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13 UNITED STATES DISTRICT COURT  
14 NORTHERN DISTRICT OF CALIFORNIA  
15 OAKLAND DIVISION

17 IN RE ONLINE DVD RENTAL  
18 ANTITRUST LITIGATION

Master File No.: 4:09-md-2029 PJH (JCS)  
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Hon. Phyllis J. Hamilton

19 This document relates to:  
20 All Actions

**NETFLIX'S RENEWED MOTION TO  
DECERTIFY THE NETFLIX  
SUBSCRIBER LITIGATION CLASS**

Date: September 28, 2011  
Time: 9:00 a.m.

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1 **NOTICE OF MOTION AND MOTION**

2 PLEASE TAKE NOTICE that on September 28, 2011, in the courtroom of the Hon.  
3 Phyllis J. Hamilton, Courtroom 3, United States District Court, Northern District of California,  
4 1301 Clay Street, Oakland, California, Defendant Netflix Inc. (“Netflix”) will and hereby does  
5 move pursuant to Federal Rule of Civil Procedure 23(c)(1)(C) to decertify the Netflix subscriber  
6 litigation class that was certified in this action pursuant to the Court’s Order dated December 23,  
7 2010. The motion is based on this Notice of Motion and Motion, the Memorandum of Points  
8 and Authorities, the pleadings and papers on file in this action, and any other submissions or  
9 arguments of counsel as may be presented to the Court.

10  
11 **MEMORANDUM OF POINTS AND AUTHORITIES**

12 **I. INTRODUCTION**

13 Once again, Plaintiffs’ counsel have acted as though the rules do not apply to them. This  
14 motion renews Netflix’s earlier motion to decertify the class of Netflix subscribers because the  
15 class is not adequately represented by the appointed class counsel. Netflix was recently  
16 informed that Lead Class Counsel’s firm currently represents the class’ adversary Walmart in  
17 other matters. Such a direct conflict should have been disclosed by Lead Class Counsel to the  
18 Court and to the other parties in this litigation at the time the conflict arose several months ago.  
19 Instead, Class Counsel remained silent about the conflict while simultaneously negotiating and  
20 subsequently pushing for approval of a settlement with Walmart -- a settlement that provides  
21 significant marketing benefits to Walmart, millions to Class Counsel, and thousands to the  
22 named class representatives. While Class Counsel claims to have obtained conflict waivers from  
23 the named class representatives, such waivers, which Plaintiffs have not produced, are  
24 ineffective. Direct conflicts cannot be waived on behalf of absent class members, especially  
25 where the waivers are obtained from interested class representatives on the verge of collecting  
26 thousands of dollars in incentive payments under the settlement. Because the conflict violates  
27 Lead Class Counsel’s duty of loyalty to its clients, representation of the class is not adequate, and  
28 the class must consequently be decertified.

1 **II. BACKGROUND**

2 On December 23, 2010, the Court issued its Order granting plaintiffs' motion for  
3 certification of a class of persons who subscribed to Netflix's online DVD rental service between  
4 May 19, 2005 and December 23, 2010. *See* ECF No. 287. After discovering certain  
5 irreconcilable conflicts of interest between the class of Netflix subscribers and the putative class  
6 of Blockbuster subscribers, both of whom were represented by the same counsel, Netflix moved  
7 to decertify the class. ECF No. 329. The Court agreed with Netflix that Class Counsel was  
8 conflicted in representing both the Blockbuster and Netflix subscribers in their settlement  
9 negotiations with Walmart and that Plaintiffs should have used separate counsel for each class.  
10 *See* ECF No. 346 at 26:20-27:16; ECF No. 348. The Court determined, however, that  
11 decertification of the litigation class of Netflix subscribers was not required since the Court had  
12 decided instead to reject the Walmart settlement and to decline to certify the proposed settlement  
13 classes where the conflict had arisen. *See id.*

14 After rejection of the initial Walmart settlement, Lead Class Counsel filed a notice that he  
15 was changing law firms to Baker & Hostetler LLP ("Baker"). ECF No. 359. Class Counsel  
16 never disclosed that Baker also currently represents Walmart in other matters. Over the next  
17 several months, despite his direct conflict with Walmart, Class Counsel continued to represent  
18 Plaintiffs in negotiating a revised settlement with Walmart, and filed a motion for preliminary  
19 approval of the revised settlement on July 15, 2011. ECF No. 454. Just recently, Netflix was  
20 informed of Class Counsel's conflicted representation via an anonymous letter and requested  
21 further information from Mr. Abrams about the conflict. Lead Class Counsel admitted the  
22 conflict but claimed to have obtained conflict waivers from the class representatives.<sup>1</sup>

23 Because the recently discovered conflict precludes Class Counsel from providing  
24 adequate representation and is unwaivable, Netflix renews its motion for class decertification.

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25  
26 <sup>1</sup> Class Counsel has not produced these conflict waivers, *see* ECF No. 472 at 8 n.5, despite  
27 the fact that Plaintiffs were previously compelled to produce their attorney retainer agreements  
28 after Judge Spero held that such notices sent to alert clients of representation issues are not  
privileged, *see* ECF No. 301 at 8:22-9:3; ECF No. 304; ECF No. 306.

1 **III. LEGAL STANDARD**

2 “A district court may decertify a class at any time.” *Rodriguez v. W. Publ’g Corp.*, 563  
 3 F.3d 948, 966 (9th Cir. 2009); *see also* Fed. R. Civ. P. 23(c)(1)(C) (“An order that grants or  
 4 denies class certification may be altered or amended before final judgment.”); *Gen. Tel. Co. v.*  
 5 *Falcon*, 457 U.S. 147, 160 (1982) (“Even after a certification order is entered, the judge remains  
 6 free to modify it in the light of subsequent developments in the litigation.”). Where a conflict  
 7 arises subsequent to certification that precludes adequate representation of absent class members,  
 8 the court should decertify the class. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625-626  
 9 (1997) (affirming decertification order); *In re N. Dist. of Cal., Dalkon Shield IUD Prods. Liab.*  
 10 *Litig.*, 693 F.2d 847, 851 (9th Cir. 1982) (“Even if the class were otherwise acceptable, it would  
 11 have to be decertified if adequate lead counsel turned out to be unavailable.”). Here,  
 12 decertification is proper because a conflict has arisen that precludes adequate representation by  
 13 Class Counsel of the absent class members.

14 **IV. THE CLASS SHOULD BE DECERTIFIED BECAUSE THE REQUIREMENT OF**  
 15 **ADEQUACY OF REPRESENTATION IS NOT MET**

16 **A. There Is No Adequacy of Representation When Class Counsel Are Conflicted**

17 Rule 23(a) requires that absent class members must be adequately represented or the class  
 18 cannot be certified. Fed. R. Civ. P. 23(a)(4). Rule 23(g) likewise imposes a requirement of  
 19 adequacy of class counsel as a component of class certification. Fed. R. Civ. P. 23(g) (Court  
 20 certifying a class “must appoint” class counsel and “Class counsel must fairly and adequately  
 21 represent the interests of the class.”)<sup>2</sup> The Rule 23(g) qualifications guide the court “in  
 22  
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24  
 25 <sup>2</sup> The Court’s December 23, 2010 order did not analyze the Rule 23(g) factors and did not  
 26 expressly make an appointment of class counsel. To the extent the Court was reserving this  
 27 decision for a later time, class certification should be rescinded for that reason as well, because  
 28 appointment of class counsel is a requirement of certifying a class under Rule 23. *See* Fed. R.  
 Civ. P. 23(c)(1)(B) (“An order that certifies a class action . . . must appoint class counsel under  
 Rule 23(g).”); *see also Bickel v. Sheriff of Whitley Cnty.*, No. 08-102, 2010 WL 883654, at \*9  
 (N.D. Ind. Mar. 5, 2010).

1 assessing proposed class counsel as part of the certification decision.” Fed. R. Civ. P. 23(g)  
2 Advisory Committee’s Note.

3 “To satisfy constitutional due process concerns, absent class members must be afforded  
4 adequate representation before entry of a judgment which binds them.” *Hanlon v. Chrysler*  
5 *Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998); *see also Simon v. Ashworth, Inc.*, No. 07-1324, 2007  
6 WL 4811932, at \*2 (C.D. Cal. Sept. 28, 2007) (“The adequacy of representation requirement is  
7 of critical importance in determining whether a class should be certified because class members  
8 who are not named parties to the suit are bound by the judgment”). Where class counsel have  
9 conflicts that prevent them from carrying out their duties of loyalty to all of their clients,  
10 adequacy of representation is not met, and no class should be certified. *Amchem*, 521 U.S. at 626  
11 n.20 (“The adequacy heading also factors in competency and conflicts of class counsel.”);  
12 *Falcon*, 457 U.S. at 157 n.13 (the adequacy requirement “raises concerns about the competency  
13 of class counsel and conflicts of interest”).

14 **B. Lead Class Counsel is Conflicted Because His Firm Concurrently Represents**  
15 **Both the Plaintiff Class and Defendant Walmart**

16 The Netflix subscriber class should be decertified because Lead Class Counsel is fatally  
17 conflicted as his firm also represents Walmart -- an adverse party and adverse witness to the  
18 class in this action -- in other matters.

19 Where class counsel also represents an adverse defendant or an adverse witness in other  
20 matters, they are too conflicted to provide adequate representation to the class and certification  
21 must be denied. *Baas v. Dollar Tree Stores, Inc.*, No. 07-03108, 2008 WL 906496, at \*3-4 (N.D.  
22 Cal. Apr. 1, 2008). In *Baas*, the court denied class certification because class counsel also  
23 represented an adverse witness in unrelated matters. *Id.* The court recognized that in order to  
24 prevail on the class claims, class counsel would “either have to cross-examine [the adverse  
25 witness client] and impeach his credibility, or ‘soft-pedal’ their examination of [the adverse  
26 witness client] to the detriment of their representation of the class members in this action.” *Id.* at  
27 \*4. The court held that such a conflict would violate the “duty of loyalty Plaintiffs’ counsel owe  
28 to all their clients.” *Id.* at \*3. Consequently, certification had to be denied. *Id.* at \*4.

1 A “heightened standard” of professional responsibility applies to class counsel who seek  
2 to represent absent class members. *Moreno v. Autozone, Inc.*, No. 05-4432, 2007 WL 4287517,  
3 at \*7 (N.D. Cal. Dec. 6, 2007). Even the mere “appearance” of divided loyalties justifies a  
4 finding of inadequate representation. *Kayes v. Pac. Lumber Co.*, 51 F.3d 1449, 1465 (9th Cir.  
5 1995). “The ‘appearance’ of divided loyalties refers to differing and potentially conflicting  
6 interests and is not limited to instances manifesting such conflict.” *Id.* Thus whether class  
7 counsel has actually acted to the detriment of the interests of the class is irrelevant.

8 The degree of similarity between the matters in which the two separate clients are  
9 represented by class counsel is likewise of little significance. “[R]epresentation adverse to a  
10 *present* client must be measured not so much against the similarities in litigation, as against the  
11 duty of undivided loyalty which an attorney owes to each of his clients.” *Baas*, 2008 WL  
12 906496, at \*2 (quoting *Truck Ins. Exch. v. Fireman’s Fund Ins. Co.*, 6 Cal. App. 4th 1050, 1056  
13 (1992); *Unified Sewerage Agency v. Jelco Inc.*, 646 F.2d 1339, 1345 (9th Cir. 1981)). “The  
14 spectacle of an attorney skewering her own client on the witness stand in the interest of  
15 defending another client demeans the integrity of the legal profession and undermines confidence  
16 in the attorney-client relationship.” *Id.* (quoting *Hernandez v. Paicius*, 109 Cal. App. 4th 452,  
17 467 (2003)).

18 The attorney ethics rules of various states recognize the heightened sensitivity to this  
19 issue that should be brought to bear in the class action context. In particular, California has a  
20 “stringent approach to conflicts involving representation of absent class members.” *Moreno*,  
21 2007 WL 4287517, at \*7 (emphasis omitted). “[P]utative class counsel are held to a ‘heightened  
22 standard’ which they must meet if they are to be allowed by the Court to represent absent class  
23 members.” *Id.* (quoting *Huston v. Imperial Credit Commercial Mortg. Inv. Corp.*, 179 F. Supp.  
24 2d 1157, 1167 (C.D. Cal. 2001)).

25 Here, as in *Baas*, representation is not adequate because Lead Class Counsel’s law firm  
26 cannot represent the class without violating the duty of loyalty owed to its other client, Walmart.  
27 Walmart and its employees have uniformly testified in deposition and would testify at trial that,  
28 contrary to the heart of the class’ claims, there was no market allocation agreement or other

1 illegal or improper conduct with Netflix. Thus, as in *Baas*, in order to prevail on the class'  
2 claims, Lead Class Counsel will "either have to cross-examine [their very own client Walmart]  
3 and impeach [its] credibility, or 'soft-pedal' their examination of [the Walmart witnesses] to the  
4 detriment of their representation of the class members in this action." In fact, to prevail on their  
5 claims, Class Counsel will need to do much more than just impeach the credibility of the  
6 Walmart witnesses, Class Counsel will need to convince the jury that every one of the Walmart  
7 witnesses is "a liar" in testifying that Walmart decided to exit the DVDR business independent  
8 from any agreement with Netflix. *Baas*, 2008 WL 906496, at \*3 ("Plaintiffs' counsel will either  
9 need to portray [their adverse witness client] as a liar or as a manager who knowingly violated  
10 his company's policies."). Because such a conflict is impermissible under the heightened duty of  
11 loyalty Class Counsel owes to the class, the class should be decertified.

12 **C. Class Representatives Cannot Waive Class Counsel's Conflicts on Behalf of**  
13 **Absent Class Members**

14 The fact that Class Counsel claims to have obtained waivers from Walmart and the  
15 named class representatives does not cure the conflict with absent class members who have not  
16 provided informed written consent. Without speculating as to why Walmart and the class  
17 representatives might have been motivated to provide waivers of the conflicted representation  
18 here, the lack of disclosure by Class Counsel (including the failure to disclose the conflict in the  
19 pending motion to approve the proposed settlement between the joint clients) is a sufficient  
20 justification to discount the conflict waivers obtained by Class Counsel. *See Kayes*, 51 F.3d at  
21 1465 (the mere "appearance" of impropriety justifies a finding of inadequate representation).

22 More importantly, even if Class Counsel attempted to "cure" the conflict by obtaining  
23 informed written consent from the named class representatives, that avenue is not available to  
24 them in the class action context. Class representatives cannot waive a conflict on behalf of  
25 absent class members as a matter of law. *Baas*, 2008 WL 906496, at \*4 ("Even if this conflict of  
26 interest could be waived, Plaintiffs' counsel would need to obtain waivers from every class  
27 member, which, as a practical matter, they cannot do from the absent class members. Therefore,  
28 the Court concludes that Plaintiffs have not demonstrated their counsel would adequately

1 represent the class as required by Rule 23(a)(4).”); *see also Moreno*, 2007 WL 4287517 at, \*7  
2 (“As a practical matter, [the law firm] cannot obtain written waiver of the actual conflicts of  
3 interest that exist from the absent class members.”); *Palumbo v. Tele-Communications, Inc.*, 157  
4 F.R.D. 129, 133 (D.D.C. 1994) (“Unidentified class members cannot waive a potential conflict  
5 of interest.”); *McCauley v. Family Dollar, Inc.*, No. 10-0363, slip op. at 6 (W.D. Ky. Nov. 1,  
6 2010) (ECF No. 330-6) (court found it “unlikely that a named plaintiff could waive a conflict on  
7 behalf of the entire class” where state ethical rule requires individualized consent); *Davis v.*  
8 *Kraft Foods N. Am.*, No. 03-6060, 2006 WL 237512, at \*13 (E.D. Pa. Jan. 31, 2006) (“I do not  
9 believe [the class representative] can waive any conflict on the class’s behalf.”); *All Star Carts &*  
10 *Vehicles, Inc. v. BFI Can. Income Fund*, No. 08-1816, 2010 WL 2243351, at \*7 (E.D.N.Y. June  
11 1, 2010) (“There is authority to support Defendants’ position that in the class action context, a  
12 conflict of interest cannot be waived.”).

13 Here, even to try to obtain an effective waiver, Class Counsel would have been required  
14 to obtain informed written consent from “each” of the tens of millions of absent class members  
15 before continuing to represent the class when the conflict arose. Cal. R. Prof. Conduct 3-310(C)  
16 (attorneys must obtain “the informed written consent of each client” before even accepting  
17 representation of clients that are adverse to other clients).<sup>3</sup> Class Counsel failed to obtain the  
18 required written waivers -- nor could they have done so as a practical matter.

19 Class Counsel therefore cannot cure the conflict by waiver. But even if they could, the  
20 waivers Class Counsel purportedly did obtain from the named class representatives are plainly  
21 defective. Those waivers were not obtained until after the settlement negotiations (both last year  
22 and this year) resulting in agreements to pay each class representative several thousand dollars.

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26 <sup>3</sup> Pretrial Order No. 3 required any counsel appearing *pro hac vice* to affirm they would abide  
27 by Civ. L.R. 11-4, which requires adherence to the standards of professional conduct of the  
28 State Bar of California. *See* ECF No. 41. The language requiring adherence to Civ. L.R. 11-  
4 was specifically added by the Court to the text of Plaintiffs’ proposed order. *Compare* ECF  
No. 36 *with* ECF No. 41.

1 The waivers were thus not signed by disinterested parties. Consequently, as in the cases cited  
2 above, Class Counsel cannot adequately represent the class.

3 **D. Class Counsel’s Failure to Report the Conflict Demonstrates that the Class is**  
4 **Not Adequately Represented**

5 Class Counsel owed a fiduciary duty to the class and duty of candor to the Court that  
6 required disclosure of the conflict when it arose. The failure to fulfill these duties demonstrates  
7 that the class is not adequately represented.

8 Class counsel has a duty to report potential conflict issues. *Rodriguez*, 563 F.3d at 968  
9 (“class counsel’s fiduciary duty is to the class as a whole and it includes reporting potential  
10 conflict issues”). A failure to disclose conflict issues to the court “violate[s class counsel’s]  
11 fiduciary duties to the class and duty of candor to the court.” *Id.* at 959. “And failing to disclose  
12 [conflicts] in connection with class certification compound[s potential impropriety] problems by  
13 depriving the court, and the class, of the safeguard of informed judicial consideration of the  
14 adequacy of class representation.” *Id.* at 960.

15 Here, Lead Class Counsel did not disclose to the Court its direct conflict with the plaintiff  
16 class for several months -- not until after the conflict was discovered by Netflix through pure  
17 happenstance when it received an unmarked envelope postmarked from Philadelphia. As in  
18 *Rodriguez*, the failure to disclose this conflict at the time it arose was inconsistent with Class  
19 Counsel’s fiduciary duty to absent class members and its duty of candor to the Court. In light of  
20 the direct, actual conflict between the Netflix subscriber class and Walmart, in a circumstance  
21 where the conflict cannot be waived by absent class members, the conflict was not disclosed, and  
22 Class Counsel is subject to a heightened duty of loyalty in representing absent class members,  
23 there can be no adequacy of representation under Rule 23, and the class should be decertified.

24 **V. CONCLUSION**

25 For the reasons set forth herein, the Court should decertify the class of Netflix subscribers  
26 previously certified in this action.

1 Dated: August 12, 2011

Respectfully submitted,

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