

POSTAL REGULATORY COMMISSION

In the Matter of:)
) Docket No. C2009-1
COMPLAINT OF GAMEFLY, INC.)

Suite 200
Postal Regulatory Commission
901 New York Avenue, N.W.
Washington, D.C.

Volume 11
Thursday, October 28, 2010

The above-entitled matter came on for hearing
pursuant to notice, at 9:35 a.m.

BEFORE:

HON. DAN G. BLAIR, COMMISSIONER (Presiding)
HON. RUTH Y. GOLDWAY, CHAIRMAN
HON. TONY HAMMOND, VICE-CHAIRMAN
HON. Nanci E. LANGLEY, COMMISSIONER
HON. MARK ACTON, COMMISSIONER

APPEARANCES:

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C O N T E N T SWITNESSES APPEARING:
SANDER GLICK

<u>WITNESSES:</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>	<u>VOIR DIRE</u>
Sander Glick	1902	--	1996	--	--
By Mr. Mecone	--	1938	--	1998	--
By Mr. Costich	--	1984	--	--	--

Confidential Testimony:

Sander Glick	2006	--	--	--	--
By Mr. Mecone	--	2045	--	--	--
By Mr. Costich	--	2049	--	--	--

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DOCUMENTS TRANSCRIBED INTO THE RECORDPAGE

Rebuttal testimony of Sander Glick on behalf of GameFly, Inc., GFL-RT-1	1906
Confidential version of rebuttal testimony of Sander Glick on behalf of GameFly, Inc., GFL-RT-1	2009

E X H I B I T S

<u>EXHIBITS AND/OR TESTIMONY</u>	<u>IDENTIFIED</u>	<u>RECEIVED</u>
Rebuttal testimony of Sander Glick on behalf of GameFly, Inc., GFL-RT-1	1902	1905
Confidential version of rebuttal testimony of Sander Glick on behalf of GameFly, Inc., GFL-RT-1	2005	2008
Cost Study Inputs, USPS-CX-1	2100	----
First Class NonMachinable Single-Piece Letters Cost Sheet, USPS-CX-2	2100	----

P R O C E E D I N G S

(9:35 a.m.)

1
2
3 COMMISSIONER BLAIR: Good morning, everyone.
4 Today's hearing will come to order. The hearing today
5 is in Docket No. C2009-1, the Complaint of GameFly,
6 Inc. against the Postal Service. I'm Dan Blair,
7 presiding officer in this proceeding. Joining me on
8 the dais this morning are Chairman Goldway, Vice
9 Chairman Hammond, Commissioner Langley and
10 Commissioner Acton.

11 First I'd like to discuss the procedures for
12 our session today, which will probably be both an open
13 and closed session. I remind counsel that this
14 hearing is being web broadcast, and in an effort to
15 reduce potential confusion I ask that counsel wait to
16 be recognized before speaking, and please identify
17 yourself when commenting.

18 Today we will complete GameFly's surrebuttal
19 case. Due to the nature of this case, a significant
20 amount of material has been filed subject to
21 protective conditions. Protecting confidential
22 information remains a high priority.

23 While we expect a witness to answer
24 questions fully, I caution Mr. Glick to be aware of
25 materials that are subject to protective conditions

1 when answering questions. If you're uncertain as to
2 whether an answer might involve revealing protected
3 information, you may consult with counsel on that
4 limited question prior to answering.

5 And again, if necessary we will conduct a
6 portion of today's hearing in camera. The procedure
7 for conducting an in camera hearing is to defer
8 questions that must involve reference to confidential
9 material until the conclusion of the day. A 15 minute
10 recess will then be taken at the end of the public
11 session to allow interested observers to become
12 subject to an appropriate confidentiality agreement.
13 The hearing is then reconvened for a separate in
14 camera session.

15 The transcript for that separate session is
16 maintained under seal, and the in camera hearing will
17 not be web broadcast. Individuals who choose not to
18 agree to abide by the confidentiality agreement will
19 be excluded from the hearing. This process has been
20 used successfully in prior hearings in this case.

21 I have two procedural matters to raise
22 before we receive testimony. First, I believe that a
23 nonpublic version of Witness Glick's testimony was
24 provided only in hard copy. However, there was a
25 filing by GameFly late last night. In that filing,

1 counsel, was an electronic version provided to the
2 Commission? Mr. Levy?

3 MR. LEVY: Thank you. David Levy for
4 GameFly. We did not do a filing last night. As a
5 courtesy, we have a small number of errata for Mr.
6 Glick's testimony, and as a courtesy rather than
7 simply have him read them at the beginning of his
8 appearance I sent by email a Word file of the
9 corrected testimony, as well as PDFs showing the
10 handwritten changes.

11 I sent those to counsel for the Postal
12 Service, to Mr. Costich and to Mr. Sharfman. We will
13 be formally filing an electronic version of the
14 corrected testimony either today or tomorrow just so
15 that it's in the Commission's docket room.

16 COMMISSIONER BLAIR: I appreciate that
17 clarification. I haven't had an opportunity to review
18 those materials, and I was informed by counsel this
19 morning of the communication, but what I wanted to let
20 counsel know is that the Commission would appreciate
21 if an electronic version of the nonpublic testimony of
22 Witness Glick could be provided to the Commission.

23 MR. LEVY: Absolutely, and if we didn't I
24 apologize.

25 COMMISSIONER BLAIR: Not a problem.

1 Additionally, it would be helpful to have an
2 electronic copy of the spreadsheets underlying
3 "GFL-RT-1, Appendix A".

4 MR. LEVY: Absolutely, and again I thought
5 we submitted that, but obviously you need a runnable
6 copy.

7 COMMISSIONER BLAIR: That would be very
8 helpful for the Commission's deliberations. The
9 material should be provided on a disk that would be
10 kept under seal. Mr. Levy, we would appreciate your
11 accommodation of this if at all possible.

12 Second, last night I issued Presiding
13 Officer's Ruling No. 42 directing counsel to provide
14 appendices containing certain types of documents
15 referenced in their briefs. I realize that requiring
16 that separate appendices be filed is unusual. This
17 was done so because of the complex nature of the
18 issues before us.

19 If counsel sees a problem with complying
20 with Ruling 42, they should file a motion by
21 November 3. Mr. Levy?

22 MR. LEVY: Commissioner Blair, we don't see
23 a problem with that. We think that's a good idea and
24 that's commonly done in other agencies, but it does
25 raise two issues that I wanted to bring to the

1 Commission's attention.

2 First of all, the Commission may be unaware
3 of the extent to which documents have already been
4 incorporated in the transcript. We noticed a few days
5 ago while getting ready for the hearing that the hard
6 copy transcripts produced by the court reporter
7 frequently do not include documents that were ruled by
8 you to be incorporated into the record and designated
9 into the evidence, but the same documents do appear in
10 the electronic PDF versions of the transcript.

11 So if you look only at the hard copy of the
12 transcript you'll think that things are missing from
13 the transcript that actually appear in the electronic
14 PDF version. We just noticed that a few days ago.

15 The second thing is something that is my
16 fault. I got a call from Mr. Costich last night or an
17 email pointing out that a number of documents cited by
18 Mr. Glick as part of the documents accompanying our
19 April 12, 2010, documentary submission as part of our
20 direct case were not included in the transcript.

21 We went back and looked last night, and it
22 turns out a half an inch of documents were not
23 included in the April 10 compendium. What happened
24 was the compendium only included the documents that
25 were cited in the memorandum at that time. Then Mr.

1 Glick in his separate testimony or subsequently cited
2 other pages of the same documents, but they never got
3 into the compendium and never got into the transcript.

4 All of these documents were produced and
5 Bates numbered formed to the Postal Service, and all
6 of these additional pages were included in the
7 documents that we covered in our motion to unseal and
8 that the Commission ordered to be unsealed subject to
9 redaction.

10 These are not documents that have not been
11 brought to the attention of the Commission or the
12 Postal Service before, but the additional formality of
13 moving them into the transcript just didn't happen.
14 When we're in the closed session I'm going to ask for
15 leave to correct that omission.

16 COMMISSIONER BLAIR: I appreciate you
17 bringing that to the Commission's attention, Mr. Levy.

18 Postal counsel, did you have any other
19 questions or comments before we proceed?

20 MR. MECONE: James Mecone for the United
21 States Postal Service with Daniel Foucheaux and
22 Kenneth Hollies.

23 On the second point GameFly counsel raised,
24 the Postal Service is going to object to any documents
25 that have not actually been entered into the record.

1 We can address this during the closed session when he
2 moves to enter the documents into the record or we can
3 address it now.

4 COMMISSIONER BLAIR: I think it would be
5 appropriate when he moves to have it addressed in the
6 record, so if you'll abstain for a few hours it would
7 be most appreciated.

8 Mr. Costich, did you have any questions
9 before we proceed?

10 MR. COSTICH: No, Commissioner Blair. Thank
11 you.

12 COMMISSIONER BLAIR: Thank you. At this
13 point, GameFly counsel, will you please call your
14 first witness?

15 MR. LEVY: Yes. Thank you. Our witness is
16 Sander Glick, who appeared previously, but who has not
17 been sworn in at this time.

18 COMMISSIONER BLAIR: Mr. Glick, it's my
19 understanding you're already under oath in this
20 proceeding, so it's not necessary to swear you in
21 again.

22 //

23 //

24 //

25 //

1 A Yes, it was.

2 Q If you were asked the same questions today,
3 would your answers be the same as the copy you have in
4 your hand?

5 A Yes, they would be.

6 Q Are there any differences between the copies
7 you have in your hand and the copies that were
8 previously filed with the Commission?

9 A Yes, there are. There are a few changes.

10 Q Could you go through them, please?

11 A Yes. On page 2, line 16, just replacing the
12 word "automation" with the word "machinable". On page
13 4, line 22, inserting the word "machinable" before
14 "letter".

15 COMMISSIONER BLAIR: Mr. Glick, can you go a
16 little bit slower, please?

17 THE WITNESS: Yes.

18 COMMISSIONER BLAIR: And can you repeat
19 that?

20 THE WITNESS: Yes. On page 4, line 22,
21 insert the word "machinable" before "letter". On page
22 9, line 11, just change the word "arrive" to
23 "arriving". On page 10, line 18, replace "its" with
24 "their", T-H-E-I-R.

25 And then on page 15, lines 7 and 8, cross

1 out "the headquarters directives that" and replace
2 that with "even though", and then after the word
3 "suggests" in line 8 "that a directive". I'll read
4 the whole sentence.

5 COMMISSIONER BLAIR: That would be helpful.

6 THE WITNESS: The letter does not commit to
7 instructing the field to cull GameFly with the same
8 frequency that it culls Netflix, even though USPS
9 Witness Seanor suggests that a directive is necessary
10 to ensure the same level of culling for GameFly
11 pieces.

12 COMMISSIONER BLAIR: Thank you.

13 THE WITNESS: And then in the footnotes,
14 footnote 9, Seanor stated that the instruction would
15 not need to come from headquarters, but to achieve
16 Netflix-like processing insert the word "clearly" and
17 cross out the word "there" and then cross out "need to
18 be" and replace that with "require". And I can read
19 that entire footnote.

20 Seanor stated that the instruction would not
21 need to come from headquarters, but to achieve
22 Netflix-like processing clearly would require a
23 nationwide commitment.

24 COMMISSIONER BLAIR: And you can delete that
25 comma after processing as well, or is that retained?

1 THE WITNESS: That should be done. That
2 should be deleted.

3 COMMISSIONER BLAIR: Thank you.

4 THE WITNESS: Those are the only changes.

5 MR. LEVY: I am now going to approach the
6 witness to take the two copies of the redacted
7 testimony and hand them to the court reporter and ask
8 that they be admitted into evidence and transcribed
9 into the transcript.

10 COMMISSIONER BLAIR: Are there any
11 objections from Postal counsel?

12 MR. MECONE: No objection.

13 COMMISSIONER BLAIR: Please proceed. Does
14 the reporter have the testimony?

15 Hearing no objections, the public version of
16 the surrebuttal testimony of Mr. Glick on behalf of
17 GameFly is received into evidence. It will be
18 transcribed.

19 (The document referred to,
20 previously identified as
21 Exhibit No. GFL-RT-1, was
22 received in evidence.)

23 //

24 //

25 //

1 GameFly, result in GameFly receiving similar processing to Netflix. The Postal
2 Service's claims are not accurate.

3 Part III of this testimony responds to the Postal Service's claim that it gives
4 Netflix return mailers custom manual processing primarily (or solely) because
5 manual culling is a low-cost process. This claim is unsupported and untrue. In
6 particular, the special treatment afforded Netflix returns **[BEGIN USPS**
7 **PROPRIETARY]** **[BEGIN USPS PROPRIETARY]** Postal
8 Service costs for handling these pieces.

9 **II. THE POSTAL SERVICE PROVIDES SPECIAL PROCESSING OF**
10 **NETFLIX RETURNS AT LETTER RATES AND HAS NOT OFFERED**
11 **THE SAME PROCESSING AT LETTER RATES TO GAMEFLY.**

12 **A. The Postal Service Cannot Dispute That It Continues To Hand-**
13 **Cull The Vast Majority Of Netflix Return Mailers Entered At**
14 **Automation Letter Rates.**

15 In its direct case, GameFly offered voluminous documentation that,
16 although Netflix pays only machinable letter rates for its DVD mailers, the Postal
17 Service manually culls the vast majority of Netflix return mail from the automation
18 mail stream and gives it other forms of custom handling, all at no extra charge to
19 Netflix. Citations to these documents appear in paragraphs 57-69 of GameFly's
20 Memorandum Summarizing Documentary Evidence (April 12, 2010). The cited
21 documents are reproduced in volume 4 of the transcript. The Postal Service's
22 testimony, rather than offering any serious challenge to this fact, contents itself
23 with quibbling over peripheral details. For example:

- 1 • Messrs. Barranca and Seanor insist that the Postal Service's practice
2 of processing Netflix DVD mail manually and giving Netflix other
3 preferential manual handling was not "uniform" or "pervasive." USPS-
4 T-1 (Barranca), pp. 14-22; USPS-T-3 (Seanor), pp. 10-11.
- 5 • Mr. Barranca asserts that the voluminous documents cited by GameFly
6 were "cherry-picked." USPS-T-1 (Barranca), pp. 14-22.
- 7 • Mr. Belair testified on cross-examination that the Pacific Area Standard
8 Operating Procedure ("SOP"), one of the many Area and District SOPs
9 and similar directives requiring the culling and manual handling of
10 Netflix return mailers, had been "rescinded." Tr. 9/1652. He professed
11 to be unaware of the Postal Service's admission, in response to an
12 institutional interrogatory, that "current processing practices for Netflix's
13 in-bound pieces in these two areas are substantially similar to those
14 described in the Pacific and Eastern Area SOPs." Tr. 9/1653.
- 15 • And Mr. Seanor asserted that the Eastern Area SOP, another SOP
16 produced by the Postal Service in discovery, and described by the
17 Postal Service in response to a follow-up GameFly discovery request
18 as "not rescinded," in fact had never been adopted. Tr. 10/1783-1788.
19 Or, more precisely, "I have no knowledge of it ever being issued." Tr.
20 10/1787.

21 These claims merit little weight. While the processing of Netflix return
22 mailers is not exactly "uniform" at every facility or in complete accord with SOPs

1 that are on the record, neither fact is of any importance. The fact that the Postal
2 Service has manually culled—and continues to manually cull—the vast majority
3 of Netflix return mailers is not contingent on whether the processing of Netflix
4 returns is uniform throughout the country, whether a particular SOP was ever
5 issued, or another one was rescinded. This fact is supported by evidence that
6 appears in the Christensen Associates reports; the United States Postal Service
7 Office of Inspector General (OIG) report of November 2007; a multiplicity of
8 SOPs and standardized procedures issued by numerous Postal Service Districts
9 and P&DCs—none of which the Postal Service disputes; and a wide range of
10 internal Postal Service communications. GameFly Memorandum Summarizing
11 Documentary Evidence (April 12, 2010), paragraphs 57-69.

12 In any event, the Postal Service has repeatedly acknowledged, in
13 pleadings, interrogatory answers and other sworn testimony *in this case*, that the
14 vast majority of Netflix return mailers still get manual culling:

- 15 • The Postal Service admitted in August 2009 that “the amount of
16 manual processing of Netflix mail is likely at least as large as was set
17 forth in the OIG Report.” USPS Responses to GFL/USPS-18 and
18 19(b)-(c). Given the finding of the OIG report that “approximately 70
19 percent” of the Netflix reply mailers studied by the OIG were manually
20 processed in 2007 (Joint Statement ¶¶ 83-84), this implies that more
21 than 70 percent of Netflix DVD reply mailers receive manual
22 processing at machinable letter rates of postage today.

- 1 • Presiding Officer's Ruling No. C2009/1-5 (issued Sept. 28, 2009)
2 ordered the Postal Service to conduct a survey of the prevalence of
3 "signs, placards, posters and similar items that are used to inform
4 Postal Service mail processing personnel where to place DVD reply
5 mailers that have been manually culled." POR 5, p. 19. Instead of
6 complying with this order, the Postal Service stipulated to the existence
7 of these items. USPS Status Memorandum (Feb. 8, 2010) at A-2
8 (discussing GFL/USPS-31).
- 9 • Mr. Seanor acknowledged during his cross-examination that
10 "subordinate facilities in the Eastern District have instructions on how
11 to process DVD mailers," and that the instructions "call for the
12 separation of DVD mailers." Tr. 10/1829-30.
- 13 • Mr. Seanor conceded that 70 percent of Netflix return mail "is still
14 pulled away by hand from the automation letter stream," and that the
15 percentage is over 80 percent at some sites. Tr. 10/1804. Mr.
16 Barranca did not disagree. Tr. 10/1875-1876.

17 **B. The Special Processing Afforded To Netflix Returns Is Much**
18 **More Than Just One Manual Cull.**

19 In my direct testimony, I identified a number of other forms of special
20 processing, apart from manual culling, that Netflix return mail customarily
21 receives. Tr. 4/654. USPS witnesses Seanor and Belair suggest in their
22 testimony that manual culling is the only activity the Postal Service performs for
23 Netflix return mail, *i.e.*, culling allows Netflix returns to bypass further processing.

1 USPS-T-2, at 6; USPS-T-3, at 6-7.¹ Their suggestion is contradicted by the
2 Postal Service's own admissions. **[BEGIN USPS PROPRIETARY]**

3

4

[END USPS

5 **PROPRIETARY]** USPS Institutional Response to GFL/USPS-162(b). While the
6 processing of Netflix returns was not exactly the same at all of these facilities,
7 Christensen found that manual culling is just the first of multiple, primarily
8 manual, activities that are generally entailed in the processing of Netflix returns.

9

[BEGIN USPS PROPRIETARY]

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¹ This same, inaccurate assumption is reflected in **[BEGIN USPS PROPRIETARY]**

[END

USPS PROPRIETARY]

1 **Table 1. Typical Components of USPS Process**
 2 **For Handling Netflix Returns**

Category	Number of Times per Piece
Manual Culling	2
Sorting	
Facing & Sleeving	
Riffing Trays for Accuracy	

3 Source: Appendix A, Table A-2 [END USPS PROPRIETARY]

4 Furthermore, because Christensen did not try to model all allied costs
 5 directly (*i.e.*, the Christensen Model includes some costs for allied activities using
 6 CRA-based proxies)³, the study did not collect data on all of the allied activities
 7 involved in the processing of Netflix returns process. In addition to the above
 8 processing steps explicitly modeled by Christensen, the national Netflix SOP
 9 requires that Extended Managed Mail (EMM) trays of Netflix returns, the type of
 10 tray that the SOP requires for Netflix returns, be brick-laid no more than four
 11 layers high into shelved APCs. GFL520-521.⁴

12 I also would like to respond to two points made by witness Belair and one
 13 point made by witness Seanor during their cross-examination. First, Mr. Belair
 14 stated that many letter trays – *i.e.*, not just Netflix trays – must be sleeved. Tr.

² This figure is higher than the Christensen estimate that 77 percent of Netflix returns were processed manually. A reason for the difference is that some pieces were manually culled, but then processed in an automated fashion.

³ See *e.g.*, cell P65 in FE Return Scenario 3.xls. worksheet "Orlando".

⁴ According to Belair, other trays are sometimes used. Tr. 9/1664.

1 9/1687. This statement, while correct, misses the point. While many other trays
2 are sleeved by the Postal Service, trays containing pieces that have been sorted
3 on automation do not require the high-cost processing in the "Facing and
4 Sleaving" operation (also referred to by Christensen as "Traying and Sleaving"
5 operation) that Christensen observed for Netflix and Blockbuster. FE Return
6 Scenario v.xls, "Misc." **[BEGIN USPS PROPRIETARY]**

7

8

[END USPS

9 **PROPRIETARY]** USPS Institutional Response to GFL/USPS-176.

10 Unlike trays of Netflix returns, letters that are sorted on automation are
11 faced and trayed in the DBCS operation. Because of this, sleeving trays of
12 letters that have been processed on automation is much less expensive than the
13 Netflix "Facing and Sleaving" operation. For example, the MODS 17 1SCAN cost
14 pool, which "contains costs for [among other activities]...Automatic Tray
15 Sleaving, or Scan-Where-You-Band equipment" was only 0.05 cents per piece
16 for under-one-ounce First-Class Mail single-piece letters in FY 2005. Docket No.
17 R2006-1, McCrery Response to PB/USPS-T22-9; FE Return Scenario 1 v.xls,
18 "SP VV Costs".

19 Second, witness Belair suggested that culling costs are small because the
20 costs for this activity are fixed. Tr. 9/1685-8. Belair offers no study to support
21 this claim, and it is completely at odds with findings over many years by the
22 Postal Service and PRC that mail processing costs do vary substantially with
23 volume. Furthermore, as I noted in my direct testimony (at page 5), in

1 developing its cost estimates, Christensen used the Postal Service's lower
2 estimates of the variability of mail processing costs. Using the PRC's higher
3 variabilities would increase the estimated cost of the Netflix return process above
4 that estimated by Christensen.

5 Third, during cross-examination, witness Seanor discussed the value of
6 manual culling "by the carriers and the collection units out in the field" to plants.
7 See, e.g., Tr. 10/1789 (Seanor). Two clarifications are necessary. Culling by the
8 carrier and the collection units is atypical. According to Christensen's web-based
9 survey to which 348 facilities responded, only fifteen percent of responses
10 indicated that culling is performed at stations/branches, i.e., prior to the
11 mailpieces arriving at processing facilities. GFL1027, 1058. **[BEGIN USPS**
12 **PROPRIETARY]**

13

14 **[END USPS PROPRIETARY]** Also, while the cost of culling at
15 collection units may not hit witness Seanor's budget because it does not occur at
16 the plant, manual culling is not a free good regardless of where it occurs.

17 **C. Even With All Of Lundahl's Techniques, Automated Letter**
18 **Processing Still Creates More Damage To DVDs Than Does**
19 **Manual Processing.**

20 USPS witness Robert Lundahl maintains in his testimony (USPS-T-4) that
21 various techniques researched by his company, ATR, for Netflix can make DVDs
22 much more resistant to breakage in automated letter processing. Mr. Lundahl
23 portrays GameFly as neglectful or irresponsible in not adopting the same
24 techniques. USPS-T-4, at 2.

1 Mr. Lundahl's testimony is beside the point. I am informed by counsel that
2 the question is not whether Mr. Lundahl's techniques can *reduce* the rate of DVD
3 breakage from automated letter processing. The question is whether the
4 resulting reduction in breakage is great enough to *eliminate* (or come close to
5 eliminating) the difference in breakage rates between automated letter
6 processing and manual processing. If the former method of processing still
7 breaks substantially more DVDs than the latter, then the former is still an inferior
8 form of mail service for DVDs than the latter, and the factual foundation for
9 GameFly's discrimination claim remains. In fact, Mr. Lundahl has *conceded* that
10 his techniques, even if implemented fully, will eliminate only a fraction of the
11 breakage of DVDs caused by automated letter processing.

12 First, the record in this case makes clear that DVDs suffer higher
13 breakage rates when forced to undergo automated letter processing than when
14 they bypass automated letter processing. This is a *ceteris paribus* or incremental
15 effect: the heightened breakage rates from automated letter processing are *in*
16 *addition to* the background level of breakage that occurs from other causes. That
17 is why DVD rental companies—not just GameFly—have sought to minimize the
18 exposure of their return mail to automated letter processing.⁵

⁵ See Tr. 5/890 (Hodess) (describing GameFly observations); GFL773 (the Round-Trip Disc Mail (RDM) Work Group Minutes: 26 September 2005) ("Disc damage is now becoming the number one issue with RDM [round-trip DVD mail] mailers as more mail is processed on equipment."); GFL1335 (slide from USPS PowerPoint Presentation titled "LSS Project Re-Measure: Return DVD Handling & Damage Reduction" and dated February 24, 2009) ("Automated USPS handling procedures cause a perceived amount of damage to mailers' DVD products causing a large return volume to be processed manually at the mailers' request."); GFL126 (document titled "Netflix and the Round-Trip Disk Mail (RDM) Project") (discussing engineering tests of disk breakage); GFL216 (reporting disk

1 Witness Lundahl's testimony confirms that automated processing breaks
 2 more discs than manual processing. The following excerpts from his testimony
 3 and ATR studies make clear that the primary cause of disk breakage is
 4 automated letter processing:

breakage rates from tests); GFL 523 (USPS letter citing Netflix's reluctance to adopt a USPS-designed mailer due to its belief that "processing of their mailers on the AFCS is causing an increase in disk damage" and explaining that Netflix prefers that its "disks are culled at the AFCS and processed manually"); GFL 525 [CONFIDENTIAL](Attachment to previously cited letter detailing the ways that automation processing damages discs); GFL768 ("[T]he overriding issue for Netflix concerned disc damage on the AFCS"); GFL10 (internal USPS memorandum noting that "damaged (broken) disks during processing and/or delivery" were "common problems" reported by Netflix); GFL 771 ("[Blockbuster] expressed concern about damage to the discs in the current Blockbuster design. [Blockbuster] reported an overall damage rate of 3% with the newer envelope designs."); GFL374 (stating, in response to testing of a DVD mailer's proposed envelope design, that "engineering's ongoing experience with the poor machineability of this design indicates that the [DVD mailer's] mailer will sustain damage . . . during processing."); GFL7293 (same); GFL7295 (same); GFL 1485 (October 9, 2005 email from [BEGIN USPS PROPRIETARY]

[END USPS PROPRIETARY] stating that "[c]urrently the only viable solution to scrap reduction is the culling of our returns prior to getting into the automation stream."); Joint Statement at ¶ 102 (noting that Blockbuster formally asked the Postal Service to "immediately implement manual culling and processing of inbound mail pieces for Blockbuster Online" to mitigate the "persistent damage to mailer contents and longer mail duration rates as judged against comparable mailings."); USPS Response to GFL/USPS-82(b) (indicating that Netflix told the USPS that the avoidance of automated processing can reduce breakage rates "with no change in the physical attributes of the DVD, its handling by the customers and employees of the DVD rental company, and the average number of mailing cycles per DVD"); USPS Response to GFL/USPS-82(c) (responding affirmatively when asked if any DVD mailers had "requested that their inbound mailers be handled manually *to reduce breakage rates*" (emphasis added))

- 1 • "DVDs face risks of damage from various types of processing
2 depending, for example, upon the mechanical twists, impacts and
3 turns a particular piece of equipment imparts." USPS-T-4 at 1.
- 4 • "In the end, the vast majority of standard definition DVD failures are
5 caused by the repeated bending stresses from mail handling
6 equipment." USPS-T-4 at 4.
- 7 • **[BEGIN USPS PROPRIETARY]**

8

9

[END USPS PROPRIETARY]

10 Although Mr. Lundahl declined to compare the breakage resulting from
11 automated letter and manual processing during cross-examination because he
12 has not studied manual processing, the conclusion that automated processing
13 causes more damage flows logically from his testimony: (1) breakage results
14 from flexing/bending; and (2) manual processing involves less flexing/bending
15 than automated letter processing. USPS-T-4 at 13; Tr. 7/1349, 1356.⁶ The
16 reduced breakage resulting from avoiding automated letter processing is also
17 confirmed by **[BEGIN USPS PROPRIETARY]**

18

19

[END USPS PROPRIETARY]

⁶ I am unaware of any evidence that manual processing involves any significant amount of flexing/bending. To the extent that the stacking of trays could stress disks, this is minimized by the containerization methods specified in National SOPs for the processing of Netflix return mailpieces.

1 Second, Mr. Lundahl conceded during cross-examination that his
2 techniques reduce, but do not eliminate, the increased disk breakage that results
3 from automated letter processing. Tr. 7/1354. He stated that Netflix's adoption
4 of most of the ATR recommendations increased the number of turns (times) that
5 a Netflix DVD could be mailed before breaking by about fifty percent. Tr. 7/1370.
6 A 50 percent increase in the average number of mailings before breakage
7 renders a disk unusable is equivalent to a reduction in per-mailing breakage
8 rates of only about 33 percent.⁷ While such a reduction is certainly beneficial to
9 Netflix, it does not come close to eliminating the breakage resulting from
10 automated letter processing. Mr. Lundahl's admission on this point is confirmed
11 by the apparent failure of Netflix, even after adopting many of ATR's
12 recommendation, to rescind its request for manual processing by the Postal
13 Service. Tr. 7/1328 (Response to GFL/USPS-T4-18); Tr. 7/1373-4. Even in
14 2008 and 2009, after the supposed adoption of Mr. Lundahl's damage-avoidance
15 techniques by Netflix, the company continued issuing its weekly report cards to
16 the Postal Service—along with frequent admonitions to keep breakage down.
17 GameFly Memorandum Summarizing Documentary Evidence (April 12, 2010),
18 ¶¶ 72; Tr. 4/509-512 (Netflix weekly scrap reports).⁸

⁷ The ratio of the average disk life before breakage is the reciprocal of the ratio of the average rate of breakage per turn. For example, increasing the number of times that a DVD can be mailed before it breaks from 10 to 15 increases the life of the DVD (in terms of the average number of mailings before breakage) by 50 percent. This is equivalent to a reduction in the average *per-trip* breakage rate from 10% to 6.7% percent, a reduction of 33 percent.

⁸ For the above reasons, Mr. Lundahl's portrayal of GameFly as neglectful or irresponsible in failing to engineer its DVDs according to ATR recommendations (USPS-T-4 at 2) would be completely irrelevant to this proceeding even if true.

1 **D. The Terms Of The May 2010 "Offer" From USPS Counsel**
2 **Would Not Give GameFly Service Comparable To What Netflix**
3 **Receives.**

4 Witnesses Barranca and Seanor argue that a May 17, 2010, letter from
5 Andrew German, a Postal Service attorney, to David Levy, an attorney for
6 GameFly, offers GameFly the same treatment as Netflix:

7 GameFly's contention that the Postal Service refuses to provide the
8 mail processing that Netflix' return DVD mail receives is
9 contradicted by the Postal Service' representation that it would
10 provide such processing, if GameFly meets conditions that would
11 place it on a comparable footing with Netflix. The Postal Service
12 has offered to treat GameFly the same as Netflix under certain
13 conditions. In a letter to GameFly's counsel dated May 12, 2010,
14 Andrew German outlined the conditions upon which GameFly
15 would be provided manual processing for return DVD mail
16 comparable to the processing provided to Netflix at the First-Class
17 Mail letter rate.

18 USPS-T-1 at 31-32 (Barranca); USPS-T-3 (Seanor) at 21.

But is also unfounded. GameFly does not manufacture DVDs or have the buying power to influence DVD production processes. See, e.g., GameFly response to USPS/GFL-29.

Furthermore, the use of machinable letter rates will be a non-starter for GameFly until the Postal Service's offers Netflix-like levels of manual processing to GameFly return mailers sent at automation letter rates. Even with full implementation of Mr. Lundahl's techniques, the resulting DVD breakage rates would still be unacceptably high. That is what has forced GameFly to use mailers with protective inserts, and to mail them as *flats*. Tr. 5/890, 905, 940-941 (Hodess).

Despite the more limited range of disc-protection options that the Postal Service's actions have allowed GameFly, the company has limited its overall rates of disc breakage by mailing its pieces as two-ounce flats—at much higher postage rates.

1 This claim is unfounded. First, as GameFly and I have previously
2 explained, the offer does not include any commitment that GameFly will receive
3 the same avoidance of automated letter processing. Tr. 4/654-5; Tr. 5/948, 954-
4 5. To the contrary, Mr. German's letter emphasizes that the Postal Service's
5 offer, if accepted by GameFly, would continue to leave the method of processing
6 GameFly mailers to local discretion. The letter does not commit to instructing the
7 field to cull GameFly with the same frequency that it culls Netflix, even though
8 USPS witness Seanor suggests that a directive is necessary to ensure the same
9 level of culling for GameFly pieces. German Letter at 1; Tr. 10/1811, 1814,
10 1818-9 (Seanor); Tr. 5/899 (Hodess).⁹

11 These are crucial omissions. The actual percentage of GameFly return
12 mailers that would be diverted from the automation mailstream, if mailed as
13 letters, is a crucial issue, since the Postal Service's offer would require GameFly
14 to abandon the protection currently offered by its use of flats processing and
15 protective inserts. And the Postal Service's performance to date in providing
16 manual culling to letter-shaped DVD mailers other than Netflix gives no grounds
17 for optimism:

- 18 • "77 percent of the Netflix returning DVD envelopes are processed
19 manually compared to Blockbuster's almost 35 percent. Just over
20 62 percent of Blockbuster's returning DVDs are processed on some
21 form of BCS equipment." USPS Mail Characteristics Study of DVD-

⁹ Seanor stated that the instruction would not need to come from Headquarters, but to achieve Netflix-like processing, clearly would require a nationwide commitment.

1 by-Mail, Survey Instruments, Methodologies, and Results,
2 Christensen Associates, November 2006 (GFL1036).

- 3 • “The OIG did not observe any other PRM mailer’s two-way DVD
4 return mailpieces being manually processed as much as this
5 specific mailer’s pieces were manually processed.” USPS Office of
6 Inspector General, Audit Report No. MS-AR-08-001, *Review of*
7 *Postal Service First-Class Permit Reply Mail* (November 8, 2007)
8 (GFL692).¹⁰
- 9 • During cross-examination, USPS witness Seanor confirmed the
10 culling pecking order – postal employees cull Netflix the most,
11 “tend” to cull Blockbuster at the same time, and (as far as he was
12 aware) don’t regularly cull mail sent by other letter mailers. Tr.
13 10/1821.

14 Whether these disparities are truly the result of local discretion, as the
15 Postal Service contends, or whether local discretion is just a fig leaf for a
16 headquarters decision to treat Netflix DVD mailers better than the DVD mailers of
17 other rental companies, ultimately does not matter. In either case, an offer that
18 reserves the ultimate choice of processing method to the Postal Service’s
19 discretion, rather than committing to a specific and enforceable minimum level of
20 manual processing, is just a warmed-over version of the status quo.

¹⁰ The DVD rental company whose return mailpieces received the most manual processing was Netflix. Joint Statement of Undisputed and Disputed Facts (July 20, 2009), Paragraph 84.

1 Finally, two of the preconditions that the Postal Service would require
2 GameFly to satisfy in exchange for an empty and unenforceable service
3 commitment would impose additional costs on GameFly for no legitimate reason.
4 Specifically, the Postal Service's offer is conditioned on GameFly's commitment
5 to:

- 6 • Take delivery of its mail via caller service at approximately 130
7 locations (a number much larger than GameFly's current number of
8 pickup points).
- 9 • Enter outbound pieces significantly deeper into the mail stream.

10 Witness Seanor asserts that these terms and conditions specified in the May 17
11 letter from Andrew German to David Levy for manual culling of GameFly return
12 pieces are reasonable. USPS-T-3 at 21. In fact, they are not.

13 With respect to the number of mail pickup points, USPS witness Seanor
14 acknowledges that "the positive impact on the outgoing operations from culling
15 Netflix pieces . . . could still be attained regardless of the number of pickup
16 points." Seanor answer to GFL/USPS-T3-27 (Tr. 10/1773). While Mr. Seanor
17 contends that a much small number of pickup points would cause "the Postal
18 Service [to] begin to assume transportation costs which are currently avoided by
19 the number of pickup points being used," these transportation costs are small. In
20 FY 2009, the average transportation cost of a Single-Piece First-Class Mail Letter
21 was only about a penny. FY 2009 Cost Segments and Components and
22 Revenue, Pieces, and Weight Reports. Container loading/unloading costs are

1 also quite small on a per piece basis, as Mr. Seanor admitted. Tr. 10/1811.
2 Consistent with his admission, the Standard Mail Letter destination entry cost
3 avoidance model estimates that avoiding all container handlings at intermediate
4 facilities through DDU entry only saved 10 cents per pound, *less than one cent*
5 *for an under-one-ounce letter*, in FY 2009. Docket No. ACR2009, USPS-FY09-
6 13, STD DEST ENT LETTERS.xls, "Summary."

7 With respect to entering outbound mailers deeper into the Postal Service
8 network, Mr. Belair, with whose testimony Seanor agrees, states that outbound
9 letters containing DVDs are processed on automation. USPS-T-2 at 3; USPS-T-
10 3 at 1. Assuming that outbound letters containing DVDs are processed similarly
11 to other letters (*i.e.*, on automation), there is no reason for any special entry
12 practices.

13 The absence of any legitimate need for these terms and conditions is
14 underscored by the Postal Service's willingness to offer Netflix manual
15 processing when the number of Netflix mail entry and pickup points was only a
16 fraction of the current number. A September 12, 2002 letter from John Rapp
17 indicates that Netflix at the time had only "twelve hub distribution centers around
18 the country with plans to establish eight additional hub sites by the end of the
19 year." GFL10. Yet, manual processing of Netflix mail was being reported around
20 this time or shortly thereafter. See GFL4 (timeline noting that by June 24, 2002,
21 many USPS sites were "handling [Netflix] return mailers manually (culling from
22 AFCS)"); GFL7-9 (detailing manual processing by September 2003 even though
23 the plants in question were not receiving large volumes of Netflix mail); GFL35

1 [BEGIN USPS PROPRIETARY]

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[END USPS PROPRIETARY];

4 GFL428 (July 17, 2003 email reading, "It seems almost everyone is processing
5 this [Netflix] mail manually.")

6 **III. THE POSTAL SERVICE HAS FAILED TO OFFER ANY RATIONAL**
7 **JUSTIFICATION FOR DISCRIMINATING BETWEEN NETFLIX AND**
8 **GAMEFLY ON GROUNDS OF EFFICIENCY.**

9 Despite having no studies to support their position,¹¹ Postal Service
10 witnesses Seanor and Belair argue that the Postal Service manually culls Netflix
11 returns because culling is a highly efficient process. See, e.g., USPS-T-2 (Belair)
12 at 11, USPS-T-3 (Seanor) at 7.¹² As detailed below, this is crude revisionism.

¹¹ "I have not prepared any studies quantifying the cost savings, and I am not aware of any studies prepared by anybody else." Tr. 9/1626 (Belair); also Tr. 9/1627, 1634 (Belair). The lack of analysis to support their positions was perhaps best illustrated by the following colloquy (Tr. 9/1691) during his cross examination:

Q Other than the Christenson Study, which is in the record, you don't have any personal knowledge of what the costs of processing Netflix are?

A Not the exact cost, sir.

Q Not even the approximate costs?

A No.

Q Have you seen any studies quantifying the net cost savings from culling Netflix mail?

A I have not, sir.

Q Have you seen any studies quantifying the value of culling Netflix mail from any service standards?

A Any studies, no.

¹² It is worth noting that Seanor admits that the purpose of the traying and

1 The Postal Service's own documents confirm that the desire of Netflix for
 2 reduced disk breakage, as well as the Postal Service's own desire to avoid jams
 3 and other processing problems¹³ were—and continue to be—the main reason for
 4 the Postal Service's special treatment of Netflix DVD return mailers.

5 The notion that this custom manual treatment is a low-cost process is, as
 6 the Postal Service's witnesses admitted, unsupported by any study or data. To
 7 the contrary, using the Christensen model, I show below that manual culling and
 8 related special handling of DVD return mailers is on balance **[BEGIN USPS**
 9 **PROPRIETARY]** **[END USPS PROPRIETARY]** as costly as
 10 automated letter processing.

containerization-related aspects of the Netflix process is to reduce mailpiece damage, not to advance internal operation goals: "My understanding is that the guidelines were issued to decrease the possibility of mailpiece damage, due to the way letter trays or flats trays (tubs) were stacked without the appropriate tray sleeve or lid." USPS-T-3 at 10.

¹³ The propensity of Netflix returns to cause jams and other processing problems stems from another aspect of the special treatment the Postal Service provides to Netflix: allowing Netflix to pay machinable letter rates on its returns. Specifically, in November 2007, the OIG found that, regardless of Domestic Mail Manual requirements, Netflix return mailpieces in practice "are not machinable." The OIG recommended that the "Acting Vice President, Pricing and Classification . . . [c]oordinate with the Vice President, Engineering, on a Domestic Mail Manual (DMM) revision to the Nonmachinable Criteria DMM, Section 101.1.2 in order to identify additional nonmachinable characteristics and physical standards for First-Class letter-size mail with the same design and general characteristics of the [Netflix] mailpiece." GFL685, 696. Three years later, the Postal Service has not yet done so. "I don't think anything has been done as a result of that audit." Tr. 10/1885 (Barranca).

1 **A. The Postal Service's Main Reasons For Manual Processing Of**
 2 **Netflix DVDs Are To Reduce DVD Breakage, Jams, and Other**
 3 **Processing Problems.**

4 As documented in studies performed by the Postal Service's Office of
 5 Inspector General (USPS OIG) and on behalf of the Postal Service, Postal
 6 Service SOPs, and other USPS documents, the primary purposes of the special
 7 processing provided by the Postal Service to Netflix are to minimize DVD
 8 breakage, jams, and other processing problems.¹⁴ Below are relevant excerpts
 9 that document this point and make clear that Netflix returns do not process well
 10 on automation.¹⁵

11 **1. November 8, 2007 OIG Report – *Review of First-Class***
 12 ***Permit Reply Mail***

- 13 • “[E]mployees manually process approximately 70 percent of the
 14 approved First-Class two-way DVD return mailpieces from one DVD
 15 rental company because these mailpieces sustain damage, jam
 16 equipment and cause missorts during automated processing.”
 17 GFL685.¹⁶

¹⁴ According to Belair, Netflix requested one aspect of the special processing that it receives – the sleeving of its trays prior to dispatch – to reduce loss (theft) as well as breakage. USPS-T-2 at 19.

¹⁵ As an aside, I have previously explained that the Christensen model likely understates the cost resulting from Netflix pieces jamming postal equipment. GFL-T-1 at 5-6; Response to PR/GFL-T1-1. This position was strengthened by the testimony of witness Seanor, who pointed out during cross examination that (1) Netflix returns have a tendency to jam in the Advanced Facer Cancellor System (“AFCS”); and (2) jam rates have a significant effect on overall productivity. Tr. 10/1797-1798.

¹⁶ The one DVD rental company is Netflix. Joint Statement of Undisputed and Disputed Facts (July 20, 2009), Paragraph 84.

- 1 • “[A]pproximately 70 percent of one DVD rental company’s approved
2 First-Class two-way return mailpieces are manually processed. The
3 Postal Service manually processes such a significant number of these
4 mailpieces because of the nonmachinability of the envelope design.
5 This design uses a floppy leading edge, which often sustains damage,
6 causes jams in equipment, and missorts during automated
7 processing.” GFL690.
- 8 • “[O]perations personnel told the OIG that the return mailpieces were
9 manually pulled to avoid damaging the mailpiece, jamming the mail
10 processing equipment, and missorting during processing.” GFL692.
- 11 • “Engineering’s testing of this and similar mailpieces has consistently
12 shown that this type of mailpiece is not machinable. Engineering has
13 noted that mailpieces with this design ‘will sustain damage, cause
14 jams, and be missorted.’” GFL695-96.

15 **2. Letters From USPS Engineering Stating that Mailpiece**
16 **Designs Identical or Substantially Similar to the Netflix**
17 **Mail Piece Are Not Machinable**

- 18 • “This mail piece design is being processed everyday throughout the
19 Postal system with very poor results. Engineering’s ongoing
20 experience with the poor machineability of this design indicates that
21 the ... mailer will sustain damage, cause jams and be mis-sorted
22 during processing. This will cause operations personnel to remove the
23 mailers from the automation mail stream and handle them manually.”

1 GFL7287. (The same quotation also appears at GFL374, GFL7278-9,
2 GFL7293, 7295 and (in part) Tr. 4/142 (USPS answer to GFL/USPS-
3 122).¹⁷)

4 3. Christensen Reports, August 2006 and November 2006

- 5 • "Often, employees cull the easily identifiable bright colored envelopes
6 from the automated mail stream. Some supervisors in mail processing
7 facilities believe these pieces will not run correctly on automation
8 machinery based on their experiences working with this equipment, or
9 feel that the risk of damage, missorts, or rejects justifies their removal
10 from the automated processing stream." GFL1025.

- 11 • "Already during the preliminary site visits, Christensen Associates staff
12 were made aware of the deficiencies in the design of the Netflix return
13 envelope. Many more complaints were heard in plants about the
14 Netflix return envelope than the issues with the slot and sticker on the
15 outbound envelope. By the time the Netflix envelope has made its way
16 to the subscriber and back to the plant, the envelope has aged to the
17 point that a flap has developed on the lead edge of the piece (due to
18 the fact that the DVD is on the trailing edge). This flap tends to fold
19 over when processed on the machinery, causing damage, jams,
20 missorts, and rejects." GFL935.

¹⁷ The mail piece design that is being processed everyday throughout the Postal system with very poor results is the Netflix mail piece design. USPS Institutional Response to GFL/USPS-122.

- 1 • “Larger design issues, such as the flap on the lead edge of the Netflix
2 envelopes, have led many plants to abandon automated processing of
3 DVDs due to the increased risk of jams, missorts, rejects, and
4 damage.” GFL936.
- 5 • “[T]he complaint heard more than any other was over the long flap on
6 the lead edge of the Netflix return envelope....On the return trip the
7 leading flap often becomes bent, causing damage, rejects, and
8 missorts on automation equipment.” GFL1025.
- 9 • “Thirty-two percent of respondents who manually process Netflix
10 return DVDs indicated that Netflix has asked them to manually process
11 its return DVD envelopes. Respondents again indicated that torn
12 envelopes are the most prevalent form of damage to DVD-by-mail
13 pieces on the return trip from the subscriber to the rental company.”
14 GFL1029.

15 **4. Comments From Site Personnel Quoted in Christensen**
16 **Reports**

- 17 • “We receive Netflix from [another facility] containerized in large letter
18 trays. We then sort these manually to the surrounding Post Offices.
19 There seems to be some jams and some damage if we process these
20 in automation. To protect all customers involved from damage to the
21 DVD manual sorting seems to be the best option.” GFL1029.

- 1 • “Netflix return envelopes sort poorly due to design. The leading edge
2 of the mailpiece lacks any rigidity, and therefore can be easily
3 missorted by the DBCS.” GFL1030.
- 4 • “Very few damaged Blockbuster envelopes – the envelopes are
5 designed more effectively than Netflix.” GFL1029.
- 6 • “Blockbuster’s mailpiece design is far superior when compared to
7 Netflix. Since the envelope size is the same size as the DVD, damage
8 is not an issue.” GFL1029.
- 9 • “[Blockbuster] envelopes have a sturdy firmer edge, more compacted-
10 sort better on automation machine. Do not see as many damaged (if
11 any) pieces as NetFlix which get damaged due to floppy edge getting
12 caught in machinery.” GFL1030.
- 13 • “At this time we are pulling return Netflix out of the automated mail
14 stream to manual operations. Packaging is too large for the DVD
15 inside. Blockbuster, for instance, has an envelope appropriately sized
16 to fit the DVD inside. Therefore, the envelopes run well in
17 automation.” GFL1030.
- 18 • “Blockbuster DVDs envelopes are a better automation compatible mail
19 piece than Netflix.” GFL1029.

- 1 • “Blockbuster DVDs are sorted on the DBCS, unlike Netflix [which] is
2 pulled out before going through the machine. Blockbuster’s return
3 envelope is much better than Netflix’s.” GFL928.
- 4 • “Blockbuster DVDs have an envelope which is a better design than
5 Netflix so very few are damaged. Blockbuster DVDs run well on
6 automation.” GFL929.

7 **5. Postal Service Standard Operating Procedures**

8 **a. February 15, 2005 National Standard Operating**
9 **Procedure**

- 10 • “Netflix believes stacking weight to be a possible contributor to DVD
11 damage. Upon receipt of this letter, please ensure consistent
12 application of the following policy:
 - 13 ○ Netflix return mail placed in EMM trays
 - 14
 - 15 ○ Netflix EMM trays placed in General Purpose Mail Containers
16 (GPMCs)

17 The added support of the EMM trays and the GPMC center shelf will
18 minimize the possibility of damage to Netflix products.” GFL520.

19 **b. May 9, 2005 National Standard Operating**
20 **Procedure**

- 21 • “We have found that low product damage rates are a direct result of full
22 compliance with policies previously issued from headquarters....The
23 required Mail Transport Equipment (MTE) for DVD return mailings is

1 the Extended Managed Mail (EMM) letter tray. The EMM tray's higher
 2 profile sidewalls enable the tray to be completely filled without the
 3 product exceeding the tray height, thus protecting the mail piece from
 4 damage....Regardless of the equipment type, DVD return trays are
 5 never to be stacked more than four layers high." GFL521.

6 **c. March 1, 2005 Pacific Area and March 3, 2005**
 7 **Eastern Area Standard Operating Procedure**¹⁸

- 8 • "To minimize jams and DVD breakage, 775 Flat tubs...are to be set up
 9 adjacent to every piece of equipment...which may be used to initially
 10 cull Netflix returns....As Netflix believes that stacking weight is also a
 11 contributor to damaged DVDs, Mail Handlers will sleeve the Extended
 12 Managed Mail Letter Trays (EMM) and stack them into General
 13 Purpose Mail Containers (GPMCs)...." GFL527-528, 536.

14 **6. Other documents**

15 GameFly has cited many other Postal Service documents—including
 16 SOP-like pronouncements issued by District and P&DC officials, internal emails,
 17 and other candid assessments by Postal Service managers—that confirm the
 18 central importance of minimizing DVD breakage and jams as the reason for

¹⁸ The Eastern Area Standard Operating Procedure has not been rescinded. Institutional Response to GFL/USPS-106 (Tr. 10/1893-1894). As discussed above, the Postal Service now disputes that it was ever issued. Also, while the Pacific Area Standard Operating Procedure has been rescinded, the process remains the same. *Id.* The current status of these documents, however, has no effect on the rationale they state for culling Netflix pieces.

1 manual culling and special handling of Netflix DVDs. GameFly Memorandum
 2 Summarizing Documentary Evidence (April 12, 2010), ¶¶ 57-64 (citing Postal
 3 Service documents).

4 **B. There Is No Rational Cost Or Service Justification For The**
 5 **Preference That Netflix Receives.**

6 **1. The Postal Service Has Already Conceded This.**

7 As explained above, the main reasons for the culling of Netflix pieces are to
 8 reduce DVD breakage, jams, and other processing problems, not because culling
 9 is a low-cost process. [BEGIN USPS PROPRIETARY]

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[END USPS PROPRIETARY]¹⁹

17 The Postal Service has also conceded that meeting service standards is
 18 not a major reason for manually culling Netflix returns:

¹⁹ The incremental cost of the special treatment Netflix receives is properly calculated in comparison to the cost of a fully machinable Netflix return that is sorted on letter automation. This is because, consistent with the OIG's recommendation (which the Postal Service still has not acted upon three years later), Netflix returns should only be eligible for the 44-cent rate that it pays if truly machinable. GFL696. Allowing Netflix to mail nonmachinable pieces at machinable letter rates is part of the special treatment Netflix receives.

1 The Postal Service disagrees with [the] statement that [a large
2 portion of Netflix mail must be handled manually to meet service
3 standards].

4 USPS institutional answer to GFL/USPS-67.

5 **2. The Modeled Cost Of The Netflix Return Process Is**
6 **Much Higher Than Automated Letter Processing.**

7 The Christensen Associates cost models confirm that these admissions
8 are correct. As detailed in Appendix A, Table A-3 (below), I estimated the cost of
9 automated processing of Netflix returns (assuming machinability) by modifying
10 the mail flows in the Christensen Associates Netflix returns cost model to reflect
11 this scenario. In performing this analysis, I used four assumptions about the
12 automated letter processing mail flow.²⁰

- 13 • Processed on Advanced Facer Cancellor System (AFCS)
- 14 • Outgoing sort on Delivery Bar Code Sorter (DBCS)
- 15 • Incoming sort on DBCS²¹
- 16 • Manual sortation of rejects

17 For consistency with the Christensen method, I used older DBCS
18 read/accept rates – those in the Netflix outbound cost model that are identified as
19 being from Docket No. R2005-1, USPS-LR-K-68 – in determining the number of

²⁰ No delivery point sequencing is necessary for Netflix returns. Tr. 9/1682.

²¹ To the extent that there is a Netflix separation in the Outgoing sort scheme, incoming sortation would be avoided (further reducing the cost of this scenario).

1 pieces that are not accepted by the machine and thus require manual sortation.
2 This overstates manual sorting costs because those accept rates were based
3 upon 1999 data and substantially understated. See Docket No. MC2007-1 Op.,
4 ¶¶ 1004-1005.²²

5 As Table 2 below shows, the average cost of the Postal Service's current
6 methods of processing Netflix returns is **[BEGIN USPS PROPRIETARY]**
7 **[END]**
8 **USPS PROPRIETARY]**²³
9

²² Also, note that the read/accept rates used to estimate the cost of Netflix outbound mailpieces were also higher than the read/accept rates that I used in my calculations. Netflix Model (FE Outbound v.xls), worksheet "DBCS DPS Cost", columns N and Q.

²³ During cross-examination, Belair criticized the Christensen study because "[i]t did not take into account the actual culling at a customer service operation, being that it did not do a cost average of that process." Tr. 9/1716. Mr. Belair appears to be referring to Christensen's use of the same unit culling cost for pieces that were culled at the delivery unit and at the dock of the processing facility. This concern is of minimal importance. As explained above, the majority of culling occurs in processing operations, not customer service operations. Also, it seems unlikely that the manual culling productivity at stations/branches would be substantially different from that at processing facilities.

1
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[BEGIN USPS PROPRIETARY (NUMBERS ONLY)]

Table 2. Modeled Cost of Netflix Returns

Category	Modeled Cost (Cents)	Netflix Return Process Cost Premium
Machinable / Processed on Automation		
Current Netflix Returns Process		
Christensen Scenario 2		
Christensen Scenario 1		
Christensen Scenario 3		

3
4

Source: Appendix A, Table A-1

[END USPS PROPRIETARY (NUMBERS ONLY)]

5

CONCLUSION

6 As explained above, the record clearly shows four important points: (1) the
7 Postal Service provides special processing for the vast majority of Netflix returns
8 at machinable letter rates; (2) the special processing, which is much more than
9 just a single cull, is costly; (3) the purpose of the special processing is to reduce
10 DVD breakage and processing problems that result from the poor design of
11 Netflix's return mail piece; and (4) the Postal Service has not offered the same
12 special processing to GameFly at machinable letter rates.

13

1 COMMISSIONER BLAIR: We received two
2 requests for oral cross-examination of Witness Glick
3 from the Postal Service and from the public
4 representative. Does any other participant wish to
5 cross-examine Witness Glick?

6 (No response.)

7 COMMISSIONER BLAIR: If not, Postal counsel,
8 please begin your cross-examination.

9 CROSS-EXAMINATION

10 BY MR. MECONE:

11 Q On page 20 of your testimony, you make a
12 reference to the desire of Netflix for reduced disk
13 breakage as being the main reason for the Postal
14 Service's special treatment of Netflix DVD return
15 mailers.

16 A Can you refer me to a line?

17 Q Sure. Lines 1 and 2, or actually 1 through
18 4.

19 A Uh-huh. Okay. I mean that as one of the
20 reasons.

21 Q Okay. And then on pages 21 through 27 after
22 that as part of that same section your testimony cites
23 about 22 excerpts and 26 documents. You also cite to
24 GameFly's memorandum, which includes over 50
25 additional documents.

1 A Correct.

2 Q Do any of the documents that you cited refer
3 to a desire of Netflix for reduced disk breakage as a
4 reason for the Postal Service's method of processing
5 Netflix DVD mailers?

6 A I'll refer you to line 10 and 11 on page 26
7 that refers to the purpose of the February 15, 2005,
8 standard operating procedure. It says that Netflix
9 believes stacking weight to be a possible contributor
10 to DVD damage, so my interpretation is clearly that
11 this is in response to Netflix's desire for that to
12 stop occurring.

13 There's also similarly on page 27, lines 10
14 through 11, there's a similar point that as Netflix
15 believes the stackable weight is also a contributor to
16 damaged DVDs, mail handlers will sleeve the extended
17 managed mail letter trays and stack them into general
18 purpose mail containers.

19 I'd also note that there's lots of
20 references throughout of Netflix specifically
21 requesting certain processing to reduce damages.

22 Q Did you cite any of those other documents
23 that you just mentioned besides the two you mentioned?

24 A Well, I clearly in my direct testimony have
25 mentioned the process specifically requested by

1 Netflix and laid that out in response to the public
2 representative.

3 I also think that I have reviewed the
4 documents in the memorandum, and I believe that some
5 of those are cited in the memorandum.

6 Q In response to my earlier quoting of your
7 rebuttal testimony, you corrected me and said that the
8 desire of Netflix to reduce disk breakage was a reason
9 and not the main reason.

10 A I didn't say that. I said a reason.

11 Q Sorry. Could you repeat that? You said
12 it's a reason?

13 A I said it is a reason. I did not
14 specifically say it was not the main reason. I
15 believe that I've laid out two reasons on that page
16 that you cited. One is reduce disk breakage. The
17 other is the fact that Netflix mail jams and processes
18 poorly.

19 And, as I've noted in the footnote on that
20 page, the reason why that happens is that the Postal
21 Service allows Netflix to mail nonmachinable pieces at
22 machinable letter rates That's something that the
23 Postal Service -- it's a self-imposed wound by the
24 Postal Service.

25 Q Okay. So of the 22 excerpts in your

1 testimony, two of them support the first reason? In
2 your opinion, two of them support that the desire of
3 Netflix to reduce disk breakage is a reason for the
4 Postal Service's treatment of Netflix DVD mailers?

5 A I disagree with your characterization of my
6 statement.

7 Q Okay. Of the 22, how many others support
8 that statement?

9 A Okay. Do you have the specific reference?
10 Why don't I go through line by line?

11 There are certainly other references to the
12 fact that the purpose is to reduce damage. Some of
13 them are more general references to reducing mail
14 piece damage. Some of them are references to reducing
15 damage to Netflix's product, but let's go through it.

16 Q Just to clarify to make this easy, I'm
17 referring to the damage to Netflix products. On page
18 20, you list two reasons as I see it. Correct me if
19 I'm wrong.

20 The desire of Netflix to reduce disk
21 breakage is one reason. The second reason is the
22 Postal Service's own desire to avoid jams. I'm asking
23 about which documents support the first reason.

24 A Okay. Well, let's go. Lines 13 through 17.
25 One, employees manually process approximately 70

1 percent of the approved first class two-way DVD return
2 mail pieces from one DVD rental company because these
3 mail pieces sustain damage.

4 That's not a specific reference to the DVDs
5 being broken, but certainly it's a reference to the
6 pieces sustaining damage.

7 Q Okay.

8 A Okay. Let's go to the next one. This
9 design --

10 COMMISSIONER BLAIR: Can you refer to the
11 page that you're --

12 THE WITNESS: I'm sorry. I apologize. Page
13 21, line 13 through 17.

14 The next quotation is on page 22, lines 1
15 through 7, and I'll refer you specifically to line 5
16 through 7. This design uses a floppy leading edge,
17 which often sustains damage, causes jams in equipment
18 and mis-sorts during automated processing.

19 Again, it's not referring specifically to
20 it's the DVD that's being damaged, but certainly it's
21 being referred to the mail piece that's being damaged.

22 BY MR. MECONE:

23 Q Is it referring to the damage as it affects
24 the equipment? Because I read these two, and both
25 after the portion you've quoted they say jam equipment

1 and cause mis-sorts.

2 A Okay. This design uses a floppy leading
3 edge, which often sustains damage. It's referring to
4 the design that uses a floppy leading edge, which is
5 the mail piece, often sustaining damage.

6 Q Is it referring to the mail piece --

7 A Yes.

8 Q -- or the content? So it's referring to the
9 mail piece?

10 A It is referring to the mail piece, and I
11 think it's clear that these -- I agree with your point
12 that some of them refer more generally to the damaged
13 mail piece. Some of them refer to DVD breakage
14 actually, and some of them refer to damage to the
15 product. Would you like me to go on?

16 Q Just the ones in your opinion that refer to
17 damage to the DVD, the contents of the mail piece.

18 A Okay. Well, I'm going to refer to damage.
19 The next one, line 8 through 10, refers to damage to
20 the mail piece, which I think it's not specific as to
21 whether it's damage to the mail piece or the contents
22 of the mail piece.

23 The next one, from lines 11 through 14 on
24 page 22. Engineering has noted that mail pieces with
25 this design will sustain damage, referring to the mail

1 piece.

2 The next one, lines 18 through 23.
3 Engineering's ongoing experience with the poor
4 machinability of this design indicates that the mailer
5 will sustain damage. That's on line 21 of page 22,
6 and this same quotation refers -- it's template in
7 engineering letters.

8 Q Just so we don't have to go through every
9 one, is there anything that's not actually cited in
10 here that in your opinion supports the statement at
11 the top on page 20 that I read earlier?

12 A I do believe that there are many other
13 documents that have been cited that support this that
14 are not cited in my testimony that have been cited in
15 previous GameFly pleadings. I'd be happy to walk
16 through this binder if you'd like me to.

17 Q First, I guess the ones you started out
18 quoting citations under Section 3(a)(1). Is that
19 correct?

20 A Can you be more specific about what you're
21 asking about?

22 Q Sure. You just read some of the passages of
23 your testimony in Section 3(a)(1) as it's designated
24 in your testimony.

25 A Right. No. 3(a).

1 Q 3(a). Okay. And Section 1 refers to the
2 OIG report. Is that correct?

3 A That is correct.

4 Q Okay. Does the OIG report convey the
5 position of the OIG?

6 A I would assume so.

7 Q Does it convey the position of the Postal
8 Service?

9 A There is a response from the Postal Service
10 in the OIG report. I believe that the OIG report
11 conveys what it believes the case is, so yes. It
12 conveys their view of the facts, but I think it also
13 conveys what the facts are.

14 Q You referred to a response by the Postal
15 Service as part of the OIG report. Other than that
16 portion of the OIG report, is there anything else in
17 the OIG report that reflects the position of the
18 Postal Service?

19 A I mean, I generally agree with the position
20 that the OIG report lays out its position and that it
21 lays out the facts based upon its study of the issue.

22 Q Okay. It's your position that the OIG
23 report is accurate?

24 A There are two major aspects, things that I
25 take out of the OIG report. One is that regardless of

1 what the DMM says, Netflix mail is not machinable.
2 Two, that Netflix receives more manual handling, more
3 special treatment, than any other mailer.

4 Those are the two aspects of the OIG report
5 that I've really focused my review of, and I believe
6 that. I think it's accurate, and I also believe that
7 it's consistent with the other key documents in this
8 case.

9 Q In your review of the OIG report did you
10 find that the OIG made any other findings besides the
11 two you just mentioned?

12 A I can flip through it if you'd like me to.
13 Those are the main ones that I grabbed onto.

14 I mean, another piece is that there's
15 certainly been inconsistent treatment of DVD mailers
16 when it comes to mail piece design in that there have
17 been other mailers with a similar design to Netflix
18 that have not been approved for machinable letter
19 rates. I think that would be the other finding that I
20 thought was a key point.

21 Q What was the purpose of the OIG report?

22 A Why don't we go grab that? I don't have
23 anything to add to the purpose of that report other
24 than what they've stated. Would you like me to read
25 it?

1 Q Besides what is on the document, you have no
2 other knowledge about what the purpose of the report
3 was?

4 A Not off the top of my head.

5 Q If it's not off the top of your head, is
6 there another way to refresh your memory about whether
7 you have any personal knowledge as to the purpose of
8 the report other than what's on the document?

9 A I do not remember any other documents that
10 describe the purpose of the IG report, so I would say
11 unless there's a document that I'm not remembering the
12 purpose of the IG report is as stated in the report.
13 I have no additional information to add to that.

14 Q Are you prepared to sponsor the findings in
15 the OIG report?

16 MR. LEVY: I'm going to ask counsel to
17 explain what he means by sponsor. Mr. Glick was not
18 the author of the report, so I'm not sure what he
19 means by that.

20 MR. MECONE: Mr. Glick clearly said it was
21 his position that the findings in the report and
22 everything else was factually accurate, that nobody
23 else has sponsored the report or attested to the
24 accuracy of the report, so my question is if he's in a
25 position to attest to the accuracy of the report by

1 sponsoring it.

2 THE WITNESS: Based on my analysis of the
3 record, the two points that I laid out, which are that
4 Netflix receives more manual culling and processing
5 than any other mailer and that Netflix mail is much
6 less than fully machinable, I think that those are
7 quite clear on the record, and based on my review of
8 the record I believe them to be true.

9 I mean, I would add that the Postal Service
10 itself in response to interrogatories has conceded
11 that the level of manual culling and processing of
12 Netflix is at least as high as stated in the OIG
13 report, so I think that in fact that's why I guess
14 it's either a sponsorship or it's saying that OIG
15 undershot and it's actually higher than that.

16 Certainly the Christensen report suggests
17 that the percentage of Netflix that's culled and
18 processed manually is higher than estimated by OIG and
19 so I don't think that these are very controversial,
20 those two points are very controversial based upon
21 this record.

22 BY MR. MECONE:

23 Q So is your use of the OIG report limited to
24 those two points that you just stated?

25 A I would there's one other, which is that --

1 and this relates more back to Mr. Barranca's
2 testimony.

3 It makes clear that the Postal Service was
4 clearly aware that a respected institution believes
5 that Netflix mail is nonmachinable three years ago and
6 recommended that the DMM be changed to address this
7 issue three years ago, and the Postal Service still
8 hasn't done anything about it.

9 So I'm not sure that that is necessarily a
10 specific -- I mean, I think that it's a key document
11 from the perspective that it makes clear how long the
12 Postal Service has been aware of the nonmachinability
13 issue.

14 I think they've probably been aware of it
15 for months longer than that, but certainly it's a
16 stake in the ground.

17 Q So your interpretation of the OIG report is
18 that it found that Netflix mail was not nonmachinable?
19 Is that correct?

20 A Yes, but I think -- absolutely.

21 Q Is there anything else besides those three
22 points you just made that you use the OIG report to
23 support?

24 A I believe that those are the -- well, that's
25 more than what I've testified to in my testimony. I

1 make no promises on how GameFly might use that
2 document in the posttrial brief.

3 I mean, it's a report issued by a very
4 respected organization, so I think that it would not
5 surprise me at all if there are other aspects of that
6 that are cited in the posttrial brief regardless of my
7 opinion of them.

8 Q But as far as your testimony, you're not
9 making those statements in anything that you just
10 referred to?

11 A Well, why don't I flip through the OIG
12 report again --

13 Q Sure.

14 A -- if you want me to be absolutely
15 definitive on this. This could take a while.

16 (Pause.)

17 MR. MECONE: We were not aware that it would
18 be necessary for the witness to read the report. He
19 relies extensively on the testimony. We're not asking
20 him to make new statements he hasn't made before.
21 We're just asking what he relied upon from the report.

22 MR. LEVY: I'm going to object to this line
23 of questioning. I've sat here for a while and not,
24 but we spent about half an hour on what is essentially
25 an exercise trying to prove that the documents that

1 Mr. Glick has cited don't support certain claims that
2 he draws from them.

3 The problem is that those documents are
4 already in the record. They've been cited back and
5 forth by the parties. If the Postal Service wants to
6 argue that Mr. Glick or for that matter GameFly has
7 mis-cited those documents or has drawn too much from
8 them that's something they can argue in the posttrial
9 brief.

10 But having the witness spend a lengthy
11 period of time reading on the stand portions that are
12 already in the record, it not only wastes time, but
13 it's a violation of the best evidence rule because the
14 best evidence of what the documents say is what the
15 documents say, which people can figure out from
16 reading them, as opposed to having a back and forth
17 between counsel and a witness in sort of a secondary
18 way of what the documents actually say.

19 MR. MECONE: Most of the rebuttal testimony
20 is citations to other documents, so this is an
21 opportunity for us to inquire about the basis of his
22 testimony.

23 It's not supposed to be a legal brief. It's
24 supposed to be testimony from things that he knows
25 within his knowledge. We're just trying to get at if

1 he knows anything beyond what is on the documents he
2 cites.

3 MR. LEVY: If Mr. Glick had cited a
4 document, that I'm relying on this document for
5 Proposition X, and the document doesn't support
6 Proposition X then the Postal Service can point that
7 out in its brief because you can read documentary
8 evidence, a document, and say it supports X or it
9 doesn't.

10 It's a fair argument for the Postal Service
11 to make. They're entitled to do that. All I'm saying
12 is that having the witness read the same document that
13 you can read directly is a violation of the best
14 evidence rule and beyond a certain point a waste of
15 time because they can do it directly on their brief.

16 MR. MECONE: A document that just includes
17 citations to other documents without any personal
18 knowledge that the witness intertwined with those
19 citations, I don't see how that differs from any type
20 of legal brief.

21 COMMISSIONER BLAIR: Does Postal counsel
22 plan or anticipate having the witness go line through
23 line through the OIG report, for instance?

24 MR. MECONE: No. We initially asked if he
25 was going to sponsor the report, and I think he said

1 he would not sponsor the report except limited to the
2 three points that he stated.

3 The author of the report is not a party to
4 the case, and he is the one witness who's putting
5 forth this document as the true facts relevant to the
6 case, so I think we should have the opportunity to
7 question him about the reliability of the report
8 because he's the only witness who's putting it up as
9 the truth.

10 MR. LEVY: Your Honor?

11 COMMISSIONER BLAIR: Go ahead, Mr. Levy.

12 MR. LEVY: The expert witnesses like Mr.
13 Glick are entitled, and this is very routine, to rely
14 and cite on authoritative blue ribbon reports like the
15 OIG report or, for that matter, expert consultant's
16 reports like the Christensen report. It doesn't make
17 the witness a sponsor of the report.

18 He's relying on them, he cites them, and the
19 Commission can judge whether he's citing them
20 accurately by comparing his statements with theirs.
21 It doesn't make him a sponsor.

22 COMMISSIONER BLAIR: At this point I will
23 allow the Postal Service to question regarding what
24 the witness has actually said, but I don't find value
25 in going line through line through a document that's

1 already in evidence at this time.

2 And I think the more appropriate point for
3 you to dispute what the witness has said is also at
4 the time that you file your final brief. So as far as
5 you asking the questions regarding what the witness
6 has said, please proceed.

7 BY MR. MECONE:

8 Q Just one more followup question on the
9 report there. Where in the record are the estimates
10 cited in the OIG report documented under the PRC's
11 rules?

12 A Can you cite me to a specific -- what you're
13 referring to?

14 Q Sure. Rule 31(k), I believe.

15 MR. LEVY: I'm going to object to that as
16 calling for a legal conclusion. If they want to argue
17 that the OIG report can't be relied on by this expert
18 witness because he hasn't documented it in the manner
19 that they think a particular rule requires that's a
20 fair argument they can make on their brief, but this
21 witness, who is not a lawyer, is not going to add
22 anything to that kind of debate.

23 COMMISSIONER BLAIR: Mr. Mecone, would you
24 like to present your point of view on that? I'm
25 inclined to accept the argument that it does rely on a

1 legal conclusion, but wanted to give you an
2 opportunity to point out differently.

3 MR. MECONE: It's my understanding that
4 every witness who relies upon a study or presents a
5 study has to submit it within the rules, Rule 31(k),
6 of the Commission. It's not a legal argument. This
7 pertains to all expert witnesses who come before the
8 Commission.

9 COMMISSIONER BLAIR: Wouldn't the format for
10 that be an objection to the testimony rather than a
11 conclusion to be drawn from the witness?

12 MR. MECONE: We're asking about where in the
13 record it's been documented. If he says it hasn't
14 been documented, I mean, that's fine.

15 MR. LEVY: I'm not sure what to add. This
16 is a conventional practice, an expert witness has
17 relied on a blue ribbon government report by an
18 investigative body that is affiliated with the Postal
19 Service itself. He's not sponsoring their testimony,
20 their document. He's relying on it.

21 If the Postal Service wants to attack the
22 OIG report or argue that what Mr. Glick is doing is
23 inappropriate, let them argue it in their brief.

24 COMMISSIONER BLAIR: I will sustain the
25 Complainant's objection at this point, and I would

1 direct the Postal Service that if it considers it wise
2 to raise this on brief. Please proceed.

3 BY MR. MECONE:

4 Q Have you studied the extent to which
5 operations decisions in the field refer to cost
6 studies that estimate costs or savings as an average
7 representing the costs at all Postal facilities?

8 A You lost me. Can you repeat the question?

9 Q Sure. Have you studied the extent to which
10 operations decisions in the field refer to cost
11 studies that estimate costs or savings as an average
12 representing the costs of all Postal facilities?

13 MR. LEVY: I'm going to object to the
14 question as unclear and ambiguous.

15 COMMISSIONER BLAIR: Could you restate that,
16 counsel? Try a little bit more clarity for the bench
17 as to what you're asking, please.

18 BY MR. MECONE:

19 Q In your testimony, you talk about and I
20 think refer to some of the Postal Service witness
21 testimony and the fact that they didn't raise any cost
22 studies in support of their statements. What is your
23 knowledge about the reliance of field managers on
24 these cost studies in making decisions?

25 A I don't know whether they do. I think they

1 should.

2 Q Okay. In Witness Seanor's testimony he
3 makes the statement of separation of high density
4 mail intended for a single recipient is a frequent and
5 common method for increasing the overall efficiency of
6 mail processing. That's on page 20, lines 20 to 23.

7 I can get you a copy if you don't have it.

8 A I have a copy.

9 Q Okay. Do you agree with that statement?

10 A Can you give me the citation again?

11 Q Sure. It's page 20, lines 20 to 23.

12 A Twenty-one to 23?

13 Q I believe it's 20 to 23.

14 MR. LEVY: Lines 21 to 23 is what appears on
15 my copy.

16 THE WITNESS: I agree that the Postal
17 Service frequently and commonly separates Netflix mail
18 from other mail manually.

19 I don't agree that it increases overall
20 efficiency, especially when you're looking at doing
21 this manual processing rather than having a machinable
22 piece that could be processed on automation.

23 BY MR. MECONE:

24 Q Do you agree that separating of the mail as
25 Seanor describes it would save processing steps?

1 A I believe that the Christensen study of what
2 actually happens out in the field shows that there are
3 numerous steps, primarily manual, required to separate
4 Netflix from other mail and process it, subsequently
5 process it, and that that is not efficient.

6 Q Do you have any other source besides the
7 Christensen study that supports that statement?

8 A There have been other back-of-the-envelope
9 calculations that numerous Postal employees have made
10 pointing to higher costs associated with the Netflix
11 process, but I would say that the primary and most
12 credible estimate is from Christensen.

13 And in fact the Postal Service in response
14 to interrogatories -- we can leave that for the closed
15 session, but I believe that the Christensen study is
16 the most credible study on the cost of processing
17 Netflix pieces.

18 Q You mentioned some back-of-the-envelope
19 calculations. Can you be more specific in what you're
20 referring to there?

21 A I'm not referring to any one. I've seen
22 several, but there was one that I believe was -- well,
23 I think we should have this discussion in the closed
24 session.

25 Q Okay. Fair enough. When was the

1 Christensen study issued?

2 A I believe it was November 2006.

3 Q Okay. Have you relied on anything more
4 recent than that?

5 A Yes, I have. Again, I think we should
6 discuss that in the closed session.

7 Q On pages 3 and 4 of your testimony you state
8 that the processing of Netflix return mailers is not
9 exactly uniform at every facility or in complete
10 accord with SOPs that are on record. What do you mean
11 by that statement?

12 A I mean what it says. I mean, I could give
13 you more specific, but I think that's a pretty clear
14 statement.

15 Q Okay. Now I'm going to turn to page 5 of
16 your testimony where you state: Witnesses Seanor and
17 Belair suggest in their testimony that manual culling
18 is the only activity the Postal Service performs for
19 Netflix return mail, and you cite to their -- do you
20 want some time to get there?

21 A No. I'm there.

22 Q Okay. And then you cite to the written
23 direct testimony.

24 A Okay.

25 Q Other than those citations, does your

1 conclusion specifically rely on any other statements
2 by these witnesses or by Witness Barranca?

3 A I believe that there were other instances
4 where that point was made within their testimony and
5 on cross-examination. Those were examples, but I
6 don't believe that those were the only points where
7 they said that.

8 Q I'm now going to go to page 2 of the
9 testimony --

10 A Okay.

11 Q -- where you state that the Postal Service
12 has not offered GameFly service on the same terms as
13 Netflix. Are you familiar with the May 17 letter from
14 Andrew German to GameFly counsel?

15 A I am familiar with it, and I can turn to it.

16 Q Do you have a copy of the letter?

17 A I do have a copy of the letter.

18 Q What conditions in the letter are not part
19 of the service that the Postal Service provides to
20 Netflix?

21 A I think that Mr. Hodess and I have been
22 clear on the aspects of the letter. Netflix can look
23 at history, and history says very clearly that the
24 Postal Service is going to cull the vast majority of
25 Netflix pieces.

1 If GameFly looks at history, what does it
2 show? It shows that the Postal Service does not do
3 the same for other mailers of letter-shaped DVD mail
4 pieces. That's what the record shows. So for GameFly
5 to get the same processing as Netflix there needs to
6 be a commitment on behalf of the Postal Service, and
7 there is no commitment in the letter.

8 Q I'm just asking about the conditions in the
9 letter that are not provided to Netflix by the Postal
10 Service.

11 A The conditions are -- what do you mean,
12 conditions provided?

13 Q This is the bullet points.

14 A That are required?

15 Q Which conditions listed in the letter are
16 not provided to Netflix as part of the service given
17 by the Postal Service?

18 MR. LEVY: I'm going to ask for
19 clarification. I think the confusion is the word
20 provided. If counsel would change the question to
21 what conditions are not required of Netflix, the
22 understanding would be clearer.

23 MR. MECONE: That's a different question.

24 //

25 BY MR. MECONE:

1 Q I'm asking which conditions in the letter
2 are not part of the service offered to Netflix, and
3 this is on page 2 of the letter.

4 A Are you talking about which conditions does
5 Netflix not satisfy?

6 Q I'm asking does the letter accurately
7 portray the service given to Netflix?

8 A You're referring me to page 2 of the letter,
9 right?

10 Q Yes.

11 A Page 2 of the letter lays out what would be
12 required of GameFly to get the service that Mr. German
13 is proposing on page 1, and so I don't understand what
14 your question is.

15 Q I'm asking if any of those four bullet
16 points, the conditions in the four bullet points, if
17 any of those are conditions that Netflix does not
18 meet?

19 A I believe that it's likely that Netflix
20 meets all of them today, but didn't meet them when the
21 Postal Service started providing them service. I've
22 made that clear in my testimony.

23 Q So is your position that GameFly wants
24 something different than what Netflix receives right
25 now?

1 A I think you need to restate the question
2 because I don't understand it and how it applies to
3 what I just said.

4 Q Okay. As I understand your last response, I
5 think you stated it was your understanding that
6 Netflix meets all the conditions currently.

7 A Right. It did not meet all these conditions
8 when the Postal Service started providing the service.

9 I believe that the latter two bullet points
10 are points, are fences that are being put around,
11 simply because they accurately -- they describe what
12 Netflix currently does. They don't accurately
13 describe what would be necessary to get the service,
14 as I've laid out in my testimony.

15 The first two points, that GameFly must
16 color its piece brightly; it must use a one ounce
17 first class mail letter piece. GameFly would be more
18 than willing to do that.

19 Q What's the basis of your conclusion that any
20 of these would not be necessary? Is it personal
21 knowledge?

22 A I've laid that out in my testimony. Would
23 you like me to summarize it?

24 Q Sure.

25 A Mr. Seanor pointed out that basically when

1 you cull, you cull it at the first facility. And so
2 if there's value to culling it's because you've
3 reduced the cost at that initial facility.

4 The only additional costs after that initial
5 facility are container handling and transportation
6 costs, which I've laid out are minimal, particularly
7 when you compare it to the substantial cost difference
8 between what Netflix and GameFly currently pay.

9 Q Has Netflix ever raised this issue with the
10 Postal Service in response to the letter?

11 A What's that? Netflix?

12 Q Sorry. GameFly. Has GameFly ever raised
13 this issue with the Postal Service in response to the
14 letter?

15 A Mr. Hodess was very clear that this letter
16 is a nonstarter if it has no commitment attached to
17 it.

18 Q My question was just about whether GameFly
19 responded to the letter by raising this issue with the
20 Postal Service.

21 A GameFly is raising it through my testimony
22 at this point.

23 Q You mentioned the transportation and I think
24 handling costs being minimal, is that right, in your
25 response?

1 A Yes.

2 Q Okay. But there is some cost, right? Do
3 you agree with that?

4 A I believe there's some cost, and I believe
5 that if it came down to it GameFly would be willing to
6 pay that minimal cost.

7 Q Pages 17 and 18 in your testimony address
8 the effect of increased pickup points on cost.

9 A Yes. That's what I was just referring to.

10 Q Okay. In your analysis, did you calculate
11 the cost of delivery?

12 A It's not relevant to this point.

13 Q So I guess just to answer the question, did
14 you calculate the cost of delivery in this analysis?
15 Yes or no is fine.

16 A Neither GameFly nor Netflix receive delivery
17 of their mail piece. They both pick up their mail
18 through caller service. Given that they both do that,
19 I have not estimated the cost of delivery in this
20 analysis.

21 Q Sure. Page 15 of your testimony alleges
22 that the May 17 letter "did not include any commitment
23 that GameFly will receive the same avoidance of
24 automated letter processing."

25 Is it GameFly's position that any offer of

1 service on the same terms as Netflix must include a
2 Postal Service commitment?

3 A It's GameFly's position that they need to be
4 processed manually to the same extent as Netflix, and
5 it's the position of Witness Seanor that instruction
6 would be required.

7 Q Is that GameFly's position also?

8 A That's my understanding.

9 Q I'm going to turn to page 10 of your
10 testimony.

11 A Okay.

12 Q Will you read the first three sentences of
13 the top paragraph?

14 A Mr. Lundahl's testimony is beside the point.
15 I am informed by counsel that the question is not
16 whether Mr. Lundahl's techniques can reduce the rate
17 of DVD breakage in automated letter processing. The
18 question is whether the resulting reduction in
19 breakage is great enough to eliminate, or come close
20 to eliminating, the difference in breakage rates
21 between automated letter processing and manual
22 processing.

23 Q Sorry. Can you read the next sentence after
24 that, please?

25 A If the former method of processing still

1 breaks substantially more DVDs than the latter, then
2 the former is still an inferior form of mail service
3 for DVDs than the latter, and the factual foundation
4 for GameFly's discrimination claim remains.

5 Q What is the factual foundation for GameFly's
6 discrimination claim that you refer to?

7 A I've been very clear that this is what I've
8 been informed by counsel about.

9 Q You have no knowledge about what that
10 factual foundation is?

11 A I'm not an expert on discrimination and so
12 I'm not going to get into the legal. I'm not going to
13 get into that issue.

14 Q I'm not asking about any legal terms, just
15 what you meant by using that term in your testimony.

16 A I've attributed that to counsel.

17 Q So do you agree that this is counsel's
18 statement and not part of your personal testimony?

19 A That is part of my counsel's statement.
20 It's clear in my mind that if Mailer A gets a service
21 that doesn't break disks and Mailer B gets a service
22 that does break disks that Mailer A gets the better
23 service so it makes sense to me, but I'm attributing
24 that to counsel. It makes sense to me.

25 Q Are there any other aspects of your

1 testimony that you would attribute to counsel?

2 A I don't believe that I have attributed
3 anything else to counsel.

4 Q Later in your testimony as part of the
5 section you just read you acknowledge that according
6 to Witness Lundahl adoption of the ATR recommendations
7 increased the number of times a Netflix DVD could be
8 mailed before breaking by 50 percent and that this was
9 equivalent to a reduction in per mailing breakage
10 rates of 33 percent.

11 Footnote 8 of your testimony states: Even
12 with full implementation of Mr. Lundahl's techniques,
13 the resulting DVD breakage rates would still be
14 unacceptably high.

15 A Okay. I see that.

16 Q How does GameFly determine what breakage
17 rate would be unacceptably high?

18 A Well, let me tell you what I meant by that.
19 I looked at Netflix breakage rates and I took into
20 account the fact that the vast majority of Netflix
21 mail is not processed manually, and it seems to me
22 that it would still be high.

23 Q Do you agree that there's a threshold
24 breakage rate above which can be considered too high
25 and below which would be considered not too high?

1 A I think it's a continuum. I don't like to
2 think of things as thresholds. I like to think of
3 them as higher is worse. Higher breakage is worse.
4 Lower breakage is better.

5 Q So how would GameFly determine what
6 particular rate is unacceptably high?

7 A Right now, as you know, GameFly's breakage
8 rate is about 1 percent. If you look at what
9 Netflix's breakage rate is -- we should probably have
10 this conversation in closed session -- and you look at
11 the fact that they have that breakage rate despite the
12 fact of a significant avoidance of automated
13 processing, particularly the AFCS, there's a
14 significant reason to believe it would be very high.

15 There's also engineering test data out there
16 on breakage from automated letter processing on the
17 topic.

18 Q So when GameFly makes the decision about how
19 to send its mail, does it do any type of calculation
20 about how much risk of loss in a certain method of
21 mailing or anything like that? I mean, does it
22 consider its costs when determining what breakage rate
23 would be too high?

24 A I believe that GameFly has stated that.

25 Q Would that cost include the cost of the

1 GameFly DVD?

2 A Yes.

3 Q Do you agree that some mailers mail DVDs at
4 different costs than GameFly has?

5 A I think it's possible.

6 Q So would a mailer who has lower costs than
7 GameFly, would its unacceptably high breakage rate be
8 lower?

9 A I believe that if you did a cost/benefit
10 test, if you have a DVD that's worth less than the
11 cost of breakage would be lower. I'm not going to
12 start talking about how different mailers define
13 unacceptable.

14 Q So if the breakage cost would be lower, do
15 you agree that that mailer could withstand a higher
16 breakage rate?

17 A I think that's a -- I think you should
18 rephrase the question because I think that's
19 completely unclear what the assumption is. I think
20 that you need to ask a question that's understandable.

21 Q Okay. Assume two DVD mailers. One has a
22 cost of let's say \$50 per DVD. The other has a cost
23 of \$10 per DVD.

24 A So you're saying if two mailers get an
25 inferior service is the cost of that inferior service

1 less for one of them than the other?

2 Q That's not what I'm talking about.

3 A I think that's absolutely what you're
4 asking.

5 Q I'm asking about a business decision of how
6 to mail a DVD, okay?

7 A But you're asking about a business decision
8 that relates to the assumption that both of these
9 mailers receive an inferior service to the service
10 that Netflix received. And I'm willing to answer it,
11 taking that as the assumption.

12 Q I'm not making any statement about whether
13 the type of service is inferior or superior, just that
14 it's the same service.

15 A All right.

16 Q So let's say one mailer has a cost of \$50
17 per DVD mailed. The second mailer has a cost of \$10.
18 They receive the same breakage rate.

19 When trying to determine whether to continue
20 to mail in that method, would the lower cost mailer
21 have a higher threshold unacceptably high breakage
22 rate?

23 A Again, you're using the term unacceptable.
24 I think they would define that differently. I think
25 you also have to take into account you don't want all

1 your disks breaking.

2 I mean, it's not a good way of business to
3 have the disks breaking and going back and a lot of
4 additional cost other than just the disk, so you'd
5 have to take those costs into account as well.

6 Q I understand what you're saying, but can you
7 answer the question I'm asking?

8 A I can't answer the question about what
9 different mailers mean by acceptable or unacceptable
10 without addressing those other issues.

11 Q How do you define the unacceptably high
12 breakage rate as you use it in your testimony?

13 A I define it as well above 1 percent. That
14 is the point that I was trying to make.

15 Q Do you agree that breakage is a risk all
16 mailers face and take into account when determining
17 how to ship their DVDs?

18 A Can you repeat the question?

19 Q Do you agree that disk breakage is a risk
20 that all mailers face and take into account when
21 determining how to ship their DVDs?

22 A I think it's a risk all mailers face.

23 Q Okay.

24 A I don't know whether they take it into
25 account or not. Certainly Netflix takes it into

1 account and it's a reason why they've pushed so hard
2 for a particular method of processing and it's why
3 GameFly not having access to that processing mails its
4 pieces as a flat.

5 Q Just to clarify, in some of your responses
6 you've referred to Netflix as mailing at automation
7 rates.

8 A What responses are you referring to? I
9 haven't responded to any interrogatories in this
10 round.

11 Q I'm just talking about your responses to my
12 questions here today.

13 A Okay.

14 Q Are you referring to the inbound or outbound
15 Netflix pieces?

16 A What I meant was -- I appreciate the
17 opportunity to clarify. The point that I'm making is
18 that all of their pieces of mail, that machinable
19 letter rate.

20 Q Going back to our discussion about
21 unacceptably high breakage rates, what's the lowest
22 breakage rate that GameFly would consider unacceptably
23 high?

24 A I've told you that my use of that was to
25 really reflect the fact that I think it would be a

1 substantially higher breakage rate than they currently
2 face.

3 You know, it was perhaps a poor choice of
4 words to say unacceptably high. What I meant to
5 intend by that was that it was substantially above the
6 breakage they currently would face.

7 Q So when you take the position that a 33
8 percent reduction per piece in damage would still be
9 too high, how are you measuring that?

10 A Well, my point is that Mr. Lundahl's
11 techniques, they benefit Netflix. I have no doubt
12 that they benefit Netflix. They've got lower
13 breakage. But it doesn't eliminate the problem. I
14 mean, before you had 150 broken disks. Now you have
15 100 broken disks. There's still a significant
16 fundamental problem, so it doesn't resolve the
17 problem. That's the point I was making.

18 And the other reason why Lundahl is perhaps
19 completely or why he is irrelevant to this case is
20 that whether or not Netflix has done these things has
21 no impact on the cost of the Postal Service to provide
22 the service that they provide to Netflix and so it has
23 no value, probative value in this case in my opinion.

24 Q So is your testimony that you do not know
25 what particular rate would be acceptable to GameFly?

1 A My testimony is that I know that if the
2 Postal Service made a commitment to process GameFly
3 like Netflix that would be acceptable.

4 Q You're stating that you don't know what
5 GameFly's rate would be?

6 A I can't give you an exact number.

7 Q Okay. Do you know that a 33 percent
8 reduction would not be enough to bring the breakage
9 rate to an acceptable level?

10 MR. LEVY: I'm going to ask counsel to
11 clarify, and this is an objection. Clarify a 33
12 percent reduction from what?

13 MR. MECONE: Okay. A 33 percent reduction
14 from the rate that GameFly would receive if it mailed
15 at letter rates, the same rates as Netflix.

16 THE WITNESS: I think that probably would
17 not be acceptable.

18 BY MR. MECONE:

19 Q How do you know that?

20 A Well, I think Mr. Hodess was pretty clear
21 about what he saw when he visited the site and he had
22 a test stack of GameFly mail processed through
23 automation and the devastation that resulted. I think
24 that's just one example of the fact that AFCSS -- and
25 I think mostly that AFCS is the most damaging -- and

1 DBCSS do in fact result in significant breakage.

2 I can't give you an exact figure on what
3 that is, but I don't think that -- I think it's
4 sufficiently high that a 33 percent wouldn't change
5 the calculation.

6 Q So you know that --

7 A I think there's another pretty important
8 point here. Most of the points that Mr. Lundahl
9 pointed out, they're not things that -- Netflix is the
10 only one who can make someone do this. Netflix is the
11 only one that can require their manufacturers to
12 implement these methods.

13 Hodess was very clear that he has no
14 influence over how DVDs are produced and manufactured
15 and replicated. He can't influence that.

16 Q What's the basis for your statement that
17 Netflix is the only mailer who uses these methods? I
18 know Witness Lundahl made one reference to
19 reinforcement rings which were available commercially.

20 A I believe that reinforcing rings is probably
21 the only one that seems to be something that was
22 something that many could implement.

23 In terms of influence production methods and
24 manufacturing methods and replication methods, Netflix
25 certainly appears to have the power to make that

1 happen. Perhaps there is another company that could
2 make that happen, but GameFly is I believe the third
3 largest DVD mailer, and they certainly have no
4 influence over it.

5 Q Have they ever attempted to contact any
6 manufacturer and --

7 A I don't believe that there's been any formal
8 contact. Mr. Hodess has explained why.

9 Q So how do you know that GameFly couldn't
10 enter into a similar relationship with a manufacturer?

11 A I'm relying on the testimony of Mr. Hodess
12 on that point and the responses of GameFly to
13 institutional interrogatories.

14 Q Can you point to any particular parts of his
15 testimony or interrogatory responses?

16 A I do not have the institutional responses,
17 but if Mr. Levy would --

18 MR. LEVY: We'd be happy to answer that if
19 that's a transcript request or a request for us to
20 come back --

21 THE WITNESS: Yes.

22 MR. LEVY: -- although it's in the record
23 already. The Postal Service can cite to what it says
24 and argue what it doesn't say.

25 THE WITNESS: I believe there was a

1 discovery response.

2 COMMISSIONER BLAIR: Mr. Mecone?

3 MR. MECONE: It's not necessary to follow
4 up.

5 BY MR. MECONE:

6 Q Throughout your testimony you used the term
7 manual processing. Can you explain what you mean by
8 that term?

9 A You want to give me a particular?

10 Q Do you use it consistently throughout your
11 testimony or do you use the term --

12 A I think I use it consistently, but in a
13 different context it might mean different.

14 When I use manual processing, generally what
15 I'm referring to is the process identified for Netflix
16 returns by Christensen, which is a manual cull,
17 sometimes a manual sort, sometimes just a separating
18 DVDs from DVDs of others, manual traying and facing.

19 So I'm meaning activities that are performed
20 by Postal employees manually, not on the machines.
21 And so it's not referring just to manual. It's
22 referring to manual handling, any form of manual
23 handling of Netflix returns.

24 Q So when you use the term it encompasses all
25 those different methods that you mentioned?

1 A I don't know. I may have used it more
2 specifically in particular parts of my testimony, but
3 when I think of manual processing I'm referring to --
4 unless there's a specific context, I'm referring to
5 all of those.

6 Q So each time you use that term it could mean
7 something different?

8 A Let me give you an example. When I quote
9 Christensen as saying that 77 percent of Netflix
10 returns were processed manually, what that refers to
11 is Christensen's report on whether it was sorted
12 manually rather than automation.

13 But the general term of manual processing,
14 and I've also said on manual culling I have a
15 different number of how frequently I think manual
16 culling occurs. So when I refer to manual culling I
17 say the word manual culling, but I'd say manual
18 processing, other than my reference to Christensen, I
19 think probably generally refers to the entire process.

20 But you'd have to give me a specific
21 reference because it probably would be more clear
22 within the context of what the previous and next
23 sentence are.

24 Q When you use the term manual culling, what
25 are you referring to?

1 A I mean the separating of Netflix from other
2 mail pieces manually. When I say manual culling --

3 Q So to clarify, presuming, though, this is
4 accurate of what you just said, when you use the term
5 manual processing, it refers, it includes manual
6 culling?

7 A I think that if you want to have the record
8 be absolutely clear, you should point me to a specific
9 sentence that you want me to clarify.

10 Q Without having to go through the whole
11 testimony, when you use the term manual processing,
12 does it include manual culling?

13 MR. LEVY: I'm going to object. The witness
14 has made clear that the meaning of Manual X or Manual
15 Y can depend on the context. He's offered to respond
16 if presented with a specific quotation and a specific
17 context. He has said he cannot give a portmanteau or
18 all purpose cover all statement about it without being
19 shown the context. So I ask, if counsel wants to
20 continue in this line of questioning that he shows the
21 witness a particular statement with a particular, so
22 we can give the particular context.

23 BY MR. MECONE:

24 Q Is there an example where you use the term
25 manual processing and it does not include manual

1 culling?

2 A I mean, I'm happy to look through my entire
3 testimony.

4 Q Why did you decide to use that more
5 ambiguous term instead of specifically identifying the
6 processing you're referring to at each point in your
7 testimony?

8 A I don't believe that I specifically intended
9 to do that, and, in fact, I'm happy to go through and
10 we can see whether I've done that. I think that, for
11 example, when I've tried to make clear the process
12 which is typical for Netflix, I've tried to lay out
13 all of the components of it, and so I think I've been
14 quite clear on the process which Netflix receives.

15 Q Okay. So just to confirm, when you use the
16 term throughout your testimony, it could mean two
17 different things at different points in the testimony?

18 A I think that if you want to, if you think
19 anything is unclear, the best approach would be for
20 you to point me to it and I'd be happy to respond.

21 Q What's the basis for your position
22 throughout your testimony that Netflix' mail is
23 processed in the way you described.

24 A The primary source is the Christensen study.

25 Q Are there any other sources?

1 A Yeah, and I think we probably ought to go
2 through that in the closed session.

3 Q Sure. Are you familiar with the
4 descriptions of how Netflix' mail is processed given
5 by Postal Service Witnesses Barranca, Blair and
6 Seanor?

7 A I've read their testimony.

8 Q Did they address how Netflix' mail is
9 processed?

10 A Part of their testimony was on that. I'd
11 want to familiarize myself about it again, but yes. I
12 think that one of, I mean, a theme running through
13 particularly the testimony of Seanor is that you
14 manually cull it and you're done. You know, I can
15 understand why, you know, people would have that gut
16 instinct and the Christensen study said, well, that's
17 not true, there's a lot more.

18 Q What are you referring to when you say gut
19 instinct?

20 A What am I referring to?

21 Q What are you referring to?

22 A I think that when people think of culling,
23 when people think of mail processing, you think of
24 here's this major activity that it goes through, and
25 they forget all the other activities that are required

1 after that.

2 Q So when Witness Seanor testified regarding
3 how Netflix' mail is processed, is it your position
4 that he was not actually testifying about what he
5 observed?

6 A What he observed?

7 Q Observed.

8 A Yeah. I do not want to prescribe intent to
9 him. What I'm saying is that what Christensen saw was
10 a substantially larger process than described by Mr.
11 Seanor.

12 Q What's the basis for that statement?

13 A I think we should talk about that in the
14 closed session.

15 Q Have you ever witnessed the processing of
16 Netflix' mail?

17 A I haven't, and I don't think it would be
18 nearly as useful as reading studies that have done a
19 thorough analysis of the topic.

20 MR. MECONE: That's all we have for the
21 public session.

22 COMMISSIONER BLAIR: Thank you, Mr. Mecone.
23 At this point, why don't we take an eight minute break
24 and come back for further cross-examination by the
25 public representative and the bench. Thank you very

1 much.

2 (Whereupon, a short recess was taken.)

3 COMMISSIONER BLAIR: If I could have
4 everyone's attention, please. The hearing will
5 resume. At this point we will have further cross-
6 examination and I ask the public representative in
7 this case, Mr. Rand Costich, if you have any cross-
8 examination in which you would like to engage.

9 MR. COSTICH: Yes, I do, Commissioner Blair.

10 COMMISSIONER BLAIR: Please proceed.

11 MR. COSTICH: Thank you.

12 CROSS-EXAMINATION

13 BY MR. COSTICH:

14 Q Good morning, Mr. Glick.

15 A Good morning.

16 Q Could you look at page 18 of your testimony.

17 On Line 19 you have a citation to a document with the
18 Bates number GF10. Do you see that?

19 A Yes.

20 Q Do you have a copy of the public version of
21 that document?

22 A Yes, I do.

23 Q What's the date on that document?

24 A September 12, 2002.

25 Q And could you read the last sentence of the

1 first paragraph.

2 A Their, and it's referring to Netflix, annual
3 revenue contribution is over \$16 million.

4 Q Subject to check, would you accept for a
5 hypothetical that in 2002 the contribution per piece
6 for both first-class presort and single piece was 18.8
7 cents?

8 A I'd accept that, subject to check.

9 Q If you take 18.8 cents and \$16 million, can
10 you get a volume estimate from those two numbers?

11 A When I read that sentence, I don't believe
12 they're referring to institutional cost contribution.
13 I mean, it doesn't, I suspect that's referring to
14 revenue, not to contribution, but certainly you could
15 take the \$16 million and divide it by the applicable
16 rate and derive a volume estimate from that. I mean,
17 I agree there is the word contribution, but it says
18 revenue contribution. That makes me think that's
19 referring to revenue, not contributions. Regardless,
20 if we figured out which one it was referring to, yes,
21 you could back into a volume.

22 Q If we assume that it's contribution per
23 piece, I mean, contribution that's being talked about
24 there, the estimate would be about 85 million pieces.
25 Would you agree to that?

1 A I mean, it would be somewhere a little less
2 than 100 million. Eighty-five sounds about right.
3 And it would be much less than that if you divided by
4 revenue per piece.

5 Q Right.

6 A Yeah.

7 Q And assume hypothetically that each piece
8 makes one outbound trip and one inbound trip. You
9 really have half that number of pieces.

10 A Half that number of round trips. Yeah.

11 Q Yes. Paragraph 1 of that document also
12 states that Netflix has 12 pick up sites, is that
13 correct?

14 A That's correct. It says they have 12 hub
15 distribution centers and they may have a couple, yeah,
16 so the number of pick up sites is probably close to
17 that.

18 Q So if each pick up site got the same volume,
19 that would have about three and a half million
20 returned pieces per site?

21 A So you're taking 85 divided by two, divided
22 by 12?

23 Q Yes.

24 A Approximately. Yeah.

25 Q Is it your testimony that GameFly has

1 similar volume per pick up site as Netflix did in
2 2002?

3 A Doing some calculations here.

4 MR. LEVY: Let the record reflect that the
5 witness is using his analog calculator.

6 THE WITNESS: I'd say in the same ballpark.
7 I mean, the calculation I'm doing is that GameFly has
8 about 600,000 round trips per month. You multiply
9 that by 12 months a year, you get to about 7.2
10 million. You divide that by four distribution
11 centers, you get to about two million. If you
12 interpret that statement that we talked about before
13 about the annual revenue contribution, which I believe
14 it is, you know, Netflix would not be at the three and
15 a half million they talked about. It would be, you
16 know, about half that.

17 BY MR. COSTICH:

18 Q Could you look at page 20.

19 A Yes.

20 Q Lines 7 through 9.

21 A Okay.

22 Q Here you say that the manual processing of
23 Netflix' letters, it is redacted, as costly as
24 automated letter processing, correct?

25 A Right.

1 Q You rely on the Christensen model for that,
2 is that correct?

3 A I rely on the Christensen model, and then
4 also my modifications to the Christensen model for,
5 that are discussed in Section 3 of the testimony.
6 Section 3(b)(2).

7 Q Is the Christensen model in the record?

8 A The Christensen model was provided by the
9 Postal Service. I guess I would defer to my lawyer
10 about whether it's in the record.

11 MR. LEVY: The Christensen spreadsheets
12 underlying their reports were produced to us by the
13 Postal Service. Sitting here, I can't remember
14 whether we put them into the record, but we certainly
15 could if there were a desire for that.

16 MR. COSTICH: Could I ask that that be done,
17 Commissioner Blair?

18 COMMISSIONER BLAIR: Please proceed.

19 MR. COSTICH: I'd like to make sure that
20 that Christensen, the spreadsheets underlying the
21 Christensen report are available at the Commission.

22 MR. MECONE: The Postal Service would like
23 to object to the admission of those documents into the
24 record. We don't object to the public representative
25 having access to review them.

1 MR. COSTICH: The public representative
2 doesn't care whether they are evidence, but since Mr.
3 Glick has used them to make calculations, at least
4 they should be available to check.

5 COMMISSIONER BLAIR: Why don't we allow a
6 motion on this and the Commission can take the motion
7 into consideration.

8 MR. MECONE: The Postal Service does not
9 object to the situation that the public representative
10 raised, having the public representative's access to
11 the spreadsheets. The objection is only to the
12 admission of these spreadsheets into evidence.

13 COMMISSIONER BLAIR: Could these
14 spreadsheets, if they were admitted, come in under
15 seal? Do they contain confidential information?

16 MR. MECONE: Yes.

17 COMMISSIONER BLAIR: Again, why don't we
18 have a formal motion on this and the Commission will
19 consider.

20 MR. COSTICH: Thank you, Commissioner Blair.

21 BY MR. COSTICH:

22 Q Could you look at page 18.

23 A I'm there.

24 Q Lines 5 and 6.

25 A Okay.

1 Q Here you cite a standard mail cost model
2 from the Commission's 2009 ACD, is that right?

3 A That's correct.

4 Q Does the ACD also have first-class cost
5 models?

6 A It does have first-class cost models, but it
7 doesn't have first-class cost models related to cost
8 avoided due, related to container handling costs
9 avoided, so there's no first-class mail analogy to
10 this particular model.

11 Q So you can't use the ACD cost models to
12 generate the relative cost difference that you got
13 from the Christensen report?

14 A Well, this is referring to the cost of
15 having to move GameFly's mail from one facility to a
16 second facility, so kind of the container handling
17 related to bit, and moving a container from San
18 Francisco to L.A. for GameFly to pick it up at call of
19 service. So the most analogous cost model that I'm
20 aware of to the cost of that activity is the standard
21 mail letter destination entry cost avoidance.

22 Q There's no drop shipping going on in first-
23 class cost models, is there?

24 A That's correct. There is not.

25 Q So are the ACP first-class cost models

1 similar to the Christensen cost model?

2 A Some of the inputs to the Christensen model,
3 and they've, this is in their report, which is
4 publicly available, the redacted version, this is part
5 of that, some of the inputs are from the equivalent of
6 the ACD cost model. They're from the R2006-1 first-
7 class mail letter cost model. So there's more to the
8 Christensen model than the ACD cost model, but the
9 ACD, or rate case, cost models are one of the inputs
10 to the Christensen model.

11 Q What I'm trying to get at is whether these
12 publicly available ACD models could be used to develop
13 the relative costs that you got out of the Christensen
14 report that led to that redacted number on page 20.

15 A I don't believe so. I don't believe there's
16 sufficient information in the ACD cost models to do
17 that.

18 Q Could those public first-class cost models
19 give an estimate of what the cost difference is
20 between automation and manual handling?

21 A Yes.

22 MR. COSTICH: Thank you. No further
23 questions.

24 COMMISSIONER BLAIR: Thank you, Mr. Costich.
25 With regard to the motion for those spreadsheets to

1 come into evidence, I would ask that you file that
2 formal motion with us by close of business tomorrow.
3 Given that we have a set schedule and that this is the
4 final hearing in this matter and the final briefs are
5 scheduled, I would ask any of the parties who wish to
6 reply to do so by close of business on Monday,
7 November 1. At this point I would like to open the
8 questioning up to the bench. I have a few questions
9 that I would ask at this time. First, one of the
10 things I'm trying to do is bring some clarity in my
11 mind to the mailing pieces of GameFly and those of
12 Netflix and other DVD mailers. Mr. Glick, do
13 GameFly's mailing pieces today meet the engineering
14 specifications for automated letters?

15 THE WITNESS: No.

16 COMMISSIONER BLAIR: Do Netflix' mailing
17 pieces meet those specifications?

18 THE WITNESS: Netflix' pieces, I'm going
19 back to the Inspector General report here, meet the
20 machinability requirements, or don't, they are, they
21 meet the DMM specifications for machinable letters,
22 but, as the IG noted, those should be changed because
23 the piece, indeed, is not machinable.

24 COMMISSIONER BLAIR: Well, that feeds into
25 my next question, is that the real world experience in

1 processing and the engineering specifications, do
2 these comport or are they at odds?

3 THE WITNESS: Right. I think for all
4 practical purposes Netflix' pieces are nonmachinable
5 based upon the record. There's been numerous letters
6 from engineering to mailers who wanted approval of
7 pieces that are similar to Netflix' mail piece design
8 that have said they are not machinable.

9 COMMISSIONER BLAIR: Well, but you did say
10 they do meet the technical specifications.

11 THE WITNESS: Well, I think that I meant
12 there is a little confusion because if engineering
13 said they're nonmachinable, then they are not
14 machinable. So I think that the IG, you know, does
15 say that it meets the DMM specifications. On the
16 other hand, engineering has clearly turned down other
17 mailers who wanted to mail those pieces as machinable
18 letters. So I think there is a lack of clarity on
19 that piece, but the IG's main point is that they do
20 believe that it does meet the requirements of the DMM,
21 but the DMM should be changed.

22 COMMISSIONER BLAIR: You just confused me a
23 bit because I asked you earlier do Netflix' mailing
24 pieces meet the specifications, and you said yes, but
25 then you just said no to me, so I'm a little confused.

1 THE WITNESS: I'm so sorry. The IG said
2 that Netflix does meet --

3 COMMISSIONER BLAIR: Regards, we have the IG
4 report and it's in evidence, and we have the ability
5 to read that.

6 THE WITNESS: Okay.

7 COMMISSIONER BLAIR: What I'm trying to get
8 at is that they meet the specifications, is that true,
9 as outlined in the DMM?

10 THE WITNESS: I believe they do.

11 COMMISSIONER BLAIR: Okay. Now, the next
12 question is do those specifications and the real world
13 experience in processing comport with one another?

14 THE WITNESS: I believe they don't.

15 COMMISSIONER BLAIR: And do other DVD
16 mailers besides Netflix mail at automated letter
17 rates?

18 THE WITNESS: Yes.

19 COMMISSIONER BLAIR: Do they receive manual
20 culling, or are you aware?

21 THE WITNESS: I believe that there is manual
22 culling to a lesser extent of some other mailers.

23 COMMISSIONER BLAIR: And if they do receive
24 these automated letter rates, could GameFly package
25 its mailing in such a way as to comport with the

1 specifications required for automated letter rates?

2 THE WITNESS: Yes, they could.

3 COMMISSIONER BLAIR: Okay. Well, I
4 appreciate that. Thank you. I'd like to yield at
5 this time to any of my colleagues who have questions.
6 Any questions?

7 COMMISSIONER ACTON: No. Thank you.

8 CHAIRMAN GOLDWAY: I just have one question
9 about the IG report, which is doesn't the IG report
10 include in it comments from the Postal Service?

11 THE WITNESS: Yes, it does.

12 CHAIRMAN GOLDWAY: Yes. That's what I
13 thought. So they had an opportunity to --

14 THE WITNESS: Yes.

15 COMMISSIONER BLAIR: -- rebut that. Thank
16 you.

17 COMMISSIONER BLAIR: Thank you, Madam Chair.
18 If there's no follow-up, if there's no further cross-
19 examination, I would like to ask GameFly counsel if
20 you'd like to have some time with your witness for any
21 redirect.

22 MR. LEVY: Thank you, Commissioner Blair.
23 We do not need time. I'm ready to proceed with
24 redirect.

25 COMMISSIONER BLAIR: Okay. What we would

1 like at this point, if we're moving on a quick pace
2 like this, why don't we go ahead with your redirect,
3 and then we'll allow any re-cross, and then after that
4 we could break for lunch.

5 MR. LEVY: Great.

6 COMMISSIONER BLAIR: Given that we're moving
7 quickly, if we proceed to get more, if timewise by, if
8 the clock flies by faster than anticipated, then we'll
9 revisit that, but why don't we go ahead with the
10 redirect.

11 MR. LEVY: That's a polite way for saying if
12 the lawyer is more time-consuming than --

13 COMMISSIONER BLAIR: I would never phrase it
14 in such a way.

15 REDIRECT EXAMINATION

16 BY MR. LEVY:

17 Q Mr. Glick, I want to go back to the first
18 line of questioning that Mr. Mecone asked you, and, as
19 I recall, he asked you something to the effect of
20 whether the Postal Service's manual handling of
21 Netflix' DVDs was driven at least in part by Netflix'
22 desire to reduce disc breakage. Do you recall the
23 line of questions along that line?

24 A Yes, I do.

25 Q And you had a discussion of documents cited

1 in some parts of your testimony.

2 A That's correct.

3 Q And the discussion was somewhere in the 20s
4 of the pages. Page 20 or so. Twenty-three.

5 A Correct.

6 Q Now, one portion of your testimony that Mr.
7 Mecone didn't ask you about was the footnote that
8 begins on page 10 of your testimony, Footnote 5.
9 Would you go there.

10 A Yes.

11 Q Does that have any relationship to the same
12 subject?

13 A Yes, it does.

14 Q Could you explain.

15 A These are documents, emails, et cetera, from
16 and references to other postal documents related to
17 the issue. Some of them include letters from DVD
18 mailers to the Postal Service indicating that the only
19 way to resolve this issue is to cull it. You know,
20 one, for example, on page 11 is an email stating that
21 currently, the only viable solution to scrap reduction
22 is the culling of our returns prior to getting into
23 the automation stream.

24 Q Now, you're referring to the quotation that
25 follows the proprietary marking?

1 A That's correct.

2 Q And without identifying the individuals who
3 were involved in that communication, could you confirm
4 what organization the sender of the email was
5 affiliated with.

6 A Netflix.

7 Q And what organization was the recipient of
8 the email affiliated with?

9 A Postal Service.

10 MR. LEVY: Thank you. Nothing further.

11 COMMISSIONER BLAIR: Is there any re-cross
12 as a result of the redirect? Mr. Mecone?

13 MR. MECONE: Yes. Thank you.

14 RE-CROSS-EXAMINATION

15 BY MR. MECONE:

16 Q Okay. GameFly counsel just asked you about,
17 it looks like document GFL1485.

18 A Yes.

19 Q Does that document reflect any position of
20 the Postal Service?

21 A That document itself does not.

22 MR. MECONE: That's all I have.

23 COMMISSIONER BLAIR: Mr. Costich?

24 MR. COSTICH: Nothing further, Commissioner
25 Blair.

1 COMMISSIONER BLAIR: Any re-cross from the
2 bench at this point?

3 (No response.)

4 COMMISSIONER BLAIR: If there is none, at
5 this point, we did go through that quite
6 expeditiously, and so why don't we go ahead and break
7 for 10 minutes in order to prepare for the closed
8 session and we'll reconvene at 11:50. I'd like to
9 take a break around noon or so. Let's see how the
10 pace of cross-examination is proceeding. I know that
11 there's some appointments that Commissioners have and
12 if there's a natural break in the cross-examination,
13 then we can break for lunch. So I just wanted to give
14 alert. We can start the cross-examination once we
15 come back in a few minutes. With that, the hearing is
16 temporarily adjourned.

17 (Whereupon, a short recess was taken.)

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REPORTER'S CERTIFICATE

DOCKET NO.: C2009-1
CASE TITLE: Complaint of GameFly, Inc.
HEARING DATE: 10/28/10
LOCATION: Washington, DC

I hereby certify that the proceedings and evidence are contained fully and accurately on the tapes and notes reported by me at the hearing in the above case before the Postal Regulatory Commission

Date: 10/28/10
/s/ Gledy

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