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10 *Counsel for proposed intervenor,*
Dennis Dilbeck

11
 12 **IN THE UNITED STATES DISTRICT COURT**
FOR THE NORTHERN DISTRICT OF CALIFORNIA
 13 **SAN FRANCISCO DIVISION**

14 NETFLIX, INC. a Delaware corporation,

15 Plaintiff,

16 v.

17 BLOCKBUSTER INC., a Delaware
 corporation, and DOES 1-50,

18 Defendants.

No. C 06 2361 WHA
 Judge William Alsup
**(PROPOSED) COMPLAINT IN
 INTERVENTION**

19 DENNIS DILBECK, an individual, on his
 own behalf and on behalf of all
 20 similarly situated,

21 Plaintiff in Intervention

22 v.

23 NETFLIX, INC. a Delaware corporation

24 Defendant in Intervention.

25 **DILBECK'S PROPOSED COMPLAINT IN INTERVENTION**

26 Dennis Dilbeck ("Dilbeck" or "Intervening Plaintiff"), for his complaint, alleges as
 27 follows upon information and belief, based upon, *inter alia*, investigation conducted by and
 28 through their attorneys, except as to those allegations pertaining to Intervening Plaintiff and his

1 counsel personally, which are alleged upon knowledge:
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3 **Nature of the Claim**

- 4 1. This is a national antitrust class action brought on behalf of a class of all persons and
5 entities who subscribed to Netflix, Inc. (“Netflix” or “Defendant in Intervention”). The
6 class action concerns two patents obtained by Netflix: U.S. Patent No. 6,584,450 (the
7 “450 Patent”) and U.S. Patent No. 7,024,381 (the “381 Patent”). The '450 Patent was
8 issued on June 23, 2003 and the '381 Patent was issued on April 4, 2006.
- 9 2. As further alleged below, these Patents were obtained by fraud on the Patent Office and
10 the fraudulent concealment of prior art. Because prior art anticipates some or all of the
11 claims in the the '450 and '381 Patents, and Netflix knew of this prior art, but failed to
12 disclose it to the Patent Office, the '450 and '381 Patents are invalid and unenforceable.
13 But for Netflix's fraud and fraudulent concealment, the Patent Office would have never
14 issued either the '450 Patent or the '381 Patent.
- 15 3. Through its control of the '450 and '381 Patents, Netflix monopolized the online DVD
16 rental market by deterring other competitors from entering that market. But for the threat
17 of liability for infringing on the '450 and '381 Patents, there would be more competition
18 (and, hence better services and lower prices) in the online DVD rental market. The '450
19 and '381 Patents have deterred and continue to deter competitors and delay the
20 introduction of competition in the market for online DVD rentals and related subscription
21 services. As a consequence of Netflix's exclusion of competitors and constraint of
22 competition, Dilbeck and the other class members have paid supracompetitive online
23 DVD rental subscription rates to Netflix.
- 24 4. To maintain its monopoly, Netflix has sued Blockbuster for allegedly infringing on the
25 '450 and '381 Patents by operating its Blockbuster Online rental service (“Blockbuster
26 Online”). The instant proceeding has had both the effect of impairing Blockbuster
27 Online's competitive impact on the market and of deterring other competitors from
28 entering the online DVD rental market. Blockbuster has counterclaimed for Sherman Act
violations.

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5. Netflix's acts in obtaining and enforcing the '450 and '381 Patents to exclude and restrain competition constitute an unlawful trust prohibited under California's Cartwright Act. Netflix's use of the '450 and '381 Patents to delay, deter, and destroy competition in the online DVD rental market also established and maintained a monopoly prohibited under the Sherman Act.
 6. Netflix's actions violate the Sherman Act (15 U.S.C. § 2), California's Cartwright Act (Cal. Bus. & Prof. Code §§ 16720, 16726), and California's unfair competition law (Cal. Bus. & Prof. Code § 17200). This lawsuit seeks remedies for consumers against Netflix's anticompetitive acts, including damages (and treble damages under the Sherman Act and the Cartwright Act), restitution, and other injunctive relief restraining Netflix from similar anticompetitive acts in the future under the Clayton Act (15 U.S.C. § 15, 26), the Cartwright Act (Cal. Bus. & Prof. Code § 16750), and the unfair competition law (Cal. Bus. & Prof. Code § 17203).

Parties

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7. Dennis Dilbeck is a resident of Los Angeles, California. Dilbeck has been a Netflix subscriber since October 2002.
 8. Defendant Netflix, Inc. is a Delaware corporation which maintains its headquarters at 100 Winchester Circle, Los Gatos, CA 95032. Founded in 1999, Netflix claims to be the world's largest online DVD movie rental service. Netflix now claims to have 5.2 million subscribers.

Jurisdiction and Venue

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9. Intervening Plaintiff asserts a claim under the Sherman Antitrust Act and seeks damages and injunctive remedies under the Clayton Act on behalf of himself and all others similarly situated. This Court has federal subject matter jurisdiction over this case under 28 U.S.C. § 1331.
 10. The aggregate claims of Intervening Plaintiff and the proposed class members substantially exceed the sum or value of \$5,000,000, and the proposed class members are scattered throughout the fifty states and other countries: there is diversity of citizenship

1 between proposed class members and Defendant in Intervention. This Court also has
2 subject matter jurisdiction over this case under 28 U.S.C. § 1332(d).

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4 11. This Court has personal jurisdiction over the Defendant in Intervention under Cal. Code
5 Civ. Proc. § 410.10 because Netflix maintains its corporate headquarters in, and the
6 majority of acts alleged herein were committed in, California and, specifically, the
7 Northern District of California.

8 12. Venue is also proper before this Court under 28 U.S.C. § 1391(b)(1) ,(2), (c).

9 **Intradistrict Assignment**

10 13. This is an Intellectual Property Action subject to district-wide assignment under N.D.
11 Cal. Civil L.R. 3-2(c).

12 **Netflix's Patents**

13 14. **The '450 Patent Application:** At issue in this case are two patents U.S. Patent No.
14 6,584,450 (the "450 Patent") and U.S. Patent No. 7,024,381 (the "381 Patent"). Netflix
15 filed its application for the '450 patent with the Patent Office on April 28, 2000 ("450
16 Patent Application"). The '450 Patent Application was designated Serial No. 09/561,041
17 and listed W. Reed Hastings, (Netflix's Chief Executive Officer and President), Marc B.
18 Randolph, and Neil Duncan Hunt as the inventors ("Netflix Inventors").

19 15. Claim 1 of the '450 Patent Application covered:

20 A method for renting items to customers, the method comprising the
21 computer-implemented steps of:
22 receiving one or more item selection criteria that indicates one or more
23 items that a customer desires to rent;
24 providing to the customer up to a specified number of the one or more
25 items indicated by the one or more item selection criteria; and
26 in response to receiving any of the items provided to the customer,
27 providing to the customer one or more other items indicated by the
28 one or more item selection criteria, wherein a total current number
of items provided to the customer does not exceed the specified
number.

Claims 14, 29, 49, 65, 79, 94, and 96 of the '450 Patent Application all describe
iterations of the claimed method adjusted to the rental of movies.

16. **The '381 Patent Application:** On or about, April 7, 2003 the Patent Office gave Netflix
notice that the '450 Patent would be allowed and would issue shortly (and the '450 Patent

1 indeed issued on June 24, 2004). Five weeks later, on May 14, 2003, Netflix applied for
2 the '381 Patent (the "381 Patent Application"). The '381 Patent Application was
3 designated Serial No. 10/438,727 and, again, listed the Netflix Inventors as the inventors.
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5 17. Claim 1 of the '381 Patent Application covered:

6 A computer-implemented method for renting movies to customers, the
7 method comprising:
8 providing electronic digital information that causes one or more attributes
9 of movies to be displayed;
10 establishing, in electronic digital form, from electronic digital information
11 received over the Internet, a movie rental queue associated with a
12 customer comprising an ordered list indicating two or more movies
13 for renting to the customer;
14 causing to be delivered to the customer up to a specified number of
15 movies based upon the order of the list;
16 in response to one or more delivery criteria being satisfied, selecting
17 another movie based upon the order of the list and causing the
18 selected movie to be delivered to the customer; and
19 in response to other electronic digital information received from the
20 customer over the Internet, electronically updating the movie
21 rental queue.

22 18. Despite the startling breadth of its claims, the '450 Patent Application made no reference
23 to any prior art.

24 19. Conversely, the '381 Patent Application listed over 100 references to prior art, the
25 volume of which Dilbeck alleges on information and belief was sufficient to "swamp" the
26 Patent Office's examiners by burying any references which would limited the '381 patent
27 application's claims in a plurality of innocuous, plausibly relevant references. Further, as
28 alleged below, the '381 patent application completely omitted other prior art known to
the Netflix patent applicants.

**Netflix Patent Applicant's Duty of Candor
and Good Faith to the Patent Office**

20. To qualify for protection under the patent laws, an invention must be both novel and
nonobvious. To prior art, or knowledge already publicly available, anticipates an
invention, the invention is not novel and cannot be patented. Where the difference
between the invention and prior art is such that the invention as a whole would have been
obvious at the time the invention was made, the invention is obvious and cannot be
patented.

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21. **The Netflix Patent Applicants:** Under 37 C.F.R. § 1.56 and federal common law, each individual “associated” with the filing and prosecution of a patent application has a duty of candor and good faith to the Patent Office. Per Patent Office regulation, individuals “associated” with the filing and prosecution of a patent application include each inventor named in the application, each attorney or agent who prepares or prosecutes the application; and

8 [e]very other person who is substantively involved in the preparation or prosecution of the application and who is associated with the inventor, with the assignee or with anyone to whom there is an obligation to assign the application.
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10 Each of the following were associated with the '450 and '381 patent applications: W. Reed Hastings, Marc B. Randolph, and Neil Duncan Hunt (the listed inventors), Edward A. Becker and Hickman Palermo Truong & Becker LLP (the prosecuting attorneys), Netflix (the assignor), and any of Netflix's other employees, directors, officers, or agents substantively involved in the '450 and '381 patent applications (collectively, the “Netflix Patent Applicants”).
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16 22. **Patent Applicants' Duty of Candor and Good Faith:** The Netflix Patent Applicants' duty of candor and good faith to the Patent Office has public implications:
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18 A patent by its very nature is affected with a public interest. The public interest is best served . . . when, at the time an application is being examined, the Office is aware of and evaluates the teachings of all information material to patentability.
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21 37 C.F.R. § 1.56(a). The Netflix Patent Applicants' duty of candor and good faith to the Patent Office specifically included “a duty to disclose to the Office all information known . . . to be material” to the '450 and '381 patent applications' subject matter. Thus, the Netflix Patent Applicants had a duty to disclose material prior art to the Patent Office.
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25 23. 37 C.F.R. § 1.51(b) requires all patent applicants submit an oath or declaration with their application. The declaration includes an acknowledgment of the duty to disclose to the Office “all information known to the person to be material to patentability” defined in 37 C.F.R. § 1.56.
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24. The Netflix Inventors submitted a declaration in which they acknowledged the duty to

1 disclose material information to the Patent Office. The declaration indicates that W. Reed
 2 Hasting signed on September 28, 2000, by Neil Duncan Hunt signed on September 29,
 3 2000, and Marc B. Randolph signed on October 3, 2000.

4 **Material Prior Art to the '450 and '381 Patents**

- 5 25. The information alleged below (the "Prior Art") to constitutes prior art to the '450 and
 6 '381 Patents, and anticipates at least some , if not all, of the claims contained in the '450
 7 and '381 Patents.
- 8 26. **The NCR Patents:** A number of patents assigned to the NCR Corporation ("NCR
 9 Patents") predate, anticipate, and are prior art to the '450 and/or '381 Patents:
- 10 (a) U.S. Patent No. 5,699,526 (the "526 Patent"), entitled "Ordering and
 11 Downloading Resources from Computerized Repositories," issued on
 12 December 16, 1997, whose subject matter concerns, *inter alia*,
 13 a system for managing resources, comprised of multiple servers
 14 and one or more PCs coupled to the servers. The servers are
 15 grouped into local servers and regional servers, wherein each of
 16 the local servers stores resources, and each of the regional servers
 17 stores profiles of the resources. The profiles contain descriptive
 18 information about the resources stored on the local servers. The
 19 local and regional servers are linked together so that profiles and
 20 resources can electronically transferred therebetween. A PC
 21 coupled to server can view profiles stored in the regional servers,
 22 and then electronically order delivery of any resource described in
 23 a profile viewed by the PC);
- 24 (b) U.S. Patent No. 5,951,643, entitled "Mechanism for Dependably
 25 Organizing and Managing Information for Web Synchronization and
 26 Tracking Among Multiple Browsers," issued September 14, 1999;
- 27 (c) U.S. Patent No. 5,991,791, entitled "Security Aspects of Computer
 28 Resource Repositories," issued November 23, 1999; and
- (d) U.S. Patent No. 6,026,403, entitled "Computer System for Management
 of Resources," issued on February 15, 2000;
- (e) U.S. Patent No. 6,169,997, entitled "Method and Apparatus for Forming
 Subject (Context) Map and Presenting Internet Data According to the
 Subject Map," issued January 2, 2001;
- (f) U.S. Patent No. 6,253,203, entitled "Privacy-Enhanced Database," issued
 June 26, 2001;
- (g) U.S. Patent No. 6,502,096, entitled "Managing a Resource on a Network
 Where Each Resource Has an Associated Profile with an Image," issued
 December 31, 2002; and

1 (h) U.S. Patent No. 6,714,931, entitled “Method and Apparatus for Forming
2 User Sessions and Presenting Internet Data According to the User
Sessions,” issued March 30, 2004.

3 27. The '526 Patent is, in particular, plainly prior art to the '450 and '381 Patents: the '450
4 and '381 Patents claim methods for selecting preferred items (in particular DVDs) to be
5 delivered to a computer user. Likewise, the '526 Patent claims a system of selecting
6 preferred resources that would then be delivered to a computer user.

7 28. **Other Prior Art:** In addition, a good deal of other information predates, anticipates, and
8 is prior art to the '450 and '381 Patents (the “Other Prior Art”). This prior art includes:

9 (a) more than 100 references included the '381 Patent Application which
10 predate the '450 Patent Application and could have been included in the
11 '450 Patent Application (the “Omitted '381 Patent Application
References”); as well as

12 (b) subscription systems, including libraries for the blind and other
13 subscription libraries, cable and satellite television services, pay television
14 services, as well as TiVo and other video and film subscription services;
15 the wide-spread use of waiting lists and/or reservation lists for out-of-
stock videos in the video rental industry; and prior art in the electronic
description, selection and ordering of items via the Internet
16 (“Miscellaneous Prior Art”).

17 **Netflix Patent Applicants Fraudulently 18 Concealed Prior Art From the Patent Office**

19 29. The Netflix Patent Applicants learned of at least some of the Prior Art before the '450
20 Patent issued. Further, the Netflix Patent Applicants knew that some of this Prior Art
21 anticipated and was material to the pending '450 and '381 Patents Applications, and knew
22 that they had a duty to disclose the such material prior art to the Patent Office under 37
23 C.F.R. § 1.56.

24 30. Despite their acknowledged duty to disclose all material prior art to the Patent Office, the
25 Netflix patent applicants fraudulently concealed at least some of the Prior Art alleged
26 above.

27 31. **The NCR Patents:** The most telling evidence of the Netflix Patent Applicants' fraudulent
28 concealment of Prior Art from the Patent Office involves the NCR Patents. Netflix has
filed documents before this very Court which demonstrate that Netflix knew about the
NCR patents well before either the '450 or the '381 patent issued. Netflix filed a

1 declaratory judgment action against NCR on March 10, 2006.

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3 32. In that case (titled *Netflix, Inc. v. NCR Corp.*, No. C 06 1892), Netflix alleged in its
4 complaint for declaratory action:

5 On January 7, 2003, Bruce A. Langos, Vice President of Business Operations and
6 Intellectual Property Management at NCR, wrote to Reed Hastings, the Chief
7 Executive Officer of Netflix claiming notice “that various Netflix.com offerings
8 infringe at least the following patents owned by NCR Corporation.” The letter
9 identified ten separate patents that NCR claimed were infringed, and enclosed
10 several exemplary claim charts, each of which accused Netflix of infringing the
11 claims described therein. . . .

12 On August 1, 2005, Mr. Langos once again wrote to Mr. Hastings of Netflix
13 concerning “your company's infringements of NCR patents.” The letter enclosed
14 updated claim charts that again accused Netflix of infringing the claims described
15 therein, and threatened that should Netflix refuse to license the technology NCR
16 was “prepared to pursue other options.” . . .

17 In late 2005, counsel for NCR contacted counsel for Netflix in San Francisco,
18 California, seeking to schedule a face-to-face meeting in San Francisco to discuss
19 NCR's allegations of infringement. . . . [D]uring [a November 28, 2005] meeting
20 NCR's counsel once again asserted that Netflix infringed the NCR patents . . .
21 [O]n January 11, 2006, counsel for NCR sent via email . . . revised charts
22 purporting to show that Netflix was currently infringing the claims described
23 therein.

24 Thus, Netflix's own pleadings in *Netflix, Inc. v. NCR Corp.* allege and establish that the
25 Netflix patent applicants had notice of the NCR patents no later than January 7, 2003.

26 33. Netflix further alleged that it has a reasonable apprehension that NCR would sue Netflix
27 for infringing on the NCR Patents and, therefore, an actual and justiciable controversy
28 existed between Netflix and NCR concerning whether Netflix infringes any valid claim of
the NCR patents.

34. Despite acknowledging that it knew of the NCR Patents, that it had an apprehension that
NCR would actually sue Netflix for infringing the NCR Patents, Netflix failed to disclose
the NCR Patents to the Patent Office.

35. Further, *none of the other Netflix Patent Applicants ever disclosed the NCR Patents to
the Patent Office*, either in respect to the '450 Patent Application (which was pending
until June 24, 2003) or in respect to the '381 Patent Application (which was pending until
April 24, 2006).

36. The Netflix Patent Applicants' duty of candor and good faith obliged them to notify the

1 Patent Office of any material prior art under 37 C.F.R. § 1.56(a). The Netflix Patent
2 Applicants should have notified the Patent Office of the NCR Patents because the NCR
3 Patents were material to the '450 and '381 Patent Applications:

- 4 (a) neither the '450 nor the '381 Patent Applications contained references to
- 5 the NCR Patents, so the NCR Patents could not be cumulative to any
- 6 information contained in the '450 nor the '381 Patent Applications;
- 7 (b) the NCR Patents were inconsistent with the Netflix Patent Applicants'
- 8 position that the '450 and '381 Patent Applications' subject matter was
- 9 novel and nonobvious (and therefore patentable); and
- 10 (c) the NCR Patents established a *prima facie* case that the subject matter of
- 11 the '450 and '381 patent applications was not novel (and therefore not
- 12 patentable).
- 13 (d) the NCR Patents (notwithstanding whether they do in fact cover Netflix's
- 14 rental service, or whether they indeed valid), their applications, and the
- 15 references cited in those applications, contain information that a
- 16 reasonable examiner would be substantially likely to consider important in
- 17 deciding whether to allow an application to issue as a patent.

18 37. **The Other Prior Art:** To the extent that the Netflix Patent Applicants knew or learned
19 of the Other Prior Art during the pendency of either the '450 or the '381 Patent
20 Applications, they had a duty to disclose the Other Prior Art under 37 C.F.R. § 1.56(a).

21 38. The Netflix Patent Applicants' duty of candor and good faith obliged them to notify the
22 Patent Office of any material prior art under 37 C.F.R. § 1.56(a). The Netflix Patent
23 Applicants should have notified the Patent Office of the Other Prior Art because the
24 Other Prior Art was material to the '450 and '381 Patent Applications:

- 25 (a) Neither the '450 nor the '381 Patent Applications contained references to
- 26 the Miscellaneous Prior Art, so the Miscellaneous Prior Art could not be
- 27 cumulative to any information contained in the '450 nor the '381 Patent
- 28 Applications;
- (b) Likewise, the '450 Patent Application did not contain any reference to the
- Omitted '381 Patent Application References, and so the Omitted '381
- Patent Application References could not be cumulative to any information
- contained in the '450 Patent Application;
- (c) the Other Prior Art was material to the '450 and '381 Patent Applications
- because the Other Prior Art is inconsistent with the Netflix Patent
- Applicants' position that the '450 and '381 Patent Applications' subject
- matter was novel and nonobvious (and therefore patentable); and
- (d) the Other Prior Art was material to the '450 and '381 Patent Applications
- because they established a *prima facie* case that the subject matter of the

'450 and '381 patent applications was not novel (and therefore not patentable);

(e) the Other Prior Art contains information that a reasonable examiner would be substantially likely to consider important in deciding whether to allow an application to issue as a patent.

39. Dilbeck alleges on information and belief that the Netflix Patent Applicants knew or learned of the Other Prior Art during the pendency of the '450 and '381 Patent Applications, but did not disclose the Other Prior Art to the Patent Office.

40. But for the Netflix Patent Applicants' concealment of the Prior Art (including the NCR Patents, the Omitted '381 Patent Application References, and Miscellaneous Prior Art), the Patent Office would not have issued either the '450 or the '381 Patent.

41. **Fraudulent Intent:** The '450 and the '381 Patents are invalid and unenforceable because of the Prior Art alleged above establishes that the '450 and the '381 Patents' subject matter was not novel. Further, the '450 and the '381 Patents are invalid and unenforceable because the Netflix Patent Applicants breached their duty of candor and good faith to the Patent Office.

42. Dilbeck alleges on information and belief that the Netflix Patent Applicants intended that the Patent Office rely on their concealment of the Prior Art alleged above, and concealed the Prior Art as part of an intentional and deliberate scheme to deceive and induce the Patent Office into issuing the '450 or the '381 Patents. In the alternative, the Netflix Patent Applicants breached their duty to disclose material prior art to the Patent Office in a manner so reckless that it is sufficient to allege fraud.

43. Blockbuster's counterclaim alleges objective evidence that the Netflix Patent Applicants knew the '450 or the '381 Patents were invalid and unenforceable:

In January 2005, Netflix CEO and Named Inventor Reed Hastings met with Blockbuster's then-Executive Vice President and General Counsel, Edward Stead. Hastings praised Blockbuster's competitive position in the online rental business and asked Stead when he had figured out that Netflix's '450 patent was a "joke."

(Def.'s Countercl. ¶ 40.) Dilbeck alleges on information and belief that Hasting indeed said the '450 Patent was a "joke."

44. **The Instant Sham Litigation:** On April 4, 2006, the '381 Patent issued. On the same

1 day, Netflix sued Blockbuster for allegedly infringing on the '450 and '381 Patents by
2 operating Blockbuster Online.

3 45. The instant proceeding has had both the effect of impairing Blockbuster Online's
4 competitive impact and of deterring other competitors from entering the relevant market,
5 alleged below.

6 46. Objectively, Netflix's litigation against Blockbuster is a sham. Netflix should have known
7 that the '450 and '381 Patents are invalid and unenforceable because they are anticipated
8 by Prior Art or because the Netflix Patent Applicants breached their duty of candor and
9 good faith to the Patent Office by concealing the Prior Art from the Patent Office.

10 47. Subjectively, Netflix's litigation against Blockbuster is a sham. Netflix indeed knew that
11 the '450 and '381 Patents were invalid and unenforceable when it sued Blockbuster, and
12 its CEO even further went so far as to call the '450 Patent a "joke."

13 **The Relevant Market**

14 48. As defined by Blockbuster's counterclaim against Netflix, the relevant product market is
15 "the market for online DVD rentals and related subscription services" and the relevant
16 geographic market is "the United States and its territories as a whole." (Def.'s Countercl.
17 ¶ 89.) In the alternative, Dilbeck alleges that the relevant product market is the market
18 for monthly DVD rental subscription services which rent a set number of DVDs to
19 consumers by mail (collectively, the "Relevant Market").

20 49. The Relevant Market represents several significant inelastic demands which create both
21 significant barriers to entry and clear borders between the Relevant Market and putative
22 substitute markets.

23 50. First, consumers in the Relevant Market demand a vast inventory of DVDs from which
24 consumers can select their rentals. (For instance, Netflix claims to have more than 55,000
25 titles and more than 25 million DVDs.) Because brick-and-mortar stores have a
26 centralized inventory and a centralized customer base, they do not have a sufficient
27 inventory and cannot substitute for the Relevant Market. (Moreover, brick-and-mortar
28 stores offer immediate gratification, while the Relevant Market's fulfillment of customer

1 orders is necessarily delayed by the mail. In order to compete with brick-and-motor
2 stores, Relevant Market must compensate with a significantly better selection and variety
3 of DVD titles.)

4 51. Second, consumers in the Relevant Market demand that the delay between rental order
5 and subsequent fulfillment be reasonably short. Because consumers in the Relevant
6 Market are dispersed throughout the nation, this requires a service in the Relevant
7 Market to store its DVD inventory in a geographically distributed network of shipping
8 centers. This way, a subscriber will be relatively close to at least one shipping center and
9 the rental DVDs' time in transit will not be overly long. (For instance, Blockbuster Online
10 has 30 specialized distribution centers, and also processes rental fulfillments through
11 approximately 1,000 of its brick-and-motor stores.)

12 52. Both the vast DVD inventory and the geographically distributed network of shipping
13 centers demanded by the Relevant Market represent serious capital expenditures and
14 constitute significant barriers to entry into the Relevant Market.

15 **Netflix's Market Power**

16 53. Netflix has competed in the Relevant Market since 1999. Dilbeck alleges that on
17 information and belief, Netflix has used the implicit or express threat of liability for
18 infringing on the '450 and '381 Patents to exclude competitors from the market.

19 54. Dilbeck alleges on information and belief that the Netflix Patent Applicants' scheme to
20 deceive and induce the Patent Office into issuing the '450 or the '381 Patents was
21 specifically intended to buttress Netflix's efforts to deter, delay, and destroy competition
22 and competitors from its market and to monopolize its market.

23 55. Specifically, Dilbeck alleges that Wal-Mart Stores, Inc. also competed in the Relevant
24 Market from June 2004 to June 2005, and Dilbeck alleges on information and belief that
25 Netflix used the '450 and '381 Patents to induce Wal-Mart Stores, Inc. to withdraw from
26 the Relevant Market. Nonetheless, Blockbuster entered the Relevant Market on August
27 11, 2004. As alleged below, the impact of competition on prices in the Relevant Market
28 has been substantial and immediately visible.

1 56. Netflix has maintained significant market power throughout the course of the events
2 alleged in this Complaint in Intervention. Netflix's market power can be measured by the
3 differential between subscription rates before and after Blockbuster's entry into the
4 Relevant Market, and the proportion of its subscribers to the total number of consumers
5 on the market.

6 57. **Netflix's Pricing Power in the Relevant Market:** The market power Netflix derived
7 from the '450 and the '381 Patents is, in part, evident in the fluctuation of the monthly
8 price of a standard three (3) DVD subscription package over the course of events alleged
9 in this Complaint in Intervention.

10 58. From October 2000 to June 2004, Netflix offered a standard three (3) DVD subscription
11 package for \$20 per month. In June 2004, Netflix raised the subscription rate on its
12 standard subscription package to \$22 per month. Blockbuster Online entered the
13 Relevant Market in August 2004, pricing a similar three (3) DVD subscription package
14 for \$17.50 per month.

15 59. Since November 2004, Netflix priced its standard subscription package at \$18 per month.
16 The competitive price for a standard subscription package cannot exceed (but is by no
17 means as high as) \$18 per month. This allegation is based, in part, on comments made in
18 Netflix's 2004 form 10-K filed with the SEC:

19
20 [C]ompetition has intensified significantly since Blockbuster officially
21 launched its online service in August 2004. In particular, Blockbuster has
22 been aggressive in pricing its standard three-out service at a monthly
charge of approximately twenty percent lower than ours. . . . [E]ffective
November 2004, in response to the changing competitive landscape, we
lowered the price of our standard service to \$17.99.

23 (emphasis supplied).

24 60. If Netflix succeeds in inducing Blockbuster to exit the Relevant Market, consumers in the
25 Relevant Market will again be exposed to supracompetitive subscription prices, because
26 there will be no significant competitor to restrain Netflix from raising its subscription
27 prices again.

28 61. **Netflix's Market Share:** Netflix's subscriber base has grown dramatically of the course

1 of the events alleged in this Complaint in Intervention:
2

<u>Quarter Ending:</u>	<u>Netflix's Subscribers (Thousands)</u>
December 31, 2001	456
March 31, 2002	603
June 30, 2002	670
September 30, 2002	742
December 31, 2002	857
March 31, 2003	1,052
June 30, 2003	1,147
September 30, 2003	1,291
December 31, 2003	1,487
March 31, 2004	1,932
June 30, 2004	2,093
September 30, 2004	2,229
December 31, 2004	2,610
March 31, 2005	3,018
June 30, 2005	3,196
September 30, 2005	3,592
December 31, 2005	4,179

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62. Blockbuster Online had approximately 1.2 million subscribers at the end of 2005. Wal-Mart Stores, Inc. also competed in the Relevant Market until June 2005 (as a distant third to Blockbuster and Netflix), and had between 100,000 and 200,000 subscribers. Dilbeck alleges on information and belief that when Netflix induced Wal-Mart to withdraw from the Relevant Market, it prompted Wal-Mart to market Netflix's services to its former subscribers.
63. At present, Netflix has an estimated 80% share of the Relevant Market and, on information and belief, has maintained at least a 65% share throughout the course of event alleged in this Complaint in Intervention.

Class Action Allegations

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64. **Definition of Class and Class Period:** Pursuant to Federal Rule of Civil Procedure 23, Intervening Plaintiff brings this Complaint against Netflix on behalf of himself and all persons who subscribed to Netflix's DVD rental service, regardless of their residence, (the "Class") during the four year period prior to the filing of the motion to intervene (the "Class Period"). Excluded from the Class are 1) any Judge or Magistrate presiding over

1 this action and members of their families; 2) Defendant, Defendant's subsidiaries, parents,
2 successors, predecessors, and any entity in which the Defendant or its parent has a
3 controlling interest and their current or former employees, officers and directors; and 3)
4 persons who properly execute and file a timely request for exclusion from the class and 4)
5 the legal representatives, successors or assigns of any such excluded persons.

6 65. **Numerosity:** The exact number of Class members is unknown and is not available to
7 Intervening Plaintiff, but it is clear that individual joinder of all Class members is
8 impracticable. Netflix's subscriber base grew from more than 850,000 subscribers by the
9 end of 2002 to more than 4 million subscribers by the end of 2005, and now apparently
10 numbers over 5 million.

11 66. **Class Commonality:** Common questions of fact and law exist as to all Class members
12 and predominate over the questions affecting only individual Class members. These
13 common questions include whether:

- 14 (a) Whether Netflix Patent Applicants knew of the Prior Art alleged above
15 while the '450 and '381 Patent Applications were pending;
- 16 (b) Whether the Prior Art alleged above predates and anticipates the claims
17 made in the '450 and '381 Patents, or was otherwise material to the '450
18 and '381 Patent Applications;
- 19 (c) Whether the Netflix Patent Applicants formed a combination of capital,
20 skill and/or acts for the purpose of creating restrictions and preventing
21 competition in the Relevant Market;
- 22 (d) Whether the Netflix Patent Applicants intentionally concealed the Prior
23 Art from the Patent Office while the '450 and '381 Patent Applications
24 were pending;
- 25 (e) Whether Netflix acquired and used the '450 and '381 Patents to delay,
26 deter, and destroy competition in the Relevant Market;
- 27 (f) Whether and to what extent the subscription rates charged to the Class
28 members constitute monopoly profits and antitrust damages;
- (g) Whether Netflix's acquisition, maintenance, and use of the '450 and '381
Patents violates Section 2 of the Sherman Act;
- (h) Whether Netflix's acquisition and maintenance of the '450 and '381 Patents
violates the Cartwright Act;
- (i) Whether Netflix's acquisition and maintenance of the '450 and '381 Patents
is unlawful and otherwise unfair, and thereby constitutes a violation of

California's unfair competition law; and

(j) Whether plaintiff and the Class are entitled to relief, and the nature of such relief.

67. **Typicality:** Intervening Plaintiff's claims are typical of the claims of other Class members, as the Intervening Plaintiff and other Class members sustained damages arising out of the wrongful conduct of Defendant in Intervention, based upon the same transactions which were made uniformly to the Intervening Plaintiff and the public.

68. **Adequate Representation:** Intervening Plaintiff will fairly and adequately represent and protect the interests of the other Class members, and has retained counsel competent and experienced in complex class actions. Intervening Plaintiff has no interest antagonistic to those of the Class, and Defendant in Intervention has no defenses unique to Intervening Plaintiff.

69. **Predominance and Superiority:** This class action is appropriate for certification because class proceedings are superior to all other available methods for the fair and efficient adjudication of this controversy, since joinder of all members is impracticable. The damages suffered by each individual Class member will likely be relatively small, especially given the burden and expense of individual prosecution of the complex litigation necessitated by the actions of Defendant in Intervention. It would be virtually impossible for the Class members individually to obtain effective relief from the misconduct of Defendant in Intervention. Even if the class members themselves could sustain such individual litigation, it would still not be preferable to a class action, because individual litigation would increase the delay and expense to all parties due to the complex legal and factual controversies presented in this Complaint in Intervention. By contrast, a class action presents far fewer management difficulties and provides the benefits of single adjudication, economy of scale, and comprehensive supervision by a single Court. Economies of time, effort, and expense will be fostered and uniformity of decisions will be ensured.

Class Allegations

70. **Fraud on the Patent Office:** As alleged above, the Netflix Patent Applicants

1 intentionally and fraudulently concealed Prior Art from the Patent Office which was
2 material to the pending '450 and '381 Patent Applications. In the alternative, the Netflix
3 Patent Applicants breached their duty to disclose material prior art to the Patent Office in
4 a manner so reckless that it is sufficient to allege fraud.

5 71. **Knowledge of Fraud:** As alleged above, Netflix and the other Netflix Patent Applicants
6 knew that they had concealed material Prior Art from the Patent Office at the time they
7 filed the instant patent infringement action against Blockbuster.

8 72. **Deceptive Intent:** As alleged above, the Netflix Patent Applicants knew the '450 and the
9 '381 Patents were invalid and unenforceable because the Prior Art established that the
10 '450 and the '381 Patents' subject matter was not novel. The Netflix Patent Applicants
11 intended that the Patent Office rely on their concealment of the Prior Art, and concealed
12 the Prior Art as part of an intentional and deliberate scheme to deceive and induce the
13 Patent Office into issuing the '450 or the '381 Patents. As further objective evidence that
14 the Netflix Patent Applicants intended to deceive and did deceive the Patent Office,
15 Netflix's CEO and President Reed Hasting indicated that the '450 Patent was a "joke."

16 73. **Reliance by the Patent Office:** As alleged above, the concealed Prior Art was material
17 to the pending '450 and '381 Patent Applications. Had the Patent Office learned of the
18 concealed Prior Art, the Patent Office would not have issued the '450 and '381 Patents,
19 either because the Prior Art rendered the subject matter of the '450 and '381 Patent
20 Applications non-novel (and unpatentable), or because the Netflix Patent Applicants
21 breached their duty of candor and good faith to the Patent Office by concealing
22 information known to be relevant to the '450 and '381 Patent Applications.

23 74. **Objectively Meritless Litigation:** As alleged above, Netflix should have known that the
24 instant patent litigation against Blockbuster was meritless and that it had no probable
25 cause to bring the instant patent litigation. Further, Netflix should have known that any
26 threat of patent litigation against Wal-Mart was likewise meritless and had no probable
27 cause.

28 75. **Subjectively Meritless Litigation:** As alleged above, Netflix indeed knew that the

1 instant patent litigation against Blockbuster was meritless and that it had no probable
2 cause to bring the instant patent litigation. The instant patent litigation is an attempt to
3 interfere with Blockbuster's ability to compete in the market. Further, Netflix knew that
4 any threat of patent litigation it made against Wal-Mart was likewise meritless and had no
5 probable cause, and was a successful attempt to eliminate Wal-Mart's competition from
6 the Relevant Market.

7
8 76. **Monopoly Power:** As alleged above, Netflix had and has continually maintained
9 monopoly power in the Relevant Market by dint of its dominant market share and the
10 '450 and '381 Patents.

11 77. **Willful Acquisition of Monopoly Power:** Netflix willfully obtained monopoly power in
12 the Relevant Market by obtaining the '450 and '381 Patents by fraudulent concealment of
13 Prior Art from the Patent Office, and the instant litigation based on the alleged
14 infringement of the invalid and unenforceable '450 and '381 Patents.

15 78. **Causal Antitrust Injury:** Dilbeck and the other Class Members have sustained antitrust
16 injuries from Netflix's acquisition and exercise of monopoly power in the form of
17 supracompetitive subscription prices, the differential between Netflix's prices and the
18 competitive rate representing monopoly profits and recoverable antitrust damages.
19 Further, Netflix's conduct in this case threatens additional antitrust injury if Blockbuster
20 Online is excluded from the Relevant Market.

21 79. **Unlawful Trust:** The Netflix Patent Applicants (including Edward A. Becker and
22 Hickman Palermo Truong & Becker LLP) formed a combination of capital, skill and/or
23 acts for the purpose of creating restrictions and preventing competition in the Relevant
24 Market: to wit, by fraudulently concealing material Prior Art from the Patent Office as
25 part of a scheme to have the Patent Office issue the '450 and '381 Patents.

26 **Count I: Violation of the Sherman Act, 15 U.S.C. § 2**

27 80. Intervening Plaintiff incorporates the above allegations by reference.

28 81. Netflix and the other Netflix Patent Applicants intentionally and fraudulently concealed
Prior Art from the Patent Office that was material to the '450 and '381 Patent

1 Applications.

2 82. Had the Patent Office learned of the Prior Art, it would not have issued the '450 and '381
3 Patent Applications. Netflix and the other Netflix Patent Applicants fraudulently
4 concealed the Prior Art in order to have the Patent Office issue the '450 and '381 Patents.

5 83. Netflix brought the instant patent litigation to deter and destroy competition in the
6 Relevant Market. Objectively, Netflix should have known the instant patent litigation is
7 meritless and without probable cause. Subjectively, Netflix knows the instant patent
8 litigation is meritless and without probable cause.

9 84. Further, any threat of patent litigation Netflix made to Wal-Mart Stores, Inc. was
10 intended to deter and destroy competition in the Relevant Market. Objectively, Netflix
11 should have known any such threat was meritless and without probable cause.
12 Subjectively, Netflix knew any such threat was meritless and without probable cause.

13 85. Netflix willfully obtained monopoly power in the Relevant Market by obtaining the '450
14 and '381 Patents by fraudulent concealment of Prior Art from the Patent Office, and the
15 instant litigation based on the alleged infringement of the invalid and unenforceable '450
16 and '381 Patents.

17 86. Netflix's anticompetitive acts violate the Sherman Act (15 U.S.C. § 2).

18 87. Dilbeck and the other Class Members have sustained antitrust injuries from Netflix's
19 violations of the Sherman Act and will suffer additional antitrust injury if Blockbuster
20 Online is excluded from the Relevant Market.

21 88. Dilbeck, on his own behalf and behalf of the other Class members, seeks treble damages
22 and the cost of this suit, including a reasonable attorneys' fee, and injunctive relief under
23 the Clayton Act (15 U.S.C. § 15, 26).
24

25 **Count II: Violation of California's Cartwright Act,**
26 **Cal. Bus. & Prof. Code §§ 16720, 16726**

27 89. Intervening Plaintiff incorporates the above allegations by reference.

28 90. The Netflix Patent Applicants include both Netflix, its employees, and its patent counsel,
Edward A. Becker and Hickman Palermo Truong & Becker LLP.

1 91. The Netflix Patent Applicants formed a combination of capital, skill and/or acts by two or
2 more persons for the purpose of creating restrictions and preventing competition in the
3 Relevant Market. Without the skill and acts of Netflix's patent counsel, Netflix could not
4 have obtained or prosecuted either of the '450 or the '381 Patents. Without Netflix's
5 capital and cooperation, Netflix's patent counsel would not have obtained or prosecuted
6 either of the '450 or the '381 Patents.

7 92. As a combination of capital, skill and/or acts for the purpose of creating restrictions and
8 preventing competition in the Relevant Market, the Netflix Patent Applicants formed a
9 trust prohibited by California's Cartwright Act (Cal. Bus. & Prof. Code § 16720, 16726).

10 93. Dilbeck and the other Class Members have sustained injuries from Netflix's violations of
11 the Cartwright Act and will suffer additional antitrust injury if Blockbuster Online is
12 excluded from the Relevant Market.

13 94. Dilbeck, on his own behalf and behalf of the other Class members, seeks treble damages,
14 a reasonable attorneys' fee together with the costs of this suit, and injunctive relief under
15 the Cartwright Act (Cal. Bus. & Prof. Code § 16750).

16 **Count III: Violation of California's Unfair Competition Law,**
17 **Cal. Bus. & Prof. Code § 17200**

18 95. Intervening Plaintiff incorporates the above allegations by reference.

19 96. Netflix's business acts and practices alleged above are unfair, unlawful and fraudulent.

20 97. Dilbeck and the other Class Members have sustained injuries from Netflix's business acts
21 and practices and will suffer additional injury if Blockbuster Online is excluded from the
22 Relevant Market.

23 98. Dilbeck, on his own behalf and behalf of the other Class members, seeks injunctive relief,
24 including restitution, under California's unfair competition law (Cal. Bus. & Prof. Code §
25 17203)

26 WHEREFORE, Plaintiff prays that the Court enter judgment and orders in their favor
27 and against Defendant as follows:

- 28 (a) Declaring the action to be a proper class action and designating Plaintiff
and his counsel as representatives of the Class;

- (b) With respect to Counts I and II, treble damages in an amount to be determined at trial against Netflix, an injunction against further anticompetitive acts, and statutory attorneys' fees;
- (c) With respect to Counts III, equitable relief including an accounting, a constructive trust and restitution, in an amount to be determined at trial, against Netflix;
- (d) Awarding pre- and post-judgment interest; and
- (e) Granting such other and further relief as the Court may deem just and proper.

JURY TRIAL DEMAND

The Intervening Plaintiff hereby demands a trial by jury of all issues so triable.

Dated: November __, 2006

By: _____

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