CASE NO.: 12-15889
CONSOLIDATED WITH: 12-15705, 12-15957, 12-15996, 12-16010, 12-16038

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

In re: ONLINE DVD RENTAL ANTITRUST LITIGATION

ANDREA RESNICK; et al.,

Plaintiffs-Appellees,

v.

JON M. ZIMMERMAN,

Objector-Appellant,

v.

NETFLIX, INC.; et al.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, OAKLAND DIVISION

OBJECTOR-APPELLANT ZIMMERMAN'S REPLY BRIEF

Joshua R. Furman, Bar No. 225461
JOSHUA R. FURMAN LAW CORP.
10940 Wilshire Boulevard, 18th Floor
Los Angeles, California 90024
Telephone: (310) 295-0404
Facsimile: (310) 861-0449

Attorney for Objector-Appellant
JON M. ZIMMERMAN

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I. INTRODUCTION

Class Counsel's Answering Brief fails to address the core issues raised in Appellant-Objector Zimmerman's Opening Brief and pays little regard to the valuation analysis that must take place before a court may approve a class action settlement under Rules.

Relying entirely on the fact that class members were offered a choice of cash or gift card and a significant number of the 3.4 percent of class members that actually bothered to file a claim selected gift cards, Class Counsel simply pretends that gift cards are properly valued the same as cash. Class Counsel does not acknowledge that requiring class members to provide Social Security Numbers and mail in a paper claim for cash payment may impact the number of cash selections when gift card claimants could file online and did not need to disclose Social Security Numbers. Class Counsel does not acknowledge that gift cards do not have a 100 percent redemption rate—which impacts the value of the gift cards to the class membership because only redeemed cards convey benefit. Class Counsel does not acknowledge that the use of gift cards is limited in ways that the use of cash is not limited—e.g., where it is redeemable, terms and conditions, nonfungibility, etc. Class Counsel does not acknowledge that gift cards convey value to the settling defendant by inducing class members to spend more money.

In addition, Class Counsel fails to address the fact that courts have consistently reject fluid recovery mechanisms, like the claim fund sharing mechanism proposed here, for failing to serve the purposes of class actions and because of the disparate and unfair treatment of silent non-claimant class members.

Common sense and black letter law instruct that these are factors which must be addressed in order to understand the propriety and value of a settlement including gift cards. Class Counsel offers no authority or argument to the contrary.

II. ARGUMENT

A. CLASS COUNSEL HAS WAIVED ALL ARGUMENTS REGARDING THE IMPROPRIETY OF ITS CLAIMANT FUND SHARING SCHEME

Class Counsel's Answering Brief fails to address this Objector's second issue on appeal: does the claim fund sharing structure of the settlement render it unapprovable?

Argument not raised in an appellee's answering brief is waived by the appellee. *Clem v. Lomeli*, 566 F.3d 1177, 1182 (9th Cir. 2009) ("where appellees fail to raise an argument in their answering brief, 'they have waived it'"), *quoting United States v. Gamboa-Cardenas*, 508 F.3d 491, 502 (9th Cir. 2007). *See also*, *Miller v. Fairchild Industries, Inc.*, 797 F.2d 727, 738 (9th Cir. 1986) (holding that matters not raised in a party's brief are ordinarily not considered by the Court of Appeals).

Objector-Appellant Zimmerman raised only two issues on appeal in his Opening Brief. The first issue was the gift card valuation issue addressed thoroughly by Class Counsel. [Answering Brief ("Ans."), pp. 18–27.] The second issue raised crucial concerns about the structure of the settlement itself—to which Class Counsel has not responded.

This settlement provides for a form of fluid recovery that does nothing to recompense or otherwise benefit over 96 percent of the class membership. As cited in Appellant's Opening Brief, Persuasive authority from the California Supreme Court draws a bright line rejecting such settlements. *State of California v. Levi& Co.*, 41 Cal.3d 460, 476 (1986) ("the advantages of claimant fund sharing can only be realized where a large proportion of class members participate and submit accurate claims").

Similar fluid recovery mechanisms are even more soundly condemned by the Court's sister circuits: "Such a method of computing damages in a class action has been appropriately branded as 'illegal, inadmissible as a solution of the manageability problems of class actions and wholly improper.'" *Windham v. American Brands, Inc.*, 565 F.2d 59, 72 (4th Cir. 1977) (quoting *Eisen v. Carlisle & Jacquelin*, 479 F.2d 1005, 1018 (2d Cir. 1973)).

Accordingly, not only is the method of recovery unfair to the class members—particularly the staggering majority of injured silent class members

who will receive nothing at all—the question remains as to whether a class action such as the one before the Court may even be certifiable. Class Counsel has failed to address any of these questions and the order approving settlement may be reversed on these grounds alone.

B. CLASS COUNSEL'S RELIANCE ON THE "CASH OPTION" AS A PROXY FOR PROPER EVIDENCE OF VALUE OF ITS GIFT CARD "COUPON" SETTLEMENT IGNORES THE ANALYSIS REQUIRED UNDER RULE 23

1. *Reibstein* and *O'Brien* Do Not Support Approval of This Settlement

Class Counsel relies entirely on two district court motion rulings from the Third Circuit for the proposition that gift card class action settlements can be approved on the same basis as cash. Neither of these cases, even if they were considered meaningfully persuasive, provide any support for the idea that the value of the gift cards here is equivalent to their face value in cash because class members were supposed offered a choice between cash or cards of equal value.

In *Reibstein v. Rite Aid Corporation*, 761 F.Supp.2d 241 (E.D. Pa. 2011), 366 class members each had their non-truncated credit card numbers and credit card expiration dates reprinted on Rite Aid receipts, a technical violation of federal consumer protection laws. *E.g.*, *id.* at 245. The *Reibstein* court noted that, since the settlement consisted of gift cards, "[a]s a non-monetary award, this fund

'deserve[s] careful scrutiny to ensure … [it] ha[s] actual value to the class.'" *Id.* at 255 (quoting Fed. R. Civ. P. 23, Advisory Committee Note) (first alteration here, subsequent alterations in original).

Applying that careful scrutiny, the *Reibstein* court reviewed actual evidence that each of the class members had patronized the Rite Aid self-service pharmacy dispenser (the transaction at the genesis of the class claims) an average of seven times, and approved a gift card settlement because: "In this case, the gift cards have actual cash value, are to be mailed to a class of (mostly) regular customers, have no expiration date, are freely transferrable, and can be used for literally thousands of products for which ordinary consumers, including class members, have need." *Id.* at 255–256 (footnote omitted). In light of the evidence, the court held that, "***Under these circumstances***, the gift cards are more like 'cash' than 'coupons.'" *Id*. at 256 (emphasis added). Class counsel cites to the same sentence from *Reibstein* (Ans. p. 14) but misleadingly omits the prepositional phrase.

"These circumstances" are not present in this case. There was no evidence before the trial court upon which it could have made any of the determinations that the *Reibstein* court made. Importantly, many of the facts before the trial court here are different. For example, the gift cards here are subject to the terms and conditions of Wal-Mart gift cards in general and do not necessarily have cash value. Additionally, there was no evidence submitted that would tend to indicate

any Netflix consumer (the criteria for class membership) would be interested in Wal-Mart gift cards. In contrast to *Reibstein*, not only is there no evidence that the class membership routinely patronized Wal-Mart, there is no evidence that the class membership ***ever*** patronized Wal-Mart.

Class Counsel's reliance on *O'Brien* is equally misplaced. First, *O'Brien* is a coupon case, not a gift card case. Second, the court in *O'Brien* refused to value the coupons there at face value. Instead of accepting the settlement proponent's proffered face value, as the trial court did here, the *O'Brien* court performed a careful analysis in assessing the value of the settlement at least for attorneys' fees purposes.

> The value of this coupon is more difficult to fix. While the maximum savings that a class member could realize by using the coupon would be $29.97, the Court need not accept this figure as the value of the coupon. First, it is difficult to measure the subjective value that each class member would attach to the coupon; the only inference the Court can draw is that the class members choosing the coupon value it at least as much as the twenty dollar cash payment, for if they valued it less, they would have opted for cash. Second, Defendant likely valued the coupon at less than the $20 cash payment as

> reflected by the fact that they did not cap the number of coupons it would issue. Third, Defendant is likely to profit further from the additional sales resulting from class members using their coupons. [Citation.] Given these factors, the Court values the coupon option at no more than $20 per class member.

O'Brien v. Brain Research Labs, LLC, 2012 U.S. Dist. LEXIS 113809, **72–73 (D.N.J. Aug. 9, 2012). Accordingly, while the *O'Brien* court did note the choice made by class members, it actually valued the coupons at nearly 30 percent less than the maximum face value advocated by the settlement proponents.

Moreover, the *O'Brien* court was faced with a nearly 10 percent claim rate out of a total noticed class membership of 254,657 (*id*. at *41), which is on the order of 10 times the gift-card selecting claim rate in this case. That is a significantly more positive response than Class Counsel's proposed settlement, the injustice of which is magnified exponentially considering that the class here includes over 35 million people. One district court's decision to overlook the rights of approximately 220,000 silent class members does not justify overlooking 34 million silent class members here.

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2. Argument Regarding the Offenberg Study Impels the Question of Actual Gift Card Valuation in This Case

Class Counsel acknowledges that the purpose of the Offenberg study was to arrive at actual consumer valuation of gift cards through controlled examination of comparables. (Ans. p. 30.) Class Counsel tries to argue that the Offenberg study supports the face value of the gift cards here because of the rate at which class member claimants selected gift cards versus cash. Class Counsel's argument implies that the *ad hoc* comparison of quantities of gift card claims and cash claims made in this case is the analytic equivalent of a controlled statistical economic study in a peer-reviewed journal. Class Counsel argues too much.

By attempting to elevate the logical leap it is offering the Court to the same level as an academic economic analysis, Class Counsel illustrates the ridiculousness of its argument. Class Counsel's "choice" involved very different consumer behaviors for each of the choices. Class member claimants choosing cash payments had to submit Social Security Numbers[1] and could only submit claims on paper by mail. There is no attempt to control for these factors or understand how they impact the consumer choice. In addition, there is no attempt

[1] Class Counsel's point that the *entire* Social Security Number was not required argues a distinction without a difference. Asking for a Social Security Number was an unjustifiable and deliberate impediment for class members who would have otherwise preferred case.

to analyze any other factor vis-à-vis value inherent to gift cards and coupons, such as redemption rates and value to the settling defendant.

The point of the citation to the Offenberg study is that these issues can and should be considered in order to arrive at a rigorous and sound true value for non-cash settlement funds of any kind. An economic analysis would not have been difficult and could have been submitted to the trial court in the form of a declaration in support of the motion for preliminary or final approval of the settlement. The failure to do so is inexcusable and borders on breaches of Class Counsel's duty of candor to the trial court. Class Counsel failed to provide a legally cognizable way to value the non-cash settlement fund, and the settlement lacked sufficient evidentiary support for approval.

3. Class Counsel Offers No Response to the "Breakage" and "Upspending" Problems with Gift Cards

As with the previously raised issues, the trial court could not have arrived at the actual value of the settlement without considering the breakage and upspending problems endemic with gift cards. Class Counsel's Answering Brief fails to provide any countervailing argument on the subject.

As to the breakage question, what will happen to the value of the gift cards that are not used? While the gift cards theoretically do not expire, that does not mean that the class membership actually receives value for gift cards that are never

redeemed. To the contrary, the dollar amount of the unredeemed gift cards provides a boost to Wal-Mart's balance sheet and improperly inflates the value of the settlement for attorneys' fees cross-check and percentage purposes.

The same goes for upspending. The value of the gift cards is inherently different from cash—even cash spent at Wal-Mart—because consumer behavior with gift cards is different that cash. In short, consumers spend more in total purchase dollars when part of the purchase is a gift card compared to purchases made with cash. This phenomenon enhances the value of the gift card settlement to Defendant Wal-Mart and lowers the value of the settlement in terms of class membership value to a commensurate degree.

The settlement valuation by the trial court failed to address these facts. Class Counsel's Answering Brief here provided no reason why they should have been addressed. To the contrary, these issues clearly go to the heart of the value of the settlement and the trial court's analysis under Federal Rule of Civil Procedure 23(e)(2). The settlement should be overturned and remanded for further review of the actual value including these considerations.

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III. CONCLUSION

For each of the foregoing reasons, Objector-Appellant JON M. ZIMMERMAN respectfully submits that the Court should reverse the orders of the District Court approving class action settlement and awarding attorneys' fees.

DATED: November 9, 2012

By: /s/ Joshua R. Furman
Joshua R. Furman
Attorney for Objector-Appellant
JON M. ZIMMERMAN

CERTIFICATE OF SERVICE

I hereby certify that on August 22, 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.

As to the participants in the case who are registered CM/ECF users, service will be accomplished by the appellate CM/ECF system. As to the other participants identified herein, they will be served by U.S. Mail effective this date.

DATED: August 22, 2012

By: /s/ Joshua R. Furman
Joshua R. Furman
Attorney for Objector-Appellant
JON M. ZIMMERMAN

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Signature /s/ Joshua R. Furman

Attorney for Appellant-Objector Jon M. Zimmerman

Date November 9, 2012

JOSHUA R. FURMAN
ATTORNEY AT LAW

10940 WILSHIRE BOULEVARD, 18TH FLOOR
LOS ANGELES, CALIFORNIA 90024
TELEPHONE: (310) 295-0404
FACSIMILE: (310) 295-0405

October 19, 2012

VIA ECF

Robert G. Abrams, Esq.
rabrams@bakerlaw.com

Gregory L. Baker, Esq.
gbaker@bakerlaw.com

Carey Busen, Esq.
cbusen@bakerlaw.com

Lawrence C. DiNardo, Esq.
lcdinardo@jonesday.com

Theodore T. Frank, Esq.
tfrank@gmail.com

Melissa Holyoak, Esq.
melissaholyoak@gmail.com

Jonathan M. Jacobson, Esq.
jjacobson@wsgr.com

Christopher V. Langone, Esq.
langonelaw@gmail.com

Mark Lavery, Esq.
mtllaw@gmail.com

Darrell Palmer, Esq.
darrell.palmer@palmerlegalteam.com

Grenville Pridham, Esq.
grenville@grenvillepridham.com

Adam Schulman, Esq.
shuyande24@gmail.com

Gary Sibley, Esq.
g@juris.cc

RE: ***Zimmerman, et al. v. Netflix, et a.***
9th Cir. Case No. 12-15889

Dear Counsel:

Please be informed that the Clerk has granted Appellant Zimmerman's request for an extension of time to file his reply brief in this matter. We have been instructed to give notice that Appellant Zimmerman's reply brief is now due November 9, 2012.

Please feel free to contact the undersigned if you have any questions or concerns.

Very truly yours,

/s/ Joshua R. Furman

JOSHUA R. FURMAN