

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-49-51, 54, 57, AND 59-62  
(May 21, 2010)**

Pursuant to Rules 26 and 27 of the Commission's Rules of Practice, GameFly, Inc., ("GameFly") respectfully objects wholly or in part to United States Postal Service discovery requests USPS/GFL-49-51, 54, 57 and 59-62. These questions were served by the Postal Service on May 11, 2010, as part of its second 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.

**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.

**USPS/GFL-49.** Please provide a listing of all meetings and communications with Postal Service employees in which mail piece design, performance, including breakage and theft results, and rates and classification of GameFly mailings of DVDs were discussed. Please include dates and locations of each meeting, a list of GameFly employees attending, and a list of Postal Service employees attending.

a. For each meeting and communication please provide a description of the discussion, including recommendations made by the Postal Service, and each response by GameFly.

b. For each meeting and communication, please provide a description of any physical tests conducted on GameFly actual mail pieces or any prototype mail pieces that were considered.

c. For each meeting and communication, please produce all documents and written communications, whether directed to the Postal Service or not, related to the meetings and communications referred to in your answer.

d. For each response by GameFly to suggestions made by the Postal Service described above, please discuss the reasons why GameFly responded as it did, including any analysis employed to formulate the response.

**Objections:** GameFly objects to this request on grounds of relevance, undue burden and privilege.

First, the Postal Service already knows as much about the meetings and communications between the Postal Service and GameFly 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. Furthermore, GameFly already has described its communications and meetings with the Postal Service 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. Accordingly, the Postal Service can obtain the communications, and reconstruct the meetings, as readily as GameFly can.

Second, information about the substance of the settlement discussions between the parties is covered by settlement privilege.

Third, the internal "meeting minutes" and other meeting "records" created by GameFly employees and agents, 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.

Fourth, many of the meetings and communications covered by this discovery request 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.

Finally, even with respect to the GameFly's discrimination claims, this discovery request is not reasonably calculated to lead to the production of

admissible evidence. The Postal Service's 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.

**USPS/GFL-50.** Please provide a complete history of the physical design and composition of DVDs (as distinguished from mail piece design) containing games or other materials sent to GameFly subscribers and customers.

a. For each DVD design, please provide the physical dimensions, including thickness.

b. For each DVD design, please provide a complete description of the materials used in producing the DVD.

c. For each DVD design, please compare and contrast the dimensions and the materials used to create the DVD with the dimensions and materials used in video DVDs sent by Netflix, Blockbuster, or any other mailers who distribute video DVDs through the mail. If you lack information about any particular mailer's practices, please answer with regard to GameFly's general knowledge of the DVD industry.

d. For each DVD design, please compare and contrast the dimensions and the materials used to create the DVD with the dimensions and materials used in DVDs containing other data sent by Netflix, Blockbuster, or any

other mailers who distribute such DVDs through the mail. If you lack information about any particular mailer's practices, please answer with regard to GameFly's general knowledge of the DVD industry.

e. With regard to your answer to the previous question, how do the thickness, density, flexibility and manufacturing of the DVDs mailed by GameFly compare to DVDs used for new or alternative DVD formats, such as Blu-Ray?

**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. 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.<sup>1</sup>

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<sup>1</sup> See, e.g., 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

GameFly also objects to this request as unduly burdensome. As GameFly explained in its answer to USPS/GFL-29, GameFly buys its DVDs from commercial DVD game vendors, and does not manufacture DVDs or the materials from which DVDs are manufactured. For this reason, GameFly has not performed any research or analyses of the material used in the manufacture of DVDs. Consequently, answering this question for video game DVDs alone would require GameFly to conduct an independent analysis of the construction of and materials used in each of the approximately 6,000 DVD titles it currently mails (in addition to discovering titles it has mailed in the past, but no longer stocks). Answering the question for movie DVDs would require even more work, since more movie DVD titles have been published than video game DVD titles.

Finally, GameFly objects on grounds of relative burden. The Postal Service can perform the research needed to answer the question with no more difficulty than GameFly could.

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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.

**USPS/GFL-51.** Has GameFly conducted tests to determine mailability or machinability, including susceptibility to breakage and frequency of breakage on its own mail pieces? For each mail piece design listed in your answer to USPS/GFL-1, please describe any tests conducted, including dates, and the results of each test, including any quantitative analysis performed. Please produce all documents and communications related to any tests discussed in this answer, including any communications with the Postal Service.

**Objection:** GameFly objects to this request to the extent that it asks GameFly to compile and produce documents and information that the Postal Service generated itself, or received from GameFly. GameFly also objects to this question to the extent that it seeks (1) attorney-client communications between GameFly and its legal counsel and (2) attorney work product.

**USPS/GFL-54.** Please produce all weekly or other periodic reports, including reports internal to GameFly and reports provided to the Postal Service, related to the Postal Service's processing of GameFly mail.

**Objection:** GameFly objects on grounds of undue burden to producing all responsive documents dating back to 2002. The responsive documents generated since 2002 run into the tens of thousands of pages. Moreover, the older reports would merely be cumulative, and would not provide meaningful additional information for the Postal Service or the Commission. GameFly is willing to produce all responsive documents generated in the past 12 months. We ask that the Postal Service defer seeking older documents until it has had an opportunity to review what GameFly is providing.

**USPS/GFL-59.** Paragraph 105 of the GameFly Memo refers to envelope testing conducted by GameFly and the Postal Service in 2007 and 2008. How did this testing affect GameFly's mail piece design? Please produce all documents and communications related to this testing.

**Objection:** GameFly objects to this request to the extent that it asks GameFly to compile and produce documents and information that the Postal Service generated itself, or received from GameFly. GameFly also objects to this question to the extent that it seeks (1) attorney-client communications between GameFly and its legal counsel and (2) attorney work product.

**USPS/GFL-60.** In paragraph 106 of the GameFly Memo, GameFly states that “[f]rom July 2007 to July 2008, [it] performed ‘live mail’ tests of multiple mailer configurations.” Please produce all documents and communications related to these tests.

**Objection:** GameFly objects to this request to the extent that it asks GameFly to compile and produce documents and information that the Postal Service generated itself, or received from GameFly. GameFly also objects to this question to the extent that it seeks (1) attorney-client communications between GameFly and its legal counsel and (2) attorney work product.

**USPS/GFL-61.** In paragraphs 108 through 111 of the GameFly Memo, GameFly states that it provided multiple drafts of its Complaint to postal officials. Please explain the changes made to the drafts referred to in these paragraphs. In your answer, please include the reasons for these changes.

**Objection:** GameFly objects to this question on the ground that it seeks information covered by the attorney work product privilege. In general terms, the changes to the drafts were made by GameFly’s lawyers as they gained a clearer understanding of the case and refined their thinking and drafting as a result. Requiring GameFly to provide a more specific explanation of the “reasons for these changes,” however, would strike at the heart of the justification for the

protection afforded attorney opinion work product by forcing GameFly to reveal the mental impressions of its counsel and their thoughts regarding the best presentation of GameFly's case. Such information has been held "inviolable" by federal courts. See, e.g., *Hickman v. Taylor*, 329 U.S. 495, 510-13 (1947) ("Were [an attorney's 'statements, memoranda, correspondence, briefs, mental impressions, personal beliefs'] open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolable, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and the preparation of cases for trial."); *Director, Office of Thrift Supervision v. Vinson & Elkins, LLP*, 124 F.3d 1304, 1307 (D.C. Cir. 1997) ("Opinion work product . . . is virtually undiscoverable.").

Moreover, the protection afforded an attorney's mental impressions is not waived merely because certain information—in this case, the actual changes contained in the drafts, but not the specific reasoning behind them—was disclosed to the Postal Service. See *Burlington Indus. v. Exxon Corp.*, 65 F.R.D. 26, 46 (D. Md. 1974) (waiver limited to information disclosed during negotiations).

GameFly also objects to this request as not reasonably calculated to lead to the discovery of admissible evidence. Because the drafts in question were shown to the Postal Service as part of an attempt to resolve this dispute without litigation, any information regarding the reasoning behind changes to these drafts would be covered by the settlement privilege and inadmissible as evidence of the

invalidity of GameFly's claim. See *Bottaro v. Hatton Assocs.*, 96 F.R.D. 158, 160 (E.D.N.Y. 1982) (requiring "some particularized showing of a likelihood that admissible evidence will be generated by the dissemination of the terms of a settlement agreement" before allowing discovery into settlement discussions).

**USPS/GFL-62.** In paragraph 112 of the GameFly Memo, GameFly states "a smaller DVD rental company named [company name redacted] requested manual processing of its inbound DVD mailers [and t]he Postal Service denied this request." Please produce all communications between you and [company name redacted], or its agents, employees or attorneys.

**Objection:**

GameFly objects to this request on the grounds that it seeks information protected by the work product privilege. The communications between GameFly and the other DVD rental company about the manual processing of DVD mailers and other issues in this case were phone conversations and emails between outside counsel for GameFly and the president of the other company. Counsel for GameFly engaged in these communications to help prepare GameFly's case. These communications are protected by the attorney work product doctrine. See, e.g., *Cellco P'ship v. Nextel Communication, Inc.*, 2004 U.S. Dist. LEXIS 12717 (S.D. N.Y. July 9, 2004) (holding that a party's communications with a third party not involved in the litigation, but nevertheless created in preparation for litigation, protected by the attorney work product doctrine); *Falise v. American Tobacco Co.*, 193 F.R.D. 73, 79 (E.D.N.Y. 2000) (applying work product protection to documents relating to third parties, and holding that disclosure to

third parties does not waive protection as “the courts generally find waiver of the work product privilege only if the disclosure substantially increases the opportunity for potential adversaries to obtain the information”).

Moreover, GameFly has done nothing in this case to put the identity of the other DVD rental company, or the specific communications between that company and counsel for GameFly, at issue. The Postal Service, not GameFly, was the party that first put on the record in this case the name of the other DVD rental company identified in GFL/USPS-62, and the request of that company for manual processing of its inbound DVD mailers. This information first surfaced in the Postal Service’s answer to GameFly discovery request GFL/USPS-193(a).

The relevant portion of discovery request GFL/USPS-193(a) simply asked:

Does the Postal Service contend that no other DVD rental company other than the two companies listed in the [Postal Service’s] answer [to GFL/USPS-82(c)—i.e., Netflix and Blockbuster] have requested manual processing of their inbound DVD mailers?

The relevant part of the Postal Service’s answer was:

The Postal Service is aware of one recent instance in which a small two-way DVD mailer (a company known as [name redacted]) requested such processing. This request was made orally; the Postal Service’s response was also oral. Of course, GameFly is also seeking such treatment through this complaint.

Answer of USPS to Gamefly discovery request GFL/USPS-193(a) (filed November 4, 2009).

Respectfully submitted,

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