

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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In re GRAND THEFT AUTO VIDEO :  
GAME CONSUMER LITIGATION :  
(No. II) : No. 1:06-md-1739 (SWK)  
: (MHD)  
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This Document relates to: :  
All Actions : Date: June 25, 2008  
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-----X Dept: Hon. Shirley Wohl Kram

BRIEF OF OBJECTOR THEODORE H. FRANK  
IN OPPOSITION TO PLAINTIFFS' MEMORANDA IN SUPPORT  
OF PROPOSED SETTLEMENT  
AND AWARD OF ATTORNEYS' FEES AND EXPENSES

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## TABLE OF CONTENTS

|   |    |
|---|----|
| TABLE OF CONTENTS.....  | i  |
| TABLE OF AUTHORITIES .....  | ii |
| INTRODUCTION .....  | 1  |
| I. Frank Has Standing To Object.....  | 3  |
| II. The Settlement Is Impermissibly Self-Dealing And<br>The <i>Grinnell</i> Factors Do Not Support The Settlement. ....   | 6  |
| A. This is not a “successful” settlement meriting<br>positive consideration under <i>Grinnell</i> .....   | 8  |
| B. The “reaction of the class to the settlement” was one of disdain. ....   | 9  |
| III. “Offense and Upset” Is Not A Rational Ground<br>For Distinguishing Class Members.....  | 11 |
| IV. The Charitable Award Cannot Be Justified As<br><i>Cy Pres</i> , As A Benefit To The Class, Or As<br>A Ground For Attorneys’ Fees. ....  | 15 |
| V. Attorneys’ Fees Should Be Based Upon Benefits To The Class.....  | 17 |
| VI. The Attorneys’ Fees And Costs To Twelve Law Firms Reflects Self-Dealing At<br>The Expense Of The Class And Demonstrate That The Class Representatives Are<br>Not Adequate. .... | 17 |
| VII. Replacement Discs Have Zero Value To The Class.....  | 18 |
| VIII. Putative Class Attorneys Are Not Entitled To Costs.....   | 20 |
| CONCLUSION.....   | 20 |

## TABLE OF AUTHORITIES

### CASES

|  |               |
|--|---------------|
| <i>Blair v. Equifax Check Services, Inc.</i> , 181 F.3d 832 (7th Cir. 1999) .....                    | 2             |
| <i>Crawford v. Equifax Payment Services</i> , 201 F.3d 877 (7th Cir. 2000) .....                     | 2, 7, 16      |
| <i>Detroit v. Grinnell Corp.</i> , 495 F.2d 448 (2d Cir. 1974) .....                                 | 7-10          |
| <i>Farrar v. Hobby</i> , 506 U.S. 103 (1992) .....   | 20            |
| <i>Goldberger v. Integrated Res., Inc.</i> , 209 F.3d 43 (2d Cir.2000) .....                         | 17            |
| <i>Grant v. Bethlehem Steel Corp.</i> , 823 F.2d 20 (2d Cir. 1987) .....                             | 6             |
| <i>In re Findley</i> , 993 F.2d 7 (2d Cir. 1993).....  | 11            |
| <i>In re Joint Eastern and Southern Dist. Asbestos Litig.</i> ,<br>982 F.2d 721 (2d Cir. 1992) ..... | 11            |
| <i>Jones v. Amalgamated Warbasse Houses, Inc.</i> , 721 F.2d 881 (2d Cir. 1983).....                 | 18            |
| <i>Massachusetts v. EPA</i> , 127 S.Ct. 1438, (2007) .....   | 5             |
| <i>Masters v. Wilhemina Model Agency, Inc.</i> , 473 F.3d 423 (2d Cir. 2007) .....                   | 15, 16, 17    |
| <i>Mirfasihi v. Fleet Mortgage Corp.</i> , 356 F.3d 781 (7th Cir. 2004) .....                        | 7, 11, 15, 16 |
| <i>Murray v. GMAC</i> , 434 F.3d 948 (7th Cir. 2006) .....   | <i>passim</i> |
| <i>New Hampshire v. Maine</i> , 532 U.S. 742 (2001).....   | 4             |
| <i>Piambino v. Bailey</i> , 757 F.2d 1112 (11th Cir. 1985).....                                      | 16            |
| <i>Silberblatt v. Morgan Stanley</i> , 2007 WL 4145403 (S.D.N.Y. Nov. 19, 2007) .....                | 16            |
| <i>Synfuel Tech. v. DHL Indus., Inc.</i> , 463 F.3d 646 (7th Cir. 2006).....                         | 15            |

### STATUTES AND FEDERAL RULES

|   |    |
|---|----|
| Class Action Fairness Act, Pub.L. 109-2, § 2(a)(3)(A) ..... | 15 |
| Fed. R. Civ. Proc. 23.....                                  | 6  |

|                                   |        |
|-----------------------------------|--------|
| Fed. R. Civ. Proc. 23(a)(4).....  | 11, 18 |
| Fed. R. Civ. Proc. 23(e) .....    | 3, 16  |
| Fed. R. Civ. Proc. 23(e)(5).....  | 3, 5   |
| Fed. R. Civ. Proc. 23(h)(2) ..... | 3, 5   |

**ACADEMIC, NEWSPAPER, AND WEBLOG COMMENTARY**

|   |       |
|---|-------|
| “Analysts Expect Little Success for Videogame Legislation,”<br><i>Consumer Electronics Daily</i> , Jul. 21, 2005 .....                    | 19    |
| Frank, Theodore H.,<br><i>Cy Pres Settlements</i> , Class Action Watch, March 2008 .....  | 16-17 |
| Jacobson, Jeffrey S.,<br><i>Defining “Coupon” Under the Class Action Fairness Act</i> ,<br>Product Liability Law 360, Jan. 15, 2008.....  | 15    |
| <i>Manual for Complex Litigation (Third)</i> § 30.42.....   | 16    |
| Pingdom, “17 brilliant 404 pages and why they are cool,” Mar. 28, 2008.....   | 6     |
| Schiesel, Seth,<br>“Video Game Known for Violence Lands in Rating Trouble Over Sex,”<br><i>New York Times</i> , Jul. 21, 2005 at A1 ..... | 19    |

## INTRODUCTION

In December 2007, the Plaintiffs, represented by *twelve* law firms in *thirteen* different offices (the “Putative Class Attorneys”), negotiated a settlement that required objections to be filed by April 2008. The settlement, which bound the class of at least ten million<sup>1</sup> American purchasers of the first edition of *Grand Theft Auto:San Andreas* (“GTA”), excluded the vast majority of class members from relief and neither specified the amount of recovery the class would receive nor the amount of attorneys’ fees that would be requested. Objector Theodore H. Frank (“Frank”) was thus forced to make a series of procedural objections to the settlement on the grounds that the procedure might result in self-dealing by the class representatives and the Putative Class Attorneys.<sup>2</sup> The Putative Class Attorneys, in their response to the Objection and request for attorneys’ fees, defend the procedure by which the class settlement was reached. But now we know the substantive results of that settlement procedure. No longer is the concern that the procedural posture of the settlement *might* result in self-dealing; the substantive results of the settlement and request for attorneys’ fees, made *after* Frank’s objection, demonstrate *actual* self-dealing, mooted some of the technical objections but giving rise to new substantive objections. The self-dealing demonstrates that the Putative Class Attorneys and Plaintiffs are not adequate class representatives. The settlement should not be approved; if approved, the attorneys’ fees and class representative payments should be reduced substantially.

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<sup>1</sup> Jeffrey S. Jacobson Declaration ¶ 5.

<sup>2</sup> Plaintiffs protest that Frank could have made an informal request for this non-public information. Frank’s experience in making inquiries about class settlements is that such requests are futile and plaintiffs’ attorneys release this information only when a court forces them to do so. Moreover, Frank would still have had to file an objection by the deadline to preserve his rights if the response to the informal request turned out to be false or misleading.

The Putative Class Attorneys have negotiated a settlement that has paid at most \$26,505 to the ten million unnamed members of the class—an average of less than a quarter of a penny per class member. In doing so, they spent over \$31 in administrative expense per dollar delivered to class members, a total of \$830,000. Meanwhile, the seven named class members seek \$24,500 of payments to themselves, in some cases 100 times what they paid for the game, though their depositions reveal they have suffered no legally cognizable injury. Another \$870,000 will be distributed to the National PTA and the ESRB, neither of whom are class members or have suffered any class injury. For this, the twelve law firms ask for \$1 million in fees, or more than 37 times what was paid in cash to the unnamed class members—a contingent fee of 3772%, well above the market rate of 25% to 40%. The case is a veritable poster-child for class action abuse.

In *Murray v. GMAC*, 434 F.3d 948, 952 (7th Cir. 2006), the Seventh Circuit held that a similar settlement was “untenabl[y]” beyond the pale of approval:

This looks like the sort of settlement that we condemned in *Blair v. Equifax Check Services, Inc.*, 181 F.3d 832 (7th Cir.1999), and *Crawford v. Equifax Payment Services*, 201 F.3d 877 (7th Cir.2000), two appeals arising from the same litigation. That suit had been settled for \$2,000 to the named plaintiff, \$5,500 to a legal-aid society that had not been injured by the defendant's conduct, and \$78,000 in legal fees. We treated the disproportion—\$2,000 one class member, nothing for the rest—as proof that the class device had been used to obtain leverage for one person's benefit. [citations omitted] Here the proposed award is \$3,000 to the representative while other class members are frozen out. The payment of \$3,000 to Murray is three times the statutory maximum, while others don't get even the \$100 that the Act specifies as the minimum. ...

Such a settlement is untenable. We don't mean by this that all class members must receive \$100; risk that the class will lose should the suit go to judgment on the merits justifies a compromise that affords a lower award with certainty. [citation omitted] But if the reason other class members get relief worth about 1% of the minimum statutory award is that the suit has only a 1% chance of success, then how could Murray personally accept 300% of the statutory maximum? And, if the chance of success really is only 1%, shouldn't the suit be

dismissed as frivolous and no one receive a penny? If, however, the chance of success is materially greater than 1%, as the proposed payment to Murray implies, then the failure to afford effectual relief to any other class member makes the deal look like a sellout.

This settlement is even worse than the settlement criticized in *Murray* as “untenable.”

There was one class representative in *Murray* who received \$3,000, three times maximum possible statutory damages; here, there are four class representatives seeking \$5,000 over the purchase of a \$50 game, and three more seeking another \$1,500. In *Murray*, the 1.2 million unnamed class members were entitled to split a fund of \$947,000; here, ten times as many class members ended up with only \$26,505. And to top it all off, the Putative Class Attorneys are seeking three times more attorneys fees than in *Murray*.

There are two possibilities. The Putative Class Attorneys have brought either (1) a meritorious case that is being settled for an infinitesimal fraction of the case’s real value in a “sellout” of the attorneys’ and class representatives’ fiduciary duties to the class, or (2) a meritless lawsuit where the “class device had been used to obtain leverage for one person’s benefit.” *Murray*, 434 F.3d at 952. In either instance, the Putative Class Attorneys’ actions should be deterred, rather than rewarded; the court should not award attorneys’ fees. If Rule 23(e)(2) is to have any teeth whatsoever, this settlement must be rejected; it is hard to imagine another settlement result under the Class Action Fairness Act that is more self-serving of the Putative Class Attorneys.

#### **I. Frank Has Standing To Object.**

Under Fed. R. Civ. Proc. 23(e)(5), “any class member may object” to a settlement that requires approval under Rule 23(e). Under Fed. R. Civ. Proc. 23(h)(2), “[a] class member... may object to the motion” for attorneys’ fees. The class is defined as purchasers of GTA before

July 20, 2005. Putative Class Attorneys do not dispute that Frank purchased GTA before July 20, 2005. Frank therefore is one of the over ten million unnamed class members and has standing to object under the Federal Rules of Civil Procedure.

Putative Class Attorneys instead argue that Frank does not have standing because Frank did not submit a claim, and could not submit a claim without perjuring himself. Plaintiffs' Memorandum in Support of Settlement ("PMSS") 18. This is absurd. Frank's objection is precisely that the Putative Class Attorneys are self-dealing and have frozen the vast majority of class members out of recovery. The fact that Frank is one of the people frozen out of settlement recovery can hardly be used to preclude him from objecting.<sup>3</sup> If Plaintiffs had negotiated a settlement that only class members whose last names begin with the letter A are eligible to recover cash, it would not preclude Betsy Barker or Zachary Zimmerman from objecting to the arbitrary classification when their claims were extinguished.

Plaintiffs argue that Frank has suffered no legal injury, and therefore does not have standing to object. This proves too much: Frank argues that none of the representative plaintiffs have suffered legal injury and that he has the same standing as the representative plaintiffs; *see* Section III, *infra*. The fact that Frank was not "offended and upset" is legally irrelevant: there is no cause of action for being "offended and upset" and there is no reason to distinguish between offended and sanguine class members any more than there is a reason to distinguish between class members alphabetically.

Judicial estoppel "prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase." *New Hampshire v.*

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<sup>3</sup> Ironically, Plaintiffs also argue that Jonathan Schmugge's objection should be disregarded because Schmugge *did* file a claim. PMSS 23. Plaintiffs seem to believe that no one is entitled to object to their self-dealing at the expense of the class.

*Maine*, 532 U.S. 742, 749 (2001) (internal quotation marks omitted). Plaintiffs allege in their motion for preliminary approval of the settlement that all class members—a class that includes Frank—are similarly situated and suffered legal injury. Motion for Preliminary Approval at 20. Having used that allegation to obtain preliminary approval of the class, Putative Class Attorneys are judicially estopped from claiming otherwise at this time. Plaintiffs cannot play both sides of the fence.

Moreover, Plaintiffs have alleged, in the course of claiming that they are adequate representatives for the class, that they “do not have any interests antagonistic with the Class.” Motion for Preliminary Approval at 19, Plaintiffs cannot simultaneously claim that they are adequate representatives without interests antagonistic to the class, and simultaneously claim that millions of class members have suffered no legal injury. Again, judicial estoppel precludes Plaintiffs from making this argument.

In addition, plaintiffs’ standing argument fails to account for the Supreme Court’s recent decision broadening the scope of standing. When Congress has “accorded a procedural right to protect his concrete interests,” in this case Rules 23(e)(5) and 23(h)(2), a litigant “can assert that right without meeting all the normal standards for redressability and immediacy.”

*Massachusetts v. EPA*, 127 S.Ct. 1438, slip op. at 14 (2007).

In any event, even if Frank was somehow barred from recovery, Frank would be aggrieved by the approval of the settlement. Frank, like the vast majority of class members who did not file claims, receives consumer surplus from his purchase and enjoyment of Take-Two videogames such as GTA. Self-dealing settlements like those of Putative Class Attorneys raise the costs to Take-Two of producing videogames, and raise prices to class members like Frank without concomitant benefits, thus reducing their consumer surplus. Consumer welfare would

be improved if courts rejected such settlements and deterred socially inefficient rent-seeking litigation.

Putative Class Attorneys complain that Frank is “a tort reform advocate.” PMSS 21. They cite no law and make no argument why tort reform advocates who are class members have forfeited rights under Fed. R. Civ. Proc. 23. Indeed, a tort reform advocate is likely to be better situated than the average objector in insisting that a class action settlement is “fair, adequate, and reasonable.” If attorneys did not try to snooker unrepresented class members with self-dealing class settlements like the one proposed by Putative Class Attorneys, there would be far less demand for tort reform.<sup>4</sup>

## **II. The Settlement Is Impermissibly Self-Dealing And The *Grinnell* Factors Do Not Support The Settlement.**

Contrary to Plaintiffs’ claims, “The fact that many class members remained silent is of little import. The district court ha[s] a fiduciary responsibility to the silent class members.” *Grant v. Bethlehem Steel Corp.*, 823 F.2d 20, 23 (2d Cir. 1987). Even if Frank had no standing to object, the court has a responsibility to do more than simply rubber-stamp the settlement. “Because class actions are rife with potential conflicts of interest between class counsel and class members, district judges presiding over such actions are expected to give careful scrutiny to the

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<sup>4</sup> Separately, and of marginal relevance, the accusation in Paragraph 46 of the Declaration of Seth R. Lesser that Frank has removed any Overlawyered posts in response to this litigation is factually false. There was never a May 19, 2008, post. All six Overlawyered posts (five written by me, one written by Walter Olson) discussing the settlement, written between February 5, 2008, and May 28, 2008, are available at <http://overlawyered.com/tag/grand-theft-auto/>. Mr. Lesser’s paralegal appears to have typed in the wrong URL for the post he was looking for, resulting in a “404” “page not found” error; Overlawyered’s 404 page, written by Walter Olson, jokes that “Our lawyers probably made us take that page down,” and has been noted as an example of humorous 404 pages. See Pingdom, “17 brilliant 404 pages and why they are cool,” Mar. 28, 2008, available at <http://royal.pingdom.com/?p=270>.

Plaintiffs further protest the objection by making various scurrilous references to Frank’s original counsel, Lawrence Schonbrun. Frank has dismissed Mr. Schonbrun, mooting these protests.

terms of proposed settlements in order to make sure that class counsel are behaving as honest fiduciaries for the class as a whole.” *Mirfasihi v. Fleet Mortgage Corp.*, 356 F.3d 781, 785 (7th Cir. 2004).

The settlement proposed by Plaintiffs is substantially worse than other settlements rejected by the Seventh Circuit under Rule 23(e) as “untenable.” Compare this case with *Murray*, 434 F.3d at 952 (“untenable”); *Mirfasihi*, 356 F.3d 781 (“the settlement cannot stand”); and *Crawford v. Equifax Payment Services, Inc.*, 201 F.3d 877 (7th Cir. 2000) (“substantively troubling”):

|                         | <i>Murray</i>                 | <i>Mirfasihi</i>                     | <i>Crawford</i>                  | <i>GTA</i>                               |
|-------------------------|-------------------------------|--------------------------------------|----------------------------------|--|
| Unnamed class recovery  | Up to \$947,000               | Between \$243,000 and \$2.64 million | \$0                              | \$26,505                                 |
| Size of class           | ~1,200,000                    | ~1,600,000                           | 214,000                          | >10,000,000                              |
| Alleged damages         | \$120,000,000-\$1.2 billion   | \$35,000,000                         | \$500,000                        | \$500,000,000 + alleged punitive damages |
| Rep. plaintiff payments | \$3,000                       | \$250                                | \$2,000                          | \$24,500                                 |
| Attorney fees           | ~\$400,000                    | \$750,000                            | \$78,000                         | \$953,304.90                             |
| Approved?               | Rejected on appeal; remanded. | Reversed as abuse of discretion.     | Reversed as abuse of discretion. | ?  |

The GTA settlement is inferior to other settlements rejected by the Seventh Circuit: though alleged damages are higher, and the class is larger, the unnamed class members recover less money, and the attorneys and named class representatives receive more money. There is ample precedent that not only should the court reject the settlement, but that approving the settlement would be an abuse of discretion. Any “presumption of fairness” is rebutted by the self-dealing nature of the settlement. There is no need to consider the nine-factor *Grinnell* test (*Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974)), because on its face, the GTA settlement is unacceptable self-dealing that violates Rule 23(e): more than 98% of the cost of the settlement

goes to the Putative Class Attorneys, to class representatives, and to third parties, with less than 2% of the total going to unnamed class members.

But even if one considers the *Grinnell* factors, Plaintiffs fail to justify the settlement.

**A. This is not a “successful” settlement meriting positive consideration under *Grinnell*.**

Putative Class Attorneys repeatedly trumpet the “success” they have earned in this case, but the claim is purely *ipse dixit*: absent from their brief is any acknowledgement of the size of the class and the size of their original request for damages.

Though plaintiffs claimed to represent and seek to bind a ten-million member class, they have recovered cash damages for only 0.02% of the class members. Even if one were to improperly credit the charitable pseudo-*cy pres* award to unrelated third parties as a benefit to the class, plaintiffs have recovered for the class under \$1 million for a claim that they had alleged was worth over \$500 million plus punitive damages. Even now, plaintiffs claim they could prove at trial that they are entitled to punitive damages. MPSS 32. If we assume treble damages for the punitive component, plaintiffs brought a \$1.5 billion lawsuit that they are settling for \$1 million, well under 0.1%. Meanwhile, the representative class members receive “bonus” payments worth a hundred times their alleged damages despite shutting out the vast majority of the class members.

In *Murray*, the 1% ratio of recovery to alleged damages and a 3000-1 ratio of representative-to-individual recovery was enough to call the settlement untenable: “if the reason other class members get relief worth about 1% of the minimum statutory award is that the suit has only a 1% chance of success, then how could Murray personally accept 300% of the statutory maximum? And, if the chance of success really is only 1%, shouldn't the suit be dismissed as frivolous and no one receive a penny?” 434 F.3d at 952. Here, the “success” of

plaintiffs is abysmal failure of an even larger magnitude than the failure criticized in *Murray*, and representative plaintiffs are seeking \$5000 rewards after winning less than a penny for the average class member. Plaintiffs are either breaching their fiduciary duties by selling the class short or are bringing an extortionate “strike suit” for their own selfish benefit. Neither should be condoned by approving the settlement or attorneys’ fees. Because Plaintiffs cannot be said to have succeeded or justified the low value of the settlement relative to their original claims, and because Plaintiffs continue to insist that their case is meritorious, the first, third, fourth, fifth, sixth, seventh, and eighth factors of *Grinnell* count against the settlement.

**B. The “reaction of the class to the settlement” was one of disdain.**

The second *Grinnell* factor is the “reaction of the class to the settlement.” Plaintiffs falsely claim that the settlement is approved of by the class. In reality, the “reaction of the class to the settlement” was one of disdain. Out of over 10 million class members, only 2,676, or under 0.03%, submitted claims. Given that over 99.97% of the class members will receive no benefit from the settlement, in part because the settlement creates legally irrelevant barriers to recovery, this factor weighs strongly against approval. True: only a handful of people jumped through the hoops to submit an objection: no surprise, given the formal objection is quite expensive relative to the small sums at issue.<sup>5</sup> But hundreds of people posted comments on the Internet in a variety of forums, with the overwhelming majority ridiculing the settlement and the self-dealing actions of the Putative Class Attorneys. According to Google, there have been 4,926 blog posts about the class action settlement. Though this figure includes hundreds of duplicate “robot” posts on unread spam-blogs, it does not include the hundreds of people who

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<sup>5</sup> Frank has spent over \$700 from his own pocket in attorneys’ fees and costs to proceed to this point, not including the Federal Express costs for filing this brief and the expense of traveling to New York for the hearing.

have added comments to the blog posts. A quick sampling shows the vast majority of reaction has been negative, even if one excludes the favorable Internet commentary on Frank's objection such as, for example, that found on Lesser Declaration Exhibit D. *See, e.g.,* Slashdot, available at <http://games.slashdot.org/article.pl?sid=07/11/09/141243> (188 comments); Kotaku, available at [http://kotaku.com/gaming/take\\_two-interactive/hot-coffee-suit-settlement-may-cost-take+two-275-mil-320634.php](http://kotaku.com/gaming/take_two-interactive/hot-coffee-suit-settlement-may-cost-take+two-275-mil-320634.php) (72 comments); Shack News, available at <http://www.shacknews.com/onearticle.x/49850> (41 comments). Had the court reduced the barriers to objection by setting up a dedicated e-mail address to accept e-mailed objections, it would have been inundated with objections. Plaintiffs have made no effort to poll a representative sample of the ten million class members, and have no basis to claim that the class has a positive reaction to the settlement.

Because Plaintiffs continue to represent that their case is meritorious, because they are settling for under 0.1% of the amount of their claimed damages, and because the vast majority of the class has not ratified the settlement, all eight *Grinnell* factors weigh against approval of the settlement, and it must be rejected. To the extent that *Grinnell* is interpreted to permit the approval of the GTA settlement as “fair, adequate, and reasonable,” the Second Circuit has created a circuit split with the Seventh Circuit, and Frank would like to preserve the issue for appeal.

### **III. “Offense and Upset” Is Not A Rational Ground For Distinguishing Class Members.**

Though the defined class is all GTA purchasers, a class that consists of millions of adults who play the game because they enjoy its over-the-top satiric escapism, the only GTA purchasers eligible for cash settlement were those who were “offended and upset” by the availability of a Hot Coffee modification. But Plaintiffs give no legal or factual reason why class

members who were “offended and upset” should be treated any differently than the vast majority of class members given that being “offended and upset” is not a distinguishing ground for recovery under the relevant consumer fraud statutes, and that there was no hope of a class certification on the highly individualized claim of intentional infliction of emotional distress.

Plaintiffs have made no showing and can make no showing that the claims of one subclass are legally stronger than the claims of the vast majority of the class. Because the settlement was gerrymandered to favor the named class plaintiffs, the vast majority of the class was effectively unrepresented, making the settlement inherently indefensible given the disparate treatment of class members with identical claims that plaintiffs claim merit class certification. *In re Joint Eastern and Southern Dist. Asbestos Litig.*, 982 F.2d 721, 741-43 (2d Cir. 1992) (decertifying class under Rule 23(a)(4) because of conflicts of interest between different segments of class), *modified on reh'g on other grounds sub nom. In re Findley*, 993 F.2d 7 (2d Cir. 1993); *Mirfasihi*, 356 F.3d at 786.

Putative Class Attorneys’ claims that the settlement fights “pornography,” PMSS 20, by excluding the “Hot Coffee” scenes, are disingenuous. The Settlement, by its own terms, distributed hundreds of replacement disks to class members who filed claims. These replacement disks, rated M for “blood and gore,” “intense violence,” “use of drugs” and “strong sexual content,” contain the following scenes:

- The main character engages in violent and vocal sexual bondage acts, flagellation, and torture with the character “Catalina,” bringing her to a screaming orgasm, a requirement to advance in the game. *See* GTA, “Gone Courting Mission,” available at <http://www.youtube.com/watch?v=ML0Ca6qBLtw>.

- After the main character visits a strip club, a prostitute offers to perform the sexual act of a “half-and-half” upon the player. *See* GTA, “Jizzy Mission,” available at <http://www.youtube.com/watch?v=7MJ0NtjFWHs> at 1:15 to 3:30.
- A Christian preacher complaining about an ex-prostitute’s use of teeth while performing oral sex. *See* GTA, “Jizzy Mission.”<sup>6</sup> (The player is required to murder the preacher, the ex-prostitute, and their bodyguard and their driver to advance.)
- Two criminals, “OG Loc” and “Freddy,” discussing their homosexual relationship in prison. *See* GTA, “OG Loc Mission,” *available at* <http://www.youtube.com/watch?v=DAb-FovDuCg>. (To advance in the game, the player is required to chase and kill Freddy to satisfy OG Loc’s sense of honor.)
- In another mission, the player is required to follow a character, “the croupier,” to a sex shop, watch another character pose in a topless bustier, kill the croupier’s boyfriend “master” and disguise in his leather “gimp” outfit, pick up a purple dildo, and then have sex with the croupier, who has a screaming orgasm. *See* GTA, “Key to Her Heart Mission,” available at <http://www.youtube.com/watch?v=ZHEac6pCLFk>.
- The player can choose to receive a lap dance at a strip club.
- Throughout the game, the player can choose to regain “health” by purchasing sex with prostitutes, who have vocal orgasms; the player can choose to regain the money spent by killing the prostitute. *See, e.g.,* [http://www.youtube.com/watch?v=xSjl0\\_jJyb0](http://www.youtube.com/watch?v=xSjl0_jJyb0).

All of this is aside from the game’s extraordinary profanity, references to drug use, and explicit violence, which includes the ability of the main character to vividly and bloodily kill innocent

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<sup>6</sup> In the YouTube video of this mission, the main character, played by an unusually proficient gamer, succeeds in killing the preacher before he consummates the sex act with the ex-prostitute. When Frank stopped playing GTA, he was still stuck on this level because he is not very adept at the controls in the game for drive-by shootings.

civilians and police with, *inter alia*, automatic weapons, sawed-off shotguns, baseball bats, hand grenades, Molotov cocktails, rocket launchers, flamethrowers, farm threshers, and chainsaws.

The sequence made possible by the download of the Hot Coffee modification, *see* <http://www.youtube.com/watch?v=Pa5vf61xmDA>, is neither “pornography” nor reasonably distinguishable from the other content in the game such as the Catalina sex scene. Even if it were, the argument that, because a game or toy can be modified in unintended ways to present “pornography,” there is injury, implies that Mattel is committing consumer fraud by not warning consumers that Ken and Barbie dolls can be undressed and rubbed together while sexual sounds are made—which is the level of “pornography” in the Hot Coffee sequence. And unlike Ken and Barbie, Take-Two warns its users of strong sexual content and recommends that the game is not appropriate for those under 17.

Moreover, the Hot Coffee sequence is available *only* if a player modifies the game using non-approved downloadable content from the Internet. (To install the modification on the Playstation 2 edition of the game requires a \$30 piece of equipment for hacking.) Any teenager with the technical sophistication to download and install a highly pixellated sex scene with computer drawings will have a much easier time viewing any of the hundreds of thousands explicit pornographic videos and photos available on the Internet featuring real people—or simply looking up various sex acts and body parts on Wikipedia. (Indeed, as the cite in the last paragraph shows, video of the decidedly unerotic Hot Coffee sequence itself is readily available on Youtube.) None of the plaintiffs have downloaded the Hot Coffee modification. Jacobson Decl. ¶ 3.

It is inconceivable that a consumer “offended and upset” by the Hot Coffee modification is unconcerned about the content on the replacement disc. Indeed, not a single named plaintiff

indicates in their deposition that they were not “offended and upset” by content available on the replacement disc. Whatever “injury” named plaintiffs have suffered was suffered not because of the possibility that the “Hot Coffee” modification might be downloaded, but because they purchased a game and were disappointed with the content; as a result, all of the named plaintiffs lack the ability to prove causation by the alleged wrongful act. *E.g.*, Deposition of Brenda Stanhouse at 70:9-12:

Q: Would you have purchased the game for your son if you knew that part of the game entails entering into an adult novelty store?

A: No.

*See also id.* at 66 *ff.* The recovering and representative class members are no better legally situated to recover damages than the non-recovering class members. The only reason to treat them differently is because of impermissible self-dealing.

(Similarly, if Frank does not have standing because of plaintiffs’ claim of lack of injury, then none of the named plaintiffs have standing, and the case must be dismissed for lack of jurisdiction.)

#### **IV. The Charitable Award Cannot Be Justified As *Cy Pres*, As A Benefit To The Class, Or As A Ground For Attorneys’ Fees.**

The charitable payment by defendants to ESRB and the National PTA is not a *cy pres* award, because it does not benefit the class directly or indirectly. *Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 784 (7th Cir. 2004). But even if the charitable payment were characterized as a *cy pres* award, it could not be used to justify the fairness of the settlement or the award of attorneys’ fees.

In *Masters v. Wilhemina Model Agency, Inc.*, 473 F.3d 423 (2d Cir. 2007), the Second Circuit address the distribution of *cy pres* awards, rejecting as an abuse of discretion the trial

court's awarding a common fund to third parties. The Second Circuit suggests that *cy pres* should be limited "to circumstances in which direct distribution to individual class members is not economically feasible, or where funds remain after class members are given a full opportunity to make a claim." *Id.* at 436. Here, class members have not been given a full opportunity to make a claim; instead, plaintiffs have excluded millions of class members from recovery.

Contrary to the claims of Putative Class Attorneys, it is not true that the lessons of the Class Action Fairness Act ("CAFA") apply "only to coupons." As CAFA itself states, a concern of Congress in enacting the statute is that "counsel are awarded large fees, while leaving class members with coupons *or other awards of little or no value.*" Pub.L. 109-2, § 2(a)(3)(A) (emphasis added); *Synfuel Tech. v. DHL Indus., Inc.*, 463 F.3d 646, 654 (7th Cir. 2006); Jeffrey S. Jacobson, *Defining "Coupon" Under the Class Action Fairness Act*, Product Liability Law 360, Jan. 15, 2008. This case, offering a settlement of "little or no value" to the class, is squarely within the concern of CAFA. It is perfectly appropriate to omit noncash compensation to the class when considering the fairness of the settlement or the calculation of a reasonable fee. *E.g.*, *Silberblatt v. Morgan Stanley*, 2007 WL 4145403 (S.D.N.Y. Nov. 19, 2007).

Frank recognizes that his academic piece on *cy pres* awards, which argues against attributing their value as a benefit of the class, differs from *Masters*; after all, the piece cites *Masters* and argues that *Masters* has failed to consider all of the implications of its decision. Frank's argument, based on Rule 23(e) and public policy, has not been squarely considered by the Second Circuit and is not necessarily inconsistent with *Masters*.

To the extent this court reads *Masters* as requiring a court to use a *cy pres* award to a third party to justify the reasonableness of the settlement and of the attorneys' fees, even when

the *cy pres* award does not benefit the class, there is a circuit split, as the Seventh Circuit has repeatedly explicitly held that *cy pres* awards are not to be construed as a benefit to the class. *Murray v. GMAC*, 434 F.3d at 952; *Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 784 (7th Cir. 2004) (“There is no indirect benefit to the class from the defendant’s giving the money to someone else.”);<sup>7</sup> *Crawford v. Equifax Payment Services, Inc.*, 201 F.3d 877 (7th Cir. 2000). *Masters* does not cite or consider these cases, or the circuit split it may have created, and Frank raises the good-faith argument to preserve this issue for further appeal.

Plaintiffs criticize the fact that Frank cites to an article written by Frank critical of the use of *cy pres* awards by trial lawyers to rationalize oversized attorneys’ fees without the benefit to the class. But at no point do they explain why Frank is wrong as a matter of public policy or Rule 23(h). *Cy pres* awards to third parties are poor public policy, create conflicts of interest and unseemly political lobbying of judges by third-party charities, and are a means for plaintiffs’ attorneys to exaggerate the benefit to the class. Theodore H. Frank, *Cy Pres Settlements*, Class Action Watch, March 2008 at 1. As such, the determination of whether a settlement is fair, adequate, or reasonable settlement under Rules 23(e) and 23(h) should not include attorneys’ fees based on *cy pres* awards to third parties except when explicitly authorized by the legislature.

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<sup>7</sup> Note that plaintiffs miscite *Mirfasihi* as *supporting* the award of *cy pres* funds when the case is in fact highly critical of the practice. MPSS 13. Frank will assume that the Putative Class Attorneys’ error was a good-faith mistake, like that of Frank’s counsel in mistakenly citing *Piambino v. Bailey*, 757 F.2d 1112 (11th Cir. 1985). The *Piambino* argument should not have been made on Frank’s behalf, because Frank agrees with Putative Class Attorneys that attorneys’ fees should be negotiated separately from the class settlement. Manual for Complex Litigation (Third) § 30.42. Frank withdraws the Third Objection made on his behalf by his counsel, which, in any event, is mooted by Putative Class Attorneys’ facially obvious self-dealing.

**V. Attorneys' Fees Should Be Based Upon Benefits To The Class.**

Putative Class Attorneys misrepresent the standard for judging fees in the Second Circuit.<sup>8</sup> Fees are based on a percentage of the settlement fund, and a lodestar is used only as a “cross-check” on the reasonableness of fees. *Masters v. Wilhemina Model Agency, Inc.*, 473 F.3d 423, 436 (2d Cir. 2007); *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 49-50 (2d Cir.2000). Given that the class has received only \$24,505 in benefits, fees awarded should not exceed that amount.

**VI. The Attorneys' Fees And Costs To Twelve Law Firms Reflects Self-Dealing At The Expense Of The Class And Demonstrate That The Class Representatives Are Not Adequate.**

At no point in the brief in support of fees do Putative Class Attorneys justify why they needed twelve private law firms in *addition* to the government agencies conducting discovery to litigate this action. Class representatives acting for the benefit of the class rather than the benefit of the attorneys would have insisted on paring down this redundancy. Two or three firms would be required at most. The very fact of twelve law firms demonstrates that the class representatives cannot meet the Rule 23(a)(4) standard. In no event should fees be awarded for duplicate hours necessitated by the overlawying of this case by the Putative Class Attorneys, and costs should be closely scrutinized on the same basis.

As documented by Take-Two's brief, not a single one of the Putative Class Attorneys requesting fees adequately documents the hours spent on the case to justify their lodestar request. The burden is “on [plaintiffs'] counsel in the first instance to submit detailed contemporaneous time records.” *Jones v. Amalgamated Warbasse Houses, Inc.*, 721 F.2d 881, 885 (2d Cir. 1983)

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<sup>8</sup> See also footnote 7, *supra*.

(citation omitted). Having failed to do so, Putative Class Attorneys have no grounds to request a lodestar determination.

## **VII. Replacement Discs Have Zero Value To The Class.**

GTA is three to four years old, depending on the platform. The gaming consoles on which it is played have been superseded by more technologically advanced consoles, the X-Box 360 and Sony PS3, that are incompatible with the replacement disc; the game itself has been superseded by the well-reviewed *Grand Theft Auto IV*, which is far more advanced than the edition at issue here (and even more violent and more sexually explicit). But Putative Class Attorneys seek to attribute a \$15 value to the replacement disc. The court should see through this sham for what it is: a self-serving attempt to inflate the court's valuation of the benefits to the class to rationalize higher attorneys' fees.

There are three additional reasons why value of the replacement disc to the class cannot possibly be \$15:

*First*, the Hot Coffee content is available to GTA owners only if they voluntarily take an affirmative action to download the Hot Coffee modification. The only difference between the replacement disc and the original edition is that that particular downloadable modification is not compatible with the replacement disc. (Other downloadable user-created modifications with explicit nudity remain available, as a cursory Google or Youtube search will confirm.) A GTA consumer who objects to the Hot Coffee scenes merely need do nothing and will never see them.

*Second*, confirming the argument of Objector Jonathan Schmugge that no one plays an out-of-date four-year-old game, *Grand Theft Auto: San Andreas* is readily available on Ebay, where (as of June 1, at least) dozens of copies are going unsold for \$1.99 or less. *See*

<http://tinyurl.com/5od9tk>. How can the economic value of the replacement disc be more than what it sells for on the free market?

*Third*, the replacement disc cannot be attributed to the efforts of the Putative Class Attorneys. Before the first class action was filed, Take-Two announced that it was ceasing production of the original version of GTA and would make available a replacement version. Seth Schiesel, “Video Game Known for Violence Lands in Rating Trouble Over Sex,” *New York Times*, Jul. 21, 2005 at A1; “Analysts Expect Little Success for Videogame Legislation,” *Consumer Electronics Daily*, Jul. 21, 2005 (manufacturer agreed to “[m]ake a downloadable patch available to all consumers who have previously purchased the PC version of the game, which will make the modification that unlocks the material inoperable”). To attribute to the efforts of the Putative Class Attorneys this voluntary action by the manufacturer taken before a lawsuit was even filed requires time travel. In no event should attorneys’ fees be awarded on the basis of availability of the replacement disc.

### **VIII. Putative Class Attorneys Are Not Entitled To Costs.**

A prevailing party is entitled to costs. Fed. R. Civ. Proc. 54(d)(1). It is within a court’s discretion to deny costs to a prevailing party when that party’s success is but a small fraction of the relief they originally sought and litigated. *Farrar v. Hobby*, 506 U.S. 103 (1992). Here, Putative Class Attorneys have obtained only \$26,505 in economic benefit for the class they purport to represent, when they originally claimed that their damages were effectively \$500 million plus punitive damages: they “asked for a bundle and got a pittance.” *Id.* at 120 (O’Connor, J., concurring). This is the sort of *de minimis* nuisance settlement that should not be awarded more than nominal costs or fees. *Id.* at 121-22.

## CONCLUSION

The Putative Class Attorneys have brought either (1) a meritorious case that is being settled for an infinitesimal fraction of the case's real value in a "sellout" of the attorneys' and class representatives' fiduciary duties to the class, or (2) a meritless lawsuit where the "class device had been used to obtain leverage for one person's benefit." *Murray*, 434 F.3d at 952. In either instance, the Putative Class Attorneys' actions should be deterred, rather than rewarded; the court should reject the settlement as failing to comply with the requirements of Rule 23(a)(4) and Rule 23(e). The Putative Class Attorneys' requests for fees and costs should be rejected.

Dated: June 6, 2008

Respectfully submitted,

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PROOF OF SERVICE

I declare that:

I am employed in the District of Columbia. I am over the age of 18 years and not party to the within action; my office address is 1150 Seventeenth Street, NW, Washington, DC 20036.

On June 5, 2008, I served the attached:

BRIEF OF THEODORE H. FRANK IN OPPOSITION TO PLAINTIFFS' MEMORANDA IN SUPPORT OF PROPOSED SETTLEMENT AND AWARD OF ATTORNEYS' FEES AND EXPENSES

and

MOTION FOR SELF-REPRESENTATION OF THEODORE H. FRANK

X By Federal Express in that I caused such envelope(s) to be delivered via Federal Express to the addressee(s) designated.

Seth R. Lesser, Esq.  
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Clerk of the Court  
United States District Court  
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New York, NY 10007  
(original & courtesy copy)

I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 5, 2008.

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Sara Wexler