

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

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

OBJECTIONS AND PARTIAL OBJECTIONS OF THE
UNITED STATES POSTAL SERVICE TO
DISCOVERY REQUESTS OF GAMEFLY, INC.
(GFL/USPS-3(e), 4(e), 6(a)-(e) and (g)-(h), 7-8, 14(e),
15, 16(e)-(g), 20-21, 28-29, 31, 40, 41(c), and 51(c))
(August 10, 2009)

On July 31, 2009, GameFly, Inc. submitted 65 discovery requests, with subparts, to the Postal Service. Pursuant to the Commission's Rules of Practice and Procedure, the Postal Service hereby provides objections to several of those discovery requests: GFL/USPS-3(e), 4(e), 7, 8, 14(e), 15, 16(e)-(g), 20(d), 29, 31, 40, and 51(c). The Postal Service also partially objects to GFL/USPS-6(a)-(e) and (g)-(h), 20(a)-(c), 21, 28, and 41(c). These discovery requests are appended to this objection.

GameFly has previously noted that "[t]he heart of GameFly's complaint is a claim of discrimination," predicated on the manual processing by the Postal Service of return DVD mailers at one-ounce letter rates. See Reply of GameFly, Inc. to Requests of the USPS for Disposition of Complaint at ¶ 1 (June 2, 2009) (hereinafter "GameFly Reply"); see also id. at ¶ 6 (noting that "[t]he gist of this complaint is that the Postal Service has adopted a *de facto* rule authorizing the hand-processing of Netflix and Blockbuster DVDs while providing automated

processing to similarly situated GameFly DVDs”). As such, GameFly has noted that discovery is needed to determine the extent to which manual processing of DVD return pieces is occurring. Id. at ¶ 2. Most recently, GameFly has clarified that this complaint is based on the manual processing received by Netflix, as it now states that the relief it is seeking in this proceeding is to have “the Commission order the Postal Service to offer GameFly’s mailers processing on terms and conditions substantially identical to those offered to Netflix.” Joint Statement of Disputed and Undisputed Facts at ¶ 132.¹

Therefore, the issue presented for decision to the Commission in this proceeding is whether the manual processing that Netflix return DVD mailers often receive (id. at ¶ 79), while paying one ounce letter rates, is unlawfully discriminatory relative to GameFly, such that GameFly mail should be accorded similar processing. Consistent with this, discovery should be predicated on acquiring information that bears on the question of whether the Postal Service’s processing of Netflix return DVD mail, relative to GameFly return DVD mail, is unreasonably discriminatory. This would include information concerning the degree to which Netflix return mailers are handled manually (the occurrence of which has been stipulated), and information concerning the breakage rates of Netflix return mailers.

However, several of GameFly’s discovery requests go far beyond the proper scope of this proceeding. Instead, these requests seek extensive documentation regarding essentially all aspects of Netflix’s mail, both outbound

¹ Thus, GameFly appears to have focused this complaint primarily on Netflix, rather than both Netflix and Blockbuster.

and inbound, and the service provided to Netflix by the Postal Service. For instance, GFL/USPS-6 asks for “all written communications” between an employee of the Postal Service and an employee of Netflix since November 1, 2007 “concerning” matters such as Netflix’s “mail preparation requirements,” the “terms of service” provided to Netflix, and the “actual performance” of the Postal Service in processing Netflix mail. Yet, the Postal Service, through functions such as the Business Service Representatives (BSNs), interact constantly with Netflix (and other commercial mailers, including GameFly) on a variety of mundane, day-to-day topics that bear on the service performed by the Postal Service on individual Netflix mailings, both outbound and inbound. This interrogatory would require the Postal Service to compile and produce all such communications, no matter how far removed from the issue (the overall manual processing of Netflix return mail) which GameFly is claiming is unlawful. Furthermore, this interrogatory would also require the production of documentation concerning the “mail preparation requirements” and other aspects of the service provided to outbound Netflix mail pieces, even though GameFly’s complaint is, as discussed above, predicated on the manual processing of inbound (return) pieces. Cf. GameFly Reply at ¶ 2.

The production of this information, requiring the review of potentially thousands of extraneous emails, would clearly be unduly burdensome, considering its lack of reasonable connection to this proceeding. The Postal Service therefore objects to GFL/USPS-6(a)-(e) and (g)-(h) on the grounds of relevance and undue burden, except to the extent that these discovery requests

ask for communications that bear on the discrimination claim that is presented here (i.e, communications discussing the manual processing of the Netflix return mail, communications discussing and transmitting the overall breakage rates, loss rates, and on-time performance rates experienced by Netflix return mail, and communications discussing the OIG Report).

Other discovery requests similarly stray far beyond the scope of this proceeding, to which the Postal Service also fully objects. GFL/USPS-3(e) and 4(e) ask for certain documentation concerning “any...aspect of the service performance received by Netflix,” while GFL/USPS-14(e) requests certain documentation concerning “any...aspect of the service performance received by Blockbuster.” GFL/USPS-20(d) also asks for data concerning “any...dimension of the quality of mail service” provided to any DVD mailer. These discovery requests are objectionable on relevance grounds, for the reasons discussed above.

The Postal Service also objects to GFL/USPS-7 and 8, which request “all documents” relating to the establishment of Permit Reply Mail (PRM), and “all documents relating to communications between the Postal Service and Netflix concerning the establishment of [PRM].” However, PRM is simply a means by which mailers can pre-pay postage for a return mailing at the time of the entry of the mailpiece, by using a mailer with appropriate formatting. See DMM 507.10.0. These discovery requests would therefore require “all documents” concerning matters regarding postage payment and mailpiece formatting, issues that have no relevant connection to the discrimination claim set forth in this proceeding.

Thus, the Postal Service objects to these discovery requests on relevance grounds. Furthermore, it would be unduly burdensome for the Postal Service to have to identify and compile the documentation sought here, as the documentation underlying the establishment of PRM is potentially large.

The Postal Service similarly objects, on the grounds of relevance and burden, to GFL/USPS-16(e), (f) and (g). GFL/USPS-16(e) requests various documentation concerning “[a]ny changes in rates, fees, prices, classifications or mail preparation requirements for DVD mailers considered by the Postal Service after January 1, 2007.” Similar to GFL/USPS-6, the scope of this request goes well beyond the subject matter of this proceeding, by inquiring into a wide variety of issues concerning DVD mail unrelated to the manual processing of Netflix return pieces. Any responsive information concerning changes to the treatment of return DVD pieces that was considered by the Postal Service following the OIG Report will also be produced pursuant to other subparts of this discovery request.

Furthermore, GFL/USPS-16(f) and (g) ask for various documentation regarding [a]ny changes considered or implemented “by any level of the Postal Service after January 1, 2007, with respect to the processing of DVD mailers.” In response to GFL/USPS-16, the Postal Service has no objection to providing any information with respect to any changes to the processing accorded to DVD return mailers that may have been contemplated and/or implemented at Headquarters, to which the OIG Report and recommendations were directed. The level of detail sought in the 16(e) and (f), however, requiring the Postal

Service to determine whether any field official considered or directed any changes at any time in the past two years, is immaterial to this proceeding, especially considering the Postal Service will be providing, in response to other discovery requests, the Christensen study as to the amount of mail that is being processed manually (to supplement the OIG Report), as well as current local SOPs. In this regard, the Postal Service is also prepared to stipulate, in response to GFL/USPS-16(h), that the amount of manual culling and processing of Netflix mail is at least as large as was found in the OIG Report.

In addition, several discovery requests go beyond Netflix and require the provision of extensive documentation regarding all other DVD mailers. GFL/USPS-15 seeks the identical information as GFL/USPS-6, but with regard to “any DVD rental company other than Netflix, Blockbuster, or GameFly.” However, the provision of “all written communications” for the past 21 months between other, small DVD mailers and the Postal Service regarding the various and sundry aspects of the service those mailers are receiving is fundamentally irrelevant in determining whether Netflix receives an unlawful preference in relation to GameFly. In addition, such extensive discovery into the various smaller players in the DVD mailer market would dramatically increase the burden of discovery on the Postal Service, without any material contribution to the record of this proceeding.

The Postal Service therefore objects to the entirety of GFL/USPS-15, on the grounds of relevance and burden. The Postal Service also partially objects to GFL/USPS-20(a)-(c), to the extent that it requires the provision of data for

mailers other than Netflix and Blockbuster; the Postal Service also objects to the extent it requires the provision of data concerning outbound, as opposed to return, pieces.² The Postal Service also objects to GFL/USPS-41(c) to the extent that it requires the provision of data for mailers other than Netflix and Blockbuster. With respect GFL/USPS-21, the Postal Service objects on relevance and burden grounds to having to provide the requested information with respect to “other DVD rental companies,” for the reasons discussed above. The Postal Service also objects to having to provide such information with respect to Netflix, which does not use Confirm on its return pieces. Such information therefore has no relevance to the claim of discrimination that is being advanced by GameFly.

The Postal Service partially objects to GFL/USPS-28, which asks for information concerning retail facilities that have mail slots dedicated to the deposit of DVD mailers. While the Postal Service is providing a narrative response to this interrogatory, it objects to having to conduct any census of its retail facilities in order to identify which, if any, have such an arrangement. The Postal Service also objects fully to the related discovery request, GFL/USPS-29, which requests copies of any and all “signs” and “similar items” relating to such dedicated mail slots. The extreme level of detail sought in this interrogatory has no material bearing on the Commission’s consideration of the discrimination claim advanced in this proceeding, and it would be unduly burdensome for the

² The Postal Service objects fully to GFL/USPS-20(d), as discussed above.

Postal Service to have to canvass its retail offices for such information, to the extent that it exists.

Similarly, the Postal Service also objects to GFL/USPS-31, which requests any and all “signs” and “similar items” used in the field regarding the handling of culled pieces. The level of detail sought in this discovery requests has no material bearing on the Commission’s consideration of the discrimination claim advanced in this proceeding, and it would be unduly burdensome for the Postal Service to have to compile such information from its individual plants.

The Postal Service also objects to GFL/USPS-40 on the grounds of relevance: certainly, what is dispositive here is the manner in which the Postal Service has interacted with Netflix regarding its return mail, not every single instance in which the Postal Service has communicated to a third party regarding DVD mail in the past two and a half years. The burden of attempting to identify and compile “all” such communications would also be undue.

The Postal Service also objects fully to GLF/USPS-51(c), which requests information concerning each and every test the Postal Service has performed on any “alternative DVD mailer” since 2002, including “all documents relating to the test results.” The Postal Service objects to this interrogatory on the grounds of relevance and burden. It is not apparent how such detailed information regarding every single test that has ever been performed on a two-way DVD mailer is at all relevant in determining the discrimination claim set forth here by GameFly concerning the manual processing of Netflix return mailers. To the extent that GameFly wishes to rebut the efficacy of the Postal Service’s prior suggestion that

it increase the height of its flats mailer in order to increase the odds of its mailer being diverted to the flats mailstream (GameFly Reply at ¶ 3), it does not need information regarding each and every test ever conducted on a DVD mailer, the vast majority of which have been tests on letter mailpieces. Furthermore, having to provide “all documents relating” to these tests, which would presumably require the identification and production of the potentially large number of documents that refer, however tangentially, to any test that has ever been performed on any DVD mailer (see GameFly definition of “relating” at ¶ 12 of its “Definitions” section), is clearly undue in light of the fundamental lack of relevance any such documentation would have to this proceeding

Finally, with regard to the “Instructions” that precede GameFly’s interrogatories, the Postal Service provides the following statement: In responding to these discovery requests, the Postal Service will adhere to its obligations under well-established Commission practice regarding responses to institutional discovery requests. The Postal Service is committed to diligently responding to GameFly’s requests for all available information, and will supplement those responses when necessary. Furthermore, the Postal Service will endeavor to provide information to GameFly regarding the Postal Service function (i.e., Engineering, Operations) that were relied upon in formulating the answers, or in providing documentation, and is also of course willing to address informally any follow-up questions from GameFly concerning any particular narrative response or document.

Respectfully submitted,

UNITED STATES POSTAL SERVICE

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Discovery Requests Fully Objected to

GFL/USPS-3. Please produce all documents reflecting any written communication or relating to any oral communication since June 1, 2002, with Reed Hastings, Tom Dillon, William Henderson or Andrew Rendich concerning any of the following matters:

- (e) Any other aspect of the service performance received by Netflix.

GFL/USPS-4. Please produce all documents reflecting any written communication or relating to any oral communication since June 1, 2002, with any in-house or outside attorney of Netflix concerning any of the following matters:

- (e) Any other aspect of the service performance received by Netflix.

GFL/USPS-7. Please produce all documents, studies, analyses, workpapers, memoranda and similar documents created since January 1, 2005, relating to the establishment of Permit Reply Mail ("PRM").

GFL/USPS-8. Please produce all documents relating to communications between the Postal Service and Netflix concerning the establishment of Permit Reply Mail ("PRM") since January 1, 2005.

GFL/USPS-14. Please produce all documents reflecting any written communication or relating to any oral communication since February 23, 2006, with any Blockbuster senior executive (i.e., assistant vice president or higher) or any attorney for Blockbuster concerning any of the following matters:

- (e) Any other aspect of the service performance received by Blockbuster.

GFL/USPS-15. Please produce all written communications with any DVD rental company other than Netflix, Blockbuster or GameFly since November 2007 concerning any of the following matters:

- (a) The rates, classifications, mail preparation requirements, or standards for processing offered by the Postal Service to that company.
- (b) Any rate or service arrangement (whether formal or informal) established by the Postal Service for that company.
- (c) The terms of service established by the Postal Service for the DVD mail of that company.

- (d) The Postal Service's actual performance in processing and delivering DVDs to or from that company.
- (e) The breakage or loss of DVDs sent to or from that company.
- (f) The OIG report, or the investigation that led to the OIG report.
- (g) Changes in the Postal Service's preparation requirements for and handling of the DVD mail of that company after the issuance of the OIG report.
- (h) Possible changes in rates, fees, mail preparation requirements, or processing procedures for the DVD mail of that company.

GFL/USPS-16. Please produce all studies, analyses, reports, internal reviews, memoranda, and similar documents relating to the following matters:

- (e) Any changes in rates, fees, prices, classifications or mail preparation requirements for DVD mailers considered by the Postal Service after January 1, 2007.
- (f) Any changes considered by any level of the Postal Service after January 1, 2007, with respect to the processing of DVD mailers.
- (g) Any changes actually ordered by any level of the Postal Service after January 1, 2007, with respect to the processing of DVD mailers.

GFL/USPS-20. Please produce all available data, studies and analyses concerning the following measures of the service provided by the Postal Service to DVD mailers:

- (d) Any other dimension of the quality of mail service.

This request encompasses the service provided to any individual DVD rental company, any group of DVD rental companies, or the entire DVD rental industry. The time periods covered by this request are: (a) the period since November 2007; (b) any sub-period of the post-November 2007 period for which data are available; and (c) the last fiscal year before November 2007 for which data are available.

GFL/USPS-29. Please produce copies of any signs, placards, posters and similar items that are used to direct or encourage members of the general public to deposit DVD reply mailers separately from other mail.

GFL/USPS-31. Please produce copies of any signs, placards, posters and similar items that are used to inform Postal Service mail processing personnel where to place DVD reply mailers that have been manually culled from the automation mailstream.

GFL/USPS-40. Please produce all written communications between the Postal Service and any third party (other than a DVD rental company) since January 1, 2007, concerning:

- (a) The rates, fees, prices, classifications, mail preparation requirements, or processing standards established by the Postal Service for DVD mailers generally, or the DVD mailers of any particular DVD rental company.
- (b) The processing and other treatment actually given by the Postal Service to DVD mailers.
- (c) The Postal Service's actual performance in processing and delivering DVD mailers.
- (d) DVD breakage or loss.
- (e) The OIG report, and the OIG investigation that preceded it.
- (f) Changes (if any) in the Postal Service's preparation requirements for and handling of DVD mail after the issuance of the OIG report.
- (g) Possible changes in rates, fees, mail preparation requirements, or processing procedures for DVD mail.

GFL/USPS-51. This question refers to Paragraph 40 of the parties' July 20, 2009, Joint Statement of Undisputed and Disputed Facts. Paragraph 40 contains the following GameFly statement, which the Postal Service declined to join: "none of these means [alternative mailer designs tested by GameFly and the Postal Service] has achieved an acceptable rate of breakage at an acceptable cost."

- (c) For each alternative DVD mailer design that the Postal Service has tested since January 1, 2002, whether or not for or with a particular customer, please provide the physical specifications of the mailer design and all documents relating to the test results.

Discovery Requests Partially Objected to

GFL/USPS-6. Please produce all written communications between any employee or agent of the Postal Service and any employee or agent of Netflix since November 1, 2007, concerning any of the following matters:

- (a) The rates, classifications, mail preparation requirements, or standards for processing offered by the Postal Service to Netflix.
- (b) Any rate or service arrangement (whether formal or informal) established by the Postal Service for Netflix.
- (c) The terms of service established by the Postal Service for the DVD mail of Netflix.
- (d) The Postal Service's actual performance in processing and delivering DVDs to or from Netflix.
- (e) The breakage or loss of DVDs sent to or from Netflix.

- (g) Changes in the Postal Service's preparation requirements for and handling of the DVD mail of Netflix after the issuance of the OIG report.
- (h) Possible changes in rates, fees, mail preparation requirements, or processing procedures for the DVD mail of Netflix.

GFL/USPS-20. Please produce all available data, studies and analyses concerning the following measures of the service provided by the Postal Service to DVD mailers:

- (a) The extent of manual culling and priority manual processing.
- (b) The extent of automated letter processing.
- (c) The rate of DVD breakage.

This request encompasses the service provided to any individual DVD rental company, any group of DVD rental companies, or the entire DVD rental industry. The time periods covered by this request are: (a) the period since November 2007; (b) any sub-period of the post-November 2007 period for which data are available; and (c) the last fiscal year before November 2007 for which data are available.

GFL/USPS-21. Please produce all Confirm scan data and other business records that relate to the extent to which DVD mail pieces to or from Netflix, Blockbuster, and other DVD rental companies have been processed on letter sorting equipment, flats sorting equipment, or manually.

GFL/USPS-28. What percentage of Postal Service retail facilities have mail slots designated for members of the public to deposit:

- (a) Netflix DVD mailers?
- (b) Blockbuster DVD mailers?
- (c) The DVD mailers of any DVD rental company?

GFL/USPS-41. Please produce all studies, analyses, reports, internal reviews, memoranda, and similar documents created since January 1, 2005, by the Postal Service, any subordinate department or division of the Postal Service with national responsibilities (e.g., engineering, operations, marketing, pricing, Postal Inspection Service or Office of Inspector General), or any contractor or consultant to the Postal Service, relating to any of the following subjects:

- (c) The actual rate of DVD breakage (for Netflix, any other DVD rental company, any group of DVD rental companies, or the DVD rental industry generally).