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13  
 14 **UNITED STATES DISTRICT COURT**  
**NORTHERN DISTRICT OF CALIFORNIA**  
 15 **OAKLAND DIVISION**

<p>16 <b>IN RE ONLINE DVD RENTAL</b>          17 <b>ANTITRUST LITIGATION</b></p>	<p><b>Master File No. 4:09-md-2029 PJH</b></p> <p><b>MDL No. 2029</b></p>
<p>19 <b>This document relates to all actions <u>except</u>:</b>          20 <i>Pierson v. Walmart.com USA LLC et al.</i>,          21 M:09-CV-2163-PJH          22 <i>Levy, et al. v. Walmart.com USA LLC, et al.</i>,          M:09-CV-2296-PJH</p>	<p><b>Hon. Phyllis J. Hamilton</b></p> <p><b>PLAINTIFFS' OBJECTION TO</b>  <b>DEFENDANT NETFLIX'S BILL OF</b>  <b>COSTS</b></p>

1 Pursuant to Rule 54(d) of the Federal Rules of Civil Procedure and 28 U.S.C. § 1920,  
2 Plaintiffs hereby object to Defendant Netflix's Bill of Costs (ECF No. 549) ("Bill of Costs"),  
3 wherein Netflix seeks an award of \$744,740.11.<sup>1</sup>

#### 4 **I. INTRODUCTION**

5 This case is an antitrust class action brought on behalf of subscribers to Netflix's online  
6 DVD rental service ("Netflix Subscribers"). The Judicial Panel on Multidistrict Litigation  
7 consolidated dozens of cases filed on behalf of Netflix Subscribers for pretrial proceedings into  
8 MDL No. 2029. (ECF No. 5.) A few months later, two lawsuits were filed against the same  
9 Defendants on behalf of subscribers to Blockbuster's online DVD rental service (the  
10 "Blockbuster Subscribers").<sup>2</sup> On June 5, 2009, the Court ordered that the Blockbuster  
11 Subscribers' actions be related to MDL No. 2029.

12 Earlier this year, the Court granted Netflix's motion for summary judgment against the  
13 Blockbuster Subscribers and, thereafter, Netflix filed a bill of costs claiming one-half of the  
14 purported taxable costs that it incurred in defending both the Netflix and Blockbuster Subscribers'  
15 lawsuits. (ECF No. 376.) The clerk taxed \$791,171.18 in costs against the Blockbuster  
16 Subscribers. (ECF No. 436.) The Court later reduced the amount to \$700,084.79. (ECF No.  
17 515.)

18 On November 22, 2011, the Court granted Netflix's motion for summary judgment  
19 against the Netflix Subscribers (ECF No. 542),<sup>3</sup> and, thereafter, Netflix filed a bill of costs for  
20 \$744,740.11 (ECF No. 549). Most of the invoices submitted in support of Netflix's Bill of Costs  
21 in the Netflix Subscribers' cases are the same as the invoices that were submitted in support of  
22 Netflix's Bill of Costs in the Blockbuster Subscriber's cases.

23  
24 <sup>1</sup> Pursuant to L.R. 54-2(b), Plaintiffs' counsel conferred with Netflix's counsel on December 19,  
25 2011 at approximately 4:40 p.m. regarding Plaintiffs' objections to Netflix's bill of costs. After  
26 Plaintiffs described their primary objections, Netflix indicated that it was satisfied with its  
27 submission and declined to withdraw or change it. (See Declaration of Gregory Baker.)

28 <sup>2</sup> See *Pierson v. Wal-Mart.com USA LLC et al.*, M:09-CV-2163-PJH; *Levy v. Wal-Mart.com USA LLC et al.*, M:09-CV-2296-PJH.

<sup>3</sup> The Court entered an amended Order on November 23, 2011. (ECF No. 544.)

1 As described in detail below, Plaintiffs object to Netflix's costs for a variety of reasons,  
 2 including: (1) Netflix fails to provide sufficient documentation supporting its claimed costs; (2)  
 3 Netflix seeks to tax costs that are not reasonable or recoverable; and (3) Netflix seeks to tax costs  
 4 that this Court previously ruled are not recoverable. Moreover, Plaintiffs urge the Court to  
 5 exercise its discretion to deny all costs because of the chilling effect such an award will have on  
 6 future litigation and because the Court's summary judgment decision was a close call.

7 In particular, Plaintiffs object to the following costs:

8 Expense	Amount
9 TIFF conversion costs over the \$0.02/page rate charged on the first vendor invoice	\$204,577.99
10 Costs for copying documents for unknown recipients	\$16,942.40
11 Costs for producing the same documents in multiple formats	\$31,500.00
12 Costs for restamping documents inadvertently produced by Netflix	\$1,342.06
13 Consulting fees incurred to develop visual aids	\$14,355.50
14 Various e-discovery fees invoiced by vendor Esquire Solutions (including "Keyword Searching," "Hourly Data Analysis and Project Management," "EDD Processing," "Data Services," "Data Upload," "Clearwell Processing" and others)	\$317,616.19
15 Expedited transcript fees	\$11,673.65
16 Videotaping costs for depositions where transcript costs were also incurred	\$756.00
17 OCR costs for the convenience of counsel	\$176.17
<b>Total</b>	<b>\$598,939.96</b>

## 18 II. LEGAL STANDARD

19 The United States Supreme Court "strictly limits reimbursable costs to those enumerated  
 20 in section 1920." *Romero v. City of Pomona*, 883 F.2d 1418, 1428 (9th Cir. 1989) (overruled in  
 21 part on unrelated grounds) (citing *Crawford Fitting Company v. J.T. Gibbons, Inc.*, 482 U.S. 437  
 22 (1987)).<sup>4</sup> The Court may exercise "discretionary authority under Federal Rule of Civil Procedure

23 <sup>4</sup> Section 1920 reads as follows:

24 "A judge or clerk of any court of the United States may tax as costs the following:

- 25 (1) Fees of the clerk and marshal;
- 26 (2) Fees for printed or electronically recorded transcripts necessarily obtained for use in the case;
- 27 (3) Fees for disbursements for printing and witnesses
- 28 (4) Fees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case;
- (5) Docket fees under section 1923 of this title;
- (6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title."

1 Rule 54(d) to refuse to tax costs in favor of a prevailing party.” *Id.* (citing *Crawford Fitting Co.*,  
 2 482 U.S. at 442). The court may not award costs unless the expenses to be taxed were expended  
 3 for materials or services “necessarily obtained for use in the case” and in an amount that is  
 4 reasonable. 28 U.S.C. § 1920; *Competitive Techs v. Fujitsu Ltd.*, No. C-02-1673, 2006 U.S. Dist.  
 5 LEXIS 98312, at \*22-24 (N.D. Cal. Aug. 23, 2006). “The prevailing party bears the burden of  
 6 stating its costs with the requisite specificity, and the prevailing party necessarily assumes the  
 7 risks inherent in a failure to meet that burden.” *Terry v. Allstate Ins. Co.*, No. Civ. S-05-2261,  
 8 2007 U.S. Dist. LEXIS 81051, at \*3-4 (E.D. Cal. Oct. 31, 2007); *Shum v. Intel Corp.*, 682 F.  
 9 Supp. 2d 992, 1001 (N.D. Cal. 2009) (“the burden is on [the prevailing party] to demonstrate that  
 10 the taxation of costs is appropriate”).

### 11 **III. NETFLIX FAILED TO PROVIDE SUFFICIENT DOCUMENTATION TO** 12 **SUPPORT CERTAIN OF ITS COSTS**

13 The burden is on the party seeking reimbursement for fees for exemplification and the  
 14 costs of making copies to prove that the reproductions “were necessarily obtained for use in the  
 15 case rather than for convenience of counsel.” *Competitive Techs.*, 2006 U.S. Dist. LEXIS 98312,  
 16 at \*23-24. Recently, in a case arising from the Northern District of California, the Federal Circuit  
 17 clarified the documentation requirements that a prevailing party must meet to recover costs:

18 When the prevailing party seeks to recover copying costs related to  
 19 its own document production, to meet the documentation  
 20 requirements, the prevailing party must establish, in connection  
 21 with its proposed Bill of Costs, that the reproduced documents were  
 22 produced by it pursuant to Rule 26 or other discovery rules; that  
 23 they were copied at the prevailing party’s expense and at the  
 24 request of the opposing party; and that the copies were tendered to  
 25 the opposing party.

26 *In re Ricoh Co. Patent Litig.*, No 2011-1199, 2011 WL 5928689, at \*6 (Fed. Cir. Nov. 23, 2011)  
 27 (reversing an award of copying costs for abuse of discretion). The documentation provided by  
 28 Netflix does not meet its burden, particularly as demonstrated by its poor documentation relating  
 to its TIFF conversion rates and copying costs.

#### 26 **A. Netflix’s Documentation Does Not Support Its Costs for TIFF Conversion** 27 **Rates Over \$0.02/Page**

28 Netflix failed to provide adequate documentation to support its claimed rates for TIFF

1 conversion (“TIFFing”). In the invoices attached to its bill of costs, the first instance of a  
2 TIFFing charge is for \$0.02 per page on August 31, 2009. (Bill of Costs Exhibit C, Part 2, at  
3 13.)<sup>5</sup> Netflix then apparently allowed TIFF pricing to vary dramatically and seeks to recover  
4 \$0.04, \$0.05, and even \$0.07 per page (more than triple the amount charged to Netflix in the  
5 earliest invoice supplied). (See Exhibit 1.) With no explanation for these discrepancies, Netflix  
6 attempts to tax the vast majority of its TIFFing costs at a much higher rate than the initial \$0.02  
7 per page. Yet it is not clear from the invoices what services were provided at each price point (or  
8 if there was any difference in services provided), for whose benefits those services were  
9 performed, or whether the TIFFs were all produced to Plaintiffs. See *Ricoh*, 2011 WL 5928689,  
10 at \*5 (explaining that “a list of costs and expenses must be adequately detailed, identifying the  
11 purpose of each expenditure . . . and not filled with generic references such as ‘transcripts,’  
12 ‘publication,’ and ‘document production’”) (internal quotation omitted).

13 In defending its bill of costs in the Blockbuster Subscribers’ action, Netflix submitted a  
14 declaration by Mr. Kellermann, its counsel’s “Director of Electronic Discovery,” criticizing  
15 Plaintiffs’ expert’s assessment that \$0.02-\$0.03 per page was an appropriate rate for TIFFing.  
16 (See Declaration of Kellermann ¶ 19, ECF No. 458; see also Declaration of Schiefelbein ¶¶ 17-  
17 19, ECF No. 447-1.) Mr. Kellermann claimed that Netflix contracted with its e-discovery vendor  
18 for a \$0.07 per page TIFFing rate and that “[n]one of the vendor proposals reviewed for this  
19 litigation offered a price lower than \$0.07 per page for TIFF conversion . . . . [and] [n]one of the  
20 quotes received by Wilson Sonsini from vendors in connection with other matters in 2009 . . .  
21 offered a price lower than \$0.07 for the same services.” (See Declaration of Kellermann ¶ 19,  
22 ECF No. 458.) On their face, Netflix’s supporting invoices prove these statements false. In  
23 August of 2009 – in the very first invoice for TIFF conversion submitted with the bill of costs –  
24 Esquire Solutions charged Netflix \$0.02 per page for TIFF conversion – a nickel less than the  
25 supposed contract rate Mr. Kellermann claims was the lowest price offered. At other times,  
26 Netflix was charged \$0.04 or \$0.05 cents a page – also lower than what Mr. Kellermann claims

27 <sup>5</sup> For the Court’s convenience, Plaintiffs created a chronological chart of Netflix’s TIFFing  
28 charges, attached hereto as Exhibit 1.

1 was the lowest price offered. (*See* Exhibit 1.) While, at first blush, pennies per page may seem  
2 insignificant, in the context of e-discovery, where millions of pages of documents are converted  
3 to TIFFs, the failure to properly manage or account for TIFF costs can mean a difference of  
4 hundreds of thousands of dollars. Here, had Netflix paid the initial rate of \$0.02 per page for  
5 TIFFing all of the TIFFed pages, it would have saved \$408,927.02. (*See* Exhibit 1.) The rate of  
6 \$0.07 per page should be disallowed and Netflix’s claimed TIFFing charges taxed against the  
7 Netflix Subscribers should be reduced by \$204,577.99, one-half of the total amount incurred by  
8 Netflix.<sup>6</sup> (The other one-half was apportioned to the bill of costs in the Blockbuster Subscribers’  
9 actions.)

10 **B. Netflix’s Documentation Does Not Support Its Claim for Certain Copying**  
11 **Costs**

12 Plaintiffs object to \$16,942.40 in Netflix’s claimed costs for copying and “blowbacks”<sup>7</sup>  
13 because Netflix failed to provide sufficient documentation for these costs. (*See* Bill of Costs  
14 Exhibit C, Part 2, at 38-39, 43, 47-48, 50-57, 59-65, 68, 70.)<sup>8</sup> For example, invoices submitted by  
15 Netflix reflect entries for “Copying BLACK AND WHITE” and “Heavy Litigation Copying.”  
16 (*See, e.g.*, Bill of Costs Exhibit C, Part 2, at 38-39, 47.) It is impossible to determine whether  
17 these copies were provided to Plaintiffs or the Court, or were merely for the convenience of  
18 counsel. *Ricoh*, 2011 WL 5928689, at \*6 (finding documentation inadequate to support an award  
19 of copying costs, noting that “we are unable in many instances to determine what documents were  
20 being reproduced and to which side the copies were ultimately provided”). For this reason,

21 <sup>6</sup> Plaintiffs’ argument is distinct from its arguments regarding TIFFing costs in the Blockbuster  
22 Subscribers’ bill of costs. (ECF No. 447.) There, Plaintiffs argued that the TIFFing rates  
23 incurred by Netflix were higher than industry standards. Here, Plaintiffs explain that the initial  
24 invoice shows that lower TIFF pricing was not only available to Netflix, but Netflix at times  
25 actually paid a lower rate. Netflix’s bill of costs provides no explanation as to why Netflix did  
26 not manage its vendor to this lower price point. Further, Netflix fails to provide the type of  
27 documentation recognized as required by the recent *Ricoh* decision. *See* 2011 WL 5928689, at  
28 \*5-6. In addition, Plaintiffs reassert and incorporate by reference their prior argument that  
Netflix’s TIFFing costs are not recoverable because Netflix chose to pay an above-market rate.  
(ECF No. 447, at 8, 10.)

<sup>7</sup> “Blowbacks” is a term used to reference hard copy print outs of large volumes of documents in  
a production database.

<sup>8</sup> The \$16,942.40 includes \$4,102.01 in costs for copying done by Netflix’s counsel in house, and  
for which Netflix has not provided invoices.

1 Netflix should not recover for these copying costs.

2 **IV. THE COURT SHOULD REFUSE TO TAX CERTAIN COSTS BECAUSE THEY**  
3 **ARE NOT REASONABLE OR RECOVERABLE**

4 Courts may not award costs unless the expenses to be taxed were expended for materials  
5 or services “necessarily obtained for use in the case” and in an amount that is reasonable. *See* 28  
6 U.S.C. § 1920; *Competitive Techs*, 2006 U.S. Dist. LEXIS 98312, at \*22-24. Netflix attempts to  
7 tax Plaintiffs for costs it incurred in reproducing documents it initially produced in improper  
8 formats or should not have produced at all, driving up the costs of the litigation. These costs are  
9 not reasonable. In addition, Netflix seeks to recover for consulting fees, a type of cost  
10 specifically barred as intellectual efforts, and certain e-discovery costs that are not “copying” or  
11 “exemplification” costs as required by the statute.

12 **A. Netflix Cannot Seek Costs for Documents It Produced Multiple Times in**  
13 **Different Formats**

14 During discovery, Netflix produced thousands of pages of PowerPoint presentations as  
15 black and white TIFFs. After Netflix filed a color version of one of these presentations in  
16 connection with a “pre-argument submission” filed in opposition to Plaintiffs’ class certification  
17 motion, Plaintiffs requested Netflix produce PowerPoint files as they were kept in the ordinary  
18 course of business – here, in color. (*See* Exhibit 2, 8/27/10 Barile letter to Walsh (explaining that  
19 “[a] color document provides a more accurate presentation of evidence to the Court. By its  
20 submission, it seems that Netflix agrees. Moreover, it is apparent that Netflix keeps color, rather  
21 than black-and white, PowerPoint presentations on file in the ordinary course of business”).) The  
22 parties agreed that Plaintiffs would only pay one-half of the cost of the color productions.  
23 (Exhibit 3, 10/8/10 Cauley letter to Barile.) Eventually, Netflix produced over 600,000 pages of  
24 the same PowerPoint presentations – albeit in color this time. (*See* Exhibit 3, 10/8/10 Cauley  
25 letter to Barile; Exhibit 4, 10/18/10 Reichenberg letter to Barile.) Thus, Netflix produced, at a  
26 minimum, 600,000 pages of black and white PowerPoint presentations and 600,000 pages of the  
27 same presentations in color.

28 Netflix is not permitted to tax the costs of duplicative productions to Plaintiffs for two  
reasons. First, Plaintiffs should not bear *any* of the cost of Netflix’s black and white productions.

1 Netflix maintained these PowerPoints in color electronic files in the ordinary course of business –  
2 a fact that became obvious when Netflix submitted a color version of a presentation to the Court a  
3 year into discovery. (Exhibit 2, 8/27/10 Barile letter to Walsh.) Because Plaintiffs requested  
4 Netflix produce all documents as they were maintained in the ordinary course of business  
5 (Exhibit 5, 7/22/09 Document Requests, Instruction No. 3), Netflix should have produced the files  
6 in color in its original productions. Applying Netflix’s TIFFing rate of \$0.07 per page to the  
7 600,000 black and white pages, Netflix’s TIFFing costs should be reduced by \$42,000 (\$21,000  
8 of which Netflix seeks to tax against the Netflix Subscribers).<sup>9</sup>

9 Second, Plaintiffs should – at the most – bear half of the cost of the color TIFFs. To avoid  
10 burdening the Court with motions practice, Plaintiffs agreed to share the cost of producing the  
11 color presentations. Courts find that when parties enter into an agreement to share costs, the  
12 portion of the shared costs paid by the prevailing party is not recoverable. *See Ricoh*, 2011 WL  
13 5928689, at \*4 (reversing district court’s award for plaintiff’s share of a document database  
14 because the parties agreed to share the costs of creating a database). Plaintiffs should not be  
15 forced to pay for Netflix’s entire color production when the parties agreed that Plaintiffs would  
16 only pay one-half. Applying Netflix’s \$.07/page TIFFing rate, Netflix incurred \$42,000 to TIFF  
17 the color pages, half of which – \$21,000 – it seeks to tax against the Netflix Subscribers. Should  
18 the Court determine that this is a taxable cost, Plaintiffs should only pay for one-half of that  
19 amount (\$10,500) pursuant to the parties’ agreement.

20 Thus, as explained above, Netflix’s claimed TIFFing costs for producing the PowerPoint  
21 presentations should be reduced by a total of \$31,500.

22 **B. Netflix Cannot Seek Costs for Restamping Documents Inadvertently  
23 Produced by Netflix**

24 On one of the supporting invoices from Netflix’s e-discovery vendor, Esquire, there is an  
25 entry for “STAMPING OF OLD PROD 017” in an amount of \$2,684.12. (*See* Bill of Costs  
26 Exhibit C, Part 2, at 31.) An employee of Esquire previously represented to this Court that

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27 <sup>9</sup> If the Court agrees that TIFF rates above \$.02 per page are not taxable, these amounts should be  
28 adjusted downward accordingly.



1 “STAMPING OF OLD PROD 017” reflects “charges for re-stamping a production where quality  
2 control revealed that some privileged and other documents not to be produced were inadvertently  
3 included in a production.” (See Declaration of Vivian Liu-Somers, ECF No. 457.) Plaintiffs  
4 should not be responsible for the “re-do” costs caused by the inadvertence of Netflix or its  
5 vendor. Thus, Netflix’s claimed costs should be reduced by \$1,342.06.

6 **C. Netflix Cannot Seek Costs Associated with Professional Consulting Fees**

7 Plaintiffs object to Netflix’s attempt to tax \$14,355.50 in costs related to the design of  
8 visual aids. (See Bill of Costs Exhibit C, Part 2, at 2-3, 5-9.) “[T]he Ninth Circuit has limited  
9 recoverable exemplification fees to those ‘for the physical preparation and duplication of  
10 documents, not the intellectual effort involved in their production.’” *Gabriel Techs. v. Qualcomm*  
11 *Inc.*, NO. 08 CV 1992, 2010 U.S. Dist. LEXIS 98229, at \*35 (S.D. Cal. Sept. 20, 2010) (quoting  
12 *Zuill v. Shanahan*, 80 F.3d 1366, 1371 (9th Cir. 1996)). Costs associated with design work – the  
13 quintessential intellectual efforts – fall outside the scope of Civil L.R. 54-3(d). *Pixion Inc. v.*  
14 *PlaceWare Inc.*, No. C 03-02909 SI, 2005 U.S. Dist. LEXIS 11351, at \*9-10 (N.D. Cal. May 25,  
15 2005) (denying a request for costs associated with “technical assistance necessary to enable”  
16 display software, because “the work performed . . . appears to be the creation and preparation of  
17 the *content* of demonstrative exhibits, not the preparation of exhibits themselves”) (emphasis in  
18 original). Netflix’s claimed costs should be reduced by \$14,355.50, the amount Netflix seeks to  
19 tax for these costs.

20 **D. Most Activities Listed on Netflix’s E-Discovery Vendor’s Invoices Are Not**  
21 **Copying or Exemplification Costs and Cannot Be Taxed Because They Are**  
22 **Not Authorized by the Taxing Statute**

23 Approximately \$317,616.69 of Netflix’s claimed costs for “copying” cannot be taxed  
24 because (1) Netflix has failed to meet its burden to show that any of the expenses are in fact  
25 exemplification or copying costs, and (2) as a matter of law § 1920(4) cannot be expanded to  
include costs of searching for and retrieving documents for potential production.<sup>10</sup>

26 Netflix’s Bill of Costs claims \$702,990.09 of costs for “Fees for exemplification and the

27 <sup>10</sup> For the Court’s convenience, Plaintiffs created a chart listing all of these e-discovery costs by  
28 category, attached hereto as Exhibit 6.

1 costs of making copies of any materials where the copies are necessarily obtained for use in the  
2 case.” (Bill of Costs, ECF No. 549.) Netflix provided invoices from its “e-discovery” vendor,  
3 Esquire Solutions in support of its Bill of Costs. (See Bill of Costs Exhibit C, part 2.) The  
4 invoices do not list any service as “exemplification” or “copying.” Netflix has provided no  
5 explanation or elaboration whatsoever with this bill of costs for the hundreds of thousands of  
6 dollars charged for services listed as “Keyword Searching,” “Hourly Data Analysis and Project  
7 Management,” “Data Upload,” “Keyword Data,” “EDD Processing,” “Data Services” and others.  
8 Although Netflix previously submitted a declaration explaining these entries with its Bill of Costs  
9 relating to the Blockbuster Subscribers’ action, a review of that declaration does not show that  
10 any of these entries are “copying” or “exemplification” costs as required by the statute. (See, e.g.,  
11 Declaration of Vivian Liu-Somers, ¶ 16, ECF No. 457 (explaining that “Clearwell Processing,”  
12 “Keyword Search,” “Keyword Data,” “Keyword Filtering,” and “Filtering” refer to charges for  
13 “the use of automated software processes to reproduce the set of documents for potential  
14 production into a reduced set of documents that did not include certain types of documents that  
15 did not need to be produced.”).)

16 The United States Supreme Court has held that courts do not have discretion to tax costs  
17 for items not listed in 28 U.S.C. § 1920. *Crawford Fitting*, 482 U.S. at 445. It is the prevailing  
18 party’s burden to establish that its litigation expenses are authorized, taxable costs under § 1920.  
19 *Shum*, 682 F. Supp. 2d at 1001. Netflix’s failure to demonstrate how the e-discovery consultant’s  
20 services constitute “copying” alone warrants exclusion of the expenses from taxation.

21 However, an examination of even the bare-bones itemization on the Esquire Solutions  
22 invoices shows that the electronic evidence tasks and activities listed are not “copying,” but  
23 instead are the computerized, digital substitutes for the work that was traditionally performed by  
24 attorneys and paralegals in discovery of physical, paper documents. Activities such as “Keyword  
25 Searching,” “Hourly Data Analysis and Project Management,” “Data Upload,” “Keyword Data”  
26 take the place of searching the client corporation’s oftentimes vast documents and files, selecting  
27 sets and subsets for review as to their relevance, and preparing those documents for copying and  
28 production. No reading of § 1920 has ever permitted the costs of that work, in the form of hourly

1 attorneys' fees and paralegal fees, to be taxed against the non-prevailing party. Rather, only the  
2 actual physical copying is within § 1920(4). In the electronic realm, this is likely limited to the  
3 invoiced items "TIFFING" and "Burning to CD."

4 When confronted with costs incurred by a prevailing party through its choice to engage an  
5 e-discovery vendor, the overwhelming majority of courts hold that searching for and retrieving  
6 documents electronically is not "copying" under § 1920(4), nor is the creation of searchable  
7 forms of electronic documents. *See, e.g., Klayman v. Freedom's Watch, Inc.*, 2008 WL 5111293,  
8 at \*2 (S.D. Fla. Dec. 8, 2008); *Fells v. Virginia Dept. of Transportation*, 605 F. Supp. 2d 740,  
9 743-44 (E.D. Va. 2009); *Mann v. Heckler & Koch Defense, Inc.*, 2011 WL 1599580 (E.D. Va.  
10 Apr. 28, 2011).

11 Because Netflix has failed to show that approximately \$317,616.69 of its e-discovery  
12 vendor's charges are "exemplification or copying" within § 1920(4), the district court cannot tax  
13 those costs against plaintiffs.

#### 14 **V. NETFLIX IMPROPERLY SEEKS TO RECOVER COSTS THIS COURT** 15 **PREVIOUSLY HELD WERE NOT RECOVERABLE**

16 This Court previously rejected Netflix's attempt to tax costs for expedited deposition  
17 transcripts, videotaping depositions, and optical character recognition ("OCR"). (*See* ECF No.  
18 515, at 2.) In ruling on Netflix's bill of costs in the Blockbuster subscribers' cases, the clerk  
19 taxed \$10,652.50 in costs related to videotaping depositions, but the Court overruled that award,  
20 noting that Civil Local Rule 54-3(c)(1) permits taxation of costs for only one method of recording  
21 the depositions. (ECF No. 515, at 2.) The Court similarly overruled taxation of over \$30,000 in  
22 fees for expedited deposition transcripts and OCR, as those fees were likely incurred for the  
23 convenience of counsel. (*Id.*) Nevertheless, in its current Bill of Costs, Netflix wrongly seeks to  
24 recover \$12,109.82 for these categories of expenses.

#### 25 **A. Expedited Deposition Transcripts**

26 Netflix seeks to tax at least \$11,673.65 in expedited transcript fees. Based on invoices  
27 from its discovery vendor, Discovery Works Global, Netflix seeks \$2,961 in fees for overnight  
28 copies of transcripts. (*See* Bill of Costs Exhibit C, Part 1, at 35-36; charging \$1,543.50 and

1 \$1,417.50 for “Daily Copy – Overnight”.) In each instance, the overnight charge doubles the cost  
 2 of the deposition transcript itself. (*See id.*) Netflix’s invoices from another vendor, Digital  
 3 Evidence Group, also reveal charges for expedited transcripts. Although Netflix’s supporting  
 4 documentation does not itemize these costs separately, a comparison of the charges reveals that  
 5 Netflix’s claimed deposition fees paid to Digital Evidence Group should be reduced by at least  
 6 \$8,712.65. According to those invoices, Digital Evidence Group charged \$2.95 per page for an  
 7 ordinary certified deposition transcript. (*See Bill of Costs Exhibit C, Part 1, at 4; charging*  
 8 *\$115.05 for a 39 page transcript.*) That same vendor charged \$5.50 per page for a “5 Day  
 9 Expedite[d] Deposition Transcript” (*see Bill of Costs Exhibit C, Part 1, at 2-3*), and Netflix  
 10 ordered the vast majority of its deposition transcripts at the \$5.50 per page expedited rate. (*See*  
 11 *Bill of Costs Exhibit C, Part 1, at 2-22.*) Because Plaintiffs should not be forced to pay fees  
 12 incurred for the convenience of Netflix’s counsel, any costs award should apply the \$2.95 per  
 13 page basic rate to all depositions serviced by Digital Evidence Group. Applying that rate results  
 14 in a reduction of \$8,712.65 to Netflix’s claimed costs. Below is a chart summarizing the pertinent  
 15 calculations:

Deponent	Cost Claimed by Netflix	Number of Pages	Per Page Rate Claimed	Cost at \$2.95/page	Difference
Leslie Kilgore	\$1,892 (Bill of Costs Exhibit C, Pt 1, at 2)	344	\$5.50	\$1014.80	\$877.20
Mark Stabingas	\$1,039.50 ( <i>id.</i> at 3)	189	\$5.50	\$557.55	\$481.95
Ari Sussman	\$1,192.60 ( <i>id.</i> at 5)	268	\$4.45	\$790.60	\$402
Janusz Ordover	\$1,519.80 ( <i>id.</i> at 6)	298	\$5.10	\$879.10	\$640.70
Steve Nave	\$951.50 ( <i>id.</i> at 7)	173	\$5.50	\$510.35	\$441.15
Jessica Teitz-Becker	\$1,089 ( <i>id.</i> at 8)	198	\$5.50	\$584.10	\$504.90
Barry McCarthy	\$1,237.50 ( <i>id.</i> at 9)	225	\$5.50	\$663.75	\$573.75
Neve Savage	\$632.50 ( <i>id.</i> at 10)	115	\$5.50	\$339.25	\$293.25
John Fleming v. 1	\$1,848 ( <i>id.</i> at 11)	308	\$6.00	\$908.60	\$939.40
John Fleming v. 2	\$247.50 ( <i>id.</i> at 12)	55	\$4.50	\$162.25	\$85.25
Kevin Swint	\$726 ( <i>id.</i> at 13)	132	\$5.50	\$389.40	\$336.60
Reginald Thompson	\$308 ( <i>id.</i> at 14)	56	\$5.50	\$165.20	\$142.80
Deborah Crawford	\$830.50 ( <i>id.</i> at 15)	151	\$5.50	\$445.45	\$385.05
Paul Kirincich	\$1,160.50 ( <i>id.</i> at 16)	211	\$5.50	\$622.45	\$538.05
Matthew Sevick	\$836 ( <i>id.</i> at 17)	152	\$5.50	\$448.40	\$387.60
Leslie Kilgore	\$1,050.50 ( <i>id.</i> at 18)	191	\$5.50	\$563.45	\$487.05
Neil Hunt	\$1,309 ( <i>id.</i> at 19)	238	\$5.50	\$702.10	\$606.90
Raul Vazquez	\$643.50 ( <i>id.</i> at 20)	117	\$5.50	\$345.15	\$298.35
Dominique Hanssens	\$627 ( <i>id.</i> at 22)	114	\$5.50	\$336.30	\$290.70
				<b>Total</b>	<b>\$8,712.65</b>

1 Because Netflix attempts to tax \$2,961 in fees for overnight transcripts and \$8,712.65 in  
2 expedited transcript fees, its costs should be reduced by \$11,673.65.

3 **B. Videotaping Costs**

4 Netflix seeks \$260 in costs associated with creating a DVD of the video deposition of  
5 Raul Vasquez. (*See* Bill of Costs Exhibit C, Part 1, at 21.) Netflix, however, also attempts to tax  
6 \$756 in costs related to the written transcript of this deposition. (*See* Bill of Costs Exhibit C, Part  
7 1, at 20.) The video costs are therefore duplicative and should be disallowed. (*See* ECF No. 515,  
8 at 2.)

9 **C. OCR fees**

10 Netflix also attempts to tax \$176.17 in OCR fees. (*See* Bill of Costs Exhibit C, Part 2, at  
11 51; listing half of \$322.52, plus 9.25% sales tax, as taxable costs.) Plaintiffs object to the taxation  
12 of these costs because, as this Court has previously held, these OCR fees are for the convenience  
13 of counsel. (*See* ECF No. 515, at 2.)

14 **VI. THE COSTS SOUGHT BY NETFLIX ARE NOT RECOVERABLE BECAUSE**  
15 **IMPOSING THE COSTS AGAINST PLAINTIFFS WILL CHILL FUTURE**  
16 **LITIGANTS AND THE NETFLIX SUBSCRIBERS' ACTION PRESENTED**  
17 **CLOSE AND DIFFICULT ISSUES**

18 The Court has discretion to refrain from taxing any costs to the prevailing party. *See*  
19 *Ass'n of Mexican-Am. Educators v. Cal.*, 231 F.3d 572, 592-93 (9th Cir. 2000). There are  
20 numerous equitable factors that support denying costs including: (1) a losing party's limited  
21 financial resources; (2) misconduct by the prevailing party; (3) the chilling effect of imposing  
22 high costs on future litigants; (4) whether the issues in the case were close and difficult; (5)  
23 whether the prevailing party's recovery was nominal or partial; (6) whether the losing party  
24 litigated in good faith; and (7) whether the case presented a landmark issue of national  
25 importance. *See Tibble v. Edison Int'l*, No. CV 07-5359, 2011 WL 3759927, at \*3 (C.D. Cal.  
26 Aug. 22, 2011). The Court should exercise its discretion to refrain from taxing costs because  
27 doing so would "chill" future litigants from bringing cases on behalf of consumers and the  
28 summary judgment decision was "close and difficult."

First, imposing costs against Plaintiffs for over \$700,000 (bringing the total against

1 Plaintiffs in this multi-district litigation to over \$1.4 million) will “chill” future antitrust actions.  
2 *See Stanley v. University of Southern California*, 178 F.3d 1069 (9th Cir. 1999) (finding the  
3 district court abused its discretion by taxing costs against a civil rights plaintiff without  
4 considering the “chilling effect” on future litigants); *Quan v. Computer Sci. Corp.*, 623 F.3d 870,  
5 888-89 (9th Cir. 2010) (one reason for not taxing costs is to avoid a “chilling effect” on future  
6 actions); *White & White Inc. v. American Hospital Supply Corp.*, 786 F.2d 728, 731 (6th Cir.  
7 1986) (“awarding costs to the prevailing defendant could have a chilling effect on small  
8 businesses, for they may be dissuaded from bringing complex and expensive antitrust actions if  
9 they risk payment of substantial trial costs for defeat”). Taxing Plaintiffs for such a substantial  
10 amount of money will inhibit future litigants and/or their counsel from standing up to powerful  
11 corporations or trying to enforce the antitrust laws.

12 Second, the Court’s summary judgment was a “close and difficult” decision that does not  
13 warrant an award of costs. *See Ass’n of Mexican-Am Educators*, 231 F.3d at 592-93. The Netflix  
14 Subscribers’ case proceeded for almost three years. During that time, the Court certified a class  
15 (ECF No. 287), and preliminarily approved a settlement with Netflix’s Co-Defendant, Wal-mart  
16 (ECF No. 492). During oral argument on Netflix’s motion for summary judgment, the Court  
17 expressed uncertainty about her decision, explaining that making a ruling would be a “challenge”  
18 and that “I don’t really know how I am going to come out on this at all.” (Exhibit 7, 8/31/11  
19 Hearing Tr., 74, 84.) When analyzing whether to award costs, “the closeness of a case is judged  
20 not by whether one party clearly prevails over another, but by the refinement of perception  
21 required to recognize, sift through and organize the relevant evidence, and by the difficult[y] of  
22 discerning the law of the case.” *In re New Motor Vehicles Canadian Export Litig.*, No. 1532,  
23 2010 U.S. Dist. LEXIS 37955, at \*16-17 (D. Me. April 16, 2010) (quoting *White & White, Inc.*,  
24 786 F.2d at 728). Here, the Court acknowledged “the challenge is the voluminous amount of  
25 information both sides have presented to the court with respect to how to look at the facts and all  
26 the various different documents that have been generated.” (Exhibit 7, 8/31/11 Hearing Tr., 74.)  
27 Because this is the type of close case where costs should not be taxed, the Court should exercise  
28 its discretion and deny all of Netflix’s claimed costs.

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**CONCLUSION**

For all of the foregoing reasons, Plaintiffs respectfully request that the Court not tax the costs identified in Netflix’s bill of costs. To the extent the Court permits taxation of costs, Plaintiffs respectfully request it only tax those costs Netflix sufficiently supported and demonstrated were appropriate under 28 U.S.C. § 1920.

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Respectfully submitted,

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