UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 12-16038

Consolidated with 12-15705, 12-15889, 12-15957, 12-15996 and 12-16010

In re: ONLINE DVD RENTAL ANTITRUST LITIGATION

ANDREA RESNICK et al.,
Class Plaintiffs-Appellees,

v.

TRACEY KLINGE COX,
Plaintiff-Appellant

v.

NETFLIX,: et al.,
Defendants-Appellees

Appeal From Judgment Entered by
The United States District Court, Northern District of California,
Phyllis J. Hamilton, District Court Judge
District Court Case No. 4:09-MD-2029-PJH

BRIEF OF PLAINTIFF-APPELLANT TRACEY KLINGE COX

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND FEDERAL RULES

STATUTES

RULES

OTHER AUTHORITIES

OTHER AUTHORITIES

STATEMENT IN SUPPORT OF ORAL ARGUMENT

Appellant Tracey Klinge ("Cox") believes oral argument would benefit the court and parties.

JURISDICTIONAL STATEMENT

The district court had diversity jurisdiction under 28 USC 1331, 1332(d), and 1337 and 15 USC 1-2, 4,15, 16 and 26.

The court's final judgment, which disposed of all parties' claims pursuant to Fed. R. Civ. P. 58, was issued on March 29, 2012 ER 1-19. ("Cox") filed a notice of appeal on April 30, 2012 ER 32-33, which is timely pursuant to Fed. R. App. P. 4(a) .

STATEMENT OF ISSUES

The issues in these consolidated appeals were raised in the Cox Objection ER 219-228, Sullivan Objection ER 174-216, Cope Objection ER 165-173, Bandas Objection ER 217-218 and Frank Objection 229-260. The issues raised were overruled by the approval of the settlement by the District court ER 1-22.

Issue 1: Did the District Court abuse its discretion by certifying a class action where the class did not meet the adequacy of representation requirements embodied in the Due Process Clause of the U.S. Constitution and Federal Rule of

Civil Procedure 23(a)(4) due to a fundamental conflict of interest between the class representatives and the class members?

Standard of Review: This issue was raised by ("Cox") objections to class settlement, and the overruling thereof by the District Court. Class certification orders are generally reviewed for abuse of discretion. *Parra v. Bashas', Inc.*, 536 F.3d 975, 977 (9th Cir. 2008); *See Molski v. Gleich*, 318 F.3d 937, 946 (9th Cir. 2003) *overruled on other grounds by Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571 (9th Cir. 2010). An abuse of discretion "occurs when the district court, in making a discretionary ruling, relies upon an improper factor, omits consideration of a factor entitled to substantial weight, or mulls the correct mix of factors but makes a clear error of judgment in assaying them." *Parra*, 536 F.3d at 977-78 (quoting *Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 295 (1st Cir. 2000). It is also abuse of discretion where a court bases its decision in a case on the erroneous legal standard or clearly erroneous findings of fact, or where the record lacks any evidence supporting the court's decision. *Farris v. Seabrook*, 677 F.3d 858, 864 (9th Cir. 2012); *See MGIC Indem. Corp. v. Moore*, 952 F.2d 1120, 1122 (9th Cir. 1991) (abuse of discretion found where no evidence in record supported district court's ruling).

Issue 2: Did the District Court abuse its discretion by ruling the settlement in this case fair, adequate, and reasonable where the Order and Final Judgment and record failed to support this boilerplate, conclusory finding with any analysis of the 9th Circuit *Torrisi*[1] factors or any other relevant facts or law?

Standard of Review: This issue was raised by ("Cox") objections to class settlement, and the overruling thereof by the District Court. A finding that a settlement is fair, reasonable, and adequate is reviewed for abuse of discretion. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1027 (9th Cir. 1998). An abuse of discretion "occurs when the district court, in making a discretionary ruling, relies upon an improper factor, omits consideration of a factor entitled to substantial weight, or mulls the correct mix of factors but makes a clear error of judgment in assaying them.'" *Parra*, 536 F.3d at 977-78 (quoting *Waste Mgmt.*, 208 F.3d at 295). It is also abuse of discretion where a court bases its decision in a case on the erroneous legal standard or clearly erroneous findings of fact, or where the record lacks any evidence supporting the court's decision. *Farris*, 677 F.3d at 864; *See MGIC Indem. Corp.*, 952 F.2d at 1122.

Issue 3: Did the District Court abuse its discretion by approving an $8.5 million fee award where this award was greater than the settlement's $5.2

[1] Torrisi v. Tucson Elec. Power Co., 8 F 3d 1370 (9th Cir. 1993)

million actual value to the class; the calculation of the settlement's value to the class was grossly overinflated; and the District Court awarded a fee award in excess of the Ninth Circuit's 25 percent benchmark without providing written findings justifying the award as required by law?

Standard of Review: 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).

Issue 4: The District Court abused its discretion by approving a coupon settlement that did not comply with the Class Action Fairness Act. "CAFA".

Standard of Review: A district court's approval of a class action settlement is reviewed for abuse of discretion. *See Molski*, 318 F.3d at 953. It is also abuse of discretion when a court bases its decision in a case on the erroneous legal standard (including complete failure to apply the correct law) or clearly erroneous findings of fact, or where the record lacks any evidence supporting the court's decision. *Farris v. Seabrook*, 677 F.3d 858, 864 (9th Cir. 2012); *Casey v. Albertson's Inc.*, 362 F.3d 1254, 1257 (9th Cir. 2004).

STATEMENT OF THE CASE

This action was brought pursuant to Rule 23 of the Federal Rules of Civil Procedure on behalf of a class defined as all persons and entities that paid a subscription fee to Netflix to rent DVDs between May 19, 2005 and September 30, 2010. ER 270-271. The lawsuit claims that Wal-Mart and Netflix reached an unlawful agreement under which Wal-Mart would withdraw from the online DVD rental market and Netflix would not sell new DVDs. The lawsuit claims that this agreement caused Netflix subscribers to pay higher prices for online DVD rentals. Wal-Mart and Netflix deny that they did anything wrong or illegal. Appellant Cox adopts the statement of the case contained in the Brief of Appellant Frank (Br. 13) and the statement of the case contained in the Sullivan Brief (Br.8).

STATEMENT OF THE FACTS

On or before May 19, 2005, Wal-Mart and Netflix completed and entered into an illegal anticompetitive agreement to divide the markets for sales and online rentals of DVDs in the United States, with the purpose and effect of monopolizing and unreasonably restraining trade, in at least the market for online DVD rentals. The mechanics of the agreement allowed Netflix to charge supracompetitive prices to Class members.

At the start of 2005, Defendants Netflix and Walmart.com were competing directly in the Online DVD Rental Market. Walmart.com viewed its relatively new online rental program, "Wal-Mart DVD Rentals," as a success and was optimistic about its future growth. In early January 2005, Walmart.com reduced the price of its most popular online DVD rental program, reflecting its plans to expand in that market, which placed price pressure on Netflix. Netflix CEO Reed Hastings invited Walmart.com CEO John Fleming to dinner for a meeting to discuss their (then) competing businesses.

The result of the meeting and other communications led to Wal-Mart and Netflix entering into a Market Allocation Agreement, pursuant to which Walmart.com agreed to exit the Online DVD Rental Market and Netflix agreed not to enter the retail DVD market, and instead actively promote DVD sales by Wal-Mart Stores and Walmart.com. ER 268-269.

Since entering into the agreement, neither Wal-Mart Stores nor Walmart.com has rented DVDs online and Netflix has not sold new DVDs. The agreement served to eliminate all competition between Walmart.com and Netflix in the Online DVD Rental Market, and enabled Netflix to charge higher subscription prices for online DVD rentals than it would have had they not entered into the agreement. The class members did in fact pay - and continue to

pay - higher subscription prices to Netflix than they would have absent the agreement. Appellant Cox further adopts the Statement of Facts contained in the Frank Brief Br. 6-9 and the Sullivan Brief Br. 12-15.

SUMMARY OF ARGUMENT

The District Court should not have approved the settlement because of a fatal conflict of interest between class representatives and class members.

The District Court should not have approved the settlement because the settlement was not fair, reasonable or adequate to class members.

The Attorney fee should not have been approved because the District Court did not provide justification for awarding a fee in excess of this Circuits 25% benchmark.

The District Court abused its discretion when it approved a coupon settlement without complying with the Class Action Fairness Act.

ARGUMENT

This court should reverse the District Court's Order and Final Judgment Approving Settlement Between Settlement Class Plaintiffs and Wal-Mart Stores, Inc. and WalMart.com USA LLC. Here, the trial court abused its discretion by: (1) failing to recognize this settlement as a coupon settlement and judge it by the required heightened standards, including failure to apply the Class Action

Fairness Act (CAFA) to the coupon settlement as required by law; (2) wrongfully allowing the use of the claimant fund-sharing approach where class participation in the settlement was too small to justify it; (3) wrongfully awarding an attorney fee award based on an incorrect and over-inflated valuation of the settlement; (4) erroneously approving the Settlement Class under Federal Rule of Civil Procedure 23; and (5) approving a final settlement that was not fair, reasonable, or adequate as required by law. Accordingly, this Court should reverse the orders of the District Court approving this class action settlement and awarding attorney's fees.

I. ADOPTION OF BRIEF OF JON M. ZIMMERMAN

Appellant adopts in its entirety the substantive arguments of Objector-Appellant Zimmerman's Opening Brief identifying this Settlement as a coupon settlement under the law (Section VI.A). Zimmerman Br. 12-26. Appellant further adopts in its entirety the substantive arguments of Objector-Appellant Zimmerman's Opening Brief demonstrating class participation in the settlement is too small to justify the claimant fund-sharing approach. (Section VI.B). *Id.* at 27-31.

II. ADOPTION OF BRIEF OF THEODORE H. FRANK

Appellant adopts in its entirety the substantive arguments of the Opening Brief of Theodore H. Frank on the failure to apply CAFA to this coupon settlement (Section I). Frank Br. 13-25. Appellant further adopts in its entirety the substantive arguments of the Opening Brief of Theodore H. Frank on the District Court's abuse of discretion in granting an $8.5 million fee award to class counsel (Section II). *Id.* at 25-35.

III. THE DISTRICT COURT ERRED BY CERTIFYING THE SETTLEMENT CLASS

A plaintiff class can form under federal law only if: (1) it has so many members that joinder of all of them would be impracticable; (2) there are questions of law or fact common to the class (commonality); (3) representative parties' claims and defenses are typical of the class' claims and defenses (typicality); and (4) representative parties will "fairly and adequately protect" the class' interests (adequate representation). Fed. R. Civ. P. 23(a)(1)–(a)(4); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613 (1997). Crucially, finding a proposed settlement "fair" cannot substitute for the certification requirements embodied in Rule 23; certifying a class merely because a settlement is "fair" is a clear error of law. *Amchem*, 521 U.S. at 622. Before allowing a case to proceed as a class action, a court must make all necessary legal and factual probes to

ensure all of Rule 23(a)'s requirements are met; if they are not, certification must be denied and the class action barred. *See Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2552 (2011); *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 676 (7th Cir. 2001). Where parties craft a settlement agreement before class certification the court:

> must pay undiluted, even heightened, attention to class certification requirements because, unlike in a fully litigated class action suit, the court will not have future opportunities "to adjust the class, informed by the proceedings as they unfold".

Alberto v. GMRI, Inc., 252 F.R.D. 652, 658 (E.D. Cal. 2008) (quoting *Amchem*, 521 U.S. at 620) . Further,

> [t]he parties cannot "agree to certify a class that clearly leaves any one requirement unfulfilled," and consequently the court cannot blindly rely on the fact that the parties have stipulated that a class exists for purposes of settlement.

Id. (quoting *Amchem*, 521 U.S. at 622) (observing that Rule 23 does not make certification proper simply because the settlement appears fair).

Numerosity, commonality, and typicality are not at issue in this appeal. Only the Settlement Class' failure to meet the adequacy of representation requirement will be addressed below.

A. The Federal Rules of Civil Procedure and Binding Precedent Prohibit Certification of a Class Lacking Adequate Representation

The Due Process Clause of the Federal Constitution and Rule 23(a)(4) prohibit district courts from certifying plaintiff classes where named plaintiffs (class representatives) fail to demonstrate that they will fairly and adequately protect the interests of the class. Fed. R. Civ. P. 23(a)(4); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985) ("the Due Process Clause … requires that the named plaintiff at all times adequately represent the interests of the absent class members"). The requirement that named parties fairly and adequately protect interests of the class guards against conflicts of interest between the named parties and the class they wish to represent. *Amchem*, 521 U.S. at 625.

Ensuring classes are adequately represented is vitally important, as class actions themselves are an exception to the general rule that lawsuits are prosecuted only by and for the benefit of individually named plaintiffs. *Dukes*, 131 S. Ct. at 2550. The Supreme Court only exempts classes from this general rule where the class representative(s) are part of the class, with the same interests and injury as unnamed class members. *Id.* Thus, failure to take divergent interests into account and fairly accommodate them before the parties negotiate a final settlement renders representation inadequate. *Manual for Complex Litigation, Fourth,* § 21.612. Counsel must have fairly represented the interests of all the class members when they negotiated the settlement. *Id.* To this end,

district courts must engage in a two-prong test, denying a finding of adequate representation, and refusing to certify the class, where: (1) named plaintiffs and their counsel have conflicts of interest with unnamed class members; or the named plaintiffs and their counsel are unable or unwilling to prosecute the action zealously on behalf of the entire class. *See Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 157 n.13 (1982); *Evon v. Law Offices of Sidney Mickell*, 2012 WL 3104620, 11 (9th Cir. 2012); *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998). This requirement applies separately to both the class representatives and class counsel - even where counsel is without conflict, class representatives might still fail. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 856, n. 31 (1999). Only inadequacy of representation arising from multiple separate conflicts of interest are at issue in this appeal.

Genuine conflicts of interest between the named class representatives and absent class members always destroys adequacy of representation. *Amchem*, 521 U.S. 591 (1997). Thus, genuine antagonism between the representative and the unnamed parties is a determinative factor in denying adequacy under Rule 23(a)(4)—whenever representatives have interests antagonistic to and fundamentally in conflict with other class members, fatal conflict exists. *Amchem*, 521 U.S. at 626; *Beck v. Maximus, Inc.*, 457 F.3d 291, 296 (3d Cir.

2006); *Denney v. Deutsche Bank AG*, 443 F.3d 253, 268 (2d Cir. 2006); *Andrews Farms v. Calcot, Ltd.*, 268 F.R.D. 380, 388 (E.D. Cal. 2010). Fundamental conflicts are easily recognizable because they go to the heart of the litigation. Conte & Newberg, 6 Newberg on Class Actions 4th § 18:14. As the Third Circuit has recognized, "fundamental conflict exists where some [class] members claim to have been harmed by the same conduct that benefitted other members of the class," and the conflicting conduct touches the specific issues in controversy. *Dewey v. Volkswagen Aktiengesellschaft*, 681 F.3d 170, 184 (3d Cir. 2012) (quoting *Valley Drug Co. v. Geneva Pharms., Inc.*, 350 F.3d 1181, 1189 (11th Cir. 2003)) (internal quotations omitted).

B. Multiple Conflicts of Interest Bar Class Certification in This Case

1. An Impermissible Conflict Over Allocation of Remedies Between Class Member Groups Exists, Barring Certification.

Conflict over allocations of remedies between class members with competing interests is the fundamental conflict that renders a representative plaintiff inadequate. *See*, *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 856, n. 31 at 857 (1999); *Amchem*, 521 U.S. 591 at 626-27 (1997); *Dewey v. Volkswagen Aktiengesellschaft*, 681 F.3d 170, at 184 (3d Cir. 2012). The existence of a settlement agreement whose structure "divides a single class into two groups of

plaintiffs that receive different benefits, supports the inference that the representative plaintiffs are inadequate." *Dewey*, 681 F.3d at 187. In *Dewey*, a case involving vehicle defects, the Third Circuit found an impermissible fundamental conflict of interest where, within the same class, one group (the "reimbursement group") had priority access to cash reimbursements from the settlement fund. *Id.* Only after prioritized claims were satisfied did the settlement allow the administrator to satisfy "goodwill claims" from the "residual group." *Id.* Of particular note, the parties in that case sorted class members into either group using arbitrary methodology based on sorting claim rates by model year runs. *Id.* The Third Circuit found this arbitrary line drawing in distributing relief to exacerbate a fatal conflict of interest, because:

> every plaintiff had an incentive to draw the dividing line just beneath their model run, placing as many cars as possible into the residual group. That is, every plaintiff had an incentive to draw the dividing line just beneath their model run, placing as many cars as possible into the residual group. Doing so would create the least amount of competition for the first round of reimbursement claims, and would thus give class members in the reimbursement group the best chance at having their claims satisfied in full.

Dewey at 187-188. Thus, the problem in this type of scenario is that the interests of the representative plaintiffs and the "residual group" (unnamed class members) impermissibly aligned in opposing directions: class representatives "had an interest in excluding other plaintiffs from the reimbursement group,"

while unnamed class members "had an interest in being included in the reimbursement group." *Id.* at 188. As the *Dewey* court correctly noted, this is exactly the kind of conflict that contributed to the lack of adequate representation in *Amchem*. *Id.* (citing *Amchem*, 521 U.S. at 626-27).

An analogous, even more severe conflict of interest over allocation of remedies exists in this case, and must bar class certification. Under Section 6.1.1 of the Settlement Agreement, Wal-Mart agreed to pay a percentage of the settlement in cash (the "Cash Component"), to cover: (1) "reasonable" attorneys' fees and costs; (2) "reasonable class representative incentive payments;" and actual costs of "Notice and Administration." ER 271-272. These payments are to be made only from the Cash Component. It is only after the entire Cash Component has been satisfactorily paid out that any remaining portion of the Cash Component may be allocated to the unnamed class members' "Gift Card Component." *Id.* at 9. Indeed, the Gift Card Component is explicitly defined as whatever is remains after Class Counsel and the class representatives have extracted their disproportionate fees. *Id.* As previously noted, each of the nine class representatives in this case secured for themselves a $5000 incentive award, Class Counsel is allotted an $8.5 million fee award, while each unnamed class member will receive, at most, a $12 coupon. ER 270.

This is precisely the type of conflict barred by *Amchem* and *Dewey*. The Settlement Agreement on its face divides a single class into two groups: (1) those who take huge incentive awards and excessive attorneys' fees from the Cash Component, and (2) every unnamed class member, entitled only to a pro rata share of the remaining residual funds in the form of a Gift Card Component. Worse, as explained in detail by Appellant Frank, if those class members trapped in the Gift Card Component want to receive actual cash, and not a term-restricted, non-transferrable gift card, they must jump through additional unfair and privacy destroying hoops that are plainly unsafe in the modern era of identity theft. This includes being required to providing their Social Security numbers. Thus, the class representatives and Class Counsel had every incentive to put as many class members as possible into the residual Gift Card Component group to maximize their own recovery, while unnamed class members have every incentive to escape into the Cash Component to avoid being subject to restrictive, undervalued gift card coupons - the use of which, as explained by Appellants Frank and Zimmerman, is not only unfair in this instance but plainly illegal under CAFA and other binding federal law.

2. Class Counsel Impermissibly Sold Out the Interests of Unnamed Class Members.

The Seventh Circuit has wisely observed that:

> Rule 23 contemplates, and the district court should insist on, a conscientious representative plaintiff. All class suits create some conflict between the representative and the class; the representative and counsel may be tempted to sell out the class for benefits to themselves.

Rand v. Monsanto Co., 926 F.2d 596, 599 (7th Cir. 1991). Stated more bluntly, there is a real and serious risk in any class action that class counsel will settle claims for drastically less than their worth because class counsel is satisfied with its own fees. *Vollmer v. Selden*, 350 F.3d 656, 660 (7th Cir. 2003). Judges must constantly be aware of this risk and reject as inadequate representatives any counsel who is obviously "pay[ing] inadequate attention to the interests of the others they purport to represent." *Rand*, 926 F.2d at 599. As analyzed with great detail and care by Appellant Frank, and adopted herein, Class Counsel in this case over-inflated their own fee award at the expense of the unnamed class members' recovery from the common fund. This situation is an unambiguous conflict of interest of the type barred by *Rand*, *Vollmer*, and similar cases, and plainly demonstrates that Class Counsel is involved in a fundamental, fatal conflict that fails to satisfy Rule 23(a)(4).

3. The District Court Failed to Apply the Heightened Scrutiny Necessary when Attorney Fees are Massively Disproportionate to Class Representative Recovery.

The requirement of stringent examination of adequacy of the class representatives and class counsel is especially great where class counsel's attorney's fees will far exceed the class representative's recovery. *London v. Wal-Mart Stores, Inc.*, 340 F.3d 1246, 1254 (11th Cir. 2003). The risk in this scenario is that a class representative who is closely associated with the class counsel - e.g.: through longstanding financial or personal ties - will acquiesce to a settlement on terms less favorable to the interests of absent, unnamed class members. *Id.* Unfortunately, nothing in the record, including the Order and Final Judgment, indicates the District Court even attempted this required inquiry. There does not appear to have been a guard against this potentially fatal fundamental conflict of interest. This serious oversight is unsurprising in the context of the District Court's erroneous finding that the settlement was fair, adequate, and reasonable.(Discussed at length in Section IV below).

Under the foregoing, this Court should reverse as impermissible error the District Court's holding that class representation for the Settlement Class was adequate as required by federal law.

IV. THE DISTRICT COURT ERRED BY FINDING THE SETTLEMENT FAIR, ADEQUATE, AND REASONABLE

A. The District Court Failed to Make Written Findings of Fairness, Adequacy, and Reasonableness Supported by the Record as Required by Law in This Case

1. The Federal Rules of Civil Procedure and Ninth Circuit Precedent Require Findings Supported by the Record

Under the Federal Rules of Civil Procedure and Ninth Circuit case law, a court cannot approve a class action settlement until it has held a hearing and found the settlement fundamentally fair, reasonable, and adequate. Fed. R. Civ. P. 23(e)(2). In making this determination, the Ninth Circuit requires judges to balance several factors. *Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1375 (9th Cir. 1993). The Ninth Circuit's non-exclusive list of factors includes:

> the strength of plaintiffs' case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed, and the stage of the proceedings; the experience and views of counsel; the presence of a governmental participant; and the reaction of the class members to the proposed settlement.

Id. (quoting *Officers for Justice v. Civil Serv. Comm'n of San Francisco*, 688 F.2d 615, 625 (9th Cir. 1982).[2] Additionally, courts in the Northern District of California have also routinely considered the nature of the procedure used to

[2] It is incorrect to argue, as class counsel routinely do, that an individual's (or even the majority of the class') failure to object is evidence in support of the settlement—silence must never be construed as consent. *Grove v. Principal Mut. Life Ins. Co.*, 200 F.R.D. 434, 447 (S.D. Iowa 2001) (citing *In re Gen. Motors Pick-Up Litig.*, 55 F.3d 768, 789 (3d Cir. 1995)).

arrive at the settlement: as recommended by the Manual for Complex Litigation, Fourth, § 21.6. *Chun-Hoon v. McKee Foods Corp.*, 716 F. Supp. 2d 848, 851 (N.D. Cal. 2010); Manual for Complex Litigation, Fourth, § 21.6. Further, where the record does not indicate a settlement followed sufficient discovery and genuine arms-length negotiation, that settlement receives no presumption of fairness. *Hanlon v. Chrysler Corp.*, 150 F.3d at 1026 (9th Cir. 1998).

A district judge's failure to analyze the fairness, reasonableness, and adequacy of a settlement under the law and facts, and enter her findings on the record before settlement approval has fatal consequences. According to well-settled Supreme Court precedent:

> A threshold requirement is that the trial judge undertake an analysis of the facts and the law relevant to the proposed compromise. *A "mere boiler-plate approval phrased in appropriate language but unsupported by evaluation of the facts or analysis of the law" will not suffice.*

Cotton v. Hinton, 559 F.2d 1326, 1330 (5th Cir. 1977) (quoting *Protective Comm. v. Anderson*, 390 U.S. 414, 434 (1968)) (emphasis added). Without a memorandum opinion or equivalent on record in support of the judge's conclusions, an appellate court lacks any meaningful basis to judge the propriety of the trial court's exercise of its discretion. *Cotton*, 559 F.2d at 1330; *See Anderson*, 390 U.S. at 434. Only through a careful, reasoned, sufficiently detailed, on-the-record evaluation of the proposed settlement can the court meet

it's obligation as guardian of the rights of absent class members. Only under such circumstances is meaningful appellate review possible. *Foster v. Boise-Cascade, Inc.*, 420 F. Supp. 674, 680 (S.D. Tex. 1976) *aff'd*, 577 F.2d 335 (5th Cir. 1978); *reh'g denied*, 581 F.2d 267 (5th Cir. 1978). Notably, approval of a settlement without knowledge of its actual value is an independently reversible abuse of discretion. *See,* MGIC Indem. Corp. v. Moore, 952 F.2d at 1122, (9th Cir. 1991).

2. Cases Holding Written Findings Not Required Are Inapplicable to this Settlement

Authorities allowing no written findings on the record are distinguishable from the instant case. Additionally, such authorities demonstrate the District Court's failing here. In the fairness hearing objections context only, a district court is not required to respond to objections with findings of fact and conclusions of law. But in such circumstances, the court must give a reasoned response on the record. *Linney v. Cellular Alaska P'ship*, 151 F.3d 1234, 1242 (9th Cir. 1998). Although the instant case involves misconduct at the final approval stage, not the fairness hearing, *Linney* emphasizes the need for a reasoned approach to settlement approval at every stage of the process. Further, a district court is permitted to make conclusory written findings only where the

record shows it "comprehensively explored" all relevant factors and gave a reasoned response to settlement objections. *Shaffer v. Cont'l Cas. Co.*, 362 F. App'x 627, 629-30 (9th Cir. 2010); *Churchill Vill., L.L.C. v. Gen. Elec.*, 361 F.3d 566, 577 (9th Cir.2004). A reasoned response, by definition, cannot include an erroneous application of settled law. As explained with great skill and at great length by Appellant Frank, the District Court below unequivocally misapplied the law when it examined the amount offered in settlement (the settlement value), especially as related to the fee award to Class Counsel and the Settlement's failure to comply with CAFA. In this light the District Court cannot reasonably or logically have been said to have "comprehensively explored" all relevant factors, and its written Order and Final Judgment must therefore stand or fall on its own merits.

3. The District Court Failed to Make the Requisite Findings on the Record to Support Holding This Settlement Fair, Adequate, and Reasonable

Here, the District Court clearly failed to make the requisite findings on the record to support its holding that the Settlement is fair, reasonable, and adequate. The Order and Final Judgment merely states that the District Court "considered and balanced several factors," including those required by the Ninth Circuit, and

proceeds to list off the *Torrisi* factors. ER 1-22. There is absolutely zero discussion of these factors and their requirements or how they were weighed in this particular case; beyond an acknowledgement that they exist and must be weighed and satisfied. There is no support for the Courts conclusory statement that the Settlement complies with the *Torrisi* factors. ER 1-22.

As noted above, and well-proved in Appellant Frank's brief, the District Court here unequivocally misapplied the law when it examined the amount offered in settlement. An unambiguous erroneous application of binding law is an abuse of discretion independently justifying reversal. Appellant Frank also indicates the lower court failed to comprehensively explore all the relevant factors. Thus, *Shaffer* cannot activate to excuse the lower court's otherwise plainly impermissible conclusory written findings. The language found in the Order and Final Judgment is exactly the type boiler-plate condemned by *Cotton*, and *Anderson*. Allowing such a judgment to stand would fail to guard the rights of absent class members and permit an incomplete record on appeal, as forewarned in *Foster*.

B. The Settlement is Not Fair, Reasonable, or Adequate Because the Incentive Awards are Excessive Versus the Benefit to the Class

The Ninth Circuit recognizes a fatal abuse of discretion where the result achieved for class members is markedly less than the incentive awards. *Staton v. Boeing Co.*, 327 F.3d 938, 975-78 (9th Cir. 2003). In *Staton*, the trial court's approval of a settlement as fair, adequate, and reasonable was reversed where the record failed to support incentive awards that outstripped unnamed class members sixteen times over. *Id.* This Circuit rightfully recognizes the risk that such excessive awards may put a class representative in conflict with the class. Such action encourages litigants to bring class actions merely to improve the likelihood of receiving their own cash settlement at the expenses of unnamed class members. *See Rodriguez v. West Publishing Corp.*, 563 F.3d 948, 960 (9th Cir. 2009).

The $5000 incentive award for each representative in the instant case is clearly excessive under the *Staton* standard. As explained in great detail by Appellant Frank, and acknowledged by the District Court itself, each individual class member in this Settlement will only receive approximately $12 of value. ER 21-22 and 164. Under the *Staton* logic, each $5000 incentive award to the nine class representatives in this case (total: $45,000) is 416.6667 times higher than each individual unnamed class member's maximum coupon recovery. This is clearly excessive under Ninth Circuit precedent and simple logic.

C. The Settlement is Not Fair, Reasonable, or Adequate Because of the Improper Wal-Mart Reversion and Incorporation of "Confidential" Provisions Not Included in the Settlement

Two clauses of the Settlement Agreement as approved by the District Court deserve special attention for their failure to satisfy fairness, adequacy, and reasonableness in any meaningful sense. While the court approved notice stated that the entire amount of the net settlement fund (minus attorneys' fees and costs of administration) would be distributed per capita to all who filed a valid claim, Paragraph 11.1.4 of the Settlement Agreement (incorporated into the Order and Final Judgment) mandates that any unclaimed or unused funds "return to Wal-Mart." ER 16. Given the representations contained in the Notice, other communications to the class, and the general principle that the Settlement is meant to benefit the Settlement Class, no reversion to Wal-Mart should be allowed under any circumstances.

Assuming proper claim administration, there should be no unused funds at all, as the money and coupons will be distributed per capita. There is a possibility of un-cashed checks and expiring gift-cards. These amounts, if any, should be distributed under *cy pres* to appropriate recipients. To permit anything else is to diminish the value of the settlement to the class.

The Settlement Agreement also contains a startling provision stating: "Wal-Mart, at its sole discretion, has the right to terminate this Settlement pursuant to the terms of the *confidential Supplemental Agreement Regarding Opt Outs*." ER 278. (Emphasis added.). There is no reference to the terms of this apparently secret contract in the Order and Final Judgment, nor is it even clear who all the parties were beyond Wal-Mart itself. It is not included as an exhibit to the Settlement Agreement, nor is it readily available from the litigation website. Its terms are a complete mystery to unnamed class members. Yet, it gives Wal-Mart unchecked power to kill the entire Settlement forever if some condition(s) - which it is impossible to define - occur. At the very least, such a potentially dangerous provision to the Settlement would warrant discussion in the Order and Final Judgment. This cannot be considered fair, adequate, or reasonable under even the most generous and flexible definitions of those terms.

Under the foregoing, this Court should reverse as impermissible error the District Court's holding that the settlement between the Class and Wal-Mart was fair, reasonable, and adequate as required by law.

RELATED CASES

Appeal Nos. 12-15889, 12-15957, 12-15996, and 12-16010 are appeals by other objectors that have been consolidated with Frank's lead appeal, 12-15705.

Resnick v. Netflix, Inc., No. 11-18034 (9th Cir.) is Plaintiffs' appeal of the District court's order granting summary judgment for Netflix in this case. The appeal addresses the merits of plaintiffs' underlying antitrust claims. That case is fully briefed, but oral argument has not yet been scheduled. Appeal Nos. 12-16160 and 12-16183 from the district court in this case are a collateral appeal by the plaintiffs and a collateral cross-appeal by defendant Netflix relating to the district court's award of costs, and do not affect this appeal.

Ciolino v. Hewlett-Packard Co., No. 11-16097 (9th Cir.), raises closely related issues relating to the scope of a district court's obligations under the Class Action Fairness Act, and the district court's failure to justify departure from the Ninth Circuit's 25 percent benchmark. That case is fully briefed, but oral argument has not yet been scheduled.

CONCLUSION

For each of the foregoing reasons, Appellant respectfully submits that this Court should reverse the orders of the District Court approving this class action settlement and awarding attorney's fees.

Respectfully Submitted,

Date: 9/7/2012

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)(C)

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I certify that the foregoing brief is proportionately spaced, has a type-face of 14 points, and as calculated by my word processing software (Microsoft Word) contains 6,800 words.

Date: September 7, 2012 /S/ Gary W. Sibley.

CERTIFICATE OF SERVICE
CM/ECF FILING/SERVICE
U.S. Court of Appeals, Case No. 11-15192

I hereby certify that on September 7, 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. Participants in the case who are registered CM/ECF users are served via the appellate CM/ECF system. (The foregoing Appellant's Brief will be served via First Class US Mail to the non-CM/ECF participants.)

Date: September 7, 2012 /S/ Gary W. Sibley.