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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:

**NETFLIX'S OPPOSITION TO
PLAINTIFFS' SECOND MOTION
FOR PRELIMINARY APPROVAL OF
SETTLEMENT WITH WALMART**

20 All Actions

Date: August 24, 2011
Time: 9:00 a.m.

1 **I. INTRODUCTION**

2 Netflix does not object to the settlement itself. It does, however, object strongly to the
3 manner of effectuating the proposed settlement and notice plan, which in effect, would authorize
4 a massive court sponsored marketing campaign by a Netflix competitor to Netflix's current and
5 former subscribers in a manner that unnecessarily is designed to tarnish Netflix's reputation.
6 Furthermore, Netflix would like to remind the Court that it is hardly surprising that Walmart is
7 motivated to settle with Plaintiffs in exchange for access to Netflix's trade secret customer list
8 and a massive publication plan that targets millions of potential online consumers with an
9 incentivized offer to utilize Walmart's online service. This motivation, and the potential
10 competitive disadvantage it poses for Netflix, is highlighted by the fact that Walmart has
11 renewed aggressively marketing its competing Vudu movie streaming service.

12 This is Plaintiffs' (and Walmart's) second defective attempt to obtain preliminary
13 approval of their settlement. The prior attempt was rejected by the Court for a number of
14 reasons, including the proposed notice plan. This time around, Plaintiffs again inexplicably
15 attempt to advance the same proposed notice plan as before (no mail notice and massive
16 publication) in utter disregard of the concerns that the Court observed and recognized in denying
17 Plaintiffs' prior request for preliminary settlement approval. The second motion for preliminary
18 approval of the settlement should likewise be denied because the proposed notice plan is fatally
19 deficient.

20 As the Court has already determined, the properly designed notice plan under the
21 circumstances is to (1) provide e-mail notice to current and former Netflix subscribers, (2) send a
22 hard-copy notice by mail to the members whose e-mails "bounce back" as undeliverable; and (3)
23 limited publication notice to follow, if necessary. This practice is typical in these types of cases,
24 is one that Netflix has done before when it settled a class action, and it limits the reputational
25 harm to Netflix. While this does not prevent the perverse result of Walmart being able, through
26 a court order, to promote its online services directly to Netflix current and former subscribers, it
27 does limit the ability of the only two parties to the settlement (Plaintiffs and Walmart) to damage
28

1 unfairly Netflix's reputation when Netflix has done nothing wrong. Because the proposed plan
2 fails to address the Court's and Netflix's serious concerns, it should be rejected.

3 **II. PLAINTIFFS' MOTION SHOULD BE DENIED BECAUSE THE SETTLEMENT**
4 **FAILS TO COMPLY WITH THE COURT'S PRIOR INSTRUCTIONS**
5 **CONCERNING NOTICE TO THE CLASS**

6 Plaintiffs' motion for preliminary approval should be denied because Plaintiffs have
7 again failed to address the Court's concerns about providing adequate and proper notice to class
8 members. At the hearing on Plaintiffs' last attempt to obtain preliminary approval of the
9 settlement, the Court agreed with Netflix that to effect class notice, Plaintiffs should first send
10 out email notice to class members, followed by U.S. Mail notice to any class members whose
11 email addresses are found to be inoperative or invalid. *See* ECF No. 438 at 70:8-25. The Court
12 also agreed with Netflix that publication of the notice should be limited and should not become a
13 marketing campaign for Walmart aimed at diverting potential Netflix customers away from
14 Netflix's service. *Id.*

15 Plaintiffs' "revised" notice plan ignores the Court's previously-expressed concerns, and
16 indeed exacerbates them. The revised notice plan fails to provide for U.S. Mail notice to class
17 members whose email addresses are found to be inoperative or invalid. Instead, Plaintiffs' notice
18 plan takes the unrestrained approach of broad and scattered publication notice in consumer
19 magazines and social websites. As Netflix explained in its objections to the prior notice plan,
20 this plan is defective because Rule 23 requires that all class members be individually notified
21 where practicable. *See* ECF No. 328. Under Rule 23, the "the court must direct to class
22 members the best notice that is practicable under the circumstances, including individual notice
23 to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B)
24 (emphasis added). "[T]he import of this language is unmistakable. Individual notice must be
25 sent to all class members whose names and addresses may be ascertained through reasonable
26 effort." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173 (1974) (emphasis added).

27 Here, Plaintiffs' own expert concedes that because Plaintiffs' proposed notice plan does
28 not include direct mail notice to class members with inoperable email addresses, over 2.1 million
class members (about 5.3% of the estimated 40 million class members) will never receive any

1 notice of the settlement. ECF No. 454-2 ¶ 35. Such a result is unwarranted here, because
2 Plaintiffs will have access to the mailing addresses for any class member whose email address is
3 no longer valid or operable. 1 McLaughlin on Class Actions § 5:80 (“[i]f a list of class members
4 already exists, the fact that mailing the notice is expensive is rarely, if ever, a basis to circumvent
5 Rule 23(c)(2)(B)’s requirement of individual notice.”).

6 Indeed, Plaintiffs’ expert has published an article explaining how Plaintiffs can
7 reasonably take the last known addresses from Netflix, update them, and provide direct notice to
8 class members in an effective manner using “[n]umerous means.” See ECF No. 328 at 4
9 (citation omitted). Plaintiffs’ expert also describes cases in which courts have required the
10 parties to use diligent efforts to locate current addresses using publicly available databases. See
11 *id.* at 5 n.3; see also *Chavez v. Netflix, Inc.*, 162 Cal. App. 4th 43, 48 (2008) (“in the case of
12 former members, [notice would be sent] using the e-mail addresses it had previously used to
13 communicate with the former members. Follow-up mail notice would be sent to those whose e-
14 mail addresses came back as undeliverable.”); *Browning v. Yahoo! Inc.*, No. C04-01463, 2006
15 WL 3826714, at *8 (N.D. Cal. Dec. 27, 2006) (“in the event that an Email Notice sent to a
16 Settlement Class Member is bounced back as undeliverable, the Amended Settlement Agreement
17 provides for notice by standard mail.”); *Simon v. Toshiba Am.*, No. C 07-06202, 2010 WL
18 1757956 (N.D. Cal. Apr. 30, 2010) (approving settlement where notice plan -- as described in
19 motion for preliminary approval -- “requires direct email notice to all class members known and
20 reasonably identified from Toshiba’s records. For class members whose email addresses are no
21 longer valid, direct notice will be sent to those individuals by first class mail.”) (footnote
22 omitted).

23 Accordingly, Plaintiffs’ proposal -- while minimizing their own out-of-pocket costs --
24 should be rejected because it does not satisfy the clear and well-established requirements of Rule
25 23 to provide individual notice where practical. Plaintiffs’ notice plan should also be rejected
26 because in substituting broad publication notice for the direct individual mailing notice required
27 by Rule 23, the notice plan will have the unnecessary yet damaging effect of disparaging Netflix
28 in the eyes of all non-class members who see the publication notice. ECF No. 454-2 ¶ 33. This

1 concern is heightened by the fact that Walmart is now aggressively marketing its Vudu online
 2 video rental service which it is motivated to tout as a competing alternative to the Netflix service,
 3 including by featuring Vudu on the Walmart.com website, *see* Liddiard Decl. Exs. 1-3.
 4 Consequently, potential Netflix customers -- who are not members of the class -- should not be
 5 misled into believing that that the unproven and unfounded allegations described in the
 6 settlement notice that Netflix overcharges its customers are true.¹ Given the great potential for
 7 unwarranted harm to Netflix, Plaintiffs' plan to ignore 2.1 million class members by substituting
 8 broad publication notice in place of the required individual mailed notice should be rejected.

9 **III. PLAINTIFFS' MOTION SHOULD BE DENIED BECAUSE THE SETTLEMENT**
 10 **WOULD PERMIT WALMART TO GAIN ACCESS TO NETFLIX'S TRADE**
 11 **SECRET CUSTOMER INFORMATION**

12 Plaintiffs' motion for preliminary approval should also be denied because the proposed
 13 settlement would permit Walmart to obtain access to Netflix's trade secret customer names and
 14 addresses. Even though the settlement suggests that class members will be providing their
 15 names and contact information to a third party claims administrator and not directly to Walmart,
 16 class members will only be able to redeem their "gift cards" at walmart.com. *See* ECF No. 454
 17 at 14. Consequently, the settlement gives Walmart the power to obtain Netflix's customer
 18 information when those customers enter their names and contact information on the walmart.com
 19 website when redeeming their gift cards. The gift cards issued to class members will have
 20 redemption codes that will be identifiable to Walmart as ones that were provided to Netflix
 21 customers as part of the settlement. It will be trivial for Walmart to compile a list of everyone
 22 who redeemed a settlement gift card on Walmart.com, at which point Walmart will have

23 ¹ Plaintiffs' proposed notice plan itself reveals the potential harm to Netflix that the massive
 24 and unnecessary publication plan will cause. For example, the publication plan provides for a
 25 "full-page ad" in TV Guide Magazine and People Magazine even though only 2.2 percent and
 26 9.9 percent, respectively, of the readership of those magazines are Netflix customers. ECF No.
 27 454-2, Ex. B at 19-22. In other words, Plaintiffs and Walmart are attempting to use the proposed
 28 settlement between them as a way to expose 98 percent of TV Guide Magazine readers and 90
 percent of People Magazine readers who are potential future Netflix customers and not class
 members to view ads that unjustifiably depict Netflix as a company that overcharges its
 subscribers. Plaintiffs designed this publication plan to smear Netflix's reputation because
 Plaintiffs are already estimating that only 5.3 percent of the estimated class members will not
 receive an email notice. This is simply not acceptable to Netflix.

1 appropriated Netflix's customer list for its own uses. Walmart could easily use that list to send
2 targeted promotions to Netflix customers promoting its Vudu online DVD rental service and
3 otherwise seek to compete unfairly against Netflix with this information. Netflix keeps its
4 customer list as a proprietary trade secret and considers it to be an extremely valuable asset.
5 There is simply no basis for using the class action procedures of Rule 23 to seize this asset from
6 Netflix and hand it over to Walmart for free. The proposed settlement would confer an unfair
7 and unprecedented competitive advantage on Walmart to market its own streaming video rental
8 business, Vudu, to millions of Netflix customers as a direct result of entering into a settlement
9 with Plaintiffs. *See* Liddiard Decl. Exs. 1-3 (news articles describing Walmart's recent attempts
10 to aggressively market its Vudu video streaming service). In light of the unique circumstances of
11 this case – where the class members are not customers of the settling defendant, but rather
12 customers of a competing, non-settling defendant – the Court should exercise special care to
13 safeguard the confidentiality of Netflix's customer information.²

14 To address the acute confidentiality concerns surrounding Netflix's customer list, the
15 appropriate remedy is for the settlement and any approval thereof: (1) expressly to prohibit
16 Walmart from ever using the names and contact information provided by class members when
17 redeeming their gift cards at walmart.com for any purpose other than fulfillment of the orders
18 placed in that transaction; and (2) certifications under oath from Walmart executives that their
19 systems and databases have been modified to ensure that all information obtained from class
20 members who receive and use the Walmart.com coupon is deleted and will not be used for any
21 marketing or other purposes. Alternatively, gift cards could be made to be redeemable only at
22 Walmart retail stores, and not through online transactions that require customer information to
23 fulfill orders (with a similar caveat that Walmart may not use customer information obtained
24 from the in-store sales, such as via credit card transactions, for any other purpose).

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27 ² If appropriate safeguards are not mandated, Walmart will unfairly gain access to Netflix's
28 highly coveted and targeted mailing list that would cost millions of dollars to purchase in the
market if it were available (and it is not).

1 **IV. PLAINTIFFS' MOTION SHOULD BE DENIED BECAUSE THE SETTLEMENT**
2 **WOULD PERMIT WALMART TO GAIN AN UNFAIR COMPETITIVE**
3 **ADVANTAGE IN MARKETING ITS COMPETING VIDEO STREAMING**
4 **SERVICE TO NETFLIX CUSTOMERS**

5 Plaintiffs' motion for preliminary approval should be denied because the settlement will
6 have the effect of directing tens of millions of Netflix subscribers to the walmart.com website to
7 redeem gift cards -- a website on which Walmart has recently begun to display its competing
8 Vudu video streaming service. *See* Liddiard Decl. Exs. 1-3 (news articles in the past week
9 reporting Walmart has moved its Vudu service to the walmart.com website). The "gift card"
10 provided to Netflix subscribers -- subscribers who, under the notice plan would have just been
11 given notice that Netflix has been accused of overcharging them -- will be unfairly directed to
12 Walmart's competing Vudu service now located on walmart.com at no additional cost to
13 Walmart and with no compensation to Netflix. This inequitable result to Netflix is not justified
14 in a circumstance where there has been no finding of liability against Netflix and indeed, as
15 Netflix demonstrated in its recently-filed motion for summary judgment, where plaintiffs' claims
16 are wholly without merit. Essentially, Walmart is paying \$27 million to exit this litigation and it
17 is motivated to steer 40 million video consumer class members to its website that offers a
18 competing video streaming service -- the equivalent of a marketing campaign that costs Walmart
19 only 68 cents per potential customer. Whatever benefits Walmart and Plaintiffs' counsel may
20 obtain from the settlement, the expense to Netflix, which is inevitable, should be narrowly
21 circumscribed by the Court.

22 Consequently, the settlement, and any approval thereof, should strictly prohibit Walmart
23 from (a) placing any Vudu-related materials, advertisements, or promotions on the website pages
24 that will be visited by class members in redeeming their gift cards, and (b) allowing gift cards to
25 be redeemed for Vudu video rentals. Alternatively, gift cards could be made to be redeemable
26 only at Walmart retail stores, and not through online transactions where class members can be
27 solicited to subscribe to Walmart's competing Vudu online movie rental service.
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1 **V. CONCLUSION**

2 For the foregoing reasons, Plaintiffs’ motion for preliminary approval should be denied.³

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4 Dated: July 29, 2011

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By: /s/ Jonathan M. Jacobson

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Attorneys for Defendant Netflix, Inc.

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23 ³ Just prior to this filing, Netflix’s counsel was provided with information indicating that the
24 currently appointed Lead Counsel’s law firm (Baker Hostetler) is also currently representing
25 Walmart in ongoing litigation. Whether or not Walmart itself may have waived this conflict of
26 interest is irrelevant as it seems apparent that the Class has not. *See* Cal. R. Prof. Conduct 3-310.
27 Such a conflict would seem to preclude a finding of adequacy of class counsel, including Lead
28 Counsel who was admittedly involved in negotiating the settlement with Walmart; this, in turn
would preclude class certification. Because of the late receipt of this information, Netflix has
asked the Baker Hostetler firm to advise Netflix next week as to whether there are facts that
would negate this apparent conflict and, if not, what steps they intend to take consistent with the
disciplinary rules. Netflix accordingly reserves the right to file a formal motion addressing this
issue at the conclusion of its investigation, if necessary.