

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

COMPLAINT OF GAMEFLY, INC.

)
)
)

Docket No. C2009-1

OBJECTION OF THE UNITED STATES POSTAL SERVICE
TO DISCOVERY REQUESTS OF GAMEFLY, INC.
(GFL/USPS-79-80)
(September 8, 2009)

Pursuant to Rules 26 and 27 of the Commission's Rules of Practice and Procedure, the Postal Service hereby objects to the following discovery requests of GameFly, Inc., which were filed on August 28, 2009: GFL/USPS-79-80. The two instant discovery requests are attached to this filing.

The Postal Service objects to GFL/USPS-79-80 on the grounds of relevance, undue burden,¹ and procedural impropriety. The information requested in the instant interrogatories, which focus upon two photographs for which Complainant seeks authentication, is not reasonably calculated to lead to the discovery of admissible evidence; rather, it is focused on mundane details related to two specific postal facilities. This level of detail can not shed light on the main issue in this case: specifically, whether the Postal Service, *as an institution*, may have unduly discriminated against GameFly (or, alternatively, granted an undue preference in favor of Netflix or Blockbuster). The details

¹ Particularly, the burden that would arise if any affirmative answer to these interrogatories were to imply that future requests for photographic authentication, for the remainder of postal facilities across the country, would be appropriate for this docket.

regarding the specific mail slots which may have been in operation at any given time in one or two of the Postal Service's approximate 35,000 facilities do not address this main issue. Discrete, isolated examples of postal facilities that may have had certain features at any given point in time will not speak to whether the Postal Service, as an organization, may have violated the law with respect to GameFly and its competitors. Further, providing such trivial details related to these two photographs would only serve to clutter the record and obfuscate the key issues in this case.

Additionally, the Postal Service objects to these discovery requests on the grounds of undue burden. Responding to the instant interrogatories would require the Postal Service to track down minute details relating to the two photographs (the source of which GameFly is presumably capable of testifying about). First, there is the basic difficulty of confirming the accuracy of any photograph taken by another party, when modern technology offers relatively easy methods of "photo-shopping." Second, the Postal Service cannot reasonably attempt to authenticate every photograph that may be taken in any of the Postal Service's 35,000 facilities across the country. The Postal Service is willing to stipulate that the mail slots contained in these photographs may have existed at some point in time, but it is wholly impractical to think that the Postal Service can reasonably locate these mail slots or ascertain the details requested by GameFly in the instant interrogatories, and the 34,998 other facilities for which photograph-based interrogatories might follow.²

² Challenges facing the Postal Service would include the fact that no email list for all facilities does or could exist. The Postal Service recently described the difficulty of a recent effort to

Moreover, as discussed above, the requested information is (at best) only tangentially related to the mail processing discrimination claim alleged by GameFly. Thus, the burden of responding to this interrogatory would outweigh the likely benefit the information would have, in terms of its contribution to the record and to the Commission's ultimate consideration of the Complaint.

The interrogatories are procedurally improper since the photographs on which they are based have been produced by GameFly, through means unknown to the Postal Service. The Postal Service understands that GameFly is now conducting discovery for the purpose of putting together its direct case. The photos can be made part of Complainant's direct case; presumably the extent to which GameFly also authenticates them will have some bearing on their ultimate utility in this proceeding.

Thus, for the foregoing reasons, the Postal Service objects to GFL/USPS-79-80 on the grounds of relevance, undue burden and procedural impropriety.

conduct a census of approximately 3300 non-automated offices for information with similar complexity as the existence or not of Netflix slots: Within County versus Outside County revenue. *Response of the United States Postal Service to Chairman's Information Request No. 1*, PRC Docket No. RM2009-7 (August 20, 2009). That attempt to derive a census of 3300 offices cost in excess of \$200,000 over a period of three months and still had an 11.4 percent non-response rate. Any inquiry related to GFL/USPS-79-80 could potentially require a census of ten times the number of facilities, and would also be complicated by the fact that Headquarters would be asking about the existence of slots it had previously warned against dedicating to a single mailer.

Respectfully submitted,

UNITED STATES POSTAL SERVICE

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

Kenneth N. Hollies
Elizabeth A. Reed
Keith E. Weidner

475 L'Enfant Plaza West, S.W.
Washington, D.C. 20260-1137
(202) 268-6252, Fax -6187

GFL/USPS-79. This question concerns the following photograph:



(a) Please confirm that this is a true and accurate photograph of the public mail drop slots in the lobby of the Susanville, California, post office on or about August 1, 2009. If you do not confirm without qualification, please explain fully.

(b) Please confirm that one of the four mail drop slots in the lobby of the Susanville, California, post office is marked "NETFLIX ONLY." If you do not confirm without qualification, please explain fully.

(c) Please confirm that Netflix is the only DVD rental company with a mail drop slot reserved for its return mail in the lobby of the Susanville, California, post office. If you do not confirm without qualification, please explain fully.

(d) Please confirm that Netflix is the only private company of any kind with a mail drop slot reserved for its return mail in the lobby of the Susanville, California, post office. If you do not confirm without qualification, please explain fully.

(e) When was a mail drop slot in the lobby of the Susanville, California, post office first reserved for "NETFLIX ONLY"? If you do not know the precise date, please provide the best approximation you can.

(f) Please identify the organization that devised the idea of reserving a drop slot in the Susanville post office for "NETFLIX ONLY."

(g) Please identify the organization that created the red "NETFLIX ONLY" sign in the Susanville post office.

(h) Please produce all documents relating to the creation of the "NETFLIX ONLY" drop slot in the Susanville post office.

(i) Has the Susanville post office, or any higher-level entity to which the Susanville post office reports (e.g., P&DC, District, Area office), considered establishing a drop slot in the Susanville post office for the reply mailers of other DVD rental companies? If so, please produce all documents relating to such consideration.

GFL/USPS-80. This question concerns the following photograph:



(a) Please confirm that this is a true and accurate photograph of the public mail drop slots in the lobby of the Alturas, California, post office on or about August 1, 2009. If you do not confirm without qualification, please explain fully.

(b) Please confirm that one of the four mail drop slots in the lobby of the Alturas, California, post office is marked "NETFLIX ONLY." If you do not confirm without qualification, please explain fully.

(c) Please confirm that Netflix is the only DVD rental company with a mail drop slot reserved for its return mail in the lobby of the Alturas, California, post office. If you do not confirm without qualification, please explain fully.

(d) Please confirm that Netflix is the only private company of any kind with a mail drop slot reserved for its return mail in the lobby of the Alturas, California, post office. If you do not confirm without qualification, please explain fully.

(e) When was a mail drop slot in the lobby of the Alturas, California, post office first reserved for "NETFLIX ONLY"? If you do not know the precise date, please provide the best approximation you can.

(f) Please identify the organization that devised the idea of reserving a drop slot in the Alturas post office for "NETFLIX ONLY."

(g) Please produce all documents relating to the creation of the "NETFLIX ONLY" drop slot in the Alturas post office.

(h) Has the Alturas post office, or a higher-level entity to which the Alturas post office reports (e.g., P&DC, District, Area office), considered establishing a drop slot in the Alturas post office for the reply mailers of other DVD rental companies? If so, please produce all documents relating to such consideration.