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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

IN RE ONLINE DVD RENTAL ANTITRUST LITIGATION	**Master File No. M:09-CV-2029 PJH** **MDL No. 2029** **Hon. Phyllis J. Hamilton**
This document relates to: **ALL ACTIONS**	**NOTICE OF MOTION AND PLAINTIFFS' MOTION FOR CLASS CERTIFICATION; MEMORANDUM IN SUPPORT THEREOF** Date: September 1, 2010 Time: 9:00 a.m. Judge: Hon. Phyllis J. Hamilton Courtroom: 3, 3rd Floor

REDACTED VERSION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on September 1, 2010, at 9:00 a.m., before the Honorable Phyllis J. Hamilton, Courtroom 3, United States District Court, Northern District of California, 1301 Clay Street, Oakland, California, Plaintiffs Andrea Resnick, Amy Latham, Bryan Eastman, Melanie Miscioscia Salvi, Stan MaGee, Michael Orozco, Liza Sivek, and Michael Wiener will, and hereby do, move the Court, pursuant to Rule 23 of the Federal Rules of Civil Procedure, for an Order certifying a Plaintiff Class defined as follows:

> **Any person or entity in the United States that paid a subscription fee to Netflix on or after May 19, 2005 up to and including the date of class certification.**
>
> **Excluded from the Class are government entities, Defendants, their co-conspirators, Reed Hastings, John Fleming, Defendants' subsidiaries, corporate affiliates, and counsel in this action. Also excluded are persons who subscribed to Wal-Mart DVD Rentals as of May 19, 2005. Also excluded are the Judge presiding over this action, her law clerks, her spouse, and any person within the third degree of relationship living in the Judge's household and the spouse of such a person.**

This Motion is based upon this Notice of Motion and Motion, Plaintiffs' Memorandum of Points and Authorities, the Expert Report of Dr. John C. Beyer, the Declaration of Peter A. Barile III, the pleadings and other documents and testimony on file, and other written or oral arguments as may be presented to the Court.

STATEMENT OF ISSUES TO BE DECIDED

The issues to be decided are: (1) whether the Court should certify this action as a class action and (2) whether the Court should confirm the appointments of lead counsel, liaison counsel and the steering committee.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This is an example of an antitrust conspiracy case for which class certification is especially appropriate. Plaintiffs are direct purchasers of online DVD rental subscriptions from Defendant Netflix. Plaintiffs allege violations of Sections 1 and 2 of the Sherman Antitrust Act and will prove on a class-wide basis that Netflix and the two Wal-Mart defendants (collectively, "Wal-Mart"), who had

been competitors in the online DVD rental market, conspired to allocate markets. Wal-Mart agreed to, and did, exit the online DVD rental market and Netflix agreed not to sell, and did not sell, new DVDs. Netflix subscribers paid artificially higher monthly subscription fees than they would have paid as a direct result of the conspiracy.

Plaintiffs readily meet the requirements of Rule 23(a). The class – consisting of millions of members – satisfies the numerosity requirement. There are many common issues, including the formation and terms of the conspiracy and its effect on Netflix's prices. The claims of the class representatives, which focus on the Defendants' conduct, are typical of those of the entire class. The class will be adequately represented: the class representatives face no conflicts and counsel will continue to vigorously pursue this litigation.

With respect to the requirements of Rule 23(b)(3), common issues predominate over issues, if any, affecting only individual class members. Proof of the conspiracy between Netflix and Wal-Mart will be common to all class members. The conspiracy's impact on Netflix's pricing, as a result of the loss of competition from Wal-Mart, will be measured with common evidence, not individualized evidence. That evidence will include the following class-wide facts: The conspiratorial communications between Netflix and Wal-Mart began at a time of rapid price reductions resulting from the recent arrival of a third competitor, Blockbuster. Netflix's purpose in instigating the conspiracy was to avoid further price reductions, which it would have been forced to make, had three-firm competition continued. Wal-Mart had ambitious expansion plans at the time the conspiratorial communications began. Netflix predicted that Wal-Mart's departure would cause a rise in profits, and that is what happened. The nature of this market assures that a loss of competition from one of only three firms would and did affect prices. There has been no entry by any new online DVD rental businesses since Wal-Mart's exit; competition is based on price; and the products are highly similar.

Netflix's standardized pricing assures that, had the price of its plans been lower, all class members would have paid less. [redacted]

[redacted].

A class action is not only the superior means for resolving these claims, it is the only means. The Netflix subscribers' individual claims are far too small to prosecute a complex antitrust case against these large defendants on a non-class basis.

II. BACKGROUND

A. The Online DVD Rental Market

The online DVD rental market consists of those firms that rent DVDs online by subscription for delivery by mail in the United States. From August 2004 to May 2005, there were three major online DVD rental providers—Blockbuster, Netflix, and Wal-Mart.[1] As a result of the conduct alleged herein, which began in October 2004, the market was reduced to just two firms: Netflix and Blockbuster, a situation which has continued to the present.

Like other online DVD rental firms, Netflix charges a monthly fee based on how many DVDs subscribers wish to rent. Plans that allow more rentals have higher monthly fees. [redacted] (Barile Decl. Ex. 1, at 287-88.)[2] [redacted] (*Id.* at 37, 53-54.)

B. Defendants' Illegal Market Allocation Agreement

As of August 2004, Netflix and Wal-Mart were the only meaningful competitors in this market. Netflix charged $21.99 for its most popular plan, the 3-out plan. On August 11, 2004, a third competitor – Blockbuster – entered the market with a price of $19.99 for its 3-out plan. On October

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[1] Walmart.com was the entity immediately responsible for the Wal-Mart Online DVD Rentals Service. Its parent, Wal-Mart Stores, Inc., is a co-conspirator. For purposes of this Motion, the distinction between the two Wal-Mart entities is immaterial. Any issues regarding the role of the parent entity and its relationship to Walmart.com will be class-wide in nature.

[2] Citations to Barile Decl. Ex. 1 refer to Exhibit 1 attached to the Declaration of Peter A. Barile III, submitted herewith, and to which all Exhibits referenced herein are attached.

14, 2004, Netflix responded to the increased competition by dropping its price to $17.99. (Barile Decl. Ex. 2, at 0710.) The next day Netflix's stock dropped by 40% and its CEO, Reed Hastings, attributed the price cut to strong competition, including from Blockbuster and Wal-Mart, whom he identified as "major competitors." (*Id.* at 0709.) That same day Blockbuster reduced its 3-out price to $17.49.

Facing the threat of further price reductions, Netflix reacted quickly to reduce or eliminate competition. Not even waiting until the next business day, Hastings contacted John Fleming, the CEO of Walmart.com. (Barile Decl. Ex. 3, at 0121-22.) The two CEOs met later in October 2004. (Barile Decl. Ex. 4, at 1569.) The communications continued over the next several months. (*Id.*; Barile Decl. Ex. 5, at 0123.) By March 17, 2005, Netflix and Wal-Mart had reached a [redacted] on the Market Allocation Agreement.[3] (Barile Decl. Ex. 6, at 8042; Barile Decl. Ex. 1, at 280.) The process of documenting the public aspects of the deal continued through April 2005, and a joint press release announcing Wal-Mart's exit was issued on May 19, 2005. (CAC ¶ 53; Barile Decl. Ex. 7, at 0004.)

From their beginning on October 17, 2004, the discussions initiated by Netflix sought to have Wal-Mart exit the online DVD rental market. From Netflix's perspective, Wal-Mart's exit was not only the central goal of the discussions; Wal-Mart's agreement to promote Netflix to Wal-Mart's customers across all plans only made sense if Wal-Mart was agreeing to exit this market. (Barile Decl. Ex. 8, at 4818; Barile Decl. Ex. 1, at 247.) Wal-Mart would hardly tell its own customers to use Netflix if Wal-Mart was staying in the online DVD rental market and providing a competing rental service. (CAC, ¶ 57-58; Barile Decl. Ex. 9, at 1402.)

For its part, Netflix agreed not to enter the market for the sale of new DVD sales. Netflix had seriously considered new DVD sales as an additional revenue stream at least as late as December 2004. (Barile Decl. Ex. 10, at 5901; Barile Decl. Ex. 3, at 0122.) It was at Netflix's suggestion that Wal-

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[3] The phrase "Market Allocation Agreement" refers to the entirety of the conspiratorial agreement between Netflix and Wal-Mart, not merely the formal document that was announced on May 19, 2005. The conspiratorial Agreement apparently was reached more than two months earlier, on March 17, 2005.

Mart agreed to exit the online DVD rental market in exchange for Netflix's promotion of Wal-Mart's new DVD sales. (Barile Decl. Ex. 1, at 277; Barile Decl. Ex. 11, at 2710.)

C. Wal-Mart's Competitive Significance

When Netflix initiated discussions in the Fall of 2004, leading to the Market Allocation Agreement, Wal-Mart was planning to expand its online DVD rental business. In November 2004, Wal-Mart declared that its outlook for 2005 for DVD rentals was to [redacted]" (Barile Decl. Ex. 12, at 1702.) Its CEO, John Fleming, told CNBC on January 7, 2005 that the DVD rental business was among the company's "very good businesses" which it was "focused on developing over the next year or two." (Barile Decl. Ex. 13, at 941.) Another senior Walmart.com executive stated that this was "a viable business for us, with growth potential" and that Wal-Mart planned to add more distribution facilities. (Barile Decl. Ex. 14, at 2793.) In its Fiscal Year 2005 planning, Wal-Mart listed DVD rentals as a "[redacted]" of its business. (Barile Decl. Ex. 15, at 5605.) [redacted]. (*Id.*) [redacted] (*Id.* at 5623.)

This optimism was shared by Walmart.com's parent, the world's largest corporation. During the Fall of 2004, Wal-Mart Stores' CEO H. Lee Scott stated that the DVD rental business had "[redacted]" (Barile Decl. Ex. 16, at 2262.) Scott also stated that in 2005, Wal-Mart would "[redacted]" and that Wal-Mart "[redacted]" (*Id.* at 2262-63.)

D. The Price Effects Of The Transition To Three-Firm Competition

From the time Wal-Mart launched its online DVD rental service in June 2003, until June 2004, Wal-Mart's and Netflix's prices remained stable, with their 3-out plans at $18.76 and $19.99, respectively. Shortly after hearing that Blockbuster would soon launch a competing online service, however, Netflix raised the price of its 3-out plan as of June 15, 2004 from $19.99 to $21.99 per month, [redacted] (Barile Decl.

Ex. 1, at 99, 107, 134; Barile Decl. Ex. 17, at 2771.) [redacted] (Barile Decl. Ex. 1, at 99, 107, 134.) These higher prices yielded "[redacted]" profit margins. (*Id.* at 159.)

However, these high prices rapidly changed once three-firm competition began. On August 11, 2004, Blockbuster entered the online DVD rental market with a 3-out unlimited plan priced at $19.99, undercutting Netflix by 10%. (Barile Decl. Ex. 1, at 124-25.) Because of the competitive situation, Netflix cut its price. (Barile Decl. Ex. 18, at 0107-8.) On Thursday, October 14, 2004, Netflix announced that it would lower its 3-out unlimited price nearly 20% from $21.99 to $17.99 per month. The next day, October 15, 2004, Netflix CEO Reed Hastings stated that competition from firms such as Blockbuster and Wal-Mart is "why we're doing the price cut." (Barile Decl. Ex. 2, at 0709.)

Later that same day, on October 15, 2004, Blockbuster announced it would decrease its price further, undercutting Netflix once again, to $17.49. (Barile Decl. Ex. 19, at 2785.) A Netflix executive remarked: "[redacted]" (Barile Decl. Ex. 20, at 8803.) But Wal-Mart was the real "Gorilla-in-waiting in this space." (Barile Decl. Ex. 21, at 2081.) By the time Netflix implemented its new $17.99 price, Wal-Mart had undercut both Netflix and Blockbuster, lowering its price to $17.36 per month. (Barile Decl. Ex. 22, at 3625.)

By late Fall 2004 Netflix had not yet succeeded in eliminating competition from Wal-Mart, and the three-firm market conditions caused further price reductions by other firms. On December 22, 2004, Blockbuster cut its prices even more dramatically, to $14.99 for a 3-out unlimited plan. (Barile Decl. Ex. 23, at 2789.) Blockbuster assured that this "is not a promotion." (*Id.*) [redacted] (Barile Decl. Ex. 24, at 3847; Barile Decl. Ex. 1, at 155-56.)

Although competition in a three-firm market had already forced Netflix to lower prices by some 20%, Netflix avoided the need for further price reductions by expanding its efforts to get Wal-Mart to agree to exit the market. It had substantial communications with Wal-Mart in early 2005. Those efforts soon bore fruit, with the March 17, 2005 [redacted] on the Market Allocation Agreement.

E. The Price Effects Of The Return To A Two-Firm Market

The conspiracy was driven by Netflix's desire to avoid further price cuts by eliminating competition. Conversely, once Netflix knew that the plan had succeeded in getting Wal-Mart to exit, Netflix expected that the reduced competition would benefit its bottom line. A month after the [redacted], but before the public announcement that Wal-Mart would exit, Hastings stated:

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

(Barile Decl. Ex. 25, at 0069.) As Hastings expected, the agreement stabilized market prices. [redacted] (Barile Decl. Ex. 26, at 0271.) Blockbuster delayed the actual announcement, however, until August 9, when it revealed it was raising the price of its most popular 3-out plan from $14.99 per month to $17.99 per month—the same price charged by Netflix. (Barile Decl. Ex. 27, at 8841.) When the Blockbuster price increase actually went into effect on August 19, 2005, one Netflix executive called it a "[redacted]" (Barile Decl. Ex. 28, at 5790.) Hastings wrote to his executive staff: "[redacted]" (Barile Decl. Ex. 29, at 2483.)

In contrast to the rapid price reductions during the brief period of three-firm competition, once Wal-Mart exited the market, prices regained their stability. After Blockbuster raised its price from $14.99 to $17.99, Netflix held its 3-out plan steady at that same price level of $17.99 for two years. Blockbuster and Netflix also had matching 1-out and 2-out unlimited plans at $9.99 and $14.99, respectively, and the prices for the Netflix and Blockbuster 1-out, 2-out- and 3-out unlimited plans would remain the same for nearly two years. In June 2007, Blockbuster dropped its 1-out, 2-out- and 3-out plans by $1 dollar. (Barile Decl. Ex. 1, at 314-17; Barile Decl. Ex. 30, at 0599-601.) Netflix soon made similar reductions. (Barile Decl. Ex. 1, at 311.) Since that time, for nearly three years, the basic subscription rates for Netflix and Blockbuster have remained identical:

ONLINE DVD RENTAL PRICES JULY 2007 – MARCH 2010

Plans	Blockbuster	Netflix
1-out unlimited	$8.99	$8.99
2-out unlimited	$13.99	$13.99
3-out unlimited	$16.99	$16.99

(Barile Decl. Ex. 31, at pages 13-20 of spreadsheet.)[4]

F. The Expert Report Of Dr. John C. Beyer

In further support of this Motion, Plaintiffs offer the expert report of Dr. John C. Beyer. Dr. Beyer, the CEO of Nathan Associates, has more than 40 years of experience in economic analysis. Based on a detailed review of Defendants' documents, the 30(b)(6) deposition of Netflix, data on Defendants' prices, sales, costs and other topics, and based on his experience and expertise, Dr. Beyer concludes that injury to the class can be proved with common evidence and that there are realistic methodologies for measuring damages on a class-wide basis. *Beyer Rpt.* ¶¶ 12, 65-76. Given the absence of [redacted], Dr. Beyer concludes that this market is especially appropriate for class-wide analysis. *Id.*, ¶¶ 12, 36-64.

III. ARGUMENT

A. The Governing Law

Federal Rule of Civil Procedure 23 provides that a district court must certify a class where, as here, Plaintiffs satisfy Rule 23(a) and one of the subsections of Rule 23(b). The four requirements of Rule 23(a) are: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

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[4] For a limited time during 2008, Blockbuster's basic 3-out plan was priced at $15.99 for new subscribers. (Barile Decl. Ex. 32, at 2816.)

With respect to Rule 23(b), Plaintiffs seek certification under subsection (3) which provides that "[a] class action may be maintained" if "[t]he court finds that the questions of law or fact common to the class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy."

A Rule 23 determination is wholly procedural. *In re Tableware Antitrust Litig.*, 241 F.R.D. 644, 648 (N.D. Cal. 2007). In ruling on a motion for class certification, Plaintiffs' substantive allegations are accepted as true. *Blackie v. Barrack*, 524 F.2d 891, 900-901 (9th Cir. 1975). The court "does not make a preliminary inquiry into the merits of plaintiffs' claims[.] It will, however, scrutinize plaintiffs' legal causes of action to determine whether they are suitable for resolution on a class wide basis." *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, No. M-02-1486-PJH, 2006 U.S. Dist. LEXIS 39841, at *26 (N.D. Cal. June 5, 2006) (internal citations omitted). In reversing a denial of class certification, the Ninth Circuit recently reiterated that district courts "may not go so far . . . as to judge the validity of these claims." *United Steel, Paper & Forestry, Rubber Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union v. ConocoPhillips Co.*, 593 F.3d 802, 808 (9th Cir. 2010) (internal citation omitted). Thus, for example, the issue is not whether Plaintiffs will succeed in proving that Netflix and Wal-Mart agreed to allocate markets. The class certification issue is whether the evidence used to prove the existence of that Agreement will be predominately common or individualized.

The Court may examine the facts to understand the nature of the evidence, but not to prejudge which side ultimately will win on the merits. *See Hanon v. Dataproducts Corp.*, 976 F.2d 497, 509 (9th Cir. 1992); *see also In re Graphics Processing Units Antitrust Litig.*, 253 F.R.D. 478, 483 (N.D. Cal. 2008) ("Although a district judge may not investigate the likelihood of prevailing on the merits, he or she is at liberty to consider evidence relating to the merits if such evidence also goes to the requirements of Rule 23."); *DRAM,* 2006 U.S. Dist. LEXIS 39841, at *27 (The Court "will consider matters beyond the pleadings in order to ascertain whether the asserted claims or defenses are susceptible of resolution on a class wide basis."). As the Ninth Circuit very recently made clear, "[A]

full inquiry into the merits of a putative class's legal claims is precisely what both the Supreme Court and we have cautioned is not appropriate for a Rule 23 certification inquiry." *United Steel*, 593 F.3d at 809.

It is well-accepted that "class actions play an important role in the private enforcement of antitrust laws." *DRAM*, 2006 U.S. Dist. LEXIS 39841, at *27. Thus, "when courts are in doubt as to whether certification is warranted, courts tend to favor class certification." *Id.*; *see also Tableware*, 241 F.R.D. at 648 ("in antitrust cases, courts tend to favor class certification when in doubt").

Market allocation agreements, like that between Netflix and Wal-Mart, "are anticompetitive regardless of whether the parties split a market within which both do business or whether they merely reserve one market for one and another for the other." *Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46, 49-50 (1990) (*per curiam*); *see also United States v. Topco Assocs., Inc.*, 405 U.S. 596, 608 (1972) ("[H]orizontal territorial limitations . . . are naked restraints of trade with no purpose except stifling of competition."). Such horizontal agreements are *per se* illegal whether the effect is to raise prices or prevent prices from falling. *eMag Solutions LLC v. Toda Kogyo Corp.*, 426 F. Supp. 2d 1050, 1056 (N.D. Cal. 2006). Even if Defendants' conduct is judged under the Rule of Reason, any additional issues thereby injected into the case would still be class-wide in nature.

B. The Proposed Class Action Satisfies The Requirements Of Rule 23(a).

1. The Class is so numerous that joinder of all members is impracticable.

Common knowledge and Netflix's public statements[5] confirm that the proposed class will have millions of members, easily satisfying the numerosity requirement. In addition, these millions of class members are dispersed throughout the United States and any attempt to join all of them in a single action would be impracticable. *See DRAM*, 2006 U.S. Dist. LEXIS 39841, at **27-28.

2. The case involves questions of law and fact common to the Class.

Rule 23(a)(2)'s commonality requirement is more relaxed than Rule 23(b)(3)'s predominance requirement and is satisfied by the existence of a "common core of salient facts." *Hanlon v. Chrysler*

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[5] *See* Barile Decl. Ex. 7, at 0005 (Netflix had more than three million subscribers as of May 2005).

Corp., 150 F.3d 1011, 1019 (9th Cir. 1998). The "very nature of a conspiracy antitrust action compels a finding that common questions of law and fact exist." *DRAM*, 2006 U.S. Dist. LEXIS 39841, at *29 (quoting *In re Rubber Chemicals Antitrust Litig.*, 232 F.R.D. 346, 351 (N.D. Cal. 2005)). The "existence, scope, and efficacy of the conspiracy . . . are common questions that all plaintiffs must address." *DRAM*, 2006 U.S. Dist. LEXIS 39841, at *29. Other common questions include:

- Whether Defendants unreasonably restrained trade in the Online DVD Rental Market;
- Whether Defendants had the specific intent for Netflix to monopolize the Online DVD Rental Market;
- The nature and character of the acts performed by Defendants in the furtherance of the alleged contract, combination, and conspiracy;
- Whether the alleged contract, combination, and conspiracy violated Section 1 of the Sherman Act;
- Whether the alleged contract, combination, and conspiracy and other conduct violated Section 2 of the Sherman Act;
- The anticompetitive effects of Defendants' violations of law;
- Whether Defendants have acted or refused to act on grounds generally applicable to the Class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the Class as a whole; and
- Whether the conduct of Defendants, as alleged in the Complaint, caused Netflix subscription fees to be higher than they otherwise would have been and thereby caused injury to the business or property of Plaintiffs and other members of the Class.

3. The claims of the class representatives are typical of the claims of the Class.

Rule 23(a)(3)'s typicality requirement is "permissive." *In re Infineon Techs. AG Securities Litig.*, No. C-04-04156, 2009 U.S. Dist. LEXIS 103385, at *22 (N.D. Cal. Mar. 6, 2009). It is met if the class representatives' claims "are reasonably co-extensive with those of absent class members; they need not be substantially identical." *Hanlon,* 150 F.3d at 1020. *See also Lozano v. AT&T Wireless*

Servs., Inc., 504 F.3d 718, 734 (9th Cir. 2007) ("[I]t is not necessary that all class members suffer the same injury as the class representative.").

Here, the injuries are of the same type and stem from the same conduct. The eight class representatives and the absent class members all paid supra-competitive prices to Netflix during the class period. *See Graphics Processing*, 253 F.R.D. at 497 (finding typicality where all plaintiffs made purchases online). They all must prove the same central elements: the existence, scope and effects of the Agreement. *See also Simpson v. Fireman's Fund Ins. Co.*, 231 F.R.D. 391, 396 (N.D. Cal. 2005) ("In determining whether typicality is met, the focus should be 'on the defendants' conduct and plaintiffs' legal theory,' not the injury caused to the plaintiff." (internal citation omitted)). As this Court held in *DRAM*, 2006 U.S. Dist. LEXIS 39841, at **34-35:

> [P]laintiffs' claims are typical of the class because proof of their section 1 claim will depend on proof of violation *by defendants*, and not on the individual positioning of the plaintiff . . . as such, the claims are typical of each other despite the differences in types of DRAM, customer categories, and sales channels.

The typicality requirement "does not mandate that products purchased, methods of purchase, or even damages of the named plaintiffs must be the same as those of the absent class members." *In re Static Random Access Memory (SRAM) Antitrust Litig.*, No. C-07-01819, 2009 U.S. Dist. LEXIS 110407, at *38 (N.D. Cal. Nov. 25, 2009) (quotation omitted); *see also DRAM*, 2006 U.S. Dist. LEXIS 39841, at *30 (typicality exists "even though the plaintiff followed different purchasing procedures, purchased in different quantities or at different prices, or purchased a different mix of products than did the members of the class"). Yet, here the Plaintiffs all purchased the same product from the same company through the same channel of distribution.

4. The class representatives will fairly and adequately protect the interests of the Class.

The adequacy requirement under Rule 23(a)(4) has two elements. First, the interests of the class representatives must not be antagonistic to those of the Class. Second, plaintiffs must be represented by counsel of sufficient diligence and competence to fully litigate the claim. *DRAM*, 2006 U.S. Dist. LEXIS 39841, at *36; *see also Hanlon*, 150 F.3d at 1020. Both elements are satisfied here.

There are no conflicts of interest between the class representatives and the rest of the Class. They all have an interest in recovering damages by proving the Market Allocation Agreement's existence and that it resulted in higher Netflix prices. *See Tableware*, 241 F.R.D. at 649 (class members "have a mutual and coterminous interest in establishing defendants' liability and recovering damages"). They will all present the same basic theory of injury – that there were overcharges in Netflix's prices. Because Defendants have deep pockets, no class member has any reason to try to diminish the claims of any other class member. *See Cummings v. Connell*, 316 F.3d 886, 896 (9th Cir. 2003) ("[T]his circuit does not favor denial of class certification on the basis of speculative conflicts.").

Plaintiffs have retained highly capable and well-recognized counsel with extensive experience litigating antitrust cases in general and class action antitrust cases in particular. Lead counsel's firm, Howrey LLP, has the largest competition/antitrust practice of any law firm in the world. Liaison counsel – Saveri & Saveri, Inc. – and the other firms on the steering committee – Berger & Montague; Berman DeValerio; and Spector, Roseman, Kodroff and Willis – are all among the nation's most successful firms in the prosecution of antitrust class actions.[6] Plaintiffs' counsel developed this case and have pursued it vigorously for the benefit of the entire class.

C. Common Questions Of Law And Fact Predominate Over Individual Questions.

Rule 23(b)(3)'s predominance requirement is "readily met" in this type of antitrust class action. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997). As the Rule states, common questions need only predominate; the existence of some individualized questions does not defeat the predominance of the common questions. The common issues must be "numerically and qualitatively substantial in relation to the issues peculiar to individual class members." *DRAM*, 2006 U.S. Dist. LEXIS 39841, at *37. The predominance analysis tracks the claim's substantive elements. *Id.* at *38.

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[6] Plaintiffs will not burden the record with the resumes of the lawyers involved in the case but will provide them upon request.

A review of the three elements — (1) liability, (2) the fact of injury, and (3) damages, *see id.*, — demonstrates how common issues will substantially predominate over individual questions, if any.

1. Proof of the existence and terms of the Market Allocation Agreement will involve common evidence.

As is typical in antitrust cases, the liability evidence will focus on Defendants' conduct. *DRAM*, 2006 U.S. Dist. LEXIS 39841, at *39. Plaintiffs will use common evidence to prove that Defendants entered the Market Allocation Agreement and to prove its terms, including the agreement to allocate the online DVD rental market through Wal-Mart's exit from that market. The Agreement affected the entirety of Wal-Mart's online DVD rental business. Defendants did not enter different agreements affecting different members of the Class. Such proof is all common to the class members. *Id.* at *40. In their public statements Defendants did not refer to particular subscribers or plans, but rather to their businesses, arrangement, and customers as a whole. (Barile Decl. Ex. 7, at 0004-05; Barile Decl. Ex. 33, at 7577-89.)

Given the importance of proving the Market Allocation Agreement and its terms, the class-wide nature of the liability evidence goes a long way toward showing that common issues will predominate. *See Rubber Chemicals*, 232 F.R.D. at 352 ("[T]he great weight of authority suggests that the dominant issues in cases like this are whether the charged conspiracy existed and whether price-fixing occurred.") (internal citation omitted)); *Tableware*, 241 F.R.D. at 652 (central and common element of this suit is whether defendants agreed to boycott retail competitor); *see also Local Joint Exec. Bd. of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc.*, 244 F.3d 1152, 1161 (9th Cir. 2001); *Hanlon,* 150 F.3d at 1022.

2. Proof that the Market Allocation Agreement caused antitrust injury will involve common evidence.

Proof of the second element – antitrust injury – does not require proving the amount of the injury; it only requires proving that there was some injury. *DRAM*, 2006 U.S. Dist. LEXIS 39841, at *40. Here, that means proving that class members paid artificially high prices because Netflix's prices would have been lower absent the Agreement. That proof will be common to the Class.

In *DRAM* this Court found that four market conditions cited by plaintiffs' expert showed that injury could be proved with class-wide evidence. *Id.* at *42.[7] The same conditions are present here.

Facts supporting class-wide proof of injury in *DRAM*	**Similar or stronger facts are present here.**
Product is a "commodity."	• There is no branding or other differentiation among Netflix plans. The differences are all based on quantity and price. • Netflix and Blockbuster offer essentially the same services.
Defendants "possessed sufficient market power to raise prices (70%)."	• Netflix alone has a market share of roughly 75%. • Netflix and Blockbuster together have nearly the entire market.
Market conditions "are such that effective price-fixing with respect to the sale of DRAM to some customers will raise the price of DRAM to other customers."	• [redacted]
"all prices for DRAM products were linked and closely correlated"	• The prices of Netflix plans are closely correlated to each other and with those of Blockbuster plans. • Within any given plan, prices are the same.

Not only do the facts cited by plaintiffs in *DRAM* also apply here, but the facts cited by Defendants in *DRAM*, while not sufficient to preclude class-wide proof of injury in that case, are completely absent here.

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[7] *DRAM* involved a price-fixing conspiracy. This case involves market allocation. Although the conduct is different, for purposes of analyzing impact here, the substance is analogous. In a price-fixing case, the conspirators price as if they were a single firm. In market allocation, a competitor leaves the market altogether.

Facts cited in opposition to class certification in *DRAM*	Such facts do not exist here.
"variations among the different types of DRAM (component v. module)"	• The online DVD rental plans of Netflix, Wal-Mart and Blockbuster all perform(ed) the same basic function.
"various customer categories that utilize different types of DRAM for different purposes"	• Online DVD rental plans are used for the same basic purpose. Prices only vary based on the quantity the customer wishes to rent.
"the varying methods of purchasing DRAM (negotiated contract prices v. spot market transactions)"	• [redacted]

These general market conditions, fully supported by detailed facts, charts, graphs and analyses in Dr. Beyer's report, are sufficient to establish the reasonableness of class-wide proof of injury, as they did in *DRAM*. Nonetheless, Plaintiffs will go beyond general market conditions and review the specific facts, documentary evidence, and testimony to date that may be used to demonstrate the fact of injury. As shown below, the pertinent facts and evidence will be overwhelmingly, if not entirely, class-wide. There will be no evidence applicable only to an individual class member. This should provide a more than "sufficient showing that the evidence [Plaintiffs] intend to present concerning antitrust impact will be made using generalized proof common to the class[.]" *DRAM*, 2006 U.S. Dist. LEXIS 39841, at **44-45 (quotation omitted).

a. Proof that continued competition from Wal-Mart would have affected Netflix's pricing will be common to all class members.

The parties will use class-wide evidence to contest whether a three-firm market that included Wal-Mart would have yielded lower prices than a two-firm market without Wal-Mart. The following illustrate important categories of such class-wide facts.

The vitality of Wal-Mart's online DVD rental business. The facts that Plaintiffs will use to show that Wal-Mart was a significant competitive force, and would have remained so, will be class-wide in nature. They include the following: (1) Netflix CEO Reed Hastings' statement at the outset of the conspiracy that Wal-Mart is a "major competitor" (Barile Decl. Ex. 2, at 0709-710); (2) Wal-

Mart's many public statements that its business was "exceeding expectations," (Barile Decl. Ex. 34, at 0626), and that it was a business Wal-Mart was focused on "growing" (Barile Decl. Ex. 13, at 0941); (3) Wal-Mart's plans [redacted] (Barile Decl. Ex. 35, at 1710, 1714, 1720); (4) Wal-Mart's projection [redacted] (Barile Decl. Ex. 15, at 5623); (5) the fact that Netflix, not Wal-Mart, initiated the communications – the opposite of what would be expected if Wal-Mart was failing and looking to exit (Barile Decl. Ex. 3, at 0120-22; Barile Decl. Ex. 36, at 0234); and (6) Wal-Mart's plans to join forces with [redacted]. (Barile Decl. Ex. 37, at 2639.)

The impact of Wal-Mart's exit on Netflix's profitability. When Hastings predicted that a two-firm market would yield higher profits for Netflix than a three-firm market, (Barile Decl. Ex. 38, at 0356), he did not suggest that the impact was limited to a portion of Netflix's business. [redacted]. *Beyer Rpt.* ¶¶ 12, 35, 44, 76-77.

Blockbuster's competitive significance and strategies. In determining the but-for price Netflix would have charged in a market with continued competition from Wal-Mart and Blockbuster, it may also be relevant to consider Blockbuster's strategies and their influence on Netflix. That analysis will focus on competition from Blockbuster's online DVD rental business as a whole and will not raise individualized issues. Economic theory predicts that a market with just two firms is much more susceptible to outright collusion and less overt forms of non-competitive conduct. *See Beyer Rpt.* ¶¶ 60-64. [redacted]. (Barile Decl. Ex. 39, at 3401 [redacted]; Barile Decl. Ex. 40, at 3304-5 [redacted]; Barile Decl. Ex. 41, at 0658 [redacted]; Barile Decl. Ex. 42, at 2165 [redacted].) Such evidence, and the conclusions drawn from it, are all class-wide.

The absence of new entry since Wal-Mart's exit. The last entrant into this market was Blockbuster in August 2004. Since the conspiracy began, there have been no new entrants. That confirms the existence of barriers to entry, which help assure that the drop in competition will translate into higher prices. The absence of new entry will be established with common evidence.

Netflix's monopoly and market power. Plaintiffs' Section 2 claims for monopolization, attempted monopolization, and conspiracy to monopolize will focus on class-wide evidence.

- Market definition. The evidence relevant to market definition will focus on the extent to which other forms of entertainment, such as in-store video rentals, compete with online DVD rentals. Netflix's statements about the lack of such competition all focus on the online DVD rental market as a whole and do not concern individual issues. For example, on its "Investor Fact Sheet" under the heading "Strong Growth," Netflix claims "We're the clear leader of online DVD rental. Since we invented online DVD rental in 1999, our total subscribers have grown at a compound annual rate of 64 percent." (Barile Decl. Ex. 43, at 2817.) These and other statements all focus on the business as a whole.
- Netflix's share of the relevant market. This is a mathematical exercise based on Netflix's total subscribers/revenues compared to all online DVD subscribers/revenues.
- The price effects of Netflix's market power. This evidence will focus on the points made above regarding Wal-Mart, Blockbuster and other competitive dynamics. Dr. Beyer explains how such analyses will use class-wide evidence. *Beyer Rpt.* ¶¶ 57-64.

Defendants' sections of the Joint Case Management Statement (Dkt. No. 34, July 2, 2009) refer solely to class-wide issues. Their description of Wal-Mart's online DVD rental business, Wal-Mart's and Netflix's reasons for entering this transaction, the significance of the transaction for the marketplace, as well as their other points, all rely upon class-wide arguments. (*Id.*, ¶ 2 (b), at 4-6; ¶ 3(b), at 7-8.) Defendants did not point to any fact or argument that would concern less than all class members.

b. Had Netflix lowered its prices, all class members would have paid less.

Had Netflix further lowered its prices as a result of continued three-firm competition, all class members would have paid less. (Barile Decl. Ex. 1, at 290-91.) [redacted],[8] none of the complications that defendants often cite in their efforts to defeat class certification in other cases is even present here.

- The subscribers are direct purchasers; no person or entity stands between them and Netflix in the chain of distribution. The subscribers have the sole claim for any overcharges they have paid.
- [redacted]. (*Id.* at 288.)
- [redacted] (*Id.* at 33, 36.)
- [redacted]. (*Id.* at 287.)
- [redacted]. (*Id.* at 37.)
- [redacted].

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[8] [redacted] (Barile Decl. Ex. 1, at 288-89, 294.) [redacted] (*Id.* at 296-7.)

c. The fact that Netflix had multiple plans does not change the predominance of common questions.

As set forth above, and as described in Dr. Beyer's Report, *Beyer Rpt.* ¶¶ 12-15, Netflix charges one national monthly subscription price for online DVD rentals that varies only by the number of DVDs in the plan the subscriber chooses and, in the case of a "capped" plan, how many DVDs the subscriber can rent during a month. However, the existence of slight variations in the Netflix plans does not make individualized questions predominate over common questions.

First, the various Netflix plans can be analyzed together. They all do the same thing – they allow subscribers to rent DVDs. The plans are essentially commodities relative to each other. *Beyer Rpt.* ¶¶ 37-43. [redacted] (Barile Decl. Ex. 1, at 37.) [redacted] . (*Id.* at 52-54, 76-77.) [redacted] (*Id.* at 53.) While the number of DVDs allowed by the plan will affect the monthly subscription price, it does not affect the fundamental fact that the plans are otherwise identical.

Second, [redacted] . (*Id.* at 80, 117.) [redacted] (*Id.* at 79-81, 121-22 ("[redacted]"); *Beyer Rpt.* ¶¶ 29-35.) [redacted] (Barile Decl. Ex. 25, at 0069.) [redacted] . (Barile Decl. Ex. 1, at 78.)

Third, even if there is some need to measure damages separately for certain plans, that does not change the predominance of common questions. The need to deal with some product variations is routinely held not to bar class certification. *See SRAM,* 2009 U.S. Dist. LEXIS 110407, at *57 ("contentions of infinite diversity of product, marketing practices, and pricing have been made in numerous cases and rejected") (internal citation omitted); *Tableware*, 241 F.R.D. at 652 (certifying

class despite demonstrated differences in price trends for various types of tableware); *DRAM*, 2006 U.S. Dist. LEXIS 39841, at **43-44 (certifying class despite differences in types and uses of DRAM).

That principle is especially applicable here. With millions of class members and only eight or so Netflix plans, each plan had a very large number of subscribers. Some of the most popular plans, such as the 3-out plan, [redacted]. *Beyer Rpt.* ¶ 29. Thus, even if there is a need to calculate some aspects of damages separately for the 3-out plan, that work would be commonly applicable to a million or more class members. None of that work would concern "only individual members." Fed. R. Civ. P. 23(b)(3).

d. Reliable statistical methods are available to demonstrate and quantify the fact of injury.

As shown above, the evidence from fact witnesses and documents showing the fact of injury will be overwhelmingly, if not entirely, class-wide. The expert testimony likewise will focus on class-wide issues. Dr. Beyer concludes that there are reasonable statistical methods for proving the fact of injury and the quantum of damages on a class-wide basis. *Beyer Rpt.* ¶¶ 12, 65-76. Based on the record to date, Dr. Beyer has identified at least two such methods to calculate the prices that Netflix would have charged absent the Market Allocation Agreement. The methods are: (1) a cost-margin analysis which applies profit margins and trends from the period of three-firm competition to the period after Wal-Mart's exit and (2) a competitive benchmark analysis which looks to the pricing strategies and plans before and after the conspiracy. *Beyer Rpt.* ¶¶ 65-76.

The cost-margin and competitive benchmark approaches "have been upheld by numerous courts." *DRAM*, 2006 U.S. Dist. LEXIS 39841, at *46 (citing cases). Decisions in this District subsequent to *DRAM* continue to recognize the validity of these methods and have certified classes accordingly. *See, e.g.*, *Tableware*, 241 F.R.D. at 652 (the materials supporting the before and after method "suffice to show that means exist for proving impact on a class-wide basis"); *SRAM*, 2009 U.S. Dist. LEXIS 110407, at *59 (finding "before and after" and "cost data" methods sufficient for certification of indirect purchaser class); *In re Static Random Access (SRAM) Antitrust Litig.*, No. C-

07-01819, 2008 U.S. Dist. LEXIS 107523, at *48 (N.D. Cal. Sept. 29, 2008) (same methods suffice for certification of direct purchaser class).

The issue is not whether Plaintiffs will prevail in proving injury via one or more of these methods. At this stage, Plaintiffs need only offer "realistic methodologies." *DRAM*, 2006 U.S. Dist. LEXIS 39841, at *42 (citation omitted). Arguments over the merits of these methodologies will be common to class members. As Justice Souter recently wrote:

> Plaintiffs have offered affidavits of their expert economist in support of a class-wide methodology for appraising damages depending on severity and duration of contamination. [Defendant's] effort to discredit this approach apparently portends a fight over admissibility and weight that would be identical in at least a high proportion of cases if tried individually.

Gintis v. Bouchard Transp. Co., No. 09-1717, 2010 U.S. App. LEXIS 3644, at **7-8 (1st Cir. Feb. 23, 2010) (vacating denial of class certification).

3. Proof of damages will involve predominately common questions.

The statistical methods described by Dr. Beyer provide a roadmap not only for proving the fact of injury, but also for quantifying the difference between the actual price and the but-for price. For present purposes, Plaintiffs need not supply a "precise damage formula." *SRAM*, 2009 U.S. Dist. LEXIS 110407, at *58. The Court's inquiry is limited to whether or not the proposed methods are "so insubstantial as to amount to no method at all." *Id.* at *59 (internal quotation omitted). As shown above, Dr. Beyer has identified damages methodologies that readily meet the applicable standard.

There will be some ministerial post-trial proceeding that takes the damages per subscriber-month as calculated by the jury and, using computerized information, simply multiplies it by the number of months paid by the class member. Such "damage calculations alone cannot defeat certification." *Yokoyama v. Midland Nat'l Life Ins. Co.*, No. 07-16825, 2010 U.S. App. LEXIS 2631, at *16 (9th Cir. Feb. 8, 2010); *see also Blackie*, 524 F.2d at 905 ("The amount of damages is invariably an individual question and does not defeat class action treatment.").

D. A Class Action Is Superior To Other Available Methods For The Fair And Efficient Adjudication Of This Case.

Rule 23(b)(3) indentifies four factors, among others, that determine whether the class action is superior to other available methods. All four factors favor class certification.

The class members' interests in individually controlling the prosecution or defense of separate actions. The class members have no interest in individually controlling the litigation because it is not practical to bring a non-class action challenging these antitrust violations. In *Yokoyama*, 2010 U.S. App. LEXIS 2631, at *17, the Ninth Circuit held that damages of $10,000 - $15,000 per class member were too small to justify individual lawsuits and thus a class action was superior. *See also Gintis*, 2010 U.S. App. LEXIS 3644, at *9 (damages of $12,000 to $39,000 per class member raise "a real question whether the putative class members could sensibly litigate on their own").

The individual damages here will be far lower. Consider a class member who has subscribed from May 2005 to the present — roughly 60 months. Assuming, for illustrative purposes, that the overcharge was $3 per month, damages to that subscriber would be $180, trebled to $540. No plaintiff would pursue a case against adversaries such as Netflix and Wal-Mart for the prospect of recovering $540 in damages. No lawyer would take such a case on contingency. This litigation requires a multi-million dollar commitment of lawyer time, along with very considerable outlays for experts, court reporters, travel, data and document review, among other tasks. The Court's civil filing fee is $350.

As the only available means of recourse, a class action is superior. *See Culinary/Bartender*, 244 F.3d at 1163; *Hanlon*, 150 F.3d at 1023 (noting the need for class actions where individual claims "would prove uneconomic for potential plaintiffs"). As Justice Souter wrote last month, "Rule 23 has to be read to authorize class actions in some set of cases where seriatim litigation would promise such modest recoveries as to be economically impracticable." *Gintis*, 2010 U.S. App. LEXIS 3644, at *5.

The extent and nature of any litigation concerning the controversy already begun by or against class members. This MDL is the only active litigation regarding Netflix's agreement with Wal-Mart. No class member has brought his or her own action, nor would that be economically possible. An action by a putative class of California subscribers is pending in Santa Clara County

Superior Court. That action does not cover the other 49 states. Moreover, it is purely a tag-along which has been stayed pending developments in this case, and its class is subsumed in this litigation.

The desirability or undesirability of concentrating the litigation of the claims in the particular forum. Defendants have already supported consolidation through the MDL process, and the Judicial Panel on Multidistrict Litigation agreed that the cases should be consolidated in this Court.

The likely difficulties in managing a class action. The proposed class action is a fair and efficient means for resolving these claims. The litigation will decide a large number of common questions in a single proceeding. The jury will determine the aggregate damages. The calculation of individual class members' damages, based on the number of months they paid for a plan, can be handled in a post-trial ministerial proceeding.

IV. THE COURT SHOULD CONFIRM ITS APPOINTMENT OF CLASS COUNSEL.

By Order dated May 13, 2009, (Dkt. No. 13), this Court appointed lead counsel, liaison counsel and the steering committee for all Plaintiffs in this MDL. Rule 23(c)(1)(B) provides that "[a]n order that certifies a class action . . . must appoint class counsel under Rule 23(g)." To avoid any doubt, Plaintiffs respectfully request that this Court confirm the appointments of these same firms as class counsel, as provided in the attached Proposed Order. These firms already have invested millions of dollars in attorney time in investigating this case, developing the factual evidence and legal theories, initiating the litigation, and pursuing the lawsuit efficiently and vigorously on behalf of the entire class.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully submit that the proposed class should be certified, and that counsel for plaintiffs be appointed class counsel.

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Respectfully Submitted,

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