

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

COMPLAINT OF GAMEFLY, INC.

Docket No. C2009-1

**RESPONSE OF THE UNITED STATES POSTAL SERVICE TO MOTION OF  
GAMEFLY, INC., TO COMPEL THE POSTAL SERVICE TO ANSWER GAMEFLY  
DISCOVERY REQUESTS GFL/USPS-225 TO 233, 235**

(September 21, 2010)

On August 16, 2010, GameFly filed its twelfth discovery requests, GFL/USPS-225-235.<sup>1</sup> On August 26, 2010, the Postal Service filed objections<sup>2</sup> to these discovery requests, asserting that the discovery requests are duplicative and unduly burdensome, and noting that GameFly filed the discovery requests well after the close of discovery. On September 14, 2010, GameFly filed a motion to compel the Postal Service to answer discovery requests GFL/USPS-225-233 and 235.<sup>3</sup>

GameFly's most recent motion once again attempts to push the limits of its responsibilities to prove its case through its own testimony and allow it to evade the restrictions that the Commission's rules and practice place on any litigant in contentious proceedings before the Commission. In this instance, GameFly argues, in effect, that it has unbounded freedom to conduct limitless discovery against the Postal Service. It founds this argument essentially on the Postal Service's direct case in defense against GameFly's baseless allegations of unlawful discrimination, in spite of, or apparently

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<sup>1</sup> Twelfth Discovery Requests of GameFly, Inc., to the United States Postal Service (GFL/USPS-225 – 235) (August 16, 2010).

<sup>2</sup> Objections of the United States Postal Service to Discovery Requests of GameFly, Inc. (GFL/USPS-225-235) (August 26, 2010).

<sup>3</sup> Motion of GameFly, Inc., to Compel the Postal Service to Answer GameFly Discovery Requests GFL/USPS-225 to 233, 235 (September 14, 2010) ("Motion to Compel").

because of, GameFly's earlier opportunities to conduct legitimate discovery against the Postal Service and its testimony under the Commission's rules. GameFly now argues that, because the Postal Service's testimony reemphasizes what has been the foundation of the Postal Service's defense from the very beginning of this proceeding, GameFly's rights to conduct discovery have been resuscitated. It makes this argument despite the Commission's rules and the Presiding Officer's rulings establishing limitations on GameFly's penchant for conducting endless fishing expeditions in its quest to find a "smoking gun" on which to base its unsubstantiated allegations. GameFly has had ample opportunities, which it has exploited to the fullest, to conduct discovery against the Postal Service and to inquire about its written direct testimony. In the interests of fairness and balance in this and future proceedings, the Postal Service submits that GameFly's new efforts to circumvent its own responsibilities should be denied.

The Postal Service accordingly renews its earlier objections<sup>4</sup> and incorporates them into this response. GameFly's motion to compel provides no valid basis for overriding the Postal Service's objections, and has provided no legitimate basis to revive discovery. As stated in the objections, discovery has closed and has not been reopened. In this regard, GameFly cites, as support for its most recent attempts to extend discovery, the Postal Service's statement in its objections that it has a continuing obligation to produce newly discovered documents responsive to GameFly discovery requests. That acknowledgement, however, referred only to the long-established practice before the Commission of providing updated information when new facts within

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<sup>4</sup> See Objections of the United States Postal Service to Discovery Requests of GameFly, Inc. (GFL/USPS-225-235) (August 26, 2010).

the scope of an original discovery request come to light undermining the accuracy of an earlier answer. In the context of a request to produce documents, all this means is that, if documents within the scope of an earlier request for production come to light, because they were overlooked or were lost through administrative or other error, updating the response by providing the missing documents would be in order. What it does not mean is that a discovery request for production of documents filed during a scheduled period of discovery, and under the temporal limitations that would apply to such requests, creates an obligation to produce an endless stream of documents created after the deadline for discovery. If that were true, there would be no hope of establishing reasonable control over the course of the litigation, and the party subject to such continuing obligation would be deprived of a balanced and fair status as a litigant.

Furthermore, without defined discovery boundaries, the record would be subject to change at any time, and there would be no concrete set of facts to serve as a basis for the Presiding Officer's decisions. The party subject to endless discovery would be constantly faced with a moving target that would render ineffective its efforts to rebut baseless allegations through its own direct testimony. Each time it files testimony based on the evidentiary record as it exists (or, in this case, the "trial brief" of its opponent), it would merely set a new foundation for unlimited future discovery. Allowing GameFly to serve additional discovery after the end of the discovery period would render meaningless the complaint schedule and time deadlines imposed by the Presiding Officer, and lengthen the already protracted complaint process.

**GFL/USPS-235**

GameFly has not demonstrated that additional responsive documents exist, or that the record needs updating. In section I of the motion to compel, GameFly addresses discovery request GFL/USPS-235, and contends that more recent weekly reports exist and are relevant to the testimony of Postal Service witnesses Lundahl, Belair and Seanor.<sup>5</sup>

With respect to witness Lundahl's testimony, GameFly argues that a post-June 2009 "focus on DVD breakage rates in Netflix's weekly scrap reports" would show the success of the damage reduction techniques set forth in witness Lundahl's testimony. But a review of the documents provided to GameFly in the Appendix to the Response of the United States Postal Service to Motion of GameFly, Inc., to Compel the Postal Service to Answer GameFly Discovery Requests or, in the Alternative, to Strike Testimony of USPS Witness Robert Lundahl (USPS-T-4) ("Appendix") indicates that witness Lundahl conducted the studies and made recommendations based on those studies in 2007 and 2008. GameFly has not demonstrated that, for purposes of evaluating the success of the damage reduction techniques reflected in witness Lundahl's testimony, post-June 2009 weekly reports, if they exist, would contain information not present in the weekly reports already produced by the Postal Service. GameFly does not identify how many weekly reports, which would be substantially similar to the reports already produced, would be necessary to make GameFly's point. GameFly had ample opportunity to conduct discovery against witness Lundahl, and should not be permitted to conduct more.

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<sup>5</sup> See Motion to Compel, at 4-5.

In an attempt to support its contention that post-June 2009 weekly reports would be relevant to the testimony of Postal Service witnesses Belair and Seanor, GameFly states “[post-June 2009 weekly reports] reveal the extraordinary oversight over Postal Service operations given to Netflix and the extent to which the Postal Service strives to accommodate Netflix.”<sup>6</sup> GameFly does not explain how the weekly reports reflect Postal Service policies or actions. In fact, GameFly describes these reports as emails authored by Netflix, and not by the Postal Service.<sup>7</sup> GameFly has not articulated the relevance of post-June 2009 weekly reports to Postal Service policies or actions, or to the testimony of Postal Service witnesses Belair and Seanor. It merely seeks them to reinforce the same tired argument regarding “Netflix oversight over Postal Service operations” that it belabored, without convincing support, in its legal memorandum.<sup>8</sup>

### **GFL/USPS-225-233**

Section II of GameFly’s motion to compel concerns the Postal Service’s objections to GFL/USPS-225 to 233. GameFly argues that the Postal Service has additional documents responsive to certain discovery requests, and that the Postal Service must produce these documents because “the Postal Service’s witnesses have placed squarely in dispute” Postal Service processing standards and policies. This argument mischaracterizes Postal Service processing standards and policies, and Postal Service witness testimony. Postal Service witness testimony is the only evidence in the record stating Postal Service processing standards and policies. GameFly has provided no testimony or other evidence identifying specific Postal

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<sup>6</sup> See id. at 5.

<sup>7</sup> See id.

<sup>8</sup> Memorandum of GameFly, Inc., Summarizing Documentary Evidence, Docket No. C2009-1, at 26-30 (April 12, 2010).

Service processing standards or policies reflected by Postal Service documents. Postal Service documents entered into the record<sup>9</sup> have not been sponsored or authenticated. And there has been no demonstration that the author of each document had authorization to speak on behalf of the Postal Service, or had accurate knowledge regarding the subject matter of each document. If GameFly claims that Postal Service documents articulate a specific Postal Service processing standard or policy, it must identify that standard or policy and explain how Postal Service testimony “place[s] the standard or policy] in dispute.” Without this explanation from GameFly, the Presiding Officer does not possess sufficient information to assess the merits of GameFly’s motion to compel.

### **Conclusion**

In any event, GameFly’s weak attempt to bootstrap its unsustainable claims that it should be allowed endless discovery would mock any reasonable discovery limitations that the Commission’s rules provide. The Postal Service’s contention that its mail processing decisions, based on reasonable exercise of field discretion in operations, are not unlawfully discriminatory under 39 U.S.C. § 403(c) has been clear from the beginning of this proceeding.<sup>10</sup> GameFly cannot now claim that the Postal Service’s testimony that extensively addresses that contention has surprised it, leading to new discovery rights, especially since a reasonable period of discovery against the Postal Service’s witnesses has already been provided.

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<sup>9</sup> The Postal Service provided an oral objection to the entry of Postal Service documents as record evidence without any sponsorship, authentication or foundation. See Tr. 3/72-73; Tr. 4/155-156.

<sup>10</sup> Joint Statement of Undisputed and Disputed Facts, Docket No. C2009-1, ¶ 81 (July 20, 2009).

For the reasons set forth above, the Postal Service respectfully requests that the Presiding Officer deny GameFly's motion to compel.

Respectfully submitted,

UNITED STATES POSTAL SERVICE  
By its attorneys:

Daniel J. Foucheaux, Jr.  
Chief Counsel, Pricing and Product  
Support

Kenneth N. Hollies  
James M. Mecone

475 L'Enfant Plaza, S.W.  
Washington, D.C. 20260-1137  
(202) 268-6525; Fax -6187  
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