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FILED

MAR 11 2011

RICHARD W. WIEKING
 CLERK, U.S. DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA

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UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA

12 PETER COMSTOCK, individually and on
 13 behalf of all others similarly situated,

14 *Plaintiff,*

15 v.

16 NETFLIX, INC., a Delaware corporation,

17 *Defendant.*

Case No. CV 11- 1218 HRL

CLASS ACTION

BY FAX

COMPLAINT FOR:

- (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

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

4 INTRODUCTION

5 1. This Class Action Complaint stems from Defendant Netflix, Inc.'s ("Netflix")
6 unlawful retention of Plaintiff's personally identifiable information, including his credit card
7 information, billing address, and video programming history, for more than one (1) year after
8 Plaintiff canceled his Netflix membership.

9 2. With over 10 million subscribers, Netflix is one of the biggest companies
10 operating in the online movie rental space, offering online video delivery, as well as, an online
11 video rental service of both DVD and Blu-ray Discs delivered through the mail.

12 3. Netflix keeps comprehensive digital records of every streaming video and every
13 video rental ordered by each of its subscribers.

14 4. Consequently, Defendant purposefully retains confidential information regarding
15 both payment and video viewing habits for millions of individuals—even after their
16 subscriptions are cancelled. Such retention violates state and federal laws.

17 INTRADISTRICT ASSIGNMENT

18 5. Defendant Netflix Inc.'s principle executive offices and headquarters are located
19 in this District at 100 Winchester, Los Gatos, CA 95032. Intra-district assignment to the San Jose
20 Division is proper.

21 PARTIES

22 6. Plaintiff is a citizen of Virginia.

23 7. Defendant Netflix, Inc., is a Delaware corporation headquartered at 100
24 Winchester, Los Gatos, California 95032. Netflix does business throughout every state of the
25 United States, and in Canada.

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1 17. However, subscribers do not realize that Netflix maintains this video-viewing
2 information, along with confidential subscriber payment information (including, among other
3 information, a subscriber's name, address, and other billing information) in its databases long
4 after subscribers cancel their Netflix subscription, which they can do at any time.

5 18. In total, Defendant's practice of retaining confidential subscriber information
6 indefinitely—even after a subscriber cancels his or her subscription—raises a host of privacy
7 issues, particularly with respect to the Video Privacy Protection Act, 18 U.S.C. § 2710.

8 **FACTS RELATING TO THE NAMED PLAINTIFF**

9 19. Plaintiff is a former Netflix user who cancelled his account over one year ago.

10 **CLASS ALLEGATIONS**

11 20. **Definition of the Class:** Plaintiff brings this lawsuit pursuant to Fed. R. Civ. P.
12 23(b)(2) and (3) on behalf of herself and a Class of similarly situated individuals, which includes
13 all individuals and entities in the United States that subscribed to Netflix, and cancelled their
14 subscription to Netflix over one year ago. The following individuals and entities are excluded
15 from the Class: 1) Defendant, Defendant's agents, subsidiaries, parents, successors, predecessors,
16 and any entity in which Defendant or its parents have a controlling interest and their current and
17 former employees, officers, and directors; 2) the Judge or Magistrate Judge to whom this case is
18 assigned and the Judge's or Magistrate Judge's immediate family; 3) persons who execute and
19 file a timely request for exclusion; and 4) the legal representatives, successors, or assigns of any
20 such excluded person.

21 21. **Numerosity:** Although the precise number of Class members is not known at this
22 time, it is clear that individual joinder in this case is impracticable. The Class is composed of
23 millions of individuals and entities, all of who may be readily identified through Defendant's
24 records.

25 22. **Commonality:** Common questions of law and fact pertain to both Plaintiff and
26 the other members of the Class, and those questions predominate over any questions that may
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1 affect individual members of the Class. Common questions for the Class include but are not
2 limited to the following:

- 3 a) Whether Netflix unlawfully retained its former subscribers' personally
4 identifiable information and video programming viewing histories;
- 5 b) Whether Netflix benefits from that unlawful data retention;
- 6 c) Whether Netflix's conduct violates the Video Privacy Protection Act, 18
7 U.S.C. §§ 2710, *et seq.*;
- 8 d) Whether Netflix's conduct violates the California Records Act, Cal. Civ.
9 Code § 1798.80;
- 10 e) Whether Netflix's conduct violates California's Unfair Competition law,
11 Cal. Bus. & Prof. Code §§ 17200, *et seq.*;
- 12 f) Whether Netflix has been unjustly enriched; and,
- 13 g) Whether Netflix breached its fiduciary duties owed to Plaintiff and the
14 Class.

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

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

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

10 26. **Policies Generally Applicable to the Class:** This class action is also appropriate
11 for certification because Defendant has acted or refused to act on grounds generally applicable to
12 the Class, thereby making appropriate final injunctive relief or corresponding declaratory relief
13 with respect to the Class as a whole. Defendant's policies challenged herein apply to and affect
14 all members of the Class uniformly, and Plaintiff's challenge of these policies hinges on
15 Defendant's conduct, not on facts or law applicable only to Plaintiff.

16 **COUNT I: Violations of the Video Privacy Protection Act**
17 **18 U.S.C. §§ 2710, *et seq.***
 (On Behalf of Plaintiff and the Class)

18 27. Plaintiff incorporates the foregoing allegations as if fully set forth herein.

19 28. Netflix is a "video tape service provider" as defined by the Video Privacy
20 Protection Act ("VPPA"), because it "engage[s] in the business, in or affecting interstate or
21 foreign commerce, of rental, sale, or delivery of prerecorded video cassette tapes or similar audio
22 visual materials." 18 U.S.C. § 2710(a)(4).

23 29. Under the VPPA, "video tape service provider[s]" must "destroy personally
24 identifiable information as soon as practicable, but no later than one year from the date the
25 information is no longer necessary for the purpose for which it was collected." 18 U.S.C. §
26 2710(e).

1 30. By failing to destroy former subscribers' personally identifiable information as
2 soon as practicable from the date the information was no longer necessary for the purpose for
3 which it was collected, Netflix violated 18 U.S.C. § 2710(e).

4 31. Consequently, and in violation of § 2710, Plaintiff and the Class have suffered
5 injuries. Plaintiff, on his own behalf and on behalf of the Class, seeks an order enjoining
6 Defendant's conduct described above and awarding herself and the Class the maximum statutory
7 and punitive damages available under 18 U.S.C. § 2710(c).

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

10 32. Plaintiff incorporates the foregoing allegations as if fully set forth herein.

11 33. The California Customer Records Act requires that businesses take all reasonable
12 steps to destroy or arrange to destroy a customer's records within its custody or control that
13 contain personal information that is no longer to be retained by the business. Cal. Civ. Code
14 § 1798.81.

15 34. Businesses have wide discretion in the manner of destruction -- they may destroy
16 records by erasure or modification such that records are unreadable or undecipherable. Cal. Civ.
17 Code § 1798.81(b)-(c).

18 35. Because Netflix failed to erase or adequately modify its former customers'
19 records, it has violated Cal. Civ. Code § 1798.81.

20 36. Accordingly, and pursuant to Cal. Civ. Code § 1798.84, Plaintiff and the Class
21 seek damages, including statutory damages of \$3,000 per violation, and injunctive relief.
22 Plaintiff and the Class also seek attorneys' fees pursuant to Cal. Code Civ. Proc. § 1021.5, as
23 well as such other and further relief as the Court deems just and proper.

24 **COUNT III: Violation of California's Unfair Competition Law**
25 **Cal. Bus. & Prof. Code §§ 17200, et seq.**
 (On Behalf of Plaintiff and the Class)

26 37. Plaintiff incorporates the foregoing allegations as if fully set forth herein.
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1 38. California's Unfair Competition Law, Cal. Bus. & Prof. Code
2 §§ 17200, *et seq.* ("UCL"), promotes fair competition in commercial markets for goods and
3 services.

4 39. The UCL prohibits unlawful, unfair or fraudulent business acts or practices.

5 40. Netflix violated the fraudulent prong of the UCL by failing to inform its
6 subscribers, including Plaintiff and the Class, that it would retain their personally identifiable
7 information and video programming viewing histories indefinitely.

8 41. Netflix violated the unfair prong of the UCL by profiting from its sale of
9 Plaintiff's and the Class's information to third-parties.

10 42. Netflix violated the unlawful prong of the UCL by committing violations of the
11 Video Privacy Protection Act, 18 U.S.C. §§ 2710, *et seq.*, and the California Customer Records
12 Act, Cal. Civ. Code § 1798.80.

13 43. Pursuant to Cal. Bus. & Prof. Code § 17203, Plaintiff seeks an order of this Court
14 permanently enjoining Netflix from continuing to engage in the fraudulent, unfair and unlawful
15 conduct described herein. Plaintiff seeks an order requiring Defendant to (1) immediately cease
16 the unlawful practices stated in this Complaint, and (2) pay attorneys' fees pursuant to Cal. Code
17 Civ. Proc. § 1021.5.

18 **COUNT IV: Unjust Enrichment**
19 **(On Behalf of Plaintiff and the Class)**

20 44. Plaintiff incorporates the foregoing paragraphs 1-42 as if fully set forth herein.

21 45. Netflix uses and sells to third parties data given to it by Plaintiff and members of
22 the Class. The monies Defendant receives from such use and sales stems from the unlawful
23 and/or wrongful conduct alleged herein.

24 46. Netflix directly acknowledges that it uses and benefits from the data it retains.

25 47. Defendant should not be permitted to retain the monies obtained by selling
26 information about Plaintiff and members of the Class, monies that Defendant has unjustly
27 received as a result of its unlawful actions.

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

3 **COUNT V: Breach of Fiduciary Duty**
4 **(On Behalf of Plaintiff and the Class)**

5 49. Plaintiff incorporates the foregoing paragraphs 1-42 as if fully set forth herein.

6 50. As a result of its subscription relationship with Plaintiff and the Class, Netflix
7 owed Plaintiff and the Class a fiduciary duty to store data received in compliance with all
8 applicable laws and to only use the data for proper and lawful purposes.

9 51. Defendant breached its fiduciary duty to Plaintiff and the Class members by
10 failing to properly store and promptly destroy their data after they cancelled their services in
11 compliance with the Video Privacy Protection Act and the California Records Act.

12 52. Defendant should not be permitted to retain the monies it obtained by selling
13 information about Plaintiff and members of the Class to third parties, which Defendant has
14 received as a result of breaching its fiduciary duties.

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

17 **PRAYER FOR RELIEF**

18 WHEREFORE, Plaintiff Peter Comstock, individually and on behalf of the Class, prays
19 for the following relief:

20 A. Certify this case as a class action on behalf of the Class defined above, appoint
21 Plaintiff as Class Representative, and appoint his counsel as Class Counsel;

22 B. Declare that Netflix's conduct, as described herein, violates the Video Privacy
23 Protection Act, 18 U.S.C. §§ 2710, *et seq.*, the California Customer Records Act, Cal. Civ. Code
24 § 1798.80, and California's Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200, *et seq.*;

25 C. Award injunctive and other equitable relief as is necessary to protect the interests
26 of Plaintiff and the Class, including both an order prohibiting Netflix from engaging in the
27 wrongful and unlawful acts described herein and requiring Netflix to destroy its former
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1 subscribers' personally identifiable information and video program viewing histories—except as
2 strictly necessary for contact information;

3 D. Award damages, including statutory damages of \$2,500 per violation under the
4 Video Privacy Protection Act, 18 U.S.C. § 2710(c); \$3,000 per violation under the California
5 Consumer Records Act, Cal. Civ. Code § 1798.84(c); and, punitive damages where applicable, to
6 Plaintiff and the Class in an amount to be determined at trial;

7 E. Award Plaintiff and the Class their reasonable litigation expenses and attorneys'
8 fees;

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


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

12 **JURY TRIAL**

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

14 Respectfully submitted,

15 Dated: March 11, 2011

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18 By: David C. Parisi
19 Attorneys for Plaintiff Peter Comstock and
20 the putative class
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