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 18 Blockbuster Inc.

19 UNITED STATES DISTRICT COURT
 20 NORTHERN DISTRICT OF CALIFORNIA

21 NETFLIX, INC., a Delaware corporation,

22 Plaintiff,

23 vs.

24 BLOCKBUSTER INC., a Delaware
 25 corporation, DOES 1-50,

26 Defendants.

CASE NO. C 06 2361 WHA

JOINT CASE MANAGEMENT
 STATEMENT

Complaint Filed: April 4, 2006
 Case Management
 Conference Date: June 29, 2006
 Time: 11:00 a.m.
 Courtroom: 9, 19th Floor

27 AND RELATED COUNTER ACTION.
 28

1 **A. Topics in Court’s Supplemental Order**

2 The parties provide the following statements on the subjects
3 designated in Paragraph 2 of the Court’s Supplemental Order (“Order”) filed
4 May 2, 2006 (Document 8 in the Court’s file):

5 1. **Jurisdiction and Venue:** This Court has subject-matter
6 jurisdiction under 28 U.S.C. §§1331, 1337(a), and 1338(a) and 15 U.S.C. §26. The
7 parties know of no issue regarding personal jurisdiction or venue.

8 2. **Claims and Defenses and Related Proceedings:**

9 a. **Netflix’s Claims and Defenses:** Netflix alleges that
10 Blockbuster infringes two Netflix patents: U.S. Patent No. 7,024,381 (the
11 “381 Patent”), entitled “Approach for Renting Items to Customers” issued
12 on April 4, 2006, and U.S. Patent No. 6,584,450 (the “450 Patent”), entitled
13 “Method and Apparatus for Renting Items,” issued on June 24, 2003. At a
14 very high level, the patents relate to a method for subscription-based online
15 DVD rental that allows subscribers to keep the DVDs they rent for as long as
16 they wish without incurring any late fees, to obtain new DVDs upon return of
17 those they have already watched without incurring additional charges, and to
18 prioritize and reprioritize their own personal list—a dynamic queue—of
19 DVDs to be rented. Netflix alleges that Blockbuster willfully infringed the
20 ‘450 patent. Netflix seeks damages for past infringement of its patents, and
21 an injunction enjoining such infringement in the future.

22 b. **Blockbuster’s Claims and Defenses:** Blockbuster alleges
23 defenses of non-infringement, invalidity, and unenforceability of the two
24 patents asserted by Netflix, as well as patent misuse, laches, and estoppel.
25 Blockbuster’s grounds for these defenses include allegations that the patents
26 are anticipated by and obvious in view of prior art and that Netflix’s
27 inventors and patent attorneys withheld known, material prior art from the
28 U.S. Patent and Trademark Office in violation of the duty of candor and good

1 faith requiring disclosure of such art. Blockbuster also alleges that Netflix
2 unreasonably and prejudicially delayed its assertion of its first (“450”)
3 patent. Blockbuster alleges that Netflix engaged in an improper scheme that
4 included obtaining a first patent without disclosing any prior art whatsoever
5 to the Patent Office, acquiescing in Blockbuster’s expenditure of millions of
6 dollars to enter and develop the online DVD rental market, and then
7 obtaining a second (“381”) patent by flooding the Patent Office with more
8 than one-hundred prior-art references while still concealing known, material
9 prior art.

10 Blockbuster also asserts antitrust counterclaims for
11 monopolization and attempted monopolization in violation of Section 2 of the
12 Sherman Act, as well as counterclaims for declaratory judgment. In its
13 antitrust counterclaims, Blockbuster alleges that Netflix fraudulently obtained
14 the patents that it is asserting in this case, in violation of *Walker Process*
15 *Equipment, Inc. v. Food Machinery and Chemical Corp.*, 382 U.S. 172, 175-
16 77 (1965), and that Netflix’s assertion of the patents against Blockbuster
17 constitutes sham litigation actionable under *Professional Real Estate*
18 *Investors, Inc. v. Columbia Pictures Industry, Inc.*, 508 U.S. 49, 56-61
19 (1993). In its declaratory-judgment counterclaims, Blockbuster seeks a
20 judgment of non-infringement, invalidity, and unenforceability of each of the
21 asserted Netflix patents.

22 c. Related Proceedings: There are no “Related Cases” as
23 defined in L.R. 3-12(a).

24 3. Proceedings to Date:

25 a. Netflix filed its Complaint on April 4, 2006, serving the
26 Summons and Complaint on April 20. On June 8, counsel for the parties
27 timely conferred under Federal Rule Civil Procedure 26(f). Blockbuster filed
28 and served its Answer and Counterclaims on June 13, 2006.

1 b. The parties have stipulated to extend the time for
2 exchange of documents in conjunction with initial disclosures under
3 Rule 26(a) by thirty days to July 21, 2006 and to otherwise extend the time
4 for disclosures to June 26, 2006.

5 4. Pending Motions: No motions are pending.

6 5. Expected Major Motions Before Trial: Netflix expects to file a
7 motion for summary judgment of infringement and may bring a motion for
8 summary judgment of validity. Netflix also expects to move to dismiss or in the
9 alternative to sever and stay Blockbuster's antitrust counterclaim, and to strike
10 Blockbuster's allegations of inequitable conduct. Blockbuster expects to file one or
11 more motions for summary judgment of invalidity as well as non-infringement of
12 some or all of Netflix's patent claims.

13 6. Expected Addition or Deletion of Parties: Neither side expects
14 parties to be added or deleted at this time.

15 7. Anticipated Evidentiary, Claim-Construction, or Class-
16 Certification Hearings: The parties anticipate a *Markman* claim construction
17 hearing in this case but do not presently expect to present testimony at the hearing.
18 Counsel do not presently anticipate other evidentiary hearings. This is not a class
19 action.

20 8. Compliance with Evidence-Preservation Requirements: The
21 parties have complied with the evidence preservation requirements of Paragraph 4
22 of the Court's Order.

23 9. Stipulated Discovery Limits Different from the Federal Rules:

24 a. Netflix believes that the presumptive limit of ten
25 depositions per side is more than adequate for this case, absent some further
26 showing of good cause to exceed that limit. Blockbuster seeks to increase
27 the number of depositions to 15 depositions per side, without precluding
28 either side from requesting further depositions in the future should

1 circumstances support such a request. Blockbuster believes that an increase
2 to 15 depositions is appropriate because of the complexity of this case,
3 including the expected need to depose numerous persons knowledgeable
4 about prior art of multiple types relevant to Netflix's claimed inventions,
5 ranging from subscription libraries, cable and satellite television services,
6 pay television services, and other video and film subscription services to
7 video rental stores and e-commerce businesses. In addition, Blockbuster will
8 be required to depose the three inventors named in the subject patents, other
9 past and present Netflix personnel familiar with the development and features
10 of the Netflix service, the patent attorneys who prosecuted the applications
11 for the subject patents, fact witnesses on damage and antitrust issues, and
12 multiple expert witnesses.

13 b. The parties agree that each side may take up to 3
14 depositions of 14 hours each. Netflix believes that all other depositions can
15 be concluded within 7 hours. Blockbuster believes it is possible that some
16 other depositions will reasonably require more than 7 hours, in which case
17 Blockbuster's counsel will confer with Netflix's counsel in an attempt to
18 reach agreement on the appropriate length of such depositions.

19 10. Proposed Deadlines and Court Dates:

20 a. Blockbuster proposes that its time to file preliminary
21 invalidity contentions and produce supporting documents as provided in
22 Patent Local Rules 3-3 and 3-4 be extended to October 23, 2006. While
23 Blockbuster believes that it has already identified prior art sufficient to
24 invalidate the 151 claims of Netflix's asserted business-method patents,
25 much of the important prior art lies outside traditional prior art sources like
26 issued patents and published patent applications, making the prior art in this
27 case particularly time-consuming to locate and document. To fully develop
28 its invalidity defenses, Blockbuster is finding it necessary to identify and

1 locate numerous people who were involved in prior-art subscription libraries,
2 video rental businesses, e-commerce businesses and other unpatented prior-
3 art activities, to contact and interview these people, and then to obtain and
4 analyze documents related to their relevant activities, which may be buried
5 deep in storage facilities or other obscure locations. As a result, more time
6 than usual will be required to assemble complete preliminary invalidity
7 contentions and supporting documents.

8 b. Netflix proposes that the *Markman* hearing be held on or
9 around January 19, 2007. Blockbuster proposes that the hearing be held on
10 or after March 12, 2007.

11 c. The parties propose that non-expert discovery be cut off
12 ninety days before the trial date.

13 d. The parties propose that the pretrial conference be
14 conducted at least fifteen days prior to trial.

15 e. Netflix proposes that the Court set a trial date in July,
16 2006. Blockbuster proposes that the trial be in or after January 2008. Netflix
17 presently estimates that the trial is likely to require approximately 10 court
18 days, while Blockbuster estimates that it will require 10 to 15 court days.

19 f. Except as provided above, the parties propose that the
20 Court follow the timing indicated in the Patent Local Rules and the Federal
21 Rules of Civil Procedure.

22 11. Jury Demands: Both sides have properly demanded a jury trial.

23 12. Relief Sought: Netflix seeks damages from Blockbuster for
24 alleged patent infringement and an injunction. Blockbuster seeks declaratory
25 judgment for non-infringement, invalidity, and unenforceability of Netflix's
26 asserted patents and seeks damages from Netflix for alleged antitrust violations.
27 Both sides seek attorneys' fees and costs of suit. Neither side has had an
28 opportunity to formulate detailed contentions concerning damages.

1 13. ADR: The parties have conferred about ADR procedures and
2 agree that private mediation is the likely procedure to assist settlement. Because of
3 the complexity of the case, the parties believe that mediation would be premature at
4 this early stage and propose to engage in mediation within 180 days.

5 14. Consent to Assignment to Magistrate Judge: The parties are not
6 willing to consent to the assignment of the case to a magistrate judge.

7 15. Service List: The following is a service list for all counsel,
8 including telephone and facsimile numbers:

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37 16. Other Items in Local Rule 16-10: Except as set forth above, the
38 parties propose that the matters specified in Civil Local Rule 16-10(b) be scheduled
39 in accordance with the Local Rules, the Federal Rules of Civil Procedure, and the
40 Guidelines for Trial and Final Pretrial Conference in civil jury cases before the
41 Honorable William Alsup.

1 **B. Topics in Patent Local Rule 2-1(a)**

2 The parties provide the following statements concerning the topics
3 listed in Patent Local Rule 2-1(a):

4 1. Proposed Modification of Patent Local Rule Deadlines: *See*
5 Paragraph A10 above.

6 2. Live Testimony at Claim Construction Hearing: *See*
7 Paragraph A7 above.

8 3. Limits on Claim Construction Discovery: The parties propose
9 no such limits.

10 4. Order of Presentation at Claim Construction Hearing: Netflix
11 proposes that the Court adopt its standard procedures regarding the order of
12 presentation at the hearing, such that Netflix will make an initial presentation,
13 followed by Blockbuster, followed by any rebuttal from Netflix. Blockbuster
14 proposes that each side be allowed to make the first presentation as to half of the
15 claim phrases to be construed, with the other side responding and with rebuttal and
16 surrebuttal permitted as reasonably necessary.

17 5. Claim Construction Prehearing Conference: The parties do not
18 believe that such a conference will be necessary.

19 **C. Protective Order**

20 In accordance with Federal Rule of Civil Procedure 26(f), counsel
21 have conferred about a stipulated protective order to protect trade secrets and
22 confidential and proprietary information provided in discovery. The parties agree
23 that the protective order should provide two levels of confidentiality
24 (“Confidential” and “Attorneys Only”). Netflix proposes that the Attorneys’ Only
25 category should be limited to outside counsel. Blockbuster proposes that one
26 mutually acceptable in-house attorney for each side have access to Attorneys Only
27 information, after signing an appropriate undertaking to prevent inappropriate
28 disclosure or use of such information. Blockbuster and its in-house lawyers take

1 very seriously the important professional responsibilities of in-house counsel to
2 their client and its shareholders, including duties to make prudent decisions,
3 provide legal advice, and exercise direction and control over this important and
4 costly litigation. Blockbuster believes that the requested access is essential to
5 permit its in-house counsel to properly fulfill these responsibilities.

6 DATED: June 22, 2006 KEKER & VAN NEST, LLP

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8 By _____
9 Daralyn J. Durie
10 Attorneys for Plaintiff and Counterdefendant,
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11 DATED: June 22, 2006 ALSCHULER GROSSMAN STEIN & KAHAN
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