CASE NOS. 12-15996 and 12-15957 (Consolidated with 12-15705, 12-15889, 12-16010, 12-16038)

**IN THE UNITED STATES COURT OF APPEALS**

**FOR THE NINTH CIRCUIT**

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In re ONLINE DVD RENTAL ANTITRUST LITIGATION

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ANDREA RESNICK, et al.
Plaintiffs-Appellees

vs.

MARIA COPE and EDMUND F. BANDAS
Objectors – Appellants,

vs.

NETFLIX, INC., et al.
Defendants-Appellees,

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From the United States District Court
for the Northern District of California
No. 4:09-md-02029-PJH

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# JOINT OPENING BRIEF OF MARIA COPE AND EDMUND F. BANDAS

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Joseph Darrell Palmer, LL.M.
Law Offices of Darrell Palmer PC
603 North Highway 101, Ste. A
Solana Beach, CA 92075
T: 858-792-5600 / F: 866-583-8115
darrell.palmer@palmerlegalteam.com
Attorneys for Appellant Maria Cope

Christopher A. Bandas
Bandas Law Firm, P.C.
500 N. Shoreline, Ste. 1020
Corpus Christi, TX 78401-0353
T: 361-698-5200 / F: 361-698-5222
cbandas@bandaslawfirm.com
Attorney for Appellant Edmund Bandas

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## I. JURISDICTIONAL STATEMENT

The District Court had subject matter jurisdiction of this matter under 28 U.S.C. sections 1331 and 1337, and 15 U.S.C. section 15. The consolidated amended complaint alleged violations of multiple sections of the Sherman Antitrust Act and Clayton Antitrust Act.

This Court has appellate jurisdiction pursuant to 28 U.S.C. section 1291. The District Court entered its order approving the national class action settlement and releasing all outstanding claims on March 29, 2012. (D.E. 609, E.R.I, p. 1.)("D.E." refers to "docket entry' and "E.R." refers to Appellant's joint "excerpt of the record," volumes I, II, or III.) Objector-Appellant Maria Cope timely filed the instant appeal. (D.E. 619, E.R.I. 37.) Objector-Appellant Edmund Bandas timely filed the instant appeal. (D.E. 616, E.R.I. 39.) These Objectors have standing to appeal this final approval of a class action settlement.

## II. STATEMENT OF ISSUES

1. Whether the notice to the class is inadequate because it fails to disclose the benefits potentially available to class members, or the amount potentially deductible by other class attorneys, materially misleading class members as to the value of the settlement.
2. Whether Ninth Circuit attorneys' fee jurisprudence required more substantial documentation for class counsel's fee request, including

whether state class attorneys were required to comply with *In re Mercury Interactive.*

## III. STANDARDS OF REVIEW

*Issue One*

Whether notice of a proposed settlement in a class action satisfied due process is a question of law reviewed de novo. *Torrisi v. Tuscon Electric Power Co.*, 8 F.3d 1370, 1374 (9th Cir. 1993).

*Issue Two*

A district court's award of attorney fees is reviewed for abuse of discretion. *Powers v. Eichen*, 229 F.3d 1249, 1256 (9th Cir. 2000.) "[A] district court abuses its discretion when it makes an error of law." *Knight v. Kenai Peninsula Borough Sch. Dist.*, 131 F.3d 807, 816–17 (9th Cir.1997).

## IV. STATEMENT OF THE CASE

The allegations in this matter indicate that Netflix and WalMart entered into an anticompetitive market-splitting agreement wherein WalMart would enjoy the DVD sales market, and Netflix would enjoy the online DVD rental market, minimizing competition among them. This class action on behalf of both WalMart and Netflix consumers seeks to remedy the higher prices paid due to this anticompetitive agreement and/or conduct because these entities were not competing with each other, but dividing the market between them. While both WalMart and Netflix were named as defendants, summary judgment was

entered in favor of Netflix on November 22, 2011 (D.E. 542), which order is on appeal. (Doc. 11-18034.) The present settlement involves only WalMart.

The parties entered into a preliminary settlement agreement in 2010, which was denied without prejudice by the District Court. (D.E. 348.) The parties renegotiated the settlement and again sought preliminary approval, which was granted on September 2, 2011. (D.E. 492.)

In addition to several other objections, Maria Cope timely submitted her objections to the proposed settlement. (D.E. 582-1, E.R.II p. 165.) Edmund Bandas timely submitted his objections to the proposed settlement. (D.E. 582-1, E.R.II p. 217.) The final approval hearing occurred on March 14, 2012. (E.R.II, p. 44.) The District Court entered the order approving the settlement on March 29, 2012. (D.E. 609, E.R.I, p. 1.) The District Court entered an order approving the requested attorneys' fees on the same date. (D.E. 607, E.R.I, p. 20.) Objector Cope timely appealed both orders on April 27, 2012. (D.E. 619, E.R.I, 37.) Objector Bandas timely appealed both orders on April 23, 2012. (D.E. 616, E.R.I, 39.)

## V. STATEMENT OF FACTS

To avoid repetitive statements of facts common to all Appellants in this matter, Appellants Cope and Bandas adopt by reference the Statements of Facts contained in the briefs submitted by all counsel for co-appellants pursuant to F.R.A.P. 28(i). See also Circuit Advisory Committee Note to Circuit Rule 28-4.

## VI. SUMMARY OF ARGUMENT

*Issue One:* The Notice disseminated to the class utterly failed to notify the class what benefits it would be eligible to receive, yet the class members are being asked to release important antitrust rights against America's largest retailer. While the exact details of the dollar amounts could be determined after processing the eligible claims, no estimate, or range, of settlement amount was provided to class members, effectively preventing every class member from evaluating the fairness of the settlement. As pointed out in Cope's objection, and in other opening briefs, dividing 35,000,000 (number of class members) into $14,000,000 common fund balance available for distribution leaves equates to a tiny per class member award, a fact noticeably omitted from the Notice and rendering it defective.

Also of grave concern is the misleading nature of the Notice. While it discloses that WalMart is graciously parting with $27.25 million (E.R.III, p. 313), the Notice does not disclose that fully half of this money is designated for fees, notice, and administration. Further, much more troubling is the settlement provision in which state class attorneys have the ability to make claims against this remaining $14 million. (E.R.II, p. 280.)

These deficiencies call into question whether due process was satisfied. Ultimately, while the Court stated that the settlement was "confusing," (E.R.I, p. 23) but worked out in the end (E.R.I, p. 24), working out in the end does not

rescue the fact that notice was deficient and does not satisfy the parameters of Rule 23.

*Issue Two:* The Court confessed during the fairness hearing that while she *could* have examined and would likely have cut items from the lodestar (E.R.I, p. 30), this analysis was not necessary because the Court was familiar with class counsel, and the percentage requested was reasonable. (E.R.I, p. 29.) Similar questions were raised in the *Bluetooth* decision, and the court determined that a searching analysis was warranted, sending the issue back to the District Court for further proceedings. Further, hearkening back to the settlement provision authorizing state class counsel to dip into the common fund (E.R.II, p. 280), these class attorneys submitted no fee request pursuant to *Mercury's* dictates and this provision under the settlement agreement appears patently unfair to the class. The District Court did not address this arcane settlement provision which simply deprives the class of available funds, without proper notice or opportunity to object under Rule 23(h). This matter presents a ripe opportunity for the Court to address the Ninth Circuit's position on submission of contemporaneous time records in support of fee requests in class matter. Appellant Cope submits that applicable law requires this submission.

## VII. ARGUMENT

### A. The Notice Disseminated to the Class Fell Short of Rule 23 Due Process Requirements

Rule 23(d) provides in relevant part as follows:

> In conducting an action under this rule, the court may issue orders that:
>
> (b) Require – to protect class members and fairly conduct the action – giving appropriate notice to some or all class members of: The proposed extent of the judgment.

As described above, the Notice provided to the class failed to comply with this most basic tenet of due process: informing class members of the extent of the proposed judgment. The Ninth Circuit has stated that "Adequate notice is critical to court approval of a class settlement under Rule 23(e)." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1025 (9th Cir. 1998). The Committee Notes to Rule 23 underscore the due process component to this requirement: "mandatory notice pursuant to subdivision (c)(2), together with any discretionary notice which the court may find it advisable to give under subdivision (d)(2), is designed to fulfill requirements of due process to which the class action procedure is of course subject." See *Hansberry v. Lee*, 311 U.S. 32 (1940);

The Notice fails for several reasons. The class is not given any information about their portion of the judgment. The Notice states that "the actual amount of cash and gift cards depends on the total amount of claims made." (E.R.III, p. 313.) More appropriate, and what due process requires, is that some figure be provided to the class, who is releasing its rights with respect to alleged anticompetitive conduct. The Notice should have disclosed the class size (35 million) and should have estimated a payout range allowing class members to decide for themselves whether the proposed payment of $1, $5, or $12 is fair or reasonable.

The Notice could have informed the class what the alleged effect of the anticompetitive conduct was estimated to be, such that the class member could evaluate whether this was a reasonable settlement and worth releasing; in other words, the alleged conduct resulted in overcharges of $10 per month (or some other figure).

The Notice is also materially misleading, in that it fails to disclose the millions estimated in claims administration costs, also deducted from the common fund and materially reducing the amount payable to class members. The information disclosed indicates that the information not disclosed is intentionally deceptive: 25% deducted for attorney fees, plus costs incurred of $1.7 million, plus $5000 for each class representative, which may go up to $80,000 including state case class representatives. The only dollar figure missing is that of administrative fees, of $4.5 million.

Finally, the Notice is materially misleading in that it fails to disclose that state class attorneys pursuing the same claims in state court have a claim to the common fund under the settlement agreement (E.R.II, p. 280), in no particular amount and with no particular cap, which could deplete the fund in its entirety, rendering the settlement not just illusory, but absolutely nonexistent. This omission is curiously deceptive as well, in that the Notice discloses that class representatives will deplete the common fund, but it does not mention the settlement agreement provision in which attorneys' fees would deplete it in no particular amount, with no Rule 23(h) disclosure, and no cap. These material

facts and omissions lead to a concern of deception with respect to Notice which the Court should have addressed at the fairness hearing or in the final order.

The Court failed to address these objections regarding inadequacy of notice, while touching on perceived inadequacies with respect to claims payments:

> There were objections to the per capita – I would call it pro rata payments to the individual members as opposed to a more complicated payment scheme that would take into account the various different plans and options and – I mean, we all recognize that everyone has paid different amounts. . . . Shouldn't class members be able to expect at least reimbursement for one month's rental fee? This was back when we were anticipating that we could have 35 million responses and everybody would receive 50 cents or something. Well, I think, as it's borne out, $12, while not a lot of money these day even at Wal-Mart, is $12. And for class members to receive that in lieu of receiving nothing is of some, I think, actual value to the class. And I think it would be preferable – it's preferable to the Court and I think to the class members that everybody receive something rather than some people receive 30 dollars and others receive 1 dollar.

(E.R. 25-26.) This discussion was the closest the Court came to addressing objections regarding the financial information provided (rather, omitted) in the Notice being procedurally inadequate. Ultimately, the Court did not address these concerns at all.

The deficiencies described herein and overruled by the Court have been held to be inadequate notice in the Ninth Circuit. In *Mandujano v. Basix Vegetable Products, Inc.*, 541 F.2d 832 (9th Cir. 1976), the court stated:

> The record reveals no reasoned response to numerous objections to the settlement. There exists, for example, no such response . . . to allegations regarding the inadequacy of the notice given the terms of the proposed settlement, and to allegations of widespread ignorance of the terms of the settlement among a large number of the class members. . . . These deficiencies of the record make it impossible to say that adequate protection was afforded the dissidents and that they are mere spoilers whose objections are without merit.

541 F.2d at 836-37. Similarly, the Court in this matter failed to address these objections: why does the Notice omit mention of the sizeable amount of administrative costs, which costs deplete the amount payable to the class? Why does the Notice reference the state class cases with respect to incentive awards, but not with respect to attorneys' fees, which will also deplete the common fund? Why does the Notice fail to offer any glimpse of a potential payout to the individual class member? And do these material omissions render the Notice hopelessly misleading? The *Mandujano* court determined that these types of settlement flaws were significant enough to fail under Rule 23. For these reasons, Appellants Cope and Bandas urge the Court to find that this Notice fails to comply with Rule 23 with respect to providing adequate notice of the settlement and its terms.

### B. The Attorneys' Fees Award Failed to Comply with Ninth Circuit Standards for Fee Motions

Appellant Cope brought the Court's attention to the inadequate fee petition by Class Counsel, in that *In re Bluetooth Headset Products Liab. Litig.*,

654 F.3d 935 (9th Cir. 2011), requires more support for a fee request than a mere summary of hours. The Court dismissed this objection because Class Counsel was requesting the simple "benchmark" of 25%:

> I don't require time sheets and billing records when counsel are, for the most part, asking for a bench mark.

(E.R.I, p. 29.) The *Bluetooth* court, however, took a more considered view of class fee requests:

> After finding numerous defects in class counsel's proposed computation of its $1.6 million lodestar, including duplicative entries, excessive charges for most categories of services, a substantial amount of block billing, and use of an inflated hourly rate, the court announced that its own analysis revealed the lodestar still "substantially exceeds" the $800,000 defendants agreed to pay.

654 F.3d at 943. The *Bluetooth* court then determined that a more searching inquiry was warranted, and sent the matter back for further justification, even after the court had reduced the lodestar by 50%. The Court's determination here was not based upon a lodestar examination, but upon the Court's personal experience with Class Counsel:

> These lawyers have practiced before me for many years, and I have no basis for not accepting their representations with regard to the overall hours.

(E.R.I, p. 30.) This explanation falls short of the standard defined by *Bluetooth:* "Courts have an independent obligation to ensure that the [fee] award, like the settlement itself, is reasonable, even if the parties have already agreed to an amount. *See Staton v. Boeing Co.*, 327 F.3d 938, 963-64 (9th Cir. 2003)." 654

F.3d at 941. Accordingly, the record lacks adequate support to uphold the fee award.

More troubling than the rubber-stamped 25% request is the unaddressed provision at section 13.2 of the settlement agreement, which provides:

> Class Counsel and Plaintiffs agree not to oppose efforts by lead counsel for Plaintiffs in the California State Actions to file a request for attorneys' fees and/or costs relating to the claims by the subscribers in the California State Actions to be paid from the Cash Component in accordance with section 6.1.1.1. An award of attorneys' fees and/or costs for counsel in the California State Actions **shall be included** in payments by WalMart made under Section 6.1.1.1. of this Agreement.

(E.R.III, p. 280.) This is the same provision which can completely deplete the entire common fund, which was not disclosed to the class in the Notice. In this discussion, however, the clause allows state class attorneys to fully bypass any requirements under the language of Rule 23, or the holdings of *Mercury* and progeny with respect to mandatory disclosure of support for fee requests. *In re Mercury Interactive Corp. Securities Litigation,* 618 F.3d 988 (9th Cir. 2010), requires the following with respect to fee requests:

> The district court abused its discretion when it erred as a matter of law by misapplying Rule 23(h) in setting the objection deadline for class members on a date before the deadline for lead counsel to file their fee motion. Moreover, the practice borders on a denial of due process because it deprives objecting class members of a full and fair opportunity to contest class counsel's fee motion. [¶] The plain text of the rule requires a district court to set the deadline for objections to counsel's fee request on a date *after* the motion and documents supporting it have been filed. The relevant portions of Rule 23(h) provide:

> (1) A claim for an award must be made by motion under rule 54(d)(2), subject to the provisions of this subdivision (h), at a time the court sets. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.
>
> (2) A class member, or a party from whom payment is sought, may object to the motion.

618 F.3d at 993. Accordingly, this settlement provision allowing state class counsel to further deplete the common fund, with no disclosure, no fee request, and no cap, runs completely afoul of Rule 23 and applicable Ninth Circuit law. As with Cope's other objections with respect to notice, this objection with respect to requiring state class counsel fee requests to comply with *Mercury* was never addressed on the record, constituting an abuse of discretion. "[A] district court abuses its discretion when it makes an error of law." *Knight v. Kenai Peninsula Borough Sch. Dist.*, 131 F.3d 807, 816–17 (9th Cir.1997).

## VIII. CONCLUSION

For the foregoing reasons, this Honorable Court should reject the Settlement approved below and remand to the district court for further consideration of the issues above. Appellant also requests such other relief, as the Court deems appropriate.

Dated: September 7, 2012

Law Offices of Darrell Palmer PC

By: /s/ Joseph Darrell Palmer
Joseph Darrell Palmer
Attorney for Appellant Maria Cope

Bandas Law Firm, P.C.

By: /s/ Christopher A. Bandas____
Christopher A. Bandas
(w/authorization)
Attorney for Appellant Edmund F. Bandas

**CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. 32(a)(7)(C) AND CIRCUIT RULE 32-1**

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that the attached brief is proportionately spaced, has a typeface of 14 points and contains 2,947 words.

Dated: September 7, 2012

By: /s/ Joseph Darrell Palmer
Joseph Darrell Palmer

## STATEMENT OF RELATED CASES

Appellants Maria Cope and Edmund Bandas are aware of the following related cases pending in this Court:

Consolidated Appeals: 12-15957
12-15705
12-15889
12-16010
12-16038

**CERTIFICATE OF SERVICE**

I hereby certify that 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 on September 7, 2012.

I certify that all active participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system. All non-registered participants will be served via U.S. Mail.

/s/ Joseph Darrell Palmer
Joseph Darrell Palmer