

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

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

**ANSWER OF GAMEFLY INC. TO
MOTION OF USPS TO COMPEL ANSWERS TO
DISCOVERY REQUESTS USPS/GFL-5, 8, 16,
26, 28, 38, 39, 46, 49-51, 52(e), 54 AND 60
(May 14, 2010)**

Pursuant to Presiding Officer's Ruling No. C2009-1/21, GameFly, Inc., ("GameFly") respectfully answers the May 28 motion of the United States Postal Service to compel GameFly to answer discovery requests USPS/GFL-5, 8, 16, 26, 28, 38, 39, 46, 49-51, 52(e), 54 and 60.

The discovery requests seek the following kinds of information:

1. The variance of GameFly's DVD breakage rates by mailer design and any data on this issue from GameFly tests and other documents (USPS/GFL-51 and 60).
2. How GameFly DVD mailers are made (USPS/GFL-8).
3. The physical specifications of GameFly DVDs (USPS/GFL-50).
4. The relative cost of GameFly DVDs and movie DVDs (USPS/GFL-52(e)).
5. The theft and loss rates of GameFly DVDs (USPS7GFL-5 and 16).
6. The costs that GameFly incurs to carry its DVD mailers to and from Postal Service facilities, and the costs that GameFly would incur to expand its distribution network to 60 or 120 locations (USPS/GFL-26 and 28).
7. GameFly's periodic reports to the Postal Service from 2002 through 2009 (USPS/GFL-54). (GameFly has already produced all responsive such reports for the most recent 12 months in response to USPS/GFL- 54.

8. Records of all meetings and emails between GameFly and the Postal Service (USPS/GFL-38, 46 and 49), and between GameFly and any party who has submitted any filing in this docket (USPS/GFL-39).

GameFly has already answered most of these questions in part, and is producing additional responsive information in a good faith effort to narrow the scope of these discovery disputes. GameFly is also producing additional information that GameFly has located as a result of its ongoing searches of its facilities since filing its initial answers to the questions. The Commission should decline to compel the production of additional information, however.

Some of the requests for additional material are objectionable because they seek information that would be unduly burdensome for GameFly to produce, or which the Postal Service can develop as readily as GameFly could, or which is protected by attorney-client privilege or work product protection. But the objection that cuts across the remaining discovery requests is relevance: virtually none of them are reasonably calculated to lead to the discovery of relevant and admissible evidence. Stated otherwise, the facts that the USPS seeks to establish through these questions, even if taken as true, would not establish a valid defense against GameFly's discrimination claim.

The basic elements of a discrimination case under Section 403(c)(3) are well established. First, the complainant must establish that the service used by the complainant is "like"—*i.e.*, "similarly situated" or "functionally equivalent" to—the service used by other ratepayer(s). GameFly Memorandum (April 12, 2010) at 47-52 (citing cases); *Experimental Rate and Service Changes to Implement Negotiated Service Agreement With Capital One*, MC2002-2 PRC Op. & Rec.

Decis. (May 15, 2003) (“*Capital One NSA*”) ¶¶ 7011-7023; see also *MCI Telecoms. Corp. v. FCC*, 917 F.2d 30, 39-40 (D.C. Cir. 1990). Second, the complainant must show that the Postal Service is offering a lower price or better terms and conditions of service to one or more of the similarly situated ratepayers, but not to the complainant. GameFly Memorandum (April 12, 2010) at 48-49 (citing cases); *Red Tag Proceeding, 1979*, MC79-3 PRC Op. & Rec. Decis. (May 16, 1980) (“*Red Tag*”) at 11; *MCI Telecoms. Corp. v. FCC*, 917 F.2d 30, 39-40 (D.C. Cir. 1990).

Proof of these elements establishes the existence of discrimination, and shifts the burden to the Postal Service to justify the discrimination by showing that it has a rational basis. To do so, the Postal Service must show that the discrimination is rationally related to differences in the Postal Service's costs of service or (in some circumstances) the mailers' elasticities of demand—and that the terms and conditions that qualify or disqualify mail on these grounds were published in the MCS or a similar tariff-type publication. *Id.*; GameFly Memorandum (April 12, 2010) at 63-66 (citing cases); *Sea-Land Service, Inc. v. ICC*, 738 F.2d 1311, 1317-1318 & n.12 (D.C. Cir. 1984) (“The published tariffs made no distinction between contract coal and free coal, but named one rate for all alike. That being true, only that single rate could be charged.” (quoting *Pennsylvania R.R. v. International Coal Mining Co.*, 230 U.S. 184, 196-97 (1913))).

The documents produced by the Postal Service in discovery, and summarized in GameFly's Memorandum of April 12, 2010, establish that the mail

service used by GameFly is “like,” “functionally equivalent to” or “similarly situated to” the mail service used by Netflix. Both companies use First-Class Mail to ship DVDs in mailers to and from subscribers. Indeed, Postal Service officials have implicitly conceded the functional equivalence of the service provided to Netflix and other DVD rental companies, repeatedly expressing concerns about the risk that the preferred treatment given to the former might lead to a discrimination complaint by the latter. GameFly Memorandum at 32-33 (discussing directive to remove Netflix-only drop slots from post offices due to the “legal ramifications” of maintaining them); *id.* at 33-34 (citing internal Postal Service emails questioning why Netflix was not required to pay a nonmachinable surcharge and suggesting that this treatment would “open the door to other mailers requesting the same treatment”); *id.* at 36; *id.* at 40 (discussing internal Postal Service emails suggesting that a complaint could be filed if the treatment of Netflix mail was codified in a national SOP); *id.* at 45-47 (providing an overview of Postal Service documents discussing the possibility of a complaint being filed by other DVD mailers if Netflix continued to receive preferential treatment).

Likewise, it can hardly be disputed that the Postal Service is treating some DVD rental companies differently than others. The Postal Service gives the overwhelming majority of Netflix DVD return mailers custom manual processing even though Netflix pays one-ounce letter rates for them. By contrast, GameFly can avoid automated letter processing, and achieve breakage rates similar to Netflix, only by paying for its DVD mailers as two-ounce flats, at an extra postage charge of \$1.22 per round trip. GameFly Memorandum at 41-42.

The Postal Service contends that the disputed discovery requests are calculated to elicit evidence that GameFly's DVD mailers are not similarly situated to those of Netflix. But the asserted differences between GameFly and Netflix mail, *even if taken as true*, would not negate the functional equivalence of the two companies' mail service. Moreover, many of these asserted differences—such as the high theft rates of GameFly DVDs, the number of distribution centers operated by GameFly versus Netflix, and the relative costs of movie and game DVDs—are already well established on the record or otherwise not in dispute. Functional equivalence requires only that the service sought by two mailers be *similarly situated*, not identical. *Capital One NSA* at ¶ 7015. “Minor,” “incidental” or “immaterial” differences between two customers' mail do not make them unlike. *Id.* at ¶¶ 7015-7021; *MCI*, 917 F.2d at 39. Thus, for example, it is immaterial to the question of functional equivalence or substantial similarity whether two ratepayers are the same size, generate the same amount of mail, impose the identical operating requirements on the Postal Service, cost the Postal Service the same to serve, or have the same competitive options. *Capital One NSA* at ¶ 7020-7021, 7023.

Differences between two customers certainly may be relevant to the separate issue of whether the Postal Service's discrimination has a *rational basis*, particularly in terms of the Postal Service's cost of service. *MCI* at 39. But evidence that GameFly DVD mailers have a longer average haul in the postal system (and thus may impose higher transportation costs on the Postal Service) than do Netflix DVD mailers does not begin to establish such a showing. The Postal Service's own documents foreclose any such claim: they show that the

differences in cost of service stemming from differences in average transportation distance and other factors amount to only a small fraction of the rate disparity. Significantly, the Postal Service officials who have studied the issue have acknowledged that there is no cost justification for the rate preference that Netflix enjoys. GameFly Memorandum at 57-60 (discussing record); Answer of Sander Glick to Public Representative/GFL-T1-1. The Postal Service should not be allowed to use discovery as a backdoor way of re-litigating an issue that its own employees have already conceded.

Discovery of *GameFly's* transportation costs is even wider of the mark. The costs that are relevant for determining whether discrimination is justified are the costs incurred *by the Postal Service itself*, not its customer, GameFly. 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 (3rd Cir. 1995) (adopting Postal Service position that price discrimination among customers could be justified under Section 403(c) by differences in the costs “incurred by the Postal Service”); *Sea-Land Service, Inc. v. ICC*, 738 F.2d 1311, 1317 (D.C. Cir. 1984) (“The core concern in the nondiscrimination area has been to maintain equality of pricing for shipments subject to substantially similar costs and competitive conditions, while permitting carriers to introduce differential pricing where dissimilarities in those key variables exist.”); *Transcontinental Bus System, Inc. v. Civil Aeronautics Bd.*, 383 F.2d. 466, 483 (5th Cir. 1967)

(explaining that the relevant factors for determining whether shipments are similarly situated are generally “limited to competition and factors directly relating to the cost of carriage or transportation.”); *Trailways of New England, Inc. v. Civil Aeronautics Bd.*, 412 F.2d 926, 933 (1st Cir. 1969) (holding that the “inconvenience to traveler” of a service does not provide a legitimate basis for offering preferential services to certain travelers if the differing services provide no cost benefit *to the carrier*).

The Postal Service's other avenues of inquiry are equally irrelevant. That some Postal Service employees steal or lose GameFly DVDs is not a cognizable ground for injuring GameFly further by discriminating on price and terms of service. If the theft and loss of GameFly DVDs in transit has any effect on the net value of the service that the Postal Service provides GameFly, and the price that the Postal Service can reasonably charge for that service, the effect is downward, not upward. Moreover, while the theft of DVDs imposes a cost on *GameFly*, this cost in no way prevents the *Postal Service* from offering GameFly service on the same terms as Netflix. It is not up to the Postal Service to decide for GameFly whether to use that service.¹

Nor can the Postal Service argue that, because game DVDs sell for more than movie DVDs, value-of-service or Ramsey pricing principles entitle the Postal Service to appropriate some of that value for itself by charging mailers of game

¹ The Postal Service's attempt to use its failure to prevent its employees from stealing or losing GameFly mail as an excuse for failing to offer nondiscriminatory prices and services is reminiscent of the old joke about the man who, on trial for killing his parents, throws himself on the mercy of the court as an orphan.

DVDs higher rates of postage than mailers of movie DVDs. The proper role of value-of-service or Ramsey pricing in ratemaking is a complex and difficult question. The Commission held, however, that differences in demand elasticities among similarly situated customers may justify differences in price only when the differences in demand elasticities are so great as to warrant reclassifying the two customers' mail as separate subclasses. *See Postal Rate and Fee Changes*, R2006-1, PRC Op. & Rec. Decis. (Feb 26, 2007) at ¶ 5083 (citing the need for “distinct differences in demand characteristics” to warrant reclassification into separate subclasses); MC95-1, PRC Op. & Rec. Decis. at ¶ 5481 (“The driving factor for the definition of a subclass . . . is the perceived differences in demand as well as costs.”); *id.* at ¶ 5497 (“In the absence of convincing market differences, rates for worksharing categories should be based on cost avoidance.”). Among the tens of thousands of pages of emails, analyses and studies performed by the Postal Service since 2002 and produced in discovery in this case, GameFly did not find a single indication that anyone at the Postal Service performed a comparative analysis of the demand elasticities of Netflix versus the other DVD rental companies; let alone claim that differences in demand elasticities were large enough to justify the preferences given to Netflix; let alone argue that Netflix DVD mailers and GameFly DVD mailers should be put into separate subclasses.

Finally, as noted above, none of the justifications for discrimination belatedly advanced by the Postal Service is cognizable in this case because the Postal Service has never filed notice in the MCS—or any other tariff-like publication—of precisely what mailers must do to qualify for the lower rates.

Such publication is a basic requirement of common carrier regulation and a fundamental protection against discriminatory conduct. Every regulatory agency with jurisdiction over common carriers, including this Commission, has held this filing requirement to be a necessary condition of the lawfulness of any rate charged or service provided by a common carrier. See *Rate and Service Changes to Implement Baseline Negotiated Service Agreement with Bookspan*, Opinion and Recommended Decision, Docket No. MC2005-3 at 38-39 (May 10, 2006) (specifically pointing to the public availability of the terms and conditions of the NSA and the ability of other mailers to obtain service on substantially the same conditions as support for holding the NSA nondiscriminatory); Docket No. RM2003-5, *Rules Applicable to Baseline And Functionally Equivalent Negotiated Service Agreements*, Order No. 1391 at 23 (Feb. 11, 2004) (“Public disclosure also provides transparency, which helps curtail arguments of discrimination and secret dealings The Commission will adhere to its preference, and presumption, that the contents of the actual contract shall be made publicly available.”); *UPS Worldwide Forwarding v. United States Postal Service*, 66 F.3d 621, 635 (3d Cir. 1995) (“The regulation promulgating the ICM program requires the Postal Service to ‘make every ICM service agreement available to similarly situated customers under substantially similar circumstances and conditions. . . . To facilitate that process, the regulation mandates that the Postal Service *publish detailed information* about each ICM agreement. . . . We believe the publication of this information will permit competitors and mailers alike to verify that the Postal Service is complying with its mandate not to grant ‘undue or unreasonable’ discrimination or preferences”) (emphasis added); *AT&T v.*

Central Office Telephone, Inc., 524 U.S. 214, 221-224 (1998) (citing precedent supporting “filed rate doctrine”); *American Warehousemen’s Ass’n v. Ill. Cent. R. Co.*, 7 I.C.C. 556, 590, 591 (1898); *Bay Gas Storage Company, Ltd.*, 109 FERC ¶ 61,348 at 62, 616 (2004) (“[Federal Energy Regulatory] Commission policy generally favors disclosure of individual jurisdictional contract information in order to ensure that the pipeline’s contracting practices are not unduly discriminatory, and no undue preferences are granted to any customer.”)

The terms and conditions of the preferences granted to Netflix have never been published in a tariff-like schedule. They are essentially a secret NSA or niche classification. As such, they are per se discriminatory under established precedent. Thus, even if differences between GameFly’s and Netflix’s costs and production processes were otherwise potentially relevant to establishing a valid basis for discriminating between the two, the Postal Service’s defense would fail for lack of a published schedule indicating the conditions under which mailers are eligible for the same treatment as Netflix.

A. How Much Do DVD Breakage Rates Vary By Mailer Design?

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.

Response: Notwithstanding GameFly’s objections to these requests, GameFly has produced, or will produce by June 9, all of the responsive documents it possesses other than those that are covered by (1) attorney-client privilege or (2) attorney work product protection. GameFly will produce a privilege log for these documents on June 9th. The Postal Service has agreed to accept this production in satisfaction of its motion to compel a response to this request.

B. How Are GameFly DVD Mailers 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.

GameFly properly 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.² .

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

² 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.”).

object—is inducted into the postal system, the provenance and prior history of the mailpiece are immaterial.

Nevertheless, on June 9, GameFly will provide a narrative description of how it procures its mailers, how it assembles them and places its discs into them, and any other activities it undertakes to prepare these mailers for entry into the Postal Service system. GameFly will also produce purchase orders that will allow the Postal Service to identify the vendors from which GameFly procures its mailers.

GameFly cannot provide any more information on this topic even if compelled to do so. As GameFly simply purchases the mailers from third party vendors and does not design or produce them itself, it has no additional knowledge of the materials and processes used in the production of its mailers. The Postal Service's request is akin to asking a bank to describe the production process of the envelopes it uses to mail statements to its customers.

C. How Are GameFly DVDs Made?

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?

The Postal Service's continued pursuit of this question is baffling. Even a quick search of the terms "DVD specifications" or "Blu-Ray specifications" on Google or Wikipedia reveals that there is no significant physical difference between game and movie DVDs or between game and movie Blu-Ray disks. They all are 1.2 mm thick and 120 mm in diameter, and are made from a pair of clear polycarbonate wafers bonded together with a very thin information-carrying layer in between.

Moreover, even if (contrary to all information known to GameFly) there in fact were physical differences between game and movie DVDs, or among game DVDs, those differences would be legally immaterial. Differences in the design and production of mail pieces cannot undermine the similarity or functional equivalence of GameFly and Netflix mail, the disparity in the rates and terms of service offered to the two mailers, or the absence of any cognizable justification for the discrimination on grounds of cost of service (or any other ground). 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. See p. 12, n.2, *supra*.

In any event, GameFly has no particular knowledge or insight in this question. GameFly is a mailer, not a DVD manufacturer. 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 used to manufacture them. For this reason, GameFly has not performed any research or analyses of the material used in the manufacture of DVDs. Consequently, GameFly has no greater knowledge of the details of DVD manufacturing than does the Postal Service. Stated otherwise, the Postal Service can research an answer to the question as readily as GameFly could.

D. How Much Do Non-Game DVDs Cost?

USPS/GFL-52(e). 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 answered USPS/GFL-52(e) as follows: “GameFly has not studied the wholesale or retail prices of non-game DVDs.” The Postal Service, unsatisfied, argues that “a comparison of prices and costs of video and game DVDs relates to the issue of whether GameFly and Netflix are similarly situated.” USPS Motion to Compel at 6.

GameFly is at a loss to understand what additional information the Postal Service expects GameFly to provide. GameFly does not buy, sell or rent movie DVDs or other non-game DVDs. GameFly has never bought, sold or rented non-game DVDs. GameFly does not know what prices Netflix, Blockbuster, or other DVD rental companies have negotiated for the DVDs they buy for their own inventory. Wholesale price information of this kind is considered extremely confidential, and none of the other DVD rental companies have shared it with GameFly.

If the Postal Service is seeking confirmation that the average video DVD has a lower price than the average game DVD, GameFly hereby stipulates to that fact.³ But GameFly cannot provide a precise number because the company does not have access to the proprietary data from movie DVD companies that would be necessary for a more precise comparison.

³ GameFly’s stipulation is not an admission that the fact is relevant. As discussed above, the relative costs of GameFly and Netflix are irrelevant to the issue of whether the Postal Service has engaged in unlawful discrimination. Any discrimination in service can be justified only if the two companies’ shipments impose different costs upon, or generate disparate benefits for, the Postal Service. Whether GameFly suffers more economic harm from the breakage or theft of a disc by virtue of higher disc costs has no affect whatsoever on the Postal Service’s costs of service.

E. 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-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 has objected to these questions 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.

Furthermore, as discussed above, the theft and loss of GameFly DVDs by Postal Service employees is not a valid defense to GameFly’s complaint for discrimination in rates and other terms of service. DVD theft and loss do not negate the functional equivalence and similarity between GameFly and Netflix mail or the reality that the Postal Service is discriminating in the price that each company must pay to have its return DVD mailers bypass automated letter processing. And the notion that the theft and breakage of GameFly DVDs by Postal Service employees can somehow justify further injury to GameFly by discriminating against it in another dimension of service is unwarranted and ugly.

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.

Finally, the Postal Service misstates the standard for relevance in discovery in claiming it is entitled to answers to these questions because they “should inform the Postal Service direct case, which most certainly will consist of admissible evidence.” Postal Service Motion at 3. The proper standard in

Commission proceedings is whether discovery is “reasonably calculated to lead to the discovery of admissible evidence.” Rule 3001.26(a). That information may “inform” the Postal Service’s case (whatever that means) does not make the information discoverable if it is legally irrelevant to the outcome of the complaint.

Nevertheless, and without waiving its objection, GameFly is willing to produce responsive emails of Don Judge, David Barthel, and Sam Guttman, the three GameFly employees with primary responsibility for investigating and remediating the theft of GameFly DVDs, in response to USPS/GFL-5. All significant communications regarding the theft of GameFly DVDs should have one of these individuals as a sender or recipient. As to USPS/GFL-16, GameFly does not maintain the requested information separated by 5-digit ZIP code. If it wishes, the Postal Service can tabulate the information GameFly is providing to correlate with each ZIP Code, but it would be unduly burdensome for GameFly to arrange the information in this manner itself.

F. GameFly’s Transportation 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.

GameFly properly objects to USPS/GFL-26 and 28 because the requested information is irrelevant to this case and would be unduly burdensome to

produce. As noted above, 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., *Transcontinental Bus System, Inc., v. Civil Aeronautics Bd.*, 383 F.2d. 466, 483 (5th Cir. 1967) (explaining that the relevant factors for determining whether shipments are similarly situated are generally "limited to competition and factors directly relating to the cost of carriage or transportation") and other cases cited at pp. 6-7, *supra*.

USPS/GFL-26 also imposes an 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. As GameFly has not performed such a study, it is not in possession of this information. Under long-established precedent, discovery requests are properly objected to if they would require the recipient of the request to reach beyond its existing knowledge and perform a costly and burdensome special study. See, e.g., *Rate and Service Changes to Implement Negotiated Service Agreement with Washington Mutual*, MC2006-3, Presiding Officer's Ruling Denying Motion to Compel Response to Interrogatory OCA/USPS-T1-28 at 4 (July 26, 2006) (holding that a response to

an interrogatory was not required as determining costs through an after-the-fact survey would be “both burdensome and unlikely to produce reliable results”); *Miller v. Pruneda*, 236 F.R.D. 277, 282 (N.D. W.Va. 2004) (“A party answering interrogatories is required to provide information that is available to it and can be produced without undue labor and expense. . . . Interrogatories cannot require the responding party to make extensive investigations or conduct complex research.”); *Cinema Amusements Inc. v. Loew’s, Inc.*, 7 F.R.D. 318, 321 (D. Del. 1938) (“I adhere to the general rule that an interrogated party need only answer matters of fact within his knowledge and is not required to make research and compilation of data not readily known to him.”).

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, not only is the costing exercise proposed by the Postal Service both hypothetical and counterfactual, and therefore irrelevant, it would require a costly special study, and is unduly burdensome. See *Miller*, 236 F.R.D. at 282 (“Interrogatories cannot require the responding party to make extensive investigations or conduct complex research”) and other cases cited at pp. 21-22, *supra*.

G. GameFly Periodic Reports

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.

Response: Despite the unreasonable burden of this request, GameFly has produced the last twelve months of responsive reports and will produce all responsive reports GameFly has for the earlier years on June 9. The Postal Service has agreed to accept this production in satisfaction of its motion to compel a response to this request.

H. 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.

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.

Objection: GameFly has objected to these requests 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.

Furthermore, the Postal Service already knows as much about these communications 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.

Nevertheless, despite and without waiving these objections, GameFly will produce records of meetings with Postal Service employees contained in the files of Dave Hodess, Don Judge, David Barthel, Sam Guttman. GameFly will also search the email files of these individuals, as well as those of Sander Glick, for communications with the Postal Service on matters relevant to the issues of this case. These individuals are the most knowledgeable about the information that the Postal Service seeks and most likely to have responsive information. GameFly will also produce copies of presentations given to the Postal Service during these meetings.

GameFly continues to withhold on grounds of privilege the emails and meeting minutes concerning any settlement discussions between the parties. And GameFly also continues to withhold the written "meeting minutes" and other meeting "records" created by GameFly employees and agents after the meetings but not disclosed to the Postal Service. These documents 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. A listing of these documents will be included in the privilege log GameFly will produce on June 9.

I. 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. *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"). The Postal Service's assertion that GameFly and the persons who voluntarily contacted GameFly's counsel in an effort to help it prepare its case were not "aligned" with GameFly (USPS Motion to Compel at 11) is frivolous. All of the persons who contacted GameFly did so because they believed that GameFly's success in this case would help them too. That is why they contacted GameFly.

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, not the communications that helped GameFly discover the documents. 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,

A handwritten signature in black ink, appearing to read "Matthew D. Field". The signature is written in a cursive, flowing style.

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