

PRESIDING OFFICER'S  
RULING NO. C2009-1/5

UNITED STATES OF AMERICA  
POSTAL REGULATORY COMMISSION  
WASHINGTON, DC 20268-0001

Complaint of GameFly, Inc.

Docket No. C2009-1

PRESIDING OFFICER'S RULING  
GRANTING, IN PART, GAMEFLY'S MOTION TO COMPEL  
RESPONSES TO DISCOVERY REQUESTS GFL/USPS-3(e), 4(e),  
6(a)-(e), (g)-(h), 7, 8, 14(e), 15, 16(f)-(g), 20(a)-(d), 21, 28, 29, 31, 40, and 41(c)

(Issued September 28, 2009)

On August 24, 2009, GameFly, Inc. (GameFly) filed a motion seeking a ruling to compel the Postal Service to provide responses to certain discovery requests.<sup>1</sup> The discovery requests were submitted to the Postal Service on July 31, 2009.

On August 31, 2009, the Postal Service filed an Opposition asserting that the Commission should deny GameFly's Motion to Compel in its entirety.<sup>2</sup> GameFly's Motion to Compel and the Postal Service's Opposition pertain to the Postal Service's objections to discovery requests; the Postal Service previously filed its objections on August 10, 2009.<sup>3</sup> It primarily has "objected to discovery requests that inquire into

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<sup>1</sup> Motion of GameFly, Inc., to Compel Responses to Discovery Requests GFL/USPS-3(e), 4(e), 6(a)-(e), (g)-(h), 7, 8, 14(e), 15, 16(f), (g), 20(a)-(d), 21, 28, 29, 31, 40, and 41(c), August 24, 2009 (Motion to Compel).

<sup>2</sup> Opposition of the United States Postal Service to Motion to Compel of GameFly, Inc. (GFL/USPS-3(e), 4(e), 6(a)-(e) and (g)-(h), 7-8, 14(e), 15, 16(f)-(g), 20-21, 28-29, 31, 41(c)), August 31, 2009 (Opposition).

<sup>3</sup> Objections and Partial Objections of the United States Postal Service to Discovery Requests of GameFly, Inc. (GFL/USPS-3(e), 4(e), 6(a)-(e) and (g)-(h), 7-8, 14(e), 15, 16(e)-(g), 20-21, 28-29, 31, 40, 41(c) and 51(c)), August 10, 2009 (Objections).

subjects other than those related to the processing of Netflix return mail.” Opposition at 5. It also urges that the standards of discovery under rules 26 and 27, though stated in the terms of “information reasonably calculated to lead to the discovery of admissible evidence,” is further constrained by a subsidiary “operative standard of admissibility embodied in the rules.” *Id.* at 2-3.

The record reflects that an exchange of information to satisfy discovery is underway, but that differences are emerging over precisely what are the bounds of that legitimate discovery.<sup>4</sup> See Motion to Compel at 2. GameFly submitted a response to the Opposition, pursuant to a motion for leave to file it on September 3, 2009, which disputes the narrower standard of relevance and purports to substantiate its discovery into a more elaborate set of preferential practices favoring Netflix.<sup>5</sup> In all events, there is an overarching concern that progress be made to streamline the completion of discovery so that resolving this case in a timely manner is not in jeopardy.

#### I. GAMEFLY’S MOTION TO COMPEL

GameFly invokes 39 U.S.C. 403(c), which proscribes undue discrimination or preferences. GameFly contends that under that provision a mailer-complainant can explore whether the Postal Service is “discriminating” among DVD rental companies or granting a “preference” to Netflix or Blockbuster vis-à-vis other DVD rental companies. If so, it can further investigate whether the discriminatory treatment in question is unduly

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<sup>4</sup> The Commission appreciates that GameFly and the Postal Service have operated in a cooperative manner on the majority of discovery requests in trying to work informally through many unique issues. See *also*, Joint Statement of Undisputed and Disputed Facts, July 20, 2009 (Joint Statement).

<sup>5</sup> Response of GameFly, Inc., to Opposition of the United States Postal Service to Motion to Compel, September 3, 2009. (Response of GameFly). GameFly also submitted a Motion of GameFly, Inc., for Leave to File Response to Opposition of the United States Postal Service to GameFly, Inc. Motion to Compel, September 3, 2009. This motion is granted.

or unreasonably discriminatory.<sup>6</sup> After citing portions of the Postal Service's Answer<sup>7</sup> and the parties' Joint Statement, GameFly asserts that the Postal Service admits that "the amount of manual processing of Netflix mail *is likely at least as large*" as was set forth in the OIG Report. Motion to Compel at 3, *citing* response GFL/USPS-19(b)-(c). GameFly submits that the Postal Service also admitted it would not "offer to GameFly the same degree of manual culling and priority manual processing the Postal Service currently provides to Netflix" by indicating that the operations would be left to the discretion of field officials. *Id.* at 4, *citing* response GFL/USPS-19(b)-(c).

GameFly denies that any delegation of discretion by Postal Service to field personnel provides any defense for admitted discrimination, or justifies such discrimination as reasonable. *Id.* at 4-5. It seeks information to test the Postal Service's allegation that "field personnel give disproportionately manual processing to Netflix reply mailers not to cater to a larger customer, but to meet the Postal Service's own operational needs." *See id.*, *citing* response GFL/USPS-23(d) and 25 (footnote omitted).

With certain exceptions, GameFly generally asserts that its claims based on undue discrimination and unfair preferences completely justify that its discovery requests pertain to the customized treatment that the Postal Service offers Netflix, Blockbuster, and other DVD mailers. GameFly further urges that "information about the extent of *other* kinds of preferential treatment received by Netflix may very well shed light on whether the disproportionate degree of manual culling and manual processing given to Netflix reply mailers is required by Postal Service operation needs—or is one instance of a broader pattern of preferential treatment." *Id.* at 9.

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<sup>6</sup> GameFly asserts that a "variety of information indicates that the Postal Service's preferential treatment of Netflix is driven primarily by a desire to cater to a large customer, and that the operational needs that supposedly justify this discrimination are pretexts." *Id.* at 6.

<sup>7</sup> Answer of the United States Postal Service, May 26, 2009 (Answer).

## II. THE POSTAL SERVICE'S OPPOSITION

The Postal Service reinforces its objections with several general considerations before turning to the specific requests. First, it seeks to advance a balancing standard: “[t]he real focus of the Commission’s consideration of this motion to compel should be whether the objectionable discovery requests, which seek information and documents of, at best, highly questionable pertinence to the complaint, combined with the burdens that would be created, justify compelling the Postal Service to answer.” Opposition at 2. The asserted standard is that responses must not be compelled if the information sought is either irrelevant or unduly burdensome to produce.

Second, the Postal Service seeks to tie the legitimacy of each discovery request to the actual allegations in the complaint itself. The Postal Service points out that “the outcome should be guided by the actual complaint, not the imagined context of the complaint that GameFly attempts to present as the foundation for its discovery, and whether the information sought by these requests would materially contribute to the record regarding the discrimination claim ....” Opposition at 2. From this premise, it goes on to urge that “[d]iscovery should not be permitted if its sole purpose is to seek information that is inadmissible because it is not relevant to the allegations in the complaint in an evidentiary sense.” *Id.* at 3. It faults GameFly for ignoring the proper “operative standard of admissibility embodied in the rules”, while cautioning the Commission to curtail GameFly’s professed misuse of discovery as “a pretext for far-ranging fishing expeditions.” *Id.* at 3-4.

## III. ANALYSIS AS TO SPECIFIC REQUESTS

Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense, including the existence, description, and nature, of any documents that concern discoverable matter. Relevant information need not be admissible if the discovery appears reasonably calculated to lead to the discovery of

admissible evidence.<sup>8</sup> For the reasons detailed below, the Motion to Compel is granted in part, and denied in part, as indicated below.

A. Request GFL/USPS-6(a)-(e) and (g)-(h)

GFL/USPS-6. Please produce all written communications between any employee or agent of the Postal Service and any employee or agent of Netflix since November 1, 2007, concerning any of the following matters:

(a) The rates, classifications, mail preparation requirements, or standards for processing offered by the Postal Service to Netflix.

(b) Any rate or service arrangement (whether formal or informal) established by the Postal Service for Netflix.

(c) The terms of service established by the Postal Service for the DVD mail of Netflix.

(d) The Postal Service's actual performance in processing and delivering DVDs to or from Netflix.

(e) The breakage or loss of DVDs sent to or from Netflix.

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(g) Changes in the Postal Service's preparation requirements for and handling of the DVD mail of Netflix after the issuance of the OIG report.

(h) Possible changes in rates, fees, mail preparation requirements, or processing procedures for the DVD mail of Netflix.

GameFly requests the Postal Service to produce all written communication with Netflix since November 1, 2007 on DVD mail services, arrangements, performance on processing and delivery, as well as breakage. It also seeks, under subpart (h), such documents on possible changes in rates, mail preparation requirements, or processing

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<sup>8</sup> If the Postal Service's response to the request involves materials that are confidential, it may invoke the protections available under 39 CFR 3007.1, *et seq.*

procedures for the DVD mail of Netflix. The motion is granted as to 6(a)–(e), and (g). It is denied as to 6(h).

GameFly urges that discovery on related preferential treatment of Netflix beyond manual mail processing is calculated to lead to the discovery of admissible evidence that would refute the Postal Service’s defense that any discrimination shown as to manual mail processing persists solely to meet operational needs. Motion. at 13. It contests the objection as to excessive burden, particularly when the information bears on the quality of mail processing received by Netflix. *Id.*

The Postal Service indicates a wide range of communications exists and may be encompassed by these requests, even though the timeframe of the requested documents is limited. It asserts that “[t]his clearly inquires into the sundry topics about which any large mailer and the Postal Service may interact on a day-to-day basis.” Opposition at 6. It also criticizes the approach that GameFly favors in subordinating any burden objection to relevance. *Id.* The Postal Service maintains that discovery requests may still be objectionable on burden grounds if the burden of responding outweighs the likely benefit the information would have, in terms of its contribution to the record. *Id.* at 6-7, n.2.

While such balancing is appropriate, GameFly may explore the operational need for disparate treatment at the local level. To discern this, GameFly must be allowed to inspect the written communications on most of these subjects. The scope of the request appears to be directed with sufficient particularity as it is limited to communications between the Postal Service and Netflix since November 1, 2007

The Postal Service is correct that burden-related objections may be proper, and its objection has merit as to subpart (h), which is overly broad. That subpart purportedly encompasses every slight possible change for treatment of DVD mail of Netflix at every retail facility, and likely requires the review of “potentially thousands of extraneous emails.” Objections at 3.

B. Request GFL/USPS-3(e), 4(e), and 14(e)

GFL/USPS-3. Please produce all documents reflecting any written communication or relating to any oral communication since June 1, 2002, with Reed Hastings, Tom Dillon, William Henderson or Andrew Rendich concerning any of the following matters:

\* \* \* \* \*

(e) Any other aspect of the service performance received by Netflix.

GFL/USPS-4. Please produce all documents reflecting any written communication or relating to any oral communication since June 1, 2002, with any in-house or outside attorney of Netflix concerning any of the following matters:

\* \* \* \* \*

(e) Any other aspect of the service performance received by Netflix.

GFL/USPS-14. Please produce all documents reflecting any written communication or relating to any oral communication since February 23, 2006, with any Blockbuster senior executive (*i.e.*, assistant vice president or higher) or any attorney for Blockbuster concerning any of the following matters:

\* \* \* \* \*

(e) Any other aspect of the service performance received by Blockbuster.

These requests pertain to Postal Service's communications with senior executives or attorneys of Netflix and Blockbuster that concern the service performance received by these specified DVD mailers. GameFly urges that responses are not only warranted by issues on manual processing of DVD returns and breakage rates, but the prospect of a "larger pattern of undue discrimination" and certain suspect motives to satisfy "the desires of a large customer." Motion to Compel at 11. The Postal Service takes exception because such requests "go far beyond the proper scope of [the] proceeding." See Objection at 2.

The service performance received by Netflix and Blockbuster are central to this Complaint, and the requests are sufficiently narrowly drawn, as not to create an undue burden. Complaint at ¶¶ 35-37; see *also*, Motion to Compel at 11. Accordingly, these discovery requests appear to merit production of the responsive information.

C. Request GFL/USPS-7 and 8

GFL/USPS-7. Please produce all documents, studies, analyses, workpapers, memoranda and similar documents created since January 1, 2005, relating to the establishment of Permit Reply Mail (“PRM”).

GFL/USPS-8. Please produce all documents relating to communications between the Postal Service and Netflix concerning the establishment of Permit Reply Mail (“PRM”) since January 1, 2005.

GameFly seeks documents that pertain to establishing Permit Reply Mail as well as associated communications with Netflix since January 1, 2005. It claims that the objections on relevance and burden lack merit. Motion to Compel at 13. While GameFly does not directly deny that the responsive materials may be potentially large, it is willing to exclude any document or information relating to the operation of Permit Reply Mail (PRM) after the service was implemented. It reasserts that the material is likely relevant because it suspects that PRM was created as a pretext for extending Netflix preferential treatment. *Id.* at 14.

The Postal Service presents two objections on the relevance of this material. First, PRM is merely a payment option of general availability under the Domestic Mail Manual. Second, it has no bearing on the pivotal point of GameFly’s ineligibility to receive manual processing of its return mail. Opposition at 7.

The Complaint raises the issue of discrimination as to treatment accorded to Netflix and Blockbuster vis-à-vis GameFly. Request 7 encompasses a wide variety of documents related to an arrangement that is generally available. Thus, the burden appears excessive.<sup>9</sup> In contrast, request 8 seeks documents between the Postal Service and Netflix that pertain to payment options. The latter question is far more likely to produce admissible evidence relevant to this Complaint and is far less

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<sup>9</sup> See, e.g., *Burka v. U.S. Department of Health and Human Services*, 87 F.3d 508, 517 (D.C. Cir. 1996) (factors considered include “the requestor’s need for the information from this particular source, its relevance to the litigation at hand, the burden of producing the sought-after material, and the harm which disclosure would cause to the party seeking to protect the information”).

burdensome. The Motion to Compel is denied as to request 7, and granted as to request 8, subject to certain limitations

Relief to GameFly is granted as to request 8 solely for documents available from Postal Service headquarters, and is narrowed further as well. The documents that must be produced by the Postal Service may exclude any responsive information relating to the operation of PRM after the service was implemented.

D. Request GFL/USPS-15

GFL/USPS-15. Please produce all written communications with any DVD rental company other than Netflix, Blockbuster or GameFly since November 2007 concerning any of the following matters:

(a) The rates, classifications, mail preparation requirements, or standards for processing offered by the Postal Service to that company.

(b) Any rate or service arrangement (whether formal or informal) established by the Postal Service for that company.

(c) The terms of service established by the Postal Service for the DVD mail of that company.

(d) The Postal Service's actual performance in processing and delivering DVDs to or from that company.

(e) The breakage or loss of DVDs sent to or from that company.

(f) The OIG report, or the investigation that led to the OIG report.

(g) Changes in the Postal Service's preparation requirements for and handling of the DVD mail of that company after the issuance of the OIG report.

(h) Possible changes in rates, fees, mail preparation requirements, or processing procedures for the DVD mail of that company.

This request extends the investigation under request 6 to communications of the Postal Service with other DVD rental companies. GameFly contends that the Postal Service's objection as to relevance is misguided. GameFly asserts that its request is

likely to lead to admissible evidence of disparities in treatment of DVD rental companies, breakage rates, differences in the resilience of movie DVDs, and the attribution of breakage to GameFly's employees.

The Postal Service objects again as to irrelevance and burden. Objections at 6-7. It urges that "such extensive discovery into the various smaller players in the DVD mailer market would dramatically increase the burden of discovery on the Postal Service, without any material contribution to the record...." *Id.* Even if relevance of the breakage rates of other DVD mailers could still be shown, the Postal Service maintains that it would not justify production of all written communications with another DVD company on the wide range of matters identified in GLF/USPS-15. See Opposition at 11. It takes further exception to producing documents related to DVD breakage of any other DVD rental company other than Netflix and Blockbuster.<sup>10</sup> Objections at 7.

The Postal Service objections are sustained in part. The request for "all written communications" with "any DVD rental company" is denied as overly broad. The Postal Service can not be expected to know the business of all mailers, or maintain records that would allow it to respond to such a broad request. This does not necessarily foreclose all investigation under request narrowed to either the treatment accorded to specified DVD mailers other than Netflix and Blockbuster, or to concern the return DVD mail of groups of DVD mailers.

GameFly may pose narrower questions to explore the specific return DVD mail of other more clearly identified DVD mailers, or to investigate the Postal Service's

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<sup>10</sup> The Postal Service characterizes the breakage rates experienced by other DVD mailers as tangential, since that information would only bear upon loss claims raised by mailers other than GameFly. While it clarifies that it adheres to the point that GameFly's personnel may contribute to the breakage of GameFly's DVDs, it points out that the causation point was already conceded partly in request GFL/USPS-48, and that Postal Service "does not dispute that automated processing may be a cause of catastrophic breakage of DVDs." Opposition at 10.

treatment of the DVD mail processing of returns to groups of DVD mailers.<sup>11</sup>

Accordingly, request GLF/USPS-15 and its subparts are denied as overly broad.

E. Request GFL/USPS 20

GFL/USPS-20. Please produce all available data, studies and analyses concerning the following measures of the service provided by the Postal Service to DVD mailers:

- (a) The extent of manual culling and priority manual processing.
- (b) The extent of automated letter processing.
- (c) The rate of DVD breakage.
- (d) any other dimension of the quality of mail service.

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This request encompasses the service provided to any individual DVD rental company, any group of DVD rental companies, or the entire DVD rental industry. The time periods covered by this request are: (a) the period since November 2007; (b) any sub-period of the post-November 2007 period for which data are available; and (c) the last fiscal year before November 2007 for which data are available.

Request 20 seeks data, studies, and analyses on measures of service to DVD mailers concerning the extent of manual and automated processing, the rate of DVD breakage, or, under subpart (d), other dimensions of quality of mail service. GameFly urges that the requests could unearth evidence of disparate treatment of individual DVD mailers, a correlation between manual processing and lower breakage, causative factors in breakage, and attribution of such cause. Motion at 17.

The Postal Service asserts that these materials are cumulative of materials in other responses. It also objects to producing data for mailers other than Netflix and Blockbuster, and takes exception to the scope of the demand that includes outbound mail. Objections at 6-7.

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<sup>11</sup> Using this approach, GameFly may test the allegations in the Answer, including the contention that “other DVD mailers use single-ounce letter rates, with essentially all outbound piece handled on letter automation, and most inbound pieces handled the same.” Answer at 22.

In the provision of market dominant services by the Postal Service of the First-Class mail for mailpieces with DVDs, GameFly surmises that the measures of service to DVD mailers concern the general availability of automated letter processing and incidence of breakage.

GameFly urges its request for data, studies, and analyses on specified measures of service as reasonably narrow. The timeframes are limited. It also concerns manual culling and priority manual processing. Elsewhere, the Postal Service urges that “the other major flaw in count 1, is the assertion that other DVD mailers are provided expedited or manual handling”, because “today letter size DVD mail pieces consistently run on letter automation equipment.”<sup>12</sup> There also appears to be sufficient grounds to permit GameFly to examine the factual basis of certain related contentions of the Postal Service.<sup>13</sup>

The Postal Service’s objections to document production responsive to subparts (a), (b), and (c) of request 20 must be denied, insofar as these subparts properly seek certain information that precisely relates to the inbound or return DVD mail of other DVD mailers.

In other respects its objections are sustained. While the Motion to Compel is granted in limited part as to subparts (a) through (c), it is denied as to subpart (d) of request 20, that seeks data and analyses on measures of service provided to DVD mailers that pertain to any other dimension of the quality of mail service. GameFly has not articulated with sufficient specificity the likely connection of such other dimensions of mail service to other DVD mailers to its theory of unfair discrimination and preference in favor of the two named DVD mailers.

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<sup>12</sup> Answer at 23. The quoted passage continues to indicate that “[t]his is true for both outbound and inbound pieces, although less consistently so when inbound. Official policy is not to handle such inbound pieces manually, although some of it is handled that way as previously explained.” *Id.*

<sup>13</sup> See, e.g., Joint Statement at ¶¶ 81, 82, and 108. Other contentions warrant further testing. See, e.g., Answer at 23 (“Gamefly in fact receives at least similar handling as other DVD mailers, after allowing for processing stream distinctions”); see also, *Id.* at 14 (the Postal Service “has no current practice of manually culling incoming DVDs”), and at 24 (“[t]he automated processing of GameFly’s inbound pieces receive is a function of the logic... that must be applied to each piece.”).

Request GFL/USPS 41(c)

GFL/USPS-41. Please produce all studies, analyses, reports, internal reviews, memoranda, and similar documents created since January 1, 2005, by the Postal Service, any subordinate department or division of the Postal Service with national responsibilities (e.g., engineering, operations, marketing, pricing, Postal Inspection Service or Office of Inspector General), or any contractor or consultant to the Postal Service, relating to any of the following subjects:

\* \* \* \* \*

(c) The actual rate of DVD breakage (for Netflix, any other DVD rental company, any group of DVD rental companies, or the DVD rental industry generally).

Subpart (c) of request 41 seeks documents created after 2004 by any subordinate department of the Postal Service with national responsibilities, or by any contractors or consultants, which concern the actual rate of DVD breakage of any DVD rental companies. GameFly relies on the justification set forth under requests 15 and 20. The Postal Service objects to the extent that it requires the provision of data for mailers other than the two named movie DVD rivals. Objection at 7. As the request is limited as to origin and timeframe, and pertains to breakage of DVDs which is one of the core contentions by GameFly on harm, the Motion to Compel is granted, in part, for documents available from Postal Service headquarters.

F. Request GFL/USPS 21

GFL/USPS-21. Please produce all Confirm scan data and other business records that relate to the extent to which DVD mailpieces to or from Netflix, Blockbuster, and other DVD rental companies have been processed on letter sorting equipment, flats sorting equipment, or manually.

GameFly asserts that its request for Confirm scan data and other records that relate to the processing and sorting of similar mailpieces is not misguided, even though the Postal Service objects to providing data on Confirm scans with respect to Netflix, as Netflix does not use Confirm scans. Motion to Compel at 17. GameFly points out that

the request extends to Confirm scan data relating to other DVD mailers as well. It explains that the data is also likely to show whether the Postal Service discriminates between Netflix and other DVD mailers, and if the Postal Services response as to Netflix, may be incorporated with the other responsive information.

The Postal Service objected to this request on grounds of relevance and burden. In its Opposition, it claims that GameFly mischaracterizes the Postal Service's objection by claiming it alleges that Netflix does not use Confirm. Opposition at 7. Instead, as the Postal Service's Objection clearly notes, Netflix does not use Confirm scans "*on the return trip.*" The Postal Service therefore continues to object to having to capture and provide Confirm data on Netflix outbound mail. *Id.* (emphasis original).

Request 21 extends to (a) Confirm scan data, and (b) other business records. Under each of those headings, it requires the production of documents that concern (i) inbound (or return) DVD mailpieces, and (ii) outbound DVD mailpieces. Moreover, the request encompasses information that relates to the DVD mail pieces that have been processed for Netflix, Blockbuster, and other DVD rental companies.

(a) Confirm scans.

(i) Inbound DVD mail. Because distinct modes of processing for inbound DVD mailpieces for DVD mailers bears upon claims of discriminatory treatment, the Confirm scan information is relevant and should be produced if it concerns DVD mail of Netflix and Blockbuster. If none exists for any named mailer, the Postal Service should provide an answer for the record as to that mailer, instead of the information sought. For the reasons outlined above on request 15, Confirm scans on inbound DVD mail need not be produced if it merely concerns the DVD mail of other DVD rental companies.

(ii) Outbound DVD mail. The likelihood of this data leading to admissible evidence is lower since it is extremely tangential to the Complaint, which focuses upon differences that concern inbound DVD mailpiece processing. Because GameFly does not distinctly allege that any appreciable portion of Netflix's mailers are being manually processed in the outbound direction, and it would not benefit Netflix to

displace processing on automated processing equipment which may operate more timely, the request for Confirm data to Netflix's outbound DVD mailpieces appears to be predicated on tenuous speculation even if it is not altogether irrelevant. This reasoning applies to Blockbuster's outbound DVD mail as well. The basis for extending discovery to the Confirm scan data of other DVD rental companies appears to be based on still weaker rationalizations.

As to Confirm scan data, the Motion to Compel is only granted in part, as to data on inbound DVD mail of either Netflix or Blockbuster.

(b) Other business records.

(i) Inbound DVD mailpieces. Other business records that concern inbound DVD mailpieces are likely to lead to admissible information that is relevant to the methods of processing of Netflix and Blockbuster returns, and must be produced.<sup>14</sup> Responsive records may indicate the relevant extent to which mailpieces are processed upon automated equipment during the return and delivery for other DVD rental companies also, but this production could entail greater burdens. For the reasons outlined above on request 15, other business records on inbound DVD mail need not be produced for every individual DVD rental company. The Postal Service is required to produce only responsive information as to inbound mail processing which concerns any group of DVD rental companies, or any segment of the DVD mailing industry that encompasses such a group.

(ii) Outbound DVD mailpieces. The likelihood that other business records concerning outbound DVD mail will actually lead to admissible evidence is generally quite low, since outbound DVD mail processing appears more peripheral to the Complaint's allegations on inbound processing. Any justification for extending

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<sup>14</sup> If none exists that relate to a named mailer, the Postal Service should provide an answer for the record as to that mailer, instead of the information sought.

discovery to all “other business records” on outbound DVD mail that concern Netflix, GameFly, or other DVD rental companies is not adequately supported.<sup>15</sup>

G. Request GFL/USPS 16(f)-(g)

GFL/USPS-16. Please produce all studies, analyses, reports, internal reviews, memoranda, and similar documents relating to the following matters:

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(f) Any changes considered by any level of the Postal Service after January 1, 2007, with respect to the processing of DVD mailers.

(g) Any changes actually ordered by any level of the Postal Service after January 1, 2007, with respect to the processing of DVD mailers.

According to GameFly, “information about Netflix mail, or the degree of manual processing given to Netflix or other companies’ DVD mailers does not represent the entire universe of information relevant to this proceeding.” *Id.* at 18; *see also*, Response of GameFly at 15.

The Postal Service objected to request GFL/USPS 16(f)-(g) on grounds of relevance and burden as well. It again urges that the “scope of this request goes well beyond the subject matter of this proceeding, by inquiring into a wide variety of issues concerning DVD mail unrelated to the manual processing of Netflix return pieces.” Objections at 5. The Postal Service takes particular exception to having to determine “whether any field official considered or directed any changes at any time in the past two years,” since it is “immaterial to this proceeding.”<sup>16</sup> *Id.* at 6. It also goes on to

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<sup>15</sup> If such business records are intended to be used to help establish a reasonably narrow consequence of distinct outbound processing modes, such as the incidence of loss due to theft, then GameFly may seek information more closely tailored to a narrower purpose.

Notably, GameFly indicates that request GFL/USPS 40 was earlier withdrawn, but referenced it in its Motion to Compel due to inadvertence. *See* Notice of GameFly, Inc., Concerning Narrowing of Motion to Compel Filed August 24, 2009, filed September 3, 2009. As to request GFL/USPS 40, GameFly clarifies that no determination is being sought at this time.

<sup>16</sup> It also contends that the responsive information would be cumulative or redundant with regard to other responsive documents produced including the Christenson Study and current local standard

reconfirm that it is “prepared to stipulate” that the amount of manual culling of Netflix mail is at least as large as was found in the OIG Report.” Objections at 6.

As to subpart (f), it appears that the Postal Service’s objection that the burden outweighs the relevance has merit here. First, much of the information may be scattered across the numerous retail facilities in the field, and is likely to be either cumulative or of ephemeral value in leading to truly admissible information. Additionally, canvassing for “changes considered” at all levels for litigations may create a disincentive for cultivating an environment to freely consider improvements. The Postal Service’s objections to GFL/USPS-16(f) are sustained.

The documents and information responsive to request GFL/USPS-16(g) appear to be properly calculated to lead to admissible evidence, and this ruling grants the Motion to Compel as to this subpart. Having placed at issue the variable local conduct and discretionary treatment of DVD mailpiece processing, the Postal Service can not completely curtail discovery into actual changes in policies or practices in the field offices.<sup>17</sup>

#### H. Request GFL/USPS 28 and 31

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-31. Please produce copies of any signs, placards, posters and similar items that are used to inform Postal Service mail processing personnel where to

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operating procedures (SOPs). *Compare*, Motion of GameFly, Inc. to Extend the Procedural Schedule, at 2, September 2, 2009.

<sup>17</sup> The request calls for documents on changes ordered with respect to processing of DVD mailers only after the end of 2006.

place DVD reply mailers that have been manually culled from the automation mailstream.

To support its Motion to Compel, GameFly asserts that the Postal Service can not both contend that the decisions to handle different mailers' DVDs differently were made on a local level, yet foreclose discovery of the practices in the field that reflect what decisions were made and how distinctions arose in the processing of DVD mailpieces of GameFly's actual or potential rivals. Motion to Compel at 19.

The Postal Service contends that no such data is available for dedicated mail slots. Response to GFL/USPS 28. It refers to its policy, reflected in the *Retail Digest*, dated May 4, 2007, that Netflix slots are “not an authorized use of mail drop slots” and that removal of the signage is required. See *id.*, *Retail Digest* at 2. It urges that the burden of conducting such a “census” across 36,500 field offices of which mailers have mail slots, for the public to deposit mailpieces of Netflix, Blockbuster or other DVD rental companies, would be immense. Opposition at 8. It explains that such an effort “would dwarf any possible relevance that this information—which is, at best, tangentially related to the mail processing discrimination claim alleged by GameFly—would contribute to the record of this proceeding.” *Id.*

The Postal Service states that “it is plausible that there are some facilities among the Postal Service’s ...35,000 Post Offices that may have mail slots that have been improperly designated as being solely for Netflix mail.”<sup>18</sup> Unless the Postal Service is prepared to stipulate that the contention is more than plausible, because it is true, GameFly should be allowed the opportunity to verify the extent that such facilities exist through limited discovery. In other words, if the Postal Service wants to contest the practice, then it must take the survey described below.

For request 28, a reasonable estimate of the percentages requested based upon limited empirical data is likely to lead to admissible information, without undue burden.

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<sup>18</sup> Response of the United States Postal Service to Motion of GameFly Inc., To Compel the Postal Service to Answer Discovery Requests GFL/USPS-79-80, September 24, 2009, at 2.

Counsel for the parties are directed to meet and confer to resolve the discovery dispute as to request 28, as outlined below. The parties shall identify an effective sample of the retail facilities that can provide responsive information. It must be one that they stipulate in advance is sufficiently representative of the larger universe of retail facilities, along with any mutually agreed upon qualifications.<sup>19</sup> Once the parties identify the reliable sample, the Postal Service shall complete a survey within fourteen days. Results of the survey from retail facilities may be collected using fax, electronic mail, voting (or polling) software, or other forms of communication, as may be most economical and efficient.

Request GFL/USPS 31 also seeks production from field offices of copies of any signs, placards, posters and similar items that are used to inform Postal Service mail processing personnel where to place DVD reply mailers, that have been manually culled. The request would appear burdensome if granted in full. Instead, this ruling grants this request in more limited part, as modified below. The Postal Service shall survey its Area Mail Processing facilities, along with a modest representative sample of Cost Accounting Group (CAG) designations A through G post offices.<sup>20</sup> Each location shall be questioned as to whether any signs, placards, posters, or similar items are used to inform the Postal Service mail processing personnel where to place DVD mailers that have been manually culled from the automation mailstream, and, if so, to further describe such signs, making sure to state whether and what names of specific mailers are used.

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<sup>19</sup> The Postal Service will, jointly with GameFly, identify the constituent retail facilities of the representative sample (including postal offices, branch and station locations), subject to any exclusion or other assumptions deemed acceptable to both parties.

<sup>20</sup> The Postal Service and GameFly should agree on a modest but representative sample of retail facilities designated A through G, along with any mutually agreed upon qualifications.

I. Request GFL/USPS 29

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.

As to request GFL/USPS 29, the burden of producing copies or images of any material signs, placards, etc., that encourage return deposits of DVD reply mailers separately from other mail, appears to outweigh the relevance of any non-cumulative information likely to be gained. This resolution is made in view of the disposition of requests 28 and 31, and other requests above, and the likely ability to attain similar information without imposing further formal duties on the Postal Service field offices.

RULING

1. The Motion of GameFly, Inc. to Compel Responses to Discovery Requests GFL/USPS-3(e), 4(e), 6(a)-(e), and (g), 8, 14(e), 16(g), 20(a)-(c), 21, 28, 31, and 41(c) , filed August 24, 2009, is granted, at least in part, in accordance with the discussion in the body of this ruling.
2. Requests GFL/USPS-6(h), 7, 15, 16(f), 20(d), and 29 are denied. No ruling concerns Request GFL/USPS 40, as it is no longer in dispute.

Dan G. Blair  
Presiding Officer