NO. 12-16010

Consolidated with NOS. 12-15705 (L)
12-15889, 12-15957, 12-15996, 12-16010, 12-16038

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

I
n re ONLINE DVD RENTAL ANTITRUST LITIGATION,
ANDREA RESNICK; BRYAN EASTMAN; AMY LATHAM;
MELANIE MISCIOSCIA; STAN MAGEE; MICHAEL OROZCO;
LISA SIVEK; MICHAEL WIENER,
Plaintiffs-Appellees,

JOHN SULLIVAN,
Objector-Appellant,
v.
NETFLIX, INC.; WAL-MART STORES, INC.; WALMART.COM
USA LLC,
Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of California, No. 4:09-md-2029 PJH

Opening Brief of Appellant JOHN SULLIVAN

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ORAL ARGUMENT REQUESTED

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JURISDICTIONAL STATEMENT

The statutory basis of subject matter jurisdiction of the district court is 28 U.S.C. §§ 1331, 1337, and 15 U.S.C. §§ 1-2, 15 & 26 because this is a federal question, arising under the Sherman and Clayton Acts. No defendant contested personal jurisdiction. ["Joint Statement," DE[1] 34, p. 2].

The judgment appealed from is final because it resolved all claims as to all parties and this Court has jurisdiction under 28 U.S.C. § 1291.

The judgment and order appealed from were entered on March 29, 2012 [E.R. 1-19, "Order and Proposed Judgment Approving Settlement Between Settlement Class Plaintiffs and Wal-Mart Stores, Inc. and Walmart.com USA LLC" (hereinafter "Final Approval Order,") and E.R. 20-22, "Order Awarding Class Counsel Attorneys' Fees, Reimbursement of Expenses, and Payments to Class Representatives." (hereinafter "Fee Award,")]. Sullivan appealed on April 30, 2012 [E.R. 35]. The appeal is timely under Fed. R. App. Proc. 4(a)(1) and FRAP 26(a)(1)(C).

[1] DE refers to "Docket Entry"

ISSUES PRESENTED FOR REVIEW

1. Did the district court err when it denied [E.R. 112] Sullivan's request that another class notice be sent, at Lead Counsel's expense [E.R. 191-92], because: (A) the class members' due process rights were violated when they became bound by a summary judgment against them before the date to opt out expired, and (B) the majority of class members were erroneously told the case against a co-defendant was proceeding, when in fact summary judgment was entered in favor of the co-defendant, and thus were materially misled, requiring reversal under *Molski v. Gleich*, 318 F.3d 937 (9th Cir. 2003), *overruled on other grounds* by *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011)? Whether notice of a proposed settlement in a class action satisfies due process is a question of law reviewed *de novo*. *Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1374 (9th Cir. 1993)[*See*, Argument I-A to I-C herein].

2. Does *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974) require this Court to remand with instructions that Lead Counsel (or the class representatives) either send a proper and accurate

FRCP 23(c)(2) notice as argued by Sullivan at the hearing [E.R. 78], or the class be decertified? Whether notice of a proposed settlement in a class action satisfies due process is a question of law reviewed *de novo*. *Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1374 (9th Cir. 1993) [*See*, Argument I-D herein].

3. Did the trial court violate FRCP 23(h) – which requires motions for fees and/or nontaxable expenses be directed to the class in a reasonable manner – when it did not require that the Rule 23(e) Settlement Notice contain language indicating the deadline for filing the attorneys' fees motion, specifically stating the deadline for any class member objections to the fees motion, and informing class members that the motion and supporting materials will be available for viewing on class counsel's website – and that class members be given at least 20 days to review the materials posted on the website before their objections are due, as required by *In re Mercury Interactive Corp., Sec. Litigation*, 618 F.3d 988 (9th Cir. 2010), and as done by some courts as in *Yoshioka v. Charles Schwab Corp.*, 2011 U.S. Dist. LEXIS 97383 (N.D. Cal. Aug 30, 2011), and *Harris v. Vector Mktg. Corp.*, 2011

U.S. Dist. LEXIS 48878 (N.D. Cal. April 29, 2011)? [*See*, Argument 1-E, herein]. Sullivan made this request explicitly at the fairness hearing [E.R. 74-78], and it was denied. [E.R. 112]. Whether notice of a proposed settlement in a class action satisfies due process is a question of law reviewed *de novo*. *Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1374 (9th Cir. 1993)

4. Did the district court abuse its discretion when it did not "adequately explain" its fee determination as required by *Dennis v. Kellogg*, -- F.3d --, 2012 U.S. App. LEXIS 14385 (9th Cir. 2012) and *Powers v. Eichen*, 299 F.3d 1249 (9th Cir. 2000), thus preventing meaningful review and requiring remand? [*See*, Argument II-A herein]. Sullivan argued the court should apply factors [E.R. 78-81 & 192-211]. The district court did not make findings of fact and conclusions of law as required by Fed. R. Civ. Pro. 23(h), and the "Fee Award" [E.R. 20-22] is conclusory. The failure to "follow proper standards in awarding fees was inconsistent with the sound exercise of discretion" *Moore v. James H. Matthews & Co.*, 682 F.2d 830, 838 (9th Cir. 1982)

5. Did the district court err, as a matter of law, when it rejected Sullivan's argument [E.R. 177-181], and determined that the settlement in this case was not subject to the provisions of the Class Action Fairness Act (CAFA), 28 U.S.C. § 1712 [E.R. 23-24], governing awards of attorneys' fees in settlements involving "coupons?" [*See* Argument II-B1, herein]. Questions of statutory interpretation are reviewed *de novo. Bush v. Cheaptickets*, 425 F.3d 683, 686 (9th Cir. 2005)(construing *de novo* applicability of CAFA).

6. Did the district court err when it denied [E.R. 112] Sullivan's request for discovery [E.R. 183, 191, & 213-215] disclosure to the class Lead Counsel's significant and disqualifying conflicts of interest, including its concurrent representation of Wal-Mart? [*See*, Argument II-B2 herein]

7. Do other factors such as partial degree of success, risk, and awards in other cases suggest an award toward the low end, and not the "standard of excellence," known as the "benchmark," of 25% as argued by Sullivan below? [E.R. 192-215][*See*, Argument II-B3-6, herein]

8. Did the district court err when it allowed costs to be considered as part of the "common fund" as opposed to being taken off the top, as agreed to by the class representatives? [*See*, Argument III-A herein].

9. Did the district court err in taxing $1.5 million dollars in expert costs for the failed Netflix clams against the Wal-Mart settlement fund, and did not scrutinize travel, meal and other expenses as was urged by Sullivan's counsel in his objection [E.R. 211-212] and at the hearing [E.R. 73-77][Argument III-B herein].

STATUTES AND RULES

28 U.S.C. § 1711 note.

> …
> § 2(a) Findings. Congress finds the following: …
> (3) Class members often receive little or no benefit from class actions, and are
> sometimes harmed, such as where—
> (A) counsel are awarded large fees, while leaving class members with
> coupons or other awards of little or no value;
> (B) unjustified awards are made to certain plaintiffs at the expense of
> other class members; and
> (C) confusing notices are published that prevent class members from being able to fully understand and effectively exercise rights.

28 U.S.C. § 1712.

(a) Contingent Fees in Coupon Settlements. If a proposed settlement in a class action provides for a recovery of coupons to a class member, the portion of any attorney's fee award to class counsel that is attributable to the award of the coupons shall be based on the value to class members of the coupons that are redeemed.

(b) Other Attorney's Fee Awards in Coupon Settlements. - (1) In general. - If a proposed settlement in a class action provides for a recovery of coupons to class members, and a portion of the recovery of the coupons is not used to determine the attorney's fee to be paid to class counsel, any attorney's fee award shall be based upon the amount of time class counsel reasonably expended working on the action.
* * *
(d) Settlement Valuation Expertise. - In a class action involving the awarding of coupons, the court may, in its discretion upon the motion of a party, receive expert testimony from a witness qualified to provide information on the actual value to the class members of the coupons that are redeemed.

Federal Rule of Civil Procedure 23. Class Actions.

(h) Attorney's Fees and Nontaxable Costs.
(1) In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement. The following procedures apply: …
(2) A class member, or a party from whom payment is sought, may object to the motion.
(3) The court may hold a hearing and must find the facts and state its legal conclusions under Rule 52(a). …

STATEMENT OF THE CASE

The action was certified as a settlement class on behalf of all persons or entities residing in the United States or Puerto Rico that paid a subscription fee to rent DVDs online from Netflix on or after May 19, 2005 until the settlement was preliminarily approved on September 2, 2011. [E.R. 270-71; DE 492]. The antitrust claims alleged jointly exposed defendants to over $1.5 billion dollars in damages, after trebling. The case was settled as on a class-wide basis as to one of the two Defendants: Wal-Mart. [E.R. 264-310]. Under the settlement, as approved, Wal-Mart will end up paying $18,000,000 in cash, and distributing an additional approximately $8.9 million in "gift cards."

John Sullivan is a class member. He objected [E.R. 174-215] and appeared through counsel at the final fairness hearing on March 14, 2012 [E.R. 67-81]. He objected on the grounds the notice was insufficient under Rule 23 and did not satisfy due process and the attorneys' fees should be scrutinized under a number of factors. His objections were over-ruled and Sullivan appealed pursuant to *Devlin v. Scardelletti*, 536 U.S. 1 (2002).

SUMMARY OF ARGUMENT

Wal-Mart is paying approximately $18,000,000 in cash to settle antitrust claims with potential (theoretical) exposure of over $1.5 billion dollars. Only $5.2 million dollars (approximately 28%) of this cash is being distributed to allegedly injured class members. The balance of the cash is being paid to, or for the benefit of, Class Counsel, as follows: $6,800,000 in attorneys fees, and $6,200,000 in nontaxable litigation costs, including notice and administrative fees. Wal-Mart is also distributing approximately 742,000 Gift Cards with a face value of $12.00 each, but there is no evidence in the record as to the actual cash value of the gift cards, or their actual (or anticipated) redemption rates.

When the Class Action Fairness Act was passed in 2005, it enumerated a "consumer class action bill of rights" which was designed to "put an end to unfair compensation packages," which "award huge attorneys fees at the expense of injured victims who often get a coupon or nothing at all." (CLASS ACTION FAIRNESS ACT, 151 Cong. Rec. S996-02, S996-97). In order to remedy this, Congress mandated a specific procedure that judges must use

when awarding fees in settlements involving non-cash or "in-kind" compensation. This procedure requires judges to either: (1) use the lodestar test, or (2) if the Court decides to use the percentage-of-the-fund method, then to base the percentage upon the redeemed value of the non-cash compensation. 28 U.S.C. 1712.

Objector Sullivan requested that the district court comply with the CAFA and apply the lodestar test for awarding fees and requested that the district court lower the "claimed lodestar" in light of the limited success of the "partial settlement" and other *Kerr*-type factors. Objector Sullivan advised the district court that if a percentage-of the-fund method was employed then CAFA mandated certain procedures. The district court decided not to use the lodestar method but nonetheless failed to comply with CAFA's requirements regarding in-kind, or coupon, funds. The district gave no explanation in either the Final Approval Order or the Fee Award order about why she chose to avoid the CAFA requirements and/or chose not to use the lodestar method to award fees.

Sullivan now brings this appeal because the district court failed in its unique role of fiduciary to class members in awarding attorneys' fees. The court substituted thorough analysis and close scrutiny of the fee request with a cursory examination and approval of the request.

The district court also failed in its role as fiduciary by endorsing a flawed process for notifying class members about the settlement and the fee request. For these errors, the district court's decision should be reversed and the case remanded. On remand, a new notice should be send that complied with Fed. R. Civ. Pro. 23(c)(2), 23(e) and 23(h). The district court should also be ordered to allow Sullivan's discovery requests into Class Counsel's conflicts of interests, including its simultaneous representation of Wal-Mart. Sullivan's request for an evidentiary hearing under CAFA should have been granted. The district court should be ordered to more adequately explain it's decision under relevant factors, including partial success, low *ex ante* risk, and overall lack of litigation success. The $1.7 million dollars in alleged costs should also be given some scrutiny.

STATEMENT OF FACTS

A. *Antitrust claims, alleged to be in excess of 500 million dollars (trebled to 1/5 billion), are asserted against Wal-Mart and on behalf of 33 million class members who subscribed to Netflix online DVD rental service.*

On January 2, 2009, plaintiff Andrea Resnick filed a complaint against Walmart.com USA LLC, Wal-Mart Stores, Inc., (collectively "Wal-Mart") and Netflix, Inc., in the United States District Court for the Northern District of California, after which approximately sixty-five other complaints were filed in courts across the country. [Settlement Recitals at ¶ 3.1, E.R. 268]. Each of these cases – with the exception of seven cases filed in state court in California – either was dismissed or was consolidated in the instant action. [*Id.*; DE 1, "Transfer Order from MDL"].

The claims asserted arise from a Promotion Agreement that Walmart.com entered into with Netflix, Inc., in May 2005, in connection with Walmart.com's decision to discontinue its online-DVD rental business. [Settlement Recitals at ¶ 3.2, E.R. 268]. Plaintiffs alleged that this agreement was an illegal market allocation agreement to "divide the markets for the sales and

online rentals of DVDs in the United States, with the purpose and effect of monopolizing and unreasonably restraining trade in at least the online DVD rental market." [*Id.*] Plaintiffs alleged a variety of violations of state and federal antitrust law by Wal-Mart and Netflix [*Id.*]

The case was filed as a putative class action on behalf of approximately 33 million Netflix subscribers. Plaintiffs asserted that the class was damaged because, as a result of the allegedly-illegal market allocation agreement, "Netflix was able to 'charge higher subscription prices for online DVD rentals than it [otherwise] would have' in the absence of the agreement." [*Id.*] Plaintiffs alleged in excess of $500 million in class-wide damages, which if trebled under the antitrust laws would exceed $1.5 billion dollars.

On May 15, 2009, a stipulation was filed whereby the class-action lawyers who filed the consolidated cases agreed to a leadership structure amongst themselves. [DE 17]. Robert G. Abrams, of Howrey LLP was appointed "Lead Counsel." [DE 17, at ¶1). The lawyers stipulated to a "Liaison Counsel," and a

"Steering Committee," but Lead Counsel was expressly deemed responsible for all litigation decisions. As Netflix subsequently reported to the district court, however, no determinations were ever made under FRCP 23(g) expressly appointing class counsel. [DE 474, p. 3, n.2].

B. *Failed efforts to assert "umbrella" claims on behalf of an eight-million member Blockbuster subscriber class.*

In 2009 and early 2010, Lead Counsel made several efforts to amend the complaint to add alleged "umbrella" claims on behalf of an additional eight million people who were online customers of Blockbuster. [*See, e.g.*, DE 18, 19, 47, 64, 87, 140, 143 & 168]. The court at first dismissed the Blockbuster claims, with prejudice, on the grounds the plaintiffs lacked antitrust standing to pursue claims for artificially-inflated prices paid to non-Defendant Blockbuster as the result of the allegedly illegal Market Allocation agreement between Wal-Mart and Netflix [*see* December 1, 2009 Order, DE 87].

Lead Counsel requested the district court to reconsider the "with prejudice" portion of the dismissal, claiming newly-discovered evidence directly linked the allegedly conspiratorial

conduct to the Blockbuster price increase. [DE 168]. As the district court explained, "Plaintiffs' reconsideration arguments vowed that this new theory would no longer depend upon Wal-Mart's exit from the market, but rather on a more direct link between defendants' anticompetitive conduct and Blockbuster's eventual price increase." [DE 168, p. 3].

The district court granted reconsideration, and allowed amendment, but cautioned: "plaintiffs would be well-advised to pay particular attention to the legal viability of their new causation theory." [DE 168, p. 3]. Indeed, the court stressed that it was concerned that "plaintiffs have not come forward with any legal authority to support their position." [*Id.*, at 10]. Notwithstanding the court's "strong doubts" as to the viability of the Blockbuster claims, the court noted Plaintiffs just barely cleared the standards imposed by *Twombly*, and invited "defendants to file an early summary judgment motion limited to antitrust standing." [*Id.* at 11]. Ultimately, on April 29, 2011, the district court granted summary judgment against the Plaintiffs on this claim. [DE 376]. On May 13, 2011, Defendant Netflix filed a

bill of costs seeking $792,361.35 in costs as a result of successfully obtaining summary judgment with respect to the Blockbuster subscriber actions [DE 399]. Lead Counsel appealed this Order on May 31, 2011 [DE 411]. This appeal (11-1615) was voluntarily dismissed on July 29, 2011.

C. *Certification of the Netflix subscriber class, a/k/a the "Netflix Litigation Class" & the first (failed) proposed settlement with Wal-Mart.*

1. The Netflix Litigation class

On March 23, 2010, Plaintiffs moved for certification of the Netflix subscriber class [DE 128]. That motion was fully briefed, and was heard by the trial court on September 1, 2010. [DE 206]. A few days prior to the Netflix class certification hearing, counsel informed the district court that Plaintiffs and Wal-Mart had agreed to settle the case. [DE 200]. They signed a Term Sheet dated August 26, 2010. [DE 278, p. 5, lines 13 &14].

In October 2010, Netflix deposed the Blockbuster subscribers. [DE 329]. During the depositions, Netflix inquired about the plaintiffs' roles in approving the settlement with Wal-Mart. Plaintiffs' counsel objected. The Magistrate Judge

sustained the objection until such time as preliminary approval of the proposed settlement was filed [DE 253]. After the joint motion for preliminary approval was filed Netflix proceed with further depositions, which ended in January 2011. In these depositions it was learned that the class representatives played no meaning role in overseeing the settlement, did not review settlement communications, did not review the Term Sheet, or drafts of the proposed settlement agreement." [DE 329 p. 6; DE 330 Ex. 1]. These depositions were made part of the record by Netflix's motion to decertify the class [*see, e.g.*, Exhibits 1-20 to DE 330], which was denied.

2. The first proposed Wal-Mart settlement class

A formal agreement of all terms was worked out between Wal-Mart and Class Counsel by December 3, 2010, and on December 14, 2010, Class Counsel filed a motion for preliminarily approval of the "partial" settlement with Wal-Mart. [DE 278]. Under this proposal, Wal-Mart agreed to pay a $15,000,000 "Cash Component" and then make available additional compensation in the form of gift cards, unless the class member elects, by mail, to

request a check, by mail. To honor claims, Wal-Mart agreed to supply gift cards and cash in a value not less than an additional $14,000,000. While Wal-Mart ostensibly agreed to pay an additional $25,000,000 (for a total fund allegedly "up to" $40,000,000), it would only pay more than $14,000,000 additional dollars if more than 56% (14/25) of the class members made claims. As Class Counsel stated, "Wal-Mart would pay out the full $40 million in the event all class members chose to submit timely and proper claims." [DE 278, p. 13 of 26]. As further detailed in the Agreement, Wal-Mart also agreed to pay out of the so-called "Cash Component" the costs of providing class notice and administering claims, reasonable attorneys' fees, service awards for the representative plaintiffs, and monies to help fund the continued litigation against Netflix.

After this first settlement, Class Counsel stated:

> At this time, Plaintiffs are not requesting a schedule for notifying Settlement Class Members of the Settlement, but request that such notice be deferred until after the Court has ruled on the pending motion by Plaintiffs to certify a litigation class against defendant Netflix. In the event the Court grants that motion for certification, Plaintiffs would seek Court approval of a single, combined notice for both the Settlement with Wal-Mart, and certification of the litigation

> class against Netflix. Such combined notice would be far more efficient and cost-effective than two rounds of notice (i.e., one now for the Wal-Mart Settlement, and another later for a litigation class against Netflix), particularly given the large size of the sub-classes at issue. All of Plaintiffs' requests are unopposed by Wal-Mart, and the non-settling Defendant, Netflix, lacks standing to object. See, e.g., Waller v. Financial Corp. of America, 828 F .2d 579, 582 (9th Cir. 1987) ("[A] non-settling defendant, in general, lacks standing to object to a partial settlement").

Wal-Mart competitors Netflix and Blockbuster, however, vigorously opposed this proposed settlement. Netflix claimed that Class Counsel, in violation of *Amchem,* entered into a class settlement that presented conflicts regarding how to divvy-up the proceeds. The settlement angered Netflix and Blockbuster, both of whom mounted vigorous objections to the settlement. Blockbuster, for instance, argued that by virtue of the settlement, Wal-Mart would obtain Blockbuster's customer lists, which are worth millions of dollars. [DE 305].

Ironically, Netflix seemed at times a vigorous advocate for the Class' interests, as Netflix repeatedly pressed issues related to Lead Counsel's inadequacy. Netflix vocally noted the numerous violations of Rule 23 that plague the record, including, for instance: (1) the failure of the class representative to adequately

supervise the case, as required by Rule 23(a); (2) the failure of the district court, at any phase in the litigation, to make FRCP Rule 23(g) findings and expressly appoint class counsel, on an interim or contested basis; and (3) the fact that there were *Amchem*-type conflicts with respect to Lead Counsel's representation of subclasses; and (4) the fact that Lead Counsel for Plaintiffs and the Class actually simultaneously represented Defendant Wal-Mart in other matters.

On December 23, 2010, the trial court issued an order granting plaintiff's motion to certify a nationwide class of persons who subscribed to Netflix's online DVD rental service between May 19, 2005 and December 23, 2010 [DE 287]. This order, however, does not expressly appoint class counsel in accordance with FRCP 23(g). In February 2011, Netflix moved to decertify the class, arguing, "Recent developments in the case have brought to light new evidence demonstrating that this action is not eligible for class treatment under Rule 23." [DE 329]. Specifically, Netflix argued there were irreconcilable *Amchem*-type conflicts between the certified Netflix subscriber class and the proposed Blockbuster

settlement class, both of whom were represented by Lead Counsel. [DE 329]. The district court agreed with Netflix that Lead Counsel was conflicted in representing both the Blockbuster and Netflix subscribers in their settlement negotiations with Wal-Mart and that Plaintiffs should have used separate counsel for each class. [DE 346 at 26:20-27:16; DE 348, DE 474, p. 2, lines 7-9]. The district court determined, however, that decertification of the litigation class of Netflix subscribers was not required since the court had decided instead to reject the proposed settlement and decline to certify the proposed settlement classes where the conflict had arisen. *Id.*

After rejection of the initial Wal-Mart settlement, Lead Counsel filed a notice that he was changing law firms to Baker & Hostetler LLP ("Baker")[DE 359]. Lead Counsel never disclosed that Baker also currently represents Wal-Mart in other matters. [DE. 474, p. 2, line 16]. Over the next few months, and despite this conflict, Lead Counsel continued to represent the Class in negotiating a revised settlement with Wal-Mart (Baker's own client), and filed a motion for preliminary approval of the revised

settlement on July 15, 2011. [DE 454]. It is this proposed settlement that was ultimately approved, and is at issue in this appeal. Class Counsel did not, at this time (or any other time), disclose to the Court that at the time Class Counsel moved to approve the settlement, the settling defendant – Wal-Mart – was an existing client of Baker & Hostetler. Had it not been for an anonymous letter sent to Netflix' counsel [DE 474], this conflict might have never come to light at all.

D. *The Settlement Agreement approved by the district court.*

On July 1, 2011, Plaintiffs again entered into a settlement agreement with Wal-Mart. [E.R. 264-310]. This time the agreement involved the Netflix litigation class only. [E.R. 270-71]. In this regard, an odd provision in the agreement stated that Plaintiffs counsel would agree to bring *Amchem* to the attention of the court in the event the court denied certification to the Netflix class. [DE 269].

Pursuant to the Settlement, class members could make an online claim for a so-called "gift card," valid for purchases at Walmart.com, or could mail away and request a gift card or check.

[E.R. 275]. Moreover, to request a check (the "cash" option), a class member was required to disclose their social security number. [E.R. 275].

Whilst urging preliminary approval, Lead Counsel stressed the partial nature of the settlement, stating:

> Significantly, because this is a partial settlement only and because of joint and several liability, all Settlement Class Members will retain their ability to recover their full damages from Netflix, subject perhaps only to a credit for the amount paid by Wal-Mart. See Texas Indus. v. Radcliff Materials, Inc., 457 U.S. 630, 646 (1981). Two other features of this case make the ability to continue the litigation against Netflix especially significant. First, while certainly not the size of Wal-Mart, Netflix has become a substantial corporation (due in part to the conduct at issue in this case) with a current stock market valuation of approximately $10 billion. Thus, even without Wal-Mart, there remains a very deep pocket to pay any judgment. Second, some of Plaintiffs' claims are brought against only Netflix.

[D.E. 454, filing 7/15/11, p.18].

The court preliminarily approved the settlement on September 2, 2011. [DE 492]. Email notice was sent in November 2011 to approximately 35 million class members. [DE 548]. U.S. mail notice was ordered for emails that "bounced-back." The email and U.S. mail notices differed substantially in their statement of

material terms due to changes in litigation posture between the time the email and mail notices were sent. [E.R. 188-199].

Class members submitted approximately 742,000 claims for coupons, and 431,000 claims for cash. [E.R. 147-48]. The settlement agreement creates an alleged settlement fund of $27.2 million dollars. Class counsel requested, and was awarded an alleged 25% of this "fund," – a fee of $6.8 million dollars. Thus fund, supposedly for the benefit of the class, also includes 1.7 million dollars in costs, and $4.5 million dollars in administrative fees. Class counsel thus received 25% of these amounts (totaling an additional $1.55 million dollars), which operates effectively as a "commission" on their own nontaxable litigation expenses. After attorneys' fees, and nontaxable litigation expenses (including administration fees) were deducted, there was approximately $14.1 million to distribute in coupons and checks – this works out to about $12 per claimant. [E.R. 21-22, 148 & 164]. 742,000 class members will thus receive "gift-cards," totaling $8.9 million dollars, and mail checks to 431,000 people for a grand total of $5.2 million dollars. [E.R. 147-148, & 164]. There is no evidence as to

how much Wal-Mart will actually pay in "gift-cards," are the district court refused to comply with CAFA and take evidence in this regard. Wal-Mart will thus pay a total of $18,000,000 in cash, but the class will only receive 28.8% of this. Class Counsel will thus receive a total of $8.5 million out of the $18 million in cash (47%).

ARGUMENT

I. Class Counsel violated class members' constitutional due process rights by providing inadequate, untimely, and misleading notice under FRCP 23, in pursuit of its own financial interests.

Whether notice of a proposed settlement in a class action satisfies due process is a question of law reviewed *de novo*. *Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1374 (9th Cir. 1993). *See also Molski v. Gleich*, 318 F.3d 937, 951 (9th Cir. 2003); *Silber v. Mabon*, 18 F.3d 1449, 1453 (9th Cir. 1994); *In re Cement & Concrete Antitrust Litig.*, 817 F.2d 1435, 1440 (9th Cir. 1987).

A. Due process requires notice in a class action.

Notice is the essence of due process. *Mullane v. C. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950)*; *Grannis v. Ordean, 234 U.S. 385, 394 (1914)*. As the Manual for Complex Litigation

explains, "Notice to class members is required in three circumstances: (1) when a Rule 23(b)(3) class is certified; (2) when the parties propose a settlement or voluntary dismissal that would be binding on the class; and (3) when an attorney or party makes a claim for an attorney fee award." Manual for Complex Litigation, 4th ed., section 21.31, p. 285. This case involves all three circumstances.

As the United States Supreme Court stressed in *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 627 (1997), notice is a critical part of class action practice; notice provides the structural assurance of fairness that permits representative parties to bind absent class members. *Id.* Defects in all three aspects of notice render the final approval order constitutionally infirm and mandate reversal and remand. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173 (1974)(holding "mandatory notice pursuant to subdivision (c)(2) . . . is designed to fulfill the requirements of due process to which the class action procedure is of course subject"); *see also* 3 H. NEWBERG & A. CONTE, NEWBERG ON CLASS ACTIONS, § 8.4, at 175 (4th ed. 2002) ("It is now established

beyond doubt that Fourteenth Amendment considerations prompted the Rule 23(c)(2) mandatory notice section.")

B. *FRCP 23(c), in the case of all certified classes, and FRCP 23(e)(1), in the case of settlement classes, are designed to safeguard class- members' due process interests in accurate and timely notice.*

Federal Rule of Civil Procedure 23(c)(2)(B) provides, in relevant part:

> …*For (b)(3) Classes*. For any class certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances … The notice must clearly and concisely state in plain, easily understood language:
> (i) the nature of the action;
> (ii) the definition of the class certified;
> (iii) the class claims, issues, or defenses;
> (iv) that a class member may enter an appearance through an attorney if the member so desires;
> (v) that the court will exclude from the class any member who requests exclusion;
> (vi) the time and manner for requesting exclusion; and
> (vii) the binding effect of a class judgment on members under Rule 23(c)(3).

FRCP 23(e)(1) further provides that when a class action is settled or compromised "the court must direct notice in a reasonable manner to all class members who would be bound by the proposal." Fed. R. Civ. P. 23(e)(1). This notice, despite being directed at a settlement class rather than a litigation class, is

subject to the same due process requirements, cited above, as a FRCP 23(c) litigation class notice. *Cf. Amchem Products, Inc. v. Windsor, 521 U.S. 591, 621 (1997)* (on Rule 23(e): "[t]his prescription was designed to function as an additional requirement, not a superseding direction, for the 'class action' to which Rule 23(e) refers is one qualified for certification under Rule 23(a) and (b)"). *See also, Mendoza v. United States*, 623 F.2d 1338, 1352 (9th Cir. 1980)(This standard does not require the inclusion of every provision of the settlement agreement and every detail of the current litigation status; it does, however, require that class members be notified of "information that a reasonable person would consider to be material in making an informed, intelligent decision of whether to opt out or remain a member of the class and be bound by the final judgment.")

Although the federal rules give a court broad discretion, *Eisen* requires that both the form and content of the notice satisfy constitutional due process requirements. 417 U.S. 156, 172-77 (1974). Rule 23(e) notice must describe "the terms of the settlement in sufficient detail to alert those with adverse

viewpoints to investigate and to come forward and be heard." *Mendoza v. United States*, 623 F.2d 1338, 1352 (9th Cir. 1980), cert. denied, 450 U.S. 912 (1981). Due process requires that best practicable notice be sent to every class member, and obviously that the notice not be materially misleading. *Molski v. Gleich*, 318 F.3d 93 937, 952 (9th Cir. 2003)*, overruled on other grounds* by *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011).

C. *The dual notice was inadequate because it was materially misleading (as to 90% of the class) and lacking essential information.*

1. The notice was materially misleading

In *Molski v. Gleich*, 318 F.3d 93 937, 952 (9th Cir. 2003), *overruled on other grounds* by *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), this Court reversed on the grounds a class action notice was materially misleading. There, the notice inaccurately stated that claims released did not "affect the rights of any Class member with respect to personal injuries." *Id.* In truth, personal injuries – specifically claims for emotional distress – were released under the settlement. *Id.* The claims that were preserved were for physical injuries, not personal injuries. *Id.*

Because the notice was misleading as to the scope of the release, this Court found it was inadequate, and constitutionally deficient with respect to class members due process rights.

Similarly, in this case the notice was materially misleading. The notice advised class members that the case would proceed to jury trial, when in fact summary judgment was granted to Netflix before the opt-out deadline and shortly after notice was mailed [D.E. 542]. When the district court preliminarily approved the settlement, it allowed email notice provided those whose emails "bounced back" would receive an additional notice via U.S. Mail. Netflix was awarded summary judgment after the initial email was sent, but before the U.S. Mail letter was sent to "bounce-backs." By the time the bounce-back letter was to be sent, the notice was changed to more accurately report the status of the case. [E.R. 189-90]. But this notice only went to approximately a small percentage of the class. As Sullivan stressed in his objection, the following conflicting and mixed messages have been sent to class members at various times:

- Case has been dismissed and must be appealed.

- Unless you exclude yourself from the Netflix Litigation Class, you give up the right to individually sue Netflix for the claims asserted in the lawsuit. If you have a pending lawsuit against Netflix, speak to your lawyer in that lawsuit immediately. You must exclude yourself from the Netflix Litigation Class to continue your own lawsuit against Netflix.

- On November 22, 2011, the Court granted Netflix's Motion for Summary Judgment, resulting in the dismissal of the lawsuit. Plaintiffs can appeal this decision.

- Check the website at www.OnlineDVDclass.com to be kept informed of the trial schedule. If there is a trial, a jury will hear all of the evidence and then make a decision about whether the Plaintiffs have proven their claims against Netflix in the lawsuit. There is no guarantee that the Plaintiffs will win or that they will receive any money or benefits for the Netflix Litigation Class as a result of the trial.

- 8. Will I get benefits after the trial?
  If the Plaintiffs obtain money or benefits as a result of a trial or future settlement with Netflix, you will be notified about how to ask for a share or what your other options are at that time. These things are not known right now and additional money or benefits may not become available.

[E.R. 190].

2. The notice did not contain all the information required.

As the Fifth Circuit explained in describing the due process requirements imposed regarding the content of the notice:

Not only must the substantive claims be adequately

> described but the notice must also contain information reasonably necessary to make a decision to remain a class member and be bound by the final judgment or opt out of the action. The standard then is that the notice required by subdivision (c)(2) must contain information that a reasonable person would consider to be material in making an informed, intelligent decision of whether to opt out or remain a member of the class and be bound by the final judgment

In re Nissan Motor Corp. Antitrust Litigation, 552 F.2d 1088, 1104-1105 (5th Cir. Fla. 1977); *see also*, Manual for Complex Litigation, (notice should contain "sufficient information about the case … to enable class members to make an informed decision about their participation"). As the Manual stressed, a constitutional notice must: "identify the opposing parties, class representatives and counsel, describe the relief sought; and *explain any risks and benefits of retaining class membership and opting out, while emphasizing that the court has not ruled on the merits of any claims or defenses."* Manual for Complex Litigation, at 289 (emphasis added).

The notice in this case did not "emphasize" that the court has not ruled on the merits of any claims or defenses. Nor did it "emphasize" that such a ruling was imminent before the deadline by which Class members were required to opt out. The procedural

differences between a settlement class and a litigation class are difficult enough for a lay class member to understand when the two concepts are not muddled together in a single notice. Sullivan, citing to the Federal Judicial Center's standards, suggested possible language. [E.R. 188-89]. The district court never addressed Sullivan's proposals for additional notice, or the notice issue at all. Sullivan requested new notice be sent at Lead Counsel's expense [E.R. 189-92], and renews that request on appeal.

Similarly-situated class members received one of several different versions of the notice, each containing differing and often contradictory information about status of the litigation. Most importantly, the majority of the 23(e) notices, despite being packaged inappropriately with the 23(c) notices (which should have contained up-to-date information about the continuing Netflix litigation), contained no mention of the material fact that a summary judgment motion had been granted on the merits of the case while it was in the process of being partially settled.

To make matters worse, the summary judgment decision on the merits of the class's claim is not the only material fact omitted from the notice. The fact that a major conflict of interest existed due to the concurrent representation of Defendant Wal-Mart by Lead Class Counsel's firm is a fact that any reasonable person would consider material to the decision of whether to accede to the terms of the settlement. Any reasonable class member would look upon a settlement with suspicion when members of a firm that represent the defendant negotiated that settlement – it certainly creates an appearance of impropriety. Lead counsel hid this fact from not only the district court, but from the class, as well.

D. *Due to Class Counsel's own self-serving desire to avoid paying for notice to the Netflix litigation class, the timing of the notice resulted in due process violations to the both the Wal-Mart Settlement Class and the Netflix litigation class.*

Being experienced in class-action litigation, Class Counsel were undoubtedly aware that *Eisen v. Carlisle & Jacquelin* would require them to fully bear the cost of Rule 23(c)(2) notice to the Netflix litigation class, and that if they were unwilling or unable to bear this cost they would risk decertification of the Netflix class

and loss of control of the case. *417 U.S. 156, 179*. It is against this backdrop that class counsel convinced Wal-Mart to allow the Rule 23(c)(2) notice – the costs of which Class Counsel were obligated to pay – to be attached to the Rule 23(e) settlement notice, thus subsuming the cost. Thus, the Rule 23(c)(2) notice to the Netflix litigation class was delayed to coincide with the Rule 23(e) notice to the Wal-Mart settlement class. The end result was a late, confusing and misleading "dual notice" that inappropriately cited the existence of the continuing Netflix litigation as a potential source of further recovery in exhorting class members to remain in the Wal-Mart settlement class.

Due to the late timing of the notice – the result of Class Counsel placing its own financial interests first – class members were given materially inaccurate information: they were told the litigation was continuing and there would be a jury trial, when in fact summary judgment had been rendered in favor of Netflix. Moreover, Wal-Mart settlement class members were told the compensation offered was only "partial," when in fact it is likely the only compensation they will ever receive Sullivan detailed

half-a-dozen examples of these inconsistent and confusing messages in his written objection. [E.R. 190-191].

At the least, the failure to notify class members of a summary judgment against them on the very same merits as those of the action which they are being prompted to settle constitutes the omission of information that a reasonable person would consider to be material to the decision to opt in or out of a settlement agreement. *See, In re Nissan Motor Corp. Antitrust Litig.* 552 F.2d at 1105.

Applying the basic due process notice standard to the class action device, the Fifth Circuit in *In re Nissan Motor Corp. Antitrust Litig.* defended non-appearing class members' due process right to be fully informed of the current status of the litigation, stating that "[e]xplaining the law suit as it has developed to date in objective, neutral terms which do not prejudice the rights of nonsettling defendants, though requiring careful drafting, [sic] is far from impossible." *552 F.2d 1088, 1106 (5th Cir. 1977)*, (ruling that class notice sent at plaintiffs' expense must include information about a proposed partial settlement,

because the existence of that settlement proposal was material to class members' decision on whether to utilize the class action device). The dual notice of which Sullivan complained did not contain the information required by FRCP 23(c)(2)(B)(iv) or (vii). [E.R. 311-312]. Moreover, as highlighted extensively by Sullivan in his written objection, the dual notice did not comply with the Federal Judicial Center's proposed guidelines [E.R. 185-189].

As a result of class counsels' attempt to sidestep a basic litigation cost for which they were responsible, members of the Wal-Mart class received a confusing, incomplete, and deceptive 23(e) notice, in violation of their due process right to be notified of facts material to the opt-out decision. While a generally adequate compromise has been agreed upon concerning the terms of the Wal-Mart settlement, Class Counsel's attempt to exploit that compromise to avoid the costs of its obligations in continuing to represent to Netflix litigation class (a potential conflict-of-interest in its own right) has plunged this case into a constitutional morass which tramples upon the basic due process rights of non-appearing class members.

Class Counsel has created this constitutional problem with an otherwise acceptable settlement agreement themselves through their own questionable conduct. Had class counsel simply issued a timely and adequate Rule 23(c)(2) notice to the Netflix litigation class, which overlaps completely with the Wal-Mart class, class members could have been made aware of the summary judgment motion pending against them. Instead, they sought to save on advancing costs for the Netflix litigation (which, given the weaknesses in the case they made, they were unlikely to recover), and created an inconsistent series of dual notices, which confused and misled class members by mischaracterizing the state of the case with incomplete information. Had class counsel done its due diligence in crafting an adequate Rule 23(e) notice to the Wal-Mart class, they would have referenced the pending Netflix summary judgment motion and anticipated the possibility that it could be granted. Instead, they merely exhorted class members to celebrate - and, implicitly, to opt in to – the partial settlement while simultaneously attempting to rally the class around continuing litigation which they deceptively characterized as

"going to trial" with a good chance of recovery despite the fact that it was on the verge of being dismissed.

Thus, while the settlement agreement should be approved, the Court's only remedy for the due process violations is to remand for the purposes of issuing a new, consistent, complete and adequate Rule 23(e) notice describing the current state of the litigation, explaining the effect of the Netflix summary judgment motion on class members' underlying claims, and providing for a new opt-out period. Under *Eisen*, this notice should (appropriately) be issued at class counsel's expense, or if they refuse or are unable to cover cost, the class should be decertified and the summary judgment be effective as to the named representatives only.

E. The district court did not direct Rule 23(h) notice in a reasonable manner

In *Mercury Interactive*, this Court emphasized the importance of Rule 23(h). 618 F.3d 988, 993-94 (9th Cir. 2010). There, this Court reversed a settlement in a case where the FRCP 23(h) request was made after the objection deadline. *Mercury*

Interactive focused on the timing requirements. FRCP 23(h) has a three part requirement and requires:

> (1) A claim for an award [for attorneys' fees and/or non-taxable expenses] must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision (h), at a time the court sets. *Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner*.
>
> (2) A class member, or a party from whom payment is sought, may object to the motion.
>
> (3) The court may hold a hearing and must find the facts and state its legal conclusions under Rule 52(a).

Fed. R. Civ. Pro. 23(h)(emphasis added).

Objector Sullivan contends that the district court did erred by not ordering that notice of the fee motion be directed to the class in a reasonable manner, and erred under FRCP 23(h)(3), by not finding facts and stating legal conclusions with respect to its fee determination. *See*, Argument 2-A, herein.

In *Mercury*, this Court stated,

> The plain text of the rule requires that any class member be allowed an opportunity to object to the fee 'motion' itself, not merely to the preliminary notice that such a motion will be filed. In this case, although notice of the motion was provided to the class, class members were deprived of an adequate opportunity to object to the motion itself because, by the time they were served with the motion, the time within which they were required to file their objections had already expired.

In re Mercury Interactive Corp. Sec. Litig., 618 F.3d 988, 993-94 (9th Cir. 2010)

The Advisory Committee Notes to the 2003 amendments to Rule 23(h) further support this reading of the rule. They elaborate that "[i]n setting the date objections are due, the court should provide sufficient time after the full fee motion is on file to enable potential objectors to examine the motion." Fed. R. Civ. P. 23, 2003; Advisory Committee Notes, p. 68. The Advisory Committee Notes further contemplate that, in appropriate cases, the court will permit an "objector discovery relevant to the objections." *Id.* at 69. Clearly, the rule's drafters envisioned a process much more thorough than what occurred in this case.

Commentators also agree with this logical interpretation of the FRCP 23(h). For example, Moore's Federal Practice counsels that "[a]ny objection deadline set by the court should provide the eligible parties with an adequate opportunity to review all of the materials that may have been submitted in support of the motion and, in an appropriate case, conduct discovery concerning the fees request." 5 Moore's Federal Practice § 23.124[4] (Matthew Bender 3d ed. 2009).

In *In re Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 988, 994 (9th Cir. 2010) this Court stressed:

> Allowing class members an opportunity thoroughly to examine counsel's fee motion, inquire into the bases for various charges and ensure that they are adequately documented and supported is essential for the protection of the rights of class members. It also ensures that the district court, acting as a fiduciary for the class, is presented with adequate, and adequately tested, information to evaluate the reasonableness of a proposed fee.

The Notice approved in this case simply stated that Class Counsel would seek fees up to 25%. It was the kind of notice rejected in *Mercury*. It did not give the class information about, or access to, any preliminary estimate of fees requested, nor does it inform them of how to access that information once Class Counsel

files its application for attorney's fees" and this violates Rule 23(h).

Judge Chen, in the case of *Yoshioka v. Charles Schwab Corp.*, 2011 U.S. Dist. LEXIS 97383 (N.D. Cal. Aug 30, 2011), recently held that under Rule 23(h), class members must be given a full and fair opportunity to examine and object to attorneys' fees motion which includes being provided with information about how to review the fee and costs request. And in *Harris v. Vector Mktg. Corp.*, 2011 U.S. Dist. LEXIS 48878 (N.D. Cal. April 29, 2011) the court ordered:

> To enable class members to review class counsel's motion, class counsel shall include language in the Settlement Notice indicating the deadline for filing the attorneys' fees motion, specifically stating the deadline for any class member objections to the fees motion, and informing class members that the motion and supporting materials will be available for viewing on class counsel's website... That motion shall be filed with the Court and posted on class counsel's website not later than 20 days before class members' objections are due.

Id. at *54. This approach should be commended. Sullivan requests that this case be remanded and the district court directed to consider procedures such as those used in *Harris* and *Yoshioka*. In today's age, use of the Internet is the most practicable manner

of directing notice of a 23(h) to this class. A reasonable notice under Rule 23(h) should include information about the lead counsel's time and efforts expended on the litigation, and not simply inform class members of the percentage award sought.

Requiring lead counsel to file supporting papers for its fees is also consistent with the PSLRA's requirement for increased disclosure in the settlement notice. 15 U.S.C. § 78u-4(a)(7)(B); see also *In re Veritas Software Corp. Sec. Litig.*, 496 F.3d 962, 969-70 (9th Cir. 2007) (stating '[c]lass members often receive insufficient notice of the terms of a proposed settlement and, thus, have no basis to evaluate the settlement.'")(citation omitted).

While class counsel attempt to duck these requirements by contending that any class member could have accessed material information on PACER or the class administrator's website, they ignore clear precedent in order to make the argument: due process absolutely requires the issuing of individual notice; the choice is not discretionary, publication notice is simply inadequate. See, *Eisen v. Carlisle and Jacquelin*, 417 U.S. 156, 174 (1974); *Mullane v. C. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950).

II. The district court erred in awarding attorneys' fees to Class Counsel without identifying, applying, and adequately explaining the relevant factors as required by *Dennis*, *Powers*, *Vizcaino*, and *Kerr*.

A. A remand is required under the holdings of *Dennis v. Kellogg* and *Powers v. Eichen,* because the district court did not "adequately explain" its fee decision.

Recently, this Court reversed a class-action fee award in *Dennis v. Kellogg*, stating:

> In overruling the objections to the attorneys' fees, the district court recited the *Vizcaino* factors but did not "adequately explain" its determination that those factors justified the fees as fair and reasonable. *Powers v. Eichen*, 229 F.3d 1249, 1257 (9th Cir. 2000*)*. Indeed, the court did not explain its determination at all. Given the high amount of the negotiated attorneys' fees, the court "needed to do more to assure itself — and us — that the amount awarded was not unreasonably excessive in light of the results achieved." *In re Bluetooth Headset Products Liab. Litig.,* 654 F.3d at 943.

Dennis v. Kellogg Co., -- F.3d --, 2012 U.S. App. LEXIS 14385 at *21 (9th Cir. July 13, 2012). See also, *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1048 (9th Cir. 2002)(the question on appeal is not "whether the district court should have applied some other percentage, but whether in arriving at its percentage it considered all the circumstances of the case and reached a reasonable percentage."); *Powers v. Eichen*, 229 F.3d 1249, 1257 (9th Cir.

2000)(remanding on account of inability to "conduct meaningful appellate review" on account of the district court's failure to explain findings).

In this case, the district court did not even recite the *Vizcaino* factors, let alone "adequately explain its determination" of those factors. In its order approving fees ["Fee Award," E.R. 20-22], the district court stated it found "the amount of fees requested reasonable under the 'percentage-of-recovery' method." [Fee Award, at 2, E.R. 21]. But the district court did not address or explain most of the relevant factors.

One California district court described the state of the law as follows:

> The Ninth Circuit has "established 25% of the common fund as the 'benchmark' award for attorney fees." *E.g., Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1376 (9th Cir. 1993); see also *Six Mexican Workers v. Arizona Citrus Growers*, supra. Although not mandated by the Ninth Circuit, courts often consider the following factors when determining the benchmark percentage to be applied: (1) the result obtained for the class; (2) the effort expended by counsel; (3) counsel's experience; (4) counsel's skill; (5) the complexity of the issues; (6) the risks of non-payment assumed by counsel; (7) the reaction of the class; and (8) comparison with counsel's loadstar.

Craft v. County of San Bernardino, 624 F. Supp. 2d 1113, 1116-1117 (C.D. Cal. 2008). Sullivan believes this to be an accurate characterization of the law, and he contends that the district court erred in not explicitly considering all of these factors, many of which – as he argues below – strongly support awarding less than the 25% benchmark in this case. As this Court stressed in *In re Washington Pub. Power Supply System Securities Litig.*, when considering post-settlement fee applications, "courts cannot rationally apply any particular percentage - whether 13.6 percent, 25 percent or any other number - in the abstract, without reference to *all the circumstances* of the case." 19 F.3d 1291, 1298 (9th Cir. 1994)(emphasis added).

Although the district court stressed that the attorneys fees were "entirely contingent upon success" ["Fee Award," at 3, E.R. 21], and mentioned that Class Counsel "risked time and effort," *id.,* and "advanced costs and expenses," *id.,* the court made no mention of any other *Vizcaino*, factors, *Kerr* factors, or other factors. Indeed, contingency and risk is the one (and only) *Kerr* factor the United States Supreme Court has overruled and said

should not be considered. *City of Burlington v. Dague*, 505 U.S. 557 (1992).

Under the holding of *Dennis v. Kellogg*, this case must be remanded for further determination of the fee award. And like in *Dennis*, Sullivan requests that the case be remanded, so that when the issue of fees is again before the district court, it must "consider all of the circumstances of the case, as they exist at that time, including time wasted in preparing a stillborn settlement, in finally determining a reasonable award of attorneys' fees." *Id.*

B. *The case should be remanded to consider explicitly factors found relevant in cases such as Vizcaino, Kerr, and Craft, which militate against a "benchmark" award in this case.*

In the Ninth Circuit 25% is a "benchmark" percentage in determining a reasonable fee in a common-fund case. This Court first referred to this "benchmark" more than twenty years ago, (and sixteen years before the passage of the CAFA), in *Paul, Johnson, Alston & Hunt v. Graulty*, 886 F.2d 268, 272-73 (9th Cir. 1989); *Six Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990)(this "benchmark percentage should be adjusted, or replaced by a lodestar calculation, when special

circumstances indicate that the percentage recovery would be either too small or too large in light of the hours devoted to the case or other relevant factors.")

In determining whether the benchmark should be awarded – or adjusted either upward or downward – courts in this district typically consider: the result obtained for the class, the effort expended by counsel, counsel's skill and experience, the risks and complexity of the litigation, the reaction of the class, the comparison of the percentage of the fund with the lodestar crosscheck. See, e.g., *Craft v. County of San Bernardino*, 624 F. Supp. 2d 1113, 1116-17 (C.D. Cal. 2008); *Fernandez v. Victoria Secret Stores, LLC*, No. CV 06-04149, 2008 U.S. Dist. LEXIS 118631, 2008 WL 8150856, at *11 (C.D. Cal. July 21, 2008). These factors are based upon, and subsume, many of the lodestar-evaluation factors articulated in *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 70 (9th Cir. 1975) (setting forth twelve factors in consideration of a reasonable fee award under lodestar calculation), *abrogated, in part,* by *City of Burlington v. Dague*, 505 U.S. 557 (1992)(on the "contingency" factor).

Sullivan contends that the following six "special circumstances" justify (and mandate) an award of less than the "benchmark":

(1) The applicability of the Class Action Fairness Act, 28 U.S.C. § 1711, ("CAFA"), because the majority of the Class' relief is in the form of "Gift Cards," the CAFA mandates compliance with certain fee-setting procedures;

(2) The existence of undisclosed (to the Class) conflicts of interest – both with respect to Class Counsel's failed efforts to attempt to represent subclasses with potentially conflicting interests, as well as lead counsel's law firm's undisclosed (to the Class) concurrent representation of Defendant Wal-Mart – mandating disgorgement of part of the fees;

(3) The "partial" nature of the settlement, under which only a small percentage of claimed overcharges (6%) is recovered, in a "fund" consisting mostly of Gift Cards that cannot be resold;

(4) The lack of risk due to spread risk among a consortium of entrepreneurial lawyers that filed over 60 cases;

(5) The level of skill required to bring claims related to a publicly-announced deal alleged to be a "market allocation agreement"; and,

(6) Awards in similar cases, such as *In re Air Cargo Shipping Servs. Antitrust Litig.*, 2009 U.S. Dist. LEXIS 88404 (2009 E.D. N.Y.).

Although this Court has held that the benchmark should be applied absent special circumstances requiring deviation, this Court has also cautioned against a "mechanical or formulaic application" of the percentage method. *In re Coordinated Pretrial Proceedings in Petroleum Antitrust Prods. Antitrust Litig.*, 109 F.3d 602, 607 (9th Cir. 1997) (also stating "[a] twenty-five percent benchmark might be reasonable in some cases, but arbitrary if the fund were extremely large"). This is what Sullivan contends has happened in this case – the district court formulaically-applied the "benchmark" percentage and did not give due regard to the following six "special circumstances."

1. *The district court erred as a matter of law in holding that this was not a CAFA settlement.*

Whether the in-kind relief is called a "gift card," "coupon," "voucher," or "on-line credit" is an irrelevant matter of semantics. Online claimants were only permitted to choose scrip, and the $9,000,000 "Gift Card" portion of the fund is a form of in-kind compensation subject to CAFA scrutiny – the so-called "Gift Cards" are "coupons," in the plain sense of the word, and certainly for C.A.F.A purposes.

One of the reasons Congress passed CAFA was to prevent abusive scrip settlements, which "award huge attorneys fees at the expense of injured victims who often get a coupon or nothing at all." CLASS ACTION FAIRNESS ACT, 151 Cong. Rec. S996-02, S996. Congress specifically cited to over two-dozen cases where consumers received coupons, rebate, credits, vouchers, or other scrip when it passed the C.A.F.A. in 2005.

In this case, Class Counsel argued, and the district court agreed, that C.A.F.A.'s consumer protections against unbalanced settlements that favor counsel could be disregarded because "a gift card is not a coupon" [E.R. at 112]. Specifically, the court stated:

> But with regard to the big – the big objections being to the gift cards as coupons, I'm certainly persuaded that there are some shared characteristics between a gift card and a coupon, but a gift card is not a coupon, and unless some appellate court tells me otherwise, I will proceed to treat gift cards differently, particularly when they have the attributes of this particular gift card. And this particular gift card is, I think, sufficient – sufficiently distinguished from the coupon in that it has no expiration date…[and that] its transferrable from one party to another…[E.R. 112].

Sullivan believes that neither of these features disqualifies a gift-card from being considered a coupon for CAFA purposes. There is nothing that requires a coupon to have an expiration date: some coupons may expire, but the failure to impose expiration does not disqualify the scrip as a "coupon." So this distinction is, as the saying goes, a distinction without a difference.

The same is true regarding transferability; most coupons are transferrable in the same sense as the gift cards. There is, for instance, nothing that prevents a grandmother from giving her grandson a coupon she clipped from the paper; he can still use it at the grocery himself. The district court gave no other reasons for not considering a so-called "gift-card" a coupon for CAFA. purposes.

In his objection, Sullivan quoted *Radosti v. Envision Emi, LLC*, 717 *F. Supp. 37, 55 (D.D.C. 2010)*, for the definition of "coupon," as follows: "Although Congress did not define the term 'coupon' in the statute, courts have considered a coupon settlement to be one that provides benefits to class members in the form of discount towards the future purchase of a product or service offered by defendant."

And Websters (via dictionary.com), defines "coupon," as follows:

> a portion of a certificate, ticket, label, advertisement, or the like, set off from the main body by dotted lines or the like to emphasize its separability, entitling the holder to something, as a gift or discount, or for use as an order blank, a contest entry form, etc.

The "Gift Card" offered in this case meets both the plain-language dictionary definition, and the definition set forth in *Radosti*, per section 2.21 of the Settlement Agreement:

> The "term 'Gift Card' as used herein means an electronic gift card redeemable for purchases at walmart.com. Each Gift Card shall be subject to applicable laws, the walmart.com Terms of Use (available at www.walmart.com), and any other terms of use or terms and conditions governing Gift Cards in effect at the time the Gift Cards are issued; provided, however, that unless an applicable law provides to the contrary, each Gift Card shall be fully transferrable but

> may not be resold unless the Settlement Class Member is a licensed reseller.

(Settlement Agreement, E.R. 265).

Neither Class Counsel nor the district court addressed the *Radosti* case. Class Counsel did, however, cite to *True v. American Honda Motor Co.*, 749 F. Supp. 2d 1052, 1075 (C.D. Cal. 2010), where the court stated, "Coupons promote sales without lowering the price to everyone (that is, holding a 'sale')." *Id. at 1075* (quoting *Menasha Corp. v. News Am. Mktg. In-Store, Inc.*, *354 F.3d 661, 662 (7th Cir. 2004)*. ("[C]oupons aim to facilitate a sale to a purchaser who would not otherwise purchase a product at a higher price . . . .") But this case cannot support the view that the Gift Card is not a coupon: the gift card plainly promotes sales of merchandise to purchasers who might not otherwise purchase a product at Wal-Mart without lowering prices across-the-board; thus, it is a coupon.

Class Counsel also cited to *Synfuel Technologies v. DHL Express (USA)*, 463 F.3d 646 (7th Cir. 2006) for the definition of "coupon." But the *Synthfuel* holding is favorable to Sullivan. There, the Seventh Circuit stated as follows:

> Our confidence in the fairness of the settlement is further undermined by the agreement's bias toward compensating class members with pre-paid Letter Express envelopes instead of cash. Pre-paid envelopes, like coupons, are a form of in-kind compensation. "[C]ompensation in kind is worth less than cash of the same nominal value," since, as is typical with coupons, some percentage of the pre-paid envelopes claimed by class members will never be used and, as a result, will not constitute a cost to Airborne. In *re Mexico Money Transfer Litig., 267 F.3d 743, 748 (7th Cir. 2001)*. Further, as the Hutsler objectors point out, although an individual pre-paid envelope is significantly more valuable to a class member than the equivalent amount of cash offered by the settlement, compensation in envelopes "require[s] the claimant to return to the Defendant to do business with him," something at least some class members likely would prefer not to do. And although this case is not covered by the Class Action Fairness Act (CAFA) of 2005, we note that in that statute Congress required heightened judicial scrutiny of coupon-based settlements based on its concern that in many cases "counsel are awarded large fees, while leaving class members with coupons or other awards of little or no value." *Pub. L. 109-2, ß 2(a)(3)(A), 119 Stat. 4, 4.* We recognize that the pre-paid envelopes are not identical to coupons, since they represent an entire product, not just a discount on a proposed purchase. Nonetheless, they are a form of in-kind compensation that shares some characteristics of coupons, including forced future business with the defendant and, especially for heavier users, the likelihood that the full amount of Airborne's gains will not be disgorges.

These are the types of concerns both Sullivan and Frank complained of below, and regarding which the district court erred in insufficiently considering. Indeed, Sullivan cited to *Fleuary v.*

Richemont N. Am., Inc,, 2008 U.S. Dist. LEXIS 112459 (N.D. Cal 2008) for the proposition that C.A.F.A. should be applied as a matter of good judicial policy, stating: "Even if the instant case did not involve any coupons such that CAFA would not apply, courts have still found the above CAFA provision instructive when the benefit to the class is 'coupon-like.'" Certainly, the gift cards are "coupon-like." The district court found that the gift card shared several features with a coupon. Nonetheless, the district court did not explicitly address or distinguish *Radosti* or *Fleuary* in either her oral reasoning or written judgment order.

Finally, Sullivan believes the district court erred in evaluating the settlement as if she had to place it on a continuum with cash on one end and coupon on the other. Ultimately, the district court stated that she concluded:

> Most importantly…the parties were given the option [to choose cash]…Given that we know what the response is to the settlement and that the vast majority by two-to-one have elected the gift cards instead of the cash component…so because of the distinguishing features and primarily the ability of the class members to choose whether or not they wanted cash or a gift card, I think makes this settlement closer to a cash settlement than it is to a coupon.

[E.R. at 112-113].

The district court determined that a key factor in her conclusion was that class members were ostensibly allowed to choose cash. But the CAFA anticipates such mixed settlements. For example, the CAFA Committee Notes explained, "Thus, if a proposed settlement provides for both coupons and equitable relief, then the portion of the award that is a contingent fee based on the value of the coupons must be calculated based on the value of redeemed coupons, and the portion not based on the value of the coupons should be based on the time spent by class counsel on the case." And the idea that the proposed settlement was not a "coupon settlement" because other relief was being offered was specifically rejected in *True*, 749 F. Supp. 2d at 1069, n.20.

Sullivan (as did Frank) specifically asserted his consumer rights under C.A.F.A. He specifically invoked his right under 28 U.S.C. 1712(e) that a hearing be set to determine the "real monetary value and the likely utilization rates of the coupons." Sullivan also requested a schedule and hearing be set to allow expert testimony, as required by 28 U.S.C. 1712(d). These

requests for further statutorily mandated proceedings were denied without explanation.

2. *The district court abused its discretion by not examining or discussing the repeated conflicts of interest of Lead Class Counsel.*

On at least two occasions, serious ethical questions were raised regarding the propriety of Lead Class Counsel's joint, multiple, and successive representations. First, Class Counsel proposed a settlement that involved direct *Amchem*-style conflicts between two sub-classes: the certified Netflix litigation class, and second a putative blockbuster subscriber class. In the face of opposition by Netflix (class members had not yet been notified at this point), Class Counsel was forced to appoint an "independent settlement counsel," at additional expense to the Class.

After the district court refused to certify the first proposed Wal-Mart settlement class on account of conflicting interests between the certified Netflix litigation class and the putative Blockbuster settlement class, a smaller settlement was proposed. Class members were not told however, that prior to moving for preliminary approval of this settlement (the settlement currently

under review), Lead Class Counsel moved to a firm that represented defendant Wal-Mart in other matters. Class Counsel did not take any affirmative steps to disclose this conflict to the court. But for an anonymous letter sent to Nextflix, it is doubtful this conflict would ever have come to light. Sullivan repeatedly raised Netflix's allegation of conflict in his written objection [E.R. 191, 201 & 204], and requested discovery on the issue [E.R. 191]. His request was denied without explanation by the district court.

A conflict of interest that requires disqualification of the Plaintiffs and their attorneys puts the attorneys' entitlement to fees to be paid from any class fund deeply in jeopardy. *Image Tech. Serv., Inc. v. Eastman Kodak Co.*, 136 F.3d 1354, 1358 (9th Cir. 1998). "Simultaneous representation of clients with conflicting interests (and without written informed consent) is an automatic ethics violation in California and grounds for disqualification…An attorney cannot recover fees for such conflicting representation"); *Blecher & Collins v. Northwest Airlines, Inc.*, 858 F. Supp. 1442, 1457 (CD. Cal. 1994)(In California, "[an] attorney's claim for fees may not be allowed if it

is established that he or she undertook the representation of conflicting interests without the written consent of both parties."); *Rodriguez v. Disner*, -- F.3d --, 2012 U.S. App. LEXIS 16698 (9th Cir. August 10, 2012)(noting that in a class action the court can and should consider the nature, extent and effect of the conflict in making an award under the common fund doctrine).

The rule is actually more stringent in class action cases. *Id.* at *21 ("We apply these principles even more assiduously in common fund class action cases, such as this one, because 'the district court has a special duty to protect the interests of the class.") This is because the major exception to the concurrent representation prohibition - waiver by the clients - is not available in class actions in many cases. *Cal Pak Delivery, Inc. v. United Parcel Service, Inc.* 52 Cal.App.4th 1, 12, 60 Cal. Rptr. 2d 207, 215 n. 2 (1997)("Unidentified class members cannot waive a potential conflict of interest."); *Apple Computer*, 126 Cal.App.4th at 1274, n.7 (same); *Huston v. Imperial Credit Commer. Mortg. Inv. Corp.*, 179 F. Supp. 2d 1157, n, 179 (2001)(applying "heightened

standard" to ethical questions in class action and noting that in a class action the disqualification rule is applied with more vigor).

3. The partial nature of the relief is a factor that strongly weighs in favor of a lower percentage.

The "amount involved and results obtained" is a perhaps the most obvious factor to consider in evaluating the appropriate percentage to award. This is because this factor measures degree of success. *Hensely v. Eckerhart*, 461 U.S. 424, 436 (1983)(giving "consideration to the amounts of damages awarded as compared to amount sought represents the primary means to evaluate [degree of success]"). Degree of success is certainly a requisite factor in deciding whether to award a "benchmark," which defined literally means "a standard of excellence or achievement against which similar things must be measured." [www.dictionary.com].

Class Counsel sought over $1.5 billion dollars and received a cash settlement of only $18,000,000 plus another $9,000,000 in scrip. The Blockbuster subclass claims were dismissed on summary judgment notwithstanding substantial (failed) efforts of Class Counsel. The claims against co-Defendant Netflix were lost

on summary judgment. The settlement fund was 6% of the Class' actual damages, and 2% of the trebled damages.

Before the Netflix litigation class lost their claims on summary judgment, Class Counsel was stressing the importance of the "partial," nature of the settlement. One of the purported benefits of the first (denied) Wal-Mart settlement was going to be a $1.5 million dollar litigation fund whereby Wal-Mart was going to fund further litigation by the Class against its co-Defendant and market-competitor Netflix.

The reaction of the class was negative. This case has attracted numerous objectors and some half-a-dozen objector appeals. Moreover, as Sullivan argued below, the reaction of the class as reflected in mainstream press reports was negative. Time decried the settlement as "Worthless (Twice Over)," [http://techland.time.com/2011/11/29/why-walmarts-netflix-settlement-is-worthless-in-two-ways/2/] and suggested, "This week's ruling seems to provide more support to the theory that Wal-Mart used the settlement process to gain access to Netflix customers at a time when it's making a fresh attempt to move in on the online

DVD market through its recently-acquired streaming service Vudu." [http://paidcontent.org/2011/11/24/419-in-surprise-ruling-judge-throws-out-netflix-price-fixing-lawsuit/] And the Atlantic ran an article entitled, "*The Walmart Guide to Winning by Losing Lawsuits*"[http://www.theatlanticwire.com/business/2011/09/walmart-guide-winning-losing-lawsuits/42154/, last accessed on August 22, 2012]("Thanks to some good lawyers, Walmart also stands to benefit from a class action lawsuit filed by customers angry about the retailer's shady agreement with Netflix. The company just won a suit that not only lets them pay the agreed-to settlement in the form of Walmart gift certificates but also gives them access to Netflix's customer database. This feels like a trick."

4. The risk factor, both ex ante, and ex post, weighs in favor of a lower percentage.

"The risks of non-payment assumed by counsel is another typically cited factor, and it was the only factor expressly mentioned by the district court. Risk factors encompass *Kerr* factors four, six and ten: "the preclusion of other employment," and/or "undesirability" of the case, whether the fee is fixed or contingent, respectively. The only "risk" factor addressed by the

district court was the alleged contingent nature of the case, and this is an improper factor according to the Supreme Court.

Class Counsel did not submit any evidence regarding "preclusion of other employment" and the record certainly did not suggest the case was "undesirable" – 65 lawsuits were filed; the most significant and noteworthy antitrust firms in the country were involved. Law firms were competing for this case; other employment was not "precluded." Contrary to the conclusion reached by the district court, the risk factor favors a lower percentage both when analyzed *ex ante* and *ex post.*

Ex ante, this factor strongly favors awarding the low end of the percentage range. This case was extremely desirable. Only desirable cases end up in the MDL panel. This case was very desirable for many reasons. First, it was very easy to get a client. Almost everyone has a friend who is a Netflix subscriber. Next, the major evidence was publicly available. Third, the Defendants have "mega-deep pockets" – Wal-Mart is the largest retailer in America; Netflix is the largest DVD rental company in the US. But for the conflicts-of-interest morass Class Counsel created

through its own unskillful litigation of the case, class certification was relatively straightforward.

Ex post, the risk factor weighs against Class Counsel because the settlement functions more to help Class Counsel hedge against their own risk of loss. Class Counsel made out handsomely in the district court. They negotiated a settlement whereby they could hedge on the case and recover their fees and costs incurred to date, while still rolling the dice on the mega-bucks with Netflix. What's more, they even convinced Wal-Mart to agree to fund (to the tune of $1.5 million dollars) that further litigation.

5. Most of the effort expended by counsel did not yield a fruitful result for the class.

The "effort expended by counsel" is another consideration cited by courts in determining the appropriate percentage. This factor is essentially the same as the first *Kerr* factor, the "time and labor required," but would also encompass considerations such as Kerr factor seven, "time limitations imposed by the client or the circumstances," and eleven, "the nature and length of the professional relationship with the client." The "complexity of the

issues" is another consideration, one that mirrors the second Kerr factor, "the novelty and difficulty of the questions involved."

Sometimes, antitrust cases can be particularly novel or difficult. But this was not such a case. Indeed, this was a relatively simple case for an antitrust lawyer. Here, the "mega-deep-pocket" Defendants publicly announced a marketing agreement that could be plausibly characterized as a market-allocation agreement. This is a ripe target for antitrust lawyers. As Sullivan's counsel argued at the fairness hearing, this was not a case where Class Counsel had to uncover an antitrust conspiracy. As Sullivan's counsel argued at oral argument, this was not the D-RAM case, where counsel was required to uncover some kind of conspiracy in Asia. [E.R. 72]. Rather, on May 19, 2005, Netflix and Wal-Mart issued joint press release announcing the challenged promotional agreement, and Wal-Mart's discontinuation of its DVD-rental program.

The Court's summary judgment decision focused on an analysis of the promotional agreement, press releases, and other public statements. The fact the evidence in this case was publicly

available information is strong evidence that the case was not novel or complex, as is the fact that so many law firms filed copycat cases after the original case was filed.

6. Awards in similar cases suggest a fee below the benchmark

In his objection below, Sullivan pointed to the *In re Air Cargo Shipping Serv. Antitrust Litig.*, 2009 U.S. Dist. LEXIS 88404, 2009 WL 3077396 at *16 (E.D.N.Y. Sept. 25, 2009). In that case, the court held it was "inappropriate to grant a fee request in connection with the settlement with a single defendant by reference to the total number of hours expended on the litigation as a whole." *Id.* Like this case, *Air Cargo* involved a partial settlement with a co-Defendant. In this case Class Counsel used ABA task Codes to organize their time summaries. Sullivan analyzed these task codes and concludes that approximately 5% of the time in the litigation was directly related to the Wal-Mart settlement and explicitly coded as "settlement." [E.R. 194-198]. Because Class Counsel did not submit any evidence that their claimed hourly rates were reasonable, Sullivan used so-called Laffey-Matrix rates for the purposes of the analysis set forth in his

objection [E.R. 198-199]. Under this method, approximately $800,000 in attorney time was billed to the Wal-Mart settlement, using the ABA Task Code method.

Sullivan is not contending the district court erred as a matter of law by not adopting his task-code method. There are other methods. For instance, it appears that 'Independent Settlement Counsel" was appointed to the case. The main reason so-called "Independent Settlement Counsel" was brought into the case was to remedy the conflicts of interest created by the first proposed (rejected) settlement with Wal-Mart. It is unknown how much independent settlement counsel billed for there efforts. Nonetheless, another reasonable method of valuing the settlement would be to consider as reasonable the lodestar of independent settlement counsel. After all, why should Howrey receive a fee for work done on the "stillborn" settlement? *Dennis v. Kellogg Co.,* -- F.3d --, 2012 U.S. App. LEXIS 14385 at *2y (9th Cir. July 13, 2012)("If and when the issue of fees is again before the district court, the court shall consider all of the circumstances of the case as they exist at that time, including time wasted in preparing a

stillborn settlement, in finally determining a reasonable award of attorneys' fees.") Or a settlement that was rejected because of Class Counsel's creation of a conflict of interest? And certainly it would be reasonable to cause Baker to forfeit the entirety of its fee on account of the undisclosed and perhaps unwaivable conflict involving Wal-Mart. *Rodriguez v. Disner*, -- F.3d --, 2012 U.S. App. LEXIS 16698 (9th Cir. August 10, 2012)

Sullivan's point on appeal is the district court should have held an evidentiary hearing to consider this matter further. Sullivan requests this court reverse the district court's denial of discovery on this issue and remand with instructions to allow Sullivan to conduct his requested discovery and a hearing be held on fees under CAFA, and the district court be directed the examine the special circumstances alleged by Sullivan.

III. The requested litigation costs deserve meaningful scrutiny by the district court.

A. *Costs and non-taxable expenses should be deducted off the top, and then the percentage calculated.*

Andrea Resnick's fee agreement with Howrey states that the fee percentage will be calculated "after reimbursement" of out-of-

pocket expenses. [D.E. 330, Ex. 13]. The Class should receive the same benefit. The $1.7 million dollars in alleged costs (or any lesser amount of costs ultimately awarded (See Argument III-B, below), should be deducted from the fund before the 25% (or any other percentage determined on remand) is deducted. The same should go for the $4.5 million in administration expenses. These should be treated as a nontaxable expense under FRCP 23(h) – i.e., class counsel must move for them after notice is directed to the class in a reasonable manner.

B. Many litigation costs, such as experts for the losing Netflix case, and travel hotels and meals, are not recoverable.

The district court literally "rubber-stamped" the cost request of $1,700,000. It did so even though Class Counsel has demanded a thorough inspection of Netflix's cost bill, and has even appealed such. The district court is scrutinizing the costs requested by Netflix at the request of Class Counsel, but is refusing the scrutinize the costs requested by Class Counsel at the request of Sullivan. The cost claim is not insignificant: of the $1,700,000 sought, it appears over $1.2 million related to payments to experts

in the failed Netflix-summary judgment case. These costs should not be taxed against the Wal-Mart settlement class.

CONCLUSION

Due process requires reversal and remand in this case. On remand, Sullivan requests that this Court: (a) order Lead Counsel to send a Rule 23(c)(2) notice accurately advising as to the status of the Netflix litigation class at that time, or the class be de-certified; (b) that a new, proper and accurate Rule 23(e) notice be sent, along with reasonable notice of any Rule 23(h) motion seeking reimbursement of attorneys' fees and/or nontaxable costs, including costs of administration; (c) that the district court's determination as to the applicability of CAFA be reversed, and the court instructed to conduct the proceedings in accordance with 28 U.S.C. 1711 & 1712; (d) that Sullivan be permitted discovery into Class Counsel's actual and admitted conflicts of interest and the district court be instructed to consider this factor in making any new fee award; (e) that the fee award be reversed as unreviewable on appeal and the court be instructed to make proposed findings of fact and conclusions of law as required by FRCP 23(h); and (f) that

this Court ratify and the district court be instructed to examine the factors identified in *Craft v. County of San Bernardino*, 624 F. Supp. 2d 1113, 1116-17 (C.D. Cal. 2008) and *Fernandez v. Victoria Secret Stores, LLC*, No. CV 06-04149, 2008 U.S. Dist. LEXIS 118631, 2008 WL 8150856, at *11 (C.D. Cal. July 21, 2008) when determining whether to award the "benchmark" percentage, or some higher or lower percentage.

August 22, 2012

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STATEMENT OF RELATED CASES
PURSUANT TO NINTH CIRCUIT RULE 28-2.6

Appeal Nos. 12-15705, 12-15889, 12-15957, 12-15996, and 12-16038 are appeals by other objectors that have been consolidated with Ted Frank's appeal (12-15705) being the earliest filed and lead appeal.

Lead Counsel also appealed the district court's order granting summary judgment against the Netflix litigation class. *See*, Resnick v. Netflix, Inc., No. 11-18034 (9th Cir.) That case is fully briefed, but oral argument has not yet been scheduled.

Appeals 12-16160 and 12-16183 involve an appeal and cross-

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. 32(a)(7)(C) AND CIRCUIT RULE 32-1

Certificate of Compliance with Type-Volume Limitation, Typeface Requirements, and Type Style Requirements:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because: This brief contains **13,963 words**, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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PROOF OF SERVICE

I hereby certify that on August 22, 2012, I electronically filed the foregoing with the Clerk of the United States Court of Appeals for the Ninth Circuit using the CM/ECF system, which will provide notification of such filing to all who are ECF-registered filers.

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