UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 12-16038

Consolidated with 12-15705, 12-15889, 12-15957, 12-15996 and 12-16010

In re: ONLINE DVD RENTAL ANTITRUST LITIGATION

ANDREA RESNICK et al.,
Class Plaintiffs-Appellees,

v.

TRACEY KLINGE COX,
Plaintiff-Appellant

v.

NETFLIX,: et al.,
Defendants-Appellees

Appeal From Judgment Entered by
The United States District Court, Northern District of California,
Phyllis J. Hamilton, District Court Judge
District Court Case No. 4:09-MD-2029-PJH

REPLY BRIEF OF PLAINTIFF-APPELLANT TRACEY KLINGE COX

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Appellant Tracey Klinge Cox ("Cox") hereby replies to plaintiff ("Class") Answering Brief (appellate docket entry "A.D.E." 44). Defendant Wal-Mart did not file a brief A.D.E. 45.

I. INTRODUCTION

Cox reasserts her previously appealed issues as presented in her opening brief, as if fully set forth below. The "Class" answering brief raised no issues not already addressed in Cox's opening brief or in the briefs of Frank, Zimmerman, Sullivan and Cope/Bandas. With respect to the "Class" brief, Cox stands on her previous submission.

II. ARGUMENT

A. Adoption of Reply Brief of Frank, Sullivan, Zimmerman, Cope/Bandas

Cox adopts the substantive arguments of the Reply Briefs of Frank, Zimmerman, Sullivan and Cope/Bandas in their entirety.

B. Is the Settlement a coupon settlement

Cox in her Opening Brief adopted the Sections of the Briefs of Frank and Zimmerman on the issue of "was it a coupon settlement". Rather than repeating what has been said by other Objectors/ Appellants on the settlement being in reality a coupon settlement and the District Court filing to follow the

requirements of the Class Action Fairness Act, suffice it to say that Cox agrees with the other Objectors/Appellant's arguments.

There is one point that appears to be overlooked by the Class in their attempt to argue that the gift cards were not really coupons. The Class assumes that all coupons are similar to the coupons that can be cut out of the Sunday paper or downloaded from the internet that promise one dollar off the price of your next purchase of corn flakes. What they ignore is that coupons sometimes come as ten dollars off your next purchase from the xyz store. The supposed gift card in this case is very similar to that type of coupon. The Class informs us that 63% of claimants opted for the gift card which means further sales for Wal-Mart if the gift cards are redeemed. As was stated in the Frank Opening Brief on page 14, "If it looks like a duck, walks like a duck and quacks like a duck, it must be a duck. *In re: Safeguard Self-Storage Trust*, 2 F.3d 967, 970-74 (9th Cir. 1993). What the parties purport to call the item - whether "gift card" or "coupon" - is not controlling. Rather the Court must look to the substance of the item, no matter how cleverly it is disguised. The pleadings should not be allowed to defeat the intent of a statute; here the Class Action Fairness Act requirements for coupon settlements.

C. <u>The District Court should not have approved the settlement because the settlement was not fair, reasonable or adequate to class members.</u>

1. The District Court failed to make written findings of Fairness, Adequacy, and Reasonableness Supported by the Record.

The District Court failed to make written findings of fairness, adequacy, and reasonableness supported by the record as required by law in this case. Here the District Court merely listed the factors it considered, but the Federal Rules of Civil Procedure and Ninth Circuit Precedent Require Findings Supported by the Record. Under the Federal Rules of Civil Procedure and Ninth Circuit case law, a court cannot approve a class action settlement until it has held a hearing and found the settlement fundamentally fair, reasonable, and adequate. Fed. R. Civ. P. 23(e)(2). In making this determination, the Ninth Circuit requires judges to balance several factors. *Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1375 (9th Cir. 1993).

Where the record does not indicate a settlement followed sufficient discovery and genuine arms-length negotiation, that settlement receives no presumption of fairness. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998).

Without a memorandum opinion or equivalent on record in support of the judge's conclusions, an appellate court lacks any meaningful basis to judge the propriety of the trial court's exercise of its discretion. *Cotton v. Hinton*, 559 F.2d 1326, 1330. Only through a careful, reasoned, sufficiently detailed, on-the-record evaluation of the proposed settlement can the court meet it's obligation as guardian of the rights of absent class members.

2. **The value of the settlement to the class and the award of Attorney Fees.**

A District Court Award of Attorney Fees in a class action is reviewed for abuse of discretion. *Powers v. Eichen*, 229 F. 3d 1249, 1256 (9th Cir. 2000). A District Court abuses its discretion if its decision is based on an erroneous conclusion of law or it the record contains no evidence on which it rationally could have based its decision. *Fischel v. Equitable Life Assurance Soc'y*, 307 F. 3d, 997, 1005 (9th Cir. 2002) (quoting: *Paul Johnson, Alston & Hunt v. Graulty*, 886 F. 2D 268, 270 (9th Cir. 1989)).

The other Appellants have made extensive arguments concerning the value of the settlement including the improper inclusion of the Cost to Notice the Class in the common fund. Again rather than repeat the well reasoned

arguments of other Objectors/Appellants Cox adopts there well written and well thought out arguments.

3. The Settlement is Not Fair, Reasonable, or Adequate Because of the Improper Wal-Mart Reversion and Incorporation of "Confidential" Provisions Not Included in the Settlement

The "general rule" is against entertaining arguments on appeal that were not developed in the District Court. *Peterson v. Highland Music Inc.,* 140 F. 3d 1313, 1321 (9th Cir. 1998). However, the waiver is discretionary, not jurisdictional. *United States v. Northrop Corp*., 59 F.3D 953 (9th Cir. 1995).

The Settlement Agreement contains a provision allowing: "Wal-Mart, at its sole discretion, has the right to terminate this Settlement pursuant to the terms of the *confidential Supplemental Agreement Regarding Opt Outs*." ER 278. (Emphasis added.). There is no reference to the terms of this apparently secret contract in the Order and Final Judgment, nor is it even clear who the parties to the agreement were, beyond Wal-Mart itself. This agreement is not included as an exhibit to the Settlement Agreement, nor is it readily available from the litigation website. Its terms are a complete mystery to unnamed class members. Yet, it gives Wal-Mart unchecked power to kill the entire

Settlement. This provision was known to the District Court prior to approval because the Settlement Agreement was before the Court.

RELATED CASES

Appeal Nos. 12-15889, 12-15957, 12-15996, and 12-16010 are appeals by other objectors that have been consolidated with Frank's lead Appeal, 12-15705. *Resnick v. Netflix, Inc*., No. 11-18034 (9th Cir.) is Plaintiffs' appeal of the District court's order granting summary judgment for Netflix in this case.

Appeal Nos. 12-16160 and 12-16183 from the district court in this case are a collateral appeal by the plaintiffs and a collateral cross-appeal by defendant Netflix relating to the district court's award of costs, and do not affect this appeal.

CONCLUSION

For each of the foregoing reasons, and the reasons set out in the briefs and reply briefs of Frank, Zimmerman, Sullivan and Cope/Bandas, Appellant Cox respectfully submits that this Court should reverse the orders of the District Court approving this class action settlement and awarding attorney's fees.

Respectfully Submitted,

Date: 11/ 07/2012

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)(C)

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I certify that the foregoing brief is proportionately spaced, has a type-face of 14 points, and as calculated by my word processing software (Microsoft Word) contains 1,683 words.

Date: November 7 , 2012 /S/ Gary W. Sibley.

CERTIFICATE OF SERVICE
CM/ECF FILING/SERVICE
U.S. Court of Appeals, Case No. 11-15192

I hereby certify that on November 7, 2012, 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. Participants in the case who are registered CM/ECF users are served via the appellate CM/ECF system. (The foregoing Appellant's Brief will be served via First Class US Mail to the non-CM/ECF participants.)

Date: November 7, 2012 /S/ Gary W. Sibley.