )  
  )                   Docket No. C2009-1

**MOTION OF THE UNITED STATES POSTAL SERVICE TO COMPEL  
GAMEFLY TO DESIGNATE A WITNESS TO SPONSOR INTERROGATORY  
ANSWERS AND INTERPRETATIONS OF POSTAL SERVICE DOCUMENTS**

(June 16, 2010)

The United States Postal Service (“Postal Service”) respectfully requests that GameFly be compelled to designate a witness who sponsors, and can accordingly face oral cross-examination regarding, GameFly’s institutional discovery responses and the interpretations of Postal Service documents put forth in the Memorandum of GameFly, Inc., Summarizing Documentary Evidence (April 12, 2010) (“GameFly Memorandum”). GameFly has characterized its direct case-in-chief as consisting of only the direct testimony of Sander Glick<sup>1</sup> and the GameFly Memorandum. In addition, GameFly has provided institutional answers to the Postal Service’s interrogatories and document requests without designating a sponsoring witness.<sup>2</sup> To be able to exercise its due process rights to defend itself in this complaint action, and to develop a complete evidentiary record, the Postal Service must receive the opportunity to cross-examine a GameFly witness on these materials and the GameFly Memorandum.<sup>3</sup>

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<sup>1</sup> Testimony of Sander Glick for GameFly, Inc., GFL-T-1, Docket No. C2009-1 (April 12, 2010).  
<sup>2</sup> Commission rules authorize the treatment of discovery responses as written cross-examination. 39 C.F.R. § 3001.30(e)(2).  
<sup>3</sup> Rule 3001.30(e)(3) specifies that a party’s due process rights include the opportunity to follow upon written discovery responses with oral cross examination.

GameFly's direct case includes the testimony of Mr. Sander Glick and the GameFly Memorandum. Mr. Glick is a consultant who is not a GameFly employee and is not involved with GameFly operations or management, and his testimony fails to address the elements of a discrimination claim under 39 U.S.C. § 403(c). As such, GameFly has demonstrated that that the GameFly Memorandum remains unsponsored by any witness, thereby raising the question as to how it can become record evidence. While that question does not trouble the Postal Service directly, the absence of any witness who can face cross-examination on GameFly's direct case would appear to present a direct challenge to the exercise by the Postal Service of its due process rights. Without submission of properly sponsored testimony establishing the factual and legal basis of its case, GameFly's complaint must fail for lack of evidentiary support.

I. The Postal Service Seeks To Cross-Examine A GameFly Witness Regarding GameFly Institutional Responses to Interrogatories and Document Requests, And Interpretations Of Postal Service Documents.

The Postal Service seeks cross-examination of a GameFly witness on issues related to the GameFly institutional responses to interrogatories and document requests, and interpretations of Postal Service documents contained in the GameFly Memorandum. It does not anticipate that the GameFly witness will sponsor Postal Service documents.<sup>4</sup> In addition, questions have arisen in the

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<sup>4</sup> The GameFly Memorandum relies on references to internal Postal Service communications and documents obtained through discovery against the Postal Service. By GameFly's own admission, it is not prepared to sponsor these documents for the truth of their contents, and it has offered no direct evidence of its own in the form of testimony interpreting them. See Answer of GameFly, Inc. to Motion of USPS to Postpone Hearing, Docket No. C2009-1, at 4-7 (June 8, 2010).

course of discovery against GameFly regarding the existence of evidence among its own records and knowledge regarding the allegations in its complaint.

**A. The Postal Service should have an opportunity to cross-examine a GameFly witness regarding the documents destroyed in accordance with GameFly’s defective document retention policy.**

GameFly offers institutional answers to the Postal Service’s discovery requests. Many of these answers will require cross-examination by the Postal Service to follow-up and test their accuracy. In its answers to USPS/GFL-41, 43, 44, and 45, for example, GameFly states that “[any] other written or electronic communications relating to this issue were created long enough ago to have been deleted in the ordinary course of business pursuant to GameFly’s document retention policies.”

**[REDACTED]**

GameFly’s failure to impose an effective document retention policy has resulted in the irreversible loss of responsive documents and communications that GameFly would otherwise have an obligation to produce. The GameFly employees who created these destroyed documents and communications exist as the only possible source of the information in these documents and communications. Accordingly, the Postal Service must be provided the opportunity to cross-examine a GameFly witness in an effort to recover some of

the information that, but for GameFly's defective document retention policy, the Postal Service would have received through discovery. The Postal Service would like to cross-examine one or more knowledgeable GameFly witnesses on these matters to elicit a more complete evidentiary record for the consideration of the Presiding Officer and the Commission.

**B. The Postal Service should have the opportunity to cross-examine a GameFly witness regarding discovery topics likely to have influenced GameFly's business decisions.**

GameFly has objected to interrogatories related to theft, asserting that theft is not relevant and that it conceded the existence of theft through stipulation. See Objections of GameFly Inc. to USPS Discovery Requests USPS/GFL-5, 8, 12, 15-18, 25, 26, 28, 38, 39 and 46 (May 14, 2010) ("GameFly Objections") at 3-5. Allegations of theft or loss of GameFly's DVDs, however, were prominent in GameFly's complaint.<sup>5</sup> The Presiding Officer has recognized the relevance of theft for purposes of discovery. See Presiding Officer's Ruling No. C2009-1/23 (June 10, 2010) at 4 ("the fact that theft occurs has potential implications for mailpiece design which, in turn, could affect mailpiece processing by the Postal Service"). In this regard, GameFly's stipulation as to the existence of theft does not shed light on how theft may have affected GameFly decisions regarding its mail. It is important for the Postal Service to have the opportunity to cross-examine a GameFly witness who can explain how the risk of theft or loss influenced the GameFly business decisions at issue in this case, including GameFly choices related to the design and production of its mail pieces, and the nature of mail processing sought and expected from those decisions.

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<sup>5</sup> Complaint of GameFly, Inc., PRC Docket No. C2009-1, at ¶¶ 24-25 (April 23, 2009).

As another example of issues requiring cross-examination of a GameFly witness, GameFly claims that it has no knowledge of its transportation costs or the costs of expanding its distribution network, and that consideration of such costs is irrelevant to its complaint. See GameFly Answer to USPS/GFL-26, 28 (stating that GameFly has not determined its transportation costs or the costs associated with expanding its distribution network). The Postal Service is entitled to inquire into what GameFly does know about its own business cost, especially given that the entry and delivery of a mailer's pieces are critical elements in providing the service performance a given mailer expects.

At the heart of GameFly's complaint, however, lies its insistence that it should be allowed to receive service on "the same terms" as Netflix. See, e.g., GameFly Objections at 7 ("If the Postal Service refuses to offer GameFly the opportunity to bypass automated letter processing on the same terms offered to Netflix, the Postal Service is discriminating against GameFly"); Complaint at ¶ 57 (The requested relief "should include ... an order prescribing the same prices and terms of service for GameFly, including the same degree of manual processing, that the Postal Service provides to Netflix and Blockbuster"). Key factual elements of its allegations of discrimination include the conditions and expectations that arise from whatever GameFly means by "terms of service." It is at least arguable that, to receive service on "the same terms" as Netflix, GameFly would have to make changes to its transportation and distribution networks. The Postal Service has offered GameFly service "on the same terms" as Netflix, and GameFly has not shown any interest. See May 17, 2010 letter from R. Andrew

German to David Levy; Postal Service Response to GFL/USPS-63 (August 19, 2009) (stating that the Postal Service would allow its field officials the same discretion to manually cull GameFly mail as allowed for Netflix if GameFly mailed its DVDs in lightweight mail pieces like those of Netflix at the one-ounce machinable letter rate). How a mailer enters and takes delivery of mail are key elements of any relationship between the Postal Service and that mailer, especially when a mailer focuses closely upon service performance. Given GameFly's claimed interest in Netflix like service but evident simultaneous disinterest, as well as its determination that transportation costs are not pertinent considerations in evaluating the service actually provided, the Postal Service should have the opportunity to cross-examine a GameFly witness about this apparent inconsistency and what exactly GameFly really wants.

Similarly, GameFly also claims that it has no knowledge regarding how the composition and prices of its game DVDs compare with video DVDs. See, e.g., Answer of GameFly Inc. to Motion of USPS to Compel Answers to Discovery Requests USPS/GFL-5, 8, 16, 26, 28, 38, 39, 46, 49-51, 52(e), 54 and 60 ("GameFly MTC Answer") (May 14, 2010) at 15-16. The Postal Service should be provided the opportunity to inquire about this lack of knowledge, and to cross-examine a GameFly witness regarding how, despite this lack of knowledge, GameFly supports its contention that it is similarly situated to Netflix for purposes of its complaint.

- C. The Postal Service should have the opportunity to cross-examine a GameFly witness regarding GameFly's direct case.**

The Postal Service should have the opportunity to cross-examine a GameFly witness on all of the factual allegations and legal conclusions comprising GameFly's direct case. Although GameFly states that its direct case consists solely of "(1) a cost study by Sander Glick (GFL-T-1) and (2) stipulations, interrogatory answers, and business records produced by the Postal Service in discovery," (see GameFly Memorandum at 1) this is misleading. Mr. Glick's testimony compares GameFly and Netflix mail with respect to Postal Service costs and postage payments received. See Testimony of Sander Glick for GameFly, Inc. (April 12, 2010). It does not address any of the elements of discrimination under 39 U.S.C. § 403(c). See *id.* Contrary to its characterization, GameFly does not rely directly on "stipulations, interrogatory answers, and business records produced by the Postal Service in discovery," but on its own self-serving interpretations of those records and documents that severely stretch their language to address the elements of discrimination. See, e.g., GameFly Memorandum at 32-33 (interpreting Postal Service document ordering removal of Netflix mail slot as a precautionary measure to avoid unidentified "legal ramification" as an "implicit admission" that mail slot had no operational justification and that unidentified "legal ramification" constituted discrimination under 39 U.S.C. § 403(c)).

To defend itself, the Postal Service must have an opportunity to face its accuser. This opportunity should include cross-examination of an institutional witness with knowledge of GameFly's operations and business decisions, as well as the events that led to the filing of the complaint. GameFly's contention that it

may limit its direct case to the testimony of an independent consultant, and to Postal Service documents whose content GameFly does not sponsor, represents a serious mischaracterization of its responsibilities to support its complaint with direct evidence. In this regard, the GameFly Memorandum resembles direct testimony. It addresses the elements of discrimination under 39 U.S.C. § 403(c) only through GameFly's own interpretations and expressions of fact peripherally related to Postal Service documents.<sup>6</sup> If GameFly seeks to offer the GameFly Memorandum into evidence, it should follow the procedures based upon due process as reflected in the Commission's rules and standards; GameFly should accordingly be required to sponsor the GameFly Memorandum through a GameFly witness, and the Postal Service should be afforded the opportunity to cross-examine this witness.

II. Postal Service Documents Do Not Show Any Elements Of A Discrimination Case Under 39 U.S.C. § 403(c).

By attempting to prove its direct case through the testimony of consultant Glick and Postal Service documents produced in discovery, and without testimony from any other GameFly witness, GameFly fails to address any of the elements of discrimination under 39 U.S.C. § 403(c) with evidentiary support. As described above, Mr. Glick's testimony does not purport to address the elements of discrimination. See Testimony of Sander Glick for GameFly, Inc. (April 12, 2010) at 1 (explaining that testimony serves to "(1) estimate the difference in the

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<sup>6</sup> Citing the Commission's rules applicable to respondents to a proponent's case, GameFly describes its Memorandum as a "trial brief." Answer of GameFly, Inc. to Motion of USPS to Postpone Hearing, PRC Docket No. C2009-1, at 5, n.6 (June 8, 2010). Contrary to this characterization, however, the Memorandum, which is not even labeled as a brief, is apparently offered as a key element of GameFly's evidentiary support for its complaint.

Postal Service's costs of handling Netflix and GameFly DVD mailers, and (2) compare this cost difference to the difference in average postage per piece paid by the two companies"). And Postal Service documents cited by GameFly do not address the elements of discrimination, as the majority of them, at most, consist of unsponsored comments regarding general precautionary measures, and do not even make reference to GameFly.

The GameFly Memorandum offers self-serving, forced interpretations of these Postal Service documents, many of which explain general precautionary measures and refer to "other DVD mailers." These documents reflect concerns about whether certain policies could subject the Postal Service to the risk of unspecified litigation, and in some cases, litigation brought by "other DVD mailers." For many reasons, GameFly cannot support its inference that these documents show some concession of discrimination by the Postal Service.

First, recognition and response to a legal risk does not concede legal liability for that risk. If GameFly's perspective were allowed to prevail, every organization that instituted a sexual harassment policy would be found to concede liability for sexual harassment by the mere implementation of a sexual harassment policy.

Second, the documents make no reference to discrimination or any specific type of litigation risk. In many cases, the practices described in the cited documents could arguably create legal risk for many reasons other than discrimination, including inconsistency with the many statutory, regulatory, policy and procedural standards governing postal operations.

Finally, the documents cited by GameFly refer to “other DVD mailers,” as well as specific DVD mailers, all of whom use First-Class Mail automated letter processing, including Blockbuster. They do not identify GameFly, which has never made use of letters for its round trip DVDs.<sup>7</sup> See, e.g., GameFly Memorandum at 45 (citing GFL805). It is too far a stretch for GameFly to contend that the reference to “other DVD mailers,” in the context of a discussion regarding practices affecting a mailer’s pieces in the automated letter processing mail stream, would necessarily extend to GameFly, whose mail travels through the automated flats mail stream. It is even more inappropriate to infer that through this reference the Postal Service concedes that GameFly is similarly situated to Netflix for purposes of the legal definition of discrimination. In fact, the cited document does not mention “GameFly” or “discrimination.”

A more detailed analysis of one of GameFly’s inferences demonstrates the forced and self-serving nature of GameFly’s contention that Postal Service documents prove the elements of a discrimination case under 39 U.S.C. § 403(c). GameFly alleges that “Postal Service officials themselves have conceded the functional equivalence between the mail service provided to Netflix and the service provided to other DVD rental companies,” and that “[t]hese officials have repeatedly expressed concerns about the risk that the preferred treatment given to the former might lead to a discrimination complaint by the latter.” Answer of GameFly Inc. to Motion of USPS to Postpone Hearing (June 8,

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<sup>7</sup> Indeed, other mailers make use of a payment method that requires automated letter processing on the return trip to these mailers.

2010) at 12. In support of this allegation, GameFly cites to its memorandum and a list of Postal Service documents.

One of the underlying Postal Service document states

In an effort to accommodate Netflix mail, some offices have created special mail drops and signage for Netflix returns. This is not an authorized use of mail drop slots and it has legal ramification for the Postal Service.

GameFly Memorandum at 32.

GameFly inferred from this document that

The headquarters directive certainly was an implicit admission that this form of preferential treatment for Netflix has no operational justification; and the “legal ramification” alluded to was presumably liability for discrimination under 39 U.S.C. § 403(c).

Id. at 32-33.

From a document that refers merely to the risk of litigation, with no assessment of the seriousness of the risk or the legal theory underlying the risk, GameFly concludes that the Postal Service has admitted liability for discrimination, and that it had no justification for that discrimination. See id. GameFly extends this conclusion even further, alleging that the underlying document not only concedes discrimination and the absence of an operational justification for the challenged conduct, but also concedes that GameFly and Netflix are similarly situated for purposes of discrimination. See GameFly MTC Answer at 3-4.

GameFly’s direct case does not rely merely on Postal Service documents, but on its stretched, self-serving conclusions regarding these documents. If presented at all, these conclusions must be incorporated in testimony.

Otherwise, GameFly's complaint must fail for lack of evidentiary support.

Accordingly, due process and simple fairness require that the Postal Service be provided its opportunity to cross-examine a GameFly witness regarding the conclusions that form GameFly's direct case.

III. The Postal Service Did Not Waive Its Opportunity To Cross-Examine A GameFly Witness.

The Postal Service files this motion now because it has received responses to discovery that make apparent the need to cross-examine a GameFly witness. The Postal Service received GameFly's first set of discovery responses on May 18, 2010, and received its most recent discovery responses on June 9, 2010.<sup>8</sup> Until it received GameFly's discovery responses, the full scope of the need to cross-examine a GameFly witness was not discernable. The Postal Service held out hope that subsequent interrogatory answers would provide information that would complete the record, but unfortunately this did not occur. And with GameFly's disclosure on June 9 of the details of its defective document retention policy and the destruction of many responsive documents and communications, the need to cross-examine a GameFly witness on inquiries submitted in discovery became unavoidable. See Appendix USPS/GFL-63. In any event, the Postal Service's right to test GameFly's representations in its discovery responses, as well as the interpretations and representations contained in the GameFly Memorandum, would stand, regardless of the timing of the instant motion. GameFly can cite to no Commission rule or other legal

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<sup>8</sup> Answers of GameFly, Inc., to USPS Discovery Requests USPS/GFL-1-4, 6-7, 9-38, 40-45 (May 18, 2010); Answers of GameFly, Inc., to USPS Discovery Requests USPS/GFL-63 through -83 (June 9, 2010).

principle that would abrogate the Postal Service's due process rights in this regard.

IV. Alleged Liability Under The Filed Rate Doctrine Does Not Abolish GameFly's Responsibility To Support Its Case, Or Preclude The Postal Service From Exercising Its Rights To Due Process.

GameFly has repeatedly argued that the filed rate doctrine conditions the Postal Service's legal obligations, in light of the allegations of unlawful discrimination in GameFly's complaint. See GameFly Memorandum, at 63-65. Most recently, GameFly has argued that the Postal Service's alleged failure to follow GameFly's interpretation of this doctrine, in effect, nullifies the need to cross-examine a GameFly witness on the factual representations that lie at the heart of the complaint.<sup>9</sup> In this regard, GameFly apparently argues that the filed rate doctrine is an element of a finding of undue discrimination pursuant to 39 U.S.C. § 403(c), and that the Postal Service's noncompliance has been established on the record. From this conclusion, GameFly apparently argues that "the issues that the Postal Service invokes as potential grounds for compelling the appearance of an in-house GameFly witness are 'irrelevant, immaterial,' and [un]necessary for the disposition of this proceeding' under Rule 3001.30(f)." Id. at 8. According to GameFly, the burden has therefore shifted to the Postal Service to disprove undue discrimination, and GameFly has no further obligation to support its case.

Beyond GameFly's distorted view of the evidentiary record that has been established in this proceeding so far, the filed rate doctrine simply does not

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<sup>9</sup> Answer of GameFly, Inc. to Motion of USPS to Postpone Hearing, PRC Docket No. C2009-1, at 7-10 (June 8, 2010).

apply. Even if it did, it would not preclude the Postal Service from conducting discovery or cross-examination, or from developing an evidentiary basis to support a rational justification for the alleged discrimination. Netflix pays the single-piece, one-ounce First Class Mail letter rate for its incoming mail. Beyond the basic elements of First-Class Mail Service, payment of this rate does not entitle Netflix, or any other mailer, to any specific type of processing, a general truth applicable to almost all mailers long borne out in matters considered by the Commission. Accordingly, there exist no specific “terms and conditions” of the service purchased by Netflix within GameFly’s apparent interpretation of the filed rate doctrine. To this extent, this situation is distinct from matters involving a contract between the Postal Service and a mailer – matters which are the subject of cases cited by GameFly – hence the filed rate doctrine and the case authorities cited by GameFly do not apply.

Even if the filed rate doctrine were to apply, it would have no effect on the Postal Service’s right to rebut any allegation of discrimination under 39 U.S.C. § 403(c). Contrary to GameFly’s erroneous conclusion, the filed rate doctrine has no influence over the analysis of a discrimination claim brought under 39 U.S.C. § 403(c), and GameFly cites nothing to support its claim that the filed rate doctrine somehow limits the Postal Service from mounting a factual and legal defense to alleged discrimination. The Postal Service expects to cross-examine a GameFly witness on the significance of GameFly’s arguments related to the filed rate doctrine.

## **Conclusion**

For the reasons discussed above, the Postal Service respectfully requests that the Commission direct GameFly to designate a witness to face cross-examination on GameFly's interrogatory answers and its direct case, including the GameFly Memorandum.

Respectfully submitted,

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