

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

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

**MOTION OF THE UNITED STATES POSTAL SERVICE TO COMPEL
RESPONSES TO DISCOVERY REQUESTS USPS/GFL-5, 8, 16, 26, 28, 38, 39,
46, 49, 50, 51, 52(e), 54, AND 60
(May 28, 2010)**

Pursuant to Rules 3001.26(d) and 3001.27(d) of the Postal Regulatory Commission's Rules of Practice and Procedure, the United States Postal Service (the "Postal Service") respectfully moves to compel responses by GameFly, Inc. ("GameFly") to the following interrogatories: USPS/GFL-5, 8, 16, 26, 28, 38, 39, 46, 49, 50, 51, 52(e), 54, and 60. The Postal Service filed these discovery requests on May 4, 2010 and May 11, 2010. GameFly filed objections to these requests on May 14, 2010 and May 21, 2010.

GameFly objects to discovery related to theft and loss of DVDs; the composition, design and costs of GameFly mail pieces; transportation and distribution of GameFly mail; communications between GameFly and the Postal Service; communications between GameFly and third-party DVD mailers; testing of GameFly mail pieces; and GameFly's periodic reporting. The Commission should overrule these objections and compel responses to each question. The discovery requests addressed by this Motion seek information "reasonably calculated to lead to the discovery of admissible evidence," and do not impose a disproportional burden in relation to the potential probative value of the information. See PRC Rules of Practice and Procedure 3001.26(a), 3001.27(a).

This Motion will set forth each disputed discovery request, followed by analysis explaining why the Commission should overrule GameFly's objections and compel responses to each question.

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-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.

GameFly objects to this discovery request on the grounds of relevance and undue burden. Because (1) the theft of GameFly mail pieces is relevant to (a) the extent to which GameFly and Netflix are similarly situated and (b) the reasons for GameFly's decisions about how it prepares its DVDs for mailing and the impact of those decisions upon how those mail pieces are processed, and (2) requiring GameFly to respond to these requests would impose no real burden, the Commission should overrule GameFly's objections to USPS/GFL-5 and 16.

With respect to the relevance objection, GameFly contends that "questions about the extent of the theft and loss of GameFly DVDs in transit ... are irrelevant to any disputed issue in this case." 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) ("GameFly Objections") at 3. But GameFly has repeatedly noted that one of the central issues to its case concerns whether GameFly is similarly situated to Netflix. See, e.g., Memorandum of GameFly, Inc., Summarizing Documentary Evidence ("GameFly Memo"), ¶126 (asserting that element of discrimination under 39 U.S.C. 403(c) is similarly situated customers); ¶129

("Netflix, Blockbuster, GameFly and other DVD rental companies are similarly situated in the physical design of their mailpieces and the vulnerability of DVDs to damage"). The extent of the theft experienced by GameFly reflects the nature of its product and relates directly to whether GameFly is similarly situated to Netflix. For example, if GameFly mail pieces experience significant theft rates or face different theft risks than Netflix, this may indicate that GameFly and Netflix are not similarly situated.

The extent of the theft experienced by GameFly also reflects whether GameFly and Netflix are similarly situated with regard to the most beneficial type of service they could receive from the Postal Service. Documents responsive to USPS/GFL-5 and 16 may reveal that, because of a potential increased theft risk associated with GameFly mail pieces, GameFly would benefit from different mail processing than Netflix and other DVD mailers. In any event, responses to these questions should inform the Postal Service direct case, which most certainly will consist of admissible evidence.

GameFly already concedes that its theft rate exceeds its breakage rate. See Responses of GameFly, Inc., to USPS Requests for Admissions #2 (May 25, 2010) (admitting that in spring 2009 GameFly experienced a theft rate twice as high as its breakage rate). The Postal Service should be allowed an opportunity to explore how theft and mail piece design impact GameFly, as reflected in its documents and communications, and efforts to manage that challenge.

GameFly's undue burden objection must fail. GameFly contends that the production of "thousands of emails" in response to USPS/GFL-5 and the need to

file sensitive information under seal would constitute an undue burden. However, the Postal Service has produced tens of thousands of documents in response to GameFly's discovery requests, with another fifty thousand documents now awaiting GameFly's review. And already GameFly has filed numerous documents under seal, seemingly without requiring an extraordinary burden. Given the relevance of the information sought in USPS/GFL-5 and 16, responding to these requests would not impose an undue burden on GameFly.

Postal Service counsel understands that GameFly routinely compiles information requested via interrogatory 16, and contacts Postal Service field personnel when a possible problem is identified that the parties may wish to address jointly. But to the extent GameFly has not compiled the information requested in USPS/GFL-16, the Postal Service requests that GameFly produce logs, call records or customer account records, or provide a qualitative description of the frequency of the actions described in USPS/GFL-15.

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.

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?

USPS/GFL-52. For each type of DVD sent by GameFly through the mail to subscribers or other customers.

e. For Each type of DVD mailed by GameFly described above, compare and contrast the costs and prices of DVDs containing movies or other data mailed by Netflix, Blockbuster, or other mailers of DVDs. If you lack information about any particular mailer's practices or products, please answer with regard to GameFly's general knowledge of the DVD industry.

GameFly objects to USPS/GFL-8 and 50 on relevance grounds. But as discussed in the analysis of USPS/GFL-5 above, one key issue is whether GameFly is similarly situated to Netflix. See, e.g., GameFly Memo, ¶ 129. The method of constructing a mail piece, the dimensions of a mail piece and the composition of a mail piece reflect the nature of a mail piece and affect its characteristics and qualities. Knowledge of the similarity between respective GameFly and Netflix mail pieces is one basis for comparing the two. Furthermore, the physical make-up and composition of the DVDs is a fundamental element of the susceptibility of DVDs to breakage in mail processing. This is at the heart of GameFly's case, and discovery could easily lead to admissible evidence. Accordingly, the information sought by USPS/GFL-8 and 50 is relevant and the Commission should overrule GameFly's objections.

GameFly's undue burden objection to USPS/GFL-50 is not persuasive. As discussed above, a central element of the discrimination allegation in GameFly's Complaint concerns whether GameFly and Netflix are similarly situated, and determination of this issue requires knowledge of the design and composition of GameFly mail pieces. It would appear necessary for GameFly to undertake an analysis of the design and composition of its mail pieces before bringing the Complaint, but if this did not occur, it is reasonable to require GameFly to undertake the analysis necessary for it to respond to USPS/GFL-50.

The analysis described above applies to USPS/GFL-52(e). GameFly did not object to this discovery request, nor answer the discovery request. GameFly's answer states "GameFly has not studied the wholesale or retail prices of non-game DVDs." Because a comparison of prices and costs of video and game DVDs relates to the issue of whether GameFly and Netflix are similarly situated, the Commission should compel GameFly to provide this information in response to USPS/GFL-52(e).

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.

GameFly objects to USPS/GFL-26 and 28 on the grounds of relevance and undue burden. With respect to the relevance objection, GameFly has repeatedly requested service "on the same terms" as Netflix. See, e.g., Complaint ¶ 57 (The requested relief "should include ... an order prescribing the

same prices and terms of service for GameFly, including the same degree of manual processing, that the Postal Service provides to Netflix and Blockbuster”); GameFly Objections at 7 (“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”). In this regard, comparison of every dimension of the differences between the two mailers, including what factors might lead to those differences, is a central consideration in GameFly’s Complaint.

The service provided by the Postal Service to Netflix mail does not exist in a vacuum. Netflix enters mail near customers’ addresses and picks it up from the mail as quickly as it can manage, thus minimizing the time (and distance) it spends in transit. The Postal Service could not handle GameFly mail as it does Netflix mail without GameFly undertaking similar measures. Accordingly, this interrogatory seeks information that bears on the issue of how similar Netflix and GameFly are, and elicits information necessary to the Postal Service direct case. As such, it readily meets the standard of eliciting information that leads to the discovery of admissible evidence.

GameFly claims that it has not conducted the cost estimates requested by USPS/GFL-26 and 28, and that requiring it to conduct the cost estimate now would constitute an undue burden. This objection calls into question how seriously GameFly seeks the relief sought in its Complaint. It appears reasonable that if GameFly really wanted service “on the same terms” as Netflix, it would conduct the necessary analysis to determine the costs associated with

that service, and that it would conduct that analysis before seeking this relief in a complaint. Given the relevance of the information sought in USPS/GFL-26 and 28, responding to these requests would not impose an undue burden on GameFly.

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.

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.

GameFly objects to USPS/GFL-38, 46 and 49 on the basis of relevance, undue burden, and privilege. The relevance objection appears based on GameFly's contention that its internal emails and meeting notes could be relevant only to issues related to settlement. Even if these emails have relevance to other issues, GameFly argues that it need not produce the

documents because the Postal Service can rely on GameFly's description of the emails and meetings in its filings.

The relative dearth of documents produced by GameFly in response to other discovery requests demonstrates that USPS/GFL-38, 46 and 49 seek relevant information. The few internal emails and meeting notes produced by GameFly address issues other than settlement, and identify the issues – including theft - that affect GameFly decisions and actions related to processing of its mail. GameFly's assertion that the Postal Service should rely on GameFly's own description of its internal emails and meeting notes conflicts with the fundamental purposes of litigation. GameFly has almost certainly described its documents to reflect most favorably on its position, and GameFly has an obligation to provide the Postal Service with the opportunity to analyze those documents itself.

In response to GameFly's contention that the settlement privilege, the attorney-client privilege, or the work product doctrine protects documents responsive to these requests, the Postal Service requests that GameFly be directed to produce a privilege log that allows the Postal Service to evaluate GameFly's privilege claims.

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.

GameFly objects to USPS/GFL-39 on the grounds of relevance and privilege. With respect to the relevance objection, GameFly's arguments in its

earlier Motion to Compel filed on August 24, 2009 demonstrate GameFly's belief in the relevance of third party communications. The Motion states

information on the extent to which other, smaller DVD rental companies receive manual processing of their DVD reply mailers may (1) provide a baseline from which to measure the degree of preference given to Netflix, and (2) shed light on the Postal Service's claim that manual processing of Netflix (and Blockbuster) reply mailers serves some unique operational need that the reply mailers of other DVD rental companies do not present.¹

[I]nformation about the treatment given to the DVD mailers of other DVD rental companies is likely to lead to admissible evidence regarding: (1) The extent of the disparities in the Postal Service's treatment of individual DVD rental companies. (2) The relationship between the degree of manual processing and DVD breakage rates. (3) The validity of the Postal Service's claim that the high breakage rates of GameFly DVD mailers in automated letter processing must be due in substantial part to some physical difference between game DVDs and movie DVDs.[] A number of the smaller DVD rental companies offer movies, not games. Analysis of those companies' breakage rates could be illuminating. (4) The validity of the Postal Service's suggestion that the high breakage rates of GameFly DVD mailers in automated letter processing must be due to rough handling of the DVDs by GameFly employees or customers, or some other factor other than the automated letter processing of the DVDs by the Postal Service.[] Evidence that high rates of DVD breakage in automated letter processing is pervasive throughout the DVD rental industry would tend to show that the greater rate of breakage in automated letter processing is due to Postal Service handling rather than GameFly practices.²

Communications between GameFly and third party DVD mailers are relevant to the same issues described in GameFly's pleadings as stated above. And given that GameFly has lost or destroyed so many of its documents³, its

¹ Motion of GameFly, Inc., to Compel Responses to Discovery Requests GFL/USPS-3(e), 4(e), 6(a)-(e), (g)-(h), 7, 8, 14(e), 15, 16(f)-(g), 20(a)-(d), 21, 28, 29, 31, 40, and 41(c) (August 24, 2009), at 9.

² *Id.* at 16-17.

³ *See, e.g.*, Answers of GameFly, Inc., to USPS Discovery Requests USPS/GFL-4 ("The two individuals who managed these changes ... left GameFly in December 2007 and August 2009, respectively, and GameFly did not retain the two employees' files on these matters"), 41, 43, 44,

communications with third party mailers may provide the only evidence supporting many of the contentions set forth in its interrogatory answers and direct case.⁴

GameFly bases its privilege objection on the work product doctrine, alleging that its communications with third party DVD mailers constitute protected work product.⁵ But even if these communications qualified as work product, GameFly waived the privilege by voluntarily sharing the information with third-party DVD mailers. A party waives privilege under the work product doctrine if it discloses work product to a party whose interests are not aligned with the disclosing party. See *Verschoth v. Time Warner*, 2001 WL 546630 (S.D.N.Y. 2001) (finding that editor waived privilege under work product doctrine by disclosing work product information to freelance writer working with him on a project where freelance writer did not have an employment contract with editor's magazine and disclosed information was not pertinent to project). If the third-party DVD mailers referenced in GameFly's objection to USPS/GFL-39 enter their mail as letter-shaped pieces, they are not similarly situated to – and their interests do not align with – GameFly, which uses flat-shaped pieces. The third-party DVD mailers would not benefit from the relief sought by GameFly in the last paragraph of its Complaint. GameFly requests “an order prescribing the same prices and terms of service for GameFly, including the same degree of manual

and 45 (“[a]ny other written or electronic communications relating to this issue were created long enough ago to have been deleted in the ordinary course of business pursuant to GameFly’s document retention policies”).

⁴ GameFly asserts that its case “relies on Postal Service documents themselves” and not on its communications with third party mailers, but the asserted inferences GameFly draws from these documents conflict with the Postal Service’s understanding of the issues.

⁵ GameFly also claims protection under the settlement privilege. It is not clear how this would apply, or why GameFly would be discussing settlement with a party other than the Postal Service.

processing, that the Postal Service provides to Netflix and Blockbuster,” relief that would benefit only GameFly, or possibly other DVD mailers who use flats processing.

The case authority cited by GameFly in support of its objection to USPS/GFL-62 does not address the situation at issue here. In the first case cited by GameFly, Cellco P’ship v. Nextel Communication, the Court denied a motion to compel after finding that a party did not waive work product protection by disclosing information to its advertising agency. 2004 WL 1542259 at *1 (S.D.N.Y. 2004). And in the other case cited by GameFly, Falise v. American Tobacco, the Court found waiver of work product protection where a party posted documents on the internet in response to a court order, a situation unrelated to the situation at issue in this case. 193 F.R.D. 79, 79-84 (E.D.N.Y. 2000). In Verschoth, cited above, the Court found waiver from an editor’s disclosure of work product information to another editor who was working with him but did not have an employment contract with the publication and did not need the work product information to perform his job responsibilities. 2001 WL 546630 at *3-4.

An analysis of the case authorities cited reveals the range of disclosures that qualify for waiver of work product protection. It appears that the third-party DVD mailers referenced by GameFly were not hired by GameFly for any purpose and did not work together with GameFly on a project that involved DVD mail processing. If the assumptions described above are accurate, these third-party DVD mailers did not have as close of a relationship to the party claiming work product protection, GameFly, as that of the advertising company in Cellco, or

even the freelance editor in Verschoth. The Commission should require GameFly to provide more information related to the third-party DVD mailers referred to in GameFly's objections to confirm whether the disclosure of information at issue here constitutes a waiver of work product protection.

Because GameFly has not identified the third-party DVD mailers, we have no information regarding whether these mailers' interests align with the interests of GameFly. To evaluate this issue, the Postal Service requests that GameFly be directed to produce a privilege log identifying the communications alleged to be privileged and including a description of the third-party DVD mailers who sent or received the communications.

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.

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.

GameFly objects to these discovery requests "to the extent that [they] ask[] GameFly to compile and produce documents and information that the Postal Service generated itself, or received from GameFly," and on privilege grounds. GameFly makes no representation that the "documents and information that the Postal Service generated itself, or received from GameFly" include all documents responsive to these requests, or that producing all responsive documents would impose an undue burden. The Postal Service requests that GameFly produce all

responsive documents, and identify the responsive documents and information that it claims the Postal Service generated itself or received from GameFly.

To the extent GameFly claims that the attorney-client privilege or work product doctrine protects documents responsive to this request, the Postal Service requests that GameFly be directed to produce a privilege log that allows the Postal Service to evaluate GameFly's privilege claims.

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.

GameFly objects to USPS/GFL-54 on the grounds of undue burden. GameFly contends that responsive documents run into the "tens of thousands of pages," and that older reports "would not provide meaningful information." However, the Postal Service has produced tens of thousands of documents in response to GameFly's discovery requests, and has another fifty thousand documents awaiting GameFly's review. The central focus of GameFly's case is its allegation of discrimination in the processing of mail. Reports related to the processing of GameFly's mail provide relevant evidence – and potentially the most relevant evidence – related to this issue.

GameFly's offer to provide reports generated in the past twelve months does not satisfy this discovery request. These reports provide no information related to the processing of the different GameFly mail pieces before the past twelve months, and information regarding the evolution of GameFly's mail pieces and processing is central to GameFly's allegations of discrimination. Given the

relevance of the information sought in USPS/GFL-54, responding to this request would not impose an undue burden on GameFly.

Conclusion

For the reasons discussed above, the Postal Service respectfully requests that the Commission deny GameFly's objections to USPS/GFL-5, 8, 16, 26, 28, 38, 39, 46, 49, 50, 51, 54, and 60, and order GameFly to provide more information in response to USPS/GFL-52(e).

Respectfully submitted,

UNITED STATES POSTAL SERVICE

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