

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

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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In re ONLINE DVD RENTAL ANTITRUST LITIGATION

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ANDREA RESNICK, et al.  
Plaintiffs-Appellees

vs.

MARIA COPE and EDMUND F. BANDAS  
Objectors – Appellants,

vs.

NETFLIX, INC., et al.  
Defendants-Appellees,

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From the United States District Court  
for the Northern District of California  
No. 4:09-md-02029-PJH

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**JOINT REPLY BRIEF OF MARIA COPE AND EDMUND F. BANDAS**

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339 U.S 306, 313 (1950) ..... 1

## I. ARGUMENT

### A. The district court erred by approving the Class Notice.

Fundamental due process requires that “deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.” *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S 306, 313 (1950). To satisfy this principle, it is not enough that notice reached the parties; it must also convey the required information. *Id.* at 314. Therefore, the class notice must have “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.” *In re Nissan Motor Corp. Antitrust Litig.*, 552 F. 2d 1088, 1105 (5<sup>th</sup> Cir. 1977).

Class Counsel failed to address many shortcomings of the Notice in their Answer Brief, and they mischaracterized Appellant Cope’s arguments as to others. Appellant Cope contended the number of class members entitled to a claim of settlement is a material term that should have been included in the notice. This omission of information regarding the size of the class prevented Class Members from valuing their individual claim. The information concerning the dollar value of the fund made for only half of the equation. Class Members needed to scale the size of the class so a reasonable estimation of their range of damages could have guided their decision on whether to opt out. After all, the value of a Class Member’s claim is paramount to this inquiry. Yet, Class Counsel’s Notice left the Class blind in this regard. While it may have

been impossible to notify the Class of the *exact* value of their claim at the Notice stage, that is no excuse for their failure to allow the Class to make *any* educated estimate.

Cope and Bandas further contend the district court's interpretation of the settlement agreement was incorrect in relation to attorneys' fees payable to California State Action counsel. Class Counsel's contention that the district court was correct is disingenuous. Their failure to notify the Class was a violation of due process and circumvented the requirements set out by *Mercury Interactive Corp. Securities Litig.*, 618 F. 3d 988 (9<sup>th</sup> Cir. 2010), as is more fully briefed in Appellants' Opening Brief.

**B. The district court erred in approving the fee request.**

Class Counsel mischaracterizes Appellants' argument regarding the lodestar analysis. Contrary to Class Counsel's point, they do not contend a searching analysis must be made when conducting a "cross-check" against the percentage of the fund. Instead, the error was a result of the court's decision to take Class Counsel at their word for conducting the lodestar crosscheck. That falls short of the court's obligation to "ensure that the award, like the settlement itself, is reasonable..." *In re Bluetooth Headset Products Liability Litigation*, 654 F. 3d 935, 941 (9<sup>th</sup> Cir. 2011).

The district court also erred where it failed to consider California State Action counsel's fees when calculating reasonableness of attorneys' fees. The

court's fee analysis did not contemplate these fees on top of Class Counsel's fee request. Therefore, the Court's determination was incomplete and erroneous.

## II. CONCLUSION

For the foregoing reasons, Appellants again ask that this Honorable Court should reject the Settlement approved and remand to the district court for further consideration of the issues above. Appellants also request such other relief, as the Court deems appropriate.

Dated: November 15, 2012

Law Offices of Darrell Palmer PC

By: /s/ Joseph Darrell Palmer  
Joseph Darrell Palmer  
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**CERTIFICATE OF COMPLIANCE PURSUANT TO  
FED. R. APP. 32(a)(7)(C) AND CIRCUIT RULE 32-1**

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that the attached brief is proportionately spaced, has a typeface of Times New Roman 14 point and contains 561 words.

Dated: November 15, 2012

By: /s/ Joseph Darrell Palmer  
Joseph Darrell Palmer

## STATEMENT OF RELATED CASES

Appellants Maria Cope and Edmund Bandas are aware of the following related cases pending in this Court:

Consolidated Appeals:           12-15957  
                                          12-15705  
                                          12-15889  
                                          12-16010  
                                          12-16038



**CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on November 15, 2012.

I certify that all active participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

All non-registered participants will be served via U.S. Mail.

/s/ Joseph Darrell Palmer  
Joseph Darrell Palmer