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UNITED STATES DISTRICT COURT
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** **PLAINTIFFS' OPPOSITION TO NETFLIX'S RENEWED MOTION TO DECERTIFY THE NETFLIX SUBSCRIBER LITIGATION CLASS** Date: September 28, 2011 Time: 9:00 a.m. Place: Courtroom 3
This document relates to: ALL ACTIONS	

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1 Netflix's renewed motion to decertify the Netflix Subscriber Class should be denied. The
2 conflict Netflix complains of – a conflict that does not touch Netflix – was waived by the
3 informed written consent of all class representatives and Wal-Mart. Following the ABA Model
4 Rules, California courts permit class representatives to give such consent on behalf of, and
5 without notice to, absent class members. And there is no evidence that the class representatives
6 or class counsel have wavered, or will waver, from their zealous pursuit of maximum
7 compensation for class members for the harms caused by Netflix and settling-defendant Wal-
8 Mart.

9 Netflix's latest motion to decertify is most remarkable for the things it omits. Netflix does
10 not cite or discuss California Rule of Professional Conduct 3-310(C)(3), which permits dual
11 representation in unrelated matters of clients with adverse interests when, as here, informed
12 written consent is obtained. Netflix omits any reference to *Sharp v. Next Entertainment*, 163 Cal.
13 App. 4th 410 (2008) – the leading California case on the question presented by its motion – which
14 holds that class representatives can provide the informed consent required by Rule 3-310. Netflix
15 does not mention the ABA Model Rules of Professional Conduct and related commentary which
16 state that "unnamed members of the class are ordinarily not considered to be clients of the lawyer
17 for purposes of" implementing the informed consent requirement. And Netflix does not mention
18 that *Rodriguez v. West Publ'g Corp.*, 563 F.3d 948 (9th Cir. 2009), the Ninth Circuit case it cites
19 for the proposition that the class is not adequately represented, reached precisely the opposite
20 result. Instead, Netflix builds its motion on a foundation of inapplicable cases in which informed
21 consent was never sought or, worse, counsel proceeded with conflicted representation after
22 consent was expressly denied.

23 It is unclear who Netflix seeks to protect through its motion. Netflix is not affected by the
24 conflict or conflict waivers. Those who might be affected – Wal-Mart and the class
25 representatives – were informed of the conflict and consented to waive it. While Netflix feigns
26 concern for absent class members, the relief Netflix seeks – decertification – would punish the
27 class, gut a hard-fought, arms-length settlement that provides millions of dollars in benefits to the
28 class, void thousands of hours of zealous advocacy by class counsel, and erase the investment of

1 time and effort by the class representatives. The California Rules of Professional Conduct should
2 not be construed "to hurt class members under the guise of protecting them." *Sharp*, 163 Cal.
3 App. 4th at 435.

4 **I. FACTUAL BACKGROUND**

5 **A. Providing Written Notice and Obtaining Written Consent**

6 Following the March 15, 2011 dissolution of Howrey LLP, Lead Plaintiff Class Counsel
7 Robert Abrams joined the Washington, DC office of Baker & Hostetler LLP ("Baker") effective
8 March 29, 2011. Declaration of Robert G. Abrams, August 25, 2011, ¶ 3, attached as Exhibit 1
9 (hereafter "Abrams Decl."). On March 22, 2011, Mr. Abrams informed each class representative
10 in a letter of this impending move and indicated that the move would raise a conflict of interest
11 because Baker lawyers represent Wal-Mart in specified unrelated matters. *Id.* ¶ 4. In the letters,
12 he also informed each class representative that professional conduct rules permit a law firm to
13 undertake such concurrent representations only if each client waives the conflict of interest,
14 requested that each class representative consent in writing to concurrent representation, and
15 offered to answer any questions. *Id.* ¶¶ 5, 7. The letters also acknowledged the risks of
16 concurrent representation and the procedures that would be employed internally by Baker to
17 address those risks. *Id.* ¶ 6. Each class representative consented in writing to the concurrent
18 representation. *Id.* ¶ 8.[1]

19 On March 23, 2011, following a telephone conversation between Baker and Wal-Mart,
20 Baker notified Wal-Mart in writing of Mr. Abrams' contemplated move to Baker, and informed
21 Wal-Mart that Mr. Abrams was representing clients in this matter and that his clients are adverse
22 to Wal-Mart. Declaration of John Weber, August 25, 2011, ¶ 3, attached as Exhibit 2 (hereafter
23 "Weber Decl."). Baker's letter to Wal-Mart also acknowledged the risks of joint representation
24 and outlined the steps that would be taken by Baker to prevent adverse impacts from concurrent
25
26 [1] On August 24, 2011, Plaintiffs provided these waivers for *in camera* review by the Court. *See Encompass Holdings Inc. v. Daly*, No. 09-1816, 2009 WL 3045970, at *2 (N.D. Cal. Sept. 23,
27 2009) (Court reviewed waivers *in camera*); *Neill v. All Pride Fitness of Washougal*, No. 08-5424, 2009 WL 1255101, at *3 (W.D. Wash. May 4, 2009) ("the letter regarding the potential conflict
28 of interest and consent to joint representation was sent to the Court and reviewed *in camera*").

representation if a waiver were granted. *Id.* ¶¶ 4-5. Baker asked Wal-Mart to consider consenting to the concurrent representation and Wal-Mart provided its written consent. *Id.* ¶ 6.

B. Litigation Against Wal-Mart and the Settlement

This litigation has been stayed as to Wal-Mart since August 2010. ECF Nos. 203 and 475. In the two years prior to Lead Class Counsel's move to Baker, all fact discovery, including the examination of Wal-Mart witnesses, was completed. The examinations of Wal-Mart witnesses were videotaped for use at trial in accordance with Fed. R. Civ. P. 32(a), and the last Wal-Mart witness was examined on November 3, 2010, more than four months before Mr. Abrams' move to Baker.

Almost a year before Mr. Abrams' move, Wal-Mart's counsel and Lead Class Counsel began settlement discussions, leading to an August 2010 term sheet, the stay of litigation against Wal-Mart that remains in place today, and a December 10, 2010 settlement agreement. After this Court denied without prejudice Plaintiffs' preliminary motion to approve the initial settlement, Plaintiffs associated new counsel, Craig Corbitt of the San Francisco office of Zelle Hofmann Voelbel & Mason LLP, to lead negotiations with Wal-Mart as Independent Settlement Counsel. While Mr. Abrams observed the subsequent negotiations with Wal-Mart, Mr. Corbitt, with the assistance of Joseph Tabacco of the Berman De Valerio firm, led the negotiations. The negotiations resulted in a second settlement with Wal-Mart, which is the subject of Plaintiffs' Motion for Preliminary Approval filed on July 15, 2011. ECF No. 454.

II. CLASS COUNSEL CONTINUES TO ADEQUATELY REPRESENT THE CLASS

Netflix seeks decertification of the class because Mr. Abrams, one of the many lawyers and law firms representing the plaintiff class, moved to a firm that represents Wal-Mart in unrelated matters. Netflix claims – contrary to the law in California and elsewhere – that such a conflict was not waivable by class representatives on behalf of the class. Netflix asserts that the waived-conflict renders counsel unsuitable to continue to represent the class and requires decertification.

The decertification Netflix seeks is contrary to law. The conflict at issue was waivable, and informed consents were obtained. Netflix's only alleged impact from the waived conflict –

that class counsel may not aggressively examine Wal-Mart witnesses at trial – is a non-issue in this litigation. Trial testimony from Wal-Mart witnesses likely will be presented by way of videotaped examinations completed long before the waived conflict arose. And even if a Wal-Mart witness appears live at trial, there is no reason to believe that Mr. Abrams or other class counsel would violate their ethical obligations and fail to aggressively examine that witness.

Netflix's motion should be denied. Indeed, given the current posture of this case, this Court should follow the lead of the *Sharp* court and "be skeptical of the impetus and purpose of [Netflix's] motion to disqualify . . . because it poses the very threat to the integrity of the judicial process that it purports to prevent." 163 Cal. App. 4th at 434.

A. Baker's Concurrent Representation Was a Waivable Conflict

This Court applies "the standards of professional conduct required of members of the State Bar of California." Civil L.R. 11-4(a)(1). California Rule of Professional Conduct 3-310(C)(3) – which was not cited or discussed by Netflix – directly addresses the question of dual representation in unrelated matters of clients with adverse interests. Rule 3-310(C)(3) permits counsel to "[r]epresent a client in a matter and at the same time in a separate matter accept as a client a person or entity whose interest in the first matter is adverse to the client in the first matter" where counsel has obtained "the informed written consent of each client." *See also Sharp*, 163 Cal. App. 4th at 429 (class representatives can waive conflicts that arise out of concurrent representation in unrelated matters).

Netflix cites no case holding that a concurrent representation conflict is not waivable. To the contrary, Netflix relies on *Unified Sewerage Agency of Washington County v. Jelco Incorporated*, 646 F.2d 1339, 1344 (9th Cir. 1981), in which the Ninth Circuit, applying a provision of Oregon's Code of Professional Responsibility (similar to California Rule 3-310(C)(3)), recognized that there is no "per se rule against dual representation in unrelated matters of clients with adverse interests." Indeed, key cases relied on by Netflix involved failure to obtain consent, or the continuation of concurrent representation after consent was denied. *See, e.g., Moreno v. AutoZone, Inc.*, No. 05-4432, 2007 WL 4287517, at *5 (N.D. Cal. Dec. 6, 2007) (counsel "did not take the requisite steps to obtain informed written consent" and was therefore

disqualified from concurrently representing putative class members with conflicting interests); *Truck Ins. Exch. v. Fireman's Fund Ins. Co.*, 6 Cal. App. 4th 1050, 1056 (1992) ("Crosby did not obtain the informed written consent of FFIC, and proceeded with its representation of Truck ***after such consent was explicitly denied***") (emphasis added).

B. Class Representatives and Wal-Mart Provided Written, Informed Consent

Howrey and Baker alerted their respective clients in writing to: (1) the existence of the conflict, (2) the nature of the unrelated matters that resulted in the conflict, (3) the fact that the Rules of Professional Conduct recognize such conflicts as a threat to a lawyer's exercise of independent professional judgment on behalf of clients and the possibility of adverse impacts relating to the disclosure of confidential information, and (4) the steps Baker would take (and has taken) to prevent adverse impacts to either Plaintiffs or Wal-Mart. Abrams Decl. ¶¶ 4-6, Weber Decl. ¶¶ 3-5. The Class Representatives and Wal-Mart both consented, in writing, to concurrent representation by Baker in unrelated matters.

These waivers meet the requirement of informed consent. *See, e.g., United Sewerage*, 646 F.2d at 1345-46 (finding informed consent where counsel shared with its clients "the nature of the conflict of interest in such detail so that they can understand the reasons why it may be desirable for each to have independent counsel, with undivided loyalty to the interests of each of them") (citation omitted); *Sharp*, 163 Cal. App. 4th at 431 (where waivers demonstrated that class representative "understood and acknowledged the presence of all purported conflicts of interests and the material risks of continued representation," they "made rational choices armed with full disclosures and provided informed written consent to the simultaneous representation").

Netflix does not challenge Class Counsel's representation that he obtained waivers from Class Representatives and Wal-Mart. Instead, Netflix argues that class representatives cannot give waivers on behalf of the class (an argument addressed below).

C. Class Representatives Had the Authority to Waive the Conflict on Behalf of the Class

In *Sharp*, the leading California case on the question of conflict waiver by named class members, the court acknowledged that California's Rules of Professional Conduct and case law

had not yet directly addressed whether named class members could "provide informed consent in class action lawsuits." The Court observed, however, that the American Bar Association's Model Rules of Professional Conduct directly addressed the subject and could "serve as guidelines absent on-point California authority or a conflicting state public policy." 163 Cal. App. 4th at 433 (quoting *City and County of San Francisco v. Cobra Solutions, Inc.*, 38 Cal. 4th 839, 852 (2006). The court then cited with approval Comment 25 to ABA Model Rule 1.7, which states:

> When a lawyer represents or seeks to represent a class of plaintiffs or defendants in a class-action lawsuit, unnamed members of the class are ordinarily not considered to be clients of the lawyer for purposes of applying paragraph (a)(1) of this Rule [that restricts representation when there are concurrent conflicts of interest]. Thus the lawyer does not typically need to get the consent of such a person before representing a client suing the person in an unrelated matter. Similarly, a lawyer seeking to represent an opponent in a class action does not typically need the consent of an unnamed member of the class whom the lawyer represents in an unrelated matter.[2]

Sharp, 163 Cal. App. 4th 433-34 (quoting ABA Model Rules Prof. Conduct, rule 1.7, com. [25]) (bracketed text in original)). *See also Tauriac v. Rosas*, No. 2:10-417, 2011 WL 2671517, at *1 (E.D. Cal. July 6, 2011) (citing the ABA Model Rules and *Sharp*, the court held that an unnamed class member was not considered a client of class counsel in a conflict analysis); *In re Katrina Canal Breaches Consolidated Litigation*, No. 05-4182, 2008 WL 3845228, at *4 (E.D. La. Aug. 13, 2008) ("As informed consent has been obtained from all named individual plaintiffs, the relevant issue becomes whether the potential conflict of interest with unnamed class members in this litigation would prohibit these attorneys from proceeding as counsel for the State. According to the Comments to the Model Rules, where a potential conflict of interest arises that could

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[2] This comment has been adopted in one form or another by numerous states and is currently in the final stages of approval in California. *See* American Bar Association, ABA Model Rules of Professional Conduct-Center for Professional Responsibility, *Variations of the ABA Model Rules of Professional Conduct - Rule 1.7 Conflict of Interest: Current Clients* (Feb. 3, 2010), http://www.americanbar.org/content/dam/aba/migrated/cpr/pic/1_7.authcheckdam.pdf; *see* State Bar of California, *Proposed Rules of Professional Conduct*, at 25, http://ethics.calbar.ca.gov/LinkClick.aspx?fileticket=J2Mhg5NSNdk%3d&tabid=2669 (last visited Aug. 24, 2011). And California's Commission for the Revision of the Rules of Professional Conduct observed that "Comment [25] provides important guidance of some fundamental conflicts issues that arise in class action representations." Commission on the Revision of the Rules of Professional Conduct, *Proposed Rule 1.7 [3-310] "Conflicts of Interest: Current Clients* (Feb 28, 2010), at 89, http://ethics.calbar.ca.gov/LinkClick.aspx?fileticket=mbj32CWuTAY%3d&tabid=2161.

involve unnamed class members, a lawyer need not obtain informed consent from those unnamed class members.").

Netflix relies on a single case in arguing that class representatives cannot waive conflicts on behalf of absent class members. *See Baas v. Dollar Tree Stores, Inc.,* No. 07-03108, 2008 WL 906496 (N.D. Cal. Apr. 1, 2008). The question in *Baas* was purely hypothetical since there was no waiver. Moreover, this unreported decision, which has never been cited by another court, predates the *Sharp* decision, does not discuss the guidance provided by the ABA model rules, and cites no authority for the statement in *dicta* that "counsel would need to obtain waivers from every class member, which, as a practical matter, they cannot do from the absent class members." *Id.* at *4.

This Court has already found that the named class representatives can adequately represent the class. ECF No. 287, pp. 7-8. This finding "ensure[s] that if there are conflict of interest issues, the representative plaintiffs are capable of providing informed consent on behalf of the class." *Sharp*, 163 Cal. App. 4th at 432. The named class members here have done so.

D. The Class Remains Adequately Represented

Netflix argues that the class is not adequately represented because Lead Class Counsel may not vigorously examine Wal-Mart employees at trial, and because Netflix's mysterious receipt of "an unmarked envelope postmarked from Philadelphia" suggests some lack of candor to Netflix and the Court. These claims ring hollow given that Lead Class Counsel has scrupulously followed the applicable Rules of Professional Conduct. Moreover, the many highly capable lawyers representing the plaintiff class provide further assurance that the class remains adequately represented. In any event, Netflix's arguments do not justify decertification of the class.

The assertion that Lead Class Counsel will not continue to vigorously represent the class is unsupported and belied by the immense case record before this Court. *See United Sewerage*, 646 F.2d at 1351-52 (rejecting bald claim that counsel "would be tempted to 'soft pedal' the rights of one client in these cases so as not to jeopardize the position of another client"); *Sharp*, 163 Cal. App. 4th at 435 ("We cannot assume that the Rothner firm will fail to abide by its ethical

1 obligations and there is no evidence that it will subvert the interests of one of its clients . . . for
2 those of its other client"). The assertion is also undercut by the reality of Wal-Mart's current
3 position in this case. Wal-Mart has settled this dispute twice and the case against Wal-Mart has
4 been stayed for a year. Independent settlement counsel, and counsel other than Baker, took a lead
5 role in those settlement negotiations. And it is likely that any trial testimony of Wal-Mart
6 witnesses – many of whom are believed to live more than 100 miles from the court and/or are
7 adverse within the meaning of Fed. R. Civ. P. 32 – would be put on in the form of videotaped
8 depositions taken long before any conflict developed. If Wal-Mart witnesses appear at trial, there
9 is no basis to conclude that Mr. Abrams or counsel from one of the many other firms representing
10 plaintiffs would violate their ethical obligations and their interest in a maximum recovery for the
11 class by going easy on the witnesses.
12 Finally, Class Counsel provided the notices required by the Rules of Professional
13 Conduct, which do not require notice to Netflix (which is not touched by the conflict). Baker and
14 Mr. Abrams promptly disclosed the conflict to Wal-Mart and each class representative. Mr.
15 Abrams also notified all parties of his move to Baker. In hindsight, notice to the Court by
16 Plaintiffs (or Wal-Mart) may perhaps have been the more prudent course. But Netflix's
17 suggestion that there was an effort to deprive the Court of information, or that the lack of
18 immediate disclosure to the Court or Netflix somehow breached a duty to absent class members,
19 is inconsistent with the facts and the law.
20 The *Rodriguez* case, relied on by Netflix, does not support a finding that class counsel is
21 not adequate. Indeed, it is remarkable that Netflix recites the seemingly harsh language of
22 *Rodriguez* without sharing the end of the story. Despite being troubled by class counsel's failure
23 to disclose improper incentive agreements that created conflicts among counsel and class
24 members, the Ninth Circuit "conclude[d] that the presence of the conflicted representatives was
25 harmless," and that "the adequacy requirement for class counsel is satisfied." 563 F.3d. at 961.
26 Moreover, the Ninth Circuit recognized that the participation of non-conflicted firms as
27 representatives of the class could cure the conflict issues. *Id.* at 961. *See also Linney v. Cellular*
28 *Alaska P'ship,* 151 F.3d 1234, 1239 (9th Cir.1998) ("[T]he addition of new and impartial counsel

can cure a conflict of interest even where previous counsel continues to be involved in the case."). Here there are many such firms on the Plaintiffs' Steering Committee and beyond.

Also, *Rodriguez* is factually distinguishable. There, counsel failed to disclose improper incentive agreements given to some class members that placed those class members at odds with counsel and the *Rodriguez* class. 563 F.3d. at 958-60. The Ninth Circuit understandably found that the failure to disclose this improper agreement and conflict *among class members* violated a fiduciary duty to the class. But the conflict at issue here does not pit class member against class member, or class members against counsel. Indeed, the named plaintiffs share a common desire with the unnamed plaintiffs – and all class counsel – to maximize recovery for the class.

Finally, other cases relied upon by Netflix present stark examples of inadequate representation by class representatives or counsel that are simply not present here. *See, e.g., Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625-26 (1997) (court declined to address adequacy of counsel issues, found that "common questions of law or fact do not predominate," and held that "named plaintiffs" with diverse medical conditions and exposure scenarios "cannot adequately represent the interests of this enormous class"); *In re N. Dist. of Cal., Dalkon Shield IUD Prods. Liab. Litig.*, 693 F.2d 847, 851 (9th Cir. 1982) (finding inadequate representation of the class by current counsel where, "[a]pparently none of the attorneys already involved in the case is willing to serve as class counsel.").

E. The Court Should Deny the Motion Because of the Harm Decertification Would Cause to the Class

Decertification would harm the class by erasing a hard-fought, arms-length settlement with Wal-Mart that provides millions of dollars in benefits to the class. It would void thousands of hours of zealous advocacy by class counsel. It would deny class representatives the benefits of the time and effort they have put in and their choice of counsel. Decertification would also harm Wal-Mart, which has twice settled its differences with the class and wants to be done with this litigation. It is clear that decertification would benefit no one but Netflix.

Given that this motion is brought "by opposition parties who are not directly touched by the purported conflict," and that decertification would create burdens on the class to replace

1 counsel that has invested thousands of hours on the class's behalf and developed knowledge that
2 cannot be replaced easily, this Court should deny Netflix's motion. *See Sharp*, 162 Cal. App. 4th
3 at 434.
4 DATED: August 26, 2011

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