

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

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

**STATEMENT OF GAMEFLY, INC.,  
CONCERNING DOCUMENTS RESPONSIVE TO  
USPS/GFL-41, 43, 44 OR 45  
(July 27, 2010)**

Pursuant to Presiding Officer’s Ruling No. C2009-1/24, GameFly, Inc., (“GameFly”) hereby states that it cannot “identify or recollect any deleted emails or documents which, though not produced, would be responsive to USPS/GFL-41, 43, 44 or 45.” *Id.* at 18. GameFly communicated this fact orally to Postal Service counsel several days ago. Because the Postal Service has alleged that GameFly has engaged in “spoliation” of “highly relevant and pertinent documents” and has challenged the “honesty” of GameFly’s witnesses, however, a brief further response is warranted.

USPS discovery requests 41 and 43-45 all ask in various ways for documents relating to the reasons for GameFly’s decision to mail its DVDs as flats rather than letters. As GameFly has explained repeatedly, GameFly made this decision because (1) automated letter processing breaks DVDs and (2) the USPS has not offered to give GameFly mailers the same treatment given to Netflix (manual culling and custom manual processing). In these circumstances,

the best alternative available to GameFly is to mail its DVDs in mailers with protective cardboard inserts. This alternative, however, requires paying the rate for a two-ounce flat. See Memorandum of GameFly Summarizing Documentary Evidence (April 12, 2010) at 8-45 (citing USPS documents that have been entered into evidence); see also GameFly answers to USPS/GFL-2, 20, 22, 47, 48, 49, 59 and App. USPS/GFL-1.

At the outset of its case, neither GameFly nor its counsel anticipated that the issues in this case would turn on GameFly records. The destructive effect of automated letter processing has been widely recognized within the DVD rental industry, and documents subsequently produced by the Postal Service in response to GameFly discovery requests confirmed that the problem has been acknowledged by multiple officials within the Postal Service itself. See Memorandum of GameFly Summarizing Documentary Evidence (April 12, 2010) at 8-13, 17-30, 33-37 (citing USPS documents that have been entered into evidence). Likewise, the Postal Service's willingness to offer Netflix, but not GameFly, manual processing at letter rates, and the potential defenses that the Postal Service might choose to assert under existing precedent under 39 U.S.C. § 403(c), also involve facts within the possession of the Postal Service, not GameFly. For these reasons, as well as the absence of Commission precedent requiring complainants in discrimination cases to implement litigation holds comparable to those developed in recent years in civil litigation, counsel for GameFly did not advise the company to implement a litigation hold at the outset of the case.

The Postal Service's recent allegations of "spoliation" have been part of an overall strategy of trying to change the subject. Ignoring the admissions of its own employees that automated letter processing breaks DVDs at high rates, the Postal Service has demanded that GameFly produce evidence that might somehow support an alternative theory for elevated disc breakage—or at least to establish that GameFly's own documentation of the nexus between automated letter processing and DVD breakage is insufficiently scientific or rigorous—despite the undisputable admissions in the Postal Service's own files confirming this nexus. Memorandum of GameFly Summarizing Documentary Evidence (April 12, 2010) at 8-13, 17-30, 33-37. The Postal Service's assertion that GameFly and Netflix are not similarly situated because the two companies' mailers and practices are not identical is another crude exercise in revisionism. GameFly and Netflix mailers serve the same purpose, use the same mail class; and the Postal Service's internal analyses have consistently treated the two companies as similarly situated. See, e.g., Tr. 4/186, 365, 366 and 573 (documents from Round-Trip DVD Mailer initiative and the Christensen study).

The Commission nonetheless has given the Postal Service wide leeway to pursue discovery on these matters, on the ground that the proper scope of discovery is broader than the standard of materiality at trial. See, e.g., Presiding Officer's Ruling No. C2009-1/23 at 7 & 12. The Commission's understandable reluctance to cut off the Postal Service's inquiry at the discovery stage, however, does not transform information of little or no materiality into "highly relevant and pertinent" facts. Cf. USPS Notice of Intent to Conduct Oral Cross-Examination (July 12, 2010) at 2.

Finally, and in any event, GameFly's failure to impose a litigation hold before the Postal Service launched its discovery campaign has not prejudiced the Postal Service. GameFly is not a vast and sprawling bureaucracy. It is a relatively young company with only 75 salaried employees. Decisions about mailpiece design are typically made by three individuals meeting face-to-face: David Hodess, the CEO; Terri Luke, Senior Vice President—Operations; and Michael Gimlett, Senior Vice President, Merchandising and Logistics. Decisions involving purchasing are typically made by Mr. Hodess and Mr. Gimlett alone. The offices of all three individuals are less than 100 feet apart. Consistent with size and flexibility of the company, its decisions are rarely accompanied by emails, meeting minutes or memoranda of the kind that the Postal Service generates.

GameFly nonetheless has produced a vast array of documents to the Postal Service in discovery. These documents included approximately 348 megabytes of weekly performance reports dating back to 2002, over 91 megabytes of emails and other documents concerning DVD theft and loss data dating back to 2006, and more than 328 megabytes of documents responsive to other Postal Service discovery requests. Indeed, GameFly's legal counsel and Mr. Glick are unaware of any private party, large or small, that has performed a more comprehensive and time-consuming document production in a Commission complaint or rate case than GameFly has performed.

***Electronic Data Files:*** First, GameFly has produced all of the company's weekly and monthly loss and damage reports extending back to 2002, and all

other responsive data created by the company. GameFly has retained all of the relevant electronic data files created since the company began operations, without exception.

**Other Files:** Second, GameFly has produced a substantial volume of paper and other electronic documents. These include reports of internal studies of the causes of DVD breakage; GameFly reports on the effectiveness of alternative GameFly mailer designs in minimizing disk breakage; and analyses of these matters by current and former GameFly employees. GameFly is unaware of any relevant paper files that have been lost or destroyed.<sup>1</sup>

**E-mails:** The only group of GameFly documents deleted automatically through the passage of time have been electronically stored emails. Mr. Hodess and other GameFly managers do not recall the specific contents of those emails. Given the tendency toward short, in-person communications among the GameFly employees who created the emails, however, GameFly does not believe that the emails would have contained any significant information responsive to USPS discovery requests USPS/GFL-41, 43, 44 or 45 beyond the information contained in the documents that GameFly has produced to the Postal Service. GameFly has also produced emails from the files of Sander Glick dating back to 2007.

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<sup>1</sup> GameFly's supplemental answer to USPS/GFL-4, filed separately today, explains how documents originally in the files of former GameFly employees Steve Brown and Jeff Kawasugi were preserved by GameFly and produced to the Postal Service.

Respectfully submitted,

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