

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

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

**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)**

Pursuant to Rules 26 and 27 of the Commission's Rules of Practice, GameFly, Inc., ("GameFly") respectfully objects to United States Postal Service discovery requests USPS/GFL-5, 8, 12, 15-18, 25, 26, 28, 38, 39 and 46. These questions were served by the Postal Service on May 4, 2010, as part of its first set of discovery requests to GameFly. GameFly reserves the right to supplement its objections or raise additional objections in the course of responding to these requests.

**A. Postal Service Instructions And Definitions**

GameFly objects to any instruction or definition that could be construed to require GameFly to answer questions or produce materials that are not reasonably calculated to lead to the discovery of admissible evidence; unduly burdensome; that would require the production of material protected by the attorney-client privilege, the attorney work-product privilege, the settlement privilege, trade secret privilege, or any other privilege; or that otherwise do not conform with the Commission's discovery standards as set forth in Rules 26

through 28 of the Commission's Rules of Practice. Rather, "in responding to these discovery requests, [GameFly] will adhere to its obligations under well-established Commission practice regarding responses to institutional discovery requests." *Objections And Partial Objections Of The USPS To Discovery Requests Of Gamefly, Inc.* (August 10, 2009) at 9.

## **B. Theft And Loss Of GameFly DVDs In Transit**

**USPS/GFL-5.** Please produce all documents and communications related to actual or alleged theft of GameFly DVDs, the mail piece design of each such piece, and efforts to address or remediate actual or alleged theft.

**USPS/GFL-12.** Please describe any measures GameFly undertakes to manage or limit theft. In your answer please include the anti-theft procedures utilized in GameFly's own plants and during transit of GameFly mail to and from postal facilities.

**USPS/GFL-15.** Please describe any actions taken by GameFly when it suspects customer theft.

**USPS/GFL-16.** Separated by each 5-digit ZIP Code, please describe the frequency with which GameFly has taken the actions described in the response to USPS/GFL-15.

**USPS/GFL-17.** What threshold does GameFly consider to be an acceptable loss/theft rate? Please provide the research that determined this rate. At what rate does GameFly contact postal officials for assistance? How many times and when in the last three years has GameFly:

- (a) Contacted postal officials regarding theft issues?
- (b) Visited a postal facility to conduct further investigation?
- (c) Requested a visit when that request was denied? Or

- (d) Visited a postal facility without first seeking USPS management approval of the visit?

**USPS/GFL-18.** Separated by the 5-digit ZIP Code of the customer, what is the current loss/theft rate of customer-returned GameFly mail pieces by destinating facility location.

**Objection:** GameFly objects to USPS/GFL-5, 12 and 15-18 on grounds of relevance and undue burden. First, questions about the extent of the theft and loss of GameFly DVDs in transit, and the measures taken by GameFly and Postal Service law enforcement and management personnel to minimize this theft and loss, are irrelevant to any disputed issue in this case. The parties stipulated early in this case to the following facts:

- “GameFly DVD mailers have experienced loss in transit.”
- “The Office of Inspector General and the Postal Inspection Service have, with the assistance of GameFly, undertaken vigorous efforts to control the problem.”
- “OIG/Postal Inspection Service investigations have led to the arrest of a number of Postal Service employees and contractors for alleged theft of GameFly DVDs at a number of Postal Service facilities.”
- “Many of these arrests have occurred since the beginning of 2007.”
- “These enforcement initiatives have reduced, but not eliminated, losses from theft.”

- “Some loss also occurs as a result of fraud by GameFly customers.”

Joint Statement Of Undisputed And Disputed Facts (July 20, 2009) (“Joint Statement”) at 11 ¶¶ 56-59.

After reviewing the information provided by the Postal Service in discovery, GameFly has not sought to expand on these stipulated facts in its direct case filed on April 12, 2010. Nor is GameFly asking the Commission for relief from DVD theft or loss. GameFly’s direct case concerns disk *breakage*—and the Postal Service’s discrimination among its customers in the pricing and terms by which they may reduce this disk breakage by avoiding the processing of DVD mailers on automated letter processing equipment—not disk theft or loss.

Second, several of the theft-related discovery requests would be time-consuming and burdensome to answer. Question USPS/GFL-5, for example, seeks “all documents and communications related to actual or alleged theft of GameFly DVDs, the mail piece design of each such piece, and efforts to address or remediate actual or alleged theft.” Responding to this request would require GameFly to produce thousands of emails—most involving the loss of a single disc in transit to or from an individual customer. Similarly, answering question USPS/GFL-16 would require GameFly to perform a special study to compile geographically disaggregated data that do not currently exist.

Third, questions USPS/GFL-5, 12 and 15-18 would require GameFly to disclose highly sensitive information about the extent of DVD loss and theft in

specific communities and neighborhoods, and the specific law enforcement and loss control techniques used by GameFly and the Postal Service to deter, detect and prosecute DVD theft. Public disclosure of this information could undermine the effectiveness of these techniques, thereby injuring GameFly, other DVD mailers, and the Postal Service itself. Minimizing these risks would require filing and keeping the information under seal. Given the lack of relevance of this information, its production would offer no benefits to offset the costs inherent in handling information under seal.

### **C. How GameFly Mailpieces Are Made**

**USPS/GFL-8.** Please describe in detail the production of mail pieces, starting with procurement of stock and all mailing/shipping supplies and extending to the point actual mail is inducted or entered. If changes in mail piece design triggered or coincided with any change in the production process, please explain completely before and after processes and why such changes were undertaken.

**Objection:** GameFly objects to this request for lack of relevance. The record in this case makes clear that DVDs suffer higher breakage rates when forced to undergo automated letter processing than when they bypass automated letter processing. This is a *ceteris paribus* effect: the heightened breakage rates from automated letter processing are *in addition to* the background level of breakage that occurs from other causes. And all available documentation produced by the Postal Service in discovery indicates that the heightened breakage rates from automated letter processing occur *regardless of* the DVD design and DVD mailer design used. That is why *every* major DVD rental company—not just GameFly—has sought to minimize the exposure of its return

mail to automated letter processing. And that is why the DVD rental industry regards the processing of return DVD mailers on automated letter processing equipment as an inferior and undesirable service. See GFL773 (the Round-Trip Disc Mail (RDM) Work Group Minutes: 26 September 2005) (“Disc damage is now becoming the number one issue with RDM [round-trip DVD mail] mailers as more mail is processed on equipment.”); GFL1335 (slide from USPS PowerPoint Presentation titled “LSS Project Re-Measure: Return DVD Handling & Damage Reduction” and dated February 24, 2009) (“Automated USPS handling procedures cause a perceived amount of damage to mailers’ DVD products causing a large return volume to be processed manually at the mailers’ request.”); GFL126 (document titled “Netflix and the Round-Trip Disk Mail (RDM) Project”) (“these tests suggest that if RDM disks are processed completely within letter automation in both directions, they would suffer losses due to cracking in excess of 5 percent per round trip.”); GFL216 (reporting a disk breakage rate of 4.5% within “a small sample set of other mailers”); GFL768 (“[T]he overriding issue for Netflix concerned disc damage on the AFCS”); GFL10 (internal USPS memorandum noting that “damaged (broken) disks during processing and/or delivery” were “common problems” reported by Netflix); GFL 771 (“[Blockbuster] expressed concern about damage to the discs in the current Blockbuster design. [Blockbuster] reported an overall damage rate of 3% with the newer envelope designs.”); GFL374 (stating, in response to testing of a DVD mailer’s proposed envelope design, that “engineering’s ongoing experience with the poor machineability of this design indicates that the [DVD mailer’s] mailer will sustain damage . . . during processing.”); GFL7293 (same); GFL7295 (same); Joint

Statement at ¶ 102 (noting that Blockbuster formally asked the Postal Service to “immediately implement manual culling and processing of inbound mail pieces for Blockbuster Online” to mitigate the “persistent damage to mailer contents and longer mail duration rates as judged against comparable mailings.”). 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.

Moreover, even if details about the *physical makeup* of each GameFly mail piece were somehow relevant, the details of the *processes* by which each mailpiece used by GameFly was designed, manufactured, procured and assembled *before* entry of the mailpiece into the postal system have no conceivable relevance. GameFly’s motivations for designing particular mailpieces are likewise irrelevant. Once a mailpiece—a tangible physical object—is inducted into the postal system, the provenance and prior history of the mailpiece are immaterial.

#### **D. Data on Geographic Distances**

**USPS/GFL-25.** What is the average distance from each GameFly distribution center to the postal facility or facilities in which the GameFly distribution center enters its mail? What are the weight averaged decile distances from each distribution center to GameFly customers served by each distribution center?

**Objection:** GameFly objects to this question for lack of relevance. The distance between each GameFly distribution center and the Postal Service facilities where it deposits and collects mail, and the distance between each

facility and the GameFly customers it serves, are irrelevant to the issue of whether the Postal Service is discriminating against GameFly in the mail processing service GameFly DVD mailers receive while *inside* the Postal Service facilities

Nor would information about relative distances support a cost justification for the Postal Service's discrimination against GameFly. This and other Postal Service interrogatories have suggested that charging GameFly more than Netflix to avoid automated letter processing is justified because GameFly has fewer distribution centers than Netflix, and therefore requires more Postal Service transportation per piece. But USPS transportation costs are small compared to the extra postage that GameFly must pay vis-à-vis Netflix. In FY 2005 (the fiscal year used in the GameFly cost models), per-piece First-Class Mail highway transportation (the typical transportation mode for GameFly's pieces, which are generally mailed regionally) and total transportation costs were only 0.6 and 1.0 cents per piece, respectively. Adjusting to reflect GameFly's average weight, these figures were still only 1.3 and 2.4 cents per piece, respectively. By contrast, the Postal Service's discriminatory treatment of GameFly and Netflix requires GameFly to pay 61 cents more in postage per piece (i.e., \$1.22 per round trip) than Netflix pays to bypass automated letter processing. GameFly Memorandum (April 12, 2010) at 51 ¶ 130; Joint Statement ¶¶ 48, 60-62.

GameFly nonetheless will answer the first part of USPS/GFL-25 because doing so is not difficult. Answering the second part, however, would also be unduly burdensome. GameFly has not calculated the "weight averaged decile

distances” in question, and doing so would require a time-consuming and burdensome special study. Rather, GameFly will furnish the Postal Service with the number of customers in each 5-digit ZIP Code. If the Postal Service wishes to estimate the “weight averaged decile distances” between GameFly customers and the GameFly distribution centers that serve them, these data should enable the Postal Service to develop a reasonably precise estimate for itself.

#### **E. GameFly’s Own Costs—Actual And Hypothetical**

**USPS/GFL-26.** What is the transportation cost incurred by GameFly to transport its mail from each GameFly distribution center to the postal facility used by that distribution center? What is the transportation cost incurred by GameFly to transport its mail from the postal facility to each GameFly distribution center?

**USPS/GFL-28.** Please describe the total cost that GameFly would incur if it expanded its distribution network to sixty or one hundred twenty locations. In your answer, please itemize costs separately.

**Objection:** GameFly objects to USPS/GFL-26 and 28 because the requested information is irrelevant to this case and would be unduly burdensome to produce. The cost differences that are relevant in assessing the reasonableness of Postal Service discrimination between two customers are differences in the *Postal Service’s* costs, not the customers’ costs. See, e.g., *Experimental Rate and Service Changes to Implement Negotiated Service Agreement with Capital One*, Docket No. MC2002-2, PRC Op. & Rec. Decis. (May 15, 2003) at ¶¶ 1008, 3030 (discrimination analysis under 39 U.S.C. § 403(c) focuses on the relationship between the rate differentials with the “costs avoided by the Postal Service”); *UPS Worldwide Forwarding v. USPS*, 66 F.3d 621, 632 (3<sup>rd</sup> Cir. 1995) (adopting Postal Service position that price discrimination

among customers could be justified under Section 4039(c) by differences in the costs “incurred by the Postal Service”); *Sea-Land Service v. I.C.C.*, 738 F.2d. 1311, 1317 (D.C. Cir. 1984) (discriminatory rate discounts can be justified by “lower costs” to the regulated carrier).

Moreover, even if (contrary to fact) GameFly’s own costs were somehow relevant to this case, question GFL/USPS-28 would still be objectionable for lack of relevance. As the Postal Service knows, GameFly operates four distribution centers, not 60 or 120. See GameFly Memorandum (April 12, 2010) at 5 ¶ 15. GameFly has no current plan to expand its distribution network 15- or 30-fold. Accordingly, the costing exercise proposed by the Postal Service is both hypothetical and counterfactual.

GameFly also objects to USPS/GFL-26 on grounds of undue burden. GameFly does not use outside carriers to transport its mail to and from Postal Service facilities. Nor does GameFly have employees dedicated solely to this function. Rather, individual GameFly employees transport mail to postal facilities in addition to the employees’ other duties. For these reasons, developing the transportation cost data requested by USPS/GFL-26 would require GameFly to perform a time-consuming IOCS-like study to determine how much of the compensation and other costs of each employee who picks up and drops off mail should be attributed to these tasks rather than other work responsibilities.

USPS/GFL-28 is also unduly burdensome. Because GameFly has no current plans to expand to a network of 60 or 120 distribution centers, GameFly

has not estimated the cost of such a network. Developing such an estimate would require a time-consuming and burdensome special study.

**F. Meetings And Emails Between GameFly And The Postal Service**

**USPS/GFL-38.** Please produce all records of all meetings between GameFly and postal employees. Please include the topics discussed and the meeting minutes prepared by GameFly employees.

**USPS/GFL-46.** Please produce all records of all emails between GameFly and postal employees.

**Objection:** GameFly objects to this request on grounds of relevance, undue burden and privilege. GameFly employees continually meet, talk, and exchange emails with Postal Service employees. Most of these communications are typical of the interactions that routinely occur between employees of a business mailer and the Postal Service in the course of depositing or picking up mail, and coordinating operational arrangements as part of an ongoing customer-vendor relationship. Other meetings and communications involve the joint efforts of GameFly and Postal Service to minimize the theft of GameFly DVDs in transit. Producing records or descriptions of these myriad contacts would be time-consuming and burdensome, and would yield nothing relevant to the disputed issues of fact in this case.

To be sure, some of the meetings and communications between the two parties have had a nexus to this complaint case: i.e., the meetings and written communications between GameFly and Postal Service executives, consultants and legal counsel in an effort to find a cost-effective remedy for GameFly's DVD

breakage problem and resolve the issues in this complaint. But even these emails and meeting records have little or no value in resolving the disputed factual issues in this case.

The Postal Service's theory of discovery appears to be that, since GameFly obtained discovery of many emails and other internal documents from the Postal Service, it is only fair that the Postal Service now should be free to discover many documents from GameFly. But this tit-for-tat approach ignores the fundamental asymmetry of the two parties' positions. Postal Service internal communications and internal documents are relevant to (1) the extent to which the Postal Service has allowed Netflix return mailers to bypass automated letter processing despite paying automation letter rates; (2) whether this preference has been part of a larger pattern of preferences for Netflix; and (3) whether GameFly mail and Netflix mail differ enough to justify the Postal Service's discrimination against GameFly. The best evidence on these issues consists of the Postal Service's own records and communications, and the actual mailpieces and mail flows of GameFly, Netflix and Blockbuster. By contrast, except for the subsidiary question of whether GameFly made a good faith effort to settle this dispute before filing a complaint—a fact that is not seriously disputed—it is hard to imagine any material issue for which internal GameFly emails or meeting notes would provide the best evidence of record.

Moreover, whatever the relevance of GameFly emails and meeting minutes, GameFly already has described its emails and meetings with Netflix in detail in GameFly's filings in this case. See Joint Statement of Undisputed And

Disputed Facts (July 20, 2009) ¶¶ 113-130; GameFly Memorandum (April 12, 2010) at 42-44 ¶¶ 104-111.

In any event, the Postal Service already knows as much about these emails and meetings as GameFly does. Every email between GameFly and a postal employee was, by definition, sent or received by one or more postal employees. Every meeting between GameFly and the Postal Service was, by definition, attended by Postal Service employees. And the Postal Service participants in the meetings described in GameFly's filings in this case were not unsophisticated low-level employees: they typically were headquarters executives and managers with experience in Commission litigation.

Finally, GameFly objects to USPS/GFL-38 and 46 on grounds of privilege. Emails and meeting minutes concerning any settlement discussions between the parties are covered by settlement privilege. And the written "meeting minutes" and other meeting "records" created by GameFly employees and agents after the meetings but not disclosed to the Postal Service were communications among GameFly's legal counsel, economic consultant and senior executives in anticipation of litigation. Those communications are covered by attorney-client privilege and the work product doctrine.

#### **G. Communications Between GameFly And Third Parties**

**USPS/GFL-39.** Please produce all communications with other parties identified in this case, including all parties who submitted any filing posted in the C2009-1 docket.

**Objection:** GameFly objects to this request on grounds of relevance and privilege. First, GameFly has had communications with at least two “parties identified in this case” about commercial matters unrelated to the issues that gave rise to this litigation. Disclosure of those communications is not reasonably calculated to lead to the production of admissible evidence.

Second, GameFly objects to this request to the extent that it seeks to disclose settlement discussions. Discussions of this kind are protected by settlement privilege and, when engaged in by legal counsel, also constitute attorney work product.

Third, GameFly’s legal counsel has had discussions about this case with other parties “identified in this case” who, after reading about the case, contacted GameFly to offer help in understanding the DVD rental business, the Postal Service’s conduct toward DVD rental companies, and other issues in the case. Disclosure of these communications would reveal the opinion work product of GameFly’s legal counsel, and thus is protected by the work product doctrine. Moreover, several of the parties who contacted GameFly specifically requested that their identities be kept confidential to avoid retaliation by the Postal Service. Disclosure of communications with these parties would deter potential whistleblowers in future cases.

Finally, the identities of these parties and the substance of their communications with GameFly are immaterial to the issues in this case. While the communications enabled GameFly’s counsel to focus GameFly’s discovery requests more effectively and gain a better understanding of the Postal Service’s

conduct, the case filed by GameFly on April 12 relies on Postal Service documents themselves. If the Postal Service disagrees with the inferences that GameFly has drawn from those documents, the Postal Service can and should challenge those inferences directly.

Respectfully submitted,

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