

1 UNITED STATES DISTRICT COURT  
2 NORTHERN DISTRICT OF CALIFORNIA  
3 SAN JOSE DIVISION

4 *IN RE: NETFLIX PRIVACY LITIGATION,* )  
5 ) Case No. 5:11-cv-00379-EJD  
6 )  
7 ) [Hon. Edward J. Davila]  
8 )

9 **[PROPOSED] PRELIMINARY APPROVAL ORDER**

10 WHEREAS, a class action is pending before the Court entitled *In re Netflix Privacy*  
11 *Litigation*, Case No. 5:11-cv-00379-EJD; and

12 WHEREAS, Plaintiffs and Defendant Netflix, Inc. (hereinafter “Netflix” or “Defendant”)  
13 have entered into a Settlement Agreement dated April 30, 2012 which, together with the exhibits  
14 attached thereto sets forth the terms and conditions for a proposed settlement and dismissal of the  
15 Action with prejudice as to Netflix upon the terms and conditions set forth therein (the  
16 “Settlement Agreement”), and the Court having read and considered the Settlement Agreement  
17 and exhibits attached thereto;

18 This matter coming before the Court upon the motion of Plaintiffs for preliminary  
19 approval of the Settlement Agreement, and good cause being shown,

20 IT IS HEREBY ORDERED, DECREED, AND ADJUDGED AS FOLLOWS:

21 1. Terms and phrases in this Order shall have the same meaning as ascribed to them  
22 in the Settlement Agreement.

23 2. The Plaintiffs have moved the Court for an order approving the settlement of the  
24 Action in accordance with the Settlement Agreement, which, together with the documents  
25 incorporated therein, sets forth the terms and conditions for a proposed settlement and dismissal  
26 of the Action with prejudice, and the Court having read and considered the Settlement  
27 Agreement and having heard the parties, hereby preliminarily approves the Settlement  
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1 Agreement in its entirety subject to the Final Approval Hearing referred to in paragraph 19 of  
2 this Order.

3 3. This Court finds that it has jurisdiction over the subject matter of this action and  
4 over all Parties to the Action, including all Settlement Class Members.

5 4. The Court preliminarily finds that the Settlement Agreement is fair, reasonable,  
6 adequate, and in the best interests of the class set forth below. The Court further preliminarily  
7 finds that the Settlement Agreement substantially fulfills the purposes and objectives of the class  
8 action, and provides substantial relief to the class without the risks, burdens, costs, or delay  
9 associated with continued litigation, trial, and/or appeal. The Court also finds that the Settlement  
10 Agreement: (a) is the result of arms' length negotiations between experienced class action  
11 attorneys assisted by United States District Judge Layn R. Phillips (ret.); (b) is sufficient to  
12 warrant notice of the settlement and the Final Approval Hearing to the Settlement Class; (c)  
13 meets all applicable requirements of law, including Federal Rule of Civil Procedure 23, and the  
14 Class Action Fairness Act ("CAFA"), 28 U.S.C. § 1715; and (d) is not a finding or admission of  
15 liability by the Defendant or any other parties.

16 **Settlement Class Certification**

17 5. For purposes of settlement only: (a) Jay Edelson is preliminarily appointed Class  
18 Counsel for the Settlement Class; and (b) Jeff Milans and Peter Comstock are preliminarily  
19 named Class Representatives. The Court finds that Mr. Edelson is competent and capable of  
20 exercising the responsibilities of Class Counsel and that the Class Representatives will  
21 adequately protect the interests of the class defined below.

22 6. For purposes of settlement only, the Court certifies the following class as defined  
23 in the Settlement Agreement:

24 All Subscribers as of the date of entry of Preliminary Approval. Excluded from the  
25 Settlement Class are the following: (i) the Settlement Administrator, (ii) the Mediator,  
26 (iii) any respective parent, subsidiary, affiliate or control person of the Defendant or its  
27 officers, directors, agents, servants, or employees as of the date of filing of the Action,  
28 (iv) any judge presiding over the Action and the immediate family members of any such  
Person(s), (v) persons who execute and submit a timely request for exclusion, and (vi) all  
persons who have had their claims against Defendant fully and finally adjudicated or

1 otherwise released.

2 7. The Court finds for settlement purposes only and subject to the Final Approval  
3 Hearing referred to in Paragraph 19 below that: the Settlement Class is so numerous that joinder  
4 of all members is impracticable; there are questions of law and fact common to the Settlement  
5 Class; the claims of the Class Representatives are typical of the claims of the Settlement Class;  
6 the Class Representatives will fairly and adequately protect the interests of the Settlement Class;  
7 common questions of law or fact predominate over questions affecting individuals members; and  
8 a class action is a superior method for fairly and efficiently adjudicating the Action.

9 8. Should the Settlement Agreement not receive the Court's final approval, should  
10 final approval be reversed on appeal, or should the Settlement Agreement otherwise fail to  
11 become effective, the Court's grant of class certification shall be vacated, and the Class  
12 Representatives and the Settlement Class would once again bear the burden of establishing the  
13 propriety of class certification. In such case, neither the certification of the Settlement Class for  
14 settlement purposes, nor any other act relating to the negotiation or execution of the Settlement  
15 Agreement shall be considered as a factor in connection with any class certification issue(s).

16 **Notice and Administration**

17 9. The Court approves, as to form, content and distribution, the Notice Plan and all  
18 forms of Notice to the Settlement Class as set forth in the Settlement Agreement and Exhibits A,  
19 B, and C thereto, and finds that such Notice is the best notice practicable under the  
20 circumstances, and that the Notice complies fully with the requirements of the Federal Rules of  
21 Civil Procedure. The Court also finds that the Notice constitutes valid, due and sufficient notice  
22 to all persons entitled thereto, and meets the requirements of Due Process. The Court further  
23 finds that the Notice is reasonably calculated to, under all circumstances, reasonably apprise the  
24 members of the Settlement Class of the pendency of this action, the terms of the Settlement  
25 Agreement, and the right to object to the Settlement and to exclude themselves from the  
26 Settlement Class. In addition the Court finds that no notice other than that specifically identified  
27 in the Settlement Agreement is necessary in this Action. The parties, by agreement, may revise  
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1 the Notice in ways that are not material, or in ways that are appropriate to update those  
2 documents for purposes of accuracy or formatting for publication.

3 10. The Court approves the request for the appointment of Rust Consulting and  
4 Kinsella Media as Settlement Administrator in accordance with the provisions of section 6 of the  
5 Settlement Agreement.

6 11. The Parties and Settlement Administrator are directed to proceed with the Notice  
7 Plan as set forth in section 4 of the Settlement Agreement.

8 **Exclusion**

9 12. Members of the Settlement Class who wish to exclude themselves from the class  
10 may do so by complying with the exclusion procedures set forth below. Any members of the  
11 Settlement Class who timely request exclusion consistent with those procedures shall not be  
12 bound by the terms of the Settlement Agreement.

13 13. To request exclusion, the Class Member must complete, sign, and mail to the  
14 Settlement Administrator a request for exclusion. The request must be signed by the Class  
15 Member. The request must be postmarked on or before the Exclusion Deadline, which shall be a  
16 date designated in the Notice that is no fewer than fourteen (14) days after papers supporting the  
17 Fee Award are to be filed (see paragraph 20 below). So called “mass” or “class” opt-outs shall  
18 not be allowed.

19 14. Settlement Class Members who opt out of the Settlement Agreement will  
20 relinquish their rights to benefits under the Settlement Agreement and will not release their  
21 Claims. However, Settlement Class members who fail to submit a valid and timely request for  
22 exclusion shall be bound by all terms of the Settlement Agreement and the Final Judgment,  
23 regardless of whether they have requested exclusion from the Settlement Agreement.

24 **Objections**

25 15. Any member of the Settlement Class who has not timely filed a request for  
26 exclusion may object to the fairness, reasonableness, or adequacy of the Settlement Agreement  
27 or to a Final Judgment being entered dismissing the Action with prejudice in accordance with the  
28 terms of the Settlement Agreement, to the attorneys’ fees and expense reimbursement sought by

1 Class Counsel, or to the award to the Class Representatives. Settlement Class members may  
2 object on their own, or may do so through separate counsel at their own expense.

3 16. To object, Settlement Class members must sign and file a written objection no  
4 later than on or before the Objection/Exclusion Deadline [Date]. To be valid, the objection must  
5 (a) include his/her full name, current address, telephone number; (b) state that he or she is a  
6 member of the Settlement Class; (c) provide all arguments, citations, and evidence supporting  
7 the objection; (d) include copies of any documents relied on or that the objector wishes the Court  
8 to consider; and (e) include a statement whether the objector intends to appear at the Final  
9 Approval Hearing with or without counsel. Settlement Class Members who fail to file and serve  
10 timely written objections in substantial compliance with the requirements of this paragraph shall  
11 be deemed to have waived any objections and shall be foreclosed from making any objections  
12 (whether by appeal or otherwise) to the Settlement Agreement or to any of the subjects listed in  
13 paragraph 19, below.

14 17. To be valid, objections must be filed with the Court and sent to Class Counsel,  
15 Jay Edelson, Edelson McGuire LLC, 350 North LaSalle, Suite 1300, Chicago, IL 60654 and  
16 Defendant's Counsel, Keith E. Eggleton, Wilson Sonsini Goodrich & Rosati, 650 Page Mill  
17 Road, Palo Alto, CA 94304.

18 18. Any response to objections, if any, shall be filed no less than seven (7) days prior  
19 to the Fairness Hearing.

20 **Fairness Hearing**

21 19. The Final Approval Hearing shall be held before this Court on [Date], at the  
22 Robert F. Peckham Federal Building, [Courtroom ##], 280 South 1st Street, San Jose,  
23 California to determine (a) whether the proposed settlement of the Action on the terms and  
24 conditions provided for in the Settlement Agreement is fair, reasonable and adequate and should  
25 be given final approval by the Court; (b) whether a judgment and order of dismissal with  
26 prejudice should be entered; (c) whether to approve the payment of attorneys' fees and expenses  
27 to Class Counsel; and (d) whether to approve the payment of incentive awards to the Class  
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1 Representatives. The Court may reschedule the Fairness Hearing without further notice to the  
2 Settlement Class Members.

3 20. Plaintiffs shall submit papers in support of final approval of the Settlement no  
4 later than 35 days before the Fairness Hearing.

5 21. Class Counsel's final application for any Fee Award, and any documents  
6 submitted in support thereof, shall be filed no later than 35 days before the Fairness Hearing.

7 **Further Matters**

8 22. All further proceedings in the Action are ordered stayed until the Final Judgment  
9 or termination of the Settlement Agreement, whichever occurs earlier, except for those matters  
10 necessary to obtain and/or effectuate final approval of the Settlement Agreement. In order to  
11 protect its jurisdiction to consider the fairness of this Settlement Agreement and to enter a Final  
12 Order and Judgment having binding effect on all Class Members, the Court hereby enjoins all  
13 Class Members, and anyone who acts or purports to act on their behalf, from pursuing all other  
14 proceedings in any state or federal court that seeks to address any parties' or Class Members'  
15 rights or claims relating to, or arising out of, any of the Released Claims.

16 23. Members of the Settlement class shall be bound by all determinations and  
17 judgments in the Action concerning the Action and/or Settlement Agreement, whether favorable  
18 or unfavorable.

19 24. If the Settlement Agreement is not approved by the Court in complete accordance  
20 with its terms, each party will have the option of having the Action revert to its status as if the  
21 Settlement Agreement had not been negotiated, made, or filed with the Court. In such event, the  
22 parties will retain all rights as if the Settlement Agreement was never agreed upon.

23 In the event that the Settlement Agreement is terminated pursuant to the provisions of the  
24 Settlement Agreement or for any reason whatsoever the approval of it does not become  
25 Final then (i) the Settlement Agreement shall be null and void, including any provision  
26 related to the award of attorneys' fees, and shall have no further force and effect with  
27 respect to any party in this Action, and shall not be used in this Action or in any other  
28 proceeding for any purpose; (ii) all negotiations, proceedings, documents prepared, and

1 statements made in connection therewith shall be without prejudice to any person or party  
2 hereto, shall not be deemed or construed to be an admission by any party of any act,  
3 matter, or proposition, and shall not be used in any manner or for any purpose in any  
4 subsequent proceeding in this Action or in any other action in any court or other  
5 proceeding, provided, however, that the termination of the Settlement Agreement shall  
6 not shield from subsequent discovery any factual information provided in connection  
7 with the negotiation of this Settlement Agreement that would ordinarily be discoverable  
8 but for the attempted Settlement; (iii) other than as expressly preserved by the Settlement  
9 Agreement in the event of its termination, the Settlement Agreement shall have no further  
10 force and effect with respect to any party and shall not be used in the Action or any other  
11 proceeding for any purpose; and (iv) any party may elect to move the Court pursuant to  
12 the provisions of this paragraph, and none of the non-moving parties (or their counsel)  
13 shall oppose any such motion.

14  
15 **IT IS SO ORDERED.**

16  
17 Dated this \_\_\_\_\_ day of \_\_\_\_\_, 2012.

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20 HONORABLE EDWARD J. DAVILA  
21 UNITED STATES DISTRICT JUDGE  
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