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NORTHERN DISTRICT OF CALIFORNIA

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\*Pro hac vice admission to be sought

ATTORNEYS FOR PLAINTIFF AND THE PUTATIVE CLASS

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

JEFF MILANS, individually and on behalf  
of all others similarly situated,

CV 11

Case No. 0379

Plaintiff,

CLASS ACTION

HRL

v.

COMPLAINT FOR:

NETFLIX, INC., a Delaware corporation,

Defendant.

- (1) Violations of the Video Privacy Protection Act, 18 U.S.C. § 2710;
- (2) Violations of California's Customer Records Act, Cal. Civ. Code § 1798.80;
- (3) Violations of California's Unfair Competition Law, Cal. Bus. & Prof. Code § 17200;
- (4) Unjust Enrichment; and
- (5) Breach of Fiduciary Duty.

DEMAND FOR JURY TRIAL

COMPLAINT

FAXED  
FIRST LEGAL SUPPORT SERVICES

1 Plaintiff Jeff Milans, by and through his attorneys, upon personal knowledge as to  
2 himself and his own acts, and upon information and belief as to all other matters, complains and  
3 alleges as follows:

4 **NATURE OF THE ACTION**

5 1. Plaintiff Jeff Milans brings this Class Action Complaint against Defendant  
6 Netflix, Inc. ("Netflix") for Defendant's unlawful retention of his personally identifiable  
7 information ("PII") and video programming viewing history after cancellation of his membership  
8 services with Netflix.

9 2. Netflix owns and operates the website www.Netflix.com, which provides  
10 streaming video via the Internet and online video rental services to over 10 million subscribers.

11 3. Netflix maintains a digital record system that details every streaming video or  
12 video rental that its subscribers have ordered during the course of their membership. In addition,  
13 Netflix stores and analyzes the movie preferences of its subscribers based upon a user-inputted  
14 ranking system.

15 4. Netflix maintains records containing its users' billing and contact information on  
16 its server computers.

17 5. Netflix retains, stores, and utilizes the information described in Paragraphs three  
18 (3) and four (4) *supra*, for a period of at least two (2) years after a subscriber cancels his or her  
19 account with Netflix.

20 6. As a result, Netflix maintains a veritable digital dossier on thousands, if not  
21 millions, of former subscribers. These records contain not only the former subscriber's credit  
22 card number, username and password, as well as billing/contact information, but also a highly  
23 detailed account of the individual's video programming viewing history.

24 7. Accordingly, Netflix has knowingly retained the PII and sensitive video  
25 programming viewing histories of former subscribers in violation of state and federal laws.  
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**PARTIES**

8. Plaintiff Jeff Milans is a natural person and citizen of the state Virginia.

9. Defendant Netflix, Inc., is a corporation organized and existing under the laws of the state of Delaware with its headquarters and principal place of business located at 100 Winchester, Los Gatos, California 95032. Netflix does business throughout the State of California, the United States, and Canada.

**JURISDICTION AND VENUE**

10. This Court has subject matter jurisdiction over Plaintiff’s claims arising under the laws of the United States pursuant to 28 U.S.C. § 1331, and, as to all other claims, pursuant to 28 U.S.C. § 1367.

11. This Court has personal jurisdiction over Netflix because it maintains its corporate headquarters in this District and the improper conduct alleged in the Complaint occurred in, was directed and/or emanated from California.

12. This Court is an appropriate venue for the adjudication of this controversy because a substantial part of the events giving rise to Plaintiff’s claims occurred in this District.

**INTRADISTRICT ASSIGNMENT**

13. Pursuant to Civil Local Rule 3-2(e), this case shall be assigned to the San Jose Division.

**FACTUAL BACKGROUND**

**A Brief Overview of Netflix**

14. On its website, Netflix boasts that, “[w]ith more than 16 million members in the United States and Canada, Netflix, Inc. is the world’s leading Internet subscription service for enjoying movies and TV shows.” Netflix Press Info., <http://www.netflix.com/MediaCenter> (last visited January 5, 2011).

15. Netflix has developed an extensive and complex online system to provide cataloged video programming to its subscribers. Using this system, subscribers are offered the

1 opportunity to rank in order of preference a wide variety of viewing selections. Netflix uses  
2 these user-inputted rankings to recommend video programming to the subscriber based upon his  
3 or her preferences.

4 16. Subscribers of Netflix's services may also rent DVD's from Defendant's website,  
5 which are then physically shipped to the individual.

6 17. Netflix subscribers are able to cancel their subscription to Netflix's services at any  
7 time through its website.

8 **The Information that Netflix Stores About its Subscribers**

9 18. According to its website, Netflix collects, stores, and analyzes data from its  
10 subscribers in the following manner:

11 We keep track of your interactions with us and  
12 collect information related to your use of our  
13 service, including but not limited to your online  
14 activity, title selections and ratings, payment history  
15 and correspondence as well as Internet protocol  
16 addresses, device types, operating systems, any  
17 instant watching of movies, TV shows and related  
18 activity. We use this information for such purposes  
19 as providing recommendations on movies and TV  
20 shows we think will be enjoyable, personalizing the  
21 service to better reflect particular interests, tracking  
22 your instant-watching hours, helping us quickly and  
23 efficiently respond to inquiries and requests and  
24 otherwise enhancing or administering our service  
25 offering for our customers.

26 Netflix Privacy Policy, <http://www.netflix.com/PrivacyPolicy> (last visited January 5, 2011).

27 19. In addition to their programming preferences, Defendant allows subscribers to  
28 keep track of movies and television shows they would like to watch in the future, in what is  
known as a "queue."

29 20. A queue is essentially a list of video programming, selected and organized by the  
subscriber for later viewing.

1           21. Defendant continues to store its former subscribers' queues, along with their  
2 contact, billing and viewing preference information, even after subscribers cancel their  
3 memberships.

4           22. The video programming that Netflix stores includes, but is not necessarily limited  
5 to, every streaming video that the consumer has watched, every DVD the consumer has ever  
6 rented, and the video rankings that the consumer has assigned to other videos, which in turn  
7 reveals that individual's preferences.

8           23. Former subscribers who log-in to their cancelled Netflix account are greeted with  
9 previously inputted credit card numbers and contact information, as well as a detailed history of  
10 what video programming they ordered from Defendant throughout the duration of their  
11 subscription. Defendant retains video programming history beyond the time that the customer  
12 has terminated their service with Netflix.

13           24. Indeed, Defendant's privacy policy goes on to state that Netflix uses that  
14 information to "provide analysis of our users in the aggregate to prospective partners, advertisers  
15 and other third parties." *See supra*, Netflix Privacy Policy. Armed with the knowledge that  
16 Netflix indefinitely retains its subscribers' data, it becomes clear that inherent in this statement is  
17 the fact that Defendant continues to profit from the use of its former subscribers' personal  
18 information, including their video programming viewing histories, even though these individuals  
19 have cancelled their subscriptions.

20                           **The Video Privacy Protection Act and Digital Dossiers**

21           25. The desire to keep video programming viewing history records private led  
22 Congress to enact the Video Privacy Protection Act in 1988 (the "Act" or "VPPA"). Inspired by  
23 the release of video viewing records of Supreme Court Justice Nominee Robert H. Bork and his  
24 family, Congress promulgated the Act to explicitly preserve United States citizens' right to  
25 privacy in their video viewing histories.

26           26. When the VPPA was introduced, the late Senator Paul Simon noted that,  
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1 There is no denying that the computer age has  
2 revolutionized our world. Over the past 20 years  
3 we have seen remarkable changes in the way each  
4 one of us goes about our lives. Our children learn  
5 through computers. We bank by machine. We  
6 watch movies in our living rooms. These  
7 technological innovations are exciting and as a  
8 nation we should be proud of the accomplishments  
9 we have made. Yet, as we continue to move ahead,  
10 we must protect time honored values that are so  
11 central to this society, particularly our right to  
privacy. The advent of the computer means not  
only that we can be more efficient than ever before,  
but that we have the ability to be more intrusive  
than ever before. *Every day Americans are forced  
to provide to businesses and others personal  
information without having any control over where  
that information goes. These records are a window  
into our loves, likes, and dislikes.*

12 S.Rep. No. 100-599 at 7-8 (1988) (emphasis added).

13 27. In another strikingly accurate forward-looking statement, Senator Patrick Leahy  
14 ~~remarked that “the trail of information generated by every transaction that is now recorded and~~  
15 stored in sophisticated record-keeping systems is a new, more subtle and pervasive form of  
16 surveillance.” S.Rep. No. 100-599 at 8 (1988).

17 28. Although in 1988 these Senators could not possibly forecast the amount of data  
18 collected on consumers today by large video-programming providers such as Netflix, both Sen.  
19 Simon’s and Sen. Leahy’s comments would prove prescient.

20 29. Many glaring and dangerous privacy issues are implicated by Netflix’s practice of  
21 retaining customer information indefinitely after cancellation of Defendant’s services—the exact  
22 type of dangers that the VPPA was enacted to thwart.

23 30. As a practical matter, a former subscriber who cancels his or her Netflix account  
24 logically believes that the Defendant has purged its system of that individual’s private  
25 information. Most, if not all consumers, would feel extremely uncomfortable with the prospect  
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1 that Defendant continues to store their credit card numbers and a detailed record of their video  
2 programming viewing histories.

3 31. Furthermore, Netflix's practices are indicative of a larger problem that is  
4 beginning to plague Internet users—the development and maintenance of digital dossiers on  
5 consumers by online companies.

6 32. Prof. Daniel Solove, an expert in privacy law at the George Washington  
7 University Law School has written extensively on this topic, and explains the crux of the  
8 problem as follows:

9 While life in the Information Age has brought us a  
10 dizzying amount of information, it has also placed a  
11 profound amount of information about our lives in  
12 the hands of numerous entities. These digital  
13 dossiers are increasingly becoming digital  
14 biographies, a horde of aggregated bits of  
15 information combined to reveal a portrait of who we  
16 are based upon what we buy, the organizations we  
belong to, how we navigate the Internet, and which  
shows and videos we watch. This information is not  
held by trusted friends or family members, but by  
large bureaucracies that we do not know very well  
or sometimes do not even know at all.

17 Daniel J. Solove, Digital Dossiers and the Dissipation of Fourth Amendment Privacy, 75 S. Cal.  
18 L. Rev. 1083, 1095 (2002).

19 33. The retention of subscriber data is not the first privacy concern that has raised  
20 eyebrows about Netflix's business practices. In March of 2010, Associate Director Maneesha  
21 Mithal of the Division of Privacy and Identity Protection at the Federal Trade Commission  
22 issued a public letter to Netflix cautioning Defendant about the release of data regarding the  
23 video programming viewing history of its subscribers. FTC Netflix Letter,  
24 <http://www.ftc.gov/os/closings/100312netflixletter.pdf> (last visited January 5, 2011).

25 34. It follows then from the discussion above, as well as the unlawful behavior  
26 described in this Complaint, that Netflix has continuously struggled to fully grasp its duty both to  
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1 uphold the privacy rights of its current and former subscribers, as well as to comply with federal  
2 and state laws regarding the destruction of PII.

3 **FACTS RELATING TO PLAINTIFF**

4 35. Plaintiff Jeff Milans is a former Netflix subscriber who cancelled his account with  
5 Defendant over one (1) year ago.

6 **CLASS ALLEGATIONS**

7 36. **Definition of the Class:** Plaintiff Jeff Milans brings this action pursuant to Fed.  
8 R. Civ. P. 23(b)(2) and (3) on behalf of himself and a Class of similarly situated individuals,  
9 defined as follows:

10 All individuals and entities in the United States and its territories that have  
11 cancelled their subscriptions to Netflix's services.

12 Excluded from the Class are 1) Defendant, Defendant's agents, subsidiaries, parents,  
13 successors, predecessors, and any entity in which the Defendant or their parents have a  
14 controlling interest and their current and former employees, officers, and directors; 2) the  
15 Judge or Magistrate Judge to whom this case is assigned and the Judge's or Magistrate  
16 Judge's immediate family, 3) persons who execute and file a timely request for exclusion,  
17 and 4) the legal representatives, successors, or assigns of any such excluded person.

18 37. **Numerosity:** The exact number of the members of the Class is unknown and is  
19 not available to Plaintiff at this time, but individual joinder in this case is impracticable. The  
20 Class consists of millions of individuals and other entities. Class members can be easily  
21 identified through Defendant's records and public records.

22 38. **Commonality:** There are many questions of law and fact common to the claims  
23 of Plaintiff and the other members of the Class, and those questions predominate over any  
24 questions that may affect individual members of the Class. Common questions for the Class  
25 include but are not limited to the following:  
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- 1 (a) whether Netflix unlawfully retained its former subscribers' PII and video
- 2 programming viewing histories;
- 3 (b) whether Netflix continues to benefit from the use of data relating to its
- 4 former subscribers' video programming viewing histories;
- 5 (c) whether Netflix's conduct described herein violated the Video Privacy
- 6 Protection Act (18 U.S.C. §§ 2710, *et seq.*);
- 7 (d) whether Netflix's conduct described herein violated the California
- 8 Customer Records Act, (Cal. Civ. Code § 1798.80);
- 9 (e) whether Netflix's conduct described herein violated California's Unfair
- 10 Competition Law (Cal. Bus. & Prof. Code § 17200, *et seq.*);
- 11 (f) whether Netflix has been unjustly enriched by Plaintiff and the Class;
- 12 (g) whether Netflix has breached its fiduciary duty to Plaintiff and the Class.

13 39. **Typicality:** The factual and legal bases of Netflix's liability to Plaintiff and to the  
14 other members of the Class are the same and resulted in injury to Plaintiff and all of the other  
15 members of the Class. Plaintiff and the other members of the Class have all suffered harm as a  
16 result of Netflix's wrongful conduct.

17 40. **Adequate Representation:** Plaintiff will fairly and adequately represent and  
18 protect the interests of the Class members, and has retained counsel competent and experienced  
19 in complex class actions. Plaintiff has no interest antagonistic to those of the Class and  
20 Defendant has no defenses unique to Plaintiff.

21 41. **Predominance and Superiority:** This class action is appropriate for certification  
22 because class proceedings are superior to all other available methods for the fair and efficient  
23 adjudication of this controversy, since joinder of all members is impracticable. The damages  
24 suffered by the individual members of the Class will likely be relatively small, especially given  
25 the burden and expense of individual prosecution of the complex litigation necessitated by the  
26 actions of Defendant. It would be virtually impossible for the individual members of the Class to  
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1 46. Netflix has violated 18 U.S.C. § 2710(e) because Defendant failed to destroy  
2 former subscribers' personally identifiable information as soon as practicable from the date the  
3 information was no longer necessary for the purpose for which it was collected.

4 47. As a result of Defendant's conduct described herein and its violation of § 2710,  
5 Plaintiff and the Class have suffered injuries. Plaintiff, on his own behalf and on behalf of the  
6 Class, seeks an order enjoining Defendant's conduct described herein and awarding himself and  
7 the Class the maximum statutory and punitive damages available under 18 U.S.C. § 2710(c).

8 **SECOND CAUSE OF ACTION**

9 **Violations of California's Customer Records Act, Cal. Civ. Code § 1798.80  
10 (On Behalf of Plaintiff and the Class)**

11 48. Plaintiff incorporates paragraphs 1 through 42 above as though fully set forth  
12 herein.

13 49. The California Customer Records Act mandates, among other things, that a  
14 business take all reasonable steps to destroy or arrange for the destruction of a customer's records  
15 within its custody or control which contain personal information which is no longer to be  
16 retained by the business. Cal. Civ. Code § 1798.81.

17 50. A business may destroy customer records by erasing the information, or  
18 modifying the personal information in those records to make it unreadable or undecipherable  
19 through any means. Cal. Civ. Code § 1798.81(b), (c).

20 51. Defendant has violated Cal. Civ. Code § 1798.81 by failing to erase or otherwise  
21 destroy its former subscribers customer records after cancellation of membership services.

22 52. Pursuant to Cal. Civ. Code § 1798.84, Plaintiff and the Class seek damages,  
23 including statutory damages of \$3,000 per violation and injunctive relief. Plaintiff and the Class  
24 also seek attorney's fees pursuant to Cal. Code Civ. Proc. § 1021.5, as well as such other and  
25 further relief as the Court deems just and proper.

**THIRD CAUSE OF ACTION**  
**Violation of California's Unfair Competition Law**  
**Cal. Bus. & Prof. Code §§ 17200, *et seq.***  
**(On Behalf of Plaintiff and the Class)**

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3       53. Plaintiff incorporates paragraphs 1 through 52 above as though fully set forth  
4 herein.

5       54. California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code  
6 §§ 17200, *et seq.*, protects both consumers and competitors by promoting fair competition in  
7 commercial markets for goods and services.

8       55. The UCL prohibits any unlawful, unfair or fraudulent business act or practice. A  
9 business practice need only meet one of the three criteria to be considered unfair competition.  
10 An unlawful business practice is anything that can properly be called a business practice and that  
11 at the same time is forbidden by law.

12       56. Netflix has violated the fraudulent prong of the UCL in that Defendant failed to  
13 inform Plaintiff and the Class that it would indefinitely retain their personally identifiable  
14 information and video programming viewing histories.

15       57. Netflix has violated the unfair prong of the UCL in that, Defendant continues to  
16 profit from selling Plaintiff and the Class's information to third-parties, even though they have  
17 cancelled their membership with Defendant.

18       58. Netflix has violated the unlawful prong of the UCL in that Defendant's conduct  
19 violated the Video Privacy Protection Act, (18 U.S.C. §§ 2710, *et seq.*), and the California  
20 Customer Records Act, (Cal. Civ. Code § 1798.80).

21       59. Pursuant to Cal. Bus. & Prof. Code § 17203, Plaintiff seeks an order of this Court  
22 permanently enjoining Netflix from continuing to engage in the unfair and unlawful conduct  
23 described herein. Plaintiff seeks an order requiring Defendant to (1) immediately cease the  
24 unlawful practices stated in this Complaint, and (2) pay attorney's fees and costs pursuant to Cal.  
25 Code Civ. Proc. § 1021.5.

**FOURTH CAUSE OF ACTION**  
**Unjust Enrichment**  
**(On Behalf of Plaintiff and the Class)**

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2  
3 60. Plaintiff incorporates paragraphs 1 through 42 above as though fully set forth  
4 herein.

5 61. Plaintiff and members of the Class conferred a monetary benefit on Defendant.  
6 Defendant received and retained money by continuing to sell data to third parties that was  
7 retained about Plaintiff and the Class as a result of the unlawful and/or wrongful conduct alleged  
8 herein.

9 62. Defendant appreciates or has knowledge of such benefit.

10 63. Under principles of equity and good conscience, Defendant should not be  
11 permitted to retain the money obtained by selling information about Plaintiff and members of the  
12 Class, which Defendant has unjustly received as a result of its unlawful actions.

13 64. Accordingly, Plaintiff and the Class seek full disgorgement and restitution of any  
14 amounts Netflix has retained as a result of the unlawful and/or wrongful conduct alleged herein.

15 **FIFTH CAUSE OF ACTION**  
16 **Breach of Fiduciary Duty**  
**(On Behalf of Plaintiff and the Class)**

17 65. Plaintiff incorporates paragraphs 1 through 42 above as though fully set forth  
18 herein.

19 66. Because Netflix was entrusted to store Plaintiff's and the Class's PII and video  
20 programming viewing histories ("the data"), Defendant owed a fiduciary duty to Plaintiff and the  
21 Class to (a) store the data in compliance with state and federal laws, and (b) only use the data for  
22 proper purposes.

23 67. Defendant breached its fiduciary duty to Plaintiff and Class members by:

- 24 a) Failing to destroy Plaintiff's and the Class's confidential information  
25 within a timely manner upon cancellation of membership services; and  
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1 E. Award Plaintiff and the Class their reasonable litigation expenses and attorneys'  
2 fees;

3 F. Award Plaintiff and the Class pre- and post-judgment interest, to the extent  
4 allowable; and

5 G. Award such other and further relief as equity and justice may require.

6 **JURY TRIAL**

7 Plaintiff demands a trial by jury for all issues so triable.

8 Respectfully submitted,

9 Dated: January 24, 2011

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By:   
Sean Reis  
One of Plaintiff's Attorneys

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ATTORNEYS FOR PLAINTIFF AND THE PUTATIVE CLASS

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