

interrogatories to which it objects, Gamefly apparently moves to limit their scope by restricting its answers to information and communications involving only a handful of individuals within GameFly's organization. To support this limitation, GameFly makes new factual representations about its organization and operations that currently have no evidentiary support. Both in discovery of further information that might have a bearing on GameFly's complaint, and, in reacting to such facts (if they are subsequently established), the Postal Service has a right to explore these matters through discovery and in its direct case. This Reply is necessary to clarify what evidentiary record actually has been established at this point, and to respond to the progressive evolution of GameFly's complaint, insofar as it affects discovery, as well as GameFly's new offers and representations of fact. The Postal Service has filed a motion for leave to file this Reply concurrently with the Reply.

At this point, it is important to note a pattern that has emerged in GameFly's pleadings and testimony so far. GameFly fashions its relevance objections from two fundamental sources. First, it attempts to confine inquiries on the basis of legal conclusions that have no definitive support in the statute or precedents, and certainly that have not been endorsed or adopted by the Commission in this complaint action. In particular, GameFly legally defines what constitutes discrimination, including what constitutes a similarly situated mailer for purposes of applying that definition. GameFly argues that any fact sought to be discovered that is inconsistent with those conclusions and definitions is per se irrelevant. In this regard, GameFly has every right to draw and argue its own

legal conclusions, including those based on properly established facts in evidence. It is premature, however, to make those arguments at this stage, and they certainly should not preclude the Postal Service's ability to search out facts and evidence that might support its own legal conclusions and interpretations when the time comes to file its direct case and ultimately to argue its defense in briefs.

Second, GameFly attempts to shape discovery, and to insulate itself from it, by positing an evidentiary record that simply does not exist at this stage. This tendency is no more evident than in GameFly's direct case. GameFly has chosen to file very limited direct testimony by a non-employee consultant comparing prices and costs, and to present a legal memorandum that relies on internal documents supplied by the Postal Service in discovery to present the essential elements of its discrimination complaint. GameFly proceeds as if the facts that it represents are established in the documents are evidence, and it argues that any view of those facts that conflicts with its own view is irrelevant to the proceeding.³ In the first place, as the Commission knows well, discovery responses do not become evidence until they are entered into the record. While the responses and documents might well become evidence at some point in the future, consistent with the Commission's practice of permitting discovery to become "written cross-examination," they have not yet achieved that status, and the Postal Service might well have legitimate objections to their conversion into evidence. At any rate, GameFly's *interpretations* of those purported facts do not

³ Alternatively, GameFly seems to be asking the Commission to take official notice of information obtained from Google or Wikipedia. See GameFly Answer at 14.

become evidence unless GameFly presents them as testimony. Furthermore, the Postal Service is entitled to offer its own interpretations of properly established facts through its own testimony when the time comes. Prior to filing its direct case, the Postal Service is entitled to pursue in discovery the exposition of facts that might support its own interpretations and legal conclusions.

GameFly's approach turns the logical progression of complaint proceedings on its head. It starts with legal conclusions that have not been established or adopted, and it argues against discovery on the basis of facts and interpretations that have no evidentiary status. On that foundation, it attempts to insulate itself from legitimate inquiry in discovery, and thereby to slant the record in its favor.

It must be remembered that this is not a case based on *ceteris paribus* facts, as GameFly likes to argue. This is not a case where GameFly is alleging undue or unreasonable discrimination between two essentially similar mailers who have chosen to mail at the same rate. To the extent that the facts have been illuminated through discovery and stipulations so far, this is a case involving two significantly different DVD mailers (Netflix and GameFly), who have, for whatever reasons, chosen to mail at different rates. GameFly represents that its choices are supported by its own interpretations of the facts. At this stage, Postal Service discovery is aimed at uncovering admissible evidence that might illuminate or explain GameFly's choices in light of other facts, or that might support the Postal Service's different interpretations.

This Reply sets forth each discovery request for which the Postal Service offers an additional response, followed by an explanation why the Commission should overrule GameFly's objections and compel responses to each question. The discovery requests listed below fall into two general categories: (1) discovery requests for which GameFly contends that it has no information or knowledge and (2) discovery requests for which GameFly offers to provide documents and communications from a limited number of GameFly employees. For the first category of discovery requests, the Postal Service requests that GameFly respond to the discovery request by providing any information – or documents or communications containing information – responsive to the discovery request, or to state it has no responsive knowledge or information. With respect to the second category of document requests, GameFly has no legitimate basis for limiting its production of documents and communications as proposed, or for omitting documents and communications from other high level GameFly executives.

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.

As described in the Postal Service motion to compel, these discovery requests are relevant to the complaint, do not impose an undue burden on GameFly and are reasonably calculated to lead to the discovery of admissible evidence. See Postal Service Motion to Compel at 2-4. In its answer, GameFly

repeats its objections and proposes to produce responsive emails of three GameFly employees alleged to have “primary responsibility for investigating and remediating the theft of GameFly DVDs.” See GameFly’s Answer at 20. This proposal would omit the Senior Vice President of Merchandising & Logistics, the direct supervisor of the individuals proposed by GameFly, the GameFly Chief Executive Officer and the Senior Vice President of Operations, another higher level GameFly executive.

GameFly’s proposal would not respond adequately to these discovery requests. Although emails from the three individuals alleged to have responsibility for theft issues may contain information related to theft of GameFly mail, they would not reflect how GameFly used theft information in its business decisions. It is likely that these business decisions are made by GameFly’s Chief Executive Officer, Senior Vice President of Merchandising and Logistics and Senior Vice President of Operations. How theft affected GameFly’s business decisions related to its dealings with the Postal Service, including its choice of postal services, is relevant to GameFly’s alleged discrimination. Accordingly, discovery of emails from GameFly’s Chief Executive Officer, Senior Vice President of Merchandising and Logistics and Senior Vice President of Operations are reasonably calculated to lead to the discovery of admissible evidence.

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.

As described in the Postal Service motion to compel, these discovery requests are relevant to the complaint, do not impose an undue burden on GameFly and are reasonably calculated to lead to the discovery of admissible evidence. See Postal Service Motion to Compel at 6-8. In its answer, GameFly repeats its objection that its costs have no relevance to its discrimination allegations and that because it has not conducted a study related to these discovery requests, requiring it to provide responsive information would impose an undue burden. As set forth in the Postal Service motion to compel, GameFly has requested repeatedly to receive service “on the same terms” as Netflix. See id. The Postal Service, in fact, has offered GameFly service “on the same terms” as Netflix. See May 17, 2010 letter from R. Andrew German to David Levy (attached as Exhibit 1). These discovery requests are relevant to whether GameFly has the capacity to receive service on the same terms as Netflix, and they are reasonably calculated to lead to the discovery of admissible evidence.

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.

As described in the Postal Service motion to compel, these discovery requests are relevant to the complaint, do not impose an undue burden on GameFly and are reasonably calculated to lead to the discovery of admissible evidence. See Postal Service Motion to Compel at 8-9. In its answer, GameFly repeats its objections and proposes to produce responsive emails of two GameFly employees responsible for loss prevention, GameFly's Director of USPS Operations, GameFly's Chief Executive Officer, and GameFly's consultant, Mr. Sander Glick. See GameFly's Answer at 26. This proposal would omit the Senior Vice President of Merchandising & Logistics, who is the direct supervisor of the two individuals involved with loss prevention and the Director of USPS Operations, and the Senior Vice President of Operations, another higher level GameFly executive.

GameFly has no legitimate basis for limiting discovery to these individuals. These discovery requests address a range of issues, including mail piece design, performance, and rates and classifications of GameFly DVD mailings. GameFly's proposal would omit entirely documents and communications from GameFly employees at the Senior Vice President level, as well as documents

and communications within GameFly's Operations department. It is likely that GameFly's Operations department had responsibility for some of the issues listed above, and the Postal Service is entitled to discovery of responsive communications and documents within this department. Accordingly, discovery of emails from GameFly's Senior Vice President of Merchandising and Logistics and Senior Vice President of Operations is reasonably calculated to lead to the discovery of admissible evidence.

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.

In its answer, GameFly alleges that it does not know the information requested in this discovery request, and offers to stipulate to the fact that the average video DVD has a lower price than the average game DVD. As stated in the Postal Service motion to compel, the information requested by this discovery request is relevant to the allegations in GameFly's complaint. See Postal Service Motion to Compel at 5-6. The Postal Service requests that the Presiding Officer order GameFly to respond to the discovery request by providing responsive information known by GameFly, or, if it has no responsive knowledge, to state so in its response to this discovery request.

Conclusion

For the reasons discussed above, and those raised in the Postal Service motion to compel, 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

By its attorneys:
Daniel J. Foucheaux, Jr.
Chief Counsel, Pricing and Product
Support

Kenneth N. Hollies
James M. Mecone

475 L'Enfant Plaza West, S.W.
Washington, D.C. 20260-3083
(202) 268-6525, Fax -3084
June 7, 2010

EXHIBIT 1



May 17, 2010

Mr. David M. Levy, Esq.
Venable LLP
575 7th Street, NW
Washington, DC 20004
DMLevy@venable.com

RE: Processing of GameFly Mail

Dear Mr. Levy:

This letter outlines the conditions that would be needed to provide GameFly with the manual processing it seeks in its Complaint. If the Postal Service and GameFly agree, the Postal Service is prepared to begin providing this processing to GameFly based on local determinations and upon the conditions indicated below. Please note that the Postal Service plan is operational in nature, not an offer of settlement that would depend upon withdrawal of GameFly's Complaint currently pending at the Postal Regulatory Commission (PRC Docket No. C2009-1).

The Postal Service cannot institute mail processing that includes manual culling unilaterally. Local processing of DVD mail through manual culling has evolved over time and depends on mutual cooperation between the mailer and the Postal Service. The DVD mail appropriate for manual culling has certain characteristics, including large volume, high density at destinations, multiple entry and return points, and relatively short travel distances. If GameFly wants to get similar mail processing, it needs to undertake comparable efforts to make it possible.

It is important to understand that the processing of DVD mail reflects the discretion of local mail processing operations, and not a centralized national policy. You will find that the processing of DVD mail differs among postal facilities, depending on the specific conditions of each local mail processing operation. Even in mail processing facilities where postal employees manually cull DVD mail, the employees are not able to identify and manually cull every piece of DVD mail otherwise targeted for manual culling that passes through their facility.

Currently, mail processing employees at the local level have the discretion to cull DVD mail pieces manually into a separate mail tray reserved for a DVD mailer if they believe that local conditions make manual culling a more appropriate method of processing. The same discretion can be applied to manually cull GameFly mail pieces, provided that GameFly takes the steps listed below.

- GameFly must color or mark its mail piece to make it more easily and uniquely identifiable. This is necessary because it enables Postal Service mail handlers to identify and cull GameFly mail pieces when possible.¹
- GameFly must employ a mail piece that qualifies for the one-ounce First-Class Mail letter price. This will enable GameFly to enjoy the same rates as other DVD mailers, and allow the Postal Service to employ the same processes within the same mail stream.
- GameFly must take delivery of its mail via caller service at approximately 130 locations chosen to minimize the distance return mail pieces travel in the mail stream. We can work with you to identify those locations best suited to GameFly's mail flow. Depending on mail volume and density, multiple pickups per day may prove necessary.
- GameFly needs to enter outbound pieces deep enough into the mail stream so that total one-way distance in the mail drops to approximately the same short distance that other DVD mail pieces attain. Other DVD mailers accomplish this by expedited plant verified drop shipment. We need to work cooperatively with GameFly to achieve this goal, which may require expansion of Express Mail open and distribute, GameFly's current practice.

The Postal Service understands that the plan described above will present difficult choices to GameFly in planning and managing its operations. We are willing to explore any particular problems and to seek reasonable alternatives that may be available. We are available to discuss these matters at your convenience.



R. Andrew German
Managing Counsel, Pricing and Product Development Law

¹ Employees involved in local mail processing operations exercise discretion in determining when to cull DVD mail. Culling is optional, until such time as its mail reaches sufficient density that attempts to cull all pieces are made. Employees can commence making similar judgments for GameFly pieces only after GameFly mail pieces take on a unique, contrasting coloration that makes them as recognizable as other DVD mail pieces.