

## Antitrust Law Blog

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### [Court Throws Out Antitrust Claims Against Netflix](#)

In an April 29, 2011 opinion, the District Court for the Northern District of California granted defendant Netflix's summary judgment motion against a putative class of plaintiffs comprising of individuals who subscribed to Blockbuster, Inc.'s online DVD rental services. See Order Granting Motion for Summary Judgment, No. M-09-2029 PJH, Dkt. No. 376 ("Order").

Plaintiffs made no conspiracy allegations against Blockbuster, which was their subscription provider. Instead, the multidistrict litigation stemmed from a May 19, 2005 marketing/promotion agreement between Netflix and Walmart, pursuant to which Walmart allegedly exited the market allowing Netflix to enhance its dominant position in the market for DVD rentals, and to eventually raise its subscription prices. Plaintiffs claimed that the reduced competition in the online DVD rental market allowed Blockbuster, which now operated in a two-firm market, to also raise its subscription prices for DVD rentals to plaintiffs. Order at 2.

Plaintiffs' key allegations were that (1) Blockbuster entered the market in late 2004; (2) Netflix dropped the price of its 3-out subscription plan from \$21.99 to \$17.99 in October 2004, in response to Blockbuster's entry and never raised that price; (3) in May 2005, defendants entered into their allegedly illegal "promotional agreement" pursuant to which Walmart subsequently exited the market; (4) Blockbuster was charging \$14.99 for its subscription plan prior to the challenged "promotional agreement"; (5) according to a Blockbuster executive, the \$14.99 price was "not sustainable"; (6) Blockbuster had begun testing the \$17.99 price in connection with certain of its subscription programs in advance of defendants' announcement of their allegedly unlawful agreement; and (7) in August 2005, three months after the promotional agreement was announced, Blockbuster raised its subscription price from \$14.99 to \$17.99, the price being charged by Netflix.

The court initially had granted a motion to dismiss with prejudice based on the indirectness of the alleged injury, speculative nature of the harm and complexity of apportioning damages. *Id.* at 3 (relying on *Assoc. Gen. Contractors of Cal. v. Cal. State Council of Carpenters*, 459 U.S. 519 (1983)). Later, however, the court reconsidered its prior order and granted plaintiffs leave to amend to allege a direct and proximate causal injury.

In denying a second motion to dismiss, the court noted that plaintiffs' revised theory of causation differed from their original theory in that "it now focused on Netflix's ability to convert a competitive price into a supracompetitive price by refusing to compete in an unrestrained market, as well as Blockbuster's 'reliance' on Netflix pricing in setting its own pricing." *Id.* at 5 (emphasis in original). Combined with a number of new allegations, the court held that this new theory of causation was sufficient to get plaintiffs past the pleading stage. Nonetheless, the court continued to express concern about plaintiffs' ability to satisfy the direct injury requirement and encouraged the parties to bring early summary judgment motions directed specifically to antitrust standing. *Id.* at 5-6.

At the summary judgment stage, and after discovery on the antitrust standing issue had been completed, plaintiffs no longer alleged that Blockbuster's August 2005 price increase was a direct response to Walmart's exit from the market. Instead, they argued that, in the but-for world, Netflix would have lowered its price to a true competitive level, and that because Blockbuster's price derived from Netflix's, Blockbuster would have followed suit by lowering its price, resulting in lower prices as of August 2005. The court determined that the only issue before it was, assuming Netflix would have lowered its price to the level alleged by plaintiffs, would Blockbuster "track" or "match" Netflix's pricing.

Among other facts, evidence showed that Blockbuster believed that Netflix "defined" the maximum market price as early as 2003; that Blockbuster used Netflix's then prevailing price as a baseline in setting its prices; that Blockbuster would not, and indeed did not, exceed Netflix's pricing; and that each time Netflix cut prices, Blockbuster responded by cutting its price to undercut Netflix. Based on these facts, plaintiffs argued that had Netflix lowered its price below \$17.99, Blockbuster would have followed and at least matched Netflix's price. *Id.* at 9-10.

However, evidence also showed that Blockbuster considered a variety of factors in setting its prices, besides the price charged by Netflix, including its own financial condition, costs, price testing, product usage and research. Evidence also showed that, although Blockbuster had lowered its prices to compete with Netflix, its price of \$14.99 was "temporary" and deemed "not sustainable"; that it believed it had "inferior services" compared to its rival; and that it had already begun a program of raising its prices to \$17.99 for some subscriptions before defendants' promotional agreement was announced. *Id.* at 10-11.

Concluding that there was no genuine issue of material fact present and that the only dispute was as to the legal effect to be given the undisputed facts, the court granted Netflix's motion. *Id.* at 15. The court held that, even viewing all facts in the light most favorable to plaintiffs, they had failed to demonstrate that Netflix pricing truly set Blockbuster's pricing "as a function of any interdependent market interaction, as opposed to simply a likely function of competitive dynamics of the market." *Id.* at 14. At best, the court explained, "plaintiffs demonstrate only that Blockbuster pricing was set with *reference* to Netflix pricing. But, there is nothing to indicate that Blockbuster pricing

– or its price increase in August 2005 – was in any way directly influenced or impacted by Netflix's alleged anticompetitive conduct . . . ." *Id.* at 14-15 (emphasis in original).