

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

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POSTAL RATE COMMISSION
WASHINGTON, D.C. 20268-0001

Complaint of FCA, Ltd, d/b/a/
LIFE TIME FITNESS

Docket No. C98-1

ANSWER OF THE UNITED STATES POSTAL SERVICE
(October 20, 1998)

On September 21, 1998, the Postal Rate Commission received a document captioned "Formal Complaint -- Our File No. FC100-6" (hereinafter, "Complaint") filed by the FCA, Ltd. d/b/a Life Time Fitness (hereinafter, "Life Time Fitness" or "Complainant"). By letter dated September 21, 1998, the Office of the Secretary, Postal Rate Commission, designated the docket number above and advised the General Counsel, United States Postal Service, of the Complaint's filing under title 39, United States Code § 3662.

The Postal Service contends that the subject matter of the Complaint does not fall within the scope of 39 U.S.C. § 3662 or any other grant of jurisdiction to the Postal Rate Commission. Moreover, the Complaint fails to state a claim for which the Commission could grant relief and requests relief which the Commission lacks authority to order.¹ Although the Postal Service answers the factual allegations in the Complaint below, it does not intend thereby to waive its right to seek dismissal of this proceeding.

¹The Postal Service's reasons therefor will be described more fully in a Motion to Dismiss, to be filed no later than 21 days after the filing of this Answer.

The Complaint consists of five pages² of unnumbered paragraphs. For ease of reference, attached to this Answer (as an Appendix) is a copy of the Complaint with annotations sequentially numbering the paragraphs in that document.

Pursuant to Rule 84 of the Rules of Practice and Procedure of the Postal Rate Commission (title 39, Code of Federal Regulations § 3001.84), the Postal Service answers each paragraph of the Complaint of Life Time Fitness as follows:

Paragraph 1

The first sentence of this paragraph consists of a reference to title 39, C.F.R. §§ 3001.81 through 3001.87, rules promulgated by the Commission to implement 39 U.S.C. § 3662. The Postal Service considers this sentence to be Complainant's statement of jurisdiction, not factual allegations to which an answer is required. Insofar as an answer is deemed to be necessary, the Postal Service hereby denies that the Commission has jurisdiction to hear the subject matter of the Complaint or to grant the *relief requested therein*.

The second and third sentences of this paragraph identify the Complainant and counsel. The Postal Service considers that no answer to these sentences is required.

Paragraph 2

The Postal Service admits the first sentence of this paragraph, insofar as it alleges that the Standard (A) Mail in question was accepted by the Bulk Mail Entry Unit at the USPS Processing & Distribution Center, St. Paul, Minnesota, on or about January 6, 1998.

² Accompanied by four Exhibits, designated "A" through "D."

The Postal Service admits the second sentence of this paragraph.

The Postal Service lacks sufficient information upon which to form a belief regarding the truth of the matters asserted in the third and fourth sentences of this paragraph.

Paragraph 3

The Postal Service lacks sufficient information upon which to form a belief regarding the truth of the matters asserted in the first three sentences of this paragraph.

In response to the fourth sentence of this paragraph, the Postal Service admits that its operational objective or delivery service commitment for Standard (A) Mail with the origin-destination characteristics of Complainant's mailing is to deliver each mail piece by either the second or third delivery service day after the day on which the mail was accepted by the Postal Service.

Paragraph 4

The Postal Service lacks sufficient information upon which to form a belief regarding the truth of the matters asserted in the first sentence of this paragraph.

In response to the second sentence of this paragraph, the Postal Service admits that the mail in question was accepted by the Bulk Mail Entry Unit at the USPS Processing & Distribution Center, St. Paul, Minnesota, on January 5, 1998; however, the Postal Service lacks sufficient information upon which to form a belief regarding the truth of Complainant's allegation about its expectation that this mail would be delivered on or about January 8 through 10, 1998.

Paragraph 5

The Postal Service admits the allegation in the first sentence of this paragraph concerning the information transmitted by Mary Weiss, USPS Business Services

Network Coordinator, to Prime Net Marketing Services about delivery of mail pieces in the service area of the Woodbury Classified Branch (of the St. Paul, Minnesota Post Office) on January 9, 1998.

Regarding the second sentence of this paragraph, the Postal Service lacks sufficient information upon which to form a belief regarding the truth of the allegation that Ms. Weiss was the postal official who transmitted information to Prime Net Marketing Services about the receipt or delivery of mail by the Coon Rapids Classified Branch (of the Minneapolis, Minnesota Post Office) on January 9, 1998, or the delivery of such mail in the Coon Rapids service area from January 12 through 14, 1998.

Paragraph 6

The Postal Service lacks sufficient information upon which to form a belief regarding the truth of the matters asserted in this paragraph.

Paragraph 7

The Postal Service admits the allegation contained in the first sentence of this paragraph.

The Postal Service admits the second sentence of this paragraph, insofar as it alleges that its representative at the meeting, Ms. Terry A. Chlebeck, Acting Senior Account Manager, Business Customer Relations, indicated that pursuit of a refund within the Postal Service by Life Time Fitness would likely prove futile because Standard (A) Mail is a service for which there is no postage refund guarantee when the Postal Service delivers such mail, but fails to do so in a manner which meets the specified delivery service commitment. The Postal Service also admits the second sentence, insofar as it alleges that, at the meeting, Ms. Chlebeck described the administrative procedures for submission of a postage refund request and offered to provide guidance in the application of those procedures.

Paragraph 8

To the extent that this paragraph alleges the Postal Service has caused the Complainant to lose "over \$385,937.69 in revenues" or any amount of revenue due to "late delivery of mailings," the paragraph consists of legal conclusions concerning liability for alleged lost revenues, not factual allegations to which a response is required. To the extent that a response is deemed necessary, the allegations are denied.

To the extent that this paragraph also alleges that the Postal Service has caused the Complainant to lose "\$15,418.76 in postage" or any amount of postage due to "late delivery of mailings" or for any other reason, the paragraph consists of legal conclusions concerning liability for alleged lost postage, not factual allegations to which a response is required. To the extent that a response is deemed necessary, the allegations are denied.

Paragraph 9

This paragraph consists of a characterization of and a direct quotation of two sentences from title 39, U.S.C. § 101(a). The Postal Service considers that no answer to this paragraph is required.

Paragraph 10

In response to this paragraph, the Postal Service admits that it has established procedures and practices in furtherance of the statutory policies quoted in paragraph nine of the Complaint. The Postal Service admits that it has established delivery service commitments for the delivery of Standard (A) Mail (formerly third-class mail) and has published those delivery service commitments and disseminated them through various hard-copy and electronic media. The Postal Service also admits that, depending upon the origin-destination characteristics of the mail piece, the delivery service commitment for a Standard (A) Mail piece can be as many as high as ten

delivery service days after the date on which the Postal Service accepts the piece.

To the extent that this paragraph alleges that the establishment of the pertinent delivery service commitment for Standard (A) Mail is in furtherance of specific policies listed in 39 U.S.C. § 101(a), the paragraph consists of the statement of a legal conclusion, and not a factual allegation to which an answer is required.

Paragraph 11

The first sentence of this paragraph consists of a characterization of the degree to which unspecified acts or omissions of the Postal Service deviated from “established practices” and the policies reflected in the portion of 39 U.S.C. § 101(a) quoted in paragraph nine of the Complaint. The reference to unspecified “established practices” renders the sentence too vague to permit the Postal Service to form a belief regarding the truth of any factual allegations it may contain. To the extent that the sentence consists of the statement of legal conclusions instead of factual allegations concerning Postal Service compliance with established policies and procedures, the Postal Service considers that no response to the sentence is required. To the extent that an answer is deemed necessary, the allegations are denied.

Regarding the second sentence of this paragraph, the Postal Service lacks sufficient information upon which to form a belief regarding the extent to which the January 5, 1998, Life Time Fitness Standard (A) mailing in question did not meet the delivery service commitment for such mail.

The Postal Service denies the allegations in the third sentence of this paragraph.

The fourth sentence of this paragraph consists of the statement of a legal conclusion regarding acts or omissions of the Postal Service, as they relate to policy objectives of 39 U.S.C. § 101(a). It does not consist of factual allegations to which a response is required. To the extent that an answer is deemed necessary, the allegations are denied.

Paragraph 12

This first two sentences of this paragraph consist of the statement of legal conclusions, not factual allegations to which a response is required. To the extent that answers are deemed necessary, the allegations are denied.

The Postal Service admits the third sentence of this paragraph, insofar as it alleges that the Service Commitment software publicly distributed by its National Customer Support Center -- which (for Postal Fiscal Year 1998, Quarter 1) indicates the delivery service commitments for First-Class Mail, Priority Mail, Periodicals (formerly second-class mail), Standard (A) Mail (formerly third-class mail), and Parcels (formerly fourth-class mail) for all 3-digit ZIP Code origin-destination pairs in the United States -- do not state whether there is a warranty or guarantee to deliver such mail within its specified delivery commitment window. The Postal Service also admits that the aforementioned Service Commitment software neither addresses the issue of liability nor contains an express waiver of liability for failure to deliver the aforementioned classes of mail in time to meet their respective service commitments.

Paragraph 13

This paragraph consists of the statement of a legal conclusion that the Complainant, another business, and "approximately 99,236 customers" have been "adversely affected by the services." The Postal Service considers this paragraph to consist of the statement of legal conclusions, not allegations of fact to which a response is required. To the extent that a response to the allegations in this paragraph is deemed to be necessary, the allegations are denied.

Paragraph 14

This paragraph consists of Complainant's claim for relief. The Postal Service denies that Complainant is entitled to any relief whatsoever.

Paragraph 15

The first two sentences of this paragraph consist of the statement of legal conclusions, not factual allegations to which responses are required. To the extent that responses are deemed to be necessary, the allegations are denied.

The third sentence of this paragraph consists of the statement of a legal conclusion and Complainant's prayer for relief, not factual allegations to which responses are required. To the extent that responses are deemed necessary, the allegations are denied. The Postal Service considers that Complainant is not entitled to the requested relief.

The Postal Service denies all other allegations of material fact which have not been answered specifically herein.

In accordance with Rule 84(b) and (c) of the Rules of Practice and Procedure of the Postal Rate Commission, the Postal Service further states as follows:

1. The Complaint in this proceeding alleges a failure of the Postal Service to make timely delivery of an unspecified, but presumably significant, percentage of the pieces of a Standard (A) mailing deposited on January 5, 1998, at the Bulk Mail Entry Unit at the St. Paul, Minnesota Processing and Distribution Center.

2. Standard (A) Mail is a postal service defined by the terms of Classification Schedule 300 of the Domestic Mail Classification Schedule, 39 C.F.R. § 3001, Subpart C, Appendix A, as implemented by the USPS Domestic Mail Manual.³

³ The Domestic Mail Manual is incorporated by reference in the Code of Federal Regulations. See 39 C.F.R. § 111.1. In pertinent part, DMM section D600.1.0 states that "[t]he USPS does not guarantee the delivery of Standard Mail within a specified time. Standard Mail might receive deferred service."

3. The Complaint does not raise an issue concerning whether Standard (A) Mail service contravenes the policies of the Postal Reorganization Act on a substantially nationwide basis, within the meaning of 39 C.F.R. § 3001.82. Rather, it alleges a failure on the part of the Postal Service to deliver a significant portion of one Standard (A) mailing within the delivery service commitment window for that mailing in January, 1998. By its very terms, the Complaint raises “an individual, localized, or temporary service issue not on a substantially nationwide basis,” within the meaning of that section. Because the Complaint fails to raise a matter of policy to be considered by the Commission within the meaning of 39 U.S.C. § 3662, as implemented by 39 C.F.R. § 3001.82, the Complaint should be dismissed.

4. The Complaint requests that the Commission order the Postal Service to issue a postage refund, upon finding that the Postal Service failed to meet its delivery service commitment with respect to a significant portion of a Standard (A) mailing. Assuming the Commission deemed the Complaint to be appropriate for consideration and justified, within the meaning of 39 U.S.C. § 3662, and even assuming the Commission concluded that the Postal Service failed to meet its delivery service commitment with respect to a significant portion of that Standard (A) mailing, the Commission, by operation of 39 U.S.C. § 3662, is expressly limited to rendering a public report of its findings, leaving it to the Postal Service to take such action as it deems appropriate in response to such report.⁴

⁴ Assuming *arguendo*, plaintiff's allegations to be true, unlike Express Mail, Standard (A) Mail, by its explicit terms, is not a postal service for which a failure of the Postal Service to meet its delivery service commitment entitles the sender to a postage refund. Compare 39 C.F.R. § 3001, Subpart C, Appendix A, Domestic Mail Classification Schedule 100 (§ 180) and DMM § D500.1.0 for Express Mail with Domestic Mail Classification Schedule 300 and DMM § D600.1.0 for Standard Mail. See also DMM § P014.2, which indicates that, irrespective of mail class, a refund for postage may be made by the Postal Service if postage is paid and no service is rendered. Complainant alleges late delivery service, not a failure to provide delivery service.

5. Section 3662 does not authorize the Commission to order or direct the Postal Service to refund postage to a mailer in response to a finding that the Postal Service delivered a portion of a Standard (A) mailing outside of the delivery service commitment window specified for that mailing. Since the statute only authorizes the Commission to advise the Postal Service to take such action as the Postal Service, in the exercise of its own discretion, deems appropriate, the Complaint requests relief which the Commission lacks authority to provide. Accordingly, the Complaint should be dismissed.

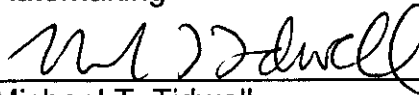
6. The Postal Service considers that a hearing on this Complaint is not necessary.

Respectfully submitted,

UNITED STATES POSTAL SERVICE

By its attorneys:

Daniel J. Foucheaux
Chief Counsel
Ratemaking



Michael T. Tidwell
Attorney

CERTIFICATE OF SERVICE

I hereby certify that, in accordance with section 12 of the Rules of Practice, I have this day served the foregoing document upon:

Bonnie L. Wilkins, Esq.
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October 20, 1998



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C98-1

September 16, 1998

Office of the Secretary
Postal Rate Commission
Washington, DC 20268-0001

Re: *Formal Complaint*
Our File No. FC100-6

Dear Sir or Madam:

Introduction

① Pursuant to Code of Federal Regulation Rules (CFR) 39 CFR Ch. III, subpart E, this is the formal complaint against the United States Postal Service (USPS). The complaint is made by FCA, Ltd. d/b/a Life Time Fitness (hereinafter referred to as "Life Time Fitness"), 6442 City West Parkway, Suite 375, Eden Prairie, MN 55334, (612) 947-0000. Communications should be directed to Bonnie L. Wilkins at Kennedy & Graven, Chartered, 470 Pillsbury Center, 200 South Sixth Street, Minneapolis, MN 55402. Phone number is (612) 337-9300.

Statement of Grounds for Complaint

② On January 6, 1998, approximately 99,236 third class advertisements were mailed at the USPS. Upon learning a few days later that there appeared to be a problem with the delivery, Life Time Fitness contacted the USPS. Life Time Fitness' immediate efforts to investigate and correct the situation, proved futile. Some of the advertising mailers were not received by individuals until the end of January 1998.

APPENDIX to USPS ANSWER
PRC Docket No. C98-1

Facts of the Case

- ③ Life Time Fitness is a national health club chain. In January 1998, it contracted with Prime Net Marketing Services, Inc. ("Prime Net") to distribute a promotional mailing of approximately 99,236 advertisements by third class mail through the Coon Rapids and Woodbury, Minnesota, USPS locations. Prior to the mailing, Life Time Fitness read the USPS software which assists customers in pinpointing dates for delivery (See, Exhibit A). Through this software, the post office established that its "mailing commitment" for third class mail within the applicable zone was two to three days.
- ④ Life Time Fitness' advertising mailing was a time sensitive offer that took effect on January 9, 1998, and expired at the end of that month. On January 5, 1998, the advertising mailers were delivered to the USPS drop station in St. Paul, Minnesota, with the expectation that the mailings would be delivered on or about January 8-10, 1998. (See, Exhibit B).
- ⑤ Prime Net was advised by Mary Weiss, USPS Business Services Network Coordinator, that the mailings were received at homes in the Woodbury postal district on January 9, 1998. In addition, Ms. Weiss advised Prime Net that the Coon Rapids Post Office Station received the mailing on January 9, 1998, and that Coon Rapids delivered a portion of the mailers on January 12, some on January 13, and the remainder on January 14. (See, Exhibit C).
- ⑥ On these dates, however, Life Time Fitness received virtually no customer response. This was contrary to previous mailings that also advertised special savings. Prime Net tried to clarify the situation with the USPS to no avail. Life Time Fitness later learned that individuals had received mailings as late as the end of the month of January 1998, some three weeks after deposit with the USPS.

7 Eventually a meeting was held with the USPS representative and representatives from Life Time Fitness and Prime Net. During this meeting, the USPS representative advised Life Time Fitness that any further efforts to pursue the matter would be futile because the post office does not guarantee the timeliness of mail service.

8 As a consequence of the late delivery, Life Time Fitness estimates that it lost over \$385,937.69 in revenues due to the late delivery of mailings, in addition to \$15,418.76 in postage. (See, Exhibit D).

Violation of Policies

9 United States Code § 101 sets forth the overall policy of the USPS, as follows:

"The Postal Service shall have as its basic function the obligation to provide postal services to bind the Nation together through the personal, educational, literary, and business correspondence of the people. It shall provide prompt, reliable, efficient services to patrons in all areas and shall render postal services to all communities."

10 In furtherance of this policy, the USPS has established procedures and practices, including "the commitment" to deliver third class mail within two to three days of receipt, as represented in the customer software provided to Life Time Fitness.

11 The USPS deviated substantially in this case both from its established practices and from the overall policy set by Congress. Contrary to its commitment to complete delivery within two to three days, the USPS delivered Life Time Fitness' mail two to three weeks after it had been deposited with the USPS branch stations. Further, the USPS was dilatory in responding to Prime Net's inquiries and concerns about the delayed delivery. Unquestionably, the USPS was neither prompt, reliable nor efficient in the delivery of postal services to Life Time Fitness.

12 Nor should the USPS be excused from reimbursing Life Time Fitness for its postage expense on the basis that there is no express guaranty of delivery within the two- to three-day time frame presented in the customer software. The use of the term "commitment" in the customer software strongly denotes a warranty or guaranty to perform within the stated time period. Significantly, the software does not contain an express waiver of liability for failing to comply with this commitment. In sum, the extreme tardiness of delivery, along with the delayed response to Prime Net's follow-up, compels the conclusion that USPS failed to substantially comply with the commitments made to Life Time Fitness. Life Time Fitness received no value whatsoever from its purchase of postal services obtained in reliance on these commitments. Accordingly, Life Time Fitness is entitled, at a minimum to be reimbursed for its postage expense.

13 Those persons adversely affected by the services

1. FCA, Ltd. d/b/a Life Time Fitness.
2. Prime Net Marketing Services, Inc.
3. Approximately 99,236 customers.

Relief Requested

14 Life Time Fitness requests a refund of the postage in the amount of \$15,418.76.

Conclusion

15 Life Time Fitness did not receive postal service in accordance with the policies of the United States Code and the practices and commitments of the USPS. Even after learning that

Office of the Secretary

Re: *Formal Complaint*

September 16, 1998

delivery was not timely, the USPS did not accord with "prompt, reliable, and effective" service. Life

Time Fitness respectfully asks for its requested relief because of these violations of USPS policy.

KENNEDY & GRAVEN, CHARTERED

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