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 16 *Class*

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 16 *Proposed Class*

17 **UNITED STATES DISTRICT COURT**  
 18 **NORTHERN DISTRICT OF CALIFORNIA**  
 19 **OAKLAND DIVISION**

20 <b>IN RE ONLINE DVD RENTAL</b> 21 <b>ANTITRUST LITIGATION</b> 22 23	Master File No. M:09-CV-2029 PJH MDL No. 2029 Hon. Phyllis J. Hamilton
24 <b>This document relates to:</b> 25 <b>ALL ACTIONS</b> 26	<b>EXPERT REPORT OF JOHN C. BEYER,</b> <b>Ph.D. PURSUANT TO FEDERAL RULE</b> <b>26(a)(2)(B) IN SUPPORT OF CLASS</b> <b>CERTIFICATION</b>

27 **REDACTED VERSION**

I. INTRODUCTION

1. I am Chief Executive Officer of Nathan Associates, Inc., an economic and management consulting firm established in 1946, with offices in Arlington, Virginia; Memphis, Tennessee; Irvine, California; London, U.K.; and Channai, India. Nathan Associates provides economic, financial, and statistical research and analysis to private and public sector clients in the United States and abroad.
2. I have been associated with Nathan Associates for 38 years. I also have been employed by the Ford Foundation. I have conducted research at the Brookings Institute, and I have served as an Adjunct Professor at American University in Washington, D.C. I received a Ph.D. from Tufts University's Fletcher School in 1966.
3. My professional experience includes the analysis of economic issues involving antitrust litigation, such as matters concerning the structure and conduct of industries; the definition of relevant markets; the determination of economic impact; and the estimation of damages. In several instances, such analyses have addressed the issue of impact upon multiple plaintiffs and plaintiff classes, as well as the development of methodologies to assess damages on a class-wide basis. During my career, I have provided analyses and opinions concerning the economic impact and damages in numerous antitrust class-action cases, including: *In re: Carbon Black Antitrust Litigation*; *In re: Corrugated Container Antitrust Litigation*; *In re: Flat Glass Antitrust Litigation*; *In re: Carbon Dioxide Antitrust Litigation*; *In re: Domestic Air Transportation Antitrust Litigation*; *In re: Monosodium Glutamate Antitrust Litigation*; *In re: Mercedes-Benz Antitrust Litigation*; *In re: Linerboard Antitrust Litigation*; *In re: Polyester Staple Fiber Antitrust Litigation*; and *In re: Oriented Strand Board Antitrust Litigation*, among others.

1 4. Additional information about my education, professional experience as an economist,  
2 publications, and affiliations may be found in my resume, which is in Appendix A. Also  
3 included in Appendix A is a list of the matters in which I have testified over the past four years.  
4 Nathan Associates charges a rate of \$515 per hour for my work. Other professional staff  
5 working under my direction have hourly billing rates ranging from \$125 to \$250. Nathan  
6 Associates' compensation is not contingent upon the outcome of this case.

7  
8 **II. ASSIGNMENT AND SUMMARY OF CONCLUSIONS**

9 5. The Consolidated Amended Class Action Complaint in this matter was filed on May 27, 2009  
10 on behalf of a Class of purchasers of an online DVD rental subscription service provided by  
11 Netflix, Inc. The Class is defined as:

12 Any person or entity in the United States that paid a subscription fee to Netflix on or  
13 after May 19, 2005 up to and including the date of class certification ("Class").

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. Also excluded are persons who subscribed to Wal-Mart DVD  
17 Rentals as of May 19, 2005. Also excluded are the Judge presiding over this action, her  
18 law clerks, her spouse, and any person within the third degree of relationship living in  
19 the Judge's household and the spouse of such a person.<sup>1</sup>

20 The Defendants named in the Complaint are Netflix, Inc. ("Netflix"), Wal-Mart Stores, Inc. and  
21 Wal-Mart.com USA LLC (collectively referred to as "Wal-Mart"). Both Netflix and Wal-Mart  
22 were service providers in the online DVD rental market prior to May 19, 2005. After May 19,  
23 2005, Netflix continued to offer online DVD rental services, but Wal-Mart terminated its online

24 \_\_\_\_\_  
25 1 United States District Court for the Northern District of California, *In re: Online DVD Rental*  
26 *Antitrust Litigation*, Master File No. M: 09-CV-2029 PJH, Consolidated Amended Class Action  
27 Complaint, filed May 27, 2009 (hereinafter, "Complaint"), at ¶ 64. *See also* United States District  
28 Court for the Northern District of California. *In Re: Online DVD Rental Antitrust Litigation*,  
Reporter's Transcript of Proceedings, No. MDL 09-CV-2029-PJH, July 7, 2009, pp. 9-11.



1 DVD rental services as a result of the agreement alleged in the Complaint, and completed its  
2 exit from the market within the following 30 days.<sup>2</sup>

3  
4 6. Plaintiffs allege that Defendants Netflix and Wal-Mart entered into discussions and  
5 negotiations that, by May 19, 2005, culminated in an unlawful agreement to divide the markets  
6 for the sale of new DVDs and online DVD rentals (“Market Allocation Agreement”) in order to  
7 monopolize and restrain trade in the market for online DVD rentals in the United States,  
8 allowing Defendant Netflix to charge supra-competitive subscription prices for online DVD  
9 rentals sold to Class members from May 19, 2005, through the present (“Class Period”).<sup>3</sup>

10  
11 7. Counsel for Plaintiffs have asked me to review documents and other information and material,  
12 as well as the Complaint itself, to determine whether the existence of the unlawful agreement  
13 and related conduct and resulting injury to the Class may be established by evidence and  
14 methodologies that are common to the Class, rather than individualized in nature, and whether  
15 the injury resulting from that conduct would be common to the Class, rather than  
16 individualized.

17  
18 8. In addition, counsel for Plaintiffs asked me to determine whether the amount of damages  
19 suffered by Class members could be established by a common damages methodology,  
20 obviating the need for individualized proof of damages.

21  
22 9. For the purpose of my analysis of the class certification issues in this report, I have assumed the  
23 following:

24  
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2 Complaint, ¶ 64.

27 3 Complaint, ¶¶ 1-5.



- 1 a. Defendants did enter into the alleged Market Allocation Agreement by which Netflix  
2 and Wal-Mart agreed that Wal-Mart would exit the online DVD rental market and cease  
3 to be a competitor to Netflix.
- 4
- 5 b. At the time that Netflix and Wal-Mart began discussing and negotiating the alleged  
6 Market Allocation Agreement, Netflix was considering the potential of selling new  
7 DVDs to its customers as a method of generating significant additional revenue.  
8 However, as part of the alleged Market Allocation Agreement, Netflix agreed not to  
9 enter into the business of selling new DVDs and did not do so.
- 10
- 11 c. Absent the alleged Market Allocation Agreement, Netflix would have lowered its prices  
12 in response to intensifying competition in a market with Netflix, Wal-Mart and  
13 Blockbuster. I have not been asked to assume a specific date by which Netflix would  
14 have reduced its prices; I have only been asked to assume that the price reductions  
15 would have been fully implemented by May 19, 2005. In reaching my conclusions, I  
16 have examined evidence that Netflix's price reductions would, in fact, have occurred  
17 and that antitrust injury was common to the entire Class, not individualized. I have not  
18 assumed that a general price reduction would have affected all, or nearly all, Class  
19 members. Rather, I have examined whether lower competitive prices, which would have  
20 resulted from continued competition, would have applied to all, or nearly all, members  
21 of the Class.
- 22
- 23 d. The online DVD rental market is a relevant product market and the geographic market  
24 is the United States. I have studied the nature of price competition between Netflix and  
25 other online DVD rental services as well as the nature of pricing among Netflix's plans  
26 to analyze whether the nature of this market lends itself to Class-wide proof of injury.
- 27
- 28

1 e. The conduct of Netflix and/or all Defendants violated Section 1 of the Sherman Act and  
2 Section 2 of the Sherman Act, as alleged in the Complaint.<sup>4</sup>  
3

4 10. In addition, it is my understanding that the following facts are consistent with the evidence  
5 made available thus far:

6 a. In mid-October 2004, approximately two months after Blockbuster joined Netflix and  
7 Wal-Mart as the third major competitor in the online DVD rental market, price  
8 reductions were made by Netflix and Blockbuster, which included price reductions on  
9 the “3-out unlimited plan”<sup>5</sup> that constituted the vast majority of Netflix’s subscribers at  
10 that time. In the face of a significant drop in its stock price and price cut by  
11 Blockbuster, among other motivations, Netflix sought to reduce competition by  
12 beginning discussions with Wal-Mart that were designed to get Wal-Mart to exit the  
13 online DVD rental market. At that time, Wal-Mart had not decided to exit the market.  
14 Rather than exit, Wal-Mart lowered its prices on November 2, 2004, Blockbuster  
15 lowered its prices on December 22, 2004 and Wal-Mart lowered its prices once again  
16 on January 4, 2005.

17  
18 b. In the face of these further price cuts, Netflix increased its efforts to get Wal-Mart to  
19 agree to exit the market in January 2005. There were additional meetings and  
20 negotiations between Netflix and Wal-Mart during February and March 2005, which  
21 culminated in a [REDACTED] on March 17, 2005 by which, among other things,  
22 Wal-Mart would exit the online DVD rental market. Wal-Mart’s agreement to exit the  
23 market was publicly announced on May 19, 2005.  
24

25 \_\_\_\_\_  
26 4 Complaint, ¶¶ 74-92.

27 5 A “3-out unlimited plan” allows a subscriber to rent up to three movies at one time without limit to  
28 the total number of movies rented. *See, infra*, ¶ 14.

- 1 c. Had Netflix not embarked on its plan to get Wal-Mart to exit the market or had Wal-  
2 Mart rejected that plan, Netflix would have been forced to respond to the price  
3 reductions by Blockbuster (especially its December 22, 2004 price reduction) and Wal-  
4 Mart.
- 5
- 6 d. The price changes that occurred as well as the further price reductions that would have  
7 occurred were a result of decisions made by these three firms as to the conditions in the  
8 online DVD rental market. They were not a result of changes in the pricing of other  
9 forms of video entertainment, such as in-theater movies, cable television, etc.
- 10

11 11. In preparing this Report, I, and members of my staff under my direction, reviewed the  
12 following information in order to evaluate the economic characteristics of the online DVD  
13 industry:

- 14 • The Complaint as well as the Blockbuster Subscribers' Consolidated Amended Class  
15 Action Complaint, filed July 16, 2009, and the Blockbuster Subscribers' Second  
16 Consolidated Amended Class Action Complaint, filed March 1, 2009;<sup>6</sup>
- 17 • Electronic databases produced by Defendant Netflix containing online DVD rental  
18 transaction data;<sup>7</sup>
- 19
- 20

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21  
22 6 United States District Court for the Northern District of California, *In Re: Online DVD Rental*  
23 *Antitrust Litigation, Blockbuster Subscribers' Consolidated Amended Class Action Complaint*, Master  
24 File No. M: 09-CV-2029-PJH, July 16, 2009; United States District Court for the Northern District of  
25 California. *In Re: Online DVD Rental Antitrust Litigation, Blockbuster Subscribers' Second*  
26 *Consolidated Amended Class Action Complaint*, Master File No. M: 09-CV-2029-PJH, March 1,  
27 2010.

28 7 Netflix provided monthly data from January 2002 to September 2009 in the following electronic  
databases: NETFLIX\_DATA\_001, received December 29, 2009; NETFLIX\_DATA\_002, received  
February 17, 2010; and NETFLIX\_DATA\_003, received February 19, 2010 (referred to collectively as  
"Netflix Electronic Data").



- 1 • Documents produced by Defendants, Netflix and Wal-Mart pursuant to discovery in this
- 2 case;<sup>8</sup>
- 3 • Publicly available information concerning the online DVD rental industry generally, as
- 4 well as about Netflix, Wal-Mart online DVD rental, Blockbuster online DVD rental,
- 5 available in media and trade documents;
- 6 • Academic literature concerning strategic interaction relevant to the structure of the
- 7 online DVD rental market; and
- 8 • Documents produced during the course of this litigation and the transcript of the
- 9 deposition of Netflix taken pursuant to Federal Rule 30(b)(6).<sup>9</sup>

10

11 A complete list of the materials reviewed is included in Appendix B. The opinions expressed in

12 this report are based on the information that I have reviewed so far and may change if new

13 information warrants. I understand that discovery in this case is not complete and that there will

14 be additional facts to be reviewed as the case progresses.

- 15
- 16 12. Based on my economic analysis of all of the information that I have reviewed, I have
- 17 concluded that the unlawful conduct alleged in the Complaint may be proven by evidence and
- 18 methodologies that are common to the Class and that the economic injury to the Class arising
- 19 from that conduct is common to the Class. I base this conclusion on the following
- 20 considerations summarized below and elaborated upon in the body of this Report:
- 21 a. Netflix charges one national monthly subscription price for online DVD rentals that
  - 22 vary only by the number of DVDs a subscriber can have home at one time ( “unlimited”
  - 23 plans) or the total DVDs the subscriber can at home during a month (“capped” plans).

24

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25 <sup>8</sup> This includes Netflix’s Interrogatory Response file received January 6, 2010, consisting of Netflix

26 Data 1209.xls, Streaming Users over 15 minutes as of 120109.xls and Blu-Ray surcharge.xls.

27 <sup>9</sup> Deposition Transcript of Leslie J. Kilgore, Rule 30(b)(6) designee of Netflix, March 3, 2010

28 (referred to as “Netflix Dep. Tr.”).

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Subscribers can easily move from one plan to another, and have done so. [REDACTED]  
[REDACTED]  
[REDACTED] Therefore, evidence of the impact of changes in supply or demand factors, as well as any price effect arising from the alleged unlawful conduct would be evidence that would be common to the Class, rather than individualized in nature.

b. [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

c. The high costs of setting up and operating distribution centers, which act as formidable barriers for potential entrants into the market, and the high concentration of the online DVD rental market suggest that Netflix had considerable ability to affect prices. Netflix's ability to affect prices increased after Wal-Mart's exit from the online DVD rental market, since the constraining presence of a third major competitor in the market was removed.

d. Online DVD rental service providers primarily compete on price. By foreclosing additional competition from Wal-Mart, a competitor with deep resources that was committed to, and focused on, being a low-price seller in this market, Defendants prevented subscribers from benefitting from the increased price competition, which would have resulted in lower subscription prices, that would otherwise have occurred.

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e. [REDACTED]  
[REDACTED] After the  
alleged Market Allocation Agreement and Wal-Mart's subsequent exit, prices  
stabilized. The evidence discussed below shows that in the absence of the alleged  
Market Allocation Agreement, Class members would have paid a lower price.

f. [REDACTED]  
[REDACTED] This  
suggests that, had three-firm competition continued, Netflix's subscription prices would  
have been lower than those it actually charged.

g. A review of the economic literature relevant to the online DVD rental market confirms  
that prices fall with increased competition. Further, economic models of strategic  
competition within concentrated industries show that reduced competition can lead to  
higher prices. Economic models relevant to the online DVD rental market suggest that  
the reduced competition in the online DVD rental market would have resulted in higher  
prices to all, or nearly all, Class members.

As explained more fully below, I have concluded that damages to the Class can be calculated  
on a common basis using valid and accepted methodologies. While the amount of damages  
sustained by a Class member might differ because he or she may have purchased different  
subscription plans at different times, these differences can be provided for in the methodology  
used to determine damages. Likewise, any differences between the price impact on different  
subscription plans can be accounted for in the methodology used to determine aggregate  
damages.



**III. SUMMARY OF SIGNIFICANT FACTS  
REGARDING MARKET IMPACT AND DAMAGES**

**A. The Online DVD Rental Market**

13. The DVDs at issue in this case are Digital Video Discs and, during later periods, Blu-ray discs,<sup>10</sup> containing commercially-recorded entertainment such as movies or TV shows for personal viewing.<sup>11</sup> Each of the major competitors marketed the rental of DVDs online by subscription agreements with consumers on a nation-wide basis without regard to any individual characteristics, as described below. I refer to the market for the rental of these discs as the “online DVD rental market.”

14. Netflix’s subscribers paid a fixed monthly subscription fee to an online service provider to rent DVDs by mail. To select a DVD, consumers visited the provider’s website, which listed the available DVD inventory. On the website, the subscriber could browse the DVD inventory and create a list of DVDs he or she wished to rent in the order in which he or she wished to rent them. The DVDs were rented without the casing or advertising or informational pamphlets associated with DVDs sold at retail. The cost of mailing was included in the price of the subscription. The DVD was then mailed, via the U.S. Postal Service, in an envelope designed for round-trip mailing, to the subscriber. Once the subscriber was ready to return the DVD, he or she placed the DVD in the pre-paid postage envelope that arrived with the DVD and dropped it at any U.S. Postal Service mailbox. Once the DVD was received at a distribution center run by the service provider, the next DVD on the subscriber’s queue was mailed. Subscribers could sign up for plans that allow one, two, three or more DVDs “out” at a time.<sup>12</sup> Under the

<sup>10</sup> Blu-ray discs allow for a high definition format resulting in higher video quality for viewers. *See* <http://www.blu-raydisc.com/en.html>.

<sup>11</sup> Complaint, ¶ 31.

<sup>12</sup> There are as many as “8-out” at a time plans available, although the core plans appear to be [REDACTED] (See Netflix (Continued...))

1 “unlimited” plans, subscribers paid a flat fee and could receive and return new DVDs as  
 2 frequently as they wished (subject to the plan limitations on the number of DVDs allowed  
 3 “out” at one time), without incurring any late fees or facing due dates. Netflix also had a small  
 4 number of “capped” plans that were identical in nature except that under these plans, a  
 5 subscriber could rent only a stated number of DVDs per month.<sup>13</sup> Subscribers generally pre-  
 6 paid only for the upcoming month of service and could cancel their subscription or change their  
 7 subscription to a different plan at any time.<sup>14</sup>


8  
 9 15. While I have not yet performed a full market definition analysis at this stage, it is useful to note  
 10 that there are functional differences between online DVD rental services and other forms of  
 11 movie rentals. DVDs are selected online in this service, allowing the consumer to compare  
 12 titles and read brief reviews of the movies he or she is considering. The DVDs are sent directly  
 13 to customers’ homes and are returned by placing the DVD in any mailbox, including the  
 14 customers’ home mailbox, eliminating the need to visit a rental store. The nature of the service  
 15 allows the subscriber to keep the DVDs as long as he or she wishes without incurring any late  
 16 fees, which, historically, were a key source of revenue for brick-and-mortar rental providers

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 (...Continued)

20 Dep. Tr., pp. 56, 81-82). The term “out” refers to the number of DVDs the subscriber can have at home  
 21 at any given time (*see* Exhibits C-1 and C-2 located in Appendix C).

22 13 For example, the 1-out two-cap plan allows a customer to have one DVD at home at a time up to a  
 total of two DVDs in a month (*see* Netflix Dep. Tr., p. 34).

23 14 Gift subscriptions are an exception, as the monthly subscription fee is pre-paid for the period of  
 24 time covered by the gift. However, gift subscriptions should not affect the analysis of injury and  
 25 damages. Gift subscriptions purchased before May 19, 2005 are not part of the Class. Thus, although a  
 26 gift subscription purchased after May 19, 2005 may not benefit from a drop in price during the period  
 of the gift, the gift purchaser would suffer an injury to the extent that the initial price of the gift  
 subscription would have been lower after May 19, 2005.

27  (Netflix Electronic Data).



1 and of dissatisfaction among consumers.<sup>15</sup> Furthermore, because DVDs are mailed from a  
2 warehousing facility, not chosen directly from a store with limited space, the selection of titles  
3 is substantially wider than would be available at a particular movie rental store. The online  
4 DVD rental market has grown as a substantial market in its own right, due to a variety of  
5 factors including the nature of the rental service, the ability to select DVD rentals from a wide  
6 variety of titles, the freedom from late fees or other costs associated with the rental, the  
7 convenience and familiarity of DVD delivery and return via mail. This market differs in  
8 significant ways from other methods for watching movies, such as movie theaters, movie  
9 channels such as HBO, and others. Market analysts and commentators have generally referred  
10 to the “Online DVD Rental Market” as a separate and growing market.<sup>16</sup> I also note that the  
11 price changes that occurred during the period from April 2004 through the Summer of 2005 by  
12 Netflix, Blockbuster and Wal-Mart appear to have been primarily, if not entirely, related to the  
13 events in the online DVD rental market, not changes in competition from other forms of video  
14 entertainment.

#### 15 16 **B. Netflix, Wal-Mart, and Blockbuster**

17 16. Defendant Netflix was founded in 1997 by Reed Hastings and Marc Randolph to rent and sell  
18 DVDs online. Initially, the products offered were similar to in-store rentals in that consumers  
19 would pay a fee to rent a DVD for a certain amount of time and additional fees were charged  
20 for keeping the DVD longer. In late 1999, however, a monthly subscription plan was  
21 introduced where the subscriber could rent four DVDs at a time with no late fees or due dates.  
22 While Netflix has introduced additional plans that allow for more or fewer DVDs out at a time,  
23 the basic, flat fee, no due date, no late fee, model has not changed since 1999. During this  
24

25 \_\_\_\_\_  
26 15 “Blockbuster Drops Late Fees,” CNNmoney.com, December 14, 2004.

27 16 *See, e.g.*, “The outlook for online DVD rental: A strategic analysis of the US and European  
28 markets,” Adams Media Research, 2005.



1 period, Netflix began to sign revenue-sharing agreements with large studios by which it would  
2 receive lower prices on the large amounts of DVDs it purchased in return for sharing a portion  
3 of the rental revenue with the studio.<sup>17</sup> In 2002, Netflix became a publicly traded company.  
4

5 17. By the end of 2002, Netflix claimed over one million subscribers, 14,500 movie titles available  
6 for rent and had 18 distribution and shipping centers to fill orders. Its most common plan was  
7 \$19.95 a month for three DVDs at a time and unlimited total rentals with no late fees or due  
8 dates and free shipping. Revenues were over \$150 million.<sup>18</sup> By the end of 2004, Netflix  
9 reported over 2.6 million subscribers, 35,000 DVD titles, 30 shipping centers and \$500 million  
10 in revenues (*see* Appendix C Exhibit 3).<sup>19</sup>  
11

12 18. Defendant Wal-Mart is generally regarded as the largest and most successful retailer in the  
13 United States. In 2003, Wal-Mart made \$245 billion in global sales and \$204 billion in U.S.  
14 sales. By 2009, it reported \$401 billion in global sales and \$303 billion in U.S. sales.<sup>20</sup> Wal-  
15 Mart has been ranked first or second on the Fortune 500 rankings of the largest American  
16 companies (in terms of revenues) every year since 1999.<sup>21</sup> Wal-Mart began testing the online  
17 DVD rental business model in October 2002 and rolled out its nation-wide unlimited DVD  
18 rental subscription plans in June 2003. At the time, Netflix and Wal-Mart were the only two  
19 nation-wide, non-niche providers of an online subscription based DVD rental service. Wal-  
20 Mart subscribers could select from three different plans: two DVDs at a time for \$15.54, three  
21

22 \_\_\_\_\_  
23 17 Netflix, Inc.- Company History, <http://www.fundinguniverse.com/company-histories/Netflix-Inc-Company-History.html>, accessed February 12, 2010.

24 18 Netflix's Form 10-K for the fiscal year ended December 31, 2002, p. 10.

25 19 Netflix's Form 10-K for the fiscal year ended December 31, 2004, pp. 2, 11-12.

26 20 Wal-Mart's 2003 Annual Report, p. 18; Wal-Mart's 2009 Annual Report, pp. 7, 14.

27 21 *See* [http://money.cnn.com/magazines/fortune/fortune500/2009/full\\_list/](http://money.cnn.com/magazines/fortune/fortune500/2009/full_list/), for 2009 rankings, and  
28 <http://money.cnn.com/magazines/fortune/fortune500/>, for previous years' rankings.

1 for \$18.76 and four for \$21.94. At the time, Wal-Mart had over 13,000 titles and at least six  
2 distribution centers.<sup>22</sup> [REDACTED]

3 [REDACTED]  
4 [REDACTED]<sup>25</sup>

5  
6 19. Wal-Mart has a reputation for strong price competition, low prices, and a commitment to be the  
7 lowest-priced competitor in every market it enters. Wal-Mart was regarded as a “massive  
8 company with enough resources to withstand a long, drawn-out price war” in the online DVD  
9 rental market.<sup>26</sup> It was reported that “[w]ith Wal-Mart’s entry into [the] market, investors are  
10 likely to grow even more jittery about Netflix’s prospects. Wal-Mart is well-known for opening  
11 its gigantic stores in areas saturated with established retailers and still succeeding in siphoning  
12 off business by severely undercutting prices.”<sup>27</sup> [REDACTED]

13 [REDACTED]  
14 [REDACTED]<sup>28</sup> Competition from Wal-Mart in the growing online DVD rental  
15 market presented a threat to Netflix’s online DVD rental business and industry analysts and  
16 commentators recognized that Wal-Mart had the potential to be a significant competitor to  
17 Netflix. For example, in regards to competition with Netflix, the media stated that “Wal-Mart is  
18 an adversary that has the ability to mount a steady, relentless attack.”<sup>29</sup>

19  
20 22 “Wal-Mart Rolls Out New Online DVD Rental Plan of \$15.54 a Month,” Wal-Mart Press Release,  
June 10, 2003.

21 23 WMHOe-100779-003-00003490 at 3493.

22 24 WMHOe-770047-019-00000135 at 135.

23 25 WMHOe-100772-001-00003839 at 3839.

24 26 David Jackson, “Wal-Mart (WMT) teams up with Netflix (NFLX); Blockbuster Online (BBI) test  
higher prices,” Seeking Alpha, May 19, 2005.

25 27 Sandeep Junnarkar, “Wal-Mart cues up a rival to Netflix,” CNET News.com, October 15, 2002.

26 28 WMHOe-100779-002-00001632 at 1639.

27 29 Nicholas Thompson, “Netflix Uses Speed to Fend Off Wal-Mart Challenge,” *The New York Times*,  
September 29, 2003.



1 20. Blockbuster Inc. (“Blockbuster”) operates a chain of video rental stores in the United States  
2 and other countries. In August 2004, the company entered into the online DVD rental market in  
3 the United States with Blockbuster Online. In March 2005, Blockbuster Online reported  
4 750,000 subscribers and planned to invest heavily in the service in order to reach two million  
5 subscribers by the beginning of 2006.<sup>30</sup> As a leading provider of in-store rentals, Blockbuster  
6 had the advantage of a large base of customers that could be converted into subscribers.

7  
8 21. While other online DVD rental services, mainly offering niche movies, have opened for  
9 business in the past decade, Netflix, Blockbuster and Wal-Mart were the three primary  
10 providers in the online DVD rental market until Wal-Mart exited the market.<sup>31</sup> At that point,  
11 the online DVD rental market became a two-firm market and remains a two-firm market today.

12  
13 **C. Market Concentration and Barriers to Entry into the Online DVD Rental Market**

14 22. Until Wal-Mart’s entry in 2003, Netflix faced little competition in the online DVD rental  
15 market. [REDACTED]  
16 [REDACTED]<sup>2</sup> By  
17 some accounts, at the end of 2004, Netflix had a 78 percent share of the online DVD rental  
18 market.<sup>33</sup> At the time Wal-Mart exited the market, Netflix possessed a dominant share of the  
19 market.

20  
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22 

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30 Blockbuster, Inc.’s Form-10K for the period ending December 31, 2004, p. 5.

23 31 “Online Segment Driving Worldwide Movie Rental Market,” Konzept Analytics, November 2008.  
24 [REDACTED] (Netflix Dep. Tr., p. 176).

25 32 NETFLIX\_CORPORATE\_00002919 at 2927-8.

26 33 “Overall report on the economic analysis of the MEDIANET project- Version 2.0,” Multimedia  
27 Networking IST-Project: FP6-507452, Information Society Technologies, MediaNet, May 9, 2005, p.  
28 35.



1 23. Barriers to entry have existed in the online DVD rental market. For example, the need to mail  
2 DVDs anywhere in the country in a short amount of time meant that entry into the market  
3 required a firm to build multiple distribution centers located throughout the country and to  
4 invest in the technology to fulfill shipments at low cost. These distribution centers could not be  
5 easily converted to an alternate use and therefore constitute a sunk cost. Patents filed by Netflix  
6 that potentially rendered various processes of online DVD rental proprietary, including the  
7 overall concept, also represented entry barriers.<sup>34</sup> Reed Hastings, the CEO of Netflix, attested  
8 to the existence of barriers to entry in his statement: “Netflix represents online rentals to the  
9 public – that’s why being first is forever an advantage. Let’s put it this way: The technology is  
10 a \$200 million barrier; the brand and customer base is probably twice that.”<sup>35</sup> The existence of  
11 barriers to entry allowed the online DVD rental market to maintain its high level of  
12 concentration. As a result, subscribers have had limited ability to avoid the impact of higher  
13 prices that resulted from collusive behavior among competitors.

14  
15 24. As of December 2004, other than Netflix, only Wal-Mart and Blockbuster had overcome these  
16 barriers to entry. Wal-Mart had rapidly grown a distribution network and DVD library and had  
17 taken steps towards building brand awareness. Blockbuster had built-in brand awareness due to  
18 its long history in the in-store retail market and was rolling out a national distribution network  
19 and larger library. Wal-Mart’s exit from the online DVD rental market eliminated one of only  
20 three nation-wide competitors that had largely overcome the high entry barriers. The barriers to  
21

22 \_\_\_\_\_  
23 34 Licensing and legal fees as well as investment in the technology to circumvent existing patent  
24 constitute costs that act as barriers to entry (Dennis W. Carlton and Jeffrey M. Perloff (2005), *Modern*  
25 *Industrial Organization: Fourth Edition*, Pearson: Addison-Wesley, Boston (hereafter, “Carlton and  
26 Perloff”), p. 77). Blockbuster and Netflix settled patent litigation in 2007 concerning Netflix’s patent  
for a system for placing movie selections in a queue and charging a subscription fee for renting from  
that queue (“Blockbuster Settles Fight with Netflix,” *The New York Times*, June 28, 2007).

27 35 Fast Company interview with Reed Hastings, December 2005,  
28 (<http://www.fastcompany.com/resources/customers-netflix.html>).

1 entry have been sufficiently formidable that despite Netflix's high profits,<sup>36</sup> no other  
2 competitors entered the market to compete with Netflix.

3  
4 **D. Pricing in the Online DVD Rental Market**

5 *i. Within Each Subscription Plan, Nearly All Netflix Customers Pay the Same Price*

6 25. Monthly prices for a particular online DVD rental subscription plan are nation-wide<sup>37</sup> [REDACTED]

7 [REDACTED]

8 [REDACTED]

9 [REDACTED]<sup>39</sup> The subscription price for each plan

10 was a single, nation-wide price that was identical for all subscribers throughout the country.

11 Netflix subscribers pre-pay only for the upcoming month of service and can cancel their

12 membership at any time, as well as re-join at any time, without incurring additional charges.

13  
14 26. [REDACTED]

15 [REDACTED]

16 [REDACTED]

17  
18  
19 <sup>36</sup> [REDACTED]

20 [REDACTED] (Netflix Data 1209.xls and Netflix Dep. Tr., Exhibit 10, cited as  
NETFLIX\_SARANDOS\_00083847).

21 <sup>37</sup> [REDACTED]

(Netflix Electronic Data; *See also* NETFLIX\_MINTZ\_00007330 at 7349).

22 38 Netflix Dep. Tr., p. 287.

23 <sup>39</sup> [REDACTED] (Netflix Dep. Tr., p. 288).

24 <sup>40</sup> [REDACTED]

25 [REDACTED]

[REDACTED] (*see* Exhibit C-1 in Appendix C).

26 <sup>41</sup> Netflix Dep. Tr., p. 288. [REDACTED]

27 [REDACTED] (Netflix Dep.  
Tr., pp. 288-294). Beginning in October 2008, Netflix added an additional surcharge to the base price

(Continued...)



1 27. [REDACTED]  
 2 [REDACTED]  
 3 [REDACTED]  
 4 [REDACTED]  
 5 [REDACTED]  
 6 [REDACTED]<sup>42</sup> For example, Netflix increased the price of its 3-out plan from \$19.95 per month  
 7 to \$21.99 per month on June 15, 2004. [REDACTED]  
 8 [REDACTED]  
 9 [REDACTED]

10  
 11 28. The nation-wide nature of the service and pricing policies mean that any subscription price  
 12 changes to a plan would impact all subscribers on that plan in the same manner without regard  
 13 to any individual characteristics. In particular, had the price competition that began in the Fall  
 14 of 2004 between Netflix, Wal-Mart and Blockbuster continued through 2005 and thereafter,  
 15 any lower prices charged by Netflix resulting from that competition would have benefitted  
 16 essentially all Netflix subscribers.

17  
 18 *ii. Online DVD Rental Subscription Plans Are Close Substitutes for One Another*

19 29. Online DVD rental subscription plans differ by the number of DVDs a subscriber may rent at  
 20 one time (or with some plans, the total number of rentals a month). Netflix, Wal-Mart and  
 21 Blockbuster had at least one offering in the popular 1-out, 2-out, or 3-out unlimited plans.<sup>43</sup> In

22  
 23 (...Continued)

24 of plans allowing for Blu-ray disc rentals. [REDACTED] (Netflix  
 25 Electronic Data).

26 42 Netflix Dep. Tr., pp. 287-90.

27 43 Netflix stated that the focus of the business has [REDACTED] (Netflix Dep. Tr., pp.  
 28 56-77, 82). [REDACTED]

[REDACTED] (Netflix Dep. Tr., p. 56).



1 the Fall of 2004, Blockbuster offered a 3-out unlimited plan, Wal-Mart offered 2- and 3-out  
2 unlimited plans, and Netflix offered a 3-out unlimited plan.<sup>44</sup> [REDACTED]

3 [REDACTED]  
4 [REDACTED]  
5 [REDACTED]  
6 [REDACTED]  
7 [REDACTED]  
8 [REDACTED]

9  
10 30. The pricing for Netflix's subscription plans follows a common structure. [REDACTED]

11 [REDACTED]  
12 [REDACTED]  
13 [REDACTED]  
14 [REDACTED]  
15 [REDACTED]  
16 [REDACTED]  
17 [REDACTED]  
18 [REDACTED]  
19 [REDACTED]  
20 [REDACTED]

21  
22 44 Netflix Data 1209.xls.

23 45 Netflix Electronic Data.

24 46 See, *infra*, ¶ 52.

25 47 Charts 1 through 5 are attached to this Report.

26 48 Quantity discounting is a common phenomenon reflecting the fact that the incremental cost of  
27 producing an additional unit of a product decreases as more units are produced because fixed costs can  
28 be spread over more units (referred to as "economies of scale" in the economic literature). Further,  
discounting based on quantity would induce consumers to buy more units (referred to as "diminishing

(Continued...)

1 [redacted]  
2 [redacted] there were  
3 common forces impacting plan pricing.  
4

5 31. [redacted]  
6 [redacted] a change in costs or competitive conditions would therefore have a price impact across  
7 each of the plans. [redacted]  
8 [redacted]  
9 [redacted]  
10 [redacted]  
11 [redacted]  
12 [redacted]<sup>49</sup> Later, in 2007, Netflix lowered the prices of its most  
13 popular plans, the 1-out, 2-out and 3-out unlimited plans, [redacted]  
14 [redacted]

15  
16 32. Information from Netflix's documents and data show that, [redacted]  
17 [redacted]  
18

19 \_\_\_\_\_  
20 (...Continued)

21 marginal utility”). Quantity discounting is a common practice observed in many industries, across a  
22 multitude of products. Examples include the lower price per ounce of a 24-ounce versus 16-ounce  
23 cereal box and the lower price per battery in a 12 versus 8 pack of batteries. In the economic literature,  
24 quantity discounting is an example of second degree price discrimination (Robert S. Pindyck and  
25 Daniel L. Rubinfeld (2001), *Microeconomics: Fifth Edition*, Prentice Hall, Upper Saddle River, NJ  
(hereafter, “Pindyck and Rubinfeld”), pp. 90, 227, 374-5, ).

26 Fixed costs contrast with variable costs, such as postage and content costs, which increase  
27 proportionally with the number of DVDs rented (e.g., the postage for mailing two separate DVDs costs  
28 twice as much as the postage for mailing one DVD, in the absence of bulk mailing discounts).  
[redacted]  
[redacted] (Netflix Dep. Tr., p. 78).

49 Netflix Data 1209.xls



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[REDACTED]

33. [REDACTED]

34. Because of inter-plan switching, Netflix would be reluctant to lower the price of only the 2- and 3-out plan. If outside competition forced Netflix to lower prices for the 3-out plan, a corresponding change would generally have been necessary for the remaining subscription plans. This nature of competition was explicitly recognized by Carl Shapiro, the Deputy Assistant Attorney General for the Department of Justice Antitrust Division.<sup>51</sup> For example, if products A and C compete with each other and products B and C compete with each other, one

---

<sup>50</sup> NETFLIX\_CORPORATE\_00003468 at 3493.

<sup>51</sup> Carl Shapiro, Deputy Assistant Attorney General, Antitrust Division U.S. Department of Justice, Speech before the Fall Forum, Antitrust Section of the ABA, November 12, 2009 (<http://www.justice.gov/atr/public/speeches/251858.htm>).

1 can conclude that products A and B compete because of the common link with product C. A  
2 decrease in the price of product A will cause consumers to move from product C to product A,  
3 forcing prices to be lower on product C. The lower price for product C then forces the prices  
4 for product B to respond. In this manner all three products are linked. This same theory applies  
5 directly to the online DVD rental market where the only significant differentiating factor  
6 between plans is the number of movies that subscribers can have “out” at a time.

7  
8 35. [REDACTED]<sup>52</sup> the decision to change prices by Netflix had a common impact  
9 on all Netflix subscribers, regardless of the plan they purchased. The exact amount of the  
10 impact might vary from plan to plan, but the fact of economic impact would not change. As  
11 described in a later section, any change in the amount of damages sustained by purchasers of  
12 different plans can be accounted for by methods that are common to the Class.

13  
14 **IV. ANTITRUST INJURY WILL BE ESTABLISHED ON A CLASS-WIDE BASIS BY**  
15 **PROOF THAT IS COMMON TO THE CLASS**

16 36. The effect of the elimination of Wal-Mart as a competitor in the online DVD rental market on  
17 the Class can be analyzed using evidence and methods that are common to the Class. These  
18 methods include examining: (i) pricing decisions before and after the negotiation and ultimate  
19 finalization of the alleged Market Allocation Agreement, and (ii) profit margins before and  
20 after the negotiation and finalization of the alleged Market Allocation Agreement. These  
21 analyses show that the reduction in competition caused by the alleged unlawful Market  
22 Allocation Agreement resulted in prices charged by Netflix to its subscribers that were higher  
23 than those that would have existed otherwise, resulting in negative economic impact on the  
24 Class. The existence of impact is confirmed by the academic literature regarding strategic  
25

26  
27 

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<sup>52</sup> See, *supra*, ¶ 26.



1 competition relevant to the online DVD rental market. This evidence of impact is common to  
2 the Class as a whole.

3  
4 **A. Online DVD Rental Service Providers Compete on Price**

5 37. The primary competitors in the online DVD rental market offer the same DVDs sent to the  
6 consumer in the same manner. The DVDs are packaged in a mailing sleeve without any  
7 accompanying advertisements or media with printed information providing a brief description  
8 of the title. Besides the design of the envelope carrying the sleeve, DVDs of the same titles sent  
9 from different online DVD rental providers are exactly the same. [REDACTED]

10 [REDACTED]

11 [REDACTED]<sup>53</sup> Thus, not only were the product offerings by  
12 the competitors in this market the same, online DVD rental services also face similar cost  
13 components. Input costs include the cost of purchasing the DVD libraries, including any  
14 revenue sharing with the studios, the costs of postage for shipping the DVDs to customers and  
15 the cost of running the fulfillment centers.

16  
17 38. The substantially commoditized nature of online DVD rental services is confirmed by the  
18 limited opportunities firms have to differentiate themselves from each other. Online DVD  
19 rental services may try to differentiate themselves on a number of factors such as the number of  
20 distribution centers for faster delivery times and the number of titles available or additional  
21 features available on the website, but these factors may not be significant and in general are  
22 only temporary. [REDACTED]

23 [REDACTED]

24  
25  
26 \_\_\_\_\_  
53 NETFLIX\_CORPORATE\_00006689 at 6699.

27 54 NETFLIX\_CORPORATE\_00006689 at 6740.

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[REDACTED]

[REDACTED]<sup>55</sup>

39. In addition to the similar services provided by online DVD rental firms, customers had the ability to switch from one provider to another and from one plan to another. Customers pre-pay each month for the service, and may terminate or change plans at any time without losing any more than the pre-paid monthly amount. Similarly, customers can re-join the service without incurring additional fees over the cost of the monthly subscription.

40. The transparent pricing, lack of significant differentiation of the product, and the ease of the substitutability of one firm’s product for another are all characteristics of a commodity product where competition is based primarily on price.<sup>56</sup> Although discovery in the case is not complete, there is a body of evidence supporting the conclusion that the online DVD rental market is typical of other commodity products, and, as such, competes primarily on price.

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

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55 NETFLIX CORPORATE\_00006689 at 6699. [REDACTED]  
[REDACTED]  
[REDACTED]

56 Carlton and Perloff, p. 200.

57 NETFLIX\_CORPORATE\_00004859 at 4890.

58 NETFLIX\_CORPORATE\_00003468 at 3492; NETFLIX\_MINTZ\_00007330 at 7351-22.

59 NETFLIX\_CORPORATE\_R\_00003407 at 3411.



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41. [REDACTED]

42. [REDACTED]

43. The evidence showing that competition between online DVD rental service providers has been based primarily on price indicates that an anti-competitive agreement to eliminate a competitor would have an impact on the subscription prices paid by customers of Netflix.

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60 WMHOe-100779-003-00003625 at 3625-7; WMHOe-001421-002-00000260; NETFLIX\_CORPORATE\_00003737 at 3771-4.

61 WMHOe-100779-003-00003625 at 3626-7.

1 **B. Pricing Decisions Before and After the Negotiation of the Alleged Market Allocation**  
2 **Agreement Present Common Evidence of Antitrust Injury**

3 44. Below, I discuss the price changes for the 3-out plan that occurred before, during and after the  
4 period of three-firm competition by Netflix, Blockbuster and Wal-Mart. The 3-out subscription  
5 plan is Netflix's most popular plan, but, as discussed above, price changes had an impact across  
6 all plans.

7  
8 45. During the period from January 2002 through May 2004, Netflix never altered its price. On  
9 April 16, 2004, Netflix announced that it would increase its 3-out price from \$19.95 to \$21.99  
10 beginning on June 15, 2004.<sup>62</sup> Netflix continued to charge this price for the next several months  
11 (see Text Table 1).

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**TEXT TABLE 1  
REDACTED**

46. Wal-Mart entered the online DVD rental market in June 2003 and charged \$18.76 for its 3-out plan. In August 2004, Blockbuster entered the online DVD rental market with a plan allowing subscribers to have three DVDs out at one time, as well as two free in-store rentals. It charged \$19.99 for this plan. On October 14, 2004, Netflix announced its decision to lower prices on its 3-out plan to \$17.99 beginning on November 1, 2004, well below the \$21.99 price it was

1 previously charging for this plan.<sup>63</sup> Following Netflix's announcement, Blockbuster announced  
2 a reduction in its price to \$17.49 on October 15, 2004. Wal-Mart then intensified the  
3 competitive pressure and reduced its price for its 3-out plan to \$17.36 per month on November  
4 2, 2004.

5  
6 47. In December 2004, Blockbuster again reduced its price for the 3-out plan, this time to \$14.99,  
7 stating that the price reduction was made because its "largest competitor made a significant  
8 price reduction."<sup>64</sup> [REDACTED]

9 [REDACTED]  
10 [REDACTED]  
11 [REDACTED]  
12 [REDACTED]  
13 [REDACTED]

14  
15 48. It was during this time frame in October 2004 and this period of intensified competition that the  
16 CEO of Netflix sought a meeting with the CEO of Wal-Mart.com. After the meetings between  
17 Netflix and Wal-Mart began in October 2004, Netflix did not further decrease its prices in  
18 response to competition. Negotiations between the two companies intensified in late February  
19 and early March 2005, after which neither Netflix nor Wal-Mart changed their prices further.

20  
21 \_\_\_\_\_  
22 63 According to Netflix, it lowered its price in order to "focus on defending its market leadership  
23 position in the online movie rental subscription business in the United States, in anticipation of  
24 increased competition from new market entrants" (Netflix's Form 10-Q Quarterly Report filed  
25 November 9, 2004, p. 14.).

26 64 Q2 2005 Blockbuster Earnings conference call, August 9, 2005.

27 65 NETFLIX\_CORPORATE\_00006689 at 6698, NETFLIX\_CORPORATE\_00003029 at 3084.

28 66 [REDACTED]

67 NETFLIX\_CORPORATE\_00003029 at 3101.



1 As discussed earlier, a [REDACTED] was reached by March 17, 2005 by which Wal-Mart  
2 agreed to exit the business and this was officially announced in May of 2005.<sup>68</sup> Market analysts  
3 who studied the online DVD rental market during the period after Wal-Mart's announcement  
4 concluded that the exit of Wal-Mart would mark a diminution in competition in this market:  
5 "the competitive environment may improve faster than earlier expected..."<sup>69</sup> [REDACTED]

6 [REDACTED]  
7 [REDACTED]

8  
9 49. The pricing behavior that followed the negotiation and ultimate finalization of the alleged  
10 Market Allocation Agreement differed from the pricing behavior that preceded it. When Wal-  
11 Mart was effectively removed as a competitive force from the marketplace, pricing in the  
12 online DVD rental market fundamentally changed. Following the onset of these negotiations,  
13 [REDACTED]  
14 [REDACTED] After Wal-Mart's exit, Blockbuster raised its  
15 prices to match those of Netflix. The world before the alleged Market Allocation Agreement  
16 with three competitors was characterized by active price movements as the three firms  
17 competed against one another. Price competition was reduced in the two-firm market that  
18 followed the negotiation and finalization of the alleged Market Allocation Agreement.

19  
20 50. This outcome and its impact upon prices are consistent with economic literature and principles  
21 that apply to this market. Economic literature confirms that in markets that compete on price  
22 (named Bertrand competition after the economist who first formally characterized this type of  
23

24 \_\_\_\_\_  
25 68 NETFLIX\_BECKER\_00229140 at 9140-1.

26 69 See, e.g., Nat Worden, "More Tailwinds for Netflix," TheStreet.com, June 27, 2005.

27 70 NETFLIX\_CORPORATE\_R\_00003573 at 3700.

28 71 Netflix Data 1209.xls

1 market), there is the potential for differences between two-, three-, and four-firm markets.  
2 Compared to three-firm markets, those with only two participants tend to reach stable prices at  
3 higher levels because the removal of the third firm allows for tacit (as opposed to overt)  
4 collusion to be reached more quickly.<sup>72</sup> The Federal Trade Commission and Department of  
5 Justice merger guidelines expressly recognize that the presence of a maverick firm, even if it  
6 holds a small share, can effectively prevent coordinated pricing (whether tacit or explicit).<sup>73</sup>  
7 Wal-Mart, with deep resources and commitment (prior to the alleged Market Allocation  
8 Agreement) to being the low cost leader is the type of price maverick referenced by the merger  
9 guidelines.

10  
11 51. Comparing price behavior before and after the negotiation and finalization of the alleged  
12 Market Allocation Agreement presents evidence that Netflix's pricing decisions, and the  
13 marketplace conditions that influenced them, were affected by the alleged Market Allocation  
14 Agreement. This, when combined with the other evidence described below, leads to the  
15 conclusion that removing Wal-Mart as a competitor in the online DVD rental market resulted in  
16 prices to Netflix subscribers that were higher than would have resulted in a "but for"  
17 competitive environment in which both Wal-Mart and Blockbuster, rather than only  
18 Blockbuster, were competitors to Netflix. This economic evidence of impact and antitrust  
19 injury is common to the Class.

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21 

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72 See, *infra*, note 84.

22 73 The Guidelines provide that "[i]n some circumstances, coordinated interaction can be effectively  
23 prevented or limited by maverick firms -- firms that have a greater economic incentive to deviate from  
24 the terms of coordination than do most of their rivals (e.g., firms that are unusually disruptive and  
25 competitive influences in the market). Consequently, acquisition of a maverick firm is one way in  
26 which a merger may make coordinated interaction more likely, more successful, or more complete. For  
27 example, in a market where capacity constraints are significant for many competitors, a firm is more  
likely to be a maverick the greater is its excess or divertible capacity in relation to its sales or its total  
capacity, and the lower are its direct and opportunity costs of expanding sales in the relevant market."  
*Horizontal Merger Guidelines*, U.S. Department of Justice and Federal Trade Commission, April 8,  
1997, § 2.12.



1 **C. Gross Profit Margins Before and After Negotiation of the Alleged Market**  
2 **Allocation Agreement Present Common Evidence of Antitrust Injury**

3 52. [REDACTED]  
4 [REDACTED]  
5 [REDACTED]  
6 [REDACTED]  
7 [REDACTED]  
8 [REDACTED]  
9 [REDACTED]  
10 [REDACTED]  
11 [REDACTED]  
12 [REDACTED]  
13 [REDACTED]  
14 [REDACTED]  
15 [REDACTED]  
16 [REDACTED]  
17 [REDACTED]  
18 [REDACTED]

19  
20 53 [REDACTED]  
21 [REDACTED]  
22 [REDACTED]

24  
25 <sup>74</sup> See, e.g., NETFLIX\_CORPORATE\_00004210 at 4228.  
26 <sup>75</sup> NETFLIX\_CORPORATE\_00003468 at 3480-3; NETFLIX\_CORPORATE\_00005533 at 5600.

27 <sup>76</sup> [REDACTED] (Netflix Dep. Tr., p. 117).  
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[REDACTED]

54. An accepted approach to measuring economic and antitrust impact arising from an event in the market is to compare gross profit margins of major competitors before that event with gross profit margins after that event, controlling for other events and phenomena that may be responsible for any change in gross profit margins. Gross profit divided by revenue yields the gross profit margin. [REDACTED]

[REDACTED]

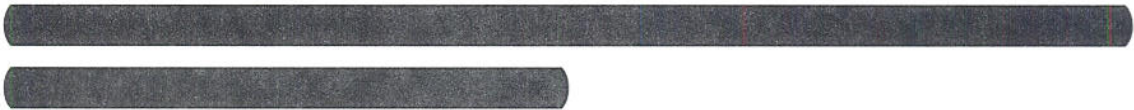
55. [REDACTED]

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<sup>77</sup> Netflix 2006 Annual Report, p. 27. *See also* Netflix Dep. Tr., p. 114.



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56. The change in Netflix’s gross profit margins before and after the alleged Market Allocation agreement constitutes evidence of the anticompetitive impact of the alleged Market Allocation Agreement. Likewise, it shows that prices for Netflix subscribers following the alleged Market Allocation Agreement were higher than they would have been but for the Agreement. Absent the alleged Market Allocation Agreement, it is reasonable to conclude that gross profit margins, and the corresponding prices, would have been lower and that subscribers would have paid a lower price. This is further evidence of economic impact and injury that is common to the Class and indicates injury to the entire Class.

**D. Market Structure and Strategic Competition**

57. The economic field of industrial organization examines the structure of markets and the behavior and interactions of firms within an industry. On the two extremes are industries which can be described as perfectly competitive, where many firms produce the same product, firms earn zero profits and prices are competed down to the cost of production; and monopolistic, where one firm serves the entire market, earns a monopoly profit and charges supra-competitive prices. Market conditions, such as the level of concentration, barriers facing potential entrants, and the nature of demand for, and supply of, the products or services, provide insights about the competitive process in the market and determine whether an industry is closer to one extreme or the other.<sup>78</sup> Industrial organization models hold meaningful insights into the incentives faced by firms and produce useful predictions about conduct and subsequent performance.

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<sup>78</sup> Carlton and Perloff, pp. 1-10.

1 58. A market composed of a small number of firms who collectively make up a large share of the  
2 market is commonly referred to as an oligopoly by economists. A key aspect of an oligopoly is  
3 the interdependence of firms' decisions (coordinated or not). In the presence of barriers to entry,  
4 oligopolies can set their price or output by considering the actions of their rivals to determine the  
5 best course of action.<sup>79</sup>  
6

7 59. Two principal oligopoly models, named after the mathematician or economist who first  
8 described them, are the Cournot and Bertrand models.<sup>80</sup> The Cournot model assumes that firms  
9 pre-select levels of output that are difficult to change in the short-run. After selecting their level  
10 of production, output is fixed for the next period and prices adjust to clear the market, a  
11 framework that is not applicable in the online DVD rental market.<sup>81</sup>  
12

13 60. Markets with largely homogeneous products and few capacity constraints, such as the online  
14 DVD rental market, are best characterized by Bertrand competition. As discussed earlier in the  
15 report, there is little differentiation between the products offered in the online DVD rental  
16 market. [REDACTED]

17 [REDACTED]<sup>2</sup> Additionally, the firms do not need to preset production  
18 levels as they are not capacity constrained within relevant ranges in the short run. The online  
19 DVD market can readily accommodate additional customers with little or no lead time. [REDACTED]

20 [REDACTED]  
21 [REDACTED]<sup>3</sup> A key conclusion of Bertrand competition is that, absent a monopoly, the equilibrium  
22

23 79 William J. Baumol and Alan S. Blinder (2003), *Economics, Principles and Policy: Ninth Edition*,  
24 Thomson South-Western, p. 215.

25 80 Carlton and Perloff, pp. 160-174.

26 81 *Id.*, p. 161.

27 82 NETFLIX\_CORPORATE\_00006689 at 6699.

28 83 Netflix Electronic Data.



1 price is equal to the marginal cost of the product.<sup>84</sup> The reason for this is that, with  
 2 homogeneous products and no capacity constraints, all customers will purchase from the firm  
 3 with the lowest price. This forces firms to compete on price and drives them down to the  
 4 perfectly competitive outcome where price equals marginal cost.

5  
 6 61. In practice, however, the Bertrand model prediction of price equal to marginal cost does not  
 7 always hold. There are several explanations to describe the ‘Bertrand Paradox’; differentiated  
 8 products, capacity constraints, multi-period competition and tacit (or explicit) coordination. In  
 9 the present case tacit collusion is of particular importance. It has been shown in repeated  
 10 experimental papers that the Bertrand outcome occurs (or nearly occurs) in markets with three  
 11 and four competitors, but when there are only two industry participants, Bertrand competition is  
 12 susceptible to collusive outcomes.<sup>85</sup>

13  
 14 62. Based on my initial analysis, the online DVD rental market is best characterized as a form of  
 15 Bertrand competition, but appears susceptible to tacit collusion when there are only two firms.  
 16 Consistent with the published literature, the Bertrand result of intense price competition does not  
 17

---

18 84 Marginal cost is the incremental cost associated with producing one additional unit of product  
 19 (Pindyck and Rubinfeld, p. 80).

20 85 Abbink and Brandts find that, in experimental designs, two-firm markets, unlike those with three  
 21 and four firms, the collusive price was the most common outcome. Prices were higher in two firm  
 22 experiments largely due to collusion (Klaus Abbink and Jordi Brandts (2008), “Pricing in Bertrand  
 23 competition with increasing marginal costs,” *Games and Economic Behavior*, 63, pp. 1-31).

24 Dufwenberg and Gneezy find in experimental design that “the viability of the Bertrand outcome  
 25 depends crucially on the number of firms being matched.” Three and four firm models price converges  
 26 to cost while two firm markets display more cooperative behavior (Martin Dufwenberg and Uri  
 27 Gneezy (2000), “Price Competition and Market Concentration: An Experimental Study,” *International  
 28 Journal of Industrial Organization*, 18, pp. 7-22).

Huck *et al.* find in experimental design that one third of cases, with two firms, prices reached the  
 collusive outcome, but with three or four, no sessions resulted in the collusive price (Steffen Huck,  
 Hans-Theo Normann and Jorg Oechssler (2004), “Two are few and four are many: number effects in  
 experimental oligopolies,” *Journal of Economic Behavior & Organization*, 53, pp. 435-446).

1 appear to hold when there are only two firms. In contrast, during the brief period from August  
 2 2004 to October 2004, where there were three national players, the market was competitive. As  
 3 discussed above, Netflix, Wal-Mart, and Blockbuster engaged in a series of price cuts that  
 4 industry commentators and Netflix described as a "[REDACTED]"<sup>86</sup> This behavior is consistent  
 5 with price discounting that one would expect to see under Bertrand competition. If uninterrupted  
 6 and allowed to run its course, the competition would have inevitably driven prices down to the  
 7 cost of supplying the market.

8  
 9 63. There is evidence that Netflix itself recognized such a possibility. [REDACTED]

10 [REDACTED]  
 11 [REDACTED]<sup>87</sup> Netflix's CEO, Reed Hastings, stated to  
 12 investment analysts in 2005 that "...If there are only two major players, Blockbuster and  
 13 Netflix, the profitability may be substantial like other two-firm entertainment markets. If, on  
 14 the other hand, Amazon, Wal-Mart, Blockbuster and Netflix are all major competitors in online  
 15 rental, then profits are likely to be small."<sup>88</sup> The fact that a high ranking officer of Netflix  
 16 recognized the impact of a two-firm market rather than a three or more firm market confirms  
 17 that the impact of reducing the market to two competitors did in fact have a significant impact  
 18 on profits and price.

19  
 20  
 21  
 22 \_\_\_\_\_  
 23 86 NETFLIX\_CORPORATE\_00006689 at 6755, "Wal-Mart, Netflix agree on DVD deal,"  
 ZDNet.com, May 19, 2005.

24 87 *See, supra*, notes 56 and 58.

25 88 Complaint, ¶ 52. Amazon.com, Inc. ("Amazon") is a large online retailer with a presence in online  
 26 markets and resources for competition in online markets. In 2004, Amazon began renting DVDs online  
 27 in the United Kingdom and contemplated entry into the U.S. online DVD rental market. However,  
 Amazon never entered the U.S. online DVD rental market (Mike Masnick, "Amazon Quietly Dumps  
 DVD Rental Business; Guess Netflix Isn't So Easy to Beat," Techdirt.com, February 5, 2008).



1 64. The elimination of Wal-Mart from the market thus changed the structure of the market from a  
2 three firm market to a two firm market, reducing the pressure to lower prices. Well-accepted  
3 economic models of market competition in oligopolies, such as the online DVD rental market,  
4 confirm that this change in market structure and reduction in competitive dynamic produces  
5 lowered competition and therefore higher prices than would have existed in a “but for” market.  
6 This impacts all members of the Class in a common, rather than individualized, manner.

7  
8 **V. DAMAGES WILL BE ESTIMATED USING**  
9 **ECONOMIC MODELS THAT APPLY TO THE ENTIRE CLASS**

10 65. There are two components to antitrust damages. One component is the extent to which actual  
11 prices per unit with the alleged anticompetitive conduct are higher than the prices estimated to  
12 have prevailed absent the anticompetitive conduct (called but-for prices). This difference can be  
13 expressed in absolute terms (dollars/units) or percentage terms. This component is often called  
14 the overcharge.

15  
16 66. The second component of damages is the quantum of purchases by the proposed Class, either in  
17 units or dollars. [REDACTED]

18 The quantum of purchases may vary among Class members (for example, one subscriber  
19 purchases for four months while another subscriber purchased for 21 months).

20  
21 67. Multiplying the estimated overcharge percentage by the dollar value of purchases yields the  
22 damage estimate for the entire Class. The remaining paragraphs of this Report are focused on  
23 feasible methodologies for estimating the overcharge. It is my understanding that the actual  
24 estimation of the overcharge will occur in the subsequent (merits) phase of this matter.

25  
26 68. Comparison of actual and but-for prices during the alleged anticompetitive period provides the  
27 overcharges incurred by consumers during this period. Based on my analysis thus far of the  
28

1 online DVD rental market, I have identified two approaches that are common to the Class for  
 2 determining the damages on a Class-wide basis. These are: (i) the price-cost margin approach  
 3 and (ii) a competitive price benchmark utilizing Netflix, Wal-Mart and Blockbuster price data.  
 4 Purchases made by Class members during the Class period can be identified through the  
 5 electronic transactions data provided by Netflix. Multiplying these purchases by the overcharge  
 6 percentage (the difference between the actual and but-for price) would yield a Class-wide  
 7 estimate of the total damages attributable to Defendants' alleged Market Allocation Agreement.  
 8

9 **A. The Price-Cost Margin Approach Can Be Used to Determine Damages on a Class-**  
 10 **wide Basis**

11 69. The price-cost margin of a firm, defined as the price less marginal cost<sup>89</sup> divided by the price,  
 12 has been used in the economic literature to examine market power.<sup>90</sup> The price-cost margin can  
 13 be used to examine whether anticompetitive behavior is associated with an increase in the price  
 14 a firm charges relative to its costs.<sup>91</sup> Comparing price-cost margins in the period during which  
 15 three firms competed and after the alleged Market Allocation Agreement would yield a  
 16 percentage overcharge that can be used to determine Class-wide damages suffered by the Class  
 17 as a result of the alleged Market Allocation Agreement.<sup>92</sup>  
 18  
 19  
 20

---

21 89 Marginal cost is the incremental cost associated with producing one additional unit of product. This  
 22 can be estimated by using variable costs, as reported in accounting data ("Econometrics: Legal  
 Practical, and Technical Issues," *ABA Section of Antitrust Law*, 2005, pp. 331-5).

23 90 W. Kip Viscusi, Joseph E. Harrington, and John M. Vernon (2005), *Economics of Regulation and*  
 24 *Antitrust, Fourth Edition*, The MIT Press, Cambridge, Massachusetts, pp. 215-6.

25 91 "Econometrics: Legal Practical, and Technical Issues," *ABA Section of Antitrust Law*, 2005, pp.  
 212-3.

26 92 [REDACTED]



1 70. [REDACTED]  
 2 [REDACTED]  
 3 [REDACTED]  
 4 [REDACTED]  
 5 [REDACTED]  
 6 [REDACTED]<sup>93</sup> Price-cost margin offers an economically sound and  
 7 feasible methodology for estimating overcharges.  
 8

9 71. The difference in the price-cost margin before and after the alleged Market Allocation  
 10 Agreement reflects the fact that while costs continued to decrease after the alleged Market  
 11 Allocation Agreement, revenues (prices) did not. [REDACTED]  
 12 [REDACTED] While further work will be required to account for  
 13 other factors that may affect the changing price-cost margins, sufficient information is available  
 14 for me to conclude that the price-cost margin method is a feasible method for determining  
 15 damages in this case.  
 16

17 72. The price-cost margin trend that prevailed before the start of the negotiations of the alleged  
 18 Market Allocation Agreement can be used as a benchmark to compute an overcharge percentage  
 19 based on the costs that Netflix incurred each month after the alleged Agreement. This  
 20 overcharge percentage applied to the total revenues after the implementation of the alleged  
 21 Market Allocation Agreement would yield Class-wide damage estimates.  
 22

---

23 <sup>93</sup> Costs of revenues include revenue sharing related to content, postage and packaging and fulfillment  
 24 costs (see ¶ 52).

25 [REDACTED]  
 26 [REDACTED]  
 27 [REDACTED]  
 28

**B. The But-For Price Benchmark Approach Can Also Be Used to Estimate the Overcharge on a Class-wide Basis**

73. As shown in the preceding sections of this Report, the presence of both Wal-Mart and Blockbuster in the online DVD rental market resulted in price competition with Netflix. In particular, by December 2004, Blockbuster had reduced its price for the 3-out plan to \$14.99 and competitive pressure existed for Netflix to respond. [REDACTED]

[REDACTED] In January 2005, Wal-Mart decreased the price for the 2-out plan although it did not decrease the price for its 3-out plan. Thereafter, Wal-Mart did not decrease prices further. Thus, as in the prior months, Netflix's two primary competitors, both of whom were formidable companies, had moved to lower prices for competitive plans. This left Netflix in the position of being the highest priced service provider.

74. [REDACTED]  
[REDACTED]  
[REDACTED] This would have been a competitive response in line with its previous price reduction that occurred with intensified competition from Wal-Mart and Blockbuster. However, at this time, Netflix instead had initiated discussions with Wal-Mart concerning an [REDACTED] which allegedly led to Wal-Mart's agreement to exit the online DVD rental market.<sup>96</sup> The Plaintiffs maintain that these discussions affected the price decisions by Netflix, [REDACTED]

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[REDACTED] (Netflix Dep.

Tr., pp. 156, 188-93. See also note 40, *supra*, NETFLIX\_CORPORATE\_00006689 at 6698; NETFLIX\_CORPORATE\_00003737 at 3774-5).

<sup>96</sup> NETFLIX\_HASTINGS\_00000120 at 122.



1 75. This suggests that a potential but-for price benchmark would be the [REDACTED]  
 2 [REDACTED] allegedly as a result  
 3 of its discussions and agreement with Wal-Mart by which Wal-Mart would exit the online DVD  
 4 rental market. Further investigation may reveal either that this but-for benchmark should be  
 5 modified or that a different but-for price benchmark is supported by the evidence, but in either  
 6 case, the evidence that would establish a but-for price benchmark would be common to the  
 7 Class. The [REDACTED] if a benchmark, would apply to all customers on the  
 8 3-out plan since Netflix charges the same prices to customers on the same plan. For reasons  
 9 discussed above, price changes would also affect and apply to all plans.<sup>97</sup> A formula based upon  
 10 the cost and price differences normally maintained between the plans could be developed that  
 11 would determine damages for the entire Class.

12  
 13 76. The but-for benchmark price may well have been lower than [REDACTED] As described  
 14 above, under Bertrand competition with homogeneous products and no tacit collusion, the  
 15 equilibrium price is equal to marginal cost.<sup>98</sup> [REDACTED]

16 [REDACTED]  
 17 [REDACTED]<sup>99</sup> While it is premature at this time, given the limited discovery, to determine  
 18

19 <sup>97</sup> See, *supra*, ¶¶ 25-35.

20 <sup>98</sup> See, *supra*, ¶¶ 57-64.

21 <sup>99</sup> NETFLIX\_CORPORATE\_00003737 at 3772. In the 2004 to 2005 time period the Wal-Mart and  
 22 Blockbuster online DVD rental offerings were not yet perfect substitutes for Netflix. While they all  
 23 offered the same movies, from the same studios, and had comparable-sized libraries, Netflix had a  
 24 head start in building the distribution network and obtaining scale economies. This gave Netflix a more  
 25 rapid “turn” rate (the amount of time between a customer dropping a return movie in the mailbox and  
 26 receiving the next movie in his or her queue). Models of Bertrand competition that take into account  
 27 quality differences between the product offerings of the competitors are consistent with a price above  
 28 marginal cost (See, e.g., Jean Tirole (1988), *Theory of Industrial Organization*, MIT Press, Cambridge,  
 MA, pp. 296-298).

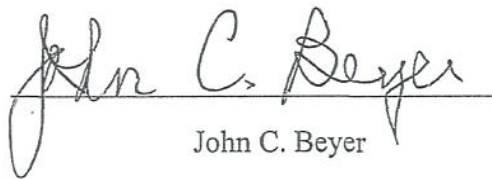
Over time, as Blockbuster and Wal-Mart lowered their costs, the Netflix (and market) price would  
 move down. Eventually, all three would have nearly identical offerings and cost structures. At this  
 point the price would reflect the standard Bertrand, perfectly competitive outcome. Therefore, a but-for

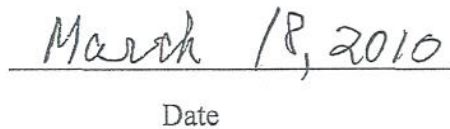
(Continued...)

1 exactly what a continuing but-for price benchmark would be, the evidence that does exist  
2 confirms that the evidence of such a benchmark would be common to the Class and that a  
3 formula could readily be devised to determine damages using a methodology common to the  
4 entire Class.

5  
6 **VI. CONCLUSION**

7  
8 77. Based upon all of the foregoing, it is my opinion that proof of economic impact or injury  
9 common to the Class exists and can be used to establish that the alleged Market Allocation  
10 Agreement between Defendants Netflix and Wal-Mart produced economic injury to all or nearly  
11 Class members. Further, it is my opinion that there exist feasible and manageable methods to  
12 determine damages suffered by the Class in a reasonably reliable manner.

13  
14  
15  
16  
17   
18 \_\_\_\_\_  
19 John C. Beyer

20  
21   
22 \_\_\_\_\_  
23 Date

24  
25 \_\_\_\_\_  
26 (...Continued)

27 benchmark of [REDACTED] that remains constant throughout the class period rather than decline over time  
28 towards the Bertrand equilibrium would result in a conservative estimate of damages.



**CHART 1  
REDACTED**

**CHART 2  
REDACTED**



**CHART 3  
REDACTED**

**CHART 4  
REDACTED**

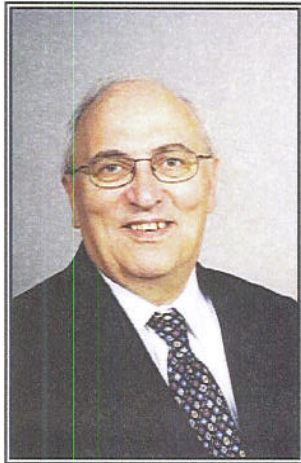


**CHART 5  
REDACTED**

# Appendix A



# JOHN C. BEYER



## **CURRENT POSITIONS**

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Chief Executive Officer, Nathan Associates Inc.  
Chairman, Board of Directors, Nathan Associates Inc.  
Adjunct Professor, The American University, Washington, D.C.

## **EDUCATION**

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Ph.D., Fletcher School, 1966  
M.A.L.D., Law and Diplomacy, Fletcher School, 1964  
M.A., International and Development Economics, Fletcher School, 1963  
B.A., Philosophy and History, University of the Pacific, 1962

## **COUNTRIES OF WORK EXPERIENCE:**

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Bolivia, Colombia, El Salvador, Egypt, Guatemala, Guyana, Honduras, India, Indonesia, Jordan, Kuwait, Malaysia, Nepal, Nicaragua, Nigeria, Peru, Poland, Puerto Rico, South Africa, Suriname, Thailand, United States, Venezuela, Western Samoa

## **EXPERIENCE SUMMARY:**

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Dr. Beyer is an economist with over 40 years of experience in economic policy research and analysis in developing countries and applied microeconomics analysis in the United States. For the period 1978-2008, he served as president of Nathan Associates and recently became Chairman. His economic policy analysis has focused on the impacts of structural adjustment, foreign exchange and trade liberalization, and changes in domestic pricing, taxes, and related regulations. He has carried out assignments for key government agencies in several Asian countries, including Indonesia, India and Nepal.

Dr. Beyer has conducted microeconomic analysis, particularly in relation to competition (antitrust), the impact of tax changes on firms, and the effects of deregulation on industries (air transport, communications, and natural gas). He has designed and implemented short-term training programs and seminars in economic analysis and is an adjunct professor at The American University.

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**EMPLOYMENT RECORD:**

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*Chief Executive Officer*, Nathan Associates Inc., Arlington, Virginia, September 2008-present

*President*, Nathan Associates Inc., Arlington, Virginia, June 1978-September 2008

United States 2008-present	Expert witness on behalf of a class of purchasers of Roundup herbicide. In the United States District Court for the Western District of Texas, Case No. SA07CA0673OLG.
United States 2008	Expert witness on behalf of a class of managers of pension funds, 401(K) plans, and related investment vehicles who purchased annuities from Nationwide. In the United States District Court, District of Connecticut, Case No. 01-CV-1552.
India 2008-present	Economic consultant to various private corporations in India.
Egypt 2007-2008	Technical assistance to the Egyptian Competition Authority, for the U.S. Agency for International Development.
United States 2007-present	Expert witness on behalf of a class of purchasers of ready mix concrete in the Central Indiana area. United States District Court, Southern District of Indiana, Case No. 1:05-cv-00979-SEB-JMS.
United States 2007-present	Expert witness on behalf of plaintiff T3 Technologies, a mainframe company. United States District Court for the Southern District of New York, Case No. 06-13565-LAK.
United States 2007-present	Expert witness on behalf of southeast dairy farmers. United States District Court for the Eastern District of Tennessee, Greeneville Division. Case No. 8-1000.
United States 2007-present	Expert witness on behalf of class of marine hose purchasers. United States District Court for the Southern District of Florida, Miami Division. Case No. 08-1888.
United States 2007-2008	Expert witness on behalf of plaintiff in Aspartame Antitrust Litigation. United States District Court for the Eastern District of Pennsylvania, Master Docket No. 06-1732-LLD.
Canada 2007-present	Expert witness on behalf of class of Canadian purchasers of hydrogen peroxide. Ontario Superior Court of Justice, Court File No.: 47025/05.
United States 2007-2008	Expert witness on behalf of plaintiff of MMA. In the U.S. District Court for the Eastern District of Pennsylvania, Civil Action No. 06-MD-1768.
United States 2007-2008	Expert witness on behalf of plaintiff of Morris & Dickson. In the U.S. District Court Western Division of Louisiana, Shreveport Louisiana, Civil Action No. CV05-2147S.

## John C. Beyer · 3

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United States 2006-2008	Retained by plaintiffs to provide economic expert witness testimony regarding certification of class in the alleged price-fixing conspiracy in the Oriented Strand Board (OSB) market. In the United States District Court for the Eastern District of Pennsylvania, Master File No. 06-CV-00826(PSD).
United States 2006-2008	Expert witness on behalf of plaintiff of pulse oximetry. In the U.S. District Court of Central District of California, Western Division, Master File No. CV-05-6419.
United States 2005-2008	Expert witness on behalf of a class of purchasers of hydrogen peroxide. In the United States District Court for the Eastern District of Pennsylvania, MDL No. 1682 (Case No. 05-CV-666).
United States 2005-2008	Expert witness on behalf of a class of purchasers of foundry resins. In the United States District Court for the Southern District of Ohio, Eastern Division, MDL No. 1638; master docket no. 2:04-CV-415).
United States 2007-present	Expert witness on behalf of a class of purchasers of EPDM. In the United States District Court for the District of Connecticut, Case No. 3:03 MD 1542 (PCD).
United States 2005-2008	Expert witness on behalf of a class of purchasers of <i>Thermus aquaticus</i> DNA polymerase ( <i>Taq</i> ). In the United States District Court for the District of Columbia, Civil No. 04-1649 (HHK) (D.D.C.).
United States 2005-present	Expert witness on behalf of a class of purchasers of plastics additives. In the U.S. District Court for the Eastern District of Pennsylvania, Master Docket No. 2:03-CV-2038 and MDL Docket No. 1684.
United States 2005-present	Expert witness on behalf of a class of purchasers of publication paper. In the U.S. District Court for the District of Connecticut, Docket No. 3:04 md 1631.
United States 2005-2007	Expert witness on behalf of a class of purchasers of light cigarettes. United States District Court for the Eastern District of New York, Civil Action No. CV 04-1945.
United States 2004-2006	Manager, Creating Economic Growth Opportunities in Peru (CRECER), a multi-year technical assistance project to the Government of Peru. For the U.S. Agency for International Development.
United States 2004-2007	Expert witness on behalf of a class of purchasers of bulk (extruded) graphite products. In the U.S. District Court for the District of New Jersey, Master File No. 02-CV-06030 (WHW).
United States 2004-2007	Expert witness on behalf of a class of purchasers of carbon black. In the U.S. District Court, District of Massachusetts, Civil Action No. 03-10191-DPW, MDL Docket No. 1543.



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United States 2004-2008	Expert witness on behalf of a class of purchasers of cable services in Philadelphia and Chicago. In the United States District Court for the Eastern District of Pennsylvania, No. 03-6604.
United States 2003-2008	Expert witness on behalf of a class of purchasers of pressure sensitive labelstock. In the U.S. District Court for the Middle District of Pennsylvania, MDL Docket No. 1556 (No. 3:03-MDL-1556).
United States 2002-2008	Expert witness on behalf of the direct purchasers of Polyester Staple Fiber. In the U.S. District Court for the Western District of North Carolina, Charlotte Division, MDL Docket No: 3:03CV1516.
United States 2001-2004	Expert witness on behalf of some purchasers of microcrystalline cellulose (MCC). In the U.S. District Court, Eastern District of Pennsylvania, MDL No. 1402.
United States 2001-2007	Expert witness on behalf of purchasers of Mercedes Benz automobiles in the New York metropolitan region. In the U.S. District Court for the District of New Jersey, Master File No. 99-4311 (AMW).
United States 2001-2006	Expert witness on behalf of purchasers of high pressure laminates (HPL). In the United States District Court for the Southern District of New York, Master File No. 00-MD-1368 (CLB).
United States 2002-2004	Expert witness on behalf of Vlastic Food International concerning an alleged fraudulent conveyance by Campbell Soup Company. In the U.S. District Court for the District of Delaware, Case No. 02137 KAJ.
United States 2002-2004	Expert witness on behalf of a class of purchasers of long distance telephone services in an antitrust matter against the providers of these services. In the United States District Court for the Northern District of Illinois, Case No. C3844.
United States 2002-2004	Expert witness on behalf of 15 independent pay telephone providers in Texas concerning an alleged monopolization by Southwestern Bell Company. In the 18 <sup>th</sup> Judicial District Court of Johnson County, Texas, No. C-2001-00072.
United States 2002-2003	Expert witness on behalf of producers of non-GMO corn and soybeans. (U.S. District Court, Eastern District of Missouri, Civil No. 4:01cv00070 RWS).
United States 2002-2003	Expert witness on behalf of land owners concerning right of way along fiber optic networks (In the U.S. District Court for the Northern District of Illinois, Case No. C3844).
Jordan 2000-2004	Manager, Jordan Poverty Alleviation Project. Direct a multi-year technical assistance project to the ministries of Social Development and Labor to identify policies and programs to reduce the incidence of poverty in Jordan. For the U.S. Agency for International Development.

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United States 2003	Expert witness on behalf of a class of models in an antitrust action. In the U.S. District Court Southern District of New York, Case No. 02CV6146.
United States 2000-2004	Expert witness on behalf of growers and quota holders of leaf tobacco (In the U.S. District Court for the Middle District of North Carolina, Greensboro Division, Case No. 00-CV-1235).
United States 2000-2003	Expert witness on behalf of purchasers of MSG (In the United States District Court, District of Minnesota, MDL Docket No. 00-1328).
United States 2000-2001	Expert witness on behalf of plaintiff in a health care services antitrust matter (In the United States District Court for the Eastern District of Pennsylvania, Civil Action No. 96-2861).
United States 1999-2003	Expert witness on behalf of purchasers of corrugated containers (In the United States District Court for the Eastern District of Pennsylvania, MDL No. 1261)
South Africa 1999-2005	Manager, South Africa Economic Growth Activities (SEGA). Direct a multi-year technical assistance project to various departments of the government of South Africa. For the U.S. Agency for International Development.
United States 1999-2001	Expert witness on behalf of plaintiffs Women's Health Associates, P.C., a corporation of OB/GYNs. Analysis of health care markets, determination of market power and whether an exclusive contract arrangement between a hospital and providers adversely affected competition (U.S. District Court, District of Connecticut, Civil No. 3:98CV2495 (AWT)).
United States 1999-2006	Expert witness on behalf of purchasers of airline transport services. Analyzed economic issues related to an alleged conspiracy surrounding restrictive ticketing policies (United States District Court for the Eastern District of Michigan Case No. 96-74711 (E.D. Mich)).
United States 2000-2002	Expert witness on behalf of purchasers of automobiles. Analyzed the economic issues related to alleged conspiracy to raise prices via an inventory tax (United States District Court for the Eastern District of Texas, Texarkana Division, Civil Action No. 5.97 CV 273).
United States 1999-2001	Expert witness on behalf of Microbix Biosystems, Inc. Analyzed economic issues related to an exclusive supply agreement (United States District Court for the District of Maryland, Case No. MJG-97-2525).
United States 1999-2000	Expert witness on behalf of Rite Aid Corporation. Analyzed economic issues related to breach of contract to supply goods (Court of Common Pleas of Chester County, Pennsylvania, Case No. 98-04896).



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United States 2000	Expert witness on behalf of Advertising Facility owners. Analyzed the economic issues related to changes in local zoning ordinances (District Court, Harris County, Texas, 281 <sup>st</sup> Judicial District, Case No. 87-000827-A).
United States 1998-2005	Expert witness on behalf of purchasers of flat glass. Analyzed economic issues related to certification of the class (U.S. District Court for the Western District of Pennsylvania, MDL No. 1200, Master File No. 97-550).
United States 1994-1998	Expert witness on behalf of Litton Systems, Inc. Analyzed harm to competition and injury to Litton and estimated damages stemming from anticompetitive behavior by Honeywell Inc. in the market for RLG inertial navigation systems for commercial jet aircraft (U.S. District Court, Central District of California, No. CV 90-4823 MRP).
United States 1999-2003	Expert witness on behalf of the equity holders of Paragon Trade Brands. Analyzed likelihood of success in on-going patent litigation and Paragon emerging from bankruptcy as a healthy business (United States Bankruptcy Court for the Northern District of Georgia, Atlanta Division, Case No. 98-60390, Chapter 11).
United States 1998-2001	Expert witness on behalf of Lantec, a designer and manufacturer of business software. Defined relevant product market, impact on competition, and assessed market power of defendant, Novell (U.S. District Court, District of Utah, Central Division, Case No. 95 C 97 S).
Indonesia 1997, 2003	Economic consultant to the Ministry of Industry and Trade on instituting a competition policy in Indonesia.
United States 1996	Expert witness on behalf of purchasers of physician and HMO services from Marshfield Clinic, Wisconsin. Analyzed anticompetitive behavior, defined relevant markets, estimated extent of market power and defined injury (U.S. District Court, Western District of Wisconsin, Case No. 96-C-592C).
United States 1995-1996	Expert witness on behalf of defendant Schumacher, manufacturer of wall coverings. Assessment of damages (U.S. District Court for the Eastern District of Pennsylvania, Civil Action No. 90-3617).
United States 1994-1996	Expert witness on behalf of Blue Cross Blue Shield of Wisconsin. Estimation of effect on physician fees caused by market power and conduct of a large clinic in north central Wisconsin; estimation of damages incurred due to clinic's foreclosure of competing HMOs, and estimation of damages due to agreements to allocate markets for physician services (U.S. District Court, Western District of Wisconsin, No. 94-C-0137-S).
United States 1995	Expert witness on behalf of purchasers of certain agricultural chemicals. Analyzed market and industry to assess issues of common impact and potential approaches to damages (U.S. District Court, Northern District of Florida, No. 94-40216 (MMP)).



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United States 1994-1996	Expert witness on behalf of Pacific Great Lakes Corporation. Assessed impact on and estimated damages incurred by PGLC as a consequence of an understanding among certain railroads to forestall a new technology for the shipment of iron ore to Lower Lake Erie (Court of Common Pleas, County of Cuyahoga, Ohio, No. 189590).
United States 1994-1996	Expert witness on behalf of class of Kansas purchasers of infant formula. Analyzed structure, performance, and conduct of U.S. infant formula manufacturers, and estimated damages (District Court, Sedgwick County, Kansas, No. 94-C-709).
United States 1994	Expert witness on behalf of Complete Newborn Care, P.C., a corporation of neonatologists. Analysis of health care markets, determination of market power and whether a tying arrangement by a hospital adversely affected competition (U.S. District Court, District of Connecticut, Civil No. 394CV00416PCD).
United States 1993-1997	Consultant to American Maritime Congress on an economic analysis of the U.S. merchant marine.
United States 1992-1996	Consultant and expert witness on behalf of purchasers of processed catfish products. Analysis regarding impact of and estimation of damages resulting from an alleged price-fixing agreement among processors of farm-raised catfish (U.S. District Court for the Northern District of Mississippi, Delta Division, Master File No. 2:92CV073-D-O, MDL No. 928).
United States 1992-1993	Consultant and expert witness to DEVCO and related companies on 482 transfer pricing regarding purchase of professional services from an affiliated firm. U.S. Tax Court, Washington, D.C.
United States 1992-1995	Consultant and expert witness on the valuation of two life insurance companies in receivership (United States Bankruptcy Court, Central District of California, Adv. No. LA 92-01723-SB).
United States 1992-1994	Served as a consultant to two firms engaged in iron scrap processing and the export of iron scrap to Asia. Analyzed prices, profitability, and changes in supplies of raw materials.
United States 1992-1993	Expert witness on behalf of purchasers of infant formula in an antitrust matter involving the three major producers. Analyzed and conducted research on the behavior of firms in an oligopolistic industry and assessed noncompetitive behavior (U.S. District Court for the Northern District of Florida, Tallahassee Division, MDL Docket No. 878).
Saudi Arabia 1991-1992	Consultant to international defense engineering company concerning economic issues on subpart F taxable income and definition of transfer pricing implications for procurement of services and maintenance parts from an affiliated firm.

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United States 1987-1991	As a consultant to an international chemical products firm, examined the guidelines for transfer pricing, royalties, licensing fees, and cost allocation between U.S. parent and foreign affiliates. Also prepared economic analyses in response to tax deficiency claims by the Internal Revenue Service.
United States 1991	Expert witness on behalf of plaintiffs in an antitrust matter concerning the major air carriers in the U.S. Analyzed and conducted research on the impact of prices as a consequence of alleged joint pricing behavior by the airlines (U.S. District Court for the Northern District of Georgia, Atlanta Division, No. 1:90-CV-2485-MHS and MDL No. 861).
United States 1988-1989	As a consultant and expert witness on behalf of Texas Utilities in the matter of TUC versus Santa Fe Industries, defined relevant market for coal transportation, measured market power in the relevant market, and analyzed actions by the defendant to leverage this power in the coal market (United States Court for the District of New Mexico, Civil No. 82-1419-C).
Nepal 1986-1989	As a consultant to the Asian Development Bank, directed a 2-year project to assist the Government of Nepal with improvements to its national budgeting system. Worked with Ministry of Health on long-term health care issues.
United States 1984-1989	Directed a worldwide project financed by the U.S. Agency for International Development (A.I.D.) that focused on agricultural policy issues, such as prices for agricultural commodities and production inputs, marketing, and international trade.
United States 1986-1988	Expert witness for the Decker Coal Company, estimated damages incurred by Decker Coal Co. as a result of the termination of a long-term coal contract with the City of Austin and Lower Colorado River Authority (U.S. District Court, Western District of Texas, No. A-85-CA-104).
United States 1985-1988	Expert witness on behalf of the State of South Dakota, analyzed the market for Powder River Basin coal and the transportation system for moving this coal to utilities in the Gulf Coast and Southwest (State of South Dakota versus Kansas City Southern Industries, Civil Action Number 83-5046).
United States 1984-1989	Expert witness on behalf of National Steel and Sharon Steel in the Lower Lake Erie Iron Ore Antitrust Litigation, analyzed the transportation system and estimated costs for moving iron ore to steel plants on or near Lake Erie. Assessed impact and estimated damages (United States District Court for the Eastern District of Pennsylvania, MDL 587).
United States 1983-1985	Expert witness for Schering Corporation, estimated damages incurred by the plaintiff resulting from an alleged conspiracy to fix prices of corrugated containers and related packaging materials (U.S. District Court of New Jersey, No. 82-291).



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United States 1983	As a consultant and expert witness for the American Maritime Association, analyzed the financial and economic impacts that would result from lifting the ban on exporting Alaskan crude oil. Presented to Subcommittee on East Asian and Pacific Affairs, Committee on Foreign Relations, U.S. Senate.
United States 1982-1983	As a consultant and expert witness for Kraft Inc., Aluminum Specialty Company, Metropak Containers Corporation, and Universal Packaging Corporation, analyzed industry characteristics and estimated damages incurred by the plaintiffs as a result of the alleged price fixing of corrugated containers (U.S. District Court, Southern District of Texas, Houston Division, MDL No. 310).
United States 1980	Expert witness for purchasers of corrugated containers, analyzed industry characteristics, relevant market, and assessed damages incurred by plaintiff class as a result of alleged price fixing by producers of corrugated containers (U.S. District Court, Southern District of Texas, Houston Division, MDL No. 310).
<i>Senior Associate and Vice President</i> , Nathan Associates Inc., Washington, D.C., January 1973-June 1978	
United States 1976-1984	As consultant for A.I.D., developed training programs in economic and financial analysis of capital projects and enterprises. Established curriculum and provided overall supervision.
United States 1977-1979	As consultant for the National Science Foundation, directed study of the public and private benefits of technological innovations in 20 industries.
United States 1975	For the Office of Technology Assessment, performed cost-benefit analyses of alternative policies for stockpiling commodities including petroleum, copper, and zinc.
Western Samoa 1975	For the Asian Development Bank and the Government of Western Samoa, provided direction and formulated recommendations for investment and policies for national development plan.
Indonesia 1974-1976	For the Government of Indonesia and the World Bank, directed Sumatra Regional Planning Project, to prepare an integrated program of specific investment projects and policies in agriculture, irrigation, air transportation, and social services for the period until 1983.
United States 1974	For the Coastal Plains Regional Commission, directed cost-benefit and regional economic impact analyses of the proposed construction of a deepwater petroleum transfer system and on-shore refinery complex.



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United States 1974	As consultant to NASA, directed study to assess criteria for space shuttle rocket manufacture in which economic models were used to evaluate alternative system, scale, and locations for producing fuel tanks.
Thailand 1973	As consultant to a private client, projected trade for proposed trans-isthmus Kra Canal in Thailand.

*Guest Scholar*, The Brookings Institution, Washington, D.C., August 1972-December 1972

*Development Economist*, The Ford Foundation, June 1970-July 1972

India 1970-1972	As consultant to the Indian Planning Commission and the Government of India, developed staff capability at the state level for investment planning and the design of an operationally useful methodology for project analysis in irrigation, forestry, and mining; project conducted by the Ford Foundation.
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*Economist*, The Ford Foundation, Washington, D.C., May 1968-May 1970

Nepal 1968-1970	As economic adviser to the National Planning Commission and Ministry of Finance, prepared and evaluated projects for international financing and assisted with the introduction of a program budgeting system; project conducted by the Ford Foundation. Advised Government on procurement of aircraft and expansion of airport facilities.
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*Associate*, Nathan Associates Inc., Washington, D.C., June 1966-April 1968

Indonesia 1967	As consultant to International Nickel Company, evaluated proposed infrastructure for a large mining operation in Indonesia.
Economist 1964-1965	Syracuse University, Sarawak, Malaysia.

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**PUBLICATIONS:**

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*Books*

*Budget Innovations in Developing Countries: The Experience of Nepal*, New York: Praeger Publishers, 1973.

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*Cost Benefit Analysis: A Case Study of the Ratnagiri Fisheries Project*, with S.N. Mishra, Institute of Economic Growth: New Delhi, 1976.

**Articles**

"Regional Inequalities and Economic Growth in Malaysia." *Yorkshire Bulletin of Economic and Social Research* 21 (May 1969): 17-30.

"High Growth, Unemployment, and Planning in Venezuela: Some Observations." *Economic Development and Cultural Change* 18, No. 2 (January 1970): 267-273.

"Economic Integration Among Developing Countries: The Advantages and Disadvantages for Nepal." *Development Review* 2 (January-March 1970): 1-14.

*Dimensions of Project Analysis for State Planning*. The Ford Foundation: New Delhi, June 1970.

*An Economic Framework for Project Analysis in India: Some Preliminary Estimates*. The Ford Foundation: New Delhi, December 1972.

*Uncertainty, Probability Analysis, and Project Choice: An Illustration*, with S.N. Mishra. Institute of Economic Growth: New Delhi, May 1973.

"Estimating the Shadow Price of Foreign Exchange: An Illustration from India." *The Journal of Development Studies* 11, No. 4 (July 1975).

*Inflation and the Dollar: No Easy Choices*. Washington, D.C., Nathan Associates Inc., October 1978.

"The Chicago School's View of Economic Reality." Eighth Annual ATP Western Transportation Law Seminar, Association of Transportation Practitioners, February 1985.

"Adjustment with Development: Strategies for Linkage," paper presented at the Economic Forum, International Monetary Fund, June 1987.

**OTHER ACTIVITIES:**

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Adjunct Professor, The American University, Washington, D.C.

Member: American Economic Association

**DEPOSITION AND TESTIMONY (2004 THROUGH 2009)**

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1. *In Re: High Pressure Laminates Antitrust Litigation*, In the United States District Court for the Southern District of New York, Master File No. 00-MD-1368 (CLB) (2001, 2003, 2005, and 2006).
2. *In Re: Microcrystalline Cellulose Antitrust Litigation*, In the United States District Court for the Eastern District of Pennsylvania, MDL No. 1402 (2002 and 2005).
3. *In Re: Mercedes-Benz Antitrust Litigation*, In the United States District Court for the District of New Jersey, Master File No. 99-4311 (AMW) (2002 and 2006).
4. *Carolyn Fears, Donna Gibbs, Ann Rogan, Plaintiffs v. Wilhelmina Model Agency, Inc., Ford Models, Inc., Defendants*. In the United States District Court Southern District of New York, Case No. 02CV6146 (2004).

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5. *In Re: Carbon Black Antitrust Litigation*. In the United States District Court, District of Massachusetts, Civil Action No. 03-10191-DPW, MDL Docket No. 1543 (2004 and 2006).
6. *Andrew Behrend, Caroline Cutler, Marc Dambrosio, Barbi J. Weinberg, Kenneth Saffren, Stanford Glaberson, Michael Kellman, Lawrence Rudman, Joan Evanchuk-Kind and Eric Brislawn, Plaintiff, v. Comcast Corporation, Comcast Holdings Corporation, Comcast CableCommunications, Inc., Comcast Cable Communications Holdings, Inc., and Comcast Cable Holdings, LLC, Defendants*. In the United States District Court for the Eastern District of Pennsylvania, No. 03-6604 (2004 and 2006).
7. *In Re Plastics Additives Antitrust Litigation*. In the United States District Court for the Eastern District of Pennsylvania, Master Docket No. 2:03-CV-2038; deposition testimony (2005)
8. *Re: Publication Paper Antitrust Litigation*. In the United States District Court for the District of Connecticut, Docket No. 3:04 md 1631; deposition testimony (2006 and 2008).
9. *In re Bulk (Extruded) Graphite Products Antitrust Litigation*, In the U.S. District Court for the District of New Jersey, Master File No. 02-CV-06030 (WHW); deposition testimony (2005).
10. *In Re Barbara Schwab et al., Plaintiffs v. Philip Morris USA, Inc., et al., Defendants*. In the United States District Court for the Eastern District of New York, Civil Action No. CV 04-1945; deposition testimony (2006).
11. *Molecular Diagnostics Laboratories v. Hoffmann-La Roche Inc., et. al.* Civil No. 04-1649 (HHK) (D.D.C.); deposition testimony (2006 and 2008).
12. *In re: Pressure Sensitive Lablestock Antitrust Litigation*. In the U.S. District Court for the Middle District of Pennsylvania, MDL Docket No. 1556 (No. 3:03-MDL-1556); deposition testimony (2006).
13. *Hydrogen Peroxide Antitrust Litigation*. In the U.S. District Court for the Eastern District of Pennsylvania, MDL No. 1682; (case no. 05-CV-777); deposition testimony (2006 and 2008).
14. *Foundry Resins Antitrust Litigation*. In the United States District Court for the Southern District of Ohio, Eastern Division, MDL No. 1638; (master docket no. 2:04-CV-415); deposition testimony (2006).
15. *Polyester Staple Antitrust Litigation*. In the U.S. District Court for the Western District of North Carolina, Charlotte Division, MDL Docket No: 3:03CV1516; deposition testimony (2005 and 2006).
16. *OSB Antitrust*. In the U.S. District Court for the Eastern District of Pennsylvania, Master File No. 06-CV-00826 (PSD); deposition testimony (2007 and 2008)
17. *Morris & Dickson, M&D Antitrust*. In the U.S. District Court Western District of Louisiana, Shreveport Louisiana, Civil Action No. CV05-2147S; deposition testimony (2007).
18. *In re: Ethylene Propylene Diene Monomer (EPDM) Antitrust Litigation*. In the U.S. District Court for the District of Connecticut, Civil Action No. 3:03 MD 1542 (PCD); deposition testimony (2007).



19. *Methyl Methacrylate (MMA) Antitrust Litigation*. In the U.S. District Court for the Eastern District of Pennsylvania, Civil Action No. 06-MD-1768; deposition testimony (2007).
20. *Pulse Oximetry Litigation*. In the U.S. District Court Central District of California, Western Division, Master File No. CV-05-6419 MRP; deposition testimony (2007).
21. *Canadian Hydrogen Peroxide*. Ontario Superior Court of Justice, Proceeding under the Class Proceedings Act of 1992, Court File No.: 47025/05; deposition testimony (2008).
22. *Ready Mixed Concrete Antitrust Litigation*. United States District Court, Southern District of Indiana, Case No. 1:05-cv-00979-SEB-JMS; deposition testimony (2008).
23. *In Re: Aspartame Antitrust Litigation*. In the U.S. District Court for the Eastern District of Pennsylvania, Master Docket No. 06-1732-LLD; deposition testimony (2008).
24. *In re: Texas Grain Storage, Inc. v. Monsanto Company*. In the United States District Court for the Western District of Texas, Case No. SA07CA0673OLG (2008 and 2009).
25. *In re: Lou Haddock v. Nationwide*. United States District Court, District of Connecticut, Case No. 01-CV-1552; deposition testimony (2008).
26. *In re: Marine Hose Antitrust Litigation (II)*. United States District Court for the Southern District of Florida, Miami Division. Case No. 08-1888 (2008).
27. *International Business Machines Corp. v. T3 Technologies, Inc.*, United States District Court for the Southern District of New York. Case No. 06-13565-LAK (2009).
28. *Sweetwater Valley Farm, Inc., et al. v. Dean Foods Company, et al.* United States District Court for the Eastern District of Tennessee, Greenville Division. Case No. 08-1000 (2009).

# Appendix B

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Materials Considered

**Court Documents**

United States District Court for the Northern District of California. *In Re: Online DVD Rental Antitrust Litigation*, Consolidated Amended Class Action Complaint, Master File No. M: 09-CV-2029 PJH, May 27, 2009.

United States District Court for the Northern District of California. *In Re: Online DVD Rental Antitrust Litigation*, Order Granting Motion to Dismiss, Master File No. M: 09-CV-2029-PJH, December 1, 2009.

United States District Court for the Northern District of California. *In Re: Online DVD Rental Antitrust Litigation*, Order Granting Motion for Reconsideration and Leave to File Amended Complaint, Master File No. M: 09-CV-2029-PJH, January 29, 2010.

United States District Court for the Northern District of California. *In Re: Online DVD Rental Antitrust Litigation*, Blockbuster Subscribers' Consolidated Amended Class Action Complaint, Master File No. M: 09-CV-2029-PJH, July 16, 2009.

United States District Court for the Northern District of California. *In Re: Online DVD Rental Antitrust Litigation*, Blockbuster Subscribers' Consolidated Second Amended Class Action Complaint, Master File No. M: 09-CV-2029-PJH, March 1, 2010.

United States District Court for the Northern District of California. *In Re: Online DVD Rental Antitrust Litigation*, Response to Plaintiff's First Request for Production of Documents From Defendant Netflix, Inc., Master File No. M: 09-CV-2029-PJH, September 4, 2009.

United States District Court for the Northern District of California. *In Re: Online DVD Rental Antitrust Litigation*, Reporter's Transcript of Proceedings, No. MDL 09-CV-2029-PJH, July 7, 2009.

Deposition of Leslie J. Kilgore on behalf of Netflix, Inc., (30)(b)(6), March 3, 2010.

**Publically Available Documents**

Abbink, Klaus and Jordi Brandts (2008). "Pricing in Bertrand competition with increasing marginal costs," *Games and Economic Behavior*, 63, pp. 1-31.

Baumol, William J. and Alan S. Blinder (2003). *Economics, Principles and Policy: Ninth Edition*, Thomson South-Western.

"Blockbuster Drops Late Fees," CNNmoney.com, December 14, 2004, [http://money.cnn.com/2004/12/14/news/midcaps/blockbuster\\_latefees/index.htm?cnn=yes](http://money.cnn.com/2004/12/14/news/midcaps/blockbuster_latefees/index.htm?cnn=yes).

"Blockbuster Launches New Online DVD Rental Service," Blockbuster News Release, Blockbuster.com, August 11, 2004 (P-02782-4).



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Materials Considered

- “BLOCKBUSTER Online(TM) Changes Pricing,” Blockbuster News Release, Blockbuster.com, August 9, 2005 (P-02808-9).
- “BLOCKBUSTER Online(TM) to Take DVD Rental Service to New Level with Guaranteed Lower Price, Enhanced Delivery and More Titles,” Blockbuster News Release, Blockbuster.com, December 22, 2004 (P-02789-90).
- “Blockbuster Settles Fight with Netflix,” *The New York Times*, June 28, 2007.
- “Blockbuster to cut price for online DVD rentals,” Reuters News, October, 15, 2004 (P-02785-6).
- Carlton, Dennis W. and Jeffrey M. Perloff (2005). *Modern Industrial Organization: Fourth Edition*, Pearson: Addison-Wesley, Boston.
- Dufwenberg, Martin and Uri Gneezy (2000). “Price Competition and Market Concentration: An Experimental Study,” *International Journal of Industrial Organization*, 18, pp. 7-22.
- “Econometrics: Legal Practical, and Technical Issues.” *ABA Section of Antitrust Law*, 2005.
- “Fortune 500 2009: Fortune 1000 Companies,” Fortune Magazine, accessed on February 12, 2010, [http://money.cnn.com/magazines/fortune/fortune500/2009/full\\_list/](http://money.cnn.com/magazines/fortune/fortune500/2009/full_list/).
- “History of Blu-ray Disk,” Blu-ray Disk Association, <http://www.blu-raydisc.com/en.html>.
- Horizontal Merger Guidelines*, U.S. Department of Justice and Federal Trade Commission, April 8, 1997.
- Huck, Steffen, Hans-Theo Normann and Jorg Oechssler (2004). “Two are few and four are many: number effects in experimental oligopolies,” *Journal of Economic Behavior & Organization*, 53, pp. 435-446.
- Jackson, David. “Walmart (WMT) teams up with Netflix (NFLX); Blockbuster Online (BBI) test higher prices,” Seeking Alpha, May 19, 2005.
- Junnarkar, Sandeep. “Wal-Mart cues up a rival to Netflix,” CNET News.com, October 15, 2002.
- Masnack, Mike. “Amazon Quietly Dumps DVD Rental Business; Guess Netflix Isn’t So Easy to Beat,” Techdirt.com, February 5, 2008.
- “Netflix Announces GAAP Net Income of \$2.9 Million and Non-GAAP Net Income of \$7.0 million for Q2 2004,” Netflix Press Release, Netflix.com, July 15, 2004.
- “Netflix, Inc. – Company History,” [www.FundingUniverse.com](http://www.fundinguniverse.com/company-histories/Netflix-Inc-Company-History.html), accessed on February 12, 2009, <http://www.fundinguniverse.com/company-histories/Netflix-Inc-Company-History.html>.

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Materials Considered

- “Netflix Says Promotional Agreement With Walmart.com Not Material to Company's Financial Performance,” Netflix Press Release, Netflix.com, May 19, 2005.
- “Online Segment Driving Worldwide Movie Rental Market,” Koncept Analytics, November 1, 2008.
- “The outlook for online DVD rental: A strategic analysis of the US and European markets,” Adams Media Research, 2005.
- “Overall report on the economic analysis of the MEDIANET project- Version 2.0,” Multimedia Networking IST-Project: FP6-507452, Information Society Technologies, MediaNet, May 9, 2005.
- Pindyck, Robert S. and Daniel L. Rubinfeld (2001). *Microeconomics: Fifth Edition*, Prentice Hall, Upper Saddle River, NJ.
- “Private Screening,” www.FastCompany.com, accessed on February 12, 2010, <http://www.fastcompany.com/resources/customers-netflix.html>.
- “Rankings,” Fortune Magazine, accessed on February 12, 2010, <http://money.cnn.com/magazines/fortune/rankings/>
- Shapiro, Carl. Speech before the Fall Forum, Antitrust Section of the ABA on November 12, 2009, accessed on February 12, 2010, <http://www.justice.gov/atr/public/speeches/251858.htm>.
- Tirole, Jean (1988). *Theory of Industrial Organization*, MIT Press, Cambridge, MA.
- Thompson, Nicholas. “Netflix Uses Speed to Fend Off Wal-Mart Challenge,” *The New York Times*, September 29, 2003.
- Viscusi, W. Kip, Joseph E. Harrington and John M. Vernon (2005). “Economics of Regulation and Antitrust, Fourth Edition,” The MIT Press, Cambridge, Massachusetts.
- “Wal-mart Rolls Out New Online DVD Rental Plan of \$15.54 a month,” Wal-Mart, Inc, Wal-mart Press Release, June 10 2003.
- “Wal-Mart, Netflix agree on DVD deal,” ZDNet.com, May 19, 2005.
- Worden, Nat. “More Tailwinds for Netflix,” TheStreet.com, June 27, 2005, accessed on February 12, 2010. <http://www.thestreet.com/story/10229832/1/more-tailwinds-for-netflix.html>.

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Materials Considered

**Company Financials**

Netflix, Inc. Form 10-K for year ending December 31, 2002.

Netflix, Inc. Form 10-K for year ending December 31, 2004.

Netflix, Inc. Annual Report for year ending December 31, 2006.

Netflix, Inc. Form 10-Q Quarterly Report filed November 9, 2004.

Blockbuster, Inc. Form-10K for year ending December 31, 2004.

Q2 2005 Blockbuster Earnings conference call, August 9, 2005.

Walmart, Inc. Annual Report for year ending January 31, 2003.

Walmart, Inc. Annual Report for year ending January 31, 2009.

**Electronic data and Related Documents**

*Netflix (received December 29, 2009)*

NETFLIX\_DATA\_001

*Netflix (received January 6, 2010)*

Netflix Data 1209.xls  
Streaming Users over 15 minutes as of 120109.xls  
Blu-Ray surcharge.xls

*Netflix (received February 17, 2010)*

NETFLIX\_DATA\_002

*Netflix (received February 19, 2010)*

NETFLIX\_DATA\_003

**Data Question Responses**

Responses to First Set of Plaintiff's Questions Re: Data Set (received February 4 and 10, 2010)



## Appendix B

## Materials Considered

**Bates Stamped Documents**Beginning Range

NETFLIX\_BECKER\_00229140  
NETFLIX\_CORPORATE\_00000045  
NETFLIX\_CORPORATE\_00000100  
NETFLIX\_CORPORATE\_00000124  
NETFLIX\_CORPORATE\_00000336  
NETFLIX\_CORPORATE\_00000705  
NETFLIX\_CORPORATE\_00000754  
NETFLIX\_CORPORATE\_00000849  
NETFLIX\_CORPORATE\_00001098  
NETFLIX\_CORPORATE\_00001632  
NETFLIX\_CORPORATE\_00001770  
NETFLIX\_CORPORATE\_00002019  
NETFLIX\_CORPORATE\_00002414  
NETFLIX\_CORPORATE\_00002820  
NETFLIX\_CORPORATE\_00003130  
NETFLIX\_CORPORATE\_00003144  
NETFLIX\_CORPORATE\_00003146  
NETFLIX\_CORPORATE\_00003149  
NETFLIX\_CORPORATE\_00003240  
NETFLIX\_CORPORATE\_00003430  
NETFLIX\_CORPORATE\_00003468  
NETFLIX\_CORPORATE\_00003573  
NETFLIX\_CORPORATE\_00003579  
NETFLIX\_CORPORATE\_00003589  
NETFLIX\_CORPORATE\_00003593  
NETFLIX\_CORPORATE\_00003599  
NETFLIX\_CORPORATE\_00003617  
NETFLIX\_CORPORATE\_00003623  
NETFLIX\_CORPORATE\_00003633  
NETFLIX\_CORPORATE\_00003638  
NETFLIX\_CORPORATE\_00003643  
NETFLIX\_CORPORATE\_00003650  
NETFLIX\_CORPORATE\_00003667  
NETFLIX\_CORPORATE\_00003699  
NETFLIX\_CORPORATE\_00003737  
NETFLIX\_CORPORATE\_00005081  
NETFLIX\_CORPORATE\_00005785  
NETFLIX\_CORPORATE\_00006073  
NETFLIX\_CORPORATE\_00007544  
NETFLIX\_CORPORATE\_R\_00000824  
NETFLIX\_CORPORATE\_R\_00000955  
NETFLIX\_CORPORATE\_R\_00001589  
NETFLIX\_CORPORATE\_R\_00001970  
NETFLIX\_CORPORATE\_R\_00002361

Ending Range

NETFLIX\_BECKER\_00229141  
NETFLIX\_CORPORATE\_00000048  
NETFLIX\_CORPORATE\_00000117  
NETFLIX\_CORPORATE\_00000129  
NETFLIX\_CORPORATE\_00000643  
NETFLIX\_CORPORATE\_00000731  
NETFLIX\_CORPORATE\_00000823  
NETFLIX\_CORPORATE\_00000943  
NETFLIX\_CORPORATE\_00001588  
NETFLIX\_CORPORATE\_00001707  
NETFLIX\_CORPORATE\_00001969  
NETFLIX\_CORPORATE\_00002360  
NETFLIX\_CORPORATE\_00002619  
NETFLIX\_CORPORATE\_00003118  
NETFLIX\_CORPORATE\_00003130  
NETFLIX\_CORPORATE\_00003144  
NETFLIX\_CORPORATE\_00003146  
NETFLIX\_CORPORATE\_00003149  
NETFLIX\_CORPORATE\_00003324  
NETFLIX\_CORPORATE\_00003433  
NETFLIX\_CORPORATE\_00003572  
NETFLIX\_CORPORATE\_00003573  
NETFLIX\_CORPORATE\_00003579  
NETFLIX\_CORPORATE\_00003591  
NETFLIX\_CORPORATE\_00003594  
NETFLIX\_CORPORATE\_00003604  
NETFLIX\_CORPORATE\_00003619  
NETFLIX\_CORPORATE\_00003624  
NETFLIX\_CORPORATE\_00003634  
NETFLIX\_CORPORATE\_00003638  
NETFLIX\_CORPORATE\_00003644  
NETFLIX\_CORPORATE\_00003653  
NETFLIX\_CORPORATE\_00003668  
NETFLIX\_CORPORATE\_00003708  
NETFLIX\_CORPORATE\_00004943  
NETFLIX\_CORPORATE\_00005622  
NETFLIX\_CORPORATE\_00005874  
NETFLIX\_CORPORATE\_00006134  
NETFLIX\_CORPORATE\_00007550  
NETFLIX\_CORPORATE\_R\_00000848  
NETFLIX\_CORPORATE\_R\_00001097  
NETFLIX\_CORPORATE\_R\_00001631  
NETFLIX\_CORPORATE\_R\_00002005  
NETFLIX\_CORPORATE\_R\_00002413



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## Materials Considered

NETFLIX_CORPORATE_R_00002620	NETFLIX_CORPORATE_R_00002819
NETFLIX_CORPORATE_R_00003119	NETFLIX_CORPORATE_R_00003239
NETFLIX_CORPORATE_R_00003407	NETFLIX_CORPORATE_R_00003467
NETFLIX_CORPORATE_R_00003573	NETFLIX_CORPORATE_R_00003736
NETFLIX_CORPORATE_R_00004944	NETFLIX_CORPORATE_R_00005080
NETFLIX_CORPORATE_R_00005623	NETFLIX_CORPORATE_R_00005784
NETFLIX_CORPORATE_R_00005875	NETFLIX_CORPORATE_R_00006072
NETFLIX_CORPORATE_R_00006135	NETFLIX_CORPORATE_R_00006239
NETFLIX_HASTINGS_00000018	NETFLIX_HASTINGS_00000119
NETFLIX_HASTINGS_00000024	NETFLIX_HASTINGS_00000024
NETFLIX_HASTINGS_00000120	NETFLIX_HASTINGS_00000127
NETFLIX_HASTINGS_00001519	NETFLIX_HASTINGS_00001519
NETFLIX_HASTINGS_00001569	NETFLIX_HASTINGS_00001569
NETFLIX_HASTINGS_00001573	NETFLIX_HASTINGS_00001573
NETFLIX_HASTINGS_00001579	NETFLIX_HASTINGS_00001581
NETFLIX_HASTINGS_00001614	NETFLIX_HASTINGS_00001614
NETFLIX_HASTINGS_00002393	NETFLIX_HASTINGS_00002393
NETFLIX_HASTINGS_00002517	NETFLIX_HASTINGS_00002517
NETFLIX_HASTINGS_00002563	NETFLIX_HASTINGS_00002563
NETFLIX_HASTINGS_00002660	NETFLIX_HASTINGS_00002660
NETFLIX_HASTINGS_00002662	NETFLIX_HASTINGS_00002662
NETFLIX_HASTINGS_00002757	NETFLIX_HASTINGS_00002757
NETFLIX_HASTINGS_00002782	NETFLIX_HASTINGS_00002783
NETFLIX_HASTINGS_00002837	NETFLIX_HASTINGS_00002837
NETFLIX_HASTINGS_00002838	NETFLIX_HASTINGS_00002838
NETFLIX_HASTINGS_00002840	NETFLIX_HASTINGS_00002841
NETFLIX_HASTINGS_00003574	NETFLIX_HASTINGS_00003574
NETFLIX_HASTINGS_00003578	NETFLIX_HASTINGS_00003578
NETFLIX_HASTINGS_00003581	NETFLIX_HASTINGS_00003581
NETFLIX_HASTINGS_00003616	NETFLIX_HASTINGS_00003616
NETFLIX_HASTINGS_00003623	NETFLIX_HASTINGS_00003624
NETFLIX_HASTINGS_00003632	NETFLIX_HASTINGS_00003632
NETFLIX_HASTINGS_00003634	NETFLIX_HASTINGS_00003635
NETFLIX_HASTINGS_00011412	NETFLIX_HASTINGS_00011413
NETFLIX_HASTINGS_00011564	NETFLIX_HASTINGS_00011565
NETFLIX_HASTINGS_00013682	NETFLIX_HASTINGS_00013687
NETFLIX_HASTINGS_00013722	NETFLIX_HASTINGS_00013722
NETFLIX_HASTINGS_00013724	NETFLIX_HASTINGS_00013724
NETFLIX_HYMAN_00000120	NETFLIX_HYMAN_00000123
NETFLIX_KILGORE_00000009	NETFLIX_KILGORE_00000010
NETFLIX_KILGORE_00000034	NETFLIX_KILGORE_00000034
NETFLIX_KILGORE_00000137	NETFLIX_KILGORE_00000139
NETFLIX_KILGORE_00000141	NETFLIX_KILGORE_00000142
NETFLIX_McCARTHY_00003999	NETFLIX_McCARTHY_00004001
NETFLIX_MINTZ_00007330	NETFLIX_MINTZ_00007449
NETFLIX_NETFLIX_00000006	NETFLIX_NETFLIX_00000007
NETFLIX_NETFLIX_00000015	NETFLIX_NETFLIX_00000015



## Appendix B

## Materials Considered

NETFLIX\_NETFLIX\_00000019  
 NETFLIX\_NETFLIX\_00000022  
 NETFLIX\_NETFLIX\_00000024  
 NETFLIX\_ROSS\_00000804  
 NETFLIX\_SAVAGE\_00084818  
 NETFLIX\_SAVAGE\_00085874  
 P-02782  
 P-02789  
 P-02808  
 WMHOe-001421-002-00000145  
 WMHOe-001421-001-00000049  
 WMHOe-001421-001-00004044  
 WMHOe-001421-002-00000168  
 WMHOe-001421-002-00000170  
 WMHOe-001421-002-00000173  
 WMHOe-001421-002-00000176  
 WMHOe-001421-002-00000178  
 WMHOe-001421-002-00000187  
 WMHOe-001421-002-00000189  
 WMHOe-001421-002-00000190  
 WMHOe-001421-002-00000191  
 WMHOe-001421-002-00000192  
 WMHOe-001421-002-00000194  
 WMHOe-001421-002-00000196  
 WMHOe-001421-002-00000218  
 WMHOe-001421-002-00000228  
 WMHOe-001421-002-00000230  
 WMHOe-001421-002-00000235  
 WMHOe-001421-002-00000240  
 WMHOe-001421-002-00000243  
 WMHOe-001421-002-00000249  
 WMHOe-001421-002-00000250  
 WMHOe-001421-002-00000258  
 WMHOe-001421-002-00000261  
 WMHOe-001421-002-00000265  
 WMHOe-001421-002-00000267  
 WMHOe-001421-002-00000271  
 WMHOe-001421-002-00000272  
 WMHOe-001421-002-00000274  
 WMHOe-001421-002-00000283  
 WMHOe-100766-001-00012617  
 WMHOe-100766-001-00012620  
 WMHOe-100766-001-00012633  
 WMHOe-100766-001-00012638  
 WMHOe-100766-001-00012672  
 WMHOe-100766-001-00013672  
 WMHOe-100766-001-00014554

NETFLIX\_NETFLIX\_00000019  
 NETFLIX\_NETFLIX\_00000022  
 NETFLIX\_NETFLIX\_00000024  
 NETFLIX\_ROSS\_00000833  
 NETFLIX\_SAVAGE\_00084818  
 NETFLIX\_SAVAGE\_00085915  
 P-02578  
 P-02790  
 P-02809  
 WMHOe-001421-002-00000145  
 WMHOe-001421-001-00000051  
 WMHOe-001421-001-00004046  
 WMHOe-001421-002-00000168  
 WMHOe-001421-002-00000171  
 WMHOe-001421-002-00000174  
 WMHOe-001421-002-00000176  
 WMHOe-001421-002-00000181  
 WMHOe-001421-002-00000187  
 WMHOe-001421-002-00000189  
 WMHOe-001421-002-00000190  
 WMHOe-001421-002-00000192  
 WMHOe-001421-002-00000192  
 WMHOe-001421-002-00000194  
 WMHOe-001421-002-00000227  
 WMHOe-001421-002-00000218  
 WMHOe-001421-002-00000238  
 WMHOe-001421-002-00000231  
 WMHOe-001421-002-00000235  
 WMHOe-001421-002-00000240  
 WMHOe-001421-002-00000244  
 WMHOe-001421-002-00000249  
 WMHOe-001421-002-00000255  
 WMHOe-001421-002-00000261  
 WMHOe-001421-002-00000262  
 WMHOe-001421-002-00000265  
 WMHOe-001421-002-00000267  
 WMHOe-001421-002-00000272  
 WMHOe-001421-002-00000272  
 WMHOe-001421-002-00000274  
 WMHOe-001421-002-00000286  
 WMHOe-100766-001-00012618  
 WMHOe-100766-001-00012621  
 WMHOe-100766-001-00012634  
 WMHOe-100766-001-00012650  
 WMHOe-100766-001-00012672  
 WMHOe-100766-001-00013672  
 WMHOe-100766-001-00014554



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## Materials Considered

WMHOe-100766-001-00014627	WMHOe-100766-001-00014631
WMHOe-100766-001-00015402	WMHOe-100766-001-00015404
WMHOe-100766-001-00015435	WMHOe-100766-001-00015447
WMHOe-100766-001-00018999	WMHOe-100766-001-00019022
WMHOe-100766-001-00019286	WMHOe-100766-001-00019303
WMHOe-100766-001-00019452	WMHOe-100766-001-00019452
WMHOe-100766-001-00019472	WMHOe-100766-001-00019487
WMHOe-100766-001-00019563	WMHOe-100766-001-00019566
WMHOe-100766-001-00019574	WMHOe-100766-001-00019574
WMHOe-100766-001-00027188	WMHOe-100766-001-00027193
WMHOe-100768-001-00012617	WMHOe-100768-001-00013676
WMHOe-100768-001-00015459	WMHOe-100768-001-00015481
WMHOe-100768-001-00019464	WMHOe-100768-001-00019470
WMHOe-100768-001-00019563	WMHOe-100768-001-00019564
WMHOe-100768-002-00000020	WMHOe-100768-002-00000024
WMHOe-100769-002-00002144	WMHOe-100769-002-00002145
WMHOe-100772-001-00000007	WMHOe-100772-001-00000007
WMHOe-100772-001-00000008	WMHOe-100772-001-00000009
WMHOe-100772-001-00000010	WMHOe-100772-001-00000010
WMHOe-100772-001-00001168	WMHOe-100772-001-00001170
WMHOe-100772-001-00002827	WMHOe-100772-001-00002828
WMHOe-100772-001-00002838	WMHOe-100772-001-00002838
WMHOe-100772-001-00002842	WMHOe-100772-001-00002844
WMHOe-100772-001-00002850	WMHOe-100772-001-00002851
WMHOe-100772-001-00002868	WMHOe-100772-001-00002868
WMHOe-100772-001-00002901	WMHOe-100772-001-00002902
WMHOe-100772-001-00003065	WMHOe-100772-001-00003066
WMHOe-100772-001-00003074	WMHOe-100772-001-00003074
WMHOe-100772-001-00003106	WMHOe-100772-001-00003106
WMHOe-100772-001-00003118	WMHOe-100772-001-00003118
WMHOe-100772-001-00003279	WMHOe-100772-001-00003279
WMHOe-100772-001-00003317	WMHOe-100772-001-00003318
WMHOe-100772-001-00003352	WMHOe-100772-001-00003355
WMHOe-100772-001-00003359	WMHOe-100772-001-00003359
WMHOe-100772-001-00003698	WMHOe-100772-001-00003700
WMHOe-100772-001-00003730	WMHOe-100772-001-00003730
WMHOe-100772-001-00003746	WMHOe-100772-001-00003747
WMHOe-100772-001-00003750	WMHOe-100772-001-00003750
WMHOe-100772-001-00003755	WMHOe-100772-001-00003755
WMHOe-100772-001-00003771	WMHOe-100772-001-00003771
WMHOe-100772-001-00003785	WMHOe-100772-001-00003785
WMHOe-100772-001-00003787	WMHOe-100772-001-00003787
WMHOe-100772-001-00003791	WMHOe-100772-001-00003791
WMHOe-100772-001-00003801	WMHOe-100772-001-00003801
WMHOe-100772-001-00003839	WMHOe-100772-001-00003840
WMHOe-100772-001-00003850	WMHOe-100772-001-00003852
WMHOe-100772-001-00003855	WMHOe-100772-001-00003856



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## Materials Considered

WMHOe-100772-001-00003859	WMHOe-100772-001-00003859
WMHOe-100772-001-00003861	WMHOe-100772-001-00003861
WMHOe-100772-001-00005643	WMHOe-100772-001-00005647
WMHOe-100778-001-00000384	WMHOe-100778-001-00000385
WMHOe-100778-001-00000396	WMHOe-100778-001-00000399
WMHOe-100778-001-00000416	WMHOe-100778-001-00000417
WMHOe-100778-001-00000419	WMHOe-100778-001-00000419
WMHOe-100779-001-00000091	WMHOe-100779-001-00000091
WMHOe-100779-001-00000095	WMHOe-100779-001-00000095
WMHOe-100779-001-00000115	WMHOe-100779-001-00000115
WMHOe-100779-001-00000117	WMHOe-100779-001-00000117
WMHOe-100779-001-00000122	WMHOe-100779-001-00000122
WMHOe-100779-001-00000124	WMHOe-100779-001-00000124
WMHOe-100779-001-00000126	WMHOe-100779-001-00000126
WMHOe-100779-001-00000140	WMHOe-100779-001-00000141
WMHOe-100779-001-00000150	WMHOe-100779-001-00000150
WMHOe-100779-001-00000158	WMHOe-100779-001-00000159
WMHOe-100779-001-00000161	WMHOe-100779-001-00000161
WMHOe-100779-002-00000025	WMHOe-100779-002-00000030
WMHOe-100779-002-00001278	WMHOe-100779-002-00001278
WMHOe-100779-002-00001306	WMHOe-100779-002-00001312
WMHOe-100779-002-00001316	WMHOe-100779-002-00001316
WMHOe-100779-002-00001632	WMHOe-100779-002-00001641
WMHOe-100779-002-00001700	WMHOe-100779-002-00001702
WMHOe-100779-002-00001707	WMHOe-100779-002-00001710
WMHOe-100779-002-00001724	WMHOe-100779-002-00001724
WMHOe-100779-002-00001729	WMHOe-100779-002-00001729
WMHOe-100779-002-00001751	WMHOe-100779-002-00001751
WMHOe-100779-002-00002260	WMHOe-100779-002-00002260
WMHOe-100779-002-00002262	WMHOe-100779-002-00002263
WMHOe-100779-002-00002266	WMHOe-100779-002-00002266
WMHOe-100779-003-00002039	WMHOe-100779-003-00002039
WMHOe-100779-003-00002064	WMHOe-100779-003-00002067
WMHOe-100779-003-00003490	WMHOe-100779-003-00003496
WMHOe-100779-003-00003499	WMHOe-100779-003-00003500
WMHOe-100779-003-00003518	WMHOe-100779-003-00003520
WMHOe-100779-003-00003529	WMHOe-100779-003-00003529
WMHOe-100779-003-00003532	WMHOe-100779-003-00003533
WMHOe-100779-003-00003538	WMHOe-100779-03-00003541
WMHOe-100779-003-00003546	WMHOe-100779-003-00003552
WMHOe-100779-003-00003561	WMHOe-100779-003-00003562
WMHOe-100779-003-00003565	WMHOe-100779-003-00003565
WMHOe-100779-003-00003569	WMHOe-100779-003-00003569
WMHOe-100779-003-00003584	WMHOe-100779-003-00003593
WMHOe-100779-003-00003602	WMHOe-100779-003-00003602
WMHOe-100779-003-00003609	WMHOe-100779-003-00003609
WMHOe-100779-003-00003613	WMHOe-100779-003-00003613

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Materials Considered

WMHOe-100779-003-00003616	WMHOe-100779-003-00003616
WMHOe-100779-003-00003617	WMHOe-100779-003-00003617
WMHOe-100779-003-00003620	WMHOe-100779-003-00003620
WMHOe-100779-003-00003623	WMHOe-100779-003-00003627
WMHOe-100779-003-00003645	WMHOe-100779-003-00003646
WMHOe-100779-003-00003649	WMHOe-100779-003-00003649
WMHOe-100779-003-00003654	WMHOe-100779-003-00003659
WMHOe-100779-003-00003765	WMHOe-100779-003-00003765
WMHOe-100779-004-00000014	WMHOe-100779-004-00000014
WMHOe-100779-004-00000041	WMHOe-100779-004-00000044
WMHOe-100779-004-00000058	WMHOe-100779-004-00000058
WMHOe-100779-004-00000059	WMHOe-100779-004-00000061
WMHOe-100780-003-00000369	WMHOe-100780-003-00000369
WMHOe-400035-001-00000106	WMHOe-400035-001-00000115
WMHOe-400035-001-00000140	WMHOe-400035-001-00000150
WMHOe-400035-001-00000196	WMHOe-400035-001-00000200
WMHOe-400036-002-00000032	WMHOe-400036-002-00000035
WMHOe-400037-001-00000991	WMHOe-400037-001-00000991
WMHOe-770047-019-00000135	WMHOe-770047-019-00000135



**APPENDIX C  
REDACTED**