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**UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA**

**IN RE ONLINE DVD RENTAL
 ANTITRUST LITIGATION**

Master File No. M:09-CV-2029 PJH

MDL No. 2029

Hon. Phyllis J. Hamilton

**This document relates to:
 ALL ACTIONS**

**BLOCKBUSTER SUBSCRIBERS'
 CONSOLIDATED AMENDED CLASS
 ACTION COMPLAINT**

JURY TRIAL DEMANDED

1 NOW COME Plaintiffs, DANIEL KAFFER, JASON LAWTON, ALAN LEVY, JUSTIN MEADOWS,
 2 ROSEMARY PIERSON, and REBECCA SILVERMAN, for their Complaint brought under Sections 1 and 2 of
 3 the Sherman Antitrust Act, 15 U.S.C. §§ 1-2, and Sections 4 and 16 of the Clayton Antitrust Act, 15
 4 U.S.C. §§ 15 & 26, for treble damages and injunctive relief, against Defendants Netflix, Inc.
 5 (“Netflix”), Wal-Mart Stores, Inc. (“Wal-Mart Stores”), and Wal-Mart.com USA LLC
 6 (“Walmart.com”).

7 Based upon personal knowledge, information, and belief, and the investigation of counsel,
 8 Plaintiffs allege as follows:

9 NATURE OF THE ACTION

10 1. This suit is brought as a class action pursuant to Rule 23 of the Federal Rules of Civil
 11 Procedure on behalf of a plaintiff Class, defined more fully below, consisting of all persons and entities
 12 that paid a subscription fee to Blockbuster, Inc. (“Blockbuster”) to rent DVDs through its online rental
 13 service, “Blockbuster Online,” between August 19, 2005 and the date of class certification (the “Class
 14 Period”).

15 2. This Complaint does not name Blockbuster as a defendant, nor does it allege that
 16 Blockbuster violated the antitrust laws. Rather, Blockbuster’s online subscribers were injured when, as
 17 a direct, foreseeable, and proximate result of the loss of competition caused by Defendants’ anti-
 18 competitive conduct, Blockbuster charged higher prices to its subscribers to its Blockbuster Online
 19 services. But for the conduct alleged herein, Blockbuster, as a competitor in this market, would have
 20 charged lower prices to Plaintiffs and other members of the Class. Defendants are liable for those
 21 injuries to Plaintiffs and other members of the Class.

22 3. On or before May 19, 2005, Defendants completed and entered into an illegal
 23 anticompetitive agreement (the “Market Allocation Agreement”) to divide the markets for sales and
 24 online rentals of DVDs in the United States, with the purpose and effect of monopolizing and
 25 unreasonably restraining trade, in at least the market for online DVD rentals (the “Online DVD Rental
 26 Market”). The mechanics of the Market Allocation Agreement, as set forth herein, allowed Defendant
 27 Netflix to charge supracompetitive prices to its subscribers. Those supracompetitive prices and the
 28 other anticompetitive conduct and effects alleged herein were the proximate cause of Blockbuster

1 charging higher prices in that market than it otherwise would have charged.

2 4. At the beginning of 2005, Defendants Netflix and Walmart.com, as well as third-party
3 Blockbuster, were competing directly in the Online DVD Rental Market. Walmart.com viewed its
4 relatively new online rental program, "Wal-Mart DVD Rentals," as a success, expressing considerable
5 optimism about the future growth of that service. In early January 2005, Walmart.com reduced the
6 price of its most popular online DVD rental program, reflecting its plans to expand in that market,
7 which placed further price pressure on Netflix. Facing growing competition from Walmart.com, in
8 January 2005, Netflix CEO Reed Hastings invited Walmart.com CEO John Fleming to dinner for a
9 meeting to discuss their (then) competing businesses.

10 5. Fleming accepted the invitation; that meeting and other communications led to Defendants
11 entering the Market Allocation Agreement, pursuant to which Walmart.com agreed to exit the Online
12 DVD Rental Market and Netflix agreed not to enter the retail DVD market, but instead to actively
13 promote DVD sales by Wal-Mart Stores and Walmart.com.

14 6. Since entering into the Market Allocation Agreement, neither Wal-Mart Stores nor
15 Walmart.com has rented DVDs online and Netflix has not sold new DVDs. The Market Allocation
16 Agreement served to eliminate all competition (including price competition) between Walmart.com
17 and Netflix in the Online DVD Rental Market, entrench and enhance Defendants' dominant market
18 positions, and otherwise cause harm to competition, including enabling both Netflix and Blockbuster
19 to charge higher subscription prices for online DVD rentals than they would have had Defendants not
20 entered into the Agreement. As a direct, proximate, and foreseeable result of Defendants' violations of
21 law, millions of Blockbuster Online subscribers did in fact pay and continue to pay higher subscription
22 prices than they otherwise would have as a result of Defendants' conduct.

23 **PLAINTIFFS**

24 7. DANIEL KAFFER is an adult individual who resides in San Diego, California. During the
25 Class Period, Mr. Kaffer directly subscribed to Blockbuster Online for his personal, non-commercial
26 use and paid Blockbuster fees in connection therewith. The subscription fees Mr. Kaffer paid to
27 Blockbuster were supracompetitive; they were greater than he would have paid, but for the antitrust
28

1 violations alleged herein. Mr. Kaffer thereby suffered injury in his property, in the form of
 2 overcharges, injury which the antitrust laws are intended to prevent and remedy.

3 8. JASON LAWTON is an adult individual who resides in Holmen, Wisconsin. During the Class
 4 Period, Mr. Lawton directly subscribed to Blockbuster Online for his personal, non-commercial use
 5 and paid Blockbuster fees in connection therewith. The subscription fees Mr. Lawton paid to
 6 Blockbuster were supracompetitive; they were greater than he would have paid, but for the antitrust
 7 violations alleged herein. Mr. Lawton thereby suffered injury in his property, in the form of
 8 overcharges, injury which the antitrust laws are intended to prevent and remedy.

9 9. ALAN LEVY is an adult individual who resides in Highland Park, Illinois. During the Class
 10 Period, Mr. Levy directly subscribed to Blockbuster Online for his personal, non-commercial use and
 11 paid Blockbuster fees in connection therewith. The subscription fees Mr. Levy paid to Blockbuster
 12 were supracompetitive; they were greater than he would have paid, but for the antitrust violations
 13 alleged herein. Mr. Levy thereby suffered injury in his property, in the form of overcharges, injury
 14 which the antitrust laws are intended to prevent and remedy.

15 10. JUSTIN MEADOWS is an adult individual who resides in Indianapolis, Indiana. During the
 16 Class Period, Mr. Meadows directly subscribed to Blockbuster Online for his personal, non-
 17 commercial use and paid Blockbuster fees in connection therewith. The subscription fees Mr.
 18 Meadows paid to Blockbuster were supracompetitive; they were greater than he would have paid, but
 19 for the antitrust violations alleged herein. Mr. Meadows thereby suffered injury in his property, in the
 20 form of overcharges, injury which the antitrust laws are intended to prevent and remedy.

21 11. ROSEMARY PIERSON is an adult individual who resides in Yuba City, California. During the
 22 Class Period, Ms. Pierson directly subscribed to Blockbuster Online for her personal, non-commercial
 23 use and paid Blockbuster fees in connection therewith. The subscription fees Ms. Pierson paid to
 24 Blockbuster were supracompetitive; they were greater than she would have paid, but for the antitrust
 25 violations alleged herein. Ms. Pierson thereby suffered injury in her property, in the form of
 26 overcharges, injury which the antitrust laws are intended to prevent and remedy.

27 12. REBECCA SILVERMAN is an adult individual who resides in Deerfield, Illinois. During the
 28 Class Period, Ms. Silverman directly subscribed to Blockbuster Online for her personal, non-

1 commercial use and paid Blockbuster fees in connection therewith. The subscription fees Ms.
 2 Silverman paid to Blockbuster were supracompetitive; they were greater than she would have paid, but
 3 for the antitrust violations alleged herein. Ms. Silverman thereby suffered injury in her property, in the
 4 form of overcharges, injury which the antitrust laws are intended to prevent and remedy.

5 DEFENDANTS

6 **NETFLIX**

7 13. Defendant NETFLIX is a Delaware corporation headquartered at 100 Winchester Circle, Los
 8 Gatos, California, 95032. Netflix is publicly traded on the NASDAQ under the symbol NFLX. Its
 9 revenues earned from engaging in interstate commerce exceed \$1 billion annually. Through its
 10 website, www.netflix.com, Netflix rents DVDs directly to consumers nationwide by charging monthly
 11 subscription fees, which entitle customers to rent DVDs pursuant to various subscription plans. Netflix
 12 has possessed a market share of at least 75% of the Online DVD Rental Market in the United States, as
 13 defined herein, at all times during the Class Period.

14 **WAL-MART**

15 14. **Wal-Mart Stores.** Defendant WAL-MART STORES is the largest retailer in the United
 16 States. Wal-Mart Stores is a Delaware corporation headquartered at 702 S.W. 8th Street, Bentonville,
 17 Arkansas, 72716. Wal-Mart Stores is publicly traded on the New York Stock Exchange under the
 18 symbol WMT. Its revenues earned from engaging in interstate and foreign commerce approach \$400
 19 Billion annually. Through its retail stores and its website, www.walmart.com, Wal-Mart Stores sells
 20 new DVDs directly to consumers nationwide. Wal-Mart Stores sells far more DVDs than any other
 21 retailer in the United States, accounting for about 40% of all new DVDs sold to consumers
 22 domestically. During fiscal years 2005-2008 combined, it and Walmart.com had revenues in excess of
 23 \$25 billion from selling DVDs to consumers. Prior to the Market Allocation Agreement, Wal-Mart
 24 Stores' wholly-owned subsidiary Walmart.com competed with Netflix in the Online DVD Rental
 25 Market through the "Wal-Mart DVD Rentals" service, which was available on www.walmart.com.

26 15. **Walmart.com.** Defendant WALMART.COM is a California Limited Liability Company with
 27 offices at 7000 Marina Boulevard, Brisbane, California, 94005. Its corporate registration with the
 28 California Secretary of State (as of May 18, 2009) lists its address as 702 S.W. 8th St., Bentonville, AR

1 72716—the same address as Wal-Mart Stores. It is the online component of Wal-Mart Stores’ retail
2 empire that is the leading seller of new DVDs in the United States.

3 16. Prior to the conspiracy alleged herein, Walmart.com was also a major competitor of Netflix
4 in the Online DVD Rental Market through the “Wal-Mart DVD Rentals” service, which was available
5 on www.walmart.com. While its financials are not publicly reported by Wal-Mart Stores,
6 Walmart.com is ranked as the 14th largest online retailer in the United States. Walmart.com sells new
7 DVDs directly to consumers nationwide. Consumers who purchase DVDs via www.walmart.com may
8 have them either mailed or otherwise delivered to them directly, or may pick them up at a Wal-Mart
9 Stores retail location via Walmart.com’s and Wal-Mart Stores’ “Site to Store” program.

10 17. **Wal-Mart Stores and Walmart.com.** Walmart.com and Wal-Mart Stores are, in essence,
11 operated as a single commercial enterprise and hold themselves out to the public as such, by which
12 Walmart.com is an internet sales channel for Wal-Mart Stores, rather than being an independent
13 business entity. Wal-Mart Stores is the registrant of the www.walmart.com domain name that is used
14 to sell products and services by Walmart.com. Likewise, Wal-Mart Stores is the registrant of
15 www.walmartdvdrentals.com. Wal-Mart Stores’ Chief Marketing Officer John Fleming has explained
16 the relationship between Wal-Mart Stores and Walmart.com as follows:

17 Walmart.com was set up as a separate company, with outside investors and with Wal-
18 Mart owning a majority. The idea was that Walmart.com was going to tap into
19 customers Wal-Mart didn’t have and, in doing so, would defend our position as the
20 world’s largest retailer. We saw very quickly that this wasn’t how customers viewed
21 the online channel. Within six months, Wal-Mart bought back the outside interest.

22 18. **Wal-Mart Stores’ Active Participation in the Conspiracy.** Wal-Mart Stores was actively
23 involved in the conspiracy alleged herein, as alleged more specifically below. For purposes of these
24 allegations, both Wal-Mart Stores and Walmart.com are active participants in the conspiracy and each
25 is liable for the unlawful conduct alleged herein, with each, among other things, participating in, and
26 benefiting from, the Market Allocation Agreement. Moreover, Wal-Mart Stores directed, ratified,
27 approved, supported, and otherwise aided and abetted Walmart.com’s violations of law.

28 19. Wal-Mart Stores had a strong motive to conspire with Netflix. In addition to its interests as
the 100% owner of Walmart.com, Wal-Mart Stores had further incentive to enter into the Market

1 Allocation Agreement, since it obtains substantial revenues from sales of new DVDs, as well as store
 2 traffic resulting in the sales of other goods, which would have been threatened by Netflix's entry into
 3 new DVD sales, and which were enhanced by Netflix's promotion of Wal-Mart Stores and
 4 Walmart.com through the Market Allocation Agreement.

5 20. In a letter submitted in connection with a prior antitrust case brought against Netflix by
 6 other plaintiffs for other alleged violations of law, an assistant general counsel of Wal-Mart Stores,
 7 referring specifically to Wal-Mart Stores, wrote of "Wal-Mart's decision to discontinue renting
 8 DVDs." Moreover, it was Wal-Mart Stores that announced in part the Market Allocation Agreement,
 9 which identifies Wal-Mart Stores, in the "About" section of the press release. The announcement
 10 quoted John Fleming, at the time both the Chief Marketing Officer of Wal-Mart Stores and the
 11 outgoing CEO of Walmart.com still overseeing Walmart.com operations, regarding the Agreement. It
 12 explained that Walmart.com's DVD sales are in fact Wal-Mart Stores' "online movie sales business,"
 13 and that, more generally, Wal-Mart Stores' "[o]nline merchandise sales are available at
 14 www.walmart.com."

15 **THIRD-PARTY BLOCKBUSTER**

16 21. BLOCKBUSTER is a Delaware corporation headquartered at 1201 Elm Street, Dallas, Texas
 17 75270. Blockbuster is publicly traded on the New York Stock Exchange under the symbol BBI. Its
 18 revenues earned from engaging in interstate and foreign commerce exceed \$5 billion annually. Among
 19 other things, Blockbuster operates the leading chain of video rental stores in the United States. In
 20 addition, through its internet division, Blockbuster Online, www.blockbusteronline.com, Blockbuster
 21 rents DVDs directly to consumers nationwide by charging monthly subscription fees, which entitle
 22 customers to rent DVDs pursuant to various subscription plans, including "Total Access," and
 23 "Blockbuster-By-Mail." Blockbuster has possessed a market share of around 25% of the Online DVD
 24 Rental Market in the United States, as defined herein, during the Class Period.

25 22. Whenever this Complaint refers to a statement or transaction of any corporation or entity,
 26 the allegation means that the corporation or entity acted by or through its directors, members, partners,
 27 officers, employees, affiliates, or agents, while engaged in the management, direction, control, or
 28 conduct of the corporation's or entity's business and acting within its scope of authority.

JURISDICTION AND VENUE

23. This Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331, 1332(d) & 1337 and 15 U.S.C. §§ 1-2, 15 & 26.

24. Venue is proper in this District pursuant to 28 U.S.C. §§ 15, 22 & 26 and pursuant to 28 U.S.C. § 1391(b), (c) & (d), because at all times relevant to the Complaint: (a) Defendants transacted business, were found, or acted through subsidiaries or agents present in this District; (b) a substantial part of the events at issue in Plaintiffs' claims occurred in this District; and (c) a substantial portion of the affected interstate trade and commerce described below has been carried out in this District.

25. This Court has personal jurisdiction over Defendants because, *inter alia*, Netflix and Walmart.com are headquartered in this State and each of the Defendants has transacted business; maintained continuous and systemic contacts; purposefully availed itself of the benefits of doing business; and committed acts in furtherance of the alleged conspiracy in this State.

INTERSTATE TRADE AND COMMERCE

26. Defendants' conduct has taken place within the flow of, and substantially affected the interstate commerce of, the United States. By way of example, Defendants have sold and/or rented DVDs throughout the United States, involving hundreds of millions or billions of dollars in interstate commerce, and used the instrumentalities of interstate commerce, including interstate wires and the U.S. mail, to sell and/or to rent DVDs throughout the United States. In addition, Blockbuster has rented DVDs online throughout the United States, involving millions of dollars in interstate commerce, including renting DVDs by use of interstate wires and the U.S. mail.

RELEVANT MARKET

27. For those claims that may require market definition, the Relevant Market for purposes of these allegations during the Class Period at least is: the rental of DVDs online by subscription for delivery by mail in the United States (the "Online DVD Rental Market"). At all relevant times, Netflix and Blockbuster have been competitors in the Relevant Market. Prior to entering into the Market Allocation Agreement, Defendants Wal-Mart Stores and Walmart.com competed in the Relevant Market.

1 28. The Market Allocation Agreement, however, is *per se* illegal and requires no allegation of
2 market definition.

3 29. Plaintiffs also allege, in the alternative, that the Market Allocation Agreement is
4 anticompetitive and illegal under the Rule of Reason. Among other facts alleged herein, the
5 Defendants' conduct ended competition between direct competitors in the Online DVD Rental Market,
6 conferred a monopoly upon Netflix in that market and has no pro-competitive benefits.

7 30. "DVD," as defined herein, refers to a Digital Video Disc or Blu-ray Disc containing
8 commercially recorded entertainment programs for personal viewing. DVDs are the primary medium
9 by which movies and other recorded entertainment are distributed in the United States. Revenues on
10 DVDs far exceed those generated from box office receipts. In addition, DVDs have become a
11 particularly lucrative means for the distribution of previously aired television programs, surpassing
12 even television syndication rights as a revenue stream in many instances. As defined herein, "DVD"
13 does not refer to blank Digital Video Discs, which are used to store or record data.

14 31. At all relevant times, there have been no reasonably interchangeable substitutes for the
15 service of online DVD rentals, which is differentiated, from both the demand and the supply side, from
16 other methods of DVD distribution channels, as well as other methods of entertainment content
17 delivery.

18 32. In the Online DVD Rental Market, for a monthly subscription fee, a consumer may rent
19 DVDs from an online service provider, such as Netflix, Blockbuster Online, or (prior to its exit from
20 this market) Wal-Mart DVD Rentals.

21 33. Within any given plan, the consumer pays the subscription fee regardless of how many
22 DVDs he or she rents per month. Thus, even a consumer who does not rent a DVD for months still is
23 charged the subscription fee; Netflix CEO Reed Hastings has called this the "gym membership effect."
24 To rent DVDs, consumers fill out a rental "queue" in their online profile, listing in order of preference
25 the DVDs they wish to rent. The DVDs are then sent to the consumer's home via U.S. mail. To return
26 the DVD and receive the next DVD in the queue, the consumer inserts the DVD in a prepaid envelope
27 provided with the rental and mails it back; the service provider then mails the next available movie in
28 the queue to the consumer.

34. From the consumer's perspective, online DVD rentals are a differentiated service that is not reasonably interchangeable with in-store video rental. In video rental from stores, consumers drive to or otherwise arrive at the store, find (or do not find) what they are looking for, and, for the most part, pay on a per-DVD basis for their selection(s). After the designated rental period, usually depending upon the release date of the DVD, the consumer returns the selection or potentially incurs late fees. During the Class Period as alleged herein, these late fees have accounted for as much as 20% of the revenues in traditional video rental stores; there are no late fees or due dates in the Online DVD Rental Market.

35. There are numerous other practical indicia of the Online DVD Rental Market being a relevant product market, distinct from other forms of video rental, including:

A. Price Competition. No direct price competition exists between online DVD rental and other forms of video rental, whether in-store, kiosk, video-on-demand, or video downloading, which are not reasonably interchangeable with online DVD rental. For example, online DVD rentals generally are priced on a monthly subscription basis. Within any given plan, the subscription rate is independent of the number of DVDs the customer actually rents in a month. In-store DVD rentals, kiosks, and downloading generally are priced on a pay-per-view basis. Also, changes in the price of online rentals do not closely track changes in the price of in-store rentals. The pricing of online DVD rentals is generally nationwide in scope and is not affected by local in-store prices and competition. As a result, the pricing of online DVD rentals would generally be the same to a customer, regardless of whether the nearest rental store is two minutes or two hours away. Online DVD rentals generally offer additional services, such as movie reviews, customer-specific recommendations based on viewing and preference history, and other metrics of popularity. The cross-elasticity of demand between these products and services is such that a small but significant non-transitory increase in price ("SSNIP") would not cause consumers to switch from online DVD rental to in-store rental or any other arguable method of DVD or video distribution, and *vice versa*.

B. Functional Differences. Online DVD rentals fundamentally differ from in-store rentals in that (1) they do not require travel to a store (including a second trip to return the DVD and potentially multiple trips if the store does not have the DVD in stock at the right time), (2) are

1 available to anyone with a postal address, regardless of proximity to a store, (3) are primarily
 2 subscription-based services, and (4) provide a much wider selection of titles than can a bricks-and-
 3 mortar store—the library of titles available from online service providers has grown over time, now
 4 ranging near 100,000 DVDs—often twenty to one-hundred times the selection of titles stocked (not to
 5 mention available) at any single video rental store. For these reasons, among others, online and in-
 6 store DVD rentals are not reasonably interchangeable. Likewise, other modes of video distribution,
 7 such as kiosk, video-on-demand, and downloading, among other forms, are not reasonably
 8 interchangeable with online DVD rentals for a number of reasons, including relative selection and
 9 convenience for consumers, pricing, as well as, from the supply perspective, licensing considerations
 10 and technological limitations.

11 **C. Public and Industry Perceptions.** The online rental market is recognized as a
 12 distinct market by the public and the industry, including by Defendants. For example, Defendants
 13 have confirmed and recognized the existence of a discrete online rental market. In September 2008,
 14 Netflix spokesman Steve Swasey told the Wall Street Journal that other types of rental services, such
 15 as kiosk and in-store rentals, do not present a direct competitive threat to Netflix explaining, “We see
 16 kiosks as competing with video stores. They’re very new-release centric—that’s all they offer—and
 17 that’s what the stores offer. You’re still going to a destination to pick it up, you have to return it, and
 18 you pay by the day.” Mr. Swasey acknowledged that while video downloads may be a competitive
 19 force in the future, “[m]ainstream consumers are still happy with DVDs, and probably will be for five
 20 to 10 years.”

21 36. With DVD being the dominant medium for years to come, the entry of this technology is
 22 not timely enough to be considered a competitive force in the relevant market. Indeed, Netflix CEO
 23 Reed Hastings has maintained that DVDs will be the dominant medium for movies for perhaps as long
 24 as the gasoline engine. He thus has predicted that the competitive threat of internet downloading to
 25 online DVD rental is like that of hydrogen powered cars to gasoline powered cars—inconsequential for
 26 many years to come.

27 37. As recently as April 24, 2009, during Netflix’s First Quarter conference call with financial
 28 analysts, Hastings said that online DVD and Blu-ray rental will “continue to grow for many years,”

1 without regard to any advances in video downloading or other modes of content delivery. Hastings
 2 went to explain that the “key takeaway” is that “there is still a lot of growth in rental by mail. The
 3 studios clearly have a vested interest in extending the life of DVD and Blu-ray and that’s good for
 4 Netflix as well.” Hastings observed video kiosks pose no serious competitive threat to Online DVD
 5 Rental, explaining that “Despite kiosk growth . . . we had a record quarter and we expect to have a
 6 record year because our differentiators continue to be our vast selection—over 100,000 titles—the
 7 convenience of mail and streaming, that you don’t have to drive anywhere to receive or return a Netflix
 8 disk, and our unlimited rentals for one flat fee.” He also observed that by year’s end, in-store rentals,
 9 video streaming and DVD sales would be even less of a competitive threat than video kiosks.

10 38. Online DVD rentals are also a separate market from DVD sales. The pricing of DVD sales
 11 and online DVD rentals is very different. For example, the price to buy a new DVD depends heavily
 12 on how popular it is, including whether it is a new release or how successful the title originally was at
 13 the box office or on television. By contrast, online DVD renters generally charge based on a
 14 subscription fee, regardless of whether the consumer is renting popular or obscure DVDs. The
 15 industry and the public perceive online DVD rentals as separate from DVD sales, whether in-store or
 16 online. The factors motivating a consumer to buy a DVD are different from those that lead to renting a
 17 DVD. The former generally applies to DVDs that the consumer intends to view (either personally, or
 18 their family or friends) numerous times. The latter generally applies to DVDs that the consumer
 19 intends to view once and then return. DVDs sold at retail have other distinguishing characteristics,
 20 such as packaging and special features not available with rentals, which are delivered unadorned in
 21 envelopes. In addition, the fact of whether a DVD is new or used is not an issue in rental, but is a
 22 significant factor in sales, for used DVDs are sold at a significant discount to their new counterparts.
 23 DVD sales and online rentals also are not reasonably interchangeable for consumers intending to
 24 collect physical DVDs or to give a DVD as a gift. The cross-elasticity of demand between these
 25 products and services is such that a SSNIP would not cause consumers to switch from online renting to
 26 purchasing DVDs, and *vice versa*.

27 39. The Geographic Market for the Online DVD Rental Market is the United States. The
 28 United States is the only area of effective competition where buyers can turn for alternative sources of

1 supply of Online DVD Rental services. Among other things, shipping costs and transglobal
 2 differences in DVD data encoding make it neither practical nor feasible for entities located in other
 3 countries to rent DVDs to U.S. consumers.

4 MARKET AND MONOPOLY POWER

5 40. At all relevant times, Netflix dominated the Online DVD Rental Market. Netflix has had an
 6 approximate market share of 75% in the Online DVD Rental Market, and is far and away the market
 7 leader in the Online DVD Rental Market. As a result of this market share, Netflix has had and
 8 continues to have market and monopoly power in the Online DVD Rental Market; it has the power to
 9 control prices or exclude competition in this Relevant Market.

10 41. Netflix also has the power to control prices or exclude competition in the Relevant Market
 11 for other reasons. Specifically, Netflix (a) set subscription prices well in excess of marginal costs, (b)
 12 enjoyed high profit margins thereon, (c) sold such subscriptions generally in excess of the competitive
 13 price, and (d) would not, with an SSNIP for its online DVD rental subscriptions (or not reducing its
 14 prices to match Blockbuster's lower prices during the Class Period), lose sufficient sales to make such
 15 a price increase unprofitable.

16 42. Netflix's market and monopoly power is strengthened by the significant barriers to entry in
 17 the Relevant Market. There have been no significant market entrants in the nearly four years since the
 18 announcement of the Market Allocation Agreement, which increased those barriers. Online DVD
 19 rental is highly capital intensive. A firm must operate on a large scale to be successful. It requires the
 20 possession of a significant number of shipping facilities strategically located throughout the United
 21 States to ensure timely delivery. It also requires stocking an extensive inventory of DVDs to maintain
 22 the selection of titles that consumers demand. As Netflix CEO Reed Hastings observed, "When you
 23 think about the barriers to entry to this business, it is subtle because it appears easy. A kid can open a
 24 website. But the barriers to profitability are very large." Hastings further noted that "opening a
 25 website that does rental is easy. What's hard is [creating] the scale to be able to do it profitably."
 26 These barriers are far greater now that they were when Netflix began. Netflix was able to enter on a
 27 much smaller scale but a new entrant today would need a much larger scale of operations.

28 43. Since the implementation of the Market Allocation Agreement, the Online DVD Rental

1 Market has been overwhelmingly comprised of only two firms: Netflix and Blockbuster, which
 2 possesses nearly all of the remaining 25% of the Online DVD Rental Market that Netflix does not
 3 control. Blockbuster's presence does not preclude Netflix's monopoly and market power. Reed
 4 Hastings has stated that Blockbuster actually "works very well for us" because it creates "a lot of
 5 press," but, from a competitive perspective, it has a "relatively not strong balance sheet and [is] in the
 6 business in a small way." A few minor firms have shares of less than 1-2% of the market. During
 7 fiscal years 2005-2008 combined, Netflix earned more than \$5 Billion in revenues and nearly \$2
 8 Billion in gross profit from renting DVDs to consumers—a margin of nearly 40%. As a result of
 9 Netflix's market and monopoly power alleged herein, its subscription fees have been higher than they
 10 otherwise would have been.

11 44. Further evidence of Netflix's market and monopoly power is reflected in the
 12 anticompetitive effects alleged herein.

13 THE ILLEGAL AGREEMENT

14 45. **Pre-Agreement Competition in the Online DVD Rental Market from Walmart and**
 15 **Blockbuster Online.** In early 2005, Netflix was coming off a year in which competition was growing
 16 and its stock price had dropped precipitously. It faced increasing competition from Wal-Mart DVD
 17 Rentals and from Blockbuster Online, the latter of which had just entered the Online DVD Rental
 18 Market.

19 46. **Blockbuster Enters and Undercuts Netflix on Price.** On August 11, 2004, Blockbuster
 20 launched its online DVD rental service, Blockbuster Online. In doing so, Blockbuster undercut Netflix
 21 by 10% per month. Shane Evangelist, Blockbuster Vice President and General Manager of
 22 Blockbuster Online stated in the formal announcement: "We think now is the opportune time for
 23 Blockbuster to enter the online rental business, and we plan to quickly establish ourselves in this arena
 24 by aggressively marketing, pricing and combining our online program and in-store capabilities. . . . To
 25 this end, the Blockbuster Online monthly fee is currently priced below our biggest competitor for the
 26 three-out rental plan."

27 47. **The Netflix Price Cut.** Netflix responded to this new three-firm market by dropping its
 28 price to match Blockbuster Online. On October 14, 2004, Netflix announced that it would be dropping

1 the price of its most popular 3-out subscription plan from \$21.99 to \$17.99, which matched
2 Blockbuster Online's price exactly.

3 **48. The First Blockbuster Price Cut.** The next day, however, Blockbuster's CEO John
4 Antioco told Reuters that Blockbuster Online would lower its monthly subscription rate from \$19.99 to
5 \$17.49 in order to undercut Netflix's price reduction. According to Antioco, but for Netflix's online
6 DVD rental price cut, Blockbuster Online would have been content to keep its price at \$19.99 per
7 month, he explained "We were growing our business at a very nice clip, but would not have elected to
8 lower our prices. Having said that, we are determined that we are not going to be beaten from a
9 price/value perspective."

10 49. Taken aback by the difference in price competition inherent in a three-firm versus a two-
11 firm market, Ted Sarandos, Netflix's Chief Content Officer, responded: "This is really new for us. We
12 have to digest a bit before we can make a comment."

13 50. On October 27, Antioco elaborated on the rationale for the price cut to investment analysts:

14 3 weeks ago Netflix lowered its monthly subscription price by \$4 to 17.99, and we
15 believe, in spite of what they may say, that it is in direct response to the impact our
16 service was demonstrating it could have on their business. Naturally, we did what
17 any serious competitor would, we responded. We lowered our price to \$17.49,
18 further enriched our in-store coupon offers by making them good for games, as well
as movies, and hopefully sent a message to the marketplace that Blockbuster is
determined to do what it takes to be the leader in both the online and in-store rental
space. Obviously, the question is, can we make money at 17.49. The short answer
is, yes.

19 **51. The First Walmart Price Cut.** Days later, on November 1, 2005, Walmart.com undercut
20 both Netflix and Blockbuster. As reported by the New York Times: "The recent price wars among
21 online DVD rental companies continued yesterday, as Walmart.com, a unit of Wal-Mart Stores,
22 lowered the price for its DVD rental service to \$17.36 a month, from \$18.76. . . . Walmart's monthly
23 price is now more than 50 cents lower than Netflix's, and about 15 cents lower than Blockbuster's."

24 **52. The Second Blockbuster Price Cut.** The next month, Blockbuster once again cut its
25 prices; this time even more dramatically. In the press release on the price cut, Evangelist announced:
26 "We are lowering our subscription price to \$14.99 a month. For those who subscribe now, this price is
27 guaranteed through January 2006. Existing Blockbuster Online subscribers will enjoy the same
28 guarantee." Evangelist went on to say:

1 This is not a promotion. We want to make it clear to anyone who is now subscribing to
 2 an online service or considering such a service that Blockbuster is committed to being
 the high-quality, low-cost provider in the online rental space.

3 53. Meanwhile, Wal-Mart Stores and its wholly-owned subsidiary Walmart.com, which had
 4 established themselves as the leader in new DVD sales, were facing increasing competition from in-
 5 store and online channels of distribution in new DVD sales, including competition from Amazon.com.
 6 At the time, Netflix was a significant potential additional competitor, since it had a subscriber base of
 7 millions of customers who were also known to be prolific DVD buyers, and the sales and profits of
 8 Wal-Mart Stores and Walmart.com stood to suffer if Netflix began selling new DVDs to these
 9 customers. Conversely, Wal-Mart Stores and Walmart.com stood to gain significant additional sales
 10 and profits and to gain further market share in the sale of new DVDs if these customers were to make
 11 their purchases of new DVDs from them instead.

12 54. **Walmart.com's success and plans for the online DVD rental business prior to the**
 13 **Agreement.** From its beginnings in 2003 through the January 2005 dinner, Walmart.com trumpeted
 14 the success of its online DVD rental service. As early as November 2003, Cynthia Lin, a
 15 spokeswoman for Walmart.com, observed that "Customers have really been responsive to the
 16 convenience of ordering online. . . . There's definitely a large appetite for this." And, in February
 17 2004, Walmart.com said it was "seeing superb growth" in Wal-Mart DVD Rentals. By April 2004,
 18 Walmart.com said its gains in monthly subscribers were "exceeding expectations." On October 24,
 19 2004, only a few months prior to the January dinner, Kevin Swint, Walmart.com's director of
 20 entertainment and photo said that Wal-Mart DVD Rentals had "grown beyond our expectations" and
 21 that "We're really bullish about this service . . . and our customers are enthusiastic."

22 55. The recognition of the potential of its DVD rental business also was reflected in the
 23 dramatic expansion of Wal-Mart DVD Rentals during 2004 by the doubling of its capacity and
 24 expressions of plans to continue that expansion in 2005. During 2004, for instance, Wal-Mart DVD
 25 Rentals expanded its DVD selection from 13,000 titles to 20,000 and doubled the number of
 26 distribution centers from 7 to 14. In December 2004, Amy Colella, a spokeswoman for Walmart.com,
 27 said that the business was going to add even more distribution centers the following year, explaining
 28 on December 29, 2004: "It's a viable business for us, with growth potential." During a January 7,

1 2005 interview, within days before the January dinner of CEOs Hastings and Fleming, John Fleming
 2 told CNBC that Wal-Mart DVD Rentals was among its “very good businesses that we’re focused on
 3 developing over the next year or two.”

4 **56. The Second Walmart Price Cut.** On that same day, January 7, 2005, and less than two
 5 weeks after the Blockbuster price cut was announced, Wal-Mart DVD Rentals dropped the price on its
 6 most popular DVD rental plan significantly—to \$12.97 per month—creating further price pressure on
 7 Netflix to reduce its DVD rental prices. In order to respond to the increased competition, Netflix
 8 would have been forced to lower its prices and thereby reduce its profits. This increased competition
 9 was not good news for Netflix. “Since its core business is online DVD rentals, Netflix might have
 10 been the company most threatened by Wal-Mart’s push into the sector,” as one industry publication
 11 then noted. That publication further explained, “Because of its size, buying power and agreements
 12 with movie distributors, Wal-Mart could have put significant pricing pressure on Netflix over time,
 13 analysts said.” This growing price disparity plainly was not good news for Netflix, even though it was
 14 for consumers.

15 **57. The January Dinner Meeting.** Faced with this increasing competition, Reed Hastings, the
 16 Chairman and CEO of Netflix, called John Fleming, then the CEO of Walmart.com, and invited him to
 17 dinner to discuss their companies’ (then) competing businesses. Fleming accepted the invitation; they
 18 met in January 2005, “started talking about how we could work together” (according to Hastings), and
 19 embarked upon a scheme that would result in the Market Allocation Agreement.

20 **58. Hastings’ Subsequent “Prediction.”** On April 21, 2005, in Netflix’s First Quarter
 21 earnings call with financial analysts, held after the January dinner, but less than one month prior to the
 22 public announcement of the Market Allocation Agreement, Hastings made plain the motive for Netflix
 23 to conspire with Wal-Mart Stores and Walmart.com:

24 In terms of profitability over the coming years, the key issue is the number of major
 25 competitors. If there are only two major players, Blockbuster and Netflix, the
 26 profitability may be substantial like other two-firm entertainment markets. If, on the
 other hand, Amazon, Wal-Mart, Blockbuster and Netflix are all major competitors in
 online rental, then the profits would likely be small.

27 Hastings went on to “predict” on that conference call:

28 [T]he likely case is [that] online rental becomes a two-firm market over the coming
 years.

1 **59. The Public Announcement.** On May 19, 2005, shortly after Fleming had been promoted
 2 by Wal-Mart Stores from his position at Walmart.com in Brisbane to be the Chief Marketing Officer of
 3 Wal-Mart Stores in Bentonville, Defendants issued a joint press release that revealed the existence of
 4 the Market Allocation Agreement. By entering into the Market Allocation Agreement, Defendants
 5 unlawfully divided and allocated the markets for DVD sales and rentals, and did, in fact, create the
 6 two-firm market that Hastings sought. Recognizing the tremendous benefits that this improper
 7 agreement would bring them, Hastings admitted that “This agreement bolsters both Netflix’s
 8 leadership in DVD movie rentals and Wal-Mart’s strong movie sales business.”

9 **60. The Media’s Reaction.** The news of the agreement was featured in a number of
 10 newspapers and other publications, in articles with aptly colorful titles, such as:

- 11 • “Wal-Mart and Netflix Scratch Each Other’s Backs,”
- 12 • “Truce in DVD-Rental Wars,”
- 13 • “Wal-Mart and Netflix: An Alliance,” and
- 14 • “Wal-Mart Loves Netflix: And Vice-Versa.”

15 **61. The Execution.** Beginning on May 19, 2005, Walmart.com, as agreed, did in fact exit the
 16 Online DVD Rental Market. Walmart.com announced to all of the subscribers to Wal-Mart DVD
 17 Rentals that it was exiting the Relevant Market and that those subscribers could be transferred to
 18 Netflix. Walmart.com took additional steps to affirmatively implement the Market Allocation
 19 Agreement by adding a prominently placed link to the Netflix website to encourage customers to
 20 transfer their subscriptions to and otherwise rent from Netflix. Since the date of their joint
 21 announcement on May 19, 2005 (apart from the 30 days that Walmart.com used to wind down its
 22 existing online rental business), neither Walmart.com nor Wal-Mart Stores has participated in the
 23 Online DVD Rental Market, and Netflix has not sold new DVDs.

24 **62.** As a result of the Market Allocation Agreement, downward pricing pressure from
 25 Walmart.com was eliminated and the Online DVD Rental Market was reduced to two competitors.
 26 Absent the Market Allocation Agreement, Netflix would have lowered its prices no later than May 19,
 27 2005. As a result of the elimination of a competitor in this Relevant Market, Netflix was able to hold
 28 its subscription rate steady at \$17.99 per month and its only competitor left, Blockbuster, was able to

1 raise its subscription price in July to match that of Netflix, from \$14.99 per month to \$17.99 per
2 month. This was in accord with Hastings' expectation that "[i]f there are only two major players,
3 Blockbuster and Netflix, the profitability may be substantial like other two-firm entertainment
4 markets." As one business publication proclaimed: "That's one less competitor for the DVD rental
5 pioneer Now it looks like the competitive storm is dying down." In Netflix's next earnings call,
6 on July 25, 2005, Hastings boasted:

7 Last quarter we said online rental was shaping up to be a two-player market, and that is
8 indeed what is happening.

9 63. The Market Allocation Agreement was not in the independent self-interest of Wal-Mart
10 Stores, Walmart.com, or Netflix. Neither Wal-Mart Stores nor Walmart.com would have wanted
11 Walmart.com to withdraw from the online rental market, encourage its subscribers to be transferred to
12 Netflix, and promote Netflix's rental business absent substantial consideration from Netflix, such as an
13 agreement not to compete for new DVD retail sales. But for the Market Allocation Agreement,
14 Walmart.com would not have exited the Online DVD Rental Market when it did. Likewise, Netflix
15 would not have foreclosed its opportunity to sell DVDs to its millions of subscribers—a base of
16 customers who purchase on average 25 DVDs per year each—and would not have promoted new DVD
17 sales by Wal-Mart Stores and Walmart.com, rather than its own sales, absent an agreement from them
18 not to compete against Netflix's online rental business.

19 64. Walmart.com's exit from the Online DVD Rental Market was not a unilateral decision. It
20 was a key element of the Market Allocation Agreement as set forth herein. First, Walmart.com's exit
21 was expressly part of the Market Allocation Agreement with Netflix that directly stemmed from the
22 meeting between the two companies' CEOs. Prior to that Agreement, Walmart.com had not
23 announced anything about exiting this market. Second, as detailed above, shortly prior to the January
24 dinner Walmart.com repeatedly described its success in the online DVD rental business and expressed
25 its intention to continue and expand in that business. Its conduct after the January meeting thus
26 represents a sudden and sharp reversal in its plans. Third, Walmart.com cut its price shortly before the
27 January dinner. It would not have done so had it planned to exit the Online DVD Rental Market. Such
28

1 **69. Blockbuster's Change in Prices Resulting from the Execution of the Market**

2 **Allocation Agreement.** Once Wal-Mart DVD Rentals was closed, Netflix was now the only
3 competition in the market and was priced 20% higher than Blockbuster Online for the three DVDs out
4 at a time subscription plan. This provided Blockbuster with the opportunity and incentive to raise its
5 price to the artificially high levels set by reason of the elimination of Wal-Mart DVD Rentals from the
6 marketplace. Indeed, on August 5, *The Hollywood Reporter* predicted that "Blockbuster might boost
7 the price of its flagship service from \$14.99 to \$17.99 as early as next week, putting it in line with
8 Netflix's most popular price option."

9 70. Days later, and just weeks after Wal-Mart DVD Rentals closed, on August 9, Blockbuster
10 Online announced that it would be raising the subscription price of its most popular three-out plan
11 from \$14.99 per month to \$17.99 per month—the very same price charged by Netflix. As the
12 Associated Press reported on the Blockbuster Online price increase, with the Online DVD Rental
13 Market growing, "Blockbuster moved to take advantage of that island of strength yesterday by raising
14 its monthly price for renting three movies at a time from \$14.99 to \$17.99, matching the higher price
15 charged by rival Netflix, Inc." Reuters heralded the price hike as a "sign of worsening competition" in
16 the marketplace.

17 71. Other plans offered by Blockbuster either had price increases shortly after the May 19,
18 2005 announcement or would have had price decreases but-for the Market Allocation Agreement. The
19 elimination of Walmart.com as a competitor allowed and caused Blockbuster and Netflix to continue
20 charging higher prices than they otherwise would have charged but-for the Market Allocation
21 Agreement. All of this was a proximate and foreseeable result of the Market Allocation Agreement.

22 **72. The Market Allocation Agreement and Defendants' acts and practices in furtherance**
23 **thereof have no procompetitive benefits.** The co-promotion aspects of the Agreement do not create
24 information that consumers need, nor do they create new or better products or services. Rather, they
25 have served to reinforce the true anticompetitive nature of the Market Allocation Agreement by
26 assuring, for example, that Walmart.com not only withdrew from the Online DVD Rental Market, but
27 further enhanced Netflix's position in that market. Even if there were any such benefits, they would
28 not outweigh any of the anticompetitive effects described herein, and, in any event, could be achieved

1 by less restrictive means.

2 73. Defendants' market allocation scheme is a naked restraint of trade; it was not and is not
3 ancillary to any legitimate business collaboration. Rather, the market allocation scheme was a core
4 activity of the Market Allocation Agreement itself. The co-promotion aspects of the Agreement were a
5 means to reinforce the market allocation. To the extent that those aspects were portrayed as the sole
6 reason for the Market Allocation Agreement, that portrayal was misleading and pretextual, allowing
7 Defendants' market allocation conspiracy to escape scrutiny and "hide in plain sight."

8 CLASS ACTION ALLEGATIONS

9 74. Plaintiffs bring this action on their own behalf and as a class action under Rules
10 23(a), 23(b)(2), and 23(b)(3) of the Federal Rules of Civil Procedure on behalf of all members of the
11 following Class:

12 Any person or entity in the United States that paid a subscription fee to Blockbuster to
13 subscribe to Blockbuster Online on or after August 19, 2005 up to and including
the date of class certification.

14 Excluded from the Class are government entities, Defendants, their co-conspirators,
15 Reed Hastings, John Fleming, Defendants' subsidiaries, corporate affiliates, and
16 counsel in this action, as well as Blockbuster, and its subsidiaries, affiliates and counsel
17 in this action. Also excluded are persons who subscribed to Walmart.com's online
DVD rental program as of May 19, 2005. Also excluded are the Judge presiding over
this action, her law clerks, her spouse, and any person within the third degree of
relationship living in the Judge's household and the spouse of such a person.

18 75. The Class numbers in the millions, the exact number and identities of the members being
19 known by Blockbuster. At all times during the Class Period, Blockbuster Online had more than one
20 million subscribers.

21 76. The Class is so numerous and geographically dispersed that joinder of all members is
22 impracticable.

23 77. There are questions of law and fact common to the Class and the members
24 thereof. These common questions relate to the existence of the conspiracy alleged, and to the type
25 and common pattern of injuries sustained as a result thereof. The questions include, but are not
26 limited to:

- 27 a. Whether Defendants engaged in a contract, combination, or conspiracy to
28 allocate markets;

- b. Whether Defendants unreasonably restrained trade in the Online DVD Rental Market;
- c. Whether Defendants had the specific intent for Netflix to monopolize the Online DVD Rental Market;
- d. The nature and character of the acts performed by Defendants in the furtherance of the alleged contract, combination, and conspiracy;
- e. Whether Blockbuster charged higher prices than it otherwise would have charged as a proximate consequence of Defendants' conduct alleged herein;
- f. Whether the alleged contract, combination, and conspiracy violated Section 1 of the Sherman Act;
- g. Whether the alleged contract, combination, and conspiracy and other conduct violated Section 2 of the Sherman Act;
- h. The anticompetitive effects of Defendants' violations of law;
- i. Whether Defendants have acted or refused to act on grounds generally applicable to the Class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the Class as a whole; and
- j. Whether the conduct of Defendants, as alleged in this Complaint, caused injury to the business and property of Plaintiffs and other members of the Class.

78. The questions of law and fact common to the members of the Class predominate over any questions affecting only individual members, including the legal and factual issues relating to liability and damages.

79. Each Plaintiff is a member of the Class. Plaintiffs' claims are typical of the claims of other members of the Class, and they will fairly and adequately protect the interests of the members of the Class. Their interests are aligned with, and not antagonistic to, those of the other members of the Class.

80. Plaintiffs are represented by counsel who are competent and experienced in class action antitrust litigation.

81. A class action is superior to other available methods for the fair and efficient adjudication of this controversy. Class treatment will permit the adjudication of relatively small claims by members of the Class who otherwise could not afford to litigate antitrust claims such as are asserted in this Complaint. This class action presents no difficulties of management that would preclude its maintenance as a class action.

ANTITRUST INJURY AND STANDING

82. During the Class Period, Plaintiffs and the members of the Class have directly paid monthly DVD subscription fees to Blockbuster in the United States, and many continue to do so.

83. Plaintiffs and the members of the Class have suffered, and many continue to suffer, injury of the type that the antitrust laws are designed to punish and prevent. Plaintiffs and the members of the Class have directly paid, and many continue to directly pay, more to subscribe to Blockbuster than they would have, absent the Market Allocation Agreement.

84. As a direct and proximate result of the unreasonable restraint of trade and market and monopoly power created by the Market Allocation Agreement, which is continuing to this day, Plaintiffs and the members of the Class were, and many continue to be, injured and financially damaged in their businesses and property, in amounts that are not presently determined. Plaintiffs are direct victims of Defendants' antitrust violations.

85. The Market Allocation Agreement was a material cause of Plaintiffs' injuries, which were inextricably intertwined with the injuries suffered by Netflix subscribers resulting from the overall harm to competition in the Online DVD Rental Market caused by Defendants' antitrust violations.

86. This Complaint seeks damages for subscription fees paid to Blockbuster Online. Plaintiffs will efficiently enforce the antitrust laws to remedy their injuries and damages, which are distinct from those suffered by Netflix subscribers. This Complaint does not seek damages for subscription fees paid to Netflix, or passed on by Netflix subscribers.

COUNT ONE

**SHERMAN ACT SECTION ONE (15 U.S.C. § 1)
Market Allocation of Online DVD Rental Market
(Against All Defendants)**

87. Plaintiffs reallege each allegation set forth above, as if fully set forth herein.

88. Defendants have entered into a *per se* illegal market division agreement, in violation of Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1.

89. In the alternative, if evaluated under the Rule of Reason, the Market Allocation Agreement is an unreasonable restraint of trade in violation of Section 1 of the Sherman Antitrust Act, 15 U.S.C. §

1.

1 90. Prior to and at the time of the agreement, Netflix and Walmart.com were actual competitors
 2 in the Online DVD Rental Market. In addition, Netflix was a potential competitor of Wal-Mart Stores
 3 and Walmart.com in new DVD sales. Wal-Mart Stores and Walmart.com were actual participants and
 4 Netflix was a potential participant, with the means and economic incentive to sell new DVDs—in the
 5 absence of the Market Allocation Agreement.

6 91. Defendants shared a conscious commitment to a common scheme designed to achieve the
 7 unlawful objective of allocating the markets for online DVD rentals and new DVD sales. The Market
 8 Allocation Agreement allocated the Online DVD Rental Market to Netflix, with Wal-Mart Stores and
 9 Walmart.com agreeing not to compete in that market. The agreement also allocated new DVD sales to
 10 Wal-Mart Stores and Walmart.com, with Netflix agreeing to refrain from selling new DVDs in
 11 competition with them.

12 92. In addition to explicitly or *de facto* agreeing not to sell new DVDs, Netflix also obtained
 13 the Market Allocation Agreement by providing potentially valuable promotion to Wal-Mart Stores and
 14 Walmart.com. In so doing, Netflix provided significant consideration to Wal-Mart Stores and
 15 Walmart.com for their agreement that Walmart.com would withdraw from, and both Walmart.com and
 16 Wal-Mart Stores would not compete in, the Online DVD Rental Market.

17 93. The Market Allocation Agreement has created significant anticompetitive effects and no
 18 pro-competitive benefits. It eliminated competition in the Relevant Market, raising prices paid by
 19 consumers. To the extent that there were any procompetitive benefits resulting from the agreement,
 20 they would not outweigh the agreement's anticompetitive effects and could have been achieved by less
 21 restrictive means.

22 94. As a result of this violation of law, Blockbuster's online subscription prices charged to, and
 23 paid by, Plaintiffs and the Class are, and have been, higher than they otherwise would have been.

24 **COUNT TWO**

25 **SHERMAN ACT SECTION TWO (15 U.S.C. § 2)** 26 **Monopolization of Online DVD Rental Market** **(Against Netflix)**

27 95. Plaintiffs reallege each allegation set forth above, as if fully set forth herein.

28 96. Netflix has monopoly power in the Online DVD Rental Market.

1 97. Netflix willfully acquired and maintained its monopoly in the Online DVD Rental Market
 2 by its acts and practices described herein, including by executing, implementing, and otherwise
 3 complying with the Market Allocation Agreement, in violation of Section 2 of the Sherman Antitrust
 4 Act, 15 U.S.C. § 2. That monopolization was achieved or strengthened through restrictive or
 5 exclusionary conduct, rather than by means of superior business acumen. It was Netflix's conscious
 6 object to further its dominance in the relevant market by and through the Market Allocation
 7 Agreement.

8 98. As a result of this violation of law, Blockbuster's online subscription prices charged to, and
 9 paid by, Plaintiffs and the Class are, and have been, higher than they otherwise would have been.

10 **COUNT THREE**

11 **SHERMAN ACT SECTION TWO (15 U.S.C. § 2)** 12 **Attempt to Monopolize Online DVD Rental Market** 13 **(Against Netflix)**

14 99. Plaintiffs reallege each allegation set forth above, as if fully set forth herein.

15 100. If Netflix does not already have monopoly power, then Netflix has a dangerous
 16 probability of success in achieving monopoly power in the Online DVD Rental Market.

17 101. With the specific intent to achieve a monopoly, Netflix, by its acts and practices
 18 described herein, including by executing, implementing, and otherwise complying with the Market
 19 Allocation Agreement, has attempted to monopolize the Online DVD Rental Market, in violation of
 20 Section 2 of the Sherman Antitrust Act, 15 U.S.C. § 2. It was Netflix's conscious object to control
 21 prices and/or exclude competition in the relevant market.

22 102. As a result of this violation of law, Blockbuster's online subscription prices charged to,
 23 and paid by, Plaintiffs and the Class are, and have been, higher than they otherwise would have been.

24 **COUNT FOUR**

25 **SHERMAN ACT SECTION TWO (15 U.S.C. § 2)** 26 **Conspiracy to Monopolize Online DVD Rental Market** 27 **(Against All Defendants)**

28 103. Plaintiffs reallege each allegation set forth above, as if fully set forth herein.

104. Defendants shared a conscious commitment to a common scheme designed to achieve
 the unlawful objective of the monopolization of the Online DVD Rental Market. Prior to and at the

1 time of the Agreement, Netflix and Walmart.com were actual competitors in that market.

2 105. Defendants conspired with the specific intent, knowledge and purpose that their
3 anticompetitive agreement would result in Netflix willfully acquiring and maintaining a monopoly in
4 the Relevant Market. Wal-Mart Stores and Walmart.com knew that the natural and probable
5 consequence of the Market Allocation Agreement would be the monopolization of the Relevant
6 Market by Netflix.

7 106. Defendants have committed overt acts in furtherance of their conspiracy, including
8 entering into, complying with, and implementing the Market Allocation Agreement, in violation of
9 Section 2 of the Sherman Antitrust Act, 15 U.S.C. § 2.

10 107. As a result of this violation of law, Blockbuster's online subscription prices charged to,
11 and paid by, Plaintiffs and the Class are, and have been, higher than they otherwise would have been.

12 **PRAYER FOR RELIEF**

13 WHEREFORE, Plaintiffs respectfully request that:

- 14 A. The Court determine that this action may be maintained as a class action under
15 Rule 23 of the Federal Rules of Civil Procedure and that Plaintiffs be appointed
class representatives.
- 16 B. Defendants be adjudged to violate Sections 1 and 2 of the Sherman Antitrust
17 Act, 15 U.S.C. §§ 1-2.
- 18 C. The Court declare the Market Allocation Agreement between Defendants
announced May 19, 2005, to be unlawful and null and void.
- 19 D. Judgment be entered for Plaintiffs and the members of the Class against
20 Defendants, jointly and severally, for three times the amount of damages
21 sustained by Plaintiffs and the Class, under Section 4 of the Clayton Antitrust
Act, 15 U.S.C. § 15, together with the costs of the action, including reasonable
attorneys' fees, and such other relief as is appropriate.
- 22 E. Defendants, their affiliates, successors, transferees, assignees, and the officers,
23 directors, partners, agents and employees thereof, and all other persons acting or
24 claiming to act on their behalf, be permanently enjoined and restrained from, in
any manner, continuing, maintaining or renewing the contract, combination or
25 conspiracy alleged herein, or from engaging in any other contract, combination
or conspiracy having similar purpose or effect, and from adopting or following
26 any practice, plan, program or device having a similar purpose or effect,
pursuant to Section 16 of the Clayton Antitrust Act, 15 U.S.C. § 26.
- 27 F. Plaintiffs and the members of the Class have such other, further, and different
28 relief as the case may require and the Court may deem just and proper under the
circumstances.

JURY DEMAND

Pursuant to Rule 38(a) of the Federal Rules of Civil Procedure, Plaintiffs demand a jury trial of all issues triable by jury.

DATED: July 16, 2009

Respectfully Submitted,

/s/ Robert G. Abrams

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