NO. 12-16010

Consolidated with NOS. 12-15705 (L)

12-15889, 12-15957, 12-15996, 12-16038

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re ONLINE DVD RENTAL ANTITTRUST 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. 409-md-2029 PJH

Reply Brief
of Appellant John Sullivan

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SULLIVAN'S ARGUMENT IN REPLY

Ignoring arguments and authority does not make them go away. In fact, such conduct constitutes waiver. Class Counsel and the district court ignored many arguments made by Objector Sullivan below. Now Class Counsel again ignores these arguments on appeal. Class Counsel's refusal to address these arguments below and on appeal and the District Court's failure to weigh these arguments and issue a written finding dealing with these fee concerns mandate a remand.

Sullivan cited forty cases in his opening brief, and advanced nine, clear, discretely stated points of error for review. Class Counsel address only six of these cases, five of which (*Fernandez, Fleury, Menasha*, *Synfuel*, and *True*) are addressed solely in the context of the C.A.F.A. argument. The other one (*Mercury Interactive*) deals with the attorneys' fees.

1. Class Counsel ignore the holding in *Powers.*

Class Counsel did not address Sullivan's argument that pursuant to this Court's holding in *Powers v. Eichen*, 299 F.3d 1249 (9th Cir. 2000), the district court must "adequately explain" its fee determination. Class Counsel do not cite to, or address *Powers*. Sullivan argued this in point II-A of his brief (pages 45-48), and as #4 in his points of error. Sullivan argued that the district court did not make findings of fact and conclusions of law as required by Rule 23(h)[a provision also not cited in Class Counsels' response brief], and the

district court should be reversed because "failure to 'follow proper standards in awarding fees [is] inconsistent with the sound exercise of discretion.'" *Moore v James H. Matthews & Co*., 682 F.2d 830, 838 (9th Cir. 1982). Class Counsel has clearly waived any response to this issue, which independently requires remand.

2. Class Counsel ignore Sullivan's arguments as to costs.

Class Counsel ignore the entirety of Section III of Sullivan's brief, and points 8 & 9 of error: his arguments regarding costs. Class Counsel spent much effort dealing with Netflix's petition for costs. But Class Counsel seem to believe that their cost request need not be scrutinized at all.

Sullivan argued that the $1.7 million in litigation costs, and the $4.5 million in administration costs, should be first deducted from the settlement, before the percentage fee is calculated. Without citation to authority, Class Counsel claim it would be "nonsensical" to combine fees and litigation costs because advancing costs is necessary and "to have their reimbursement result in a corresponding reduction in the attorneys' fee would amount to unjust enrichment for the class (Plaintiffs' response at 34). This argument tautologically begs the question – the fee is only "reduced" if it is first assumed that costs should be part of the fund, which is the issue in dispute and thus cannot be assumed. Second, to allow counsel to take an additional 25% fee for all costs they incur promotes excessive costs. For instance, if it is reasonable to bill $1,000 in copies, and counsel make $11,000 in copies – they earn an extra

$2,500 in fees. For every additional $1.00 they spend in costs, counsel receives 25 cents. So counsel is incentivized to not scrutinize excessive expert fees and administration costs because they get a kickback of 25%. For instance, if $4,000,000 is not reasonable for class administration, and only $3,000,000 is reasonable, class counsel is not incentivized to raise this because they get an extra $250,000. Perhaps it was for this reason that the Howrey fee-agreement with the class-representative stated costs would be deduced *before* the fee was calculated [DE 300, Exhibit 13]. If the class-representative agreement binds the class, then the class should have the benefit of this agreement.

Sullivan also argued that the Wal-Mart settlement class should not bear the costs for the failed Netflix litigation class (on top of which counsel are profiting from their 25% *de facto* commission). [*See* Sullivan Opening Brief, point 9 (Argument III-A)]. These costs included meals, hotels, travel, etc. Class Counsel do not address the fact that this was given no scrutiny. Waiters and waitresses are lucky to get a 25% tip, but Class Counsel are earning an additional 25% of the value of every sumptuous meal they eat, and bill for (because those 'costs' are included in the common fund). The idea that Class Counsel is entitled to eat a meal and be paid in cash for 25% of the value of that meal as a "fee" is a perversion of the class device. What private litigant would allow his lawyer to tax him for meal costs and then claim that the recovery of meal expenses entitles him to more attorneys' fees? No individual

private litigant would permit such an outrageous fee structure – the class representative did not even agree to such an arrangement. This Court should not permit it either, in its role as a fiduciary to the Class.

3. Class Counsel ignore Sullivan's arguments about the disqualifying conflict of interest.

There is a serious conflict of interest in this case. Class Counsel's law firm represents consumers suing Wal-Mart in this case and but also represents Wal-Mart in other matters. This is a case of dual representation. Point 6 on appeal, [Sullivan's Opening Brf. Argument II-B2 (pp. 59-62)], was that discovery should have been permitted regarding the significant and disqualifying conflicts of interests that existed in the case. Sullivan cited six cases on this important issue (*Image-Tech*, *Blecher*, *Disner*, *Cal-Pak Delivery*, *Apple Computer*, and *Huston*). None of these cases were addressed by Class Counsel, nor was the substance of the argument addressed.

Sullivan argued that two conflicts of interest emerged in this case: one involving Class Counsels' attempt to represent and settle for both a "Netflix" and a "Blockbuster" class, and the other regarding lead Class Counsels' concurrent representation of Wal-Mart. The only reference to this in Plaintiff's response brief is on page 5, where they state: 'Netflix later moved to decertify the litigation class based on a claimed conflict of interest for Lead Counsel for

the Class, but the District court denied the motion, finding no basis for disqualification." (Plaintiffs' Brf. at 5) and citing to SER 1-2.

In making this holding, the district judge stated she reviewed the letters *in camera* and cited to the case of *Sharp v. Next Entertainment*, 163 Cal. App.4th 410, 433-34 (2008) [a case not cited in Class Counsel's brief]. *Sharp* is not applicable. There, no class had been certified, and the motion was being brought by Defendant, to whom Class Counsel owed no duty. Here, a class was certified – and a notice sent – but the notice did not say anything about the conflict. *Sharp* held that it would be impractical to require all class members to waive a conflict prior to class certification because it would *de facto* join them to the litigation. But once a class is certified, and notice sent, the class must be told of a conflict, as this information is material to the decision to opt out. In *Sharp*, the motion was a tactical motion brought early in the litigation by a defendant trying to disqualify its adversary's counsel. Here, the concern was raised by a class member-objector, to whom Class Counsel owe a duty, and the request was merely for discovery, not disqualification of the lawyers. *Cal-Pak Delivery v. United Parcel, 52 Cal. App. 4th 1 (1997), Apple Computer*, 126 Cal. App. 4th 1253 (2005), and *Huston v. Imperial Credit*, 179 F. Supp. 2d 1157 (N.D. Cal. 2001) all hold that the conflict issue cannot so easily be dispensed. Class counsel does not address any of these three cases (or even cite the case that supposedly favors them) – they just ignore the argument. Ignoring case law

and arguments does not make them go away. Like in *Rodriguez v. West Publishing Corp.*, the predecessor to *Disner,* the case should be remanded for hearing on the conflict issue. 563 F.3d 948, 960 (9th Cir. 2009)("simultaneous representation of clients with conflicting interests (and without informed written consent) is an automatic ethics violation in California"). Here, there is at a minimum a fact question on the issue of the "informed written consent" – which is why Sullivan requested discovery.

It should be noted as well that if this Court determines the class should be bound by the class-representatives' waiver, then Class Counsel should be bound by the class-representatives' fee agreement (regarding treatment of costs, see argument 2, above). When it's convenient for Class Counsel, the actions of the class representative bind the class. But when it hurts their pocketbooks, Class Counsel want to ignore the retainer agreement that they had with the Class Representative in order to collect a 25% "fee bonus" on all costs including, experts, class administration and meals.

4. Class Counsel do not cite or analyze Rule 23(h).

Rule 23(h)(1) is explicit: it directs that notice of the fee motion be directed to the class members in a reasonable manner. After this Court issued its opinion in *Mercury Interactive*, 618 F.3d 988, 993-94, some judges took the obligation seriously. Sullivan pointed, for instance, to the decisions in *Harris v. Vector Mktg. Corp.*, 2011 U.S. Dist. LEXIS 48878 (N.D. Cal. April 29, 2011),

Yoshioka v. Charles Schwab Corp., 2011 U.S. Dist. LEXIS 97383 (N.D. Cal. Aug 30 2011). Class Counsel simply ignore these cases.

But Class Counsel also ignore this court's holding in *Mercury*. They state,

> "Here, the District Court set a schedule whereby the deadline to object or opt out of the Settlement was set fifteen days *after* the date on which Class Counsel was to make their motion for an award of attorneys' fees and reimbursement of expenses, and the notice reflected the schedule. (SER 24)….This notice is exactly what *Mercury Interactive* requires."

(Plaintiffs' Brf. at 39).

This is simply not true. The notice at SER 24 says: "attorneys fees up to 25% of the fund." But as this court stressed in *Mercury*: "The plain text of the rule requires that any class member be allowed an opportunity to object to the fee 'motion' itself, not merely the preliminary notice that such a motion will be filed." The notice in this case is exactly what *Mercury Interactive* prohibits. Sullivan requests this court endorse the procedure devised and applied in *Harris* and *Yoshioka*, and direct similar procedures be followed on remand. This issue is languishing in the District Courts. The Circuit Court can provide guidance on this issue. In the information age, reasonable notice of a Rule 23(h) motion should inform class members that a an electronic copy of the fee request will be provided for their review for free on the internet for class member access prior to the objection deadline on a specific date.

5. Sullivan adopts Frank's reply on the C.A.F.A issues.

Sullivan and Frank made extensive objections below and in their opening briefs on why this case is covered by CAFA. Frank's reply adequately addressed all the issues on reply and Sullivan see no need for additional briefing on this issue.

Dated: November 9, 2012

Respectfully Submitted.

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Proof of Service

I hereby certify that on November 9, 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.

Executed on November 9, 2012

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