JONATHAN M. JACOBSON, State Bar No. 1350495 (N.Y.)
DAVID H. REICHENBERG, State Bar No. 4477477 (N.Y.)
WILSON SONSINI GOODRICH & ROSATI
Professional Corporation
1301 Avenue of the Americas, 40th Floor
New York, New York 10019
Tel: (212) 999-5800
Fax: (212) 999-5899
Email: jjacobson@wsgr.com

KEITH E. EGGLETON, State Bar No. 159842
MAURA L. REES, State Bar No. 191698
DYLAN J. LIDDIARD, State Bar No. 203055
ANTHONY J WEIBELL, State Bar No. 238850
WILSON SONSINI GOODRICH & ROSATI
Professional Corporation
650 Page Mill Road
Palo Alto, CA 94304
Telephone: (650) 493-9300
Fax: (650) 565-5100
Email: dliddiard@wsgr.com

*Attorneys for Defendant Netflix, Inc.*

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

| | |
|---|---|
| IN RE ONLINE DVD RENTAL ANTITRUST LITIGATION | Master File No.: 4:09-md-2029 PJH (JCS)<br>MDL No. 2029<br><br>Hon. Phyllis J. Hamilton<br><br>**NETFLIX'S REPLY BRIEF IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT** |
| THIS DOCUMENT RELATES TO:<br><br>All Actions | |

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## TABLE OF ABBREVIATIONS

| Abbreviation | Meaning |
|---|---|
| Netflix | Netflix, Inc. |
| Walmart | Defendants Wal-Mart Stores, Inc. and Walmart.com, LLC, collectively |
| Walmart.com | Defendant Walmart.com, LLC |
| PA | The May 2005 Promotion Agreement |
| VC | A video clip deposition excerpt viewable by clicking on the hyperlink on the CD-ROM version of this document |
| 1C (or 2C) | One-at-a-time (or two-at-a-time) DVD rental subscription plan capped at 2 (or 4) DVDs per month |
| 1U, 2U, 3U, 4U | Unlimited DVD rental subscription plans with one-out, two-out, three-out, or four-out at a time, respectively |
| BBI | Blockbuster, Inc. |
| Compl. | Consolidated Amended Class Action Complaint (ECF No. 22) |
| DVDR | Online DVD rental |
| Hastings Decl. | Declaration of Reed Hastings (ECF No. 387) |
| Weibell Decl. | The Declaration of Anthony Weibell in Support of Netflix's Motion for Summary Judgment (ECF No. 389) |
| Second Weibell Decl. | Second Declaration of Anthony Weibell in Support of Netflix's Motion for Summary Judgment, filed herewith |
| Neasmith Decl. | Declaration of Catherine Neasmith filed herewith |
| Damages Period | May 19, 2005 through Sept. 30, 2010 |
| MSJ | Netflix's Motion for Summary Judgment (ECF No. 386) |
| Opp. | Plaintiffs' Opposition to Netflix's MSJ (ECF No. 430) |
| PX | Plaintiffs' Summary Judgment Exhibits (ECF No. 429) |
| Ex. | Netflix Summary Judgment Exhibits (Nos. 1-95 are in ECF No. 389; Nos. 96-135 are attached to Second Weibell Decl.) |

Plaintiffs' brief is long on both rhetoric and mischaracterizations of the record. But the *material* facts in this case are still not in genuine dispute. Most significantly:

- Whether Netflix would refrain from selling new DVDs was never discussed, let alone agreed on, by Netflix and Walmart. That fact, and the consumer benefits the PA indisputably generated, preclude any suggestion of a per se antitrust violation.
- Following the PA, consumer welfare increased on every measure. Output increased dramatically; prices for online DVD rentals declined; new, lower price points were introduced; innovation accelerated; and DVD availability and service levels improved. Prior to the PA, Walmart's subscriber share was tiny and declining; its presence never led to lower prices or any competitive response from anyone in DVD rental; and there was no realistic scenario in which it would somehow become competitively significant in the future. These uncontroverted facts demonstrate conclusively that the acquisition of Walmart's subscriber base by Netflix through the PA, and Walmart's concomitant exit from online DVD rental, had no adverse effect on competition – precluding any claim of an unreasonable restraint of trade under Sherman Act § 1 or of anticompetitive conduct under Sherman Act § 2.
- Netflix chose not to lower its \$17.99 3U price prior to May 19, 2005 in response to the \$14.99 price being charged by a large and growing BBI. At the time, Walmart's 3U price was \$17.36, and its subscriber share was a trivial 1.5% and declining. So Plaintiffs' only theory of injury – that Netflix would have reduced its 3U price to \$15.99 *if Walmart had not exited* – makes no sense at all. The fact of injury must be proven with "reasonable certainty," not speculation, and is an essential element of *all* of Plaintiffs' claims. Plaintiffs' failure of proof of injury-in-fact requires entry of summary judgment in Netflix's favor on all claims.

The insufficiency of Plaintiffs' case is underscored by the radical reworking it has undergone in an attempt to respond to Netflix's motion. For the first time, Plaintiffs are advancing the proposition that the PA is a per se illegal agreement *on its face* because Netflix and Walmart agreed to *promote* each other's service – an argument that, if accepted, would immediately outlaw hundreds (perhaps thousands) of similar agreements across the country. New too is the equally outlandish contention that Netflix's earlier agreements with Amazon,

Musicland, and Best Buy – entered into over a decade ago, before most people had even heard of Netflix or online DVD rental – were also per se violations of the antitrust laws. These agreements are not even mentioned in Plaintiffs' amended complaint.

Plaintiffs' brief is most notable, however, for the liberties it takes with the facts. Plaintiffs of course are entitled to all reasonable inferences from the evidence. But that is not a license to state factual propositions having no support in – and often directly controverted by – the very evidence they cite. In the end, however, Plaintiffs' mischaracterizations do not matter. As Netflix explained in its moving papers, the incontrovertible *objective* facts – confirmed by the concessions of Plaintiffs' own economist – establish beyond any doubt there was no per se illegal market allocation, that Walmart's exit from online DVD rental had no negative impact on competition whatsoever, and that consumers have benefited from lower prices, increased quality and service, and dramatic innovation. Summary judgment should be entered accordingly.

## I. NO INJURY IN FACT

Plaintiffs' *only* theory of injury in this case is that, but for Walmart's exit, Netflix would have reduced its 3U price from $17.99 to $15.99 sometime before the PA was announced on May 19, 2005. Ex. 25 ¶ 84. But, as explained in Netflix's moving papers (MSJ 24-25), no reasonable juror could believe that Netflix would have lowered its 3U price because of Walmart's presence when it chose *not* to do so in the face of: (i) BBI's $14.99 price (plus two free in-store rentals); (ii) BBI's strength, with a subscriber share of 20% and growing rapidly; (iii) Walmart's trivial market presence, reflected in its tiny and dwindling 1.5% share; (iv) the fact that Walmart's 3U price ($17.36) was *higher* than BBI's; and (v) the equally undisputed fact, conceded by Plaintiffs' own economist, that, following its entry into online DVD rental in June 2003, Walmart's presence never led to a price reduction or other competitive response by Netflix or anyone else. Ex. 22 at 182:19-184:16. The theory thus fails as a matter of law. *See Gerlinger v. Amazon.com, Inc.*, 526 F.3d 1253, 1255-56 (9th Cir. 2008) (evidence that prices would have been lower if Borders had not exited online sales insufficient as a matter of law).

Proof of injury-in-fact is an essential element of *each* of Plaintiffs' claims, *E.g.*, *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 562 (1981), and, on summary judgment, it is

Plaintiffs' burden to provide legally sufficient evidence in support of all essential elements. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). Plaintiffs have not met that burden here.

First, Plaintiffs' brief *does not respond* to Netflix's injury point and thus concedes the point by waiver. *E.g.*, *Jenkins v. Cnty. of Riverside*, 398 F.3d 1093, 1095 n.4 (9th Cir. 2005) (claims "abandoned . . . by not raising them in opposition to [defendant's] motion for summary judgment"); *Abogados v. AT&T, Inc.*, 223 F.3d 932, 937 (9th Cir. 2000). Plaintiffs allude to some of the factual issues bearing on injury in passing, Opp. 7, 24, but they nowhere argue that there is any evidence sufficient to establish injury-in-fact with the reasonable certainty the law requires. *E.g.*, *Nw. Publ'ns, Inc. v. Crumb*, 752 F.2d 473, 476-77 (9th Cir. 1985); *In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 691 F.2d 1335, 1341 & n.7 (9th Cir. 1982) ("reasonable probability"); 2A P. Areeda & H. Hovenkamp, Antitrust Law ¶ 392, at 332 (3d ed. 2007) ("in proving the fact of injury, the plaintiff must prove with reasonable certainty that the defendant's antitrust violation caused the harm").

Second, even if the point had not been waived, Plaintiffs' few passing references to the underlying events do not come close to raising an issue of fact. In arguing that a price decrease was "likely," Plaintiffs simply ignore the fact that *none* of the documents they cite *even mentions* Walmart as a factor in Netflix's consideration of a lower 3U price. Opp. 7, 24 (citing PX 6, 80, 81, 83, 150). Instead, *all* of the documents they cite, and *all* other contemporaneous documents, reflect that lower price points on the 3U plan were considered *only* because of the BBI $14.99 price and, to a lesser extent, the continued concern over potential competition from Amazon. *Id.*; *see also* Exs. 45, 97-101. And Plaintiffs ignore the plainly undisputed fact that, notwithstanding Netflix's serious concerns over the impact of BBI's $14.99 price, a 3U plan price reduction was *rejected* – again for reasons having nothing to do with Walmart. *E.g.*, Exs. 45, 97-99, 103.

Third, Plaintiffs' attempt to connect Walmart to Netflix's consideration of a 3U price reduction is based on a serious misstatement of an irrelevant fact. Specifically, Plaintiffs argue that Mr. Hastings sent his staff an e-mail noting Walmart's reduction of its 2U price to $12.97 in the "middle of the night." They repeat the claim twice. Opp. 7, 22 (citing PX 78). Even if true, the argument would be irrelevant. Before Walmart's move, Netflix already had a lower price

point ($11.99) for its 2C plan (Ex. 29, App. 1), which authorized 4 discs a month, comparable to the 4.3 disc average usage on Walmart's 2U plan (Ex. 104). And regardless of the hour, an e-mail merely stating the fact of Walmart's 2U price – without any suggestion that Netflix might respond in any way – is probative of nothing. There is no evidence – not a single document or testimony – that Netflix paid the $12.97 2U price *any* attention in considering its competitive strategy. But the statement is also false. The e-mail was not sent in the "middle of the night." It was sent at 3:13 p.m. As Plaintiffs are well aware, PX 78 (like several other documents) has an erroneous time stamp because of a vendor error. Ex. 105; *see also* Ex. 106 at 182:12-183:10, 200:1-201:10, 326:10-13; Ex. 107 at 125:11-126:2. Yet Plaintiffs chose to use a version with the wrong time stamp, rather than one showing the correct time. *E.g.*, Ex. 108; Ex. 109.

Fourth, and perhaps most importantly, Plaintiffs never come to grips with the untenable nature of their argument. If Netflix chose not to reduce its 3U price in response to the very serious threat of a much lower ($14.99) price from its largest and growing rival (BBI), it makes no sense at all to suggest that it would lower its $17.99 price because of the $17.36 price of a tiny and shrinking rival – especially one whose presence, as Plaintiffs' own economist conceded, never induced a competitive response by anyone after its service was launched in June 2003. The fact of injury must be proven with "reasonable probability," not speculation. *Petroleum Prods.*, 691 F.2d at 1341 & n.7; *see, e.g.*, *Greater Rockford Energy & Tech. Corp. v. Shell Oil Co.*, 998 F.2d 391, 404 (7th Cir. 1993). Here, the argument is not just speculative; it is absurd.

## II. NO PER SE VIOLATION

Plaintiffs argue that the PA was unlawful *on its face* because Netflix and Walmart agreed to promote each other's services, and because the agreement articulates Walmart's prior, independent decision to exit. They also assert that per se "market allocation" is shown, without more, from one firm's exit from a single market. Opp. 13-15. These contentions are meritless.

*a.* ***Joint promotion is not illegal per se.*** Plaintiffs argue that an agreement of two firms reciprocally to promote the other's services is necessarily a per se illegal market allocation. *Id.* at 14. If accepted, that argument would have staggering implications. Joint promotion agreements among actual and potential competitors are common. Microsoft promotes Facebook

in return for Facebook's use and promotion of Microsoft's "Bing" search. ABC produces TV shows shown on CBS, and the two rivals promote those shows. The arrangements are used so frequently, in fact, that contract forms for their drafting are freely available on the Internet. *E.g.*, docs.biztree.com/templates/checklistdrafting-joint-promotion-agreements/5216/. Per se condemnation would outlaw them all. Plaintiffs, unsurprisingly, cite no authority for the proposition that joint promotion agreements are "market allocations" and illegal per se.

Joint promotion agreements generally – and the PA here in particular – fall far outside the bounds of per se illegality. *See California v. Safeway, Inc.*, 2011 WL 2684942, at *10-14 (9th Cir. July 12, 2011) (en banc). Joint promotion is necessarily output-*enhancing*. Facebook's promotion of Bing, for example, enhances Bing's competitiveness as a search engine, while Bing's promotion of Facebook makes "the social network" even more widely accessible to Internet users. Nor do they "restrain trade" at all. An agreement to promote another's product is not an agreement to refrain from entering the other's market. That was especially the case here, as there was nothing preventing Walmart from resuming online DVD rental immediately, and nothing inhibiting Netflix from engaging in new DVD sales. *Id.* Per se rules are designed for those practices that necessarily "restrict competition and decrease output." *Leegin Creative Leather Prods. v. PSKS, Inc.*, 551 U.S. 877, 894 (2007). The opposite is true here. *See Safeway*, 2011 WL 2684942, at *14 ("where . . . 'the conduct at issue is not a garden-variety horizontal division of a market, we have eschewed a *per se* rule and instead have utilized rule of reason analysis.'") (quoting *Metro Indus., Inc. v. Sammi Corp.*, 82 F.3d 839, 844 (9th Cir. 1996)).

*b.* ***Per se condemnation would require, at least, an agreement by Netflix to refrain from new sales, and an absence of plausible efficiencies.*** For there to be a finding of a per se market allocation agreement in this case, Plaintiffs would have to raise a genuine issue of fact on at least two independent requirements: (1) that Netflix agreed not to sell new DVDs, *and* (2) that the PA had no plausible procompetitive efficiencies. MSJ 9, 11-12. Plaintiffs argue otherwise. Their position is that a per se claim can be maintained "where an agreement eliminates an actual or potential supplier in a single market," Opp. 12 n.2, irrespective of output-enhancing efficiencies. That is not the law.

*Every* merger or acquisition of a competitor necessarily "eliminates an actual or potential competitor in a single market." The law is as clear as can be, however, that horizontal mergers are not illegal per se. *E.g.*, *United States v. Gen. Dynamics Corp.*, 415 U.S. 486, 498 (1974). The aspect of the PA that Plaintiffs complain about was the functional sale by Walmart of its subscriber base to Netflix in return for a bounty for converting subscribers, and Walmart's concomitant exit from online DVD rental – the precise circumstance one encounters in *every* merger or acquisition. There is no authority, and Plaintiffs cite none, suggesting that this kind of agreement is illegal per se.

What separates the typical acquisition (and consequent exit of the acquired firm) from "market allocation" is the parties' *reciprocal* agreement (or quid pro quo) to *divide* their markets, and a lack of output-enhancing efficiencies. *Safeway*, 2011 WL 2684942, at *14 ("'Classic' horizontal market division agreements are ones in which 'competitors at the same level agree to divide up the market for a given product.'") (quoting *Sammi*, 83 F.3d at 844); *United States v. Brown*, 936 F.2d 1042, 1045 (9th Cir. 1991). The point was underscored by the Plaintiffs' economist. He admitted that his opinions on harm to competition "no longer hold" absent proof that Netflix agreed not to sell new DVDs, and that, absent such proof, an acquisition of Walmart's subscriber base would "presumably" be "within the law." Ex. 22 at 12:16-13:20, 134:16-135:14 (VC).[1]

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[1] Per se treatment is plainly precluded by Ninth Circuit precedent, including the en banc ruling just 10 days ago in *Safeway*. But Plaintiffs' cases are not to the contrary in any event. Opp. 12 & n.2. In *Engine Specialties, Inc. v. Bombardier Ltd.*, 605 F.2d 1, 8-9 (1st Cir. 1979), two firms agreed not to compete in each other's market. In *United States v. Gen. Elec. Co.*, No. 96-121, 1997 WL 269491, at *3 (D. Mont. Mar. 18, 1977), the agreements precluded competition among GE and some 500 hospitals. In *Gerlinger v. Amazon.com, Inc.*, 311 F. Supp. 2d 838, 851 (N.D. Cal. 2004), the court had "insufficient information" on an incomplete record to address the issue, notwithstanding Borders' agreement to exit *and not to re-enter*; and the court later dismissed the case anyway for lack of injury. Finally, *In re Cardizem CD Antitrust Litig.*, 332 F.3d 896, 900 (6th Cir. 2003), involved an agreement by a branded drug maker to pay $40 million a year to the sole generic drug maker simply to stay out of the market for the drug. Since there was no reciprocal arrangement *dividing* markets, the court's use of the "market allocation" nomenclature seems questionable. While the actual holding – that the conduct was a naked restraint with no efficiency justification, and therefore illegal per se – is on sounder footing, it is completely irrelevant here. *Cardizem* involved nothing like the output-enhancing qualities of the PA in this case. *See* Part II.d below.

1 *c.* ***No evidence that Netflix agreed to refrain from new DVD sales.*** The evidence
2 that Netflix did *not* agree to refrain from new sales is uncontroverted. The testimony is
3 unequivocal from both Walmart and Netflix that the subject was never discussed, and there is no
4 document remotely hinting otherwise. MSJ 5, 7, 9-11. Plaintiffs have no answer to that point,
5 and they therefore ignore it. Their arguments that there is "direct" and "circumstantial" evidence
6 of an agreement by Netflix to refrain from new sales have no merit.
7 *"Direct evidence."* Plaintiffs' supposed direct evidence is the PA itself and related
8 documents, including the companies' press release and similar documents touting the fact that
9 Walmart agreed to promote Netflix and Netflix, in turn, agreed to promote Walmart DVD sales.
10 Opp. 13-15 (citing, *e.g.*, PX 127 ("we are the rental business, they are the sell-through
11 business")). This is direct evidence of a promotion agreement, not an agreement by Netflix to
12 refrain from new sales. *Toscano v. Prof'l Golfers' Ass'n*, 258 F.3d 978, 983-85 (9th Cir. 2001).
13 It is difficult to imagine how one could have a joint promotion agreement without documents
14 using the same terms and descriptions on which Plaintiffs rely. There is no "direct evidence"
15 whatsoever that Netflix agreed not to sell new DVDs.
16 "*Circumstantial evidence.*" Plaintiffs' circumstantial evidence fares no better. They rely
17 on "motive" and "opportunity," Opp. 16-19, but motive and opportunity are typically of little
18 probative value in interpreting the scope of an agreement. *See In re Citric Acid Litig*., 191 F.3d
19 1090, 1096-1103 (9th Cir. 1999); *Serfecz v. Jewel Food Stores*, 67 F.3d 591, 600 (7th Cir. 1995);
20 *Riverview Invs., Inc. v. Ottawa Cmty. Improvement Corp*., 899 F.2d 474, 485 (6th Cir. 1990); 2
21 P. Areeda & H. Hovenkamp, Antitrust Law ¶ 308g (3d ed. 2007). They have no probative value
22 here. Netflix would have had a motive to engage in new sales – a business it abandoned in 1998
23 – only if it thought that doing so would be profitable and not an imprudent distraction from its
24 core business of online rental; yet Netflix consistently concluded otherwise. Hastings Decl. ¶¶ 4,
25 29. Plaintiffs offer no business plan or analysis of reentry into such a business (as any company
26 would undertake if the option were ever seriously considered) because none was ever made. The
27 senior leadership of Netflix was not interested in new sales. *Id.* ¶ 4; Ex. 3 at 319:8-321:13 (VC),
28 327:2-329:22; Ex. 58 at *651. And as to "opportunity," this is not a case in which some

unexplained conversations regarding new DVD sales occurred. It is case where the evidence is uncontroverted that the subject of new DVD sales by Netflix was *never discussed*. MSJ 9-10.

Plaintiffs assert incorrectly that Netflix was obligated to "clear" with Walmart its sales of *used* DVDs out of excess rental inventory. Opp. 18 (citing PX 139, PX 140); *but see* Ex. 110 at 158:4-159:8. To the same effect, they point to an earnings call where Netflix CFO Barry McCarthy was asked whether there was "a way Wal-Mart could prohibit you from selling DVDs on your site," and responded by inquiring whether the question related to new or used sales, Opp. 18 (citing PX 138), an obviously reasonable inquiry since Netflix was on the verge of launching used sales. Sales of used DVDs by Netflix in fact began a short while later, PX 139 at 2, and no one ever suggested that anything in the PA would inhibit that activity. Nothing in the documents cited addresses the sale of new DVDs; and nothing in them even arguably tends to exclude the possibility of independent action. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986) (evidence must tend to "exclude the possibility" of independent action).

Plaintiffs ignore the most relevant piece of circumstantial evidence – the consideration (and, once again, rejection for all the same reasons) of new DVD sales by Netflix on several occasions *after* the PA was signed, including November 2005, just a few months afterwards. Ex. 59 at *499; Hastings Decl. ¶ 29. If new DVD sales had been prohibited through an understanding with Walmart, the subject could never have come up. Plaintiffs' economist had to concede that very point, agreeing that there was no "indication when the issue arose [after May 2005] that there was anything that Netflix had committed to that would inhibit it from selling new DVDs, had it chosen to, at that time." Ex. 22 at 29:12-31:18 (VC).

*d.* ***Significant output-enhancing efficiencies.*** The Supreme Court has said on many occasions that the scope of per se rules is narrow, that the presumptive method of antitrust analysis is the rule of reason, and that arrangements supported by plausible efficiency justifications cannot be condemned per se. *E.g.*, *Leegin*, 551 U.S. at 894-95; *Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284, 289-90 (1985); *see Mass. Optometry Bd.*, 110 F.T.C. 549, 604 (1988) ("[A]n efficiency defense is plausible if it cannot be rejected without extensive factual inquiry."). Ninth Circuit decisions, *E.g.*, *Safeway*, 2011 WL

2684942, at *10-12; *Paladin Assocs., Inc. v. Mont. Power Co*., 328 F.3d 1145, 1154-55 (9th Cir. 2003), are to the same effect. Plaintiffs never discuss these principles in their brief.

Netflix's moving papers identified a number of output-enhancing aspects of the PA: Walmart's promotion of Netflix rentals; a "soft landing" for Walmart subscribers, who had the option of maintaining their rental rates for a year while keeping their queue intact rather than being stranded upon Walmart's exit; and Netflix's promotion of DVD sales at Walmart. MSJ 11-12. Plaintiffs ignore the first two – which alone preclude per se illegality – but label the promotion of DVD sales a "sham." Opp. 9. Epithets, however, are not evidence. Far from a "sham," Netflix posted a Walmart.com DVD sales banner prominently on its website (Ex. 111); promoted DVD sales at Walmart.com through a prominent display on Netflix's ubiquitous DVD mailer envelopes (Ex. 112); and also ran a special banner and sidebar for two weeks promoting "The Aviator" for sale at Walmart.com (Ex. 113). The PA, then, was indisputably designed to enhance output in both DVD sales and online DVD rentals. The per se rule does not apply.

## III. NO HARM TO COMPETITION UNDER THE RULE OF REASON

The objective evidence in the case demonstrates beyond the shadow of a doubt that there has been zero harm to competition from the PA and that, quite the opposite, consumers have benefited on every conceivable measure. Plaintiffs' arguments to the contrary misstate the facts.

*a.* ***Consumer welfare has improved since the PA on every measure.*** In the more than five years between the PA and the end of the Damages Period, output of online DVD rental increased, prices declined, and service, quality, availability, and innovation all improved.

*Output.* In applying the rule of reason, "the primary inquiry is whether the restraint tends to reduce marketwide output." 11 P. Areeda & H. Hovenkamp, Antitrust Law ¶ 1912a (2d ed. 2005). Here, the number of online DVD rental subscribers – marketwide output – went from 5.4 million in 2005 to 21 million by the end of the Damages Period. *See* Ex. 29 ¶ 23; PX 142 ¶ 28.

*Prices*. From May 2005 through the end of the Damages Period, prices for online DVD rentals declined. No Netflix plan experienced a price increase, and several new and popular low prices points were introduced, including the plan that became Netflix's most popular, the 1U. That plan was introduced in May 2005 at $9.99, and was reduced to $8.99 two years later. Ex.

1 29, App. 1. Netflix also introduced a popular 1C plan in July 2006 at just $5.99, and dropped its
2 price to $4.99 just a few months later. *Id.* Plaintiffs ignore this evidence.
3 *Service and quality*. Service and quality increased significantly since May 2005. The
4 median time of shipment has declined so that more and more subscribers have been able to get
5 their DVDs the very next day after shipment (Ex. 114; Ex. 115 at *829); and the number of titles
6 and disc copies has increased substantially, so that consumers are better able to get the title they
7 want when they want it (Neasmith Decl. ¶¶ 3-4). From the end of the first quarter of 2005
8 through the end of the Damages Period in 2010, the number of discs increased by more than 169
9 million discs, and the number of titles increased by more than 47,000 titles. *Id.*; *see also* Ex. 29
10 ¶ 24. Netflix has also made many improvements to its website, making selection of the "right"
11 movie easier and easier. Ex. 116 at *760-70; Ex. 102.
12 *Innovation.* Innovation is one of the most important competitive criteria of them all, for
13 innovation is the source of the most powerful market growth. *E.g.*, *Verizon Commc'ns, Inc. v.*
14 *Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004) ("*Trinko*"). Here, Netflix has
15 become the pioneer in next generation DVD consumption through the online streaming service it
16 introduced in 2007 and improved consistently since that time. Ex. 115 at *810,*824; Ex. 29 ¶¶
17 24, 32 & Charts 1-2. Plaintiffs pretend that this dramatic innovation should not count at all
18 because, streaming (they now say) is not in the "market." Opp. 20 n.4. That argument is
19 inconsistent with their inclusion of customers who principally consume their DVD rentals
20 through streaming when calculating market shares, PX 142 ¶ 28, but the point is irrelevant in any
21 event. It is undeniable that all by-mail subscribers benefited when streaming was added to their
22 subscriptions for free.
23 *b.* ***Plaintiffs' arguments as to "anticompetitive" effects are baseless.*** Having no
24 answer to the objective fact that the evidence shows significant consumer benefits and zero
25 consumer harm, Plaintiffs resort to some of their more egregious misstatements:
26 *28-day window*. Plaintiffs claim that the 28-day window that began in 2010 on certain
27 new releases was an anticompetitive act of Netflix's. Opp. 11. The argument is false. The 28-
28 day window was imposed by the motion picture studios on Netflix, not the opposite, as

Plaintiffs' own exhibit makes clear. PX 119 at 2-3 ("none of the Warner offers is palatable"); *see also* Exs. 117-119. The studios imposed the same restriction on the leading DVD rental kiosk provider, Redbox, which responded by suing them. *See Redbox Automated Retail LLC v. Universal City Studios LLLP*, No. 08-766, 2009 WL 2588748, at *5 (D. Del. Aug. 17, 2009) (denying motion to dismiss). Plaintiffs' own exhibit demonstrates that Netflix was considering launching litigation of its own. PX 119 at 3 ("I am advocating suing at this time"). The 28-day window came in almost *five years after the PA*. Netflix viewed it as unpalatable. To argue that it was an anticompetitive effect of the PA is insupportable.

*"Trimming" title count*. Plaintiffs' argument about title count is equally deceptive. The objective facts are that Netflix's title count and disc inventory have both increased *every* quarter since the time of the PA. Neasmith Decl. ¶ 4. Recently, the DVD rental arena has begun shifting away from physical discs and towards streaming over the Internet. PX 144 ¶ 31, Chart 2; Ex. 56 at 1. Netflix's CEO, Mr. Hastings, made the point in 2010 that Netflix is now primarily a streaming company, with more of its content consumed over the Internet than by physical discs in the mail. *Id.* That reality means that, as subscriber demand for streaming rises, demand for physical discs will decline. And so Netflix is developing plans for the inevitable reduction in disc inventory that will come. The 2009 document Plaintiffs cite is one that looks at the "Core 10 Year Challenge Ahead." PX 116 at 4. Yet this possible plan for physical disc reduction in the future, *id.* at 34, is one that Plaintiffs incorrectly cite *as a present effect*. Opp. 11; Neasmith Decl. ¶ 5. The Court should not be fooled.

*Price*. Plaintiffs argue that prices "stabilized." Opp. 10. They disregard entirely the undisputed facts that Netflix's prices *declined* on all the key plans, including the 3U, 2U, and 1U; that no plan increased throughout the Damages Period; that lower price points were introduced; and that streaming was added for free. Ex. 29, App. 1.[2]

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[2] Following the close of the Damages Period on September 30, 2010, there have been a number of changes to Netflix's plans, including the introduction of a low-cost streaming-only plan, as well as some price increases and some decreases on DVD-by-mail plans.

*c.* ***3-Firm competition fallacy.*** Although there were several other small players as well, PX 144 ¶ 45, Walmart can be described as a "third firm" in online DVD rental. Plaintiffs say that makes a difference. Citing the testimony of Netflix's economists, they argue that "going from a three-firm to a two-firm market resulted in less competition." Opp. 23. Again, Plaintiffs misstate the evidence. Netflix's experts made absolutely clear that the "three-firm" competition they were talking about was three *significant* competitors, and that Walmart – with a dwindling 1.5% share and zero competitive impact – was *not* a significant competitor. Ex. 122 at 166:22-168:15; Ex. 123 at 67:17-68:21, 150:22-151:10. Plaintiffs have deceptively omitted those portions of their testimony. They cite no legal or economic authority that there is anything to be made from the exit of a firm with a declining 1.5% share and no history of affecting rival pricing or other competitive decisions. Nor do they explain how Walmart's presence as a "third firm" ever mattered.

Plaintiffs seek to prop up their argument by claiming that the exit of Walmart "increased concentration." Citing nothing, they say that "suggest[s] an adverse effect on competition." Opp. 23. Without more, however, a simple increase in concentration – which can occur from just intense competition, increasing the market share of the leading firm – is not itself an adverse effect on competition. *United States v. Baker Hughes Inc.*, 908 F.2d 981, 986 (D.C. Cir. 1990) (no violation from merger resulting in company with 75% market share); U.S. Dep't of Justice & Fed. Trade Comm'n, Commentary on the Horizontal Merger Guidelines, at 16 (Mar. 2006). But in any event, Plaintiffs' own data demonstrate that, for the first three years after the PA, concentration *declined*. PX 142 ¶ 28 (HHI declined from 6543 in 2005 to 6502 in 2008). The argument that it increased *as a result of the PA* is undeniably wrong.

Plaintiffs also rely heavily on a CNBC interview and earnings call commentary by Mr. Hastings. Opp. 1, 9, 22. Both were addressed in Netflix's moving papers, MSJ 20, and Plaintiffs have no answer to the points made there. The earnings call referred to the number of "major" competitors, a classification inapplicable to Walmart; and the CNBC story simply mentions Walmart, as industry observers often did, as *one* of the participants in online DVD rental, an obvious fact back then. *Id.* The contemporaneous public comments by Mr. Hastings that

addressed Walmart *individually* were that "Wal-Mart is not very active in the market . . . . [I]t's a fairly minor initiative for them," Ex. 79; and that "we've been competing successfully with Wal-Mart for two years now. So I don't expect to see any significant change in their approac[h] to the market," Ex. 40 at *142. Plaintiffs ignore those statements completely.

*d.* ***Walmart had no effect on competition.*** Plaintiffs advance a few arguments that Walmart's exit was meaningful. None has any basis.

*Walmart independently decided to exit in January 2005.* Walmart's witnesses testified unequivocally that Walmart decided to exit in January 2005, independently, and at a time in which there were no discussions with Netflix. Its documents confirm the point. Most tellingly, it is undisputed that Walmart set up an impairment reserve effective January 31, 2005, to account for the shutdown. MSJ 13-15. Plaintiffs' counter that the decision to exit was equivocal. They claim (i) that the motivating BBI price cut was perceived by Walmart as "temporary," (ii) that Walmart's reduction of its 2U price to $12.97 was significant, (iii) that the Yahoo! deal could have been revived, (iv) that Wal-Mart Stores needed to sign off on the decision, and (v) that the impairment reserve could have been reversed. Opp. 25-27. The arguments all fail.

(i) The BBI price cut was in no way perceived as a "temporary promotion." Opp. 7. The very documents Plaintiffs cite say the opposite, that the price cut was *guaranteed* by BBI for the next year and that, to match BBI, Walmart would have to make the same commitment. PX 75; PX 162. Walmart knew that this would generate some $2.3 to 3.2 million in losses and a further reduction in subscribers. PX 75. (ii) Plaintiffs equally mischaracterize Walmart's decision to reduce its 2U price to $12.97. Ex. 50. Rather than signify a desire to remain competitive, it was an element of the plan to shut down – one which included elimination of signups for the 3U and 4U plans and halting all expansion plans – while retaining enough subscribers to have something to offer the logical buyers, BBI and Netflix. *Id.*; Ex. 125. (iii) Nor was it possible to revive the Yahoo! deal. While the subject was raised briefly, there was no mention of it ever again, and it evidently died well before the second Hastings-Fleming meeting. Walmart had no prospects of having 50,000 subscribers as Yahoo! desired, and could not maintain the minimum average price the term sheet required. MSJ 13-14. (iv) Approval from Wal-Mart Stores was a formality. As

1 Walmart.com CEO Fleming confirmed, the exit decision was up to him, and he made it in
2 January 2005. Ex. 126 at 23:4-24:2, 302:14-304:13. (v) And whether or not the impairment
3 reserve could have been reversed is irrelevant. The taking of the reserve demonstrates that the
4 shutdown decision *had been made*. Any decision can be reversed before it becomes effective.
5 That does not make it any less a decision. And, consequently, from at least that point forward,
6 Walmart's trivial competitive impact indisputably dwindled even more. It was maneuvering to
7 get out, not to gain share. *See Gen. Dynamics*, 415 U.S. at 510.

8 *Plaintiffs' document snippets raise no issue of fact*. Plaintiffs cite a number of documents
9 they claim show that Walmart was perceived as an effective competitor. Opp. 3-5, 22, 28-29.
10 But Plaintiffs' characterizations are not evidence, and all the evidence is to the contrary.

11 Most of the documents Plaintiffs cite (PX 25, 27, 30, 35) reflect statements made *prior to*
12 *Walmart's actual entry* and, thus, prior to the reality of its actual performance. One, PX 30,
13 which Plaintiffs quote twice, was previously discussed at the hearing on September 1, 2010. Ex.
14 127 at 20:23-21:2, 33:24-35:8. It cautioned against a price increase while Walmart was
15 "lurking." But Plaintiffs' brief makes the same misleading omission they made at the prior
16 hearing – deleting the comment on the same page stating that Netflix expected that Walmart
17 would "eventually kill [its] service" if it did not get "momentum," defined as "probably 300,000
18 subs." PX 30 at *104. Walmart never got even a fifth of that number. In 2004, *after* Walmart's
19 entry quickly had proven to be a failure, Netflix *raised* prices. MSJ 4. It reacted to *BBI*'s 2004
20 entry as "competition, *finally*," Ex. 128 at *941, and never responded competitively to anything
21 Walmart ever did. MSJ 16-18.

22 The remaining documents fall largely into a category of planning for the unlikely. *See*
23 PX 30 at *094 ("Worrying is our specialty and it keeps us healthy -- without worry what is
24 there?"). Saying that Walmart is "1 marketing spend away" from becoming a threat, for
25 example, is placed in the same category as independent entry from Yahoo, AOL, MSN, Disney,
26 Columbia House, or Sony. PX 33 at *583. And the risk that "Wal-mart decides to spend big on
27 marketing dvd rental," which Plaintiffs pretend was an actual concern, Opp. 4, is expressly
28 described as a *10%* longshot. PX 6 at *879. The other document cited, PX 34 ("incredible

competition”), is just some notes for a presentation, made months after Walmart’s departure, and there is no evidence that the quoted text (or anything like it) was ever used.

*Rationale for partnering with Walmart.* Plaintiffs ask: “If Wal-Mart was such an insignificant competitor, why was Netflix trying so hard to get it to exit the market?” Opp. 28. The limited contact that Netflix initiated with Walmart hardly seems like “trying hard,” but, even so, the answer is clear: Netflix feared Amazon’s entry, and thought that both companies would be able to compete more effectively against Amazon through a partnership. Mr. Hastings’ very first internal email on the subject in October 2004 said: “let’s think about what might get them as an anti-Amazon partner . . . . can we help them sell more against [A]mazon if they help us rent more against [A]mazon?” Ex. 43. Joining forces to increase each other’s output and to compete better against Amazon is a far cry from fearing Walmart’s unsuccessful effort in DVD rental.

*Concessions of Plaintiffs’ own expert.* Walmart’s competitive insignificance was confirmed, indeed underscored, by Plaintiffs’ own economic expert. He acknowledged the objective, undeniable fact that no one – not Netflix, BBI, Amazon, nor anyone else – ever responded competitively, whether by lowering prices or otherwise, to anything Walmart ever did in online rental. Ex. 22 at 147:24-148:2, 182:19-184:16. It is important to note that the expert did not make this concession because he *wanted* to. He made it because he *had* to. The record evidence is beyond dispute. That Plaintiffs ignore this testimony speaks volumes.

*e.* ***There was no reasonable prospect that Walmart would become an effective competitor.*** The argument that Walmart was “poised” to become a meaningful competitor disregards the evidence and raises no issue of fact. Plaintiffs do nothing more than describe the steps that Walmart took in 2003 and the first part of 2004 in its attempt to gain traction. Opp. 30-31. Those efforts, however, failed. Walmart began serious consideration of exit in the summer of 2004, well before the October 2004 meeting. Ex. 10 at 121:20-122:17. Its strategy focused on trying to salvage the business through a joint venture arrangement with either MSN or Yahoo! PX 54; Ex. 10 at 127:12-128:8. By the end of 2004, however, only the Yahoo! deal remained as a possibility; and, in December 2004, the BBI price cut eliminated that prospect as well. MSJ 13-14. As Netflix’s moving papers explained, Walmart’s own projections

demonstrated that continuing as it was would keep it below the trivial 50,000 subscriber level, while investing heavily would cause many millions of dollars in additional losses and still leave it with a tiny subscriber share. MSJ 21-22. There was no likely scenario in which Walmart would ever become competitive.

*f.* ***Walmart's exit was not an unreasonable restraint under applicable law.*** The law is clear that the acquisition (and consequent exit) of a firm with a declining 1.5% share and no likely prospects of dramatic expansion is not an unlawful restraint of trade. *Gen. Dynamics*, 415 U.S. at 510; *United States v. Oracle Corp*., 331 F. Supp. 2d 1098, 1166-73 (N.D. Cal. 2004); *FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109, 147 (D.D.C. 2004). Plaintiffs just ignore these precedents in their brief. They make much, instead, of their allegation that Netflix has "market power," a point which is not at issue on this motion. Opp. 21-22. But Plaintiffs cite no case suggesting that the possession of market power alone is unlawful, and the Supreme Court has made clear that the law is otherwise. There must be *anticompetitive conduct* for an antitrust challenge to be maintained. *Trinko*, 540 U.S. at 407; *K.M.B. Warehouse Distribs., Inc. v. Walker Mfg. Co.*, 61 F.3d 123, 129-30 (2d Cir. 1995). That is the failure of proof here.

The one case Plaintiffs try to distinguish is *Gerlinger*, 526 F.3d 1253. They argue that, there, "Amazon presented affirmative evidence that the plaintiff paid lower prices" (Opp. 24 n.6) following the agreement in question (one which, unlike here, included a specific covenant preventing Borders from re-entering online book sales). That is no distinction. Just as in *Gerlinger*, the evidence here is entirely undisputed that prices decreased following the PA, both on pre-existing plans and through the introduction of new, lower price points. *See* pp. 9-10 above. Those facts, plus the entirely speculative nature of the argument that prices would have been even lower had Borders not exited, led to the dismissal in *Gerlinger*. 526 F.3d at 1255-56. The same rationale strongly counsels dismissal here as well.

## IV. NO SECTION 2 VIOLATION

Netflix's moving papers demonstrated that, because the PA did not violate Sherman Act § 1, it could not serve as the basis for a § 2 claim as a matter of law. MSJ 23-24. Plaintiffs do not address the argument and appear to concede this uncontroversial point. *E.g.*, *Nova Designs,*

*Inc. v. Scuba Retailers Ass'n*, 202 F.3d 1088, 1092 (9th Cir. 2000). Instead, they have changed their case. They now allege that Netflix violated § 2 based on a combination of the 1998 Amazon agreement, the 1999 Musicland agreement, and a 2001 agreement with Best Buy, as well as the PA. Opp. 31-34. The argument fails for at least two separate reasons.

First, this new theory was not alleged in the amended complaint (which never mentions these agreements and never refers to Best Buy or Musicland at all). Compl. (ECF No. 22), *passim.* Nor was it included in Plaintiffs' October 2010 (post-discovery) interrogatory answers, Ex. 31, or even in Plaintiffs' January 2011 expert report, Ex. 25. Netflix was thus denied any ability to seek discovery from Musicland, Best Buy, or (on these issues) Amazon; to examine Plaintiffs' expert on the subject; or to provide expert testimony in rebuttal. The argument, therefore, is clearly barred. "[A]dding a new theory of liability at the summary judgment stage would prejudice the defendant who faces different burdens and defenses under this second theory of liability." *Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1292 (9th Cir. 2000); *accord Giddings v. Vision House Prod., Inc.*, 584 F. Supp. 2d 1222, 1225-26 (D. Ariz. 2008).

Second, the theory is baseless. The three agreements in question were entered into in 1998, 1999, and 2001. The online DVD rental "market" did not even exist at that time, and so there was no market to "allocate." In 1998-2001, Netflix was struggling to compete against Blockbuster, Hollywood Video, and other major brick-and-mortar DVD rental chains. Ex. 124 at *822, *838; Ex. 130 at *021. Plaintiffs' expert opines only that his online DVD rental market had come into existence by May 2005, Ex. 25 ¶ 16, and he conceded in his deposition that there was no such market in Netflix's early years. Ex. 131 at 173:12-174:21. Plaintiffs cite nothing suggesting that agreements entered into prior to the emergence of a relevant market – and that, in fact, contributed to the very creation of the market – can be unlawful; and the cases indicate they cannot. *E.g.*, *Fraser v. Major League Soccer, LLC*, 284 F.3d 47, 69-71 (1st Cir. 2002).

Plaintiffs' characterization of the agreements, moreover, is wrong. The Amazon agreement from 1998 precluded Netflix from new sales, but the Musicland and Best Buy agreements did not. They had provisions preventing Netflix from promoting DVD sales from *other retailers*, but neither said nor implied anything about Netflix's own sales. PX 10 at *7783

1 ("any retailer"); PX 11 at 2, 5 (several named retailer competitors). Plaintiffs' own expert
2 concurred; he acknowledged that there was nothing that impeded Netflix from engaging in new
3 sales before the PA (or afterwards). Ex. 22 at 29:12-31:18. And, yet, even if all these
4 agreements had in fact precluded Netflix from selling new DVDs, there would have been nothing
5 remotely unlawful. A covenant not to compete ancillary to an output-enhancing joint venture
6 cannot be assailed as anticompetitive. *See, e.g.*, *Rothery Storage & Van Co. v. Atlas Van Lines,*
7 *Inc.*, 792 F.2d 210, 221, 224, 230 (D.C. Cir. 1986); *Polk Bros., Inc. v. Forest City Enters., Inc.*,
8 776 F.2d 185, 189-90 (7th Cir. 1985); *Northrop Corp. v. McDonnell Douglas Corp.*, 705 F.2d
9 1030, 1050-54 (9th Cir. 1983); *see also* pp. 8-9 above.

10 **V. PLAINTIFFS' OTHER MISSTATEMENTS**

11 The text above identifies some of the factual misstatements underlying critical aspects of
12 Plaintiffs' brief. Space prevents a discussion of them all. We address here just a few more:

13 - In Netflix's moving papers, it was pointed out that, later on the same day the PA was
14 announced, Netflix was constrained to issue a press release advising the investing public that
15 the PA would not be material to Netflix's financial performance. MSJ 19-20. Having no
16 answer to that crushing fact, Plaintiffs just make one up. Citing *nothing*, they simply assert
17 that the release "was [a] dodge set up to try and shield Netflix from antitrust scrutiny." Opp.
18 28. This outrageous statement is categorically false. Having seen all the relevant documents,
19 Plaintiffs know perfectly well that, after the press release announcing the PA (the material
20 announcement to which they refer, *see* PX 168), Netflix's stock began to rise. Exs. 132-133.
21 Netflix concluded that it had no choice but to advise the public that "the agreement would not
22 materially impact the company's current subscriber growth or financial performance."
23 Hastings Decl., Ex. A. The nonmateriality release was issued without even a moment's
24 thought about any purported antitrust concern. *All* the documents, as well as the associated
25 testimony, confirm that fact. *E.g.*, Exs. 120, 129, 132-135.

26 - In the same vein, Plaintiffs condemn the fact that "Netflix . . . specifically added
27 language to the term sheet about Wal-Mart 'independently' deciding to exit" as a "fals[e]"
28 recital and another antitrust "dodge." Opp. 28. The recital, however, was plainly true, as

*every* Walmart witness expressly confirmed under oath. Ex. 7 at 23:4-9, 30:8-11 (VC); Ex. 9 at 24:17-19 (VC); Ex. 13 at 122:8-12 (VC). And if what Plaintiffs mean is that the agreement was reviewed, edited, and approved by counsel, that does not support their claim; it negates it.

- Plaintiffs say that, in December 2004, "Hastings saw new DVD sales as a growth opportunity that would 'have a big impact in future years.'" Opp. 8. The document cited says just the opposite: that Netflix will *not* pursue new DVD sales (and some other suggestions) in 2005, but "acquiring some movies (as opposed to DVDs) and . . . sell[ing] advertising to studios trying to promote their movies . . . [are] initiatives [that] will have only modest results in 2005; but we think they are good bets to have a big impact in future years." PX 93; *see* Ex. 58.
- Plaintiffs assert that, in January 2005, when Netflix was evaluating whether to respond to BBI's $14.99 3U price, a Netflix employee "explicitly reference[d] 'Wal*Mart also lower[ing] their monthly prices for on-line DVD rental' as one of the market conditions affecting that decision." Opp. 22 (citing PX 146). The document says no such thing. The employee, a media relations executive, mentioned Walmart's price reduction in October 2004 as a past fact that had not affected Netflix's growth or profitability. The only factors mentioned in terms of 2005 pricing were BBI and Amazon.
- Plaintiffs describe the October 2004 meeting as "Netflix reach[ing] out to Wal-Mart to try and escape another price cut." Opp. 6. The document cited says, again, the precise opposite, that Netflix was seeking out Walmart as "an anti-[A]mazon partner." PX 65. There is no evidence suggesting that Netflix's purpose was escaping a "price cut."

Plaintiffs take equal liberties in describing the cases. One significant example is their description of *Celotex*, 477 U.S. at 323, as holding that "[t]he party seeking summary judgment bears the burden of establishing that no genuine issue of material fact exists." Opp. 11. *Celotex*, of course, is the leading case for the very different proposition that "the plain language of Rule 56(c) mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that

party will bear the burden of proof at trial. . . . The moving party is 'entitled to a judgment as a matter of law' because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof." 477 U.S. at 322-23; *accord Gerlinger*, 526 F.3d at 1255-56. It is precisely that failure, on multiple essential elements, that warrants entry of summary judgment here.[3]

## VI. CONCLUSION

The stack of papers on the Court's desk is large, but the material facts are few; and they are not in genuine dispute: Walmart's exit from the business of renting DVDs online did not harm competition or the Plaintiffs in any way. On the contrary, consumer welfare increased by every measure – price, output, quality, service, and innovation. Walmart's presence in online DVD rentals never led to any competitive response by Netflix, BBI, Amazon, or anyone else. Its subscriber share was 1.5% and declining, and its projections demonstrated that any attempt to expand would generate even more losses and no appreciable gain in share.

These are the undeniable, objective facts. And they counsel entry of summary judgment. In a context where the FTC and two state attorneys general abandoned any pursuit of an antitrust investigation, and where Netflix was compelled to issue a press release alerting the public that the transaction would have no material effect on its financial performance, no other outcome makes sense.

Dated: July 22, 2011

WILSON SONSINI GOODRICH & ROSATI
Professional Corporation

By: /s/ Jonathan M. Jacobson
Jonathan M. Jacobson

*Attorneys for Defendant Netflix, Inc.*

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[3] Netflix objects to several documents submitted by Plaintiffs as inadmissible under the following Federal Rules of Evidence ("FRE"): FRE 801/802 (PX 12-13, 19, 21, 25, 27, 29, 32 [attach.], 39, 46, 57, 61-62, 79, 88, 115, 151-52); FRE 901 (PX 7, 14, 34, 58, 78, 112, 116-17, 119, 124, 136, 143, 165); FRE 402/403 (PX 92, 107-08, 112-14, 116-17, 119, 168).