

1 KRISLOV & ASSOCIATES, LTD.
2 Clinton A. Krislov
3 John Orellana
4 20 North Wacker Dr., Ste. 1350
5 Chicago, IL 60606
6 Tel: (312) 606-0500
7 Fax: (312) 606-0207
8 Firm Number: 21169

6 **IN THE UNITED STATES DISTRICT COURT**
7 **NORTHERN DISTRICT OF CALIFORNIA**
8 **SAN JOSE DIVISION**

9 *IN RE: NETFLIX PRIVACY LITIGATION,*

)
) Case No. 5:11-cv-00379-EJD
)

10) Honorable Edward J. Davila
11)

12) **REPLY TO SETTLEMENT**
13) **PLAINTIFFS' MEMORANDUM IN**
14) **SUPPORT OF MOTION FOR FINAL**
15) **APPROVAL OF CLASS ACTION**
16) **SETTLEMENT AND AWARD OF**
17) **ATTORNEYS' FEES, EXPENSES AND**
18) **INCENTIVE AWARD**
19)

16 Name of Objector: Matthew D. Tanner
17 Address: 53 West Jackson Boulevard, Suite 400
18 Chicago, Illinois 60604
19 Telephone: (312) 588-1970

20 Omitting to address many of Objector Tanner's objections, Settlement Counsel Edelson's
21 Reply Memorandum In Support of Final Approval ("Settlement Reply") totally ignores several
22 deficiencies in the Settlement and viciously attacks Attorney Krislov, more intent on personally
23 attacking objectors than the merits of those objections.

24 **A. Our Filing with the Court was Timely.**

25 Settlement Plaintiffs' assertion that Mr. Tanner's objection is untimely is wrong. Mr. Tanner's
26 objection was FedEx post-marked and sent to the Court on November 14, 2012. *See Exhibit A.*
27 Additionally, Settlement Class Counsel received their copies by in-person delivery the next day
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1 (November 15, 2012). In contrast, Settlement Plaintiffs' cited cases all denied objections only for
2 filings that were untimely *with the court* (and certainly more than a single day), not service to Counsel,
3 which occurred at least as early as would it would have in the ordinary course. Thus, the objection was
4 not untimely.

5 **B. The Value of the Injunctive Relief and "Decoupling."**

6 Settlement Plaintiffs do not address the objection to the value of the injunctive relief and the
7 Settlement's failure to decouple Class Members' ZIP code, birthdate and gender information from their
8 Entertainment Content Viewing Histories. In our objection, we referenced research which showed that
9 these three pieces of information are alone sufficient to expose the identities of 87.1% of United States
10 citizens. (*See* Dkt. 201 at 7-8) As we argued, the implications of this study are recognized at law,
11 leading Congress to enact HIPAA privacy regulations which require birthdates to be redacted to only
12 the year of birth, and ZIP codes to only the first three (3) digits. *Id.*

13
14 Neither Settlement Plaintiffs nor Netflix deny that these three pieces of information remain
15 attached to Class Members' Entertainment Content Viewing Histories and that these are alone
16 sufficient to reestablish the link. Nor do Settlement Plaintiffs actually address this point directly,
17 opting instead to mischaracterize the argument as follows: "[H]is claim that the Settlement's injunctive
18 relief is illusory, because Netflix could theoretically re-identify Class Members' information and
19 reconstruct it to personally-identifiable form, even after the de-coupling required by the Settlement—
20 have already been dealt with above." (*See* Dkt. 226 at 61). The only relevant "above" portion to
21 which Settlement Plaintiffs refer completely misses the mark and merely states "[b]ut as explained in
22 the Final Approval Motion, the decoupling is permanent and subject to a Court-ordered injunction."
23 *Id.* at 30. However, the main concern with allowing Netflix to retain constructively re-identifiable
24 information is not only that *Netflix* may re-couple Class Members' identities, but that outside third-
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1 parties (such as hackers or subversive Netflix employees) will obtain this information and re-identify
2 Class Members, which can be achieved using publicly available census data.

3 Settlement Plaintiffs also indirectly address this objection by stating that *destruction* of Class
4 Members' personally identifiable information is not required, because the injunction disconnects
5 identifying information from Class Members' Entertainment Content Viewing Histories and "[t]hus,
6 once retained information no longer connects an individual with their specific video rental history—
7 *i.e.*, once that information has been "decoupled"—subsection (e) is satisfied and the PII is, for the
8 purposes of the statute, destroyed." *Id.* at 30-31.

9
10 But the entire point of our objection is that the identifying information is *not actually*
11 *disconnected, i.e.*, that enough personally identifiable information (ZIP codes, genders and birthdates)
12 remains connected to Class Members' Entertainment Content Viewing Histories to allow Netflix and
13 third parties to identify them and associate them with a particular viewing history. Again, Settlement
14 Plaintiffs pose no answer to this objection, opting to ignore it instead.

15
16 Settlement Plaintiffs have also not addressed why the Settlement does not define, or even begin
17 to explain, what the term "decouple" actually means. They continue to say that the decoupling will be
18 "permanent," but the permanence is irrelevant if the underlying relief is ineffective. For instance, does
19 decouple merely imply that Class Members' Identification Information and Entertainment Content
20 Viewing History will be kept in separate databases, but still attached by anonymous identification
21 numbers? Settlement Plaintiffs cannot at once play up the value of their injunctive relief by stating
22 that it protects Class Members from "the real risk that such sensitive information will be hacked,
23 stolen, and/or used for illicit purposes" and then ignore the implications of a respected study that
24 reveals fatal flaws in that protection. Mr. Tanner's objection proposes a perfectly reasonable
25 alternative to destroying this information, which Settlement Plaintiffs and Netflix so adamantly
26 oppose, by instead requiring Netflix to follow the HIPAA privacy regulation practice and shorten
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1 birthdates to only the year and ZIP codes to only the first three digits. This solution even allows
2 Netflix to retain similarly detailed data on viewing preferences based on location, age and gender.
3 This objection cannot be glossed over, because it *severely* undermines the value of the injunction to
4 Class Members, to the point that it may even be *valueless*.

5 **C. Vast Expansion of the Class.**

6 Settlement Plaintiffs attempt to downplay the expansion of the Class, arguing that even if the
7 Class included only Section (e) Class Members, it would still be too large to warrant anything other
8 than *cy pres* relief. Yet, we argued that the damages for section (e) Class Members are undervalued,
9 possibly by as much as *twenty times*. (See Dkt. 201 at 20-21). What is troubling is that the Parties
10 expanded the Class to include an additional 32 million members, more than doubling the Class size,
11 with what Settlement Plaintiffs purport to be worthless claims, only to dilute any potential recovery for
12 Class Members with valid claims.
13

14 Even if the common fund remained at \$9 million, the Settlement could at least *attempt* to
15 provide direct monetary payment as the current revised settlement pending preliminary approval in
16 *Fraley v. Facebook Inc.*, N.D. Cal., No. 3:11-cv-01726-RS, *revised settlement filed* 10/5/12. There,
17 the parties bumped the common fund from \$10 million to \$20 million, providing \$10 per class
18 member, unless the fund is exhausted by all the claims, at which point they receive a *pro rata* share.
19 That settlement more appropriately diverts to *cy pres* only if the *pro rata* share is less than \$5 per
20 claimant. This Court should sever, or at least, split into a separate subclass Section (b) only Class
21 Members and follow an approach similar to that in *Fraley* for Section (e) Class Members.
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24 **D. Dr. Egelman's Damages Evaluation.**

25 Settlement Plaintiffs also fail to adequately address Mr. Tanner's objection to Dr. Egelman's
26 damages evaluation, and again, either misunderstand or mischaracterize the objection, of which they
27 only address one part.
28

1 Mr. Tanner first objects to Dr. Egelman's evaluation of damages because it is based on studies
2 which deal with only one-time purchases, and does not extrapolate those results over the subsequent
3 purchases Class Members make when they pay the recurring monthly fee, or renew subscriptions.
4 Settlement Plaintiffs respond that Mr. Tanner "fundamentally misunderstands the nature of Dr.
5 Egelman's report [because] Dr. Egelman's survey did not ask 'how much of your monthly Netflix
6 subscription rate pays for VPPA compliance,' [but] asked participants how much they value VPPA
7 compliance on their own." 51. Settlement Plaintiffs not only misunderstand Mr. Tanner's objection,
8 but also Dr. Egelman's report. Mr. Tanner's objection simply states that Dr. Egelman fails to multiply
9 his figures by the amount of "transactions" that occur, something which his study did not account for,
10 as the comparisons were made to one-time purchase transactions without continuous privacy intrusions
11 as with the Netflix service. A one-time transaction for the purchase of "batteries" or "sex toys" for
12 which information on only that single purchase is recorded and retained is hardly analogous to the
13 Netflix service, under which consumers engage in a series of transactions, by making multiple
14 payments for continued service and giving up new information with each transaction. In short, Mr.
15 Tanner's objection here merely reflects the common sense intuition that a consumer would value the
16 privacy of his or her rental activity spanning over ten (10) years moreso than one single month. If that
17 is not the case, Dr. Egelman's study fails to show it.

20 Settlement Plaintiffs also misunderstand Egelman's report when they claim it shows how much
21 consumers specifically "value VPPA compliance." Dr. Egelman does not actually claim his report
22 estimates the value consumers place on VPPA compliance, and neither his report nor survey to
23 subjects refer to the VPPA. (See Dkt. 191 at 12-26). Rather, Dr. Egelman attempts to measure the
24 value of consumers' video rental history privacy in the free market, not how much they value the
25 violation of their rights under the VPPA.
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1 Mr. Tanner next objects to the portion of Dr. Egelman's damages evaluation that compares
2 Netflix rental histories to other data types. In short, he objects that Dr. Egelman's survey does not
3 provide a definition of "Netflix Video Rental History" when it asks subjects to rank the sensitivity of
4 various data categories. By including categories such as "Mailing Address," "Name," "Date of Birth,"
5 and "Email Address" as categories to be ranked in the same study alongside "Netflix Video Rental
6 History," Dr. Egelman's survey causes subjects to infer that those pieces of information are not within
7 the definition of "Netflix Video Rental History." However, that conception does not match the facts of
8 *this* case, where mailing addresses, birthdates, email addresses, names and payment information were
9 *tied to and included in* Class Members' Entertainment Content Viewing Histories. Accordingly, the
10 results of his study which rank Netflix Video Rental History last, while ranking Mailing Address first,
11 are fundamentally flawed and not indicative of the type of the information of Class Members that
12 Netflix actually retained. Settlement Plaintiffs do not respond whatsoever to this objection.

14 While we recognize that damage estimations cannot be perfect, Dr. Egelman's report suffers
15 from a couple methodological flaws when applied to the facts of this case. His report needs to be
16 modified to account for these variables and should actually show his calculations.

18 **E. The Structure and Timing of the *Cy Pres* Grant Process.**

19 Settlement Plaintiffs totally mischaracterize Mr. Tanner's objection to the *cy pres* process,
20 stating "Krislov argues that the Settlement should be denied approval because the *cy pres* recipients are
21 too good." (*See* Dkt. 226 at 63). Mr. Tanner's objection to the Settlement *cy pres* process, in short, is
22 that the Settlement was constructed and timed to co-opt likely objectors and *directly solicit* them to
23 apply for substantial grants, compounded by setting the *cy pres* application deadline to occur before the
24 date for filing objections, allowing the Parties to essentially buy off the most likely opposition. Under
25 the Settlement's structure, a non-profit that seeks to object must do so in lieu of applying for a *cy pres*
26 disbursement.
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F. The Personal Vendetta of Mr. Edelson.

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2 Settlement Class Counsel's personal attacks on objectors and their counsel should be ignored or
3 stricken. The penchant to destroy (preemptively or otherwise) one's opponent rather than deal with the
4 objections on the merits is an unfortunate diversion from the issues before the Court. We hope it will
5 end the untruthful personal attacks that began with Mr. Edelson's October 31, 2012 declaration (*See*
6 Dkt. 191 at 21).

7
8 I regret that I cannot be before the court in-person as I am in corporate takeover litigation with
9 a vote December 5, 2012.

10 Accordingly, the Settlement should be vacated and Settlement Class Counsel replaced.

11 Respectfully submitted,

12 Dated: December 3, 2012

/s/ Clinton A. Krislov
Attorney for Objector, Matthew Tanner

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14 Clinton A. Krislov
KRISLOV & ASSOCIATES, LTD.
15 20 North Wacker Dr., Ste. 1350
Chicago, IL 60606
16 Tel: (312) 606-0500
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Firm Number: 21169

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EXHIBIT A

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794078484840

Ship (P/U) date :
Wed 11/14/2012 6:07 pm



Actual delivery :
Thur 11/15/2012 10:22 am

Krislov & Associates, Ltd.
Clinton A. Krislov
20 N. WACKER, SUITE 1350
CHICAGO, IL US 60606
312 606-0500

Delivered
Signed for by: B.WALTON

United States District Court
Clerk, USDC No. District of Cal.
280 S. 1st Street
Robert F. Peckham Fed. Bldg.
SAN JOSE, CA US 95113
312 606-0500

Travel History

▲Date/Time	Activity	Location
- 11/15/2012 - Thursday		
10:22 am	Delivered	SAN JOSE, CA
8:06 am	On FedEx vehicle for delivery	SAN JOSE, CA
7:29 am	At local FedEx facility	SAN JOSE, CA
6:05 am	Departed FedEx location	OAKLAND, CA
4:58 am	Arrived at FedEx location	OAKLAND, CA
2:51 am	Departed FedEx location	MEMPHIS, TN
12:31 am	Arrived at FedEx location	MEMPHIS, TN
- 11/14/2012 - Wednesday		
9:10 pm	Left FedEx origin facility	CHICAGO, IL
6:07 pm	Picked up	CHICAGO, IL
4:52 pm	Shipment information sent to FedEx	

Local Scan Time

Shipment Facts

Tracking number	794078484840	Service	FedEx Standard Overnight
Weight	2 lbs	Delivery attempts	1
Delivered To	Receptionist/Front Desk	Total pieces	1
Total shipment weight	2 lbs / 0.9 kgs	Terms	Not Available
Shipper reference	Netflix	Packaging	FedEx Envelope
Special handling section	Deliver Weekday		



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9 *IN RE: NETFLIX PRIVACY LITIGATION,*)
10) Case No. 5:11-cv-00379-EJD
11) Honorable Edward J. Davila
12) ***PROOF OF SERVICE***
13)

13 TO: Jay Edelson
14 350 North LaSalle
15 13th Floor
16 Chicago, Illinois 60654
17 Tel: (312) 589-6370
18 Fax: (312) 589-6378

17 Keith Eggleton
18 Wilson, Sonsini, Goodrich & Rosati, P.C.
19 650 Page Mill Road
20 Palo Alto, California 94304-1050
21 Tel: (650) 493-9300
22 Fax: (650) 565-5100

21 I, JOHN ORELLANA, hereby certify that on December 3, 2012, I provided service to Jay
22 Edelson by personal messenger at the above listed address and email at jedelson@edelson.com, and to
23 Keith Eggleton by FedEx overnight delivery at the above listed address and email at
24 keggleton@wsgr.com.

25 Dated: December 3, 2012

26 /s/ John P. Orellana