

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  
DISCOVERY REQUESTS GFL/USPS-79 AND -80  
(September 17, 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 answer discovery requests GFL/USPS-79 and 80. These discovery requests were filed on August 28, 2009. The Postal Service filed objections on September 8, 2009.

Section I of this motion describes the background and purposes of the two discovery requests, and reproduces their texts. Section II responds to the Postal Service's objections.

**I. BACKGROUND**

The posting of GameFly's complaint on the Commission's website in late April of this year touched off a flurry of comments, many of them purportedly by Postal Service employees, on internet websites devoted to postal matters. Some of these comments stated that the Postal Service's provision of manual culling and processing to Netflix at no extra charge was only a small part of a

broader pattern of discrimination in favor of Netflix at the expense of smaller DVD rental companies, and that the preferences given to Netflix also included Netflix-only drop slots in the lobbies of many retail post offices.<sup>1</sup>

In an effort to develop evidence on this point, GameFly included two questions in GameFly's July 31 discovery requests to elicit information on Netflix-only drop slots:

GFL/USPS-28. What percentage of Postal Service retail facilities have mail slots designated for members of the public to deposit:

- (a) Netflix DVD mailers?
- (b) Blockbuster DVD mailers?
- (c) The DVD mailers of any DVD rental company?

GFL/USPS-29. Please produce copies of any signs, placards, posters and similar items that are used to direct or encourage members of the general public to deposit DVD reply mailers separately from other mail.

In response to these questions, the Postal Service insisted that it had no data whatsoever on "any mail drops that are dedicated to the mail of a single DVD mailer," and that any Netflix-only dedicated mail slots "would be against current Headquarters policy, as detailed in" a headquarters directive issued on May 24, 2007. USPS response to GFL/USPS-28 (filed Aug. 14, 2009). The Postal Service also refused to "conduct any census of its retail facilities in order

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<sup>1</sup> See, e.g., [www.haloscan.com/comments/postalnews/9181678729162017431](http://www.haloscan.com/comments/postalnews/9181678729162017431) and [www.haloscan.com/comments/postalnews/5246963227708462661](http://www.haloscan.com/comments/postalnews/5246963227708462661).

to identify which, if any, have such an arrangement,” or to search for any signs, posters or other information responsive to GFL/USPS-29.<sup>2</sup>

In late July or early August 2009, an individual who is unaffiliated with either GameFly or the Postal Service, but who had been following this complaint case on the Commission’s website, stumbled upon the existence of Netflix-only mail drops in the lobbies of the post offices in two towns in California while on vacation there. Believing that the existence of these supposedly-illegal mail drops was newsworthy, he took photographs of them and alerted counsel for GameFly to their existence.

The two photographs were the impetus for GFL/USPS-79 and 80. Parts (a) through (d) of each question are essentially requests for admissions that the photographs accurately depict the mail slots portrayed in the pictures, that each post office has a NETFLIX-only mail drop slot, and that no other DVD rental company—or any other customer of the Postal Service—has received the same privilege. Questions 79(e)-(h) and 80(e)-(g) seek information on the decision-making processes that led to the preferential arrangements. And questions 79(i) and 80(h) seek information on the decision-making processes that excluded the DVD mailers of other DVD rental companies from use of the drop slots.

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<sup>2</sup> USPS Objections and Partial Objections (August 10, 2009) at 7-8. GameFly’s motion to compel the Postal Service to provide a more complete answer to GFL/USPS-28, and an answer to GFL/USP-29, is pending before the Commission. GameFly Motion to Compel (Aug. 24, 2009).

The texts of the discovery requests are as follows:

**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.

## **II. THE POSTAL SERVICE'S OBJECTIONS TO GFL/USPS-79 AND -80 ARE WITHOUT MERIT.**

The Postal Service offers essentially three objections to the discovery requests: (1) relevance, (2) undue burden, and (3) the supposed procedural impropriety of forcing the Postal Service to authenticate photographs that GameFly may want to offer as part of its case-in-chief. We answer each objection, beginning with the last one.

### **A. Requesting An Adverse Party To Authenticate A Photograph Is A “Procedurally Proper” Use Of The Discovery Rules.**

The Postal Service asserts that the discovery requests are “procedurally improper” because they seek to compel the Postal Service to authenticate photographs that the Postal Service did not create, and which GameFly may offer as part of its direct case. USPS Objections at 3. This objection is wholly without merit.

First, the objection applies only to GFL/USPS-79(a) and 80(a), the two subparts of the discovery requests that ask the Postal Service to admit to the accuracy of the photographs. The remaining subparts of GFL/USPS-79 and -80 deal not with the photographs, but with the actual facts on the ground at the two post offices, and the decision-making processes that led to those apparent arrangements. Those subparts are garden-variety requests for admissions, information and documents.

Second, the Postal Service cites no authority for the proposition that it is “procedurally improper” for a litigant to use discovery to authenticate a

photograph created by a third party that purports to depict the adversary's premises or some other physical setting, object or condition at issue in the case. In fact, requests of this kind are both appropriate and commonplace under modern discovery rules.

The Commission's rules entitle parties to discover any nonprivileged "information relevant to the subject matter in such proceeding" (Rule 3001.26(a)), including the admission of "any relevant, unprivileged facts, including the genuineness of any documents or exhibits to be presented in the hearing." Rule 3001.28(a). The matters that may be discovered and admitted in this way include the genuineness, authenticity, accuracy and contents of photographs and other documentary evidence. It is no objection that the party propounding the discovery may use the results "for the purpose of putting together its direct case." *Compare* USPS Objection at 3; Fed. R. Evid. 1007 (contents of photographs "may be proved by the testimony or deposition of the party *against whom offered* or by *that party's written admission*" (emphasis added); ROGER S. HAYDOCK AND DAVID F. HERR, DISCOVERY PRACTICE § 30.05 (5th ed. 2009) (an opposing party may be asked to admit the authenticity or accuracy of "statements and documents, tangible things and property, real evidence, and anything admissible at trial . . . [including] . . . demonstrative trial exhibits, such as a diagram or other visual aid."); 20A AM. JUR. PLEADING AND PRACTICE FORMS § 20 (sample requests

for admission of genuineness of photograph and other documents).<sup>3</sup> See also MANUAL FOR COMPLEX LITIGATION (FOURTH) §§ 11.64 & 12.13 (recommending that trial judges establish mandatory procedures for the admission of documentary evidence and other exhibits into evidence by stipulation rather than by “formal offer and ruling”); Order No. 235 at 7 (ordering GameFly and the Postal Service to “jointly prepare a prehearing conference memorandum that identifies relevant undisputed facts”).<sup>4</sup>

**B. The Disputed Requests Are Reasonably Calculated to Lead to the Discovery of Admissible Evidence.**

The Postal Service’s relevance objections to GFL/USPS-79 and 80 are also without merit. GameFly’s data requests are reasonably calculated to lead to admissible evidence concerning whether the Postal Service has discriminated unlawfully between Netflix and smaller DVD rental companies like GameFly.

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<sup>3</sup> Because Rule 3001.28, unlike Fed. R. Civ. P. 36(a), contains no provision authorizing the award of litigation costs against a party that unreasonably refuses to admit to a fact, the general practice in Commission cases has been to denominate requests for admissions as “interrogatories” under Rule 3001.26 rather than “requests for admissions” under Rule 3001.28(a). There is no substantive difference between the two discovery rules in this respect. If the Commission disagrees, however, GameFly requests that GFL/USPS-79(a)-(d) and 80(a)-(d) be considered under Rule 3001.28 as well as Rule 3001.26.

<sup>4</sup> GameFly would have asked the Postal Service to stipulate to the accuracy of the two photographs at issue if they had been available to GameFly before the July 23 pretrial conference in this case.

The Postal Service makes essentially two counter-arguments: (1) the discrimination portrayed in the photographs is too localized and isolated to be imputed to the Postal Service “as an institution” (Objections at 1); and (2) discrimination in providing Netflix-only mail deposit slots is irrelevant to the “mail processing discrimination claim alleged by GameFly” (*id.* at 3). We respond to each objection in turn.

(1) The notion that 49 U.S.C. § 403(c) does not cover discriminatory actions by local Postal Service employees is at odds with the plain language of Section 403(c) itself. As GameFly has previously noted, Section 403(c) forbids undue discrimination and preferences by “the Postal Service”—not just by Postal Service headquarters. Hence, the Postal Service cannot evade responsibility for undue discrimination by having delegated the relevant decision-making authority to subordinate units in the field. *Cf. Boynton v. Commonwealth of Virginia*, 364 U.S. 454 (1960) (racial discrimination by restaurant in the Trailways bus terminal in Richmond, Virginia, violated former 49 U.S.C. § 316(d), which barred “undue or unreasonable preference” or “prejudice” by “any common carrier by motor vehicle” in interstate commerce, even though the restaurant was owned and operated by a tenant of Trailways, not by the bus company itself).

The Postal Service argues that the existence of discriminatory mail drops at two post offices in California does not prove that discrimination of this kind is widespread rather than isolated. But the representativeness of the two post offices goes to the weight of the evidence, not its admissibility, and still less its discoverability. In this regard, several facts are telling:

First, the Postal Service has refused to undertake a survey of the prevalence of Netflix-only mail drops today. USPS Objection to GFL/USPS-28 (Aug. 10, 2009) at 7 (“While the Postal Service is providing a narrative response to this interrogatory, it objects to having to conduct any census of its retail facilities in order to identify which, if any, have such an arrangement.”). The effect of this refusal is to increase the importance of whatever other evidence, anecdotal or comprehensive, can be unearthed.

Second, the Postal Service thought that the problem was widespread enough two years ago to issue a directive purportedly requiring the “immediate” elimination of Netflix-only mail drop slots:

*In an effort to accommodate Netflix mail, some offices have created special mail drops and signage for Netflix returns. This is not an authorized use of mail drop slots and it has legal ramifications for the Postal Service.*

**Action Item:**

- ALL Post Offices that have implemented Netflix return mail slots must remove the signage immediately.

“Netflix Mail Drop” directive in USPS *Retail Digest* (May 2007) (attached to USPS response to GFL/USPS-28, filed Aug. 14, 2009) (italics added; boldface and underlining in original).

Third, the Postal Service, despite being on notice of the problem, appears to have made no effort since May 2007 to enforce or monitor the extent of compliance with the May 2007 directive: “With respect to any mail drops that are dedicated to the mail of a single DVD mailer, no such data are available.” USPS

Response to GFL/USPS-28 (Aug. 14, 2009). The failure of headquarters to supervise adequately the actions of field personnel its itself a systemic problem.

Finally, the Postal Service clearly knows or suspects that Netflix-only mail drops remain a widespread problem today. The Postal Service's objection on grounds of undue burden to "authentical[ing] every photograph that may be taken in any of the Postal Service's 35,000 facilities across the country" (USPS Objections at 2) makes sense only as an admission that the number of facilities with Netflix-only drops may be large. GameFly would gain nothing by having the Postal Service authenticate photographs of post office lobbies that lack such drops.

(2) The notion that the discrimination in the provision of Netflix-only drop slots has no conceivable relevance to the lawfulness of the Postal Service's disproportionate provision of manual culling and processing to Netflix without extra charge is equally untenable. As GameFly has previously noted, the Postal Service has asserted that the latter preference for Netflix is reasonable (and hence lawful) because the Postal Service's operational needs justify the preference. Whether this claim is true—or just a pretext for unlawful discrimination to cater to a large customer—thus is a central issue in this case. Evidence of the continued existence of Netflix-only mail drops, which the May 2007 directive concedes have no lawful basis, would also tend to discredit the Postal Service's claim that legitimate operational needs are the primary reason for the discrimination in manual culling and processing. See GameFly Motion to Compel (Aug. 24, 2009) at 4-9.

**C. Answering The Discovery Requests Will Not Impose An Undue Burden On The Postal Service.**

The Postal Service's objections of undue burden (Objections at 2) are also unfounded. The first objection is that authenticating photographs taken by "another party" is "difficult" in an age of "photo-shopping"—i.e., it is hard to tell whether such photographs are fake or doctored. *Id.* For the particular photographs at issue, this is nonsensical. The subjects depicted in the photographs are not transient and nonrecurring events. They are fixtures attached to the walls of buildings that have been in the possession, custody and control of the Postal Service at all relevant times. The Postal Service can readily check for fakery or doctoring by comparing the photographs with the premises that they purportedly depict. If the Netflix-only drop slots and signage are still up, local Postal Service employees can perform the comparison right now. If the drop slots or signs have been removed since August 24, when GameFly first served the photographs upon the Postal Service, the removal should be recent enough that one or more local employees will remember what was removed, and why.

The notion that authenticating the photographs would require the Postal Service to "track down minute details relating to the two photographs" (Objections at 2) is equally wide of the mark. Verifying that a photograph is a "true and accurate" depiction of the subject does not require a pixel-by-pixel comparison of the photograph and subject. It merely requires the attesting party to verify that the subject and photograph match in material respects. See 2 MCCORMICK ON EVIDENCE § 215 (6th ed. 2006) (Kenneth S. Broun, ed.) (a photograph "is authenticated if the witness testifies that the photograph is a

correct and accurate representation of relevant facts personally observed by the witness”); *United States v. Lawson*, 494 F.3d 1046, 1052 (D.C. Cir. 2007) (“A photograph may be authenticated if a witness with knowledge of the scene testifies that it accurately depicts the scene it purports to represent.”); see also 6 JACK B. WEINSTEIN AND MARGARET A. BERGER, WEINSTEIN’S FEDERAL EVIDENCE § 1001.04[1] (2d ed. 2009) (dismissing the notion that the authenticity of photographs of objects must be painstakingly established; “[t]he best evidence rule does not apply to exclude photographs of physical objects. The photograph is just as good evidence as the object.”) The material aspects of the premises depicted in the photographs at issue here are the number and location of the mail drop slots, the existence of a “NETFLIX ONLY” sign over one of them, and the absence of any comparable sign for any other Postal Service customer. The photographs and originals either match in these respects, or they do not.<sup>5</sup>

All the questions GameFly has asked could be resolved with a phone call to each of the two post offices in question, followed by transmission of the discovery requests to the local postmaster or other contact person by email (if the local post office has access to the Postal Service’s email network) or fax (if the local office does not). To help the Postal Service initiate these contacts, we

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<sup>5</sup> Nor do the remaining subparts GFL/USPS-79 and 80 ask for “minute details.” The questions ask for information that should readily be within the personal knowledge of the employees at the two post offices (whether there are any other reserved mail slots in the Susanville and Alturas post offices, when the Netflix slots were installed, what entity installed the slots and signs, and who came up with idea), or documents that should be obtainable with reasonable effort.

have taken the liberty of using the Services Locator on the Postal Service website ([http://usps.whitepages.com/post\\_office](http://usps.whitepages.com/post_office)) to obtain contact information for the Susanville and Alturas post offices.

According to these web pages, the street address and phone and fax numbers of the Susanville post office are:

65 N LASSEN ST  
SUSANVILLE CA 96130-3903  
(530) 257-4425  
Fax: (530) 257-6825

The corresponding contact information for the Alturas post office is:

240 N MAIN ST  
ALTURAS CA 96101-4047  
(530) 233-2410  
Fax: (530) 233-5995

Screen shots of the Postal Service web pages from which this information are reproduced as Exhibits A and B to this motion. For further assistance, we have attached exterior shots of the Susanville and Alturas facilities as Exhibits C and D.

In considering whether answering GFL/USPS-79(a) and 80(b) would be overly burdensome, one must also compare those burdens to the burdens that would be imposed on GameFly by requiring it to authenticate the photographs on its own. Those costs would include the air fare, hotel expense, and other out-of-pocket costs of bringing the photographer to Washington, D.C., as well as the opportunity costs of his travel time—all so that the photographer could testify for a few minutes about matters that the Postal Service, by acting in good faith,

could verify with a handful of phone calls, faxes and/or emails. Under these circumstances, the balance of burdens weighs overwhelmingly in favor of requiring the Postal Service to answer the questions. As the Advisory Committee notes to the 1970 amendments to Fed. R. Civ. P. 36(a) explain:

The rule as revised adopts the majority view, as in keeping with a basic principle of the discovery rules that a reasonable burden maybe imposed on the parties when its discharge will facilitate preparation for trial and ease the trial process. It has been argued against this view that one side should not have the burden of “proving” the other side’s case. The revised rule requires only that the answering party make reasonable inquiry and secure such knowledge and information as are readily obtainable by him. In most instances, the investigation will be necessary either to his own case or to preparation for rebuttal. Even when it is not, the information may be close enough at hand to be “readily available.”

The Postal Service’s final objection is that the Postal Service “cannot reasonably attempt to authenticate every photograph that may be taken in any of the 34,998 other facilities for which photograph-based interrogatories might follow.” Objections at 2. This, of course, is a straw man. GameFly has not asked the Postal Service to authenticate photographs of the Netflix-only drop boxes in any post offices other than the two at issue here. If and when GameFly does so, the Postal Service will be free to object on grounds of undue burden, or any other ground that the Postal Service chooses to assert. As to the questions GameFly has actually asked, the Postal Service faces little burden in responding.

## **Conclusion**

GameFly discovery requests GFL-79 and -80 are procedurally proper, reasonably calculated to lead to the discovery of admissible evidence, and not unduly burdensome. Consequently, the Postal Service should be compelled to answer the questions.

Respectfully submitted,

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September 17, 2009



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**Exhibit C**

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**Exhibit D**

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