

1 SEAN P. REIS (SBN 184044)  
sreis@edelson.com  
2 EDELSON MCGUIRE LLP  
30021 Tomas Street, Suite 300  
3 Rancho Santa Margarita, California 92688  
Phone: 949.459.2124  
4 Fax: 949.459.2123

5 JAY EDELSON (jedelson@edelson.com)\*  
6 RAFEY S. BALABANIAN (rbalabanian@edelson.com)\*  
ARI J. SCHARG (ascharg@edelson.com)\*  
7 CHANDLER R. GIVENS (cgivens@edelson.com)\*  
EDELSON MCGUIRE LLC  
8 350 North LaSalle Drive, Suite 1300  
Chicago, Illinois 60654  
9 Phone: 312.589.6370  
Fax: 312.589.6378  
\*Admitted *pro hac vice*

10 *Attorneys for Plaintiffs JEFF MILANS and PETER*  
11 *COMSTOCK and the SETTLEMENT CLASS*

12 **UNITED STATES DISTRICT COURT**  
13 **NORTHERN DISTRICT OF CALIFORNIA**  
14 **SAN JOSE DIVISION**

15  
16 *IN RE: NETFLIX PRIVACY LITIGATION*

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

[Hon. Edward J. Davila]

17  
18 **PLAINTIFFS' RESPONSE AND**  
**OBJECTION TO OBJECTOR LISA**  
19 **KATRIEL'S REQUEST FOR JUDICIAL**  
20 **NOTICE**

21  
22  
23  
24  
25  
26  
27  
28

**INTRODUCTION**

1  
2           1.       Class Member Lisa Katriel, nine days after Plaintiffs filed their Reply in Support of  
3 their Motion for Final Approval (Dkt. 226)—and two days after the Fairness Hearing—filed what  
4 purports to be a Request for Judicial Notice, asking the Court to adopt her Counsel’s view of the  
5 appropriate class size for this Settlement. (*See* Dkt. 234.) The Court should deny Katriel’s Request  
6 for Judicial Notice because it is both procedurally improper and fails in its own right.

**ARGUMENT**

7  
8           2.       First, Katriel’s purported “Request for Judicial Notice” is not a request for judicial  
9 notice at all. Under Fed. R. Evid. 201, the Court may only take judicial notice of: (1) a fact, (2)  
10 that is not subject to reasonable dispute, (3) because it either “is generally known within the trial  
11 court’s territorial jurisdiction” or it “can be accurately and readily determined from sources whose  
12 accuracy cannot reasonably be questioned.” Fed. R. Evid. 201(b). Katriel’s Request is improper  
13 because it doesn’t ask the Court to take judicial notice of facts—it asks the Court to take notice of  
14 argument (*i.e.*, that “Netflix’s own publicly filed subscriber data confirms the representation made  
15 by Katriel’s counsel that” the Class only consists of 2.5 million people). Indeed, the Request itself  
16 makes clear that argument is being proffered, because the “facts” contained in it cannot “be  
17 accurately and readily determined.” (*See* Dkt. 234 at 2 n.2 (“To be sure, the calculated result may  
18 not provide the exact tally with absolute precision . . .”).)

19           3.       Second, the Request is procedurally improper. Katriel could have, but failed to,  
20 make her arguments earlier. To be sure, Katriel had ample time before the Objection Deadline to  
21 assert and develop her objections, and the Court was very accommodating in allowing her counsel  
22 to fully explain those arguments at the Fairness Hearing. Instead of using the time allotted her at  
23 the Fairness Hearing to raise these points, Katriel chooses to now file supplemental briefing in  
24 support of her objection.

25           4.       The Local Rules forbid such practice. Under Local Rule 7-3, “[o]nce a reply is  
26 filed, no additional memoranda, papers or letters may be filed without prior Court approval,  
27 except” for an Objection to Reply Evidence. Civ. L.R. 7-3(d). Here, Plaintiffs filed their Reply  
28 brief in support of Final Approval on November 28, 2012. (*See* Dkt. 226.) Katriel’s supplemental

1 briefing in support of her objection was filed after Plaintiffs' Reply and without leave of Court.  
2 Therefore, the Request for Judicial Notice is not properly before the Court.

3           5.       Third, Katriel doesn't have standing to file her Request for Judicial Notice because  
4 she didn't follow the Court-ordered objection procedures established for this litigation. The Court  
5 will recall that, at the Fairness Hearing, Class Counsel stated its position that Katriel's Objection  
6 was untimely. Katriel's Counsel responded by representing to the Court that he properly and  
7 timely filed his client's Objection. To move past the issue, Class Counsel said they would re-  
8 investigate the matter. Upon further investigation, Class Counsel stands by its prior position that  
9 Katriel's objection was untimely. That is, the Court's Preliminary Approval Order required that  
10 objections be "*filed and sent to Class Counsel and Netflix's counsel on or before the*  
11 *Objection/Exclusion Deadline . . .*" (*See* Dkt. 80, *citing* Dkt. 76-1, Class Action Settlement  
12 Agreement § 5.5, at 18:12-18). Hence, while Katriel may have filed his objection by the  
13 November 14, 2012 Objection Deadline, he failed to properly send it to Class Counsel by the  
14 Objection Deadline, which makes it untimely. Indeed, the FedEx tracking slip for Katriel's  
15 objection (*See* Dkt. 226-4) shows that Katriel's counsel created the packing label on November 14,  
16 but didn't deposit the envelope intended for Class Counsel until the next day. (*See* Dkt. 226-4  
17 (FedEx tracking slip confirming that Katriel's Objection was not mailed until November 15,  
18 2012); *see also* Dkt. 226 at 4–6.) Thus, Katriel's counsel was being less than candid with the  
19 Court when he said on the record at the Fairness Hearing that he timely filed and served Katriel's  
20 objection via the Court's CM/ECF electronic filing system, because he failed to mention that he  
21 didn't postmark and physically send the objection to Class Counsel by the Objection Deadline,  
22 which is what the Preliminary Approval Order and Settlement Agreement required for an  
23 objection to be valid.<sup>1</sup> Because Katriel did not follow the Court's procedures for objecting, she

24  
25  
26 <sup>1</sup> It is standard practice in class actions to require mailed versions of class member  
27 submissions, especially in cases such as these where, given the size of the class, the parties  
28 (correctly) expected numerous court filings. Separate mailed service ensures the proper receipt  
and cataloguing of objections. Notably, Katriel did not object to the court-ordered requirements or  
seek—at any point—to be excused from them.



1 SEAN P. REIS (sreis@edelson.com) – SBN 184044  
2 EDELSON MCGUIRE LLP  
3 30021 Tomas Street, Suite 300  
4 Rancho Santa Margarita, California 92688  
5 Tel: 949.459.2124  
6 Fax: 949.459.2123

7 *Attorneys for Plaintiffs and the Putative Class*  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**CERTIFICATE OF SERVICE**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

The undersigned certifies that, on December 10, 2012, I caused this document to be electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of filing to counsel of record for each party.

Dated: December 10, 2012

/s/ Rafey S. Balabanian