

1 Netflix, Inc. (“Netflix”) respectfully submits this response to the objections that have been
2 filed to the proposed settlement and to request that the Court grant final approval of the
3 settlement. Netflix understands that plaintiffs are filing a comprehensive response that will
4 address the objections in detail. *See* Dkt. No. 222 (Motion for Leave to File Oversized Reply
5 Memorandum). Therefore, Netflix will be brief and to the point.

6 After more than a year of litigation, the parties agreed to a settlement that addresses the
7 core allegations of plaintiffs’ complaint while taking into account the strength of Netflix’s
8 defenses. The proposed settlement consists of two parts: (1) injunctive relief requiring Netflix to
9 “decouple” the Entertainment Content Viewing Histories from Identification Information and
10 Payment Method for those Class Members who cancel their subscriptions and do not rejoin within
11 one year;¹ and (2) a \$9 million *cy pres* settlement fund.

12 In considering “whether the settlement is fundamentally fair, adequate, and reasonable,”
13 district courts consider several factors, including the strength of plaintiffs’ case; the risk, expense,
14 complexity, and likely duration of further litigation; the risk of maintaining class action status
15 throughout the trial; the amount offered in settlement; and the reaction of the class members to the
16 proposed settlement. *Officers for Justice v. Civil Serv. Comm’n*, 688 F.2d 615, 625 (9th Cir. 1982)
17 (citing *In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 207 (5th Cir. 1981)); *In re Mego*
18 *Fin. Corp. Sec. Litig.*, 213 F.3d 454, 458 (9th Cir. 2000) (citing *Hanlon v. Chrysler Corp.*, 150
19 F.3d 1011, 1026 (9th Cir. 1998)). The issue “is not whether the settlement could be better, but
20 whether it is fair, reasonable, and adequate and free from collusion.” *Hanlon*, 150 F.3d at 1027.
21 Ultimately, a settlement is a compromise and as such, the fairness determination is “nothing more
22 than an amalgam of delicate balancing, gross approximations and rough justice.” *Officers for*
23 *Justice*, 688 F.2d at 625. The fairness determination will only be set aside upon a “strong showing
24 that the district court’s decision was a clear abuse of discretion.” *Lane v. Facebook, Inc.*, 696 F.3d
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26 ¹ Capitalized terms are defined in the parties’ May 2, 2012 Class Action Settlement
27 Agreement, Dkt No. 76-1 (“Settlement Agreement”).
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1 811, 818 (9th Cir. 2012) (affirming approval of privacy class action settlement consisting of
2 injunctive remedy and \$9.5 million *cy pres* settlement fund).

3 The vast majority of the objections to the settlement take issue with the *cy pres* aspect of
4 the settlement with many suggesting that class members should receive a substantial monetary
5 payment. These objectors ignore that this is exactly the type of settlement in which *cy pres* is
6 appropriate, as the Ninth Circuit recently recognized in *Lane v. Facebook*. Specifically, the
7 settlement fund here is “non-distributable” because distributing less than \$9 million (i.e., the fund
8 less expenses and any award of attorneys fees) amongst tens of millions of class members “would
9 be infeasible given that each class member’s direct recovery would be de minimis” and
10 prohibitively expensive. *Id.* at 819, 821. These objections also fail to give weight to the
11 injunctive aspect of the settlement and do not take into account the strength of Netflix’s defenses
12 on the merits or the other significant hurdles to classwide recovery in this case. *Id.* at 818-19
13 (“Both the district court and this court must evaluate the fairness of a settlement as a whole, rather
14 than assessing its individual components.”).

15 First, the injunctive aspect of the settlement provides a benefit to every member of the
16 class. In the event a class member cancels her subscription and does not rejoin within one year,
17 Netflix will “decouple” her Entertainment Content Viewing Histories from her Identification
18 Information and Payment Method. This is the fundamental aspect of the settlement because it
19 addresses the core allegation of the complaint about Netflix retaining member information. *See,*
20 *e.g.*, AC ¶¶ 20-40; 54-56. Netflix is not legally obligated to make this change to its systems,
21 which will require substantial engineering effort and expense, but has agreed to do so as part of
22 the settlement.

23 Second, the class is unlikely to prevail on the merits of these claims because Netflix
24 complies with the Video Privacy Protection Act (“VPPA”). Plaintiffs’ primary allegation is that
25 Section 2710(e) of the VPPA requires Netflix to destroy “personally identifiable information” or
26 “PII” for former Netflix subscribers. That section of the statute provides:

27 A person subject to this section shall destroy personally identifiable information as
28 soon as practicable, but no later than one year from the date the information is no
longer necessary for the purpose for which it was collected and there are no

1 pending requests or orders for access to such information under subsection (b)(2) or
2 (c)(2) or pursuant to a court order.

3 18 U.S.C. § 2710(e). Netflix maintains and uses PII to continuously improve its service and offer
4 a highly-personalized experience. The company's proprietary recommendation and
5 merchandising technology enables Netflix to predict and recommend titles and effectively
6 merchandise its library to subscribers. This personalization is accomplished in part by analyzing
7 data on the viewing preferences and history of others, including former subscribers. Because the
8 data is still necessary for the purpose for which it was collected, Netflix is under no obligation to
9 destroy it.

10 The California Customer Records Act claim fails because it does not mandate destruction
11 of records which a business is still maintaining; it only sets forth the means by which destruction
12 should take place if it is being done. Cal. Civ. Code § 1798.81 ("A business shall take all
13 reasonable steps to destroy, or arrange for the destruction of a customer's record within its custody
14 or control containing personal information which is no longer to be retained by the business by (a)
15 shredding, (b) erasing, or (c) otherwise modifying the personal information in those records to
16 make it unreadable or undecipherable through any means.").

17 With respect to plaintiffs' allegations that Netflix improperly uses PII for unspecified
18 "marketing and advertising purposes" (AC ¶ 58) and sold their information to unspecified third
19 parties (AC ¶ 69), Netflix has consistently denied those allegations (*see, e.g.*, Settlement
20 Agreement at 2) and plaintiffs themselves have walked away from that theory of liability. *See*
21 Plaintiffs' Motion for Final Approval at 10 ("Ultimately, however, through the exchange of both
22 formal and informal discovery, Plaintiffs determined that Netflix was not selling Class members'
23 protected PII to third parties."). To the extent information is made available to third parties to
24 provide services to members, any such "disclosures" are consistent with the company's Terms of
25 Use and the VPPA's express statutory exceptions. *See* Plaintiffs' Motion for Final Approval at 11
26 ("Plaintiffs concluded that their third-party services theories would be both highly technical in
27 nature, and, given recent broad interpretations of the VPPA's 'ordinary course of business'
28 exception, unlikely to succeed"). In all instances, Netflix takes confidentiality seriously, complies

1 with the VPPA, and believes this settlement is another example of the company's commitment to
2 ensuring information about its members remains confidential.

3 Third, the objectors do not take into account the significant obstacles to classwide
4 recovery. For example, courts throughout the country, including two courts of appeal and the
5 Northern District of California, have held there is no private right of action for alleged violations
6 of § 2710(e), i.e., the retention claims that are the core of plaintiffs' allegations. *See, e.g., Sterk v.*
7 *Redbox Automated Retail, LLC*, 672 F.3d 535, 538 (7th Cir. 2012); *Daniel v. Cantrell*, 375 F.3d
8 377, 385 (6th Cir. 2004); *Rodriguez v. Sony Computer Entertainment America, LLC, et al.*, 11-cv-
9 05084, Dkt. No. 59, at 1 (N.D. Cal.) (following the Seventh Circuit's reasoning, and dismissing
10 plaintiff's retention claims under the VPPA); *Sterk v. Best Buy*, 11-cv-01894, Dkt. 91, at 7-9 (D.
11 Minn.) (finding that plaintiff's retention claim "is foreclosed by the Seventh Circuit's decision in
12 [*Redbox*]" and citing to the later district court's decision in *Redbox* in holding that "[t]he SCA
13 does not provide a private right of relief for damages to enforce the retention provision of the
14 VPPA.").

15 Even if there was a private right of action, the class would not recover significant damages
16 given the circumstances of this case. Although some objectors suggest that class members are
17 entitled to \$2,500 in "statutory damages," they do not take in account the discretionary nature of
18 such an award. 18 U.S.C. § 2710(c)(2) ("The court **may** award . . . actual damages but not less
19 than liquidated damages in an amount of \$2,500)(emphasis added). In other words, the court
20 would have discretion to award damages, or not, in those instances where there are actual
21 damages. Where there are no actual damages – and no objector claims to have any such damages
22 – it is unlikely that the class would recover anything.

23 Finally, some objectors question whether the value of the settlement justifies the amount of
24 attorney's fees sought by plaintiffs' counsel. That is an issue on which Netflix takes no position
25 and, in any event, should not interfere with the approval of the settlement. *See Settlement*
26 *Agreement* § 10.2 ("Notwithstanding anything herein, the Parties agree that the Court's failure to
27 approve, in whole or in part, the attorneys' fees payment to Class Counsel set forth in Subsection
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1 9.1 above shall not prevent the Agreement from becoming effective, nor shall it be grounds for
2 termination.”).

3 From the inception of this lawsuit, Netflix has been prepared to demonstrate that it
4 complies with the federal and state privacy laws, including the VPPA. However, because the
5 proposed settlement is “fair, adequate and reasonable,” Netflix respectfully requests the objections
6 to the class action settlement be overruled and that plaintiffs’ Motion for Final Approval be
7 granted.

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12 Attorneys for Defendant
13 NETFLIX, INC.

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