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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

In Re Online DVD Rental Antitrust Litigation	Case No. 4:09-md-2029-PJH
Theodore H. Frank, Objector.	**REPLY IN SUPPORT OF MOTION FOR DISCLOSURE OF E-GIFT CARD REDEMPTION RATE AND ACCOUNTING**
	Date: April 11, 2018 Time: 9:00 a.m. Courtroom: 3, 3rd Floor Judge: Hon. Phyllis J. Hamilton

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INTRODUCTION

Walmart doesn't claim that it does not possess the information requested by Frank, or suggest that compiling it would be burdensome, expensive, or otherwise problematic, or claim that disclosure would reveal confidential information or trade secrets. Instead, Walmart's opposition is based primarily on flawed standing and jurisdictional arguments and an unduly narrow view of how the e-gift card redemption rate will be useful to policymakers, the judiciary, the public, and Frank, despite the many ways that Frank detailed in his opening brief. Plaintiffs are similarly dismissive of the many ways in which transparency is in the public interest and describe a parade of horribles that has no connection with disclosure of the limited data that Frank requests.

Both oppositions, then, suggest the parties don't want the e-gift card redemption rate and accounting disclosed because it is likely to show that a significant number of class members did not redeem their e-gift cards. This information will help shine a light on the common class-action settlement practice of using non-cash relief to minimize a defendant's payment while the plaintiffs' attorneys get credit for the face-value of the settlement for fee purposes. The parties are right that this information will not help Frank in the present case; however, transparency about settlement results is profoundly important to policing future settlements, setting policy, and advocating for different legal standards. *See* Dkt. 672; Decl. of Brian Wolfman (attached).

Without winning substantive arguments against disclosure, the parties focus on limiting Frank's access to the judicial process with standing and jurisdictional arguments. These arguments lack merit. Frank properly asked the Court for leave to intervene for the limited purpose of requesting the e-gift card redemption rate and accounting. Dkt. 671. If that motion is granted, he is not required to show independent Article III standing because the plaintiffs, who invoked the Court's power by filing this action, have standing. *See Vivid Entertainment LLC v. Fielding*, 774 F.3d 566, 573 (9th Cir. 2014). Lest there be any doubt, the Court expressly retained jurisdiction over limited settlement- and claims-related matters such as Frank's motion, a common judicial practice in class actions, where courts, which have a fiduciary duty to the class, are often called upon to exercise their supervisory or administrative powers. Frank now properly asks the Court to use its retained authority to provide

transparency about the settlement results for the benefit of class members such as himself and the broader public. Even if Frank is required to show independent standing, he can do so because the personal and professional harm caused by the lack of transparency can be redressed by this Court's order requiring Walmart to disclose the redemption rate and accounting.

ARGUMENT

I. This Court has jurisdiction to order Walmart to disclose the e-gift card redemption rate and whether it has recognized any "breakage" income.

In a bare-bones argument, Walmart challenges the Court's jurisdiction to decide Frank's motion for disclosure and accompanying motion for leave to intervene based on the "case or controversy" requirement. It claims to have elaborated on this argument in its opposition to Frank's motion for leave to intervene. In that brief, however, Walmart fails to cite any caselaw holding that the "case or controversy" requirement bars a court from exercising its expressly retained jurisdiction following a settlement. That failure is critical because in the order and final judgment approving settlement, this Court expressly retained jurisdiction over matters such as the implementation of the settlement, distribution of the settlement relief, and the administration of class members' claims. Dkt. 609 ¶ 15. With respect to Walmart's legal authority, in *ALREADY LLC v. Nike, Inc.*, 568 U.S. 85 (2013), Nike moved to dismiss all of the claims it alleged in the litigation following its issuance of a covenant not to sue, in which Nike promised not to raise against the defendant any claims relating to those set forth in the complaint, while the defendant wanted to continue the litigation. *Hollingsworth v. Perry*, 570 U.S. 693 (2013), involved opponents of same-sex marriage asking the Court to decide whether the Equal Protection Clause prohibits a state from defining marriage as the union of a man and woman. Neither case is remotely relevant here, where class member and objector Frank seeks disclosure of information arising from matters over which this Court continues to have jurisdiction.

As Frank states further in his reply in support of his motion requesting leave to intervene, there is no dispute that this Court properly exercised jurisdiction in this action, over the parties, in approving the settlement, or in retaining jurisdiction over matters relating to the administration and

implementation of the settlement. This Court's ongoing supervision is especially necessary in a class action such as this, where it acts as a fiduciary for the class. *E.g.*, *In re Dry Max Pampers Litig.*, 724 F.3d 713, 717-18 (6th Cir. 2013); *In re Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 988, 994 (9th Cir. 2010). This supervision is also entirely proper and consistent with common practice. *See, e.g.*, *SEC v. G.C. George Sec., Inc.*, 637 F.2d 685, 686, 689 (9th Cir. 1981) ("district court had continuing jurisdiction to enforce the terms of the stipulation and its own decree" where it had expressly retained jurisdiction for that purpose); *see also Mendez v. City of Gardena*, 222 F. Supp. 3d 782, 788 (C.D. Cal. 2015) (court had jurisdiction to rule on motion for leave to intervene where it had jurisdiction in underlying action that the parties had settled and voluntarily dismissed).

II. Frank's motion does not "impose new obligations" on Walmart.

Walmart makes the odd claim that Frank is seeking to "impose new obligations" on it with his simple request that it provide transparency into the actual settlement relief provided to the class. This interpretation of Frank's request is not based in reality. All he requests is that Walmart disclose information it already tracks because such disclosure will benefit policymakers, the judiciary, academia, the public, and himself, as a scholar and attorney whose work focuses on class actions. *See* Declaration of Brian Wolfman (describing ways in which disclosure of redemption and claims rates will benefit these stakeholders); Dkt. 671-2 (same). Nothing in the settlement agreement suggests that Walmart would not be asked to account for its implementation of the settlement or the relief that it actually provided to the class; rather, the Court's retention of jurisdiction over those issues indicates to the contrary.

Frank's request for disclosure hardly undermines the public policy favoring settlement, especially because Frank expressly disclaims any intent to challenge the settlement. Dkt. 672 at 8. The best authority Walmart can cite for its argument is a case in which the plaintiff challenged a substantive settlement provision as an unlawful taking based on a change in law five years after executing the settlement agreement. It defies credibility for Walmart to claim that it would not have settled this case

if it had known that it would have to disclose to a class member what the settlement actually cost. The terms of the settlement are already public, as is the amount of relief distributed as cash.

III. Walmart's standing analysis is wrong.

Walmart's standing analysis is premised on the fatally incorrect claim that the plaintiffs are no longer in the case. Dkt. 675 at 5. Walmart offers no support for this claim, which is belied by the court record. Numerous plaintiffs remain parties, and the last entry on the docket prior to Frank's recent motions is an order amending a prior order authorizing distribution of the settlement fund. *See* Dkt. 670. The court expressly retains jurisdiction over the subject of Frank's motion for disclosure. The parties' attempt to characterize Frank's request as falling outside those subjects and the Court's ongoing administrative authority is an exercise in hairsplitting that ultimately fails.

Walmart's standing analysis also fails by missing the forest for the trees. Walmart does not cite a single case establishing that Frank must demonstrate separate Article III standing to move for disclosure if the Court grants his motion to intervene for that limited purpose. A recent decision from the Supreme Court holds only that independent standing is required where an intervenor of right seeks "to pursue relief that is different from that which is sought by a party with standing," such as a separate monetary judgment or a distinct cause of action. *Town of Chester v. Laroe Estates*, 137 S. Ct. 1645 (2017). For example, in *Oregon Prescription Drug Monitoring Program v. U.S. Drug Enforcement Administration*, the Ninth Circuit explained that, under *Town of Chester*, an intervenor who sought to bring a Fourth Amendment claim in a case in which the plaintiff's "entire basis for relief rests on a state-law procedural argument" must have independent standing. 860 F.3d 1228, 1234 (9th Cir. 2017). Similarly, where courts grant media organizations' motions to intervene in order to modify protective orders or otherwise obtain access to judicial proceedings, "no independent jurisdictional basis is needed" where "[t]hey ask the court only to exercise that power which it already has, *i.e.*, the power to modify the protective order." *See, e.g.*, *Beckman Indus., Inc. v. Int'l Ins. Co.*, 966 F.2d 470, 473 (9th Cir. 1992).

Here, Frank is not asserting a new cause of action or seeking relief not encompassed within the original action. That distinction is critical. An intervenor who does not initiate an action, seek

review on appeal, or otherwise "*invoke* the power of the federal courts need not meet Article III standing requirements." *Vivid Entertainment, LLC*, 774 F.3d at 573 (emphasis in original). Frank seeks a very narrow set of information whose disclosure is in the public interest and is important to his own work as a class member, class-action scholar, and practicing class-action attorney, but which neither party has an interest in disclosing (as demonstrated by the remarkable lengths and expense they are going to oppose Frank's motion for transparency). Frank's request falls squarely within, indeed is part of, the original action. He intervenes solely for belt-and-suspenders reasons so there is no question about his appellate rights, and because the plaintiffs refused to ask for disclosure of such information themselves, likely because class counsel, as repeat class-action litigants, have little interest in potentially exposing a common settlement practice of providing non-cash relief whose actual value to the class is well below the face value. Thus, if the Court grants Frank leave to intervene, he need not show he has independent Article III standing because plaintiffs, who invoked the court's jurisdiction, have standing and the Court has authority to grant his disclosure request.

In addition to this precedent respecting standing generally, the unique nature of class actions provides further grounds for rejecting Walmart's standing argument. Although *Devlin v. Scardelletti* addressed class members' standing to appeal settlement approval, its reasoning elucidates Frank's interest in the e-gift card redemption rate and accounting here. Class members' claims were collectively settled for cash and the e-gift cards distributed by Walmart. As such, Frank "belongs to a discrete class of interested parties," and his request for transparency into the settlement and how it actually benefited the class "clearly falls within the zone of interests" of the requirement that the settlement and claims be implemented and administered fairly. *Devlin*, 536 U.S. 1, 7 (2002).

Even if Frank is required to show individual standing, and as also noted in his reply brief in support of his motion to intervene, he meets the requirements. He suffers an injury-in-fact to his professional livelihood and his right to information about the settlement in which his legal claims were released. *See United States v. Rand*, No. 3:16-cr-00029, 2016 WL 6304488, *1 (D. Nev. July 26, 2016) (granting motion to intervene where standing "stems from an injury in fact … characterize[d] as the

hindrance of [the intervenor's] ability to collect and disseminate information about an ongoing criminal trial"); *Riggs v. Valdez*, No. 1:09-cv-00010, 2011 WL 1598630, *3 (D. Idaho Apr. 27, 2011) (media group has sufficient interest in outcome of motion seeking to prohibit parties and counsel from making statements to the media). This injury is directly caused by Walmart's refusal to provide transparency into the actual settlement relief realized by class members. A decision by this Court ordering Walmart to disclose that information will redress Frank's harm.

Finally, Walmart's interpretation of the settlement agreement is flawed with respect to the arbitration provision as well. That provision requires arbitration only for disagreements over the implementation of the terms of the settlement or agreement. Frank's request calls upon the Court's supervisory and administrative authority to request *disclosure of information* about the administration of claims and the settlement. As a practical matter, it makes little sense to initiate costly arbitration for Frank's simple disclosure request, and Walmart almost certainly would have opposed the effort.

IV. The Court's finding that the e-gift cards are not coupons subject to the Class Action Fairness Act is irrelevant to Frank's motion.

Walmart further argues that the Court's rejection of Frank's position that the e-gift cards are coupons subject to the Class Action Fairness Act somehow forecloses his request for the redemption rate and accounting data now. Dkt. 675 at 6. Plaintiffs make a similar argument, cast as a relevancy objection based on this and other court decisions basing fees on the entire fund rather than the amount claimed by class members. Dkt. 673 at 2. Regardless of how the argument is phrased, it lacks merit. Frank made clear in his opening brief that he does not intend to re-litigate the approval of the settlement or attorneys' fee award in this case. Dkt. 672 at 8. As he stated there, he wants the parties to be transparent about the actual settlement result. The information will enable him to compare what the parties said about the settlement benefit in court with the economic reality. Then, he, as well as other scholars, lawmakers, courts, and the bar can use that comparison to understand the consequences of the Ninth Circuit's decision in this case and whether to advocate for different legal outcomes. The public, meanwhile, can use the information to make better-informed decisions about how to respond to future settlements and proposed changes in the law.

The parties' dismissal of Frank's request thus misses the heart of the issue. Even accepting the proposition that the gift cards here offered real value to class members, Dkt. 675 at 7, that doesn't mean the non-cash relief offered in future settlements also will offer real value. If the redemption rate *here* was low, shouldn't courts and class members know that? Then, in future settlements in which the settlement relief is less useful or valuable than a $12 or $3 non-expiring e-gift card for one of the world's largest retailers, they will know that the actual value (or "economic reality") of the settlement is not what the parties claim. Class members and their counsel can object or opt-out. Courts—acting as fiduciaries for the class—may scrutinize most closely class members' actual recovery when deciding motions for settlement approval and attorneys' fees. Government officials, including the Federal Trade Commission, U.S. Department of Justice, and state attorneys general who already have shown an interest in these issues on behalf of consumers, will have more information on which to base policy and resource-allocation decisions. Dkt. 672 at 6-7. In short, the parties' narrow view of how the e-gift card redemption rate might be relevant cannot overcome the widespread benefit the information will provide.

V. Walmart does not dispute that it has ready access to the requested information.

Walmart gives a carefully worded but ultimately evasive response regarding its possession of the requested information. Sure, Walmart may not have asked its accounting personnel or gift card processing vendor to run the specific report compiling that information yet, but of course it can do so and claims no burden or other hardship arising from that task. As Frank predicted, Walmart asserts that the redemption rate is incomplete because the e-gift cards do not expire; however, as he also noted previously, there is no impediment to Walmart supplementing its disclosure if the redemption rate significantly changes based on class members' sudden decision to use their e-gift cards at this late date if Walmart believes a 2018 disclosure later becomes misleading.

VI. Frank's request does not implicate personally identifiable information or other data about individual class members' "personal decisions."

Plaintiffs' primary opposition to Frank's motion for disclosure is that he cannot justify the disclosure of "class members' personal decisions on how to exercise the benefit of the settlement"

and that his request would set a "harmful precedent" in which cases could be "reopen[ed]" years later. Dkt. 673 at 3. Both concerns are overblown. With respect to the first, Frank requests only gross numbers showing the percentage of e-gift cards that have been redeemed and how Walmart accounted for unused cards. He has zero interest in personally identifying details, products purchased, date or location of purchase, or any other information that could conceivably reveal personal purchasing decisions by the class. Plaintiffs' suggestion to the contrary is a red herring. With respect to the second, Frank's very narrow, one-time request for information related to the settlement and claims administration for transparency purposes certainly does not "reopen" the case.[1] Walmart should have been aware that it could be called to account for claims data, and apparently supported the Court retaining jurisdiction over these issues. Plaintiffs identify no reason why transparency will undermine future class-action settlements. Perhaps these plaintiffs in *this* case will be embarrassed because their representations to this Court and the Ninth Circuit will turn out to be false (and plaintiffs apparently believe this, given their willingness to litigate against disclosure). But encouraging future attorneys to make truthful representations to courts in class-action settlements is a reason to support Frank's motion rather than oppose it.

CONCLUSION

For the foregoing reasons, Frank respectfully asks the Court to enter an order requiring Walmart to disclose the redemption rate of the Walmart e-gift cards distributed to class members pursuant to the settlement in this action, and whether Walmart has yet recognized any of the unredeemed gift cards as "breakage" income and, if so, the amount recognized.

[1] These were not the only overstated claims in plaintiffs' opposition. Plaintiffs also claim that the Competitive Enterprise Institute's Center for Class Action Fairness seeks to pursue "business interests," when CCAF is a non-profit whose mission is to represent class members against unfair class action procedures and settlements. Dkt. 673 at 3. Even if Plaintiffs' allegation had any relevance, the Wolfman Declaration demonstrates that the interests of disclosure are not merely those of business.

Dated: March 27, 2018

Respectfully submitted,

/s/ Theodore H. Frank

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CERTIFICATE OF SERVICE

I hereby certify that, on March 27, 2018, service of this document was accomplished pursuant to the Court's electronic filing procedures by filing this document through the ECF system.

/s/ Theodore H. Frank
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