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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

IN RE ONLINE DVD RENTAL ANTITRUST LITIGATION	**Master File No. 4:09-md-2029 PJH** **MDL No. 2029** **Hon. Phyllis J. Hamilton**
This document relates to: **ALL ACTIONS**	**PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT WITH WAL-MART DEFENDANTS** Date: August 24, 2011 Time: 9:00 a.m.

INTRODUCTION

In opposing preliminary approval, Netflix resorts to distortion and pejoratives, ignoring the benefits to the Class of the proposed Settlement, and the real adequacy of the Notice Plan. Initially, Netflix accuses Plaintiffs and their counsel of ignoring this Court's expressed desires regarding their proposed plan for providing the best notice practicable as required by Rule 23(c)(2)(B). Netflix ignores the fact that Plaintiffs acknowledge in their Motion the Court's expressed preferences regarding notice and then explain why the Court may wish to reconsider those stated preferences. As Plaintiffs point out, the Court's stated preference for a notice plan which provides for direct e-mail notice, followed by hard mail notice for bouncebacks, followed by limited publication notice, will have a significant economic impact on the Class, while providing, at best, a modest increase in reach to class members. If Plaintiffs' counsel failed to explain the enormous cost of using hard mail secondary notice and the limited benefit that might result therefrom, they would fail in their duty to the Class and the Court. As previously noted, Rule 23 does not require perfect notice, only the best notice practicable, and this proposed plan meets that requirement.

Netflix also attacks the Settlement as a marketing plan to benefit Wal-Mart and to "unnecessarily ... tarnish Netflix's reputation." It contends that the Settlement is merely a device to provide a competitor with access to its "trade secret customer list." It makes these unfounded allegations without raising a single objection to the content of the forms of notice which explain the nature of the action, the terms of the Settlement and the ability of class members to participate or opt out or object to it. In other words, Netflix, while acknowledging its lack of standing to object to the Settlement, has chosen to attack the Settlement by claiming it is something which it is not. As part of that objection, Netflix even asks the Court to limit the use to which Class members may put their gift cards - asking both that Wal-Mart be prohibited from advertising its video streaming service on its website and that class members be prohibited from using their gift cards to order such services from Wal-Mart. Finally, Wal-Mart, as described *infra*, is in the process of implementing a system (separate from Walmart.com's system for the

administration of user accounts) in which the electronic gift cards will be sent to class members who make claims, and which will be hosted and managed by a third party. When those claimants redeem the gift cards, they will have the choice to opt in or out of inclusion on Wal-Mart's mailing lists.

In all, Netflix's objections are not well founded in the facts of this case or in the law and are simply another attempt by Netflix to prevent the Class from achieving the benefits of the Settlement that was negotiated at arm's-length by very experienced counsel.[1]

ARGUMENT

I. PLAINTIFFS' PROPOSED NOTICE PLAN PROVIDES THE BEST PRACTICABLE NOTICE TO CLASS MEMBERS

Following the previous settlement hearing, Plaintiffs investigated the costs of a notice plan that included direct email notice, followed by hard mail to bouncebacks, followed by publication (the plan discussed by the Court). Plaintiffs discovered that the second phase (the hard mail to estimated bouncebacks) would increase total notice costs by $3.16 million (primarily in postage expenses), yet would provide little additional benefit in terms of actually reaching Class members. *See* Plaintiffs' Motion at 16:26-17:3. This additional $3.16 million would consume more than 10 percent of the total settlement of $27.25 million, and would more than *triple* the overall notice cost to the Class. *Id.* at 17:3-4. Plaintiffs' current proposed plan of direct email notice (which Netflix does not dispute is an adequate form of direct notice) followed by publication notice is projected to reach approximately 83.11% of the Class, which is more than the 75% to 80% reach held to be adequate in numerous similar cases. *Id.* at 17:5-6. Plaintiffs respectfully suggest that spending an additional $3.16 million to reach only a little over

[1] Netflix further ignores that the substance of the notice will have to be sent to the Netflix Litigation Class, in any event, and would contain the same language and information regarding the claims being asserted on behalf of the Litigation Class, which are identical to the claims of the Wal-Mart Settlement Class.

5% more of the Class is not an efficient nor is it the best practicable method for providing notice to the Class.[2]

"Due process does not require actual notice, but rather a good faith effort to provide actual notice." *In re The Prudential Insurance Company of America Sales Practices Litigation*, 177 F.R.D. 216, 231 (D.N.J. 1997); *see also Weigner v. The City of New York*, 852 F.2d 646, 649 (2d Cir.1988) ("[t]he proper inquiry is whether [class counsel] acted reasonably in selecting means likely to inform persons affected, not whether each [class member] actually received notice"). Plaintiffs' proposed notice plan satisfies the requirements of Rule 23, as direct notice will be provided to *all* Class members. Therefore, Netflix's reliance on *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974) is misplaced. In *Eisen*, plaintiffs proposed to implement publication notice only, with no direct notice. Moreover, since *Eisen* was decided in 1974, email has developed and become ubiquitous. Nothing in *Eisen* requires a *second* round of direct notice. As Netflix maintains *all* email addresses of current and former subscribers and Netflix *requires* a valid email address to subscribe (in addition to only allowing a customer to select his/her movies via the internet), this case presents the ideal situation where direct email notice is sufficient as the sole form of direct notice.

The ultimate question here is what type of *secondary* notice is necessary. Plaintiffs propose a second phase of notice by publication, which is far more cost effective given the large size of the Class. Courts commonly approve publication notice as a back-up to individualized notice. Cost considerations necessarily inform a publication notice program, which is why 100% coverage is not required. One could always argue that using one more magazine or newspaper might reach another class member, but that process has no end, and the law does not require it.

[2] As pointed out in Plaintiffs' Motion, additional publication notice could be used to increase the reach of the proposed Notice Plan to a level comparable to the reach of a plan requiring hard mail notice to any email bounce backs. Such a plan would add approximately $316,000 to the cost of notice, rather than $3,160,000 for the hardmail secondary notice campaign. *See*, Plaintiffs' Motion at 17, n.7 *citing* Wheatman Decl. ¶ 35 n.6.

The optimal mix of media and direct notice needs to strike an adequate balance between cost efficiency and reach effectiveness. *See* Plaintiffs' Motion at 18, n.8 *citing* Wheatman Decl., ¶36.

As Plaintiffs have discussed previously, in *Barker v. Skype*, No. 2:09-cv-01364-RSM, "Order Preliminarily Approving Class Action Settlement" ¶ 9 (W.D. Wash. Nov. 17, 2009), the court ordered that direct notice be disseminated exclusively via email, noting that "due to the unique nature of the User Accounts, which are internet based accounts that are typically not tied to a postal address, mailed notice would not be effective and would unnecessarily deplete potentially available funds, to the detriment of the Settlement Class." In granting final approval of the settlement in *Barker*, the court stated, "the E-mail Notice provided to Settlement Class Members was the best practicable notice under the circumstances and . . . fully satisfied the requirements of due process, [and] the Federal Rules of Civil Procedure . . ." *Barker v. Skype*, No. 2:09-cv-01364-RSM, "Order on Final Approval of Class Action Settlement, Judgment and Order of Dismissal with Prejudice" ¶ 9 (W.D. Wash. March 12, 2010). *See also Todd v. Retail Concepts, Inc.*, 2008 WL 3981593 (M.D. Tenn. Aug. 22, 2008). Netflix ignores this case law.

Netflix incorrectly, and without basis, accuses Plaintiffs (or their counsel) of trying to "minimize[ ] their own out-of-pocket costs." The $27.25 million that Wal-Mart is paying includes a cash component and a gift card component.[3] The cash component includes the notice and administration costs. The cash component will be deducted from the entire fund, leaving the gift card component to be split on a per capita basis among those Class members who make valid claims. Thus, it is the Class -- not Plaintiffs' counsel -- who would bear the additional $3.16 million in secondary notice costs, if hard mail for bouncebacks were required, as the gift card component will shrink in proportion to the increase in the cash component.

[3] Although it is referred to as a gift card component, Class members at their election can receive cash in lieu of the gift card.

Netflix, as it did before, erroneously claims that Plaintiffs' Notice Plan is designed to tarnish Netflix's reputation through publication notice.[4] But publication notice in class action settlements is routine. Plaintiffs have strived to make the notice *content* as neutral as possible – and indeed, Netflix *has not objected to the notice content*. A non-settling litigant's desire to limit what it may perceive as negative publicity cannot trump the need to provide notice in the most practicable manner possible. Netflix engages in unfortunate *ad hominem* attacks (accusing Plaintiffs' counsel of trying to "smear" its reputation), but the facts are that Wal-Mart wants to settle, and the Class must be provided notice of the settlement in the most practicable manner.

II. WAL-MART WILL NOT GAIN ACCESS TO NETFLIX'S "TRADE SECRET CUSTOMER NAMES"

Plaintiffs and Wal-Mart acceded to Netflix's request that the initial mailing of notice will be performed by Netflix so that its list of Netflix subscribers never leaves Netflix's hands. Some percentage of those subscribers will decide to return a claim form ("Claimants") to Rust, the third party consultant who will handle notice. Rust will provide a list of the Claimants who elect to receive a gift card to Wal-Mart ("Claimant List"). Thus, every Claimant whose name or email address could become known to Wal-Mart through the claims process established pursuant to the Settlement Agreement, dated July 1, 2011, among Plaintiffs and Wal-Mart (the "Agreement") will have affirmatively chosen to receive a gift card and will have affirmatively chosen to have his or her email address provided to Wal-Mart for that purpose. Wal-Mart will thus obtain the "Claimant List." It will *not* obtain Netflix's customer list.

Moreover, Claimants' information will not be used by Wal-Mart for any purpose other than fulfilling orders placed with settlement gift cards, unless a Claimant chooses to be included in Wal-Mart's email distribution lists. As set forth in the attached declaration, Wal-Mart is in the process of implementing a system pursuant to which its "eGift" cards will be sent to recipients

[4] Netflix makes this argument based on its assertion that it "has done nothing wrong." Netflix Opp. at 2:1. However, notice of the existence of the claims and Settlement, which includes Netflix's denial of wrong doing, must be sent to the Class.

via a system that is hosted and managed by a third party. *See* Declaration of Rachael Ulman ("Ulman Decl.") ¶ 2. The systems used for administration of eGift cards and for administration of Walmart.com user accounts will be separate systems with no integration. *Id.* Wal-Mart does not use information from the eGift system to send marketing or promotional emails. *Id.* The implementation of the eGift system is planned for completion by the end of October 2011. *Id.* When the Claimant List is sent by Rust to Wal-Mart, Wal-Mart will store that information in the eGift system and the Claimants' settlement gift cards will be sent via the eGift system. *Id.* ¶ 3.

When a Claimant redeems a Walmart.com eGift card issued pursuant to the Agreement, the Claimant will have the choice of opting in or out of inclusion on Wal-Mart's marketing mailing lists. *Id.* ¶ 4. Wal-Mart will not use the names and addresses of any Claimants who opt out of inclusion on Wal-Mart's mailing lists for any purpose other than to effectuate the Settlement pursuant to the Agreement. *Id.* ¶ 5.

Claimants who were pre-existing Wal-Mart customers may continue to receive Wal-Mart marketing materials. Wal-Mart will *never* receive Netflix's customer list, and moreover it will not retain any information about Claimants who opt out of inclusion in Wal-Mart's marketing emails.

III. NETFLIX'S ARGUMENT THAT THE SETTLEMENT WILL PROVIDE WAL-MART WITH "AN UNFAIR COMPETITIVE ADVANTAGE" FOR ITS VUDU SERVICE FAILS AS CLASS MEMBERS WILL NOT BE DIRECTED TO VUDU AND NETFLIX LACKS STANDING TO OBJECT TO THE SETTLEMENT BENEFITS

Netflix lacks standing to object to the benefits established by the Settlement, including any potential purchase by Claimants of any product offered by Wal-Mart, including Wal-Mart's Vudu movie streaming service. Additionally, its argument that the Settlement will provide Wal-Mart with "an unfair competitive advantage" for its Vudu streaming service should be rejected, because the gift cards can be used on any Wal-Mart product and would not be directed to the Vudu service.

The Ninth Circuit follows the well-established rule that a non-settling defendant generally lacks standing to object to a partial settlement by other defendants. *See Waller v. Financial Corp. of America*, 828 F.2d 579, 582-583 (9th Cir. 1987). This rule advances the policy of encouraging settlement. *Id.* at 583. There is one narrow exception to this rule: Where a non-settling defendant can demonstrate that the settlement will cause it formal legal prejudice, it may have standing to oppose the settlement. *See Smith v. Arthur Anderson LLP*, 421 F.3d 989, 998 (9th Cir. 2005). Formal legal prejudice exists where a settlement "purports to strip [a non-settling defendant] of a legal claim or cause of action, an action for indemnity or contribution for example." *Id.* As the Seventh Circuit has explained:

> Plain legal prejudice [sufficient to confer standing upon a non-settling litigant in a class action] has been found to include any interference with a party's contract rights or a party's ability to seek contribution or indemnification. A party also suffers plain legal prejudice if the settlement strips the party of a legal claim or cause of action, such as a cross-claim or the right to present relevant evidence at trial…Mere allegations of injury in fact or tactical disadvantage as a result of a settlement simply do not rise to the level of plain legal prejudice.

Agretti v. ANR Freight Sys., 982 F.2d 242, 247 (7th Cir. 1992)(citations omitted).

Netflix will suffer no legal prejudice as a result of this Settlement. Netflix's complaint that Wal-Mart may gain an "unfair competitive advantage" for its Vudu service does not qualify as "legal prejudice." Significantly, the gift cards will not be directed or restricted to the Vudu service, or to any particular Wal-Mart offering. The subset of class members who ultimately end up on the Claimant List can use the cards as they choose. There is no cause to artificially limit what such cards can be used to buy.

CONCLUSION

Wherefore, Plaintiffs respectfully request that the Court approve Plaintiffs' Motion for Preliminary Approval of Class Action Settlement with Wal-Mart Defendants.[5]

DATED: August 5, 2011

Respectfully submitted,

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[5] In a footnote, Netflix alleges that Plaintiffs' Lead Counsel may have a conflict in his representation of the Plaintiffs and the Class. Plaintiffs are confident there is no issue and explained that to Counsel for Netflix. Baker Hostetler does represent Wal-Mart Stores, Inc., in matters unrelated to this litigation. However, both Lead Counsel and his firm Baker Hostetler took appropriate measures to ensure that any conflict was waived. Upon Lead Counsel joining Baker Hostetler, an ethical screen was established at the firm. Prior to joining Baker Hostetler, Mr. Abrams obtained conflict waivers from Wal-Mart and each of the named class representatives and, as requested, informed Netflix's counsel of this on August 2. In response, Netflix's counsel asked for a copy of the waiver letters and asked that they be submitted to the Court. Lead Counsel responded that the letters are privileged and did not provide them to Netflix's counsel, but offered to submit them for *in camera* inspection by the Court, which counsel is prepared to do.

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