NO. 11-18034

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ANDREA RESNICK; et al.,
Plaintiffs-Appellants
v.
NETFLIX, INC.; et al.,
Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

REPLY BRIEF FOR ANDREA RESNICK, *et al.* AS APPELLANTS

BAKER & HOSTETLER LLP
Robert G. Abrams
Gregory L. Baker
Danyll W. Foix
Washington Square, Suite 1100
1050 Connecticut Avenue, NW
Washington, DC 20036
Telephone: (202) 861-1699
Facsimile: (202) 861-1783
Email: rabrams@bakerlaw.com
gbaker@bakerlaw.com
dfoix@bakerlaw.com
Lead Plaintiff Counsel in MDL 2029

SAVERI & SAVERI, INC.
Guido Saveri (22349)
Lisa Saveri (112043)
706 Sansome Street
San Francisco, CA 94111
Telephone: (415) 217-6810
Facsimile: (415) 217-6813
Email: guido@saveri.com
lisa@saveri.com
Liaison Plaintiff Counsel in MDL 2029

[Additional counsel on Signature page]

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Amazon	Amazon.com, Inc.
Best Buy	Best Buy Co., Inc.
BBI	Blockbuster, Inc.
CEO	Chief Executive Officer
CFO	Chief Financial Officer
CMO	Chief Marketing Officer
DVDR	Online DVD rental; the business of renting DVDs online for delivery by mail
DVDR Market	The rental of DVDs online by subscription in the United States as alleged (ER1487/¶27) and conceded by Netflix (ER1455/n2)
ER	Excerpts of Record. A citation as "ER100/¶10" refers to paragraph 10 of page 100 of Appellants' Excerpts of Record.
FER	Further Excerpts of Record. The citation format is the same as above for ER.
FRCP	Federal Rules of Civil Procedure
FRE	Federal Rules of Evidence
IB	Initial Appellant Brief (dated March 29, 2012). A citation as "(IB30)" refers to page 30 of the Initial Appellant Brief.
Market	*See* DVDR Market, *supra*
Market Allocation Agreement	The anticompetitive agreement (in both its written and unwritten form) entered into on or before May 19, 2005, by Defendants, to allocate at least the DVDR Market within the United States (ER1481/¶2; ER1493/¶45-ER1498/¶59)
MSN	Microsoft's Internet service

Musicland	The Musicland Group, Inc.
NB	Appellee Netflix's Opposition Brief (dated April 24, 2012). A citation as "(NB23)" refers to page 23 of Netflix's Opposition Brief.
Netflix	Netflix, Inc.
PA	The written agreement by Defendants effective May 5, 2005 (ER1108-17)
Wal-Mart	Wal-Mart Stores, Inc. and Walmart.com USA LLC, collectively
Walmart.com	Walmart.com USA LLC
Wal-Mart Stores	Wal-Mart Stores, Inc.
Yahoo!	Yahoo!, Inc.
2U, 3U	Unlimited DVD rental subscription plans corresponding to two DVDs and three DVDs out, respectively, at one time

SUMMARY OF ARGUMENT

Netflix fails to respond to virtually every injury-in-fact authority and argument presented by Plaintiffs. Pertinent decisions, cited by Plaintiffs, explain injury is assessed by inferring what would have occurred in a competitive world "but for" the exclusion or withdrawal of a market participant. Netflix ignores those decisions and instead argues there is no injury because Netflix did not lower its prices in the "real world" *after* Defendants had agreed Wal-Mart would stop competing. Netflix also ignores Plaintiffs' wealth of evidence raising a jury issue on injury from Netflix's restraint of trade, enhanced monopoly power, and supracompetitive pricing. Rather than confront this evidence, Netflix raises a new, and, therefore, improper, *class-wide* injury argument that, even if considered, lacks merit.

Betraying its profound lack of confidence in the District Court's injury-in-fact ruling, Netflix urges this Court to decide, on an *alternative basis*, under the rule of reason, that the PA benefits, rather than harms, competition because Wal-Mart was supposedly "insignificant." Netflix's shotgun approach (17 separately-labeled arguments) fails in the face of formidable obstacles: (1) there is no proof of actual benefits; (2) Netflix's arguments require resolution of disputed facts; and (3) the District Court said Plaintiffs presented sufficient evidence to get to the jury under the rule of reason. Moreover, Netflix's arguments are contradicted by its own actions: ***If Wal-Mart was insignificant, why was Netflix trying so hard to get Wal-Mart to exit the DVDR Market?***

In the same vein, Netflix asserts the PA cannot be *per se* unlawful because it enhanced "output." But purported output enhancement does not excuse market allocation, and Netflix does not actually prove output was enhanced. Also, by focusing on the *PA's text* – which does not encapsulate Defendants' full arrangement – Netflix fails to explain why *Defendants' agreement* to stop competing is not *per se* unlawful.

By failing to respond, Netflix concedes Plaintiffs may rely on the Amazon, Musicland, and Best Buy agreements as *evidence* supportive of their Sherman Act §§1-2 claims. Netflix's argument that Plaintiffs cannot introduce "new" theories misses the point – this evidence does not represent new theories and, even if it did, Netflix has known about them since at least 2009 (long before summary judgment).

This Court should reverse the District Court's decision and remand the case for trial.

ARGUMENT

I. NETFLIX DOES NOT REFUTE PLAINTIFFS' SHOWING OF GENUINE ISSUES OF MATERIAL FACT AS TO INJURY-IN-FACT

A. Netflix's New Class-Wide Injury Argument Is Procedurally Improper, And Contrary To Fact And Expert Opinion

Netflix's primary injury-in-fact argument – no *class-wide* injury (NB16-19) – is newly raised. On summary judgment, Netflix did not argue, as it does now, that DVDR pricing plan variety (3U, 2U, *etc*.) precludes class-wide injury. (ER226-28; SER229-35; SER1608-09.) For this reason, Netflix's argument is procedurally improper and should be rejected. *See Janes v. Wal-Mart Stores, Inc.*, 279 F.3d 883, 887 (9th Cir. 2002) ("Issues raised for the first time on appeal usually are not considered.").

Netflix's argument, if considered, is contrary to the facts. It is undisputed that Netflix maintained a structural relationship among its non-negotiable price plans (ER1235/¶102; ER1309/¶85), and initiated price changes simultaneously across all plans (ER1235/¶101; ER1310/¶86). Based on these facts, Dr. Beyer opined "[h]ad Netflix lowered price on the 3-out unlimited plan…it would have correspondingly lowered price on the remainder of its plans." (ER1235/¶102.) Netflix's supracompetitive 3U plan prices reflected supracompetitive prices for its other plans and, thus, injury to all subscribers (class members).

B. The Injury-In-Fact Argument Netflix Raised Below Failed To Address The "But For" World, And Is Contradicted By The Evidence

Netflix's only injury-in-fact argument presented here that was raised below – its contention that Netflix would have not cut prices in response to Wal-Mart because it did not reduce prices in response to BBI in May 2005 (IB19-23) – reflects the same conceptual error made by the District Court. In cases involving market exclusion or withdrawal, injury-in-fact is assessed not by what happened (or did not happen) after the exclusion or withdrawal, but rather by what a reasonable juror could infer would have occurred in a hypothetical competitive market "but for" the exclusion or withdrawal. *See Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 124-25 (1969) (inferring injury from what prices/sales would have been but for challenged conduct); *Dolphin Tours, Inc. v. Pacifico Creative Servs.*, 773 F.2d 1509, 1509-11 (9th Cir. 1985) (same).

Instead of addressing the "but for" competitive world, Netflix wrongly focuses on what it actually did (or did not do) in May 2005 *after* Defendants agreed not to compete. (ER943; ER945; ER952-53; ER959; ER1042; ER1048 (Netflix's Hastings and Wal-Mart's Fleming discussed Wal-Mart's exit from ***October 2004*** and reached "handshake" agreement on ***March 15, 2005*** for Wal-Mart to stop competing).) By focusing on its actions *after* securing Wal-Mart's agreement to exit, Netflix fails to eliminate all material injury-in-fact issues, including, critically, whether Netflix would have cut prices in a "but for" world where Netflix competed with Wal-Mart and BBI.

Aside from this legal error, the supposedly "undisputed facts" Netflix advances to support its flawed approach are controverted by other facts, omit necessary contextual facts, and disregard inferences in Plaintiffs' favor:

Netflix's "undisputed facts"	**Controverting facts, important contextual facts, and inferences favorable to Plaintiffs**
No. 1 - "***[N]one*** of Netflix's contemporaneous documents considering a 3U price decrease gave Walmart (as opposed to [BBI] and Amazon) ***any*** consideration." (NB20.)[1]	• Hastings admitted: "***Netflix [is] up against Wal-Mart***, Amazon, Blockbuster…[a]nd ***it's why we're doing the price cut***…." (ER934.) • In January 2005, as Netflix considered price cuts, Hastings deemed Wal-Mart's announced 2U price cut to $12.97 significant enough to inform his executives immediately. (ER982.) • Netflix forecasted in January 2005, when Wal-Mart was still in the market, that Netflix would "likely" cut prices in March 2005. (ER988-89.) • Hastings recognized Wal-Mart's agreement to exit would relieve pressure to cut prices and perhaps even increase prices. (ER407; ER417.)

[1] All emphases are added unless otherwise stated.

No. 2 - "[N]othing to suggest why the continued presence of *Walmart* in DVDR would have had an impact on *Netflix's* pricing by May 2005." (NB19 (original emphases.)	• *See* No. 1, *supra*. • Dr. Beyer opined the continued presence of Wal-Mart in a three-firm market would have driven down Netflix's 3U price to $15.99 (with corresponding decreases for other plans). (ER1299/¶64-ER1318/¶102; ER1224/¶80-ER1239/¶111.) • Dr. Gundlach opined the "Wal-Mart Effect" would have driven down DVDR prices over time. (ER578/¶9; ER583/¶18-ER624/¶93.)
No. 3 - Netflix did not lower its price by May 2005 in response to BBI. (NB19.)	• Netflix previously lowered its price in response to Wal-Mart, Amazon, and Blockbuster. (ER934.) • BBI announced more price cuts on December 22, 2004. (ER972.) • Hastings said "the key issue" was having two-firm instead of three-firm market. (ER407.) • Hastings pursued Wal-Mart's exit starting in October 2004. (ER943; ER952-53; ER959; ER961; ER1167.) • A Netflix executive in May 2005 explained: "Take ***walmart*** and AMZM [sic] out and investors will annoint [sic] us the category killer [in] the online space.… Probably also discourages Icahn and BBI from pursuing their current pricing strategy." (ER1417.) • Shortly after Wal-Mart's exit, BBI *increased* its price "as planned" by *Hastings*, ending the price war. (ER1073.)

No. 4 - Wal-Mart's market share was declining. (NB20.)	• Wal-Mart only entered the DVDR Market in mid-2003, its subscribership increased significantly, and its distribution system grew faster than Netflix's during a comparable period. (ER568; ER563/¶38-ER613/¶73; ER765; ER1289/¶44; ER1446.) • On January 7, 2005, Fleming said Wal-Mart's DVDR service was among the "very good businesses" that Wal-Mart was "focused on developing over the next year or two." (ER984-85.)
No. 5 - Wal-Mart's 3U price was $17.36 in May 2005. (NB20.)	• In May 2005, Wal-Mart's $17.36 3U price was lower than Netflix's $17.99 3U price. (ER939-41.) • When Wal-Mart's 3U price was $17.36, BBI lowered its 3U price to $14.99 on December 22, 2004, and Wal-Mart responded by lowering its 2U price – its "featured price" – to $12.97, the lowest 2U price in the market. (ER977; ER982.) • A majority of Wal-Mart subscribers preferred its 2U plan. (ER742.)
No. 6 - Wal-Mart cancelled *all* expansion plans in January 2005. (NB20.)	• Fleming said Wal-Mart planned to expand in 2005. (ER984-85.) • Wal-Mart's February 2005 document shows plans for continued expansion. (ER741-42.)
No. 7 - Wal-Mart's future projections indicated losses and no meaningful expansion. (NB20.)	• Given Wal-Mart's enormous resources, its projected losses were quite small, and Netflix also lost money for several years after entering the DVDR Market. (ER579/¶10-ER583/¶17; ER1220/¶72; ER1289/¶45; ER1437.) • *See* No. 6, *supra*.

No. 8 - Wal-Mart took an accounting reserve for closing its DVDR business effective January 31, 2005. (NB20.)	• The reserve, retroactive to January 31, did not represent an irreversible decision to exit, and Wal-Mart's exit was not authorized until May 4, 2005, long after Defendants' agreement was struck. (SER1192; FER31/143:15-20; FER29/93:10-94:2.) • January 2005 Wal-Mart documents show plan to "monitor [DVDR] over the next 2-3 months" before making a decision. (FER23-24.) • February 2005 Wal-Mart documents reflect discussion of "possible" DVDR phase-out "in the long-term." (SER165.)

Based on *all* the facts and inferences, a reasonable jury could easily reject Netflix's version of the "facts," and conclude (1) in the three-firm "but for" world, Netflix would have reduced its 3U price to $15.99 by May 2005 and (2) in the "real world," Netflix did not decrease its price because it no longer needed to after eliminating Wal-Mart and creating a highly-concentrated two-firm market.

C. Netflix Fails To Rebut Plaintiffs' Evidence and Authorities Raising An Injury-In-Fact Jury Question

Netflix ignores Plaintiffs' evidence supporting an inference that Netflix would have lowered DVDR prices if Defendants had not removed Wal-Mart from the DVDR Market (IB27-30), including critical evidence that: (1) Wal-Mart – the largest and most powerful retailer in history – was expanding and had capability to compete (IB5-7; IB27-28); (2) Netflix reduced prices three days before Hastings met with Fleming, due, in part, to competition from Wal-Mart (ER934); (3) Netflix expected imminent price reductions in a three-firm market with Wal-Mart and BBI

(ER988-89); and (4) the "Wal-Mart Effect" would have continued to drive down prices if Wal-Mart had remained in the Market (IB7-9; ER625/¶93). This type of evidence is sufficient to establish injury-in-fact according to Plaintiffs' authorities. (IB27-30 (citing *Zenith*, *Cardizem*, *Dolphin Tours*, *Blanton*, and *Greyhound Computer*).) Netflix failed to respond to these cases.

Netflix also ignores Plaintiffs' showing of injury-in-fact based on Netflix's enhanced monopoly power, creation of a duopoly, supracompetitive pricing, and reduced consumer choice. (IB30-34.) Netflix does not refute: (1) Netflix aimed for "total world domination" in 2005 (ER992); (2) Netflix was a monopolist in the conceded DVDR Market (ER1455/n2); and (3) elimination of Wal-Mart enhanced Netflix's enormous market share in the highly-concentrated Market, allowed Netflix to maintain supracompetitive prices, and reduced consumer choice (ER1299/¶64-ER1308/¶83; ER1224/¶80-ER1230/¶89). Netflix also fails to distinguish Plaintiffs' authorities establishing injury-in-fact in the fashion shown here. (IB32-33 (citing *Glen Holly*, *In re Insurance*, and *Full Draw*).)

Netflix further ignores Plaintiffs' cases establishing expert opinion is sufficient proof of injury-in-fact on summary judgment. (IB34-40 (citing *Southland Sod*, *Dolphin Tours*, *William Inglis & Sons*, and *Catalano*).) Netflix articulates no legitimate reason why a jury cannot rely on Plaintiffs' expert opinions to establish injury-in-fact. Netflix's main argument – that the District

Court determined these opinions could be disregarded because they are not supported by evidence (NB52) – is 100% wrong. In fact, the District Court denied Netflix's motions to exclude the testimony of Drs. Gundlach and Beyer (ER31-32), and Netflix did not cross-appeal.

Netflix attempts to overcome this problem by misdirection. Netflix quotes a portion of the District Court's Order describing ***Netflix's argument*** that there is "lack of evidence in the record" to support the opinions of Drs. Gundlach and Beyer as if it were the ***District Court's ruling***. It is not. (*Compare* NB52 *with* ER32.)

Netflix provides zero support to disregard Dr. Gundlach's opinions that, *inter alia*, Wal-Mart had the capability to remain and expand in the DVDR Market and the "Wal-Mart Effect" would have pressured prices downward. (ER593/¶38-ER625/¶93; ER805/¶8-ER822/¶38; ER847/¶82.) Netflix asserts Dr. Gundlach has "no knowledge" of the facts (NB53), but Netflix identifies no facts not known. And, Netflix cites another court's decision involving Dr. Gundlach in an unrelated case (*id.*), but that decision is irrelevant.[2]

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[2] Netflix omits decisions in other unrelated cases approving Dr. Gundlach's expert opinions. *See, e.g.*, *NAACP v. Acusport, Inc.*, 271 F. Supp. 2d 435 (E.D.N.Y.

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continued on next page…

Likewise, Netflix provides no reason to disregard Dr. Beyer's opinions that, *inter alia*, Wal-Mart would have increased its competitive significance in the DVDR Market, and the elimination of Wal-Mart reduced the Market to two competitors, strengthened Netflix's monopoly, and enabled Netflix to maintain supracompetitive prices.[3] (ER1218/¶66-ER1221/¶75; ER1224/¶80-ER1230/¶89; ER1287/¶40-ER1296/¶59; ER1299/¶64-ER1308/¶83.) Netflix's citation to decisions in unrelated cases regarding Dr. Beyer is irrelevant. (NB53-54.)[4] Netflix also asserts Dr. Beyer misinterpreted an economic model. (NB53.) After hearing that unmeritorious argument, the District Court denied Netflix's *Daubert* motion. (ER31-32.)

Finally, Netflix's bare assertion that *Rebel Oil* "provides the complete answer" misses the mark. (NB54.) Plaintiffs demonstrated *Rebel Oil* provides no

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2003); *NAACP v. A.A. Arms, Inc.*, 2003 WL 2003750, at *1 (E.D.N.Y. April 14, 2003).

3 Netflix did not contest that Dr. Beyer's calculation of monetary damages is sufficient to support an inference of injury-in-fact. (IB36 (citing *Nw. Pubs.*).)

4 Netflix omits decisions in other unrelated cases approving Dr. Beyer's expert opinions. *See, e.g.*, *DeLoach v. Philip Morris Co., Inc.*, 206 F.R.D. 551 (M.D.N.C. 2002); *In re Nw. Airlines Corp. Antitrust Litig.*, 197 F. Supp. 2d 908 (E.D. Mich. 2002).

basis for disregarding Plaintiffs' experts because (1) they are admittedly qualified, (2) they stated their factual bases, and (3) the inference of injury drawn from their opinions is reasonable and supported by specific evidence. (IB36-40.)[5]

II. NETFLIX DOES NOT REFUTE PLAINTIFFS' SHOWING THAT DEFENDANTS' AGREEMENT IS *PER SE* UNLAWFUL MARKET ALLOCATION, AND NETFLIX'S ALTERNATIVE RULE OF REASON ARGUMENT IS UNSUPPORTED AND UNSOUND

A. Netflix's "Joint Promotion" Label And Unsubstantiated "Output Enhancements" Do Not Excuse Market Allocation

"Joint promotion." Netflix argues that Plaintiffs cited (and Netflix knows of) *no cases* holding a "joint promotion agreement" to be unlawful *per se*. (NB24.) Netflix misses the point: Plaintiffs' cases show the title selected by Defendants does not provide a ready-made defense or make their unlawful agreement procompetitive.

As an initial matter, the record shows the PA is not about "joint promotion" – that is a pretextual label selected by Defendants to hide an unlawful conspiracy. In fact, Netflix had no intention of promoting Wal-Mart. (ER1042 ("***We don't***

[5] Dr. Beyer cited 520 documents, extensive data, 28 depositions, and economic literature. (ER1335-46; ER1256-59.) Dr. Gundlach cited 190 documents, 30 depositions, and research literature. (ER677-84; ER850-55.)

promote them, except we do a one time something nice for them at launch so it looks more partnership oriented”).)

Plaintiffs’ cases undermine Netflix’s contention (NB24-26) that the PA’s “joint promotion” label exempts it from the *per se* rule against market allocation. *See Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46 (1990) (*per curiam*) (cross-licensing agreement unlawful *per se*); *United States v. Topco Assocs., Inc.*, 405 U.S. 596 (1972) (group marketing agreement with purported efficiencies unlawful *per se*). Other decisions applied the *per se* rule to market allocation agreements despite positive-sounding labels. *See United States v. Sealy, Inc.*, 388 U.S. 350 (1967) (joint venture licensing agreements deemed *per se* unlawful); *Timkin Roller Bearing Co. v. United States*, 341 U.S. 593, 597-98 (1951) (“Nor do we find any support in reason or authority for the proposition that agreements…can be justified by labeling the project as ‘joint venture.’ Perhaps every agreement and combination to restrain trade could be so labeled.”).

Moreover, Plaintiffs challenge the ***entirety*** of Defendants’ arrangement, not only the PA’s text, because unlawful agreements may – and often must – be deduced from conduct. *See United States v. Parke, Davis & Co.*, 362 U.S. 29, 44 (1960) (“whether an unlawful combination or conspiracy is proved is to be judged by what the parties actually did rather than by the words they used”). Indeed, Wal-Mart admitted the PA does not represent Defendants’ full agreement.

(ER869/218:14-219:11.) Thus, the District Court erred in basing its *per se* ruling solely on the PA's text. (IB48-51.)

Netflix's attempt to compare the PA to purported agreements between ABC, CBS, and others (NB25-26) is pointless because alleged "joint promotion" agreements between ABC *et al*. prove nothing about Defendants' agreement.[6] There is *nothing* in the record about these other agreements, nor the circumstances surrounding them. Netflix's contention that condemning the PA would make *all* joint promotion agreements unlawful (NB26) is self-serving, unsupported exaggeration and does not excuse Netflix's misconduct. *See Oltz v. St. Peter's Comm. Hosp.*, 861 F.2d 1440, 1449 (9th Cir. 1988) (argument that invalidation of a particular agreement would prevent similar agreements is "flawed" and "overstated").[7]

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[6] Netflix's ABC/CBS comparison illustrates why Defendants' agreement is not "joint promotion." CBS/ABC may, as Netflix claims, promote each other's TV shows. Unlike Defendants, CBS/ABC did not stop competing with each other, and, unlike here, there is no evidence that ABC/CBS are monopolists, or their agreement created a duopoly or maintained supracompetitive prices.

[7] Whether the government closed a preliminary inquiry (NB11) has no probative value. *See Beachy v. Boise Cascade Corp.*, 191 F.3d 1010, 1015 (9th Cir. 1999).

"Output enhancement." The PA, Netflix says, is not "garden-variety division of markets" because it supposedly increased DVD rentals, title count, and "options to promote DVD sales." (NB26-27.) This argument is irrelevant. Purported procompetitive benefits do not excuse market allocation (IB56-57), and the District Court erred in relying on Netflix's unsubstantiated "benefits" as a reason not to apply the *per se* rule (IB57-60). Notably, Netflix does not attempt to rebut Plaintiffs' authorities showing the District Court's error. (IB56-60 (citing *Topco*, *Catalano*, *Maricopa County*, and *Freeman*).)

Netflix's argument, if considered, does not prove output actually increased because the enhancements claimed are illusory and/or by-products of Defendants shifting and consolidating *existing* output into the control of monopolist Netflix:

- Netflix claims DVD rentals *and* sales output increased because of "*options* to promote DVD sales through Wal-Mart" (NB27), but Netflix admitted promoting Wal-Mart was mere pretext (ER1042), and there is no evidence any such *options* were exercised.

- Netflix claims DVDR output increased because Netflix provided a "soft landing" to Wal-Mart's customers (NB26), but shifting Wal-Mart customers to Netflix (even if accomplished in full, which is not a matter of record) added ***no*** *new* output.

Because shifting existing output is commonplace in allocation agreements where the conspirators competed in the same market, Netflix's purported justification would swallow the prohibition. *See Palmer*, 498 U.S. at 49 (market allocation condemned *per se* despite defendant increasing "output" (in the sense Netflix suggested) by taking over its competitor's customers).

Finally, Netflix's assertion that the purported "consumer benefits could not have been achieved without the agreement" (NB27) highlights Netflix's burden to prove Defendants' agreement was essential to making such benefits available. *See NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 101 (1984). But Netflix cites ***no evidence*** to support its assertion.

B. The Evidence Repudiates Netflix's Argument That There Was No Market Allocation Agreement

Quid pro quo market allocation. Netflix's sole argument against applying the *per se* rule to Defendants' *quid pro quo* market allocation is the mistaken claim that it is "uncontroverted" Netflix did not agree to refrain from new DVD sales. (NB28-30.) Contrary to Netflix's litigation position, contemporaneous documents of record show Netflix agreed to refrain from competing for new DVD sales.[8] An email between Netflix executives stated, "***we are the rental business, they are the sell-through business***." (ER1128.) Wal-Mart executives described the same

[8] Although Netflix's accusation that Plaintiffs fabricated evidence deserves no response (NB28), Plaintiffs cited the evidence Netflix says was missing (ER1010 at IB13).

agreement: "In a nutshell, WMT is getting out of the DVDR and we're going to be working together to build our businesses (***movies sell-thru for us, rental for NFLX***)." (ER1130.) The joint press release announcing the PA shows a *quid pro quo* by stating Wal-Mart would discontinue its DVDR business and "***[i]n return***" Netflix would promote Wal-Mart's new DVD sales. (ER1056.) After the PA was announced, Netflix's CFO asked "[d]o you mean new or used?" when asked whether the PA prohibited Netflix from selling DVDs (ER1173) – an unnecessary distinction absent Netflix's promise not to sell *new* DVDs.[9]

Moreover, it is undisputed Netflix refrained from making new DVD sales throughout the relevant period. That Netflix "considered" resuming new DVD sales later in 2005 does not change this fact. (NB30.) Netflix's decision *not* to resume sales supports, rather than undercuts, a *quid pro quo* agreement.

Netflix inaccurately represents Dr. Beyer "admitted the lack of evidence" of a Netflix agreement to refrain from selling new DVDs. (NB28.) The cited testimony is Dr. Beyer's response to a question about whether ***the PA's text***

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[9] Netflix seeks to whitewash its CFO's response by claiming it was "an obviously reasonable inquiry." (NB29.) That is an argument for the jury, which easily could conclude the CFO made this distinction because Netflix promised not to sell *new* DVDs but could sell *used* DVDs.

prohibits Netflix from making new DVD sales. (SER486/29:25-30:8.) He did not testify there is no evidence to support a finding that Netflix agreed to refrain from selling new DVDs. To the contrary, Dr. Beyer found strong economic incentives supporting such an agreement (ER1292¶52-1299¶63), and identified substantial supporting evidence, including Netflix's prior agreements (ER1207/¶48-ER1215/¶59).

Netflix's suggestion that there is no proof of *quid pro quo* lacks merit. (NB28-30.) The PA is direct evidence of Defendants' agreement, and related documents and conduct reasonably (*see* II.A-B, *supra*) support an inference that Netflix agreed to refrain from new DVD sales, *see* Areeda & Hovenkamp, *Antitrust Law* §1504 (3d. 2010) ("Clearly, the restraint consists in any written or formal documents…*plus the way the parties have enlarged or interpreted the documents by their conduct*.").[10]

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[10] These facts are not altered by Netflix's case citations. *Toscano*, 258 F.3d at 985, held contracts between sponsors and the PGA did not constitute direct evidence of conspiracy *among sponsors* because, unlike Defendants, the sponsors were not competitors. *Abraham*, 461 F.3d at 1261, and *Citric Acid*, 191 F.3d at 1106, found no conspiracy where, unlike here, there was little evidence of an agreement.

Single market allocation. Netflix's argument that single market allocation cannot be unlawful *per se* because there was no "*reciprocal* agreement" to divide markets (NB31-32) is refuted by *In re Cardizem CD Antitrust Litig.*, 332 F.3d 896 (6th Cir. 2003). Although Netflix asserts *Cardizem* does not apply because it involved an arrangement that harmed price and output with no efficiency justification (NB32), that in no way distinguishes *Cardizem* because the same harm exits here. Moreover, the *Cardizem* defendants (like Netflix) argued supposed procompetitive benefits excused their agreement, but the Sixth Circuit rejected that argument (as should this Court) because such benefits do not excuse *per se* unlawful conduct. *See id.* at 909.

Perhaps realizing the weakness of its argument, Netflix falls back on two specious contentions. Netflix argues there can be no market allocation because the PA said *Wal-Mart* "independently" decided to exit (NB32) – but that language was inserted by *Netflix* (ER1412-13; ER909/283:6-285:10). Netflix also argues the *per se* rule cannot apply because the PA mimics a merger. (NB31-32.) Netflix confuses the law applicable to unreasonable restraints with reasonable ones. Market allocations are judged unreasonable because they restrain trade without procompetitive economic integration *see Antitrust Law* §2030a (2d 2004), while mergers may be judged reasonable restraints because they can "achieve economies of scale or integration" or "synergies in the production or distribution of complementary goods," *id*. §901a (3d 2009).

There is no evidence Defendants' agreement achieved *any* "integration" or "synergies." (*See* II.C.2., *infra*.) Instead, their agreement was implemented to reduce competition and increase prices (ER407; ER992; ER1052; ER1417), and it affected a highly-concentrated market (ER1280/¶27-ER1283/¶31), so it would be unreasonable even if viewed as a merger, *see* DOJ & FTC, *Horizontal Merger Guidelines* §10 (2010) ("[e]fficiencies almost never justify a merger to monopoly or near-monopoly"). Defendants' agreement, lacking actual economic integration, cannot masquerade as a merger to avoid the *per se* rule. *See* DOJ & FTC, *Antitrust Guidelines for Collaborations Among Competitors* §3.2 (2000) ("mere coordination of decisions on price, output, customers, territories, and the like is not integration").

Netflix cites inapt merger cases (IB47-48) that, even if considered, are not supportive of its position. For instance, in *Northrop*, the challenged agreement enabled defendants to integrate economic activity, produce a new airplane, and enter and compete in a market from which they were otherwise foreclosed. 705

F.2d at 1052-53. Here, Defendants integrated nothing and created nothing; they simply eliminated Wal-Mart as a competitor.[11]

C. Netflix's Alternative Argument Shows No Error In The District Court Concluding Plaintiffs Raised A Triable Issue Under The Rule Of Reason

Electing to defend Defendants' agreement under the rule of reason, Netflix assumes the "heavy burden" of proving, with "hard" and "empirical" evidence, the agreement's supposed procompetitive benefits outweigh its anticompetitive effects.[12] *See NCAA*, 468 U.S. at 113; *Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 774-77 (1999). This fact-intensive "balancing test is normally reserved for the jury." *Am. Ad Mgmt., Inc. v. GTE Corp.*, 92 F.3d 781, 791 (9th Cir. 1996). Netflix's litany of arguments shows fact issues abound, as the District Court recognized. (ER21-22.)

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[11] In *Oracle*, 331 F. Supp. 2d at 1175, plaintiff failed to prove relevant market (it is conceded here). In *Arch Coal*, 329 F. Supp. 2d at 124-25, there were *numerous* competitors and concentration was lower. In *General Dynamics*, 415 U.S. at 510, the existence of long-term supply contracts indicated no competitive impact (there are no such contracts here).

[12] Netflix bears the burden of proving net procompetitive benefits because it is a conceded monopolist and market power "is essentially a 'surrogate for detrimental effects.'" *United States v. Brown Univ.*, 5 F.3d 658, 668-69 (3d Cir. 1993) (quoting *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 429 (1986)).

1. Netflix's monopoly power and intent to eliminate competition outweigh any purported benefits

Rule of reason analysis begins with assessing market power and intent, *Am. Ad*, 92 F.3d at 789 – important factors missing from Netflix's brief. Both factors weigh heavily against Netflix.

Netflix's admitted monopoly power, strengthened by Defendants' agreement, undercuts Netflix's argument that Defendants' restraint is reasonable. *See Hahn v. Or. Physicians' Serv.*, 868 F.2d 1022, 1026 (9th Cir. 1988) ("The existence of market power is a significant finding that casts an anticompetitive shadow over a party's practices in a rule-of-reason case"). Indeed, Defendants' agreement to eliminate Wal-Mart from an already highly-concentrated market *harmed* competition. (*See* I.C., *supra*.)

Netflix's intent to eliminate, rather than promote, DVDR competition further undermines the argument that Defendants' restraint is reasonable. *See Hahn*, 868 F.2d at 1026 (intent is relevant "[s]ince the effect on competition is the touchstone of rule of reason analysis"). Netflix's anticompetitive intent is typified in Hastings' "partner with us rather than compete with us" strategy (ER434), and is demonstrated by Netflix's market allocation agreements with Amazon, Musicland, Best Buy, and Wal-Mart (ER453-61; ER466-79; ER481-513).

2. Netflix fails to prove the PA increased consumer welfare

Netflix's unsubstantiated claim that "consumer welfare" improved *after* the PA is insufficient. (NB33-35.) Netflix must prove (1) the improvements occurred and (2) *resulted from* Defendants' agreement. *See Am. Ad*, 92 F.3d at 791; *Antitrust Law* §1505. Netflix proved neither.

Output. Netflix says its subscribership grew after the PA. (NB34.) But, without proof, that increase cannot be attributed to Defendants' agreement. *See Cal. Dental*, 526 U.S. at 774-77. It is far more likely the DVDR Market simply grew rapidly and Netflix, as a monopolist, was the beneficiary of that growth. (ER992 ("it's a big and rapidly growing market").) The District Court appropriately concluded this presented a jury issue. (ER21-22.)

Prices. Netflix's presumption that some post-2005 decreases in DVDR prices insulate Defendants' agreement from challenge (NB34) is incorrect as a matter of law. *See Topco*, 405 U.S. at 611. Moreover, Netflix fails to prove any supposed price decreases *resulted from* Defendants' agreement. The evidence shows the contrary: Netflix pursued the elimination of Wal-Mart to maintain high prices and profits (ER407; ER992; ER1052; ER1417); Wal-Mart's elimination resulted in a duopoly (IB30-34); shortly after Wal-Mart's exit, BBI increased prices "as planned" by Hastings (ER1073), ending the price war; and Netflix's gross margins increased after Wal-Mart exited (ER1318/¶102).

Service and quality. Netflix provides no empirical evidence of any service and quality improvements *caused by* Defendants' agreement. Netflix claims it increased title count and rented more discs (NB34-35), but cannot tie this to Defendants' agreement. The District Court correctly determined this was disputed. (ER21-22.)

Innovation. Netflix says innovation is an "important competitive criteria" (NB35), but provides *no evidence* of innovation in the DVDR Market. Instead, Netflix claims to be a streaming-video pioneer. (*Id*.) However, streaming video is a concededly *different* market (ER1272/¶16-ER1279/¶25; ER1455/n2), so Netflix's argument is irrelevant.

3. Netflix's assertion of no competitive harm is controverted

Undisputed facts defeat Netflix's assertion that Defendants' agreement caused no harm because Wal-Mart "unilaterally" decided on January 3, 2005 to exit the DVDR Market (NB35-41):

- In *October 2004*, Hastings contacted and met with Fleming to get Wal-Mart to exit. (ER943; ER963.) In *November 2004* Hastings said he would "continue to plug away" at Wal-Mart (ER969), and he made at least a half-dozen phone calls to that end (ER1167).

- There is no evidence Wal-Mart decided to exit *before* the Hastings/Fleming meetings.

- Netflix cannot say when Wal-Mart decided to exit. Netflix's summary judgment brief argued Wal-Mart decided to exit on January 3, 2005. (SER1590.) At oral argument, Netflix first said Wal-Mart decided to exit sometime in January 2005 (FER48/18:22), then ***conceded the date of Wal-***

> ***Mart's decision is a fact issue*** (FER49/24:13-14) ("So – and I would concede that there is an issue of fact on that because the documents are ambiguous"), and then inferred Wal-Mart decided on February 4, 2005 (FER49/24:16-18) but acknowledged there had been no headquarters approval (FER49/24:19-21).

The District Court correctly determined Netflix's "independent" exit argument raised fact issues. (ER18.)

The evidence disproves Netflix's argument that BBI's December 22, 2004 price cut (a common occurrence with three competitors (IB9-12)) killed Wal-Mart's deal with Yahoo! and forced Wal-Mart to exit the DVDR Market (NB36). Netflix cites Wal-Mart's reaction to BBI's price cut *one day* after it was announced, but Netflix omits that Wal-Mart subsequently determined BBI's cut was temporary (ER974) and Wal-Mart considered the Yahoo! deal until at least February 2005 (FER41; FER45/76:20-77:12; *see* FER20; FER34; FER36).

Netflix fares no better arguing Wal-Mart independently decided to exit because it projected financial losses. When it entered the DVDR business (less than two years before it exited), Wal-Mart projected loses for several years (ER562/79:5-18), just as Netflix did not report a profit for five years (ER1437). Furthermore, a Wal-Mart document cited by Netflix projected a $2.5 million loss if Wal-Mart exited in a deal with Netflix, but only a $1 million loss if Wal-Mart stayed in the market for four years. (SER1263.) Given Wal-Mart's enormous resources, a jury could find avoiding this relatively meager (and likely temporary) loss was not the reason for Defendants' agreement.

Wal-Mart's retroactive booking of an accounting reserve effective January 31, 2005 does not prove Wal-Mart *independently* decided to exit in January as Netflix claims. (NB37-38.) Netflix and Wal-Mart began talking months *before* January, Defendants' "handshake" deal occurred on March 15, and exit was not authorized by Wal-Mart Stores until May 4, 2005. (*See* I.B., *supra*).

4. Netflix fails to satisfy its heavy burden of proving Wal-Mart's exit caused no competitive harm

a. Netflix cannot explain away evidence that raises fact issues

Netflix's explanation of its contemporaneous admissions reinforces the District Court's finding of fact issues. (NB44-46.) On October 15, 2004, during a CNBC broadcast, Hastings admitted Netflix cut prices due to competition from Wal-Mart and others:

> ***So it's Netflix up against Wal-Mart***, Amazon, Blockbuster, and that gives anybody smart reason to worry. ***And it's why we're doing the price cut***, it's why we're focused on growth, and it's why we're focused on extending our lead.

(ER934.) This admission clearly refutes Netflix's core litigation position that Netflix *never* lowered *any* price in response to Wal-Mart. (NB20.) Netflix elsewhere claimed this price cut was due to the "perceived threat of an Amazon launch" (SER1561/¶16) and now claims Hastings was merely acknowledging Wal-

Mart as "one of the firms in the DVDR arena" (NB44). Only a jury can decide whether to credit these *post-hoc* explanations that are inconsistent with Hastings' original admission.

Netflix also argues its contemporaneous admissions of Wal-Mart's competitive significance should be disregarded as "snippets." (NB45-46.) Netflix contends these admissions mostly pre-date Wal-Mart's entry into the DVDR Market. (NB45.) Netflix is wrong. Plaintiffs presented admissions about Wal-Mart's significance from 2002 into 2005. (ER686-87(2002); ER727/175:18-176:6 (referring to 2002); ER692(2002); ER696(2003); ER704(2003); ER709-11(2004); ER714(2004); ER934(2004); ER441(2004); ER1008(2005).) Netflix further urges its admissions be disregarded because they appear in "planning" documents. (NB46.) But "planning" documents reflect Netflix's contemporaneous views that were significant enough to be shared among senior executives. Netflix cites no authority for disregarding these admissions raising key fact issues.

b. Defendants agreed Wal-Mart would not re-enter the DVDR Market

According to Netflix, Defendants' agreement should be excused because the PA's text did not prohibit Wal-Mart from re-entering the DVDR Market. (NB50.) But, as Netflix knows, Defendants' scheme was not fully stated in the PA. (ER869/218:14-219:11.) Defendants' testimony and documents, which reveal their understanding Wal-Mart would permanently exit the Market, create a jury issue.[13] (ER1032/121:16-21; ER1034; ER1039; ER1044; ER1052; ER1119; ER1167; ER1214/¶59; ER1285/¶36.)

c. Netflix and others viewed Wal-Mart as a significant threat because of its resources and ability to compete

Netflix argues Wal-Mart's exit was a "non-event" because Wal-Mart had "no competitive significance." (NB42-43.) Aside from the considerable evidence to the contrary (*see* I.B., *supra*; II.C.4.d., *infra*), Netflix's argument is contradicted by its own actions. Netflix cannot answer one inconvenient question:

> ***If Wal-Mart was an insignificant competitor, why was Netflix trying so hard to get Wal-Mart to exit the DVDR Market?***

The record is clear, Netflix pursued Wal-Mart (not the other way around) with the explicit intent of getting Wal-Mart to exit.

The notion that Netflix viewed Wal-Mart as insignificant (NB40-41) is contradicted by much evidence: the prospect of Wal-Mart as a competitor gave Netflix "stark raving fear" (ER687; ER696); Hastings testified Netflix "viewed Wal-Mart as a threat" (ER727/175:18-176:6); a "[g]reat deep report" Hastings

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[13] It is undisputed Wal-Mart did not re-enter the DVDR Market. Wal-Mart's recent acquisition of streaming-video provider Vudu.com (NB5) is irrelevant because it operates in a concededly different market (ER1455/n2). Netflix's argument that the PA did not eliminate *potential* competition (NB49-50) is not germane because Wal-Mart was an *actual* competitor.

circulated in July 2004 ranked Wal-Mart's lower-priced DVDR service ahead of Netflix's as "most appealing" to consumers (ER709-11); and Netflix worried Wal-Mart would leverage its massive resources (ER696; ER692). Indeed, while Hastings was trying to get Wal-Mart to exit, Netflix recognized Wal-Mart was "1 marketing spend away." (ER714.)

Netflix's claim also is contradicted by Wal-Mart's documents showing it was expanding. (ER731; ER737; ER741-43; ER758; ER767; ER769; ER771; ER775; ER1448; ER1453.) Netflix's effort to dismiss document-after-document describing Wal-Mart's marketing prowess as "media puffery" (NB40) clearly presents a jury issue. And, Netflix's suggestion that Wal-Mart, the world's largest and richest retailer, lacked the resources to compete is spurious. (NB39-40.)

Netflix's related argument that BBI and Amazon viewed Wal-Mart as insignificant (NB41-42) is disputed. (ER1430/58:24-59:1 (BBI: "to the extent that Wal-Mart decides that they just want to own this business, they could."); (ER1433/180:18-181:5 (Amazon: Wal-Mart could be a "key competitor").)

Dr. Beyer did not "concede" Wal-Mart had "zero impact" on Netflix. (NB41.) Rather, he analyzed whether Netflix would have charged lower prices in a market with BBI *and* Wal-Mart (ER1299/¶64-ER1308/¶83.) He testified that Netflix's suggested one-on-one comparison of Netflix to Wal-Mart "is going down the absolute wrong path" due to pricing dynamics that occur in a three-firm market

(SER506/183:10-184:5; ER1187/¶8). Netflix's criticism of Dr. Beyer for considering the full competitive landscape is groundless, as confirmed by the District Court's denial of Netflix's *Daubert* motion.

d. Internally, Netflix viewed the PA as material

Netflix argues its May 19, 2005 press release describing the PA as "immaterial" proves Wal-Mart was competitively insignificant. (NB43-44.) This argument is easily refuted: one week before the PA was announced, *Netflix executives* confessed the transaction *was* "material" (ER1418), and *Wal-Mart executives* were concerned about Netflix describing the deal as immaterial (SER186; SER215). Moreover, Hastings understood creating a duopoly by eliminating Wal-Mart would yield "substantial" profits. (ER407.) The stock market agreed. In the months following the PA's announcement, Netflix's stock price almost doubled. (ER1226/¶82.)

e. The anticompetitive effect of a DVDR Market duopoly is no "fallacy"

It defies antitrust principles for Netflix to argue the agreed elimination of Wal-Mart from the DVDR Market, which left the Market as a duopoly, cannot be anticompetitive. (NB46-49.) Reducing the number of competitors in a highly concentrated market presumptively harms competition. (*See* I.C., *supra*.)

This principle is not repudiated by Netflix's disputed claim that Wal-Mart's market presence was "competitively insignificant." (IB47-48.) The highly-concentrated DVDR Market heightened the competitive significance of Wal-Mart, even with its then-small market presence. *See Antitrust Law* §701c (3d 2008) ("Acquisition of any firm with nontrivial *potential* as a substantial rival serves to maintain monopoly power"; "***To find a §2 monopoly is necessarily to declare the preciousness of any viable rival***"). And, Netflix does not dispute Wal-Mart was a maverick whose competitive significance exceeded its market share. (ER1221/¶75.) Moreover, the Sherman Act protects against the loss of even *potential* competition. *See Palmer*, 498 U.S. at 49-50 (condemning market allocation agreement that precluded potential competitor).

Netflix's claim that market concentration "declined" shortly after the PA is disingenuous. (IB47.) Market concentration *necessarily* increased the instant Wal-Mart exited because of the sum-of-the-squares method for calculating the Herfindal-Hirschman index ("HHI"). *See Antitrust Law* §931. Netflix's point that concentration later modestly decreased in 2005-2007 misses the clear trend toward higher concentration over the relevant period (2005-2010), when the HHI surged from 6,543 (2005) to 8,576 (2010).[14] (ER1200/¶26.)

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[14] A HHI over 2,500 reflects a "highly concentrated" market. *See Horizontal Merger Guidelines* §5.3.

Gerlinger provides no support for Netflix's argument. *Gerlinger* affirmed summary judgment on procedural grounds because the plaintiff refused to present admissible evidence to support its allegations, *see* 526 F.3d at 1255-56, not because three-firm competition is a "fallacy" as Netflix claims (NB46-49). The District Court misunderstood *Gerlinger* based on Netflix's mischaracterizations, and Netflix now cites ***briefs*** in *Gerlinger*, rather than the Court's opinion. (NB48.)

f. The District Court correctly rejected Netflix's title count/release date claims

Netflix's argument that Plaintiffs "deceived" the District Court about Netflix decreasing DVD title count and withholding new DVD releases longer is fatuous. (NB50-52.) Netflix does not deny it decreased DVD title counts. (NB51.) Netflix also does not deny it agreed to withhold new release DVDs longer, but claims third parties made it agree. (*Id*.) The very document Netflix cites, however, indicates otherwise, thus highlighting an additional fact issue for the jury. (ER1100 (Hastings: "We're going to try on [sic] the 28 days option").)

g. There may be less restrictive alternatives

If, at trial, Netflix were somehow able to satisfy its heavy burden of proving procompetitive benefits of Defendants' agreement outweigh anticompetitive effects, the jury would still need to decide whether there are less restrictive alternatives. *See Bhan v. NME Hosp., Inc.*, 929 F.2d 1404, 1410 n.4 (9th Cir. 1991). Because Defendants' agreement eliminated Wal-Mart from the DVDR

Market, alternatives not eliminating Wal-Mart could be less restrictive. Netflix proposed a less restrictive alternative venture (although it quickly reversed itself) where Netflix and Wal-Mart would coexist and offer customers choice. (ER1402; SER1245; SER1565/¶26.) A jury could find this, or another alternative, as being less restrictive. *See Am. Ad*, 92 F.3d at 791 (weighing less restrictive alternatives "should properly be decided by the jury").[15]

III. NETFLIX'S OTHER MARKET ALLOCATION AGREEMENTS ARE APPROPRIATELY IN THE CASE

The District Court excluded evidence of Netflix's market allocation agreements with Amazon, Musicland, and Best Buy (ER453-61; ER466-79; ER481-513) because they were not "expressly pled as a basis for unlawful conduct" (ER7/n3). Plaintiffs showed the exclusion was erroneous because: (1) the agreements are supportive of Plaintiffs' existing Sherman Act §§1-2 allegations; and (2) alternatively, even if these agreements are bases for "new" legal theories, Plaintiffs may raise them. (IB61-64.)

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[15] Netflix's assertion that there can be no §2 claim if the Court finds no negative effects on competition for §1 purposes is flawed because, beyond injury, §§1 and 2 proofs differ. *See Northop*, 705 F.2d at 1057-59 (refusing to grant summary judgment on §2 claims after finding no §1 violation).

Netflix fails to respond to Plaintiffs' first point, which resolves the issue in Plaintiffs' favor.

Netflix focuses on Plaintiffs' second point, arguing Plaintiffs cannot oppose summary judgment by relying on "new" theories of liability. (NB57-58.) That argument provides no basis for excluding the Amazon, Musicland, and Best Buy agreements because, even if they are "theories," they are not "new." Plaintiffs sought documents and took depositions regarding these agreements in 2009-2010. (ER55/¶5-ER57/¶10.) Netflix executives were deposed about these agreements (ER58/¶¶14-15), and Netflix counsel attended depositions of Amazon regarding the agreements (ER57¶10). Plaintiffs described their theories and facts in answers to contention interrogatories Netflix served near the close of discovery. (ER59/¶16.) In fact, because it was so well-informed about Plaintiffs' theories, *Netflix **raised*** them in its *opening* summary judgment brief. (ER1456).

Netflix's goal is not avoiding prejudicial surprise, but precluding relevant evidence damaging to Netflix. This evidence shows Netflix's predatory intent as it repeatedly pursued and entered market allocation agreements.[16] Netflix's prior

[16] Netflix's Best Buy agreement formed the "basis" for Defendants' agreement. (ER542/40:7-15.)

Amazon agreement, for example, explicitly allocated online DVD rentals to Netflix, while Netflix agreed not to sell new DVDs in competition with Amazon. (ER451; ER456/§§2-4; ER1456.) Netflix reaffirmed its predatory intent in 2005 (about the time of Defendants' agreement) when a top executive brazenly proposed paying Amazon $45 million for its agreement "[n]ot to enter the US rental market." (ER1060-61.)

None of Netflix's cases support exclusion of such evidence or theories when a defendant, like Netflix, was aware of the evidence and theories years before briefing summary judgment.

CONCLUSION

Based on the foregoing and their initial brief, Plaintiffs-appellants respectfully request reversal of the summary judgment decision and remand of this case for trial.

Dated: May 25, 2012

Respectfully submitted,

By: D G Abrams

Robert G. Abrams
Gregory L. Baker
Danyll W. Foix
BAKER & HOSTETLER LLP
Washington Square, Suite 1100
1050 Connecticut Avenue, NW
Washington, DC 20036
Telephone: (202) 861-1699
Facsimile: (202) 861-1783
Email: rabrams@bakerlaw.com
gbaker@bakerlaw.com
dfoix@bakerlaw.com

Lead Counsel and Member of the Steering Committee for Plaintiffs in MDL No. 2029

Guido Saveri (22349)
Lisa Saveri (112043)
SAVERI & SAVERI, INC.
706 Sansome Street
San Francisco, CA 94111
Telephone: (415) 217-6810
Facsimile: (415) 217-6813
Email: guido@saveri.com
lisa@saveri.com

Liaison Plaintiff Counsel in MDL 2029

Joseph J. Tabacco, Jr. *(75484)*
Todd A. Seaver (271067)
Matthew W. Ruan (264409)
BERMAN DEVALERIO
One California Street, Suite 900
San Francisco, CA 94111
Telephone: (415) 433-3200
Facsimile: (415) 433-6382
Email: jtabaccoberrnandevalerio.com
tseaver@bermandevalerio.com
mruan@bennandevaieriocom

Eugene A. Spector
William G. Caldes
Jonathan M. Jagher
SPECTOR ROSEMAN KODROFF & WILLIS, P.C.
1818 Market Street, Suite 2500
Philadelphia, PA 19103
Telephone: (215) 496-0300
Facsimile: (215) 496-6611
Email: espector@srkw-law.com
bcaldes@srkw-law.com
jjagher@srkw-law.com

H. Laddie Montague, Jr.
Merrill G. Davidoff
David F. Sorensen
Sarah R. Schalman-Bergen
BERGER & MONTAGUE, P.C.
1622 Locust Street
Philadelphia, PA 19103
Telephone: (215) 875-3010
Facsimile: *(215) 875-4604*
Email: h1montaguebm.net
mdavidoff@bm.net
dsorensen@bm.net
sschalman-bergen@bm.net
Members of the Steering Committee for Plaintiffs in MDL No. 2029

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Plaintiffs-Appellants certify, through undersigned counsel, the following related cases are or have been pending before this Court:

1. *Resnick et al. v. Frank*, Case No. 12-15705 (docketed on March 30, 2012) (Appeal from the District Court's Final Order and Judgment Approving Wal-Mart Settlement and Order Awarding Attorneys' Fees, both entered on March 29, 2012).
2. *Resnick et al. v. Zimmerman*, Case No. 12-15889 (docketed on April 18, 2012) (Appeal from the District Court's Final Order and Judgment Approving Wal-Mart Settlement and Order Awarding Attorneys' Fees, both entered on March 29, 2012).
3. *Resnick et al. v. Bandas*, Case No. 12-15957 (docketed on April 25, 2012) (Appeal from the District Court's Final Order and Judgment Approving Wal-Mart Settlement and Order Awarding Attorneys' Fees, both entered on March 29, 2012).
4. *Resnick et al. v. Cope*, Case No. 12-15996 ((docketed on April 30, 2012) (Appeal from the District Court's Final Order and Judgment Approving Wal-Mart Settlement and Order Awarding Attorneys' Fees, both entered on March 29, 2012).

5. *Resnick et al. v. Sullivan*, Case No. 12-16010 (docketed on May 1, 2012) (Appeal from the District Court's Final Order and Judgment Approving Wal-Mart Settlement and Order Awarding Attorneys' Fees, both entered on March 29, 2012).

6. *Resnick et al. v. Cox*, Case No. 12-16038 (docketed on May 3, 2012) (Appeal from the District Court's Final Order and Judgment Approving Wal-Mart Settlement and Order Awarding Attorneys' Fees, both entered on March 29, 2012).

7. *Resnick et al. v. Netflix*, Case No. 12-16160 (docketed on May 14, 2012) (Plaintiffs' Appeal from the District Court's Order Granting In Part and Denying In Part Plaintiffs' Motion to Review Taxation of Costs, entered on April 20, 2012).

8. *Resnick et al. v. Netflix*, Case No. 12-16183 (docketed on May 16, 2012) (Netflix's Cross-Appeal from the District Court's Order Granting In Part and Denying In Part Plaintiffs' Motion to Review Taxation of Costs, entered on April 20, 2012).

Dated: May 25, 2012

Respectfully submitted,

By: ______________________

Robert G. Abrams
Gregory L. Baker
Danyll W. Foix
BAKER & HOSTETLER LLP
Washington Square, Suite 1100
1050 Connecticut Avenue, NW
Washington, DC 20036
Telephone: (202) 861-1699
Facsimile: (202) 861-1783
Email: rabrams@bakerlaw.com
gbaker@bakerlaw.com
dfoix@bakerlaw.com

Lead Counsel and Member of the Steering Committee for Plaintiffs in MDL No. 2029

CERTIFICATE OF COMPLIANCE

Pursuant to Fed.R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that the attached Plaintiffs-Appellants' Reply Brief's type size and type face comply with Fed. R.App. P. 32(a)(5) and (6). The Brief is 6992 words, excluding the portions exempted by Fed.R. App. P. 32(a)(7)(B)(iii).

Dated: May 25, 2012

Respectfully submitted,

By: R G Abrams

Robert G. Abrams
Gregory L. Baker
Danyll W. Foix
BAKER & HOSTETLER LLP
Washington Square, Suite 1100
1050 Connecticut Avenue, NW
Washington, DC 20036
Telephone: (202) 861-1699
Facsimile: (202) 861-1783
Email: rabrams@bakerlaw.com
gbaker@bakerlaw.com
dfoix@bakerlaw.com

Lead Counsel and Member of the Steering Committee for Plaintiffs in MDL No. 2029

CERTIFICATE OF SERVICE

I certify that a true and correct electronic copy of the ***Reply Brief for Andrea Resnick, et al. as Appellants*** was served by operation of the CM/ECF system for the United States Court of Appeals for the Ninth Circuit upon all counsel who have consented to receive notice of filings in Case No. 11-18034.

I further certify that four true and correct copies of ***Further Excerpts of Record for Andrea Resnick, et al. as Appellants, Volume 1*** were served via Federal Express on the United States Court of Appeals for the Ninth Circuit.

I further certify that true and correct copies of the ***Reply Brief for Andrea Resnick, et al. as Appellants*** and ***Further Excerpts of Record for Andrea Resnick, et al. as Appellants, Volume 1*** were served electronically upon counsel for Netflix, Inc.:

Dylan Liddiard
Anthony Weibell
Wilson Sonsini Goodrich & Rosati
650 Page Mill Road
Palo Alto, CA 94304-1050
dliddiard@wsgr.com
aweibell@wsgr.com

Dated: May 25, 2012

Respectfully submitted,

By: R G Abrams

Robert G. Abrams
Gregory L. Baker
Danyll W. Foix
BAKER & HOSTETLER LLP
Washington Square, Suite 1100
1050 Connecticut Ave., NW
Washington, DC 20036
Telephone: (202) 861-1699
Facsimile: (202) 861-1783
Email: rabrams@bakerlaw.com
gbaker@bakerlaw.com
dfoix@bakerlaw.com

Lead Counsel and Member of the Steering Committee for Plaintiffs in MDL No. 2029