

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION**

IN RE: NETFLIX PRIVACY LITIGATION,

) Case No. 5:11-cv-00379-EJD

) [Hon. Edward J. Davila]

CLASS ACTION SETTLEMENT AGREEMENT

This Class Action Settlement Agreement (“Agreement” or “Settlement Agreement”) is entered into by and among Jeff Milans and Peter Comstock (collectively, and as defined below, the “Class Representatives”) and Netflix, Inc. (as defined below, “Netflix” or “Defendant”) (as defined below, Plaintiffs and Defendant are collectively referred to herein as the “Parties”). This Agreement is intended by the Parties to fully, finally, and forever resolve, discharge, and settle the Released Claims (as the term is defined below), upon and subject to the terms and conditions of this Agreement, and subject to the final approval of the Court.

WHEREAS, on January 26, 2011, Plaintiff Jeff Milans brought a putative class action in the United States District Court for the Northern District of California against Netflix, captioned *Milans v. Netflix, Inc.*, Case No. 11-CV-00379, alleging violations of the Video Privacy Protection Act, 18 U.S.C. §2710, *et seq.* (“VPPA”), the California Customer Records Act, Cal. Civ. Code §

CLASS ACTION SETTLEMENT AGREEMENT

CASE NO.: 5:11-cv-00379-EJD

1 1798.80 ("CCRA") and the California Unfair Competition Law, Cal. Bus. & Prof. Code § 17200,
2 *et seq.* ("UCL"). (Dkt. No. 1.)

3 WHEREAS, after the filing of the *Milans* lawsuit, several similar lawsuits were filed,
4 including *Bernal v. Netflix, Inc.*, Case No. 11-CV-00820-EJD (N.D. Cal.) (filed on February 22,
5 2011), *Rura v. Netflix, Inc.*, Case No. 11-CV-1075- SBA (N.D. Cal.) (filed on March 8, 2011),
6 *Comstock v. Netflix, Inc.*, Case No. 11-CV-1218-HRL (N.D. Cal.) (filed on March 11, 2011), *Sevy*
7 *v. Netflix, Inc.*, Case No. 11-CV-1309-PSG (N.D. Cal.) (filed on March 18, 2011), and *Wizenberg*
8 *v. Netflix, Inc.*, Case No. 11-CV-01359-HRL (N.D. Cal.) (filed on March 22, 2011). The Court
9 related each of these cases to *Milans* and, on August 12, 2012, consolidated them under the
10 caption, "*In re: Netflix Privacy Litigation*," and appointed Jay Edelson of Edelson McGuire LLC
11 as Interim Lead Class Counsel. (Dkt. No. 59.)

12 WHEREAS, on September 13, 2011, Plaintiffs Jeff Milans and Peter Comstock filed their
13 Amended Consolidated Class Action Complaint. (Dkt. No. 61.)

14 WHEREAS, as part of the Rule 26 discovery planning conference and pursuant to the
15 Court's ADR program, the Parties agreed to attempt to resolve this matter through private
16 mediation with former District Judge Layne R. Phillips (ret.) of Irell & Manella, LLP. (*See* Dkt.
17 70.)

18 WHEREAS, following the Parties' Rule 26 conference, Plaintiffs propounded and Netflix
19 responded to class-and merits-based discovery.

20 WHEREAS, on February 2, 2012, Interim Lead Class Counsel and Netflix's Counsel met
21 in Santa Ana, California for a formal mediation with Judge Phillips. The Parties were able to reach
22 agreement, which was formalized in a signed Memorandum of Understanding.

23 WHEREAS, at all times, Netflix has denied and continues to deny any wrongdoing
24 whatsoever and has denied and continues to deny that it committed, or threatened or attempted to
25 commit, any wrongful act or violation of law or duty alleged in the Action. Netflix also contends
26 that it has acted properly in all regards in connection with its duties under the VPPA. Nonetheless,
27 taking into account the uncertainty and risks inherent in any litigation, Netflix has concluded that
28 it is desirable and beneficial that the Action be fully and finally settled and terminated in the

1 manner and upon the terms and conditions set forth in this Agreement. This Agreement is a
2 compromise, and the Agreement, any related documents, and any negotiations resulting in it shall
3 not be construed as or deemed to be evidence of or an admission or concession of liability or
4 wrongdoing on the part of Netflix with respect to any claim of any fault or liability or wrongdoing
5 or damage whatsoever.

6 WHEREAS, Plaintiffs Milans and Comstock believe that the claims asserted in the Action
7 against Netflix have merit and that they would have ultimately been successful in certifying the
8 proposed classes under Rule 23 and in prevailing on the merits at summary judgment or trial.
9 Nonetheless, Plaintiffs and Class Counsel recognize and acknowledge that Netflix has raised
10 factual and legal defenses in the Action that present a risk that Plaintiffs may not prevail. Plaintiffs
11 and Class Counsel also recognize the expense and delay associated with continued prosecution of
12 the Action against Netflix through class certification, trial, and any subsequent appeals. Plaintiffs
13 and Class Counsel have also taken into account the uncertain outcome and risks of any litigation,
14 especially in complex actions, as well as the difficulties inherent in such litigation. Therefore,
15 Plaintiffs believe that it is desirable that the Released Claims be fully and finally compromised,
16 settled, and resolved with prejudice, and barred pursuant to the terms set forth herein.

17 WHEREAS, based on their evaluation, Class Counsel have concluded that the terms and
18 conditions of this Agreement are fair, reasonable, and adequate to the Class, and that it is in the
19 best interests of the Class to settle the claims raised in the Action pursuant to the terms and
20 provisions of this Agreement.

21 **NOW, THEREFORE, IT IS HEREBY STIPULATED AND AGREED** by and among
22 Plaintiffs Milans and Comstock and Netflix, by and through their undersigned counsel that,
23 subject to final approval of the Court after a hearing or hearings as provided for in this Agreement,
24 in consideration of the benefits flowing to the Parties from this Agreement set forth herein, that the
25 Action and the Released Claims shall be finally and fully compromised, settled, and released, and
26 the Action shall be dismissed with prejudice, upon and subject to the terms and conditions of this
27 Agreement.

28

1 **1. DEFINITIONS**

2 As used in this Settlement Agreement, the following terms have the meanings specified
3 below:

4 1.1 “**Action**” or “**Litigation**” means the putative class action pending in the United
5 States District Court for the Northern District of California and captioned *In re Netflix Privacy*
6 *Litigation*, Case No. 5:11-cv-00379-EJD.

7 1.2 “**Class Counsel**” means Edelson McGuire LLC.

8 1.3 “**Class Representatives**” means Jeff Milans and Peter Comstock.

9 1.4 “**Complaint**” means the Amended Consolidated Class Action Complaint filed in
10 this Litigation (Dkt. No. 61.)

11 1.5 “**Court**” means the United States District Court for the Northern District of
12 California, the Honorable Edward J. Davila presiding, or any judge who shall succeed him as the
13 Judge in this Action.

14 1.6 “**Cy Pres**” or “**Cy Pres Recipients**” means the non-profit organizations that, subject
15 to Court approval, may receive monies pursuant to this Agreement.

16 1.7 “**Defendant**” means Netflix, Inc., a Delaware corporation.

17 1.8 “**Defense Counsel**” means Wilson Sonsini Goodrich & Rosati, PC.

18 1.9 “**Effective Date**” means the date one (1) day after which all of the events and
19 conditions specified in Subsection 10.1 have been met and have occurred.

20 1.10 “**Entertainment Content**” means motion pictures, television shows, and other
21 visual entertainment content (i.e., titles), whether delivered by digital video disc (commonly
22 referred to as a “DVD”), high definition digital video disc (commonly referred to as an “HD-
23 DVD”), Blu Ray disc, or similar audio-visual material, or by streaming the content over the
24 Internet.

25 1.11 “**Entertainment Content Viewing History**” means any data, record, or information
26 identifying specific Entertainment Content as having been rented, purchased, obtained, viewed,
27 streamed, rated, or requested by a Subscriber.

28 1.12 “**Escrow Account**” means the separate, interest-bearing escrow account to be

1 established by the Settlement Administrator under terms acceptable to all Parties at a depository
2 institution insured by the Federal Deposit Insurance Corporation and that has total assets of at least
3 \$500 million and a short-term deposit rating of at least P-1 (Moody's) or A-1 (Standard & Poors).
4 The Settlement Fund of Nine Million Dollars (\$9,000,000.00) shall be deposited by Netflix into
5 the Escrow Account and the money in the Escrow Account shall be invested in the following types
6 of accounts and/or instruments and no other: (i) demand deposit accounts and/or (ii) time deposit
7 accounts and certificates of deposit, in either case with maturities of 45 days or less. The costs of
8 establishing and maintaining the Escrow Account shall be paid from the Settlement Fund.

9 1.13 ***"Fee Award"*** means any attorneys' fees and reimbursement of expenses awarded
10 by the Court to Class Counsel, which will be paid out of the Settlement Fund.

11 1.14 ***"Final"*** means one business day following the latest of the following events: (i) the
12 date upon which the time expires for filing or noticing any appeal of the Court's Final Judgment
13 approving the Settlement Agreement; (ii) if there is an appeal or appeals, other than an appeal or
14 appeals solely with respect to the Fee Award, the date of completion, in a manner that finally
15 affirms and leaves in place the Final Judgment without any material modification, of all
16 proceedings arising out of the appeal or appeals; or (iii) the date of final dismissal of any appeal.
17 For purposes of this paragraph, "appeal" includes, but is not limited to, the expiration of all
18 deadlines for motions for reconsideration or petitions for review and/or *certiorari*, all proceedings
19 ordered on remand, and all proceedings arising out of any subsequent appeal or appeals following
20 decisions on remand.

21 1.15 ***"Final Approval Hearing"*** means the hearing before the Court where the Parties
22 will request the Final Judgment be entered by the Court approving the Settlement Agreement as
23 fair, reasonable and adequate and where Plaintiffs will request approval of the Fee Award to Class
24 Counsel and the Incentive Award to the Class Representatives.

25 1.16 ***"Final Judgment"*** or ***"Final Approval"*** means the Final Judgment and Order of
26 the Court approving the Agreement as fair, reasonable and adequate, after the Final Approval
27 Hearing.

28 1.17 ***"Identification Information"*** means a Person's name, postal address (except zip

code), email address, phone number, and company name.

1.18 ***"Incentive Award"*** means the amount awarded by the Court to the Class Representatives and named-plaintiffs in the Related Actions for their time and effort bringing the Action and Related Action and serving as Class Representatives and named-plaintiffs.

1.19 ***"Mediator"*** means Judge Layne R. Phillips (ret.) of Irell & Manella, LLP.

1.20 ***"Nationwide"*** means the 50 states of the United States of America and its territories.

1.21 ***"Notice"*** means the Notices of Pendency of Class Action and Proposed Settlement, which, as described in Subsection 4.1, shall consist of an "Email Notice" (substantially in the form attached hereto as Exhibit A) and "Publication Notice" (substantially in the form attached hereto as Exhibit B), apprising Class Members of the pendency of the Litigation, the material terms of the proposed Settlement, and their options with respect thereto.

1.22 ***"Notice Date"*** means the date by which the Notice Plan set forth in Subsection 4.1 is completed pursuant to the Court's Preliminary Approval Order.

1.23 ***"Notice Plan"*** means the proposed plan of disseminating notice to Class of the proposed Settlement Agreement, and of the Final Approval Hearing.

1.24 ***"Objection/Exclusion Deadline"*** means the date by which a written comment on or objection to this Agreement or a request for exclusion submitted by a Settlement Class Member must be filed or postmarked, which shall be designated as a date sixty-five (65) days after the Notice Date or twenty-one (21) days before the Final Approval Hearing, whichever is later, or such other date as ordered by the Court.

1.25 ***"Parties"*** or ***"Settling Parties"*** means Plaintiffs Jeff Milans, Peter Comstock, the Settlement Class, and Netflix, Inc.

1.26 ***"Payment Method"*** means the credit card, debit card, or other financial instrument that a Subscriber has used to submit his or her monthly payment to Netflix.

1.27 ***"Person"*** means, without limitation, any individual, corporation, partnership, limited partnership, limited liability company, association, joint stock company, estate, legal representative, trust, unincorporated association, government or any political subdivision or

1 agency thereof, and any business or legal entity and their spouses, heirs, predecessors, successors,
2 representatives, or assigns.

3 1.28 “**Plaintiffs**” means the Class Representatives and the named plaintiffs in the
4 Related Actions.

5 1.29 “**Preliminary Approval**” means the Court’s certification of the Settlement Class for
6 settlement purposes, preliminary approval of this Agreement, and approval of the form of the
7 Notice and of the Notice Plan.

8 1.30 “**Preliminary Approval Order**” means the order (substantially in the form attached
9 hereto as Exhibit D) preliminarily approving this Agreement, certifying the Settlement Class for
10 settlement purposes, and directing notice thereof to be distributed to the Settlement Class, which
11 will be agreed upon by the Parties and submitted to the Court in conjunction with Plaintiffs’
12 motion for preliminary approval of the Agreement.

13 1.31 “**Related Actions**” means the following lawsuits: (i) *Bernal v. Netflix, Inc.*, Case
14 No. 11-CV-00820-EJD (N.D. Cal.) (filed on February 22, 2011), (ii) *Rura v. Netflix, Inc.*, Case
15 No. 11-CV-1075- SBA (N.D. Cal.) (filed on March 8, 2011), (iii) *Comstock v. Netflix, Inc.*, Case
16 No. 11-CV-1218-HRL (N.D. Cal.) (filed on March 11, 2011), (iv) *Sevy v. Netflix, Inc.*, Case No.
17 11-CV-1309-PSG (N.D. Cal.) (filed on March 18, 2011), and (v) *Wizenberg v. Netflix, Inc.*, Case
18 No. 11-CV-01359-HRL (N.D. Cal.) (filed on March 22, 2011).

19 1.32 “**Released Claims**” means any and all actual, potential, filed, known or unknown,
20 fixed or contingent, claimed or unclaimed, suspected or unsuspected, claims, demands, liabilities,
21 rights, causes of action, suits, contracts or agreements, extracontractual claims, damages, punitive,
22 exemplary or multiplied damages, expenses, costs, attorneys’ fees or obligations (including
23 “Unknown Claims” as defined below), whether in law or in equity, accrued or unaccrued, direct,
24 individual or representative, of every nature and description whatsoever, whether based on the
25 VPPA, the CCRA, the UCL, a contract, or other federal, state, local, statutory or common law or
26 any other law, rule or regulation, including the law of any jurisdiction outside the United States,
27 against the Released Parties, or any of them, arising out of or relating in any way to, the facts,
28 transactions, events, matters, occurrences, acts, disclosures, statements, misrepresentations,

omissions or failures to act regarding the alleged retention and disclosure of Plaintiffs' and the Settlement Class's personally identifiable information, Entertainment Content Viewing History, and other information, including but not limited to all claims that were brought, alleged, argued, raised, or asserted in any pleading or court filing in the Action. Released Claims shall not be construed to extend, nor shall they extend, to claims that are asserted in the case of *Mollett v. Netflix, Inc.*, No. 5:11-cv-01629-EJD as of the date of this agreement.

1.33 ***"Released Parties"*** means Defendant Netflix, Inc., as well as any and all of its present or past heirs, executors, estates, administrators, predecessors, successors, assigns, parents, subsidiaries, associates, affiliates, employers, employees, agents, consultants, independent contractors, insurers, directors, managing directors, officers, partners, principals, members, attorneys, accountants, financial and other advisors, investment bankers, underwriters, shareholders, lenders, auditors, investment advisors, legal representatives, successors in interest, assigns and companies, firms, trusts, corporations, officers, directors, other individuals or entities in which Defendant has a controlling interest or which is affiliated with any of them, or any other representatives of any of these Persons and entities.

1.34 ***"Releasing Parties"*** means Plaintiffs, those Settlement Class Members who do not timely opt out of the Settlement Class; to the extent the Settlement Class Member is an individual, any present, former, and future spouses, as well as the present, former, and future heirs, executors, administrators, representatives, agents, attorneys, partners, successors, predecessors-in-interest, and assigns of each of them; and to the extent a Settlement Class Member is not an individual, all of its present, former, and future direct and indirect parent companies, affiliates, subsidiaries, divisions, agents, franchisees, successors, predecessors-in-interest, and all of the aforementioned's present, former, and future officers, directors, employees, shareholders, attorneys, agents, independent contractors.

1.35 ***"Settlement Administration Expenses"*** means the expenses incurred by the Settlement Administrator in distributing the Notice in accordance with the Notice Plan, the costs incurred in sending CAFA notices described in Subsection 4.3 below, and the costs incurred by the Settlement Administrator in otherwise handling the administration of the settlement and

1 performing the services it is obligated to perform under this Agreement.

2 1.36 "**Settlement Administrator**" means the Person selected by the Settling Parties,
3 subject to approval of the Court, to oversee the distribution of the Notice in accordance with the
4 Notice Plan, distribution of the CAFA notice, as well as performing the services it is obligated to
5 perform under this Agreement or otherwise ordered by the Court.

6 1.37 "**Settlement**" means the settlement contemplated by this Agreement.

7 1.38 "**Settlement Class**" or "**Class**" means all Subscribers as of the date of entry of
8 Preliminary Approval. Excluded from the Settlement Class are the following: (i) the Settlement
9 Administrator, (ii) the Mediator, (iii) any respective parent, subsidiary, affiliate or control person
10 of the Defendant or its officers, directors, agents, servants, or employees as of the date of filing of
11 the Action, (iv) any judge presiding over the Action and the immediate family members of any
12 such Person(s), (v) persons who execute and submit a timely request for exclusion, and (vi) all
13 persons who have had their claims against Defendant fully and finally adjudicated or otherwise
14 released.

15 1.39 "**Settlement Class Member**" or "**Class Member**" means a Person who falls within
16 the definition of the Class as set forth above and who has not submitted a valid request for
17 exclusion.

18 1.40 "**Settlement Website**" means the website to be created by the Settlement
19 Administrator containing full details and information about the Settlement, including this
20 Agreement and the Notice.

21 1.41 "**Subscriber**" means a Person in the United States or its territories who is, or at one
22 or more times was, subscribed to Netflix.

23 1.42 "**Supporting Counsel**" means David C. Parisi and Suzanne Havens Beckman of
24 Parisi & Havens LLP, Joseph J. Siprut of Siprut P.C., Sam Dua of Dua & Associates, PLLC, L.
25 Timothy Fisher of Bursor & Fisher P.A., and Nadeem Faruqi of Faruqi & Faruqi, LLP.

26 1.43 "**Unknown Claims**" means claims that could have been raised in the Action and
27 that the Plaintiffs, or any or all other Persons and entities whose claims are being released, or any
28 of them, do not know or suspect to exist, which, if known by him, her or it, might affect his, her or

1 its agreement to release the Released Parties or the Released Claims or might affect his, her or its
 2 decision to agree, object or not to object to the Settlement. Upon the Effective Date, Plaintiffs and
 3 all other Persons and entities whose claims are being released shall be deemed to have, and shall
 4 have, expressly waived and relinquished, to the fullest extent permitted by law, the provisions,
 5 rights and benefits of § 1542 of the California Civil Code, which provides as follows:

6 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS
 7 WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO
 8 EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING
 9 THE RELEASE, WHICH IF KNOWN BY HIM OR HER MUST
 10 HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT
 11 WITH THE DEBTOR.

12 Upon the Effective Date, Plaintiffs and all other Persons and entities whose claims are being
 13 released, also shall be deemed to have, and shall have, waived any and all provisions, rights and
 14 benefits conferred by any law of any state or territory of the United States, or principle of common
 15 law, or the law of any jurisdiction outside of the United States, which is similar, comparable or
 16 equivalent to § 1542 of the California Civil Code. Plaintiffs acknowledge that they may discover
 17 facts in addition to or different from those that they now know or believe to be true with respect to
 18 the subject matter of this release, but that it is their intention to finally and forever to settle and
 19 release the Released Claims, notwithstanding any Unknown Claims they may have, as that term is
 20 defined in this Subsection.

21 2. **SETTLEMENT RELIEF**

22 2.1 **Injunctive Relief.** Within one (1) year of the Effective Date, and subject to the
 23 exceptions set forth in this Settlement Agreement, including Section 2.2 below, Netflix agrees to
 24 the following:

25 2.1.1 For those Subscribers who have not subscribed to Netflix for a period of
 26 365 or more consecutive days as of the Effective Date and who did not rejoin Netflix
 27 subsequent to the Effective Date, Netflix will cause his or her Entertainment Content
 28 Viewing History to be decoupled from his or her Identification Information and Payment
 Method.

2.1.2 Netflix shall implement a data retention practice such that, for Subscribers

1 who have cancelled their Netflix subscription and have not been a Netflix subscriber for a
2 period of 365 consecutive days, Netflix will cause his or her Entertainment Content
3 Viewing History to be decoupled from his or her Identification Information and Payment
4 Method. The parties acknowledge that many Subscribers cancel and rejoin Netflix on a
5 frequent basis and therefore agree that the 365-day period described in this Subsection will
6 commence on the Subscriber's most recent cancellation and will reset if the Subscriber
7 rejoins Netflix within the 365-day period. The requirements of this Section 2.1.2 shall
8 remain in effect and Netflix shall adhere to it for at least four (4) years from the Effective
9 Date unless inconsistent with or otherwise permitted under any newly enacted or amended
10 laws.

11 2.1.3 Netflix's performance of its obligations as outlined in Subsections 2.1.1 and
12 2.1.2, above, are subject to: (i) receiving confirmation from adverse parties in other
13 pending cases against Netflix, or with the respective courts as needed, that performing such
14 actions will not result in allegations of wrongful document destruction or spoliation, and
15 (ii) any relevant document retention obligations imposed by litigation filed after the date
16 that this Agreement is executed.

17 2.2 **Exceptions.** The obligations set forth in Section 2.1 shall not apply in the
18 following circumstances:

19 2.2.1 If a Subscriber, at or after the time he or she cancels his or her subscription,
20 provides express consent to allow Netflix to continue to associate his or her Entertainment
21 Content Viewing History with his or her Identification Information and Payment Method,
22 Netflix will be under no obligation to perform the actions described in Subsection 2.1.1 or
23 2.1.2, above, with respect to that Subscriber and any related account for which that
24 Subscriber has authority to provide consent.

25 2.2.2 The obligations described in Subsection 2.1 do not apply to Netflix's non-
26 U.S. operations.

27 2.2.3 If Netflix ceases operating its DVD-by-mail service within four (4) years
28 from the Effective Date, Netflix will no longer be subject to the obligations described in

1 Subsections 2.1.1 and 2.1.2 as it pertains to non-Settlement Class members. Nothing
2 herein shall relieve Netflix of its obligations to comply with any and all applicable laws.
3 Nothing in this Subsection 2.2.3 shall relieve Netflix of its obligations under Subsection
4 2.1.1, 2.1.2, and 2.1.3 as to the Settlement Class.

5 **2.3 Settlement Fund.** Netflix agrees to pay and shall deposit in the Escrow Account,
6 as set forth below, the total sum of Nine Million Dollars (\$9,000,000.00) in cash as a Settlement
7 Fund. The Settlement Fund will be used for payment of: (i) Settlement Administration Expenses,
8 (ii) *cy pres* distributions to the proposed *cy pres* recipients, as approved by the Court, (iii) any Fee
9 Award or costs awarded to Class Counsel, and (iv) any Incentive Award awarded to the Class
10 Representatives or Plaintiffs.

11 **2.3.1** Within ten (10) days after entry of the Preliminary Approval Order, the
12 Settlement Administrator will establish the Escrow Account. Within ten (10) days after
13 entry of the Preliminary Approval Order or within ten (10) days of receiving wiring
14 instructions from the Settlement Administrator, whichever is later, Netflix shall deposit
15 into the Escrow Account the first installment of the Settlement Fund in the amount of Four
16 Million Five Hundred Thousand Dollars (\$4,500,000.00).

17 **2.3.2** Within thirty (30) days after the Effective Date, Netflix shall deposit into
18 the Escrow Account the remaining balance of the Settlement Fund in the amount of Four
19 Million Five Hundred Thousand Dollars (\$4,500,000.00).

20 **2.3.3** The interest earned on such sum shall accrue to the benefit of the Settlement
21 Fund, and the interest shall be transferred to the *cy pres* recipients per Subsection 2.4
22 below. The Settlement Administrator will maintain control over and be responsible for all
23 disbursements from the Escrow Account. Other than as expressly set forth in this
24 Settlement Agreement, and subject to its right to repayment described in Section 9, Netflix
25 shall have no responsibility to manage, oversee or invest the money in the Escrow Account
26 following deposit. The Settlement Fund shall be the limit and full extent of Netflix's
27 monetary obligation to the Plaintiffs, the Settlement Class, and Class Counsel. Netflix does
28 not and shall have no other financial obligation under this Agreement, including but not

1 limited to any notice or administration expenses, the Fee Award, or Incentive Award. In
 2 addition, under no circumstances will Netflix have any liability for taxes or tax expenses
 3 under this Agreement.

4 2.3.4 The Escrow Account shall be completely exhausted and the Settlement
 5 Fund shall be paid out in full, and no monies shall revert to Netflix; provided, however,
 6 that in the event the Court rejects the Final Order and Judgment, or if the settlement is
 7 overturned or modified in a material way on appeal, all monies paid into the Escrow
 8 Account shall be returned to Netflix within ten (10) days after entry of an order in which
 9 the settlement was rejected, overturned or modified.

10 2.4 *Cy Pres*. After the Settlement Fund is used for payment of: (i) Settlement
 11 Administration Expenses, (ii) the Fee Award, and (iii) the Incentive Award, the balance of the
 12 Settlement Fund shall be distributed to the *Cy Pres* Recipients. The Parties agree that Plaintiffs
 13 shall designate the *Cy Pres* Recipients pursuant to the following parameters, and subject to Court
 14 approval:

15 2.4.1 The *Cy Pres* distribution shall be made to not-for-profit organizations,
 16 institutions, and/or programs that educate users, regulators, and enterprises regarding
 17 issues relating to protection of privacy, identity, and personal information through user
 18 control, and to protect users from online threats.

19 2.4.2 The designated *Cy Pres* Recipients shall have no valid objectionable
 20 affiliation with any party or counsel to the Action and Related Actions.

21 2.4.3 Upon execution of this Agreement by all signatories hereto, the Parties shall
 22 begin soliciting proposals for the nomination of *Cy Pres* Recipients. Proposals from
 23 potential not-for-profit organizations seeking nomination shall include the following
 24 detailed information:

25 (i) The organization's name and address;

26 (ii) A description of an established program currently undertaking
 27 policy or education efforts directed specifically at issues of technology, law, and
 28 privacy;

- (iii) A short statement describing how this program benefits the Class;
- (iv) The overall annual operating budget of the organization and of the specific program;
- (v) The total amount of *cy pres* distribution sought;
- (vi) Disclosure of any connections, monetary or otherwise, between the organization and the Parties;
- (vii) Disclosure of any connections, monetary or otherwise, between the organization and Class Counsel and Supporting Counsel; and
- (viii) Disclosure of the amount received, if any, in contributions from the Parties or their counsel in 2011.

2.4.4 Proposals shall be sent electronically to NetflixPrivacyLitigation@edelson.com, or via USPS postmarked by the Proposal Deadline to:

Edelson McGuire, LLC
Attn: Netflix Privacy Litigation Cy Pres
350 N. LaSalle, Suite 1300
Chicago, IL 60654

2.4.5 Any organization submitting a proposal which fails to include the information contained in Subsection 2.4.3 will not be considered for nomination. Proposals for nomination shall not exceed ten (10) pages.

2.4.6 All nomination proposals shall be submitted no later than the Proposal Deadline. Counsel shall have no obligation to consider nomination proposals submitted after the Proposal Deadline.

2.4.7 After reviewing nomination proposals, the Parties shall meet and confer to select the final nominations for Court approval that the Parties believe will effectively and efficiently educate users, regulators, and enterprises regarding issues relating to protection of privacy, identity, and personal information online through user control, and to protect users from online threats, further the policies underlying the VPPA, and otherwise promote

1 the Class's interests. In evaluating these criteria, the Parties will consider the requested
 2 disbursement amounts and operating budgets when determining *cy pres* funding
 3 allocations.

4 2.4.8 No later than fourteen (14) days before the Objection Deadline, Class
 5 Counsel will make public, via the Settlement Website and direct notice to organizations
 6 that have submitted proposals, the organizations nominated for *cy pres* disbursements,
 7 along with their corresponding funding amounts.

8 2.4.9 All disputes arising out of the designation of the *Cy Pres* Recipients shall be
 9 referred to the Mediator for binding resolution in accordance with Subsection 11.4, below.

10 2.4.10 At the Final Approval Hearing, Class Counsel shall submit to the Court the
 11 proposed *Cy Pres* Recipients, along with their respective allocations of funding, and seek
 12 Court approval for such selected *Cy Pres* Recipients.

13 2.4.11 Payments to the *Cy Pres* Recipients shall be made by the Settlement
 14 Administrator from the Escrow Account within thirty (30) days after the Effective Date or
 15 as otherwise ordered by the Court.

16 **3. RELEASES**

17 3.1 The obligations incurred pursuant to this Agreement shall be a full and final
 18 disposition of the Action and any and all Released Claims, as against all Released Parties.

19 3.2 Upon the Effective Date, the Releasing Parties, and each of them, shall be deemed
 20 to have, and by operation of the Final Judgment shall have, fully, finally, and forever released,
 21 relinquished, and discharged all Released Claims against the Released Parties, and each of them.
 22 This Agreement shall be the sole and exclusive remedy for any and all Released Claims against
 23 the Released Parties. No Released Party shall be subject to any liability or expense of any kind to
 24 any Releasing Party with respect to any Released Claim.

25 **4. NOTICE TO THE CLASS**

26 4.1 The Notice Plan and content shall be submitted for Court approval in the
 27 Preliminary Approval Order and shall consist of the following:

28 4.1.1. E-Mail Notice. Netflix (or in Netflix's sole discretion, the Settlement

1 Administrator) shall provide email notification to the email address last known by Netflix
 2 of any and all reasonably identifiable Settlement Class Members, in a form substantially
 3 similar to that attached as Exhibit A, which shall include a hypertext link to the Settlement
 4 Website. In the event that Notice sent by electronic mail to a Settlement Class Member
 5 results in a bounce-back or otherwise undeliverable message, Netflix shall re-send the
 6 Notice once by electronic mail, to the last known email address of such Settlement Class
 7 member.

8 4.1.2. Settlement Website. With the involvement and approval of the Parties, the
 9 Settlement Administrator shall publish a traditional "long form" notice (substantially in the
 10 form attached hereto as Exhibit C) through the creation and maintenance of a Settlement
 11 Website through the Effective Date. The Settlement Website shall (1) notify Class
 12 Members of their rights to object to the Settlement Agreement or opt out of the Class; (2)
 13 notify Class Members that no further notice will be provided to them that the Settlement
 14 has been approved; and (3) inform Class Members that they should monitor the Settlement
 15 Website for further developments.

16 4.1.3. Publication Notice. The Parties shall supplement direct notice with (1) a
 17 joint press release, in a form substantially similar to that attached as Exhibit B, announcing
 18 the settlement and listing the address of the Settlement Website, which Netflix shall cause
 19 to be wired to major news outlets and (2) placement of the Publication Notice in a half-
 20 page advertisement appearing in an issue of People Magazine; and (3) 60,000,000
 21 impressions of an advertisement (100 x 100 pixels) on Facebook.com that is linked to the
 22 Settlement Website.

23 4.2. The Notice Plan set forth in Subsection 4.1, above, shall be established, and the
 24 emails and joint press release sent, within thirty (30) days of entry of the Preliminary Approval
 25 Order with publication notice to be completed within sixty (60) days of entry of the Preliminary
 26 Approval Order. All costs associated with implementing the Notice Plan, including the fees and
 27 costs of the Settlement Administrator, shall be paid out of the Settlement Fund.

28 4.2.1 As set forth in Subsection 4.2, above, all costs associated with

1 implementing the Notice Plan, including the fees and costs of the Settlement
 2 Administrator, shall be paid out of the Settlement Fund. Provided, however, that in the
 3 event the Effective Date does not occur, Netflix contends that Plaintiffs shall be required to
 4 reimburse Netflix for fifty percent (50%) of any costs associated with implementing the
 5 Notice Plan. Plaintiffs dispute that they have any obligation to reimburse Netflix for any
 6 costs associated with implementing the Notice Plan irrespective of whether the Effective
 7 Date occurs. Pursuant to the Memorandum of Understanding dated and signed February 1,
 8 2012, the Parties agree that such dispute will be referred to the Mediator for resolution and
 9 that the decision of the Mediator shall be final and binding.

10 4.3 Within ten (10) days after the filing of this Agreement with the Court, Netflix shall
 11 notify the appropriate state and federal officials of this Agreement pursuant to the Class Action
 12 Fairness Act of 2005, 28 U.S.C. § 1715.

13 **5. OPT-OUTS AND OBJECTIONS**

14 5.1 Except for those Persons who properly request exclusion pursuant to the procedures
 15 described below, all members of the Class will be deemed Class Members for all purposes under
 16 this Agreement.

17 5.2 A Class Member may request exclusion from the Class up through and including
 18 the Objection/Exclusion Deadline. To request exclusion, the Class Member must write to the
 19 Settlement Administrator stating a request to be "excluded" from the Class. The request must be
 20 signed by the Class Member. The request must be postmarked on or before the
 21 Objection/Exclusion Deadline. So-called "mass" or "class" opt-outs shall not be allowed.

22 5.3 The Parties shall have the right to challenge the timeliness and validity of any
 23 exclusion request. The Court shall determine whether any contested exclusion request is valid.

24 5.4 Within ten (10) days after the Objection/Exclusion Deadline, the Settlement
 25 Administrator will provide to Class Counsel and Defense Counsel a list of all Persons who opted
 26 out by validly requesting exclusion. In the event that the number of Persons who opted out
 27 exceeds a level separately agreed to by Class Counsel and Netflix, Netflix may elect to terminate
 28 this Agreement on the ground that exclusion at that level threatens to frustrate the essential

1 purpose of this Agreement. Netflix may exercise its right to terminate under this subsection by
 2 notifying Class Counsel of its election no later than seven (7) days after receipt of the list of
 3 Persons who opted out.

4 5.5 Settlement Class Members who have not requested exclusion from the Class shall
 5 have the right to appear if they have any objection to the Court granting Final Approval to this
 6 Agreement. Any objection to this Agreement must be in writing, filed with the Court, with a copy
 7 delivered to Class Counsel and Defense Counsel at the addresses set forth in the Notice. The
 8 written objection must include the Class Member's name and address, along with a clear statement
 9 of the basis for the objection, including any arguments, citations, and evidence supporting the
 10 objection (including copies of any documents relied on), state that he or she is a member of the
 11 Settlement Class, and provide a statement whether the objector intends to appear at the Final
 12 Approval Hearing with or without counsel. To be valid, the objection must be filed and sent to
 13 Class Counsel and Netflix's counsel on or before the Objection/Exclusion Deadline approved by
 14 the Court and specified in the Notice. Any Class Member who fails to timely file a written
 15 objection and notice of his or her intent to appear at the fairness hearing pursuant to this
 16 Subsection or as detailed in the Notice, shall not be permitted to object to this Settlement at the
 17 fairness hearing, and shall be foreclosed from seeking any review of this Settlement by appeal or
 18 other means.

19 5.6 The Parties shall have the right to respond to any objection no later than seven (7)
 20 days prior to the Final Approval Hearing by filing a response with the Court that shall also be
 21 served (by regular mail, hand or overnight delivery) on the objector (or counsel for the objector)
 22 and to counsel for the other Party in the Action.

23 **6. SETTLEMENT ADMINISTRATION**

24 6.1 The Settlement Administrator shall administer the relief provided by this
 25 Agreement in a rational, responsive, cost effective, and timely manner. The Settlement
 26 Administrator shall maintain reasonably detailed records of its activities under this Agreement.
 27 The Settlement Administrator shall maintain all such records as are required by applicable law in
 28 accordance with its normal business practices and such records will be made available to Class

1 Counsel and Netflix upon request. The Settlement Administrator shall also provide reports and
 2 other information to the Court as the Court may require. The Settlement Administrator shall
 3 provide Class Counsel and Defendant's Counsel with information concerning Notice, and
 4 administration and implementation of the Settlement Agreement. Should the Court request, the
 5 Parties shall submit a timely report to the Court summarizing the work performed by the
 6 Settlement Administrator.

7 6.2. Without limiting the foregoing, the Settlement Administrator shall receive
 8 exclusion forms and other requests from Settlement Class Members to exclude themselves from
 9 the Settlement Agreement and promptly provide to Class Counsel and Defendant's Counsel copies
 10 thereof upon receipt. If the Settlement Administrator receives any exclusion forms or other
 11 requests from Settlement Class Members after the deadline for the submission of such forms and
 12 requests, the Settlement Administrator shall promptly provide copies thereof to Class Counsel and
 13 Defendant's Counsel.

14 **7. TERMINATION OF SETTLEMENT**

15 7.1 Subject to Paragraph 10 below, the Class Representatives, on behalf of the
 16 Settlement Class, or Netflix, shall each have the right to terminate this Agreement by providing
 17 written notice of his or its election to do so ("Termination Notice") to all other Parties hereto
 18 within twenty-one business (21) days, after any of the following events: (i) the Court's refusal to
 19 grant Preliminary Approval of this Agreement in any material respect; (ii) the Court's refusal to
 20 grant final approval of this Agreement in any material respect; (iii) the Court's refusal to enter the
 21 Final Judgment in this Action in any material respect; (iv) the date upon which the Final Judgment
 22 is modified or reversed in any material respect by the Court of Appeals or the Supreme Court; or
 23 (v) the date upon which an Alternative Judgment, as defined in Subsection 10.1 of this Agreement
 24 is modified or reversed in any material respect by the Court of Appeals or the Supreme Court.

25 **8. PRELIMINARY APPROVAL ORDER AND FINAL APPROVAL ORDER**

26 8.1. Class Counsel shall submit this Agreement together with its Exhibits to the Court
 27 and shall move the Court for Preliminary Approval of the Settlement as set forth in this
 28 Agreement, certification of the Settlement Class for settlement purposes only, appointment of

1 Class Counsel and the Class Representatives, and entry of a Preliminary Approval Order, which
 2 order shall set a Final Approval Hearing date and approve Notice for dissemination in accordance
 3 with the Notice Plan. Such Preliminary Approval Order, shall also authorize the Parties, without
 4 further approval from the Court, to agree to and adopt such amendments, modifications and
 5 expansions of this Agreement and its implementing documents (including all exhibits to this
 6 Agreement) so long as they are consistent in all material respects with the Settlement and Final
 7 Judgment and do not limit the rights of the Settlement Class Members.

8 8.2 At the time of the submission of this Agreement to the Court as described above,
 9 Class Counsel and Defendant's Counsel shall request that, after Notice is given, the Court hold a
 10 Final Approval Hearing and approve the settlement of the Action as set forth herein.

11 8.3 After Notice is given, the Parties shall request and obtain from the Court a Final
 12 Judgment. The Parties proposed Final Judgment Order is attached as Exhibit E. The Final
 13 Judgment will (among other things):

14 8.3.1 find that the Court has personal jurisdiction over all Settlement Class
 15 Members and that the Court has subject matter jurisdiction to approve the Agreement,
 16 including all exhibits thereto;

17 8.3.2 approve the Agreement and the proposed Settlement as fair, reasonable and
 18 adequate as to, and in the best interests of, the Settlement Class Members; direct the Parties
 19 and their counsel to implement and consummate the Agreement according to its terms and
 20 provisions; and declare the Agreement to be binding on, and have *res judicata* and
 21 preclusive effect in all pending and future lawsuits or other proceedings maintained by or
 22 on behalf of Plaintiffs, the Releasing Parties, and their heirs, executors and administrators,
 23 successors and assigns, based, in whole or in part, on the Released Claims;

24 8.3.3 find that the Notice and the Notice Plan implemented pursuant to the
 25 Agreement (1) constitute the best practicable notice under the circumstances, (2) constitute
 26 notice that is reasonably calculated, under the circumstances, to apprise the Settlement
 27 Class Members of the pendency of the Action, their right to object to or exclude
 28 themselves from the proposed Agreement, and to appear at the Final Approval Hearing,

(3) are reasonable and constitute due, adequate, and sufficient notice to all persons entitled to receive notice, and (4) meet all applicable requirements of the Federal Rules of Civil Procedure, the Due Process Clause of the United States Constitution, and the rules of the Court;

8.3.4 find that the Class Representatives and Class Counsel adequately represented the Settlement Class for purposes of entering into and implementing the Agreement;

8.3.5 dismiss the Action (including all individual Claims and Settlement Class Claims presented thereby) on the merits and with prejudice, without fees or costs to any Party except as provided in this Agreement;

8.3.6 incorporate the Release set forth above, make the Release effective as of the date of the Final Judgment, and forever discharge the Released Parties as set forth herein;

8.3.7 permanently bar and enjoin all Settlement Class Members who have not been properly excluded from the Settlement Class from filing, commencing, prosecuting, intervening in, or participating (as class members or otherwise) in, any lawsuit or other action in any jurisdiction based on the Released Claims;

8.3.8 without affecting the finality of the Final Judgment for purposes of appeal, retain jurisdiction as to all matters relating to administration, consummation, enforcement, and interpretation of the Settlement Agreement and the Final Judgment, and for any other necessary purpose; and

8.3.9 incorporate any other provisions, as the Court deems necessary and just.

9. CLASS COUNSEL'S ATTORNEYS' FEES AND REIMBURSEMENT OF EXPENSES; INCENTIVE AWARD

9.1 The Parties have agreed that Class Counsel may seek a Fee Award, subject to Court approval, to be paid from the Settlement Fund. Netflix agrees that it will not object to, or otherwise challenge, directly or indirectly, Class Counsel's application for attorneys' fees of up to 25% of the Settlement Fund and for reimbursement of up to \$25,000.00 in out of pocket costs. Class Counsel has, in turn, agreed not to seek or accept more than this amount from the Court. The

1 Settlement Administrator shall pay to Class Counsel the Fee Award from the Settlement Fund, no
2 later than three (3) business days after the Final Approval Hearing, notwithstanding an appeal,
3 objection, or challenge to the Court's entry of the Judgment or Final Approval Order and
4 Judgment; provided, however, that Netflix is given adequate security for the recovery of amounts
5 paid in the event of reversal on appeal of the final approval of this Settlement.

6 9.2 In addition to any benefits afforded under this Agreement, and in recognition of
7 their effort on behalf of the Settlement Class, the Class Representatives and the Plaintiffs shall,
8 subject to Court approval, receive a collective Incentive Award in the amount of Thirty Thousand
9 Dollars (\$30,000.00), as appropriate compensation for their time and efforts in the Action and
10 Related Actions. Netflix agrees that they will not object to, or otherwise challenge, directly or
11 indirectly, Class Counsel's application for a collective Incentive Award if limited to this amount.
12 Class Counsel shall have the sole responsibility of ensuring that the collective Incentive Award is
13 distributed appropriately to the Class Representatives and Plaintiffs.

14 9.4 Any amounts awarded pursuant to this Section 9 shall be paid by the Settlement
15 Administrator from the Settlement Fund to Class Counsel, which shall be solely responsible for
16 distributing the Fee Award to the Class Representatives, Plaintiffs, and Supporting Counsel. The
17 amounts distributed to each of the Supporting Counsel shall be within the sole discretion of Class
18 Counsel.

19 9.5 Any amounts awarded pursuant to this Section 9 shall be made within three (3)
20 business days following an award by the Court, notwithstanding the existence of any timely filed
21 objections thereto, or potential for appeal therefrom, or collateral attack on the Settlement or any
22 part thereof, subject to Class Counsel's obligation to make appropriate repayments to Defendant
23 or the Settlement Fund, plus accrued interest at the same net rate as is earned by the Settlement
24 Fund, if and when, as a result of any appeal and/or further proceedings on remand, or successful
25 collateral attack, the fee or cost award is reduced or reversed or return of the Settlement Fund is
26 required. If the Order and Final Judgment approving the Settlement is reversed, a refund or
27 repayment of the Fee Award plus accrued interest shall be made to Defendant or the Settlement
28 Fund if and when: (a) the Fee Award and/or the Incentive Award are reduced, vacated, or

1 reversed, without remand, by non-appealable order of the United States Court of Appeals for the
 2 Ninth Circuit or by final, non-appealable, order of the United States District Court for the
 3 Northern District of California; (b) the Effective Date does not occur; (c) this Settlement is
 4 terminated or cancelled for any reason; (d) this Settlement is voided by any party; (e) the Fee
 5 Award and/or Incentive Award do not become final; or (f) the Settlement is not approved, or is
 6 reversed, or modified, without remand, by non-appealable order of the United States Court of
 7 Appeals for the Ninth Circuit or by final, non-appealable, order of the United States District Court
 8 for the Northern District of California. The full amount of the Fee Award and/or Incentive Award,
 9 or the amount by which any such fee or Incentive Award is reduced, or modified, without remand,
 10 by non-appealable order of the United States Court of Appeals for the Ninth Circuit or by final,
 11 non-appealable, order of the United States District Court for the Northern District of California
 12 shall be paid to Netflix within ten (10) business days of the date of the event requiring the refund
 13 and repayment as set forth in this Paragraph.

14 9.6 When an obligation to refund or repay the Fee Award and/or any part of the
 15 Incentive Award arises under the preceding Paragraph, Class Counsel shall be obligated to refund
 16 or repay Defendant or the Settlement Fund the full amount that is required to be refunded or
 17 repaid, plus accrued interest, regardless of whether any portion of the Fee Award and/or Incentive
 18 Award have already been distributed to any other person or entity, including Plaintiffs and
 19 Supporting Counsel. The obligations in this Section and the preceding Section shall survive and
 20 remain in full force and effect and be binding in all respects on Class Counsel, even if the
 21 Settlement is terminated, the Settlement is not approved, or the Effective Date does not occur.

22 **10. CONDITIONS OF SETTLEMENT, EFFECT OF DISAPPROVAL,**
 23 **CANCELLATION, OR TERMINATION**

24 10.1 The Effective Date of this Settlement Agreement shall not occur unless and until
 25 each of the following events occurs and shall be the date upon which the last (in time) of the
 26 following events occurs:

27 10.1.1 This Agreement has been signed by Class Counsel and Netflix;

28 10.1.2 The Court has entered the Preliminary Approval Order;

1 10.1.3 The Court has entered an order finally approving the Agreement, following
 2 notice to the Settlement Class and a Final Approval Hearing, as provided in the Federal
 3 Rules of Civil Procedure, and has entered the Final Judgment, or a judgment substantially
 4 consistent with this Agreement; and

5 10.1.4 The Final Judgment has become Final, as defined above, or, in the event
 6 that the Court enters an order and final judgment in a form other than that provided above
 7 ("Alternative Judgment") and that has the consent of the Parties, such Alternative
 8 Judgment becomes Final.

9 10.2 If some or all of the conditions specified in Subsection 10.1 are not met, or in the
 10 event that this Agreement is not approved by the Court, or the settlement set forth in this
 11 Agreement is terminated or fails to become effective in accordance with its terms, then this
 12 Settlement Agreement shall be canceled and terminated subject to Subsection 10.3 unless Class
 13 Counsel and Netflix mutually agree in writing to proceed with this Agreement. If either Party is in
 14 material breach of the terms hereof, the other Party, provided that it is in substantial compliance
 15 with the terms of this Agreement, may terminate this Agreement on notice to the non-compliant
 16 Party. Notwithstanding anything herein, the Parties agree that the Court's failure to approve, in
 17 whole or in part, the attorneys' fees payment to Class Counsel set forth in Subsection 9.1 above
 18 shall not prevent the Agreement from becoming effective, nor shall it be grounds for termination.

19 10.3 If this Agreement is terminated or fails to become effective for the reasons set forth
 20 in Subsections 5.4, 7.1, 10.1, or 10.2 above, the Parties shall be restored to their respective
 21 positions in the Action as of the date of the signing of this Agreement. In such event, any Final
 22 Judgment or other order entered by the Court in accordance with the terms of this Agreement shall
 23 be treated as vacated, *nunc pro tunc*, and the Parties shall be returned to the *status quo ante* with
 24 respect to the Action as if this Agreement had never been entered into.

25 **11. MISCELLANEOUS PROVISIONS**

26 11.1 The Parties intend this Settlement Agreement to be a final and complete resolution
 27 of all disputes between them with respect to the Released Claims by Plaintiffs, the Settlement
 28 Class, and each or any of them, on the one hand, against the Released Parties, and each or any of

1 the Released Parties, on the other hand. Accordingly, the Parties agree not to assert in any forum
2 that the Action was brought by Plaintiffs or defended by Netflix, or each or any of them, in bad
3 faith or without a reasonable basis.

4 11.2 The Parties have relied upon the advice and representation of counsel, selected by
5 them, concerning their respective legal liability for the claims hereby released. The Parties have
6 read and understand fully the above and foregoing agreement and have been fully advised as to the
7 legal effect thereof by counsel of their own selection and intend to be legally bound by the same.

8 11.3 Whether or not the Effective Date occurs or this Agreement is terminated, neither
9 this Agreement nor the settlement contained herein, nor any act performed or document executed
10 pursuant to or in furtherance of this Agreement or the Settlement:

11 11.3.1 is, may be deemed, or shall be used, offered or received against the
12 Released Parties, or each or any of them, as an admission, concession or evidence of, the
13 validity of any Released Claims, the truth of any fact alleged by the Plaintiff, the
14 deficiency of any defense that has been or could have been asserted in the Action, the
15 violation of any law or statute, the reasonableness of the Settlement amount or the Fee
16 Award, or of any alleged wrongdoing, liability, negligence, or fault of the Released Parties,
17 or any of them;

18 11.3.2 is, may be deemed, or shall be used, offered or received against Netflix as
19 an admission, concession or evidence of any fault, misrepresentation or omission with
20 respect to any statement or written document approved or made by the Released Parties, or
21 any of them;

22 11.3.3 is, may be deemed, or shall be used, offered or received against the
23 Released Parties, or each or any of them, as an admission or concession with respect to any
24 liability, negligence, fault or wrongdoing as against any Released Parties, in any civil,
25 criminal or administrative proceeding in any court, administrative agency or other tribunal.
26 However, the Settlement, this Agreement, and any acts performed and/or documents
27 executed in furtherance of or pursuant to this Agreement and/or Settlement may be used in
28 any proceedings as may be necessary to effectuate the provisions of this Agreement.

1 However, if this Agreement is approved by the Court, any Party or any of the Released
2 Parties may file this Agreement and/or the Final Judgment in any action that may be
3 brought against such Party or Parties in order to support a defense or counterclaim based
4 on principles of *res judicata*, collateral estoppel, release, good faith settlement, judgment
5 bar or reduction, or any other theory of claim preclusion or issue preclusion or similar
6 defense or counterclaim;

7 11.3.4 is, may be deemed, or shall be construed as or received in evidence as an
8 admission or concession against Plaintiffs, the Settlement Class or each or any of them, or
9 against the Released Parties, or each or any of them, as an admission or concession that the
10 consideration to be given hereunder represents an amount equal to, less than or greater than
11 that amount that could have or would have been recovered after trial;

12 11.3.5 is, may be deemed, or shall be construed as or received in evidence as an
13 admission or concession against Plaintiffs, the Settlement Class, or each and any of them,
14 or against the Released Parties, or each or any of them, that any of Plaintiffs' claims are
15 with or without merit or that damages recoverable in the Action would have exceeded or
16 would have been less than any particular amount; and

17 11.3.6 is, may be deemed, or, shall be construed as precedent or be admissible for
18 any purpose in any proceeding; provided, however, that this Agreement shall be admissible
19 in any proceeding related to the approval of this Agreement, to enforce any of its terms and
20 conditions, to support or defend this Agreement in an appeal from an order granting or
21 denying Final Approval, or to enforce or assert a claim or defense of *res judicata*, collateral
22 estoppel, claim preclusion, issue preclusion, settlement, release, merger and bar, or any
23 similar claim or defense against the Plaintiffs, any Class Member, or any third party.
24 is, may be deemed, or shall be construed as affecting Netflix's ability to (1) oppose class
25 certification in this Action should the Agreement not be approved or implemented; (2)
26 oppose class certification in any Related Actions or in any other putative or certified class
27 action should those actions not be dismissed; or (3) use the certification of the Class
28 Members to oppose certification of any other proposed or existing class of Netflix

1 Subscribers.

2 11.4 All disputes arising out of or relating in any way to the drafting, finalization, or
3 consummation of this Agreement, or the obligations arising from the Settlement itself, will be
4 referred to the Mediator for binding resolution, first, by way of expedited telephonic mediation
5 and if unsuccessful, then by way of final, binding, non-appealable resolution. Nothing herein shall
6 be interpreted in any way as removing from the Court its traditional responsibility to review the
7 Settlement for its fairness, reasonableness, and adequacy when deciding whether to grant
8 Preliminary Approval or Final Approval.

9 11.5 The headings used herein are used for the purpose of convenience only and are not
10 meant to have legal effect.

11 11.6 The recitals are incorporated herein and made a part hereof.

12 11.7 The waiver by one Party of any breach of this Agreement by any other Party shall
13 not be deemed as a waiver of any other prior or subsequent breaches of this Agreement.

14 11.8 All of the Exhibits to this Agreement are material and integral parts thereof and are
15 fully incorporated herein by this reference.

16 11.9 This Agreement and its Exhibits set forth the entire agreement and understanding
17 of the Parties with respect to the matters set forth herein, and supersedes all prior negotiations,
18 agreements, arrangements and undertakings with respect to the matters set forth herein. No
19 representations, warranties or inducements have been made to any Party concerning this
20 Agreement or its Exhibits other than the representations, warranties and covenants contained and
21 memorialized in such documents.

22 11.10 This Agreement may be amended or modified only by a written instrument signed
23 by or on behalf of all Parties or their respective successors-in-interest.

24 11.11 Except as otherwise provided herein, each Party shall bear his or its own attorneys'
25 fees and costs.

26 11.12 Plaintiffs represent and warrant that they have not assigned any claim or right or
27 interest therein as against the Released Parties to any other Person or Party and that they are fully
28 entitled to release the same.

10 11.15 This Agreement shall be binding upon, and inure to the benefit of, the successors
11 and assigns of the Parties hereto and the Released Parties.

17 11.17 This Agreement shall be governed by and construed in accordance with the internal
18 laws of the State of California without regard to conflicts of law principles that would direct the
19 application of the laws of another jurisdiction.

11.19 Where this Agreement requires notice to the Parties, such notice shall be sent to the undersigned counsel: Jay Edelson, Edelson McGuire, LLC, 350 North LaSalle Street, Suite 1300, Chicago, Illinois 60654; Keith Eggleton, Wilson Sonsini Goodrich & Rosati, 650 Page Mill Road, Palo Alto, California 94304.

28

1 Dated: April __, 2012

By _____
Jeff Milans, as an Individual and Class
Representative

2
3 Dated: April __, 2012

By _____
Peter Comstock, as an Individual and Class
Representative

4
5 Dated: April __, 2012

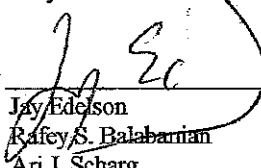
Netflix, Inc.

6
7 By _____
8 Title _____

9 **IT IS SO STIPULATED:**

10
11 Dated: April 30, 2012

EDELSON MCGUIRE LLC
Attorneys for Plaintiffs

12
13 By  _____
14 Jay Edelson
15 Rafey S. Balabanian
16 Ari J. Scharg
17 Chandler R. Givens

18 Dated: April __, 2012

WILSON SONSINI GOODRICH & ROSATI
Attorneys for Defendant Netflix, Inc.

19
20 By _____
21 Keith E. Eggleton
22 Rodney G. Strickland
23 Dale R. Bish

1 Dated: April ³⁰ __, 2012

By Jeffery D. Milans
Jeff Milans, as an Individual and Class
Representative

2
3 Dated: April __, 2012

By _____
Peter Cornstock, as an Individual and Class
Representative

4
5 May
6 Dated: April 2, 2012

Netflix, Inc.

7
8 By David Hyman
Title General Counsel

9 IT IS SO STIPULATED:

10
11 Dated: April __, 2012

EDELSON MCGUIRE LLC
Attorneys for Plaintiffs

12
13 By _____
14 Jay Edelson
15 Rafey S. Balabanian
16 Ari J. Scharg
17 Chandler R. Givens

18 Dated: April __, 2012

WILSON SONSINI GOODRICH & ROSATI
Attorneys for Defendant Netflix, Inc.

19
20 By Keith E. Eggleton
21 Rodney G. Strickland
22 Dale R. Bish

1 Dated: April³⁰, 2012

By Jeffery S. Milans
Jeff Milans, as an Individual and Class
Representative

2
3 Dated: April __, 2012

By _____
Peter Comstock, as an Individual and Class
Representative

4
5 Dated: April __, 2012

Netflix, Inc.

6
7 By _____
8 Title _____

9 **IT IS SO STIPULATED:**

10
11 Dated: April __, 2012

EDELSON MCGUIRE LLC
Attorneys for Plaintiffs

12
13 By _____
14 Jay Edelson
15 Rafey S. Balabanian
16 Ari J. Scharg
17 Chandler R. Givens

18 Dated: April __, 2012

WILSON SONSINI GOODRICH & ROSATI
Attorneys for Defendant Netflix, Inc.

19
20 By _____
21 Keith E. Eggleton
22 Rodney G. Strickland
23 Dale R. Bish

1 Dated: April __, 2012

By _____
Jeff Milans, as an Individual and Class
Representative

2
3 Dated: April 30, 2012

By Peter Comstock
Peter Comstock, as an Individual and Class
Representative

4
5 Dated: April __, 2012

Netflix, Inc.

6
7 By _____
8 Title _____

9 **IT IS SO STIPULATED:**

10
11 Dated: April __, 2012

EDELSON MCGUIRE LLC
Attorneys for Plaintiffs

12
13 By _____
14 Jay Edelson
15 Rafey S. Balabanian
16 Ari J. Scharg
17 Chandler R. Givens

18 Dated: April __, 2012

WILSON SONSINI GOODRICH & ROSATI
Attorneys for Defendant Netflix, Inc.

19
20 By _____
21 Keith E. Eggleton
22 Rodney G. Strickland
23 Dale R. Bish
24
25
26
27
28