

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

|   |             |                      |
|---|-------------|----------------------|
| COMPLAINT OF GAMEFLY, INC.  | )           | Docket No. C2009-1R  |
|   | )           |                      |
| COMPETITIVE PRODUCT LIST<br>ADDING ROUND-TRIP MAILER                | )           | Docket No. MC2013-57 |
|   | )           |                      |
| COMPETITIVE PRODUCT LIST<br>ADDING ROUND-TRIP MAILER<br>(MC2013-57) | )<br>)<br>) | Docket No. CP2013-75 |

**NOTICE OF GAMEFLY, INC.,  
CONCERNING STATUS OF DAVID HODESS  
AS REVIEWING REPRESENTATIVE  
(March 10, 2014)**

GameFly, Inc. ("GameFly") hereby gives notice that, effective immediately, its President and CEO, David Hodess, will no longer be serving as a reviewing representative for GameFly under 39 C.F.R. § 3007.40 with respect to any material filed under seal pursuant to 39 C.F.R. Part 3007 that concerns Netflix, Inc.

Mr. Hodess has been an authorized reviewing representative for GameFly in this litigation since 2009. In that capacity, Mr. Hodess has received information designated by the Postal Service or Netflix as proprietary to Netflix. This access was permitted under the Commission's rules because GameFly and Netflix were not competitors. On or about April 1, 2014, however, GameFly plans to begin a test offering of a selection of movie DVDs for rent along with video game DVDs. Although this test will be small in

scale, GameFly does recognize that it will make Netflix a competitor under 39 C.F.R. § 3007.40.

GameFly does not believe that the information filed under seal to date by the Postal Service and Netflix, and received by Mr. Hodess, has conferred, or could confer, any competitive advantage on GameFly vis-à-vis Netflix, and GameFly has not used any of the information to make or influence its decisions regarding the test. The sealed material contains the following categories of information about Netflix:

1. USPS data on the volume of mail sent by Netflix before 2009.
2. Emails and other correspondence between the USPS and Netflix before 2009 concerning the quality of processing received by Netflix DVDs, and their rate of breakage.
3. Data showing the volume of Netflix's mail volume, and the relative sizes of Netflix's DVD-by-mail and Internet streaming businesses, during each of the last several years.
4. Data showing what percentage of Netflix's subscribers receive their movies by mail, by Internet streaming, or both.

The first two categories of information are now five or more years old, and in any event reveal nothing about the kinds of video entertainment that are likely to be most profitable for GameFly to offer in competition with Netflix, or the costs currently incurred by Netflix in serving its DVD rental customers.

The third and fourth categories of data, which Netflix produced in response to Chairman's Information Request No. 3 on January 16, 2014, and the USPS produced in response to Chairman's Information Request No. 1 on January 16, 2014, are more current. Like the earlier nonpublic data, however, the data about Netflix in the January 2014 filings are also too aggregate to reveal anything of competitive value to GameFly. The data show the overall volume of movies mailed by Netflix each year for the past several years, the overall volume trends of Netflix's DVD-by-mail business vs. the company's Internet streaming business, and the overall percentage of Netflix's subscribers who obtain their content by mail, by Internet streaming or both. None of the 2014 material identifies the specific geographic or demographic characteristics of the current DVD-by-mail customers of Netflix, the specific titles or kinds of entertainment content that are the most appealing to those consumers, or the marginal or incremental costs incurred by Netflix in serving those consumers.

Moreover, anyone can get a good picture of the general state of Netflix's DVD-by-mail business from the company's Form 10-K and other public filings. Netflix's Form 10-K for calendar year 2013 stated, for example, that

The number of memberships to our DVD-by-mail offering is declining, and we anticipate that this decline will continue. We believe, however, that the domestic DVD business will continue to generate significant contribution profit for our business.

*Id.* at 11. Likewise, the January 22, 2014, letter of Netflix's CEO to the company's shareholders stated:

6.9 million DVD members continue to value the tremendous selection we offer on DVD. Contribution profit was roughly stable at \$110 million. We expect \$98 million in contribution profit for Q1, which reflects the postal rate increase implemented this month and higher seasonal usage.

*Id.* at 6. In any event, because GameFly already possesses the merchandising, technology and distribution assets required to offer movie DVDs for rent, GameFly's decision to test market movie DVDs was not based on any market or cost studies by GameFly, or any data from Netflix or any other competitor. Whether offering movie DVDs by mail is an attractive business opportunity is a determination that GameFly will make based on the results of the market test itself.

Notwithstanding the foregoing, Mr. Hodess has decided, out of an abundance of caution, to terminate his access to any information concerning Netflix that has been filed under seal. Attached to this notice is a certification by Mr. Hodess that he has destroyed all materials obtained by him under the protective conditions in these dockets.<sup>1</sup> Mr. Hodess will not seek to obtain any nonpublic information from Netflix in the future, and counsel for GameFly will screen from Mr. Hodess any nonpublic information about Netflix that the Postal Service files under seal.

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<sup>1</sup> Although Mr. Hodess received CDs containing the January 2014 responses of the USPS to CHIR 1 and Netflix to CHIR 3, he never loaded the CDs into a computer, or learned of their contents by any other means, before destroying them.

Respectfully submitted,

/s/

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*Counsel for GameFly, Inc.*

March 10, 2014

## CERTIFICATION

I certify that I have destroyed all of the materials provided to me that contain information about Netflix, Inc., that was submitted under seal pursuant to the protective conditions established in Docket No. C2009-1R, *Complaint of GameFly, Inc.*, Docket No. MC2013-57, *Competitive Product List—Adding Round-Trip Mailer*, and Docket No. CP2013-75, *Competitive Product List—Adding Round-Trip Mailer (MC2013-57)*. I also certify that these materials were maintained in accordance with the established protective conditions.



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David Hodess  
President and CEO  
GameFly, Inc.

March 7, 2014