

**IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA**

OFFICE OF THE ATTORNEY GENERAL,
DEPARTMENT OF LEGAL AFFAIRS,
STATE OF FLORIDA,

Plaintiff, Case No.:

vs.

INTELLIFLIX, INC., a Delaware
corporation, and CHRISTOPHER
HICKEY, an individual.

Defendants.

COMPLAINT

Plaintiff, **DEPARTMENT OF LEGAL AFFAIRS, STATE OF FLORIDA**
(hereinafter referred to as "Plaintiff"), sues **INTELLIFLIX, INC.**,
a Delaware corporation (hereinafter, "Intelliflix") **CHRISTOPHER
HICKEY**, an individual, and alleges:

1. This Complaint is brought pursuant to Florida's
Deceptive and Unfair Trade Practices Act, Chapter 501, Part II,
Florida Statutes (2007) (hereinafter, "FDUTPA") and also pursuant
to §607.0505, Fla. Stat. (2007) (concerning failure to maintain a
registered office and agent in Florida, when doing business in
Florida.)

2. This Court has jurisdiction pursuant to the provisions
of FDUTPA and pursuant to the provisions of §607.0505, Fla. Stat.
(2007).

3. Plaintiff is an enforcing authority of FDUTPA as defined in Chapter 501, Part II, Florida Statutes, and is authorized to seek damages, injunctive and other statutory relief pursuant to this part.

4. Plaintiff is also the state agency authorized to seek the appointment of an INTELLIFLIX registered agent and office, pursuant to §607.0505, Fla. Stat. (2007) and to seek certain fines and penalties pursuant to that statute.

5. The statutory FDUTPA violations alleged herein occurred in or affected more than one judicial circuit in the State of Florida. Additionally, the State Attorney has deferred, in writing, to the jurisdiction of this office and a true and correct copy of that deferral letter is attached hereto, as Exhibit "A."

6. Plaintiff has conducted an investigation, and the head of the enforcing authority, Attorney General BILL McCOLLUM, has determined that an enforcement action serves the public interest. A true and correct copy of said determination is attached hereto and incorporated herein as Plaintiff's Exhibit "B" to this Complaint.

7. Defendants, at all times material hereto, provided services as defined within Section 501.203(8), Florida Statutes (2007). Unless otherwise specified, whenever the phrase "all times material hereto" is used in this Complaint, it references

the time period from 2004 (when Defendants first commenced their business operations) to the present.

8. Defendants, at all times material hereto, solicited consumers within the definitions of Section 501.203(7), Florida Statutes (2007).

9. Defendants, at all times material hereto, engaged in trade or commerce and transacted business within Florida within the meaning of §§501.203(8) and 607.0505, Florida Statutes (2007).

DEFENDANTS

10. INTELLIFLIX, INC. has been, at all times material hereto, a Delaware for-profit corporation doing business from its principal (and only) administrative office located at 1401 Forum Way, Suite 503, West Palm Beach, FL 33401. At all times material hereto, INTELLIFLIX, INC. has been headquartered in Palm Beach County, Florida.

11. Defendant CHRISTOPHER HICKEY is an adult male over the age of twenty one residing, at all times material hereto, in Palm Beach County, Florida. CHRISTOPHER HICKEY is the CEO of INTELLIFLIX, INC. and as such, owned, managed and/or controlled INTELLIFLIX'S operations.

FACTUAL ALLEGATIONS

12. INTELLIFLIX, INC., at all times material hereto, has failed to register with the Florida Secretary of State, and has

failed to appoint a registered agent and registered office as is required by §§48.091 and 607.0505, Fla. Stat. (2007).

13. The material time period is calendar years 2004, 2005, 2006 and 2007 (through the present). During the material time period, Defendants have been engaged in the business of Online DVD Rental.

14. In order to induce potential customers to use their online DVD rental service, INTELLIFLIX has conspicuously made the following representations on the home page of its internet website, a true and correct copy of which is attached hereto, as Exhibit "C":

- a) That it has "Over 60,000 movies and games"; and
- b) That customers can "Cancel Anytime."

15. The bold and prominent assurance that customers can "Cancel Anytime" was in effect, and appeared on the INTELLIFLIX website until sometime after April, 2007, probably until around August, 2007.

16. To further induce potential customers to use their online DVD rental service, INTELLIFLIX makes the following representations in the "Quick Tour" portion of its website, a true and correct copy of which is attached hereto as Exhibit "D":

"Fast Free Shipping

Our goal is to deliver your DVDs to your mailbox in 1 to 3 business days (dependent on origin and availability)."

17. The INTELLIFLIX "Quick Tour" (Exhibit "D") summarizes a variety of rental plans, including a "Monthly Standard" plan, a Pay Per Rental plan, and a variety of "SuperPass" plans. All of the various Superpass plans require consumers to prepay for an entire year in advance.

18. INTELLIFLIX encourages consumers to sign up for annually pre-paid SuperPass plans, rather than its Monthly Standard plan, by advertising a discounted payment rate for these plans. The discounted rate is expressed as a monthly average payment amount, even though no actual monthly payments are involved.

19. Many consumers have chosen to pre-pay annually under a SuperPass plan, because of INTELLIFLIX's advertising assurances that it has 60,000 titles, fast delivery and most importantly, that consumers can "Cancel Anytime."

20. Many consumers have reasonably understood INTELLIFLIX's "Cancel Anytime" assurance to mean that they can cancel anytime and receive a pro-rated refund. However, INTELLIFLIX has never allowed consumers to receive pro-rated refunds upon cancellation of its annual plans. Moreover, at various times, and notwithstanding its "Cancel Anytime" assurances, it has taken the incongruous position that no refunds should ever be given upon cancellation. INTELLIFLIX has taken the unreasonable and unfair position that when a consumer cancels, his cancellation only becomes effective at the end of the annual plan year, and

therefore, that no refund is due when the consumer pre-pays for the entire year and then chooses to "Cancel Anytime."

21. INTELLIFLIX's website assurances that consumers could "Cancel Anytime" appeared in large-sized print, on the home page. However, INTELLIFLIX's website also included less conspicuous and smaller print-sized disclaimers which purported to deny the consumer any right to receive a pro-rated refund upon cancellation. In other words, what INTELLIFLIX appeared to assure consumers in large and conspicuous print (that they could "Cancel Anytime") it then sought to take away in smaller print-sized and less conspicuously positioned disclaimers.

22. INTELLIFLIX's Cancel Anytime/no-refund position became increasingly unfair, unreasonable, and/or deceptive over the course of its relatively short corporate history.

23. At one time, INTELLIFLIX offered a free trial period, but then discontinued that practice. Then, as time went on, it further restricted refund rights, saying that consumers could not receive a refund at all if they purchased a gift certificate or "Starter Plan," and could only receive a partial refund if they purchased any other kind of annual pre-paid SuperPass plan. Even when a partial refund was allowed, it was less than pro-rata, and was also subject to a \$10 cancellation fee.

24. During the time period when INTELLIFLIX offered partial refunds to some but not all of its consumers, it would advertise

"Cancel Anytime," in large print, on its home page, but then insert the following conflicting disclaimer in smaller print, on its "Terms and Conditions" page:

Refunds of a SuperPass membership are granted and calculated as follows: you will be charged for the months you've used our service using the current monthly pricing, not the SuperPass amount divided by twelve, as the SuperPass pricing is for people who remain with us for an entire year. We do not give credit for partial months. In addition, there is a \$10 early termination fee to cover our processing charges to cancel the account. The Intelliflix Starter plan is a non-refundable plan. Gift certificates are non-refundable as well.

(Actual print size).

25. A true and correct copy of the above-quoted small-print disclaimer, dated 1/22/07, is attached hereto as Exhibit "E." (Hereinafter, "Prior Disclaimer").

26. Over the course of time, INTELLIFLIX's marketing and refund practices continued to degenerate to the point where INTELLIFLIX started to deny all consumers any right to receive a refund under any circumstances.

27. INTELLIFLIX began luring consumers into a false sense of security (with its' prominent assurance that they could "Cancel Anytime"), while taking the incongruous position (in a smaller and less conspicuous disclaimer) that no refund could ever be received upon cancellation. For example, the April 12, 2007 "Standard Terms and Conditions" website disclaimer provided, in smaller and less conspicuous print:

All cancellations (for gift certificates, monthly subscriptions as well as SuperPass subscriptions) must be submitted in writing via the Intelliflix support website at least 25 hours before the end of your current billing cycle.

All subscriptions automatically renew at the end of a billing cycle, although members may cancel at any time. For members on a monthly subscription, membership cancellation takes effect at the end of your billing cycle and refunds for unused portions of a membership will not be given. . . .

Refunds

All sales are final and non-refundable.

(Actual print size).

28. A true and correct copy of the above-quoted small-print disclaimer, dated 4/12/07, is attached hereto as Exhibit "F." (hereinafter, "Current Disclaimer").

29. In order to lure consumers into prepaying annually, INTELLIFLIX also exaggerated the benefits from SuperPass membership, in the following ways:

(a) INTELLIFLIX prominently advertised, on its home page, that consumers would be afforded "Unlimited Rentals" and that it had "Over 60,000 Movies and Games" (presumably available);

(b) INTELLIFLIX further assured consumers, in a section of the website entitled "About Us" that these movies and games could be "delivered free to their door in about 1-3 business days!"

30. In reality, many consumers have discovered that INTELLIFLIX's movie selection and delivery times are far worse than has been represented. The Attorney General's Office has obtained 287 complaints from consumers about INTELLIFLIX, either directly or from the Better Business Bureau or other sources, and has obtained 29 sworn affidavits from dissatisfied consumers.

31. A spreadsheet identifying the consumer affiants, and summarizing their complaints, is attached hereto as Exhibit "G." (hereinafter, "Consumer Affiants")

32. The Consumer Affiants have attested to a pattern of extraordinarily poor selection, slow delivery, and lack of

company responsiveness. They swear under oath that the company is unavailable by phone to respond to delivery problems or to process cancellation requests. They swear under oath that INTELLIFLIX responds to e-mailed cancellation requests by sending form e-mails apologizing and promising better future service, rather than simply processing the refund request. The allegations made by the Consumer Affiants are true and correct.

33. Most of the Consumer Affiants have also attested that INTELLIFLIX's selection is so poor that they have either obtained far less movies than they are entitled to receive by contract, or that they have been unable to obtain movies at all for one or more months. These allegations are true and correct.

34. Many of the Consumer Affiants have further attested that they have used one or more INTELLIFLIX competitors, such as Netflix or Blockbuster, and that they have not experienced these types of problems with any other company.

35. Many of the Consumer Affiants have further attested that they were able to receive a partial refund, but only after many months and only after complaining to the Better Business Bureau or to a governmental authority. Most often, a refund was received from a credit card processor, and not from INTELLIFLIX. These sworn allegations are true and correct.

36. To better determine whether these particular Consumer Affiants had experienced unusual problems with selection and

delivery, or whether these types of problems were widespread and systemic, the Attorney General's Office subpoenaed INTELLIFLIX's inventory spreadsheet and then compared INTELLIFLIX's own inventory (those in warehouse and available to ship) with the top 10 most prominently advertised movies on INTELLIFLIX's website, for each of the following movie categories: "Action and Adventure," "Comedy Movies," "Drama Movies," and "Sci-Fi Movies."

37. A true and correct copy of the spreadsheet accurately reflecting that comparison is attached hereto as Exhibit "H." As can be seen, for the majority of advertised movies, only one copy was available and in stock within the entire country, although there were a substantial number of copies available for a handful of lesser known films.

39. Based upon this comparison of advertised merchandise to inventory, and based on the unusual number of complaints received against INTELLIFLIX, and also based upon a careful review of the numerous consumer affidavits received, the Attorney General's Office alleges that INTELLIFLIX's movie selection is very poor and that INTELLIFLIX does not deliver high quality service or selection as its advertising erroneously suggests.

39. INTELLIFLIX's poor selection and delivery was particularly problematic because, unlike INTELLIFLIX's principal competitors, NETFLIX and BLOCKBUSTER, INTELLIFLIX collects an entire year's payment in advance. When consumers find out that

INTELLIFLIX's selection and delivery is poor, and sought to cancel (under the "Cancel Anytime," assurance) they found out all too late about INTELLIFLIX's fine-print no-refund policy.

COUNT 1

**DECEPTIVE AND UNFAIR TRADE PRACTICES
CHAPTER 501 PART II, FLORIDA STATUTES**

40. Plaintiff adopts, incorporates herein and re-alleges paragraphs 1 through 39 as if fully set forth below.

41. Chapter 501.204(1), Florida Statutes, declares that unfair or deceptive acts or practices in the conduct of any trade or commerce are unlawful.

42. At all times material, Defendants engaged in various deceptive and unfair trade practices, as set out further herein, in willful violation of Chapter 501, Part II, Florida Statutes (2007). Among said acts and practices were the following:

43. The Defendants' past claims concerning the consumers' right to "Cancel Anytime," their continuing claims concerning the company's ability to deliver movies to the consumers' doorstep in 1-3 days, and their claims concerning the vast movie selection available to consumers, were and continue to be false, grossly exaggerated or misleading.

44. The INTELLIFLIX "Cancel Anytime" assurance has always been likely to mislead reasonable consumers because any right to a refund has always been less than pro-rata. Moreover, the

INTELLIFLIX "Cancel Anytime" assurance became, for a period of time, completely illusory, because consumers who purchased prepaid plans and then canceled were denied any refund.

45. The acts and practices of the Defendants, as herein alleged, have been injurious to the public and have resulted in damages thereto and as to Defendants' competitors, constitute unfair and deceptive acts and practices and/or unfair methods of competition, within the intent and meaning of Section 501 Part II, Florida Statutes. Said acts and practices further constitute unfair and deceptive acts and practices within the intent and meaning of the Federal Trade Commission Act and pursuant to the standards of unfairness and deception set forth and interpreted by the Federal Trade Commission and federal court.

46. Defendants' activities violate FDUTPA and should be enjoined.

47. Defendants knew or should have known that their acts and practices were unfair or deceptive.

WHEREFORE, Plaintiff requests this Court to:

(a) Enter an order permanently enjoining the Defendants, its agents, employees, or any other persons who act under, by, through, in concert with or on behalf of the Defendants from engaging in the business of online video rental;

(b) Alternatively, should the Court permit Defendants to continue in the online video rental business, enter an order

permanently enjoining the Defendants, its agents, employees, or any other persons who act under, by, through, in concert with or on behalf of the Defendants from collecting more than one month's payment in advance. Instead, Defendants should be limited to selling monthly plans, as do its competitors, NETFLIX and BLOCKBUSTER, which do not collect for the year in advance;

(c) Alternatively, to enter an order prohibiting Defendants from ever again advertising "Cancel Anytime," or words to a similar effect, while denying or severely limiting refunds;

(d) Enter a temporary injunction upon motion, and waive bond in connection with the entry of the same;

(e) Award actual damages against each of the Defendants, jointly and severally, to all consumers who are shown to have been injured, pursuant to Section 501, Part II, Florida Statutes (2007);

(f) Award reasonable attorney's fees and costs to Plaintiff herein, against each of the Defendants, pursuant to Section 501.2105, Florida Statutes (2007);

(g) Assess against each of the Defendants civil penalties in the amount of Ten Thousand Dollars (\$10,000.00) for each and every violation of Chapter 501, Part II, Florida Statutes (2007) and;

(h) grant such other and further relief as this Court deems just and proper.

COUNT 2

**FAILURE TO REGISTER WITH SECRETARY OF STATE
SECTION 607.0505, FLA. STAT. (2007)**

48. Plaintiff adopts, incorporates herein and re-alleges paragraphs 1 through 13 as if fully set forth below.

WHEREFORE, Plaintiff petitions the Court to enter the following relief:

(a) Order the Defendant INTELLIFLIX to properly designate a registered office and a registered agent with the Florida Secretary of State, in accordance with Section 607.0505, Fla. Stat. (2007)

(b) Enter judgment against Defendant INTELLIFLIX, and in favor of the Plaintiff, in the amount of \$2,000 (\$500 for each of the years 2004, 2005, 2006 and 2007), and \$500 additional for 2008 and each subsequent year in which the failure to register continues, based on Defendants' failure to designate a registered agent and office;

(c) Prohibit Defendant INTELLIFLIX from presenting any defense to this lawsuit, until such time as it has complied with Section 607.0505(1)(b), Fla. Stat. (2007), which provides in pertinent part: "a corporation, foreign corporation, or alien business organization which fails to have and continuously maintain a registered office and a registered agent as required in this section may not defend itself against any action

instituted by the Department of Legal Affairs or by any other agency of this state until the requirements of this subsection have been met;" and

(d) grant such other and further relief as is just and proper.

Respectfully Submitted,

BILL McCOLLUM
ATTORNEY GENERAL

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