

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

COMPLAINT OF GAMEFLY, INC.

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Docket No. C2009-1

**MOTION OF GAMEFLY, INC.,
TO COMPEL THE POSTAL SERVICE TO ANSWER
GAMEFLY DISCOVERY REQUESTS OR,
IN THE ALTERNATIVE, TO STRIKE TESTIMONY
OF USPS WITNESS ROBERT LUNDAHL (USPS-T-4)
(August 25, 2009)**

Pursuant to Rule 3001.26(d) and 3001.27(d) of the Commission's Rules of Practice, GameFly, Inc. ("GameFly") respectfully moves to compel the United States Postal Service to provide complete and responsive answers to GameFly Discovery Requests GFL/USPS-T4-4-9, 12, 13, 15, 16-19, 22, 23(a-d) and (f), 27(c), 28, 29, 31(a), 33(c), 35(a), 37(a, c, d), 39, and 40(a)—or, in the alternative, to strike the testimony of USPS witness Robert Lundahl (USPS-T-4). Because cross-examination of the Postal Service's witnesses, including Mr. Lundahl, is scheduled to occur on September 1 and 2, and because the discovery requests are consistent with clear and settled precedent, GameFly requests that the Postal Service be directed to produce the requested information by email to GameFly counsel on or before 5 pm on Tuesday, August 31.

I. SUMMARY

These discovery requests seek information about the studies, analyses and related information underlying Mr. Lundahl's testimony that certain changes in DVD design, manufacturing, packing and handling would enable GameFly to avoid DVD breakage from automated letter processing. The Postal Service has objected to producing any of this foundational information on the ground that it is covered by a nondisclosure agreement between Mr. Lundahl's employer, Advanced Technology and Research Corporation ("ATR"), and Netflix, or is otherwise "confidential" and "commercially sensitive."¹

These objections are utterly without merit. Since 1980, the Commission has repeatedly put the Postal Service on notice that it may not offer expert opinion testimony without disclosing the studies, analyses and other information on which the witness has relied. This rule is consistent with the cognate requirements of the Federal Rules of Civil Procedure and basic norms of due process. Allowing Mr. Lundahl's testimony to be offered into evidence, while withholding from GameFly the underlying information on which he purportedly relied, would deny GameFly due process by effectively forcing it to litigate against a black box. Any nondisclosure agreement between Mr. Lundahl's employer, ATR, and Netflix became irrelevant as a bar to disclosure when the Postal Service filed Mr. Lundahl's written testimony.

¹ On August 13, 2010, the Postal Service filed a single two-paragraph set of general objections to GFL/USPS-T4-17, 18, 19, 22, 23(a)-(d), 23(f), 27(c), 28, 33(c), 35(a), 37(a) and 39(a)-(b). On August 18, 2010, the Postal Service filed "answers" to GFL/USPS-T4-4, 5, 6, 7, 8, 9, 12, 13, 15, 16, 26, 29, 31 and 37 that were tantamount to objections. The questions, objections and nonresponsive answers are reproduced in Appendix A to this Motion.

The Postal Service's related objection to disclosure on grounds of commercial sensitivity is likewise without substance. Mr. Lundahl's key recommendations are already a matter of public record; the Postal Service has failed to show why the Commission's protective conditions would be insufficient; and the Postal Service has waived any objection by submitting Mr. Lundahl's testimony. Finally, the Postal Service's objections of "relevance" and "undue burden" are throwaway objections that the Postal Service has not even bothered to explain, let alone justify.

For these reasons, a decision by the Postal Service to offer the testimony of a witness whose opinions rest on studies that are covered by a nondisclosure agreement with a third party was a decision that the Postal Service made at its own peril. The Postal Service should be given three choices now: (1) obtain the consent of Netflix to disclose the information without further delay, (2) disclose the information without Netflix's consent (if the Netflix/ATR contract is typical of nondisclosure agreements, it allows disclosure when compelled by a court or agency), or (3) accept having the testimony (and all references to it in other Postal Service testimony or briefs) stricken.

II. STATEMENT OF FACTS

A. Mr. Lundahl's Reliance On Netflix Studies To Support His Testimony

The thrust of Mr. Lundahl's testimony is that GameFly has failed to make several readily available design and process changes that would reduce DVD breakage during the processing of GameFly DVD mailers on Postal Service

automated letter processing equipment. Mr. Lundahl suggests (although he does not say so outright) that these measures would allow GameFly to achieve acceptable breakage rates without resorting to either manual processing or automated flats processing. USPS-T-4 at 1-15.

Mr. Lundahl's testimony on the effectiveness of these measures relies largely, if not entirely, on studies or analyses that he and his employer, ATR, performed for Netflix. See USPS-T-4 at 3-6; Response to GFL/USPS-T4-27. His testimony repeatedly emphasizes the importance of the Netflix research as a foundation for his testimony in this case:

- His employer was recently "retained by Netflix to analyze DVD breakage." USPS-T-4 at 3-6.
- His recommendations to Netflix on the most effective means of redesigning DVDs to minimize disc breakage were based on this research. USPS-T-4 at 5.
- The opinions offered in his testimony in this case on the most effective means of redesigning DVDs to minimize disc breakage are also "[b]ased on this background."). Lundahl Direct Testimony, USPS-T-4 at 6. See also *id.* at 6-7 (opinions on importance of maintaining smooth inside diameter hole assertedly based on stress testing for Netflix); *id.* at 7-8 (opinions on the importance of minimizing UV curing assertedly based on Netflix experience); *id.* at 9 (opinions on importance of improved DVD "covering coat" and "new adhesive"

based on Netflix experience); *id.* at 12-13 (opinions on the importance of “the orientation of a DVD inside a mailpiece” based on Netflix experience); *id.* at 13 (opinions on the importance of “transportation strategies” based on Netflix experience); *id.* at 14 (opinions on the importance of envelope design in minimizing DVD breakage during automated letter processing based in part on Netflix experience).

Mr. Lundahl’s responses to GameFly discovery requests further underscore the extent of his reliance on his Netflix research as the foundation for his testimony in this case:

- “*All work that ATR performed concerning the failure analysis of DVDs was performed under contract to NETFLIX.*” Answers to GFL/USPS-T4-4 (emphasis added), 5 (same), 6 (same), 7 (same), 8 (same), 9 (same), 12 (same), 13 (same), 15 (same), 16 (same), 29 (same), 31 (same), 37(c) (same) and 37(d) (same).
- Mr. Lundahl and ATR have never “performed tasks related to DVD breakage for the Postal Service.” Answer to GFL/USPS-T4-25.
- Mr. Lundahl and ATR have never “performed tasks related to DVD breakage for anyone other than Netflix.” Answer to GFL/USPS-T4-27.
- Mr. Lundahl has never spoken with GameFly, or performed any analyses specific to video game DVDs. Answers to GFL/USPS-T4-8, 9, and 11.

- The only additional documents Mr. Lundahl claims to have reviewed in preparing his testimony are documents provided by GameFly in discovery. Answers to GFL/USPS-T4-1 and 2. None of those documents contain analyses of the factors that, according to Mr. Lundahl's testimony, heavily influence DVD breakage rates.

In sum, Mr. Lundahl's claims about the ability of DVD rental companies to reduce DVD breakage from automated letter processing by changing the design, manufacture, packaging and handling of DVDs and DVD mailers rely heavily, if not entirely, on his work for Netflix.

B. The Postal Service's Refusal To Produce The Netflix Studies Relied On By Mr. Lundahl In His Testimony

To enable GameFly to analyze, and test the data, assumptions, analyses and other information underlying Mr. Lundahl's claims, GameFly filed discovery requests on August 4 seeking the studies, analyses, reports and similar information cited or otherwise relied on by Mr. Lundahl. The Postal Service, however, has refused to provide any of these studies.

On August 13, it filed a two-paragraph set of general objections to GameFly requests GFL/USPS-T4-17-19, 22, 23(a)-(d) and (f), 27(c), 28, 33(c), 35(a), 37(a), and 39(a)-(b). The Postal Service's main objection was that "these discovery requests seek commercially sensitive information of companies that are not parties to this case. . . . Disclosure of the information . . . would reveal confidential and commercially sensitive information of companies that are not parties to this case" and would "allow GameFly to obtain through discovery

commercially sensitive and competitively valuable information for which it consciously chose not to make the necessary investment.” USPS Objections (Aug. 13, 2010) at 6-7.

The Postal Service also objected to “the above discovery requests on the grounds of relevance and undue burden.” *Id.* at 6. The Postal Service offered no further explanation for this one-line objection.

Many of the “Responses” filed by the Postal Service on August 18 offered a new and different objection. In response to GameFly data requests GFL/USPS-T4-5-9, 12, 13, 15, 16, 29, 31, 37(c)-(d), and 40(a), all of which asked the Postal Service to produce information related to the underlying studies and analyses performed by Mr. Lundahl and ATR, the Postal Service asserted for the first time that that these documents were covered by a nondisclosure agreement between ATR and Netflix:

All work that ATR performed concerning the failure analysis of DVDs was performed under contract to Netflix. All studies, analysis, reports, and ATR generated documents are Netflix proprietary information and cannot be disclosed without written authorization under the terms of our confidentiality agreement.

Unlike the August 13 objections, the August 18 “Responses” did not assert that some of ATR’s DVD breakage analysis had been performed for “other unidentified companies.” To the contrary, the “Responses” stated that all of ATR’s DVD failure analysis had been “performed under contract to NETFLIX.” See p. 5, *supra*.

III. ARGUMENT

A. **GameFly Is Entitled To Discovery Of All Of The Information Relied On By Mr. Lundahl In Formulating His Testimony, Including The Studies Referenced In His Testimony.**

One of the most basic rules of adversarial litigation is the obligation of the proponent of opinion testimony to disclose fully the facts, data, analyses and other information on which the opinions are based. The primary way for an adverse party to challenge the credibility of an expert is to show that the expert's opinions are unsupported by, or inconsistent with, the data on which the expert supposedly relied. Without the right to "examine and test all material relied upon by their opponents" as the "foundation for evidentiary presentations . . . opposing parties may be disadvantaged by the lack of an adequate opportunity to test the findings from which the conclusions are drawn." Docket No. RM81-2, *Rules of Practice and Procedure for Introducing Studies and Analyses into Testimony*, 46 Fed. Reg. 45376, 45377 (1981).

Consistent with this principle, Rules 3001.31(k)(1), (2) and (3) have required for nearly 30 years that the Postal Service disclose in detail—even without being requested to do so in discovery—the source data, methodology and conclusions of "all studies and analyses which are to be relied upon as support for other evidence, even if the studies and analyses themselves are not to be offered in evidence." Docket No. RM81-2, *supra*, 46 Fed. Reg. at 45377 (proposing requirements now codified at 39 C.F.R. § 3001.31(k)); *id.*, 47 Fed. Reg. 12794 (1982) (adopting final rules).²

² The Commission promulgated these rules in 1981 to avoid the "inordinate amount of time and resources [that had been devoted] to disputes as to what

Similarly, in Docket No. R84-1, *Postal Rate and Fee Changes, 1983*, the Commission struck testimony by a Postal Service economist on the attribution of mail processing costs during peak handling periods after the Postal Service refused to produce the “basic program documentation necessary to authenticate, replicate and test” the Mail Processing Cost Model, a cost model relied on by the witness. Order No. 562 (May 30, 1984).

Likewise, in Docket No. R97-1, *Postal Rate and Fee Changes, 1997*, Chairman Gleiman, ruling from the bench on behalf of the Commission, ordered the Postal Service to produce certain mail disqualification logs underlying the testimony of a Postal Service witness or have the testimony stricken. R97-1 Tr. 36/19643-46; see also R97-1 PRC Op. & Rec. Decis. (May 11, 1998) at ¶¶ 1013-1019 (summarizing procedural history).

The Commission’s disclosure requirements are not unusually stringent. The Federal Rules of Civil Procedure provide that a party sponsoring the testimony of an expert witness must, at the outset of discovery, submit a report that contains “a complete statement of all opinions the witness will express and the basis and reasons for them” and “the data or other information considered by the witness in forming” these opinions. Fed. R. Civ. P. 26(a)(2)(B). Failure to

supplementary material must be provided” as a result of the Postal Service’s recurring attempts to avoid full disclosure of the computer models and data underlying the output values that the Postal Service had submitted in testimony. Order No. 425, Docket No. RM81-2, 47 Fed. Reg. 12794, 12795 (1982). One such dispute required three successive orders of the Commission before the Postal Service complied. See Docket No. R80-1, *Postal Rate and Fee Changes, 1980*, Order No. 346 (July 15, 1980); *id.*, Order No. 349 (July 23, 1980); *id.*, Order No. 350 (July 29, 1980).

provide such a report, or to disclose adequately the data or information considered by the witness, is ground for exclusion of the witness's testimony. Fed. R. Civ. P. 37(c)(1). After disclosure has occurred, adverse parties may use traditional means of discovery to obtain additional or supplemental information as of right. Fed. R. Civ. P. 26(a)(5). Similarly, the Federal Rules of Evidence require an expert witness "to disclose the underlying facts or data" of his opinions either before offering his opinion or on cross-examination. Fed. R. Evid. 705.

The courts, in applying these rules, have held repeatedly that expert testimony must be excluded if the proponent of the testimony refuses to disclose its basis. See, e.g., *University of R.I. v. A. W. Chesterton Co.*, 2 F.3d 1200, 1218-1219 (1st Cir. 1993) (holding that the trial court did not abuse its discretion in excluding an expert's testimony on damages when the party submitting the testimony refused to provide any documentation supporting it); *Haworth, Inc. v. Herman Miller, Inc.*, 162 F.R.D. 289, 295 (W.D. Mich. 1995) ("all factual information considered by the expert must be disclosed"; and "failure to so disclose requires that the information may not be used at trial.").

These principles apply with particular force here. Through Mr. Lundahl's opinion testimony, the Postal Service seeks to persuade the Commission that certain changes in the design, manufacture, packaging and handling of DVDs can reduce the rate of DVD breakage from automated letter processing—and reduce the breakage enough as to warrant dismissal of GameFly's discrimination claim.³ Stated otherwise, the Postal Service has placed in issue through Mr.

³ The Postal Service must establish the more far-reaching claim for Mr. Lundahl's testimony to have any legal relevance under 39 U.S.C. § 403(c). Design and

Lundahl's testimony not only the theoretical question of whether his proposed techniques can reduce DVD breakage, but also the *quantitative* question of *how much* DVD breakage from automated letter processing would remain. Without access to the studies and analyses (including the methodologies and source data) underlying Mr. Lundahl's testimony, GameFly cannot evaluate or challenge Mr. Lundahl's conclusions about the effectiveness of the techniques that he recommends. Any rebuttal testimony and briefing on the issues discussed in Mr. Lundahl's testimony would be no more than "he said, she said" posturing. If GameFly cannot obtain the foundational documents and information that provide the basis for Mr. Lundahl's opinions, GameFly cannot effectively challenge that basis.

Compounding this injustice, the Postal Service's objections would prevent GameFly from examining Mr. Lundahl's credibility in other, related ways. The Postal Service has objected to GameFly's requests concerning Mr. Lundahl's work for other clients, which could show whether he is well-respected in the industry (GFL/USPS-T4-17 and -27); whether Netflix or his other clients accepted and implemented his recommendations, which would shed light on whether those companies found his proposed remedies to be as effective and cost-effective as Mr. Lundahl claims (GFL/USPS-T4-17, -28, and -35); and the level of breakage rates actually experienced by Netflix and other clients of Mr. Lundahl and ATR after implementing his recommendations (GFL/USPS-T4-18, -19, and -35).

process changes that reduced DVD breakage, but still left automated letter processing significantly inferior to manual processing in this regard, would still leave GameFly with a discrimination claim under 39 U.S.C. § 403(c).

In sum, the Postal Service's position would prevent GameFly from testing Mr. Lundahl's conclusions either directly (by examining the studies he performed for Netflix), or indirectly (by examining circumstantial evidence of the objectivity, reliability and effectiveness of his proposals). This position is hopelessly at odds with any reasonable notion of due process. As the Commission noted in an analogous context, accepting Mr. Lundahl's testimony while shielding it from the scrutiny sought by GameFly "would be effectively to accept a black box—the parties and the Commission would be required to accept on faith" Mr. Lundahl's conclusions. Order No. 350 in Docket No. R80-1 (July 29, 1980) at 4. After the Commission's adoption of Rule 3001.31(k), and the subsequent rulings in R84-1 and R97-1, "it is difficult to imagine what could have provided clearer notice that it would not be adequate to again" submit opinion testimony while trying to stonewall against discovery of the data and studies underlying the opinions. Order No. 562, *supra*, at 15.⁴

B. The Postal Service Cannot Evade Its Disclosure Obligations to GameFly By Sponsoring Testimony Whose Underlying Studies And Analyses Are Covered By A Non-Disclosure Agreement With A Third Party.

The Postal Service's main reason for refusing to produce the studies and analyses underlying Mr. Lundahl's opinions is that "[a]ll work that ATR performed

⁴ Mr. Lundahl's testimony cannot be admitted under Federal Rule of Evidence 703, which states that an expert witness may rely on facts not admissible in evidence only if these facts are "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." Because the Postal Service will not reveal these facts, neither GameFly nor the Commission is in a position to determine whether Mr. Lundahl's testimony even meets basic standards of admissibility.

concerning the failure analysis of DVDs was performed under contract to Netflix,” and the contract (or contracts) include a “confidentiality agreement” that bars disclosure of the information “without written authorization” from Netflix. See p. 7, *supra*. Any such confidentiality agreement, however, became irrelevant the moment that the Postal Service filed Mr. Lundahl’s testimony with the Commission. By filing the testimony, the Postal Service waived any defenses—whether based on contract, confidentiality, commercial sensitivity or any other asserted privilege—to disclosure of the data relied on by Mr. Lundahl.

The Postal Service cannot simultaneously offer opinion testimony against GameFly while invoking a protective agreement between the witness and a third party as a shield against disclosure to GameFly of the information underlying the testimony. “When a party puts privileged matter in issue as evidence in a case, it thereby waives the privilege as to all related privileged matters on the same subject.” 8 Wright, Miller & Marcus, FEDERAL PRACTICE AND PROCEDURE § 2016.6 (2010) at 405. As Judge Learned Hand wrote about the Fifth Amendment, “the privilege is to suppress the truth, but that does not mean that it is a privilege to garble it; . . . it should not furnish one side with what may be false evidence and deprive the other of the means of detecting the imposition.” *Id.* (quoting *U.S. v. St. Pierre*, 132 F.2d 837, 840 (2nd Cir. 1942)). See also Fed. R. Civ. P. 26(a)(2)(B) (Advisory Committee notes to 1993 amendments):

Given this obligation of disclosure, litigants should no longer be able to argue that materials furnished to their experts to be used in forming their opinions—whether or not ultimately relied upon by the expert—are privileged or otherwise protected from disclosure when such persons are testifying or being deposed.

Thus, in *Colgate-Palmolive Co. v. Procter & Gamble Co.*, the court struck evidence from an expert for Colgate-Palmolive when the witness refused to disclose “the protocol, statistical plan and analysis and procedures used in the study” on the ground that he, like Mr. Lundahl, was bound by a confidentiality agreement with a third party. 2004 U.S. Dist. LEXIS 12714 at *3 (S.D.N.Y. 2004). The court explained that the burden is on the witness to disclose the facts and data relied on in his testimony. *Id.* Even if the information would be available through a third-party subpoena, the requesting party is under no obligation to take such a step—the witness must come forward with the information when asked. *Id.*

The lack of merit in the Postal Service’s “protective agreement with a third party” defense is underscored by contrasting the Postal Service’s objection with the limited exception to disclosure established in 39 C.F.R. § 3001.31(k)(iv). Rule 3001.31(k)(iv) provides:

If the recipient of a request for materials pursuant to this paragraph (k)(3) of this section [documentation of certain computer analyses] asserts that compliance with the request would conflict with patent, copyright, trade secret or contract rights applicable to the requested material, the recipient shall immediately notify the requestor and the Presiding Officer. If valid, the Presiding Officer shall devise means of accommodating such rights. Such means may include protective orders, including access under protective conditions to the computer facilities of the recipient of a request, making material available for inspection, compensation, or other procedures, according to the nature of the right affected by compliance with this paragraph (k)(3) of this section. If the Presiding Officer determines that compensation is necessary to accommodate the affected right, the cost of compensation shall be borne in the same manner that paragraph (k)(3)(iii) of this section prescribes for bearing the costs referenced there. If such right cannot be accommodated by reasonable compensation, or by protective orders or other procedures, and, as a result, materials required by this paragraph

(k)(3) of this section cannot be provided, the Presiding Officer shall determine, in his/her discretion, whether evidence that relies upon the materials not provided shall be admissible or afforded limited weight.

Comparing the narrow scope of this exception with the broad scope of non-disclosure sought by the Postal Service here is instructive. First, Rule 3001.31(k)(iv) does not appear to cover most of the information in dispute. Rather, the purpose of the exception was to deal with circumstances when the proponent of a computer study had used an “off the shelf” statistical software package or similar software, and the manufacturer of the software was unwilling to disclose its source code to either the proponent or its adversary. Rule 3001.31(k)(iv) was intended to allow use of “reliable” commercial software in those circumstances without disclosure of the underlying computer source code. Order No. 425, 47 Fed. Reg. at 12795-96. The narrow scope of Rule 3001.31(k)(iv) necessarily implies, under the well-established doctrine of *expressio unius est exclusio alterius*, that no broader exceptions were intended. *Linan-Faye Constr. Co. v. Housing Authority*, 49 F.3d 915, 937 (3rd Cir. 1995); *Marshall v. Western Union Tel. Co.*, 6212 F.2d 1246, 1251 (3rd Cir. 1980).⁵

Second, even if Rule 3001.31(k)(iv) were somehow applicable here, the rule requires that any party who wishes to invoke its protections “shall *immediately* notify the requestor and the Presiding Officer” of the “patent, copyright, trade secret or contract rights” allegedly “applicable to the requested material.” *Id.* (emphasis added). The Postal Service made no attempt to comply

⁵ At the risk of belaboring the obvious, GameFly is not asking the Postal Service to produce electronic copies of any commercially available applications software (e.g., Excel, Access or Word) used by Mr. Lundahl or ATR.

with this requirement. Rather, it remained silent for 12 days (and, in many instances, 14 days) after the discovery requests had been filed, and then simply issued blanket objections. After the Commission's repeated admonitions against further needless delay, the Postal Service's actions cannot be regarded as a good faith attempt to invoke Rule 3001.31(k)(iv).

Third, the general remedy under Rule 3001.31(k)(iv) is to subject production of computer programs to a protective order. But the Commission has already approved protective conditions in this case. The Postal Service has offered no reason why they would be inadequate.

Finally, there is no basis for the alternative remedy under Rule 3001.31(k)(iv) of monetary compensation. The supposed crown jewels of ATR's work for Netflix—the specific processes and techniques that supposedly can reduce disc breakage—are already in the public domain. The Postal Service put them there by filing Mr. Lundahl's testimony in the public docket. Any DVD manufacturer or DVD rental company in the world can learn these supposedly proprietary techniques by downloading Mr. Lundahl's testimony from the Commission's website. Moreover, Mr. Lundahl's advice has essentially no economic value to GameFly in any event. As GameFly's CEO, David Hodess, noted during his live testimony on July 27, 2010, GameFly does not manufacture its own DVDs, and the quantities it purchases are too small to give it any influence over the design and manufacturing practices of GameFly's DVD vendors. Tr. 5/940.

C. The Postal Service's Claim That The Studies And Analyses Underlying Mr. Lundahl's Testimony Are "Confidential" Or "Commercially Sensitive" Is Also Without Merit.

The Postal Service's related objection that "[d]isclosure of the information sought . . . would reveal confidential and commercially sensitive information" that "would allow GameFly to obtain through discovery commercially sensitive and competitively valuable information" is likewise without merit. As noted in the previous section, (1) the specific techniques that Mr. Lundahl asserts will reduce DVD breakage are already in the public record; and (2) the supporting studies sought by GameFly can be submitted under protective conditions if the Postal Service (or, more pertinently, Netflix) makes an appropriate showing under the Commission's rules.⁶ In this regard, it is telling that neither the Postal Service nor Netflix objected to production of 90 pages of documentation for an ATR report to Netflix in September 2006. See GFL7178-7267.

D. The Postal Service's Objections Of "Relevance And Undue Burden" Are Frivolous.

The Postal Service's final objections—"relevance and undue burden" (Objections at 6)—are empty makeweights. The Postal Service has not identified what requested material it contends is irrelevant. In any event, the presumption

⁶ Significantly, the Postal Service has not asserted that it has asked Netflix to consent to the release of the requested material, that Netflix has declined to provide such consent, or that the nondisclosure provision in the Netflix/ATR contract has an exception for disclosure without the consent of Netflix if compelled by the Commission. These are striking omissions: Netflix has vehemently insisted in the past that it has not sought to block disclosure of Netflix-related information sought by GameFly from the Postal Service in discovery. See Response Of Netflix To Comments Of Gamefly, Inc, In Response To Presiding Officer's Ruling No. C2009-1/12 (December 17, 2009).

of relevance for data, studies and other information underlying the opinions of an expert witness is so strong that the rules of this Commission and the Federal Rules of Civil Procedure require disclosure of such information by default. See pp. 8-12, *supra*.

The Postal Service's objections of undue burden are equally unsubstantiated. The Commission's rules require that objections of this kind be specific:

In the interest of expedition, the bases for objection shall be clearly and fully stated. If objection is made to part of an item or category, the part shall be specified. . . . A participant claiming undue burden shall state with particularity the effort that would be required to answer the request, providing estimates of cost and work hours required, to the extent possible.

39 C.F.R. § 3001.27(c); *accord, id.*, §§ 3001.26(c). It is too late for the Postal Service to cure this omission belatedly in its answer to this motion to compel. See 39 C.F.R. § 3001.27(d) ("Answers will be considered supplements to the arguments presented in the initial objection."); *id.*, § 3001.26(d) (same).

CONCLUSION

The Postal Service must make a choice. If it wants to present Mr. Lundahl as a witness, it must produce forthwith the studies and other information that he considered in formulating the opinions expressed in his testimony. If the Postal Service wants (or is contractually obligated) to maintain the confidentiality of the studies on which Mr. Lundahl relied, it cannot offer Mr. Lundahl's testimony. The Postal Service cannot have its cake and eat it too. The Postal Service must produce the information that GameFly has requested or Mr. Lundahl's testimony

must be stricken from the record. GameFly requests that the Postal Service be directed to produce the requested information by email to GameFly counsel on or before 5 pm on Tuesday, August 31, the day before the scheduled start of hearings.

Respectfully submitted,

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August 25, 2010

APPENDIX A

Discovery Requests Covered By This Motion

GFL/USPS-T4-4. Please produce all studies, analyses, reports and similar documents performed by you or ATR concerning damage to DVDs; damage to mail from processing it on AFCS, DBCS or other automated letter processing equipment; damage to polycarbonate or other plastic objects from material fatigue or mechanical impact; videogame disk composition; videogame production processes.

OBJECTIONS:

None.

“RESPONSE”:

All work that ATR performed concerning the failure analysis of DVDs was performed under contract to NETFLIX. All studies, analysis, reports, and ATR generated documents are NETFLIX proprietary information and cannot be disclosed without written authorization under the terms of our confidentiality agreement.

GFL/USPS-T4-5. Please produce all studies, analyses, reports and similar documents performed by you or ATR concerning damage to DVDs.

OBJECTIONS:

None.

“RESPONSE”:

All work that ATR performed concerning the failure analysis of DVDs was performed under contract to Netflix. All studies, analysis, reports, and ATR generated documents are Netflix proprietary information and cannot be disclosed without written authorization under the terms of our confidentiality agreement.

GFL/USPS-T4-6. Please produce all studies, analyses, reports and similar documents performed by you or ATR concerning damage to mail from processing it on AFCS, DBCS or other automated letter processing equipment.

OBJECTIONS:

None.

“RESPONSE”:

All work that ATR performed concerning the failure analysis of DVDs was performed under contract to Netflix. All studies, analysis, reports, and ATR generated documents are Netflix proprietary information and cannot be disclosed without written authorization under the terms of our confidentiality agreement.

GFL/USPS-T4-7. Please produce all studies, analyses, reports and similar documents performed by you or ATR concerning damage to polycarbonate or other plastic objects from material fatigue or mechanical impact.

OBJECTIONS:

None.

“RESPONSE”:

All work that ATR performed concerning the failure analysis of DVDs was performed under contract to Netflix. All studies, analysis, reports, and ATR generated documents are Netflix proprietary information and cannot be disclosed without written authorization under the terms of our confidentiality agreement.

GFL/USPS-T4-8. Please produce all studies, analyses, reports and similar documents performed by you or ATR concerning videogame disk composition.

OBJECTIONS:

None.

“RESPONSE”:

All work that ATR performed concerning the failure analysis of DVDs was performed under contract to Netflix. All studies, analysis, reports, and ATR generated documents are Netflix proprietary information and cannot be disclosed without written authorization under the terms of our confidentiality agreement. ATR did not conduct any studies specific to video game disc technology.

GFL/USPS-T4-9. Please produce all studies, analyses, reports and similar documents performed by you or ATR concerning videogame production processes.

OBJECTIONS:

None.

“RESPONSE”:

All work that ATR performed concerning the failure analysis of DVDs was performed under contract to Netflix. All studies, analysis, reports, and ATR generated documents are Netflix proprietary information and cannot be disclosed without written authorization under the terms of our confidentiality agreement. ATR visited two replication facilities and saw how the DVDs and Blu-Ray DVDs were manufactured. ATR was not provided documentation specific to their production process and did not review any information specific to the production of video game discs.

GFL/USPS-T4-12. This question concerns pages 3-11 of your testimony (USPS-T-4), where you discuss a number of factors that you contend affect the rate of DVD breakage. Please produce all studies, analyses, compilations of data, and other information quantifying the effect of each such factor on the rate of DVD breakage.

OBJECTIONS:

None.

“RESPONSE”:

All work that ATR performed concerning the failure analysis of DVDs was performed under contract to Netflix. All studies, analysis, reports, and ATR generated documents are Netflix proprietary information and cannot be disclosed without written authorization under the terms of our confidentiality agreement.

GFL/USPS-T4-13. This question concerns pages 11-14 of your testimony (USPS-T-4), where you discuss various methods of reducing damage to DVDs from Postal Service equipment. Please produce all studies, analyses, compilations of data, and other information on the effectiveness of each such method in reducing damage to DVDs.

OBJECTIONS:

None.

“RESPONSE”:

All work that ATR performed concerning the failure analysis of DVDs was performed under contract to Netflix. All studies, analysis, reports, and ATR generated documents are Netflix proprietary information and cannot be disclosed without written authorization under the terms of our confidentiality agreement.

GFL/USPS-T4-15. By how much would adherence to the standards and procedures recommended on pages 3-14 of your testimony (USPS-T-4) lessen the DVD breakage that results from automated letter processing vis-à-vis manual processing? Please produce all studies, analyses, compilations of data, and other documents on which you rely.

OBJECTIONS:

None.

“RESPONSE”:

All work that ATR performed concerning the failure analysis of DVDs was performed under contract to Netflix. All studies, analysis, reports, and ATR generated documents are Netflix proprietary information and cannot be disclosed without written authorization under the terms of our confidentiality agreement.

GFL/USPS-T4-16. Please produce all studies, analyses, compilations of data, and other information quantifying the effect of manual vs. automated letter processing on the breakage rates of DVDs that have been designed, manufactured, handled and mailed in compliance with the recommendations on pages 3-14 of your testimony (USPS-T-4).

OBJECTIONS:

None.

“RESPONSE”:

All work that ATR performed concerning the failure analysis of DVDs was performed under contract to Netflix. All studies, analysis, reports, and ATR generated documents are Netflix proprietary information and cannot be disclosed without written authorization under the terms of our confidentiality agreement. ATR has performed tests and analysis on an experimental basis only. ATR was not involved in the actual implementation of any remedial actions. ATR does not know what remedial actions have ever been implemented by Netflix.

GFL/USPS-T4-17. This questions [sic] concerns the standards and practices described on pages 3-14 of your testimony (USPS-T-4):

(a) Please identify the DVD rental companies to which your company has recommended adoption of these standards and practices.

(b) For each DVD rental company identified in response to part (a), please specify the extent to which the company has adopted each of the recommended standards and practices.

(c) For each standard or practice that your company has recommended but the DVD rental company has not adopted, please explain why the DVD rental company chose not to adopt the standard or practice.

(d) Please produce documents sufficient to verify your responses to the previous parts of this question.

OBJECTIONS:

“The Postal Service objects to the above discovery requests on the grounds of relevance and undue burden. The Postal Service also objects on the grounds that these discovery requests seek commercially sensitive information of companies that are not parties to this case. GameFly seeks the results of studies undertaken by the witness on behalf of Netflix and other unidentified companies. None of these companies are parties to this case. Netflix and the unidentified companies invested significant resources to obtain these studies and the information derived from them, and they shared information with the witness on the condition that the witness would maintain the confidentiality of the information. Forced disclosure of the information sought in GameFly’s discovery requests is particularly troubling because GameFly made the intentional decision not to invest the resources necessary for the research and development that other DVD mailers have performed. See, e.g., Tr. V/889-890 (discussing GameFly’s lack of knowledge regarding other DVD mailers practices concerning modification of DVDs); 892 (conceding GameFly’s lack of knowledge regarding the industry standard for DVDs and the composition of DVDs).

Disclosure of the information sought in the discovery requests listed above would reveal confidential and commercially sensitive information of companies that are not parties to this case. It would also allow GameFly to obtain through discovery commercially sensitive and competitively valuable information for which it consciously chose not to make the necessary investment, severely

disadvantaging those parties who invested the substantial resources necessary to obtain this information.”

GFL/USPS-T4-18. Since receiving or applying your advice on how to reduce DVD breakage, has Netflix communicated to the Postal Service or ATR a willingness to have its DVD mailers receive less manual culling and processing from the Postal Service, and more automated letter processing? Please produce all communications to and from Netflix on this point, as well as all internal communications within the Postal Service and ATR on this point.

OBJECTIONS:

(Same general objections offered for GFL/USPS-T4-17.)

GFL/USPS-T4-19. Please identify each and every DVD rental company that, after learning of your advice on how to reduce DVD breakage, has communicated a willingness to have its DVD mailers receive less manual culling and processing by the Postal Service and more automated letter processing. Please produce all communications to and from the DVD rental company on this point, as well as all internal communications within the Postal Service on this point.

OBJECTIONS:

(Same general objections offered for GFL/USPS-T4-17.)

GFL/USPS-T4-22. On page 2, lines 9-10, of your testimony (USPS-T-4), you state: “By way of contrast, Netflix has studied DVDs and their structure and composition.”

(a) Please provide copies of all such studies, whether performed by Netflix employees, outside vendors or consultants, or a combination of the two.

(b) If you obtained any of your information about the Netflix studies from written communications or documents other than the studies themselves, please produce the communications and documents.

(c) If you obtained any of your information about the Netflix studies from oral communications, please state the date(s) of the communications, summarize the communications, and identify the sources of and witnesses to in the communications by name, title and employer.

(d) Please discuss your role (if any) in each of the Netflix studies of “DVDs and their structure and composition.”

OBJECTIONS:

(Same general objections offered for GFL/USPS-T4-17.)

GFL/USPS-T4-23. On page 3, line 20, of your testimony (USPS-T-4), you state: [“]More recently, my firm was retained by Netflix to analyze DVD breakage.”

(a) Please provide the scope of work and period of performance for this project.

(b) Please produce the contract for this project.

(c) Please provide the budget for this project.

(d) Please provide copies of all reports, briefings, analyses, workpapers and other documents that you or your firm provided to Netflix.

* * *

(f) How did your firm become aware that Netflix wanted to have a study performed to analyze DVD breakage?

OBJECTIONS:

(Same general objections offered for GFL/USPS-T4-17.)

sGFL/USPS-T4-27. If you have ever participated in any study of DVD breakage for any client other than the Postal Service or Netflix, please provide the following information for each study:

* * *

(c) The name of the client(s).

OBJECTIONS:

(Same general objections offered for GFL/USPS-T4-17.)

GFL/USPS-T4-28. This question concerns the “recommendations to Netflix” referenced on page 5, lines 7-9, of your testimony (USPS-T-4). Please identify the recommendations, produce any documents setting them forth, and describe the extent to which the recommendation [sic] were adopted by Netflix.

OBJECTIONS:

(Same general objections offered for GFL/USPS-T4-17.)

GFL/USPS-T4-29. On page 6, lines 16 and 17 of your testimony (USPS-T-4), you say “A clearer inside diameter hole results in more durability, reduced damage, and more accurate playing.” Please provide the basis of this assertion, including any quantitative analysis which supports the assertion, the data underlying the analysis, the analysis plan, the results of the analysis, and the report(s) setting forth the results.

OBJECTIONS:

None.

RESPONSE:

It is generally understood in failure analysis that surface defects act as stress concentrations when the part is under load. Cracks tend to form at stress concentrations and continued fatigue loading will encourage these cracks to propagate to the point of failure. ATR looked carefully at the quality of the ID on the DVDs since this is where the cracks formed that eventually led to the majority of the disc failures. The quality of the cut hole became a subject of concern and ATR performed several tests to evaluate the effect of a new cutter as compared with an older and presumably duller cutter. The test results indicated that there was a correlation. Newer and sharper cutters contributed to a longer fatigue life. All work that ATR performed concerning the failure analysis of DVDs was performed under contract to Netflix. All studies, analysis, reports, and ATR generated documents are Netflix proprietary information and cannot be disclosed without written authorization under the terms of our confidentiality agreement.

GFL/USPS-T4-31. On pages 7-8 of your testimony (USPS-T-4), you state with respect to UV curing that:

Testing results were difficult to validate with the number of parameters that cannot be controlled. However, the damage to plastics caused by UV exposure is commonly understood, and Netflix also understood the likely ramification from too much UV exposure. Netflix reviewed its printing techniques and the exposure levels at all steps of the fabrication process. (See appendix ATR 4 for a summary chart of the improved printing techniques.)

(a) Please identify and produce the referenced testing results, along with the underlying study design, data and workpapers.

* * *

OBJECTIONS:

None.

RESPONSE:

(a) ATR attempted to isolate the ultraviolet exposure effects by looking at different printing techniques. The screen printing process requires an ultraviolet cure cycle between each color layer. As a result, a one color print has fewer ultraviolet cure cycles than a five color printed label.

All work that ATR performed concerning the failure analysis of DVDs was performed under contract to Netflix. All studies, analysis, reports, and ATR generated documents are Netflix proprietary information and cannot be disclosed without written authorization under the terms of our confidentiality agreement.

* * *

GFL/USPS-T4-33. This question concerns page 10 of your study (USPS-T-4), in which you state that “ATR looked at impact failures as the predominant mechanism for the Blu-ray discs.”

* * *

(c) If so, please identify the client and the period of performance, and produce the study and workpapers.

OBJECTIONS:

(Same general objections offered for GFL/USPS-T4-17.)

GFL/USPS-T4-35. On page 11, lines 15-17, of your testimony (USPS-T-4), you state that “Many mailers have taken actions to reduce or even avoid the risks of damage described above without changing the type of mail processing they receive.”

(a) Please identify each of the “many mailers” to whom you refer.

* * *

OBJECTIONS:

(Same general objections offered for GFL/USPS-T4-17.)

GFL/USPS-T4-37. On page 11, lines 24-25, of your testimony (USPS-T-4), you state: “ATR evaluated the use of reinforcement rings with an FEM study and later with actual destructive testing.”

(a) For what client(s) did ATR perform these evaluations?

* * *

(c) Please produce the documents that defined the scope of the study or studies.

(d) Please produce the report of the results of the study or studies, the study plan(s), the underlying data, and any analysis methods.

* * *

OBJECTIONS:

(Same general objections offered for GFL/USPS-T4-17.)

“RESPONSE”:

* * *

(c) All work that ATR performed concerning the failure analysis of DVDs was performed under contract to NETFLIX. All studies, analysis, reports, and ATR generated documents are NETFLIX proprietary information and cannot be disclosed without written authorization under the terms of our confidentiality agreement.

(d) All work that ATR performed concerning the failure analysis of DVDs was performed under contract to NETFLIX. All studies, analysis, reports, and ATR generated documents are NETFLIX proprietary information and cannot be disclosed without written authorization under the terms of our confidentiality agreement.

GFL/USPS-T4-39. On page 12, lines 12-15, of your testimony (USPS-T-4), you state: “ATR ... recommended that these spindles be inspected and the manufacturing process should avoid excessive handling by the inside diameter or the use of jewel cases.”

(a) To whom did ATR make these recommendations?

(b) If ATR memorialized the recommendations in any documents, please produce them.

OBJECTIONS:

(Same general objections offered for GFL/USPS-T4-17.)

GFL/USPS-T4-40. On page 13, lines 10-12, of your testimony (USPS-T-4), you state, “Netflix has succeeded in reducing the amount of handling by developing automated internal handling processing and requiring minimal handling of its DVDs within the Postal Service processing network.”

(a) Please describe the specific methods of “automated internal handling processing” used by Netflix.

* * *

OBJECTIONS:

None.

“RESPONSE”:

(a) Netflix understands the relationship between increasing the fatigue life of DVDs by reducing the number of stress cycles from material handling and sortation equipment and took steps to minimize these stress cycles in their internal sorting operations.

The specific details of their internal material handling operations are proprietary and cannot be disclosed without written authorization.

* * *