

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

In Re: Grand Theft Auto Video Game
Consumer Litigation (No. II)

Case No. 06-md-1739 (SWK)(MHD)

This Document Relates to:

Samarino v. Take-Two Interactive Software, Inc., et al., 05-cv-6767;
Carlson v. Take-Two Interactive Software, Inc., et al., 05-cv-6907;
Stanhouse v. Take-Two Interactive Software, Inc., et al., 05-cv-01174;
Goldfine v. Take-Two Interactive Software, Inc., et al., 06-cv-6537;
Casey v. Take-Two Interactive Software, Inc., et al., 05-cv-4268;
Cohen v. Take-Two Interactive Software, Inc., et al., 05-cv-6734;
Robinson v. Take-Two Interactive Software, Inc., et al., 06-cv-5263

**PLAINTIFFS' MEMORANDUM IN SUPPORT OF
CLASS COUNSEL'S APPLICATION FOR AN AWARD OF
ATTORNEYS' FEES AND REIMBURSEMENT OF LITIGATION EXPENSES
AND OF CLASS REPRESENTATIVES' ENHANCEMENTS**

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Class Counsel for the Settlement Class in this action respectfully submit this memorandum in support of Class Counsel's Application, pursuant to Federal Rules of Civil Procedure 23(h) and 54(d)(2), for an award of Attorneys' Fees in the amount of \$934,749.75 and attorneys' expenses in the amount of \$65,250.25, and also for class representative enhancements of \$5,000 to Brenda Stanhouse, Susan Carlson, Rose Goldfine, Robert Samario and \$1,500 to Florence Cohen, Cindy Casey, and John Robinson. This application is made in conjunction with the motion for final approval of the proposed Settlement now before the Court.

I. PRELIMINARY STATEMENT

Class Counsel respectfully submit that they have achieved a fair and adequate result in this litigation. As set forth in greater detail in Plaintiffs' Memorandum In Support of Final Approval of Class Action Settlement ("Approval Brief"), Defendants Take-Two Interactive Software, Inc and its wholly-owned subsidiary Rockstar Games, Inc. ("Defendants") had agreed to provide up to \$2.75 million in compensation to Class members, and as a minimum "floor" of \$1.025 million for the benefit of Class members. While the number of Class Members who filed claims was only in the few thousands and the value of those claims is relatively small, final approval of the Settlement will mean that Defendants will still be required to pay the \$1.025 million floor to Class Members and to the charitable entities set forth in the Approval Brief. Thus, the total recovered benefit to the Class (aside from fees and expenses incurred in the litigation), when the additional costs of notice and administration for the Class are factored in (*i.e.*, approximately \$830,000) totals approximately \$1,855,000.

As part of the Settlement, Defendants, as set forth in the Notice published to the Class, have agreed to and do not oppose an application by Plaintiffs' Counsel for attorneys' fees and litigation expenses of \$1,000,000. The Notice estimated that \$955,000 of this total request would

represent attorneys' fees and that \$45,000 would represent litigation costs and expenses. Class Counsel's final calculation of litigation expenses totals \$46,695.11, and Plaintiff's counsel's total time (their "lodestar") equals \$,317,433.25. Therefore, Class Counsel reduces its request for attorneys' fees in this litigation to \$945,000 – or the difference between counsel's lodestar and the agreed upon total set forth in the Notice and agreed to by Defendants– a "negative" multiplier of their lodestar.

Class Counsel believe that this amount is reasonable in light of the benefits obtained by the litigation and on behalf of the Class as a whole and the efforts that Class Counsel undertook to bring about these benefits. The procedural history of this class action demonstrates that the extent and nature of the motion practice, the extensive discovery conducted, the costs of retaining and consulting with experts, the preparation and briefing of the class certification motion, and the protracted and extensive settlement negotiations, and the risks of establishing liability and damages at trial, as are detailed in Class Counsel's Memorandum of Points and Authorities in Support of Request for Final Approval of Class Action Settlement and in the Declaration of Seth R. Lesser in Support of Final Approval of Class Action Settlement and of Class Counsel's Application for an Award of Attorneys' Fees and Expenses ("Lesser Decl."), all satisfy the legal standards for this Court to grant the attorneys' fees requested herein.

Plaintiffs' Counsel submit herewith declarations from all the Plaintiffs' counsel involved in this litigation, setting forth their respective time and expenses in this litigation and their qualifications in the Compendium of Declaration of Plaintiffs' Counsel in Support of Motion For Award of Attorneys' Fees and Reimbursement of Litigation Expenses (Comp. Decl.).¹

¹ Time detail will be provided for the Court's *in camera* review, should the Court wish it.

The two objections filed opposing Class Counsel's fee application are without merit and should be rejected, for the reasons outlined below.

Finally, this memorandum sets out why the requested awards of \$5,000 to Brenda Stanhouse, Susan Carlson, Rose Goldfine, Robert Samario and \$1,500 to Florence Cohen, Cindy Casey, and John Robinson for their services as class representatives in connection with this litigation and Settlement are fair and reasonable and should be approved.

II. THE LEGAL STANDARDS GOVERNING THE AWARD OF ATTORNEYS' FEES

As the Supreme Court has noted, in an ideal case, the parties will negotiate and agree upon payment of a definite amount in attorneys' fees. *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). That was done here. Of course, even where the parties have reached agreement as to the appropriate amount of the fee, the Court must still review and approve the fee. However, in the absence of any evidence of collusion (and none exists here), a negotiated fee that does not diminish the amount of recovery by the class is entitled to substantial weight. *See In re First Capital Holdings Corp. Fin. Prods. Sec. Litig.*, 33 F.3d 29 (9th Cir. 1994) (fee request approved where it was negotiated between the parties and was in addition to the benefits provided to the class); *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 720 (5th Cir. 1974) (encouraging both sides to "understandingly, sympathetically, and professionally arrive at a settlement as to attorney's fees"). The reasonableness of the fee requested here is underscored by the fact that it was negotiated at arms-length – *after* the parties reached substantial agreement on appropriate Class-wide compensatory. Lesser Decl., ¶¶ 19-20.

The award of counsel fees in class action litigation is based on the long-standing principle that a party whose efforts produce a benefit for a class of persons is entitled to compensation. *See Central R.R. & Banking Co. v. Pettus*, 113 U.S. 116 (1885); *Trustees v. Greenough*, 105 U.S. 527

(1881); *Boeing Co. v. Van Gemert*, 444 U.S. 472 (1980); *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970); *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 166 (1939).

Most significantly, the Federal Rules of Civil Procedure to provide for attorneys' fees in class action settlements when the parties themselves have negotiated such fees. Fed. R. Civ. P. 23(h) now provides: "In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement."² This is such an instance, of course, and pursuant to the Fed. R. Civ. P., Plaintiffs are now seeking their fair and reasonable costs in obtaining the judgment that this Settlement will provide in favor of the Class.³

We would further note that the Settlement made available to the Class the possibility of fair recompense for their purchase of the video game at issue, as is shown in the Approval Brief. However, as is also set forth in that brief (*see also* Lesser Decl., ¶ 16), the possibility of a relatively low claims rate was also recognized given the facts of the case and to ensure that the Class's concerns as to what occurred here – the inclusion of the Hot Coffee pornography in a "M"-rated game and the Settlement had a negotiated floor of \$1.025 million providing essentially for a *cy pres* remedy and the payment of (what has turned out to be) approximately \$830,000 in administrative and notice costs apart and separate from that floor. Taken in conjunction with the litigation as a whole, the *cy pres* component will provide cognizable value to the class and the litigation

² Although the clear majority of recent federal and state court cases have, in a typical "common fund" case, determined the appropriateness of an attorneys' fee award based on a percentage-of-the-recovery approach, this action is not a traditional common fund case – indeed, Defendants simply refused to negotiate it as such (Lesser Decl., ¶ 6) and, in accordance with their obligations to the Class, Class Counsel negotiated the Settlement notwithstanding. *Id.* Were the case a common fund case the fee request would still be reasonable, being approximately one-third of the total monetary benefits provided on behalf of the Settlement Class when fees and costs are recognized as providing value in making the fund available.

³ Even aside from being an agreed-upon amount under Rule 23(h), inasmuch as the case was brought under deceptive acts and practices statutes providing for attorneys' fees, Class Counsel would have been entitled, as a prevailing party in obtaining the Final Judgment here, for fees.

inasmuch as the case as precedent provided a deterrent against further such conduct by Defendants in the future and the *cy pres* component will also help ensure that consumers are more aware of the content and ratings of such games, will buy appropriate games as suits their personal preferences, and ultimately reduce the actual number of consumers damaged by such conduct like that at issue in this litigation. That such relief is significant and, above all, constitutes a favorable resolution of the core issues upon which this case was commenced, cannot be gainsaid.

It should further be noted, that Class Counsel's requested fee will not diminish the benefits obtained for or on behalf of the Class. Defendants agreed to pay Class Counsel's fee (up to the limit requested herein), subject to Court approval, wholly apart from the benefits afforded to the members of the Class. Thus, unlike the typical common fund case, reducing or even refusing to award a fee will not result in any additional benefit to Class members. *See In re First Capital Holdings Corp. Fin. Prods. Sec. Litig.*, 33 F.3d 29 (9th Cir. 1994). Instead, the money would simply revert back to Defendants.

A. Class Counsel's Lodestar

Lodestar is calculated by multiplying the number of hours expended on the entire litigation by a particular attorney by his or her current hourly rate. *See Kirsch v. Fleet Street, Ltd.*, 148 F.3d 149, 172 (2d Cir. 1998). The hourly billing rate to be applied is the hourly rate that is normally charged in the community where the counsel practices, *i.e.*, the "market rate"). *See Blum v. Stenson*, 465 U.S. 886, 895 (1984); *Hensley v. Eckerhart*, 461 U.S. 424, 447 (1983) (Brennan, J., concurring in part, dissenting in part) ("market standards should prevail"); *Luciano v. Olsten Corp.*, 109 F.3d 111, 115-116 (2d Cir. 1997) (the "[t]he 'lodestar' figure should be in line with those [rates] 'prevailing in the community for similar services by lawyers of reasonably

comparable skill, experience and reputation.’’’) In addition, the Supreme Court and other courts have held that the use of *current* rates is proper since such rates more adequately compensate for inflation and loss of use of funds. *Missouri v. Jenkins*, 491 U.S. 274 (1989). Here, Class Counsel’s current rates are the competitive market hourly rates in New York for cases of this sort -- complex consumer class action litigation that involves sophisticated issues and counsel on both sides. *See In re Prudential Sec. Inc. Ltd. Partnerships Litig.*, 985 F. Supp. 410, 416-17 (S.D.N.Y. 1997); *Roberts v. Texaco Inc.*, 979 F.Supp.185, 194 n. 13 (S.D.N.Y. 1997). Such rates necessarily reflect the reputation, experience, care, and successful records of Plaintiffs’ Counsel.

Class Counsel devoted a total of 3,280.3 hours prosecuting this litigation and negotiating its settlement. Lesser Decl., ¶ 30. The hours devoted by each firm, and the accompanying time charges are set forth in chart in the Lesser Declaration at page 21, paragraph 37, and supported by the declarations of counsel in the Comp. Decl. As reflected in the declarations, these efforts have resulted in a total lodestar of \$1,317,433.25 – much of it, it bears emphasizing, at lower-than New York market rates. *See, e.g.*, Comp. Decl., Exs.2, 5, 8 and 9.

The hours spent on this case are reasonable given the magnitude and complexity of this fifty-state consumer fraudMDL litigation and the fact that it not only involved seminal issues of consumer fraud class action jurisprudence, but also involved the work-up of the case from inception through substantial discovery involving, among other things, review of thousands of pages of emails and the conduct of numerous depositions. Discovery in excess of that obtained by governmental agencies was obtained. In these lodestar figures the time spent in connection with this fee request is not included. As further set forth in detail the Lesser Declaration, the amount of time spent by counsel in prosecuting this action was devoted to, among other things:

- a. Beginning in the Fall of 2005, Plaintiffs brought seven (7) actions in federal courts against Defendants alleging various state statutory and common law claims;
- b. The claims in the cases were substantially similar and involved parents who, not knowing that the Grand Theft Auto: San Andreas game contained a hidden pornographic sex scene or “game within a game” known as the “Hot Coffee” scenes, had purchased the game for their children or (in one case) grandchildren;
- c. Integral to the claims was fact that, because the Hot Coffee scenes had been not disclosed to the Entertainment Software Ratings Board (the “ESRB”), the industry’s rating board, the game had been given a “M” (“Mature”) rating – denoting that while it had violence and sexuality, it was less violent and sexual in nature than a game denominated with an “AO” (“Adult Only”) rating; in commonplace understanding, the difference is akin to the difference between a “R” film and an “X” rated film and the distinct commercial difference between the two is captured by the fact that the majority of retailers, and virtually every major commercial retail entity, will not sell “AO” games;
- d. On February 13, 2006, the cases were consolidated and transferred to this Court pursuant to an order of the federal Multi-District Litigation Panel for pre-trial proceedings;
- e. After the undersigned requested and obtained a status conference before the Magistrate Judge on April 12, 2006 and after a contested Rule 23(g) motion between various counsel who represented some of the various cases, the Court appointed the undersigned as Lead Counsel on May 1, 2006; at that point, the case began to be litigated in earnest;

- f. From the outset, Lead Class Counsel undertook to ensure that all Plaintiffs' counsel understood that this was going to be a litigation where efforts were to be made to be efficient and that only attorneys with appropriate experience were to be used and that unnecessary expenses and unnecessary proffers of (say) legal research were not to be countenanced;
- g. Additionally, from the outset, it was also determined that third-party expertise need to be obtained, a good example being the retention of a expert computer consulting firm (Interhack whose principals are on the faculty of Ohio State University) to explain the technical matters presented with the litigation and to evaluate the proffered defenses by the Defendants as to the reasonability of their actions in failing to expunge the "Hot Coffee" scenes entirely from the game;
- h. On June 8, 2006, after research sufficient to draft what (we believe to be) a state-of-the-art nationwide consumer class action complaint, Plaintiffs filed the comprehensive Amended Consolidated Complaint ("Complaint") (D.E. 18);
- i. Defendants then moved to dismiss portions of the Complaint, which motion was denied on October 25, 2006 (D.E. 33);
- j. Meanwhile, a Protective Order was entered on consent on September 6, 2006, as the parties simultaneously, and by agreement, proceeded to class certification discovery;
- k. Following substantial pressing for discovery both between the two sides and in a motion to compel production of documents from Defendants filed on October 26, 2006, Plaintiffs, during the fall of 2006 and into 2007, reviewed tens of thousands of pages of documents, took numerous depositions of Defendants' CEOs and chief

officer in charge of reviewing software for submission to the ratings board, and defended depositions of the following putative class representatives – Barbara Stanhouse, Susan Carlson, Rose Goldfine, and Robert Samario; in addition, Plaintiffs pressed strenuously for electronic discovery and, aided by their computer experts, negotiated at length with Defendants and where negotiation proved fruitless, before the Court concerning additional discovery and, in particular, obtained discovery beyond that which had been sought and obtained by the governmental agencies that had investigated Defendants’ actions;

- l. On November 10, 2006, Defendants’ filed a preemptory Motion to Deny Class Certification and /or strike the class allegations of the Complaint together with a fulsome expert report concerning consumer matters concerning, among other things, the “Hot Coffee” scenes, the ESRB rating system, and the use of the game;
- m. After several attempts to foreclose further discovery by Defendants prior to responding to the motion, pursuant to a schedule established by the Magistrate Judge, Plaintiffs, on January 24, 2007, filed an omnibus motion for class certification of a national class and, having obtained their own expert on consumer surveying, filed a motion to strike Defendants’ expert’s report; the motion for class certification drew deeply upon the results of the discovery and document review and put forward a significant and compelling liability case;
- n. Following further motion practice, and while Defendants were preparing the opposition papers to Plaintiffs’ class certification motion and their reply to their motion to deny class certification, the parties commenced settlement discussions upon Defendants’ suggestion. After some initial discussion between the parties

themselves, the settlement discussions were overseen by Magistrate Judge Dolinger;

- o. Between themselves and with Magistrate Judge Dolinger, the two sides held numerous meetings and discussions in the spring of 2007 – some of which were quite adversarial – and little headway was achieved for a number of months;
- p. On June 8, 2007, Defendants withdrew their prior motion to deny class certification and filed an opposition to Plaintiffs’ motion for class certification;
- q. During the entire summer of 2007, the discussions of potential settlement again commenced and the parties negotiated each and every substantive issue. Counsel exchange innumerable emails and telephone calls which finally resulted in an agreement in principle in September 2007;
- r. Including in the matters that were hotly negotiated was the matter of notice, the two sides being unable to reach agreement and it took specific and further recourse to the offices of Magistrate Judge Dolinger to obtain what, ultimately, constituted the notice plan, one well in excess of what Defendants’ otherwise would have agreed to;
- s. The agreement in principle was a complete settlement except that it did not set forth any provision regarding attorneys’ fees; it provided, in effect, that Plaintiffs would petition the Court for a fee; this was due out of the insistence by defense counsel that this was not to be a “common fund” settlement and that there would be no negotiation of attorneys’ fees until the substantive Class relief was negotiated; and
- t. Only after the settlement in principle was reached was there a negotiation of fees, which itself took many weeks and innumerable arms-length and contentious

negotiations that continued until the very eve of the submission of the Settlement to the Court for preliminary approval.

Lesser Decl., ¶ 8. As is obvious, two goals were paramount in the litigation: both advancing the case but doing so on a focused manner that might most expeditiously lead to resolution.

Efficiency and expediency were our goals. The result of a settlement in a MDL proceeding within two years of its commencement is not inconsiderable.

B. Class Counsel's Requested Fees Represent a Negative Lodestar Multiplier

The reasonableness of Class Counsel's requested attorneys' fees is reflected by the fact they are seeking a negative multiplier of .72 on their time, notwithstanding the success in this litigation represented by this Settlement.⁴ The lodestar/multiplier method involves calculating the number of hours spent multiplied by counsel's respective hourly rates and then adjusting the lodestar for contingency, complexity, risks associated with the litigation and other factors by applying a multiplier to the lodestar. *In re Washington Public Power Supply System Sec. Litig.*, 19 F.3d 1291 (9th Cir. 1994). As Judge Pollack noted in *In re Prudential Inc. Limited Partnerships Litigation*, 912 F. Supp. 97 (S.D.N.Y. 1996),

The Court has broad discretion which should be appropriately exercised to adjust the lodestar to take into account such factors as (i) the contingent nature of the expected compensation for their services; (ii) the consequent risk of non-payment *viewed as of the time of filing the suit*; (iii) the quality of representation; (iv) the results achieved. In high risk...cases such as these, courts normally apply a multiplier to the lodestar to adjust for the foregoing considerations in arriving at the total fee to be awarded.

⁴ Compare, e.g., *In re Visa Check/Mastermoney Antitrust Litig.*, 297 F. Supp. 2d 503, 524 (E.D.N.Y. 2003), *aff'd* 396 F.3d 96 (2d Cir 2005) (approving attorneys' fees of 3.5 times the lodestar); *In re Bristol Myers Squibb Secs Litig.*, 361 F. Supp. 2d 229, 237 (S.D.N.Y. 2005) (approving a 2.29 multiplier); *Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 371 (S.D.N.Y. 2002) (approving a 4.65 multiplier). The multiplier here is in line with at least one other FCRA settlement, *Perry v. FleetBoston Fin. Corp.*, 229 F.R.D. 105, 123 (E.D. Pa. 2005) ((1.5 multiplier in FCRA class action settlement).

Id. at 102 (emphasis supplied). *See also In re NASDAQ Market - Makers Antitrust Litig.*, 187 F.R.D. 465, 489 (S.D.N.Y. 1998) (an adjustment of the lodestar “takes into account the social and economic value of class actions, and the need to encourage experienced and able counsel to undertake such litigation”), *citing Alpine Pharmacy v. Chas. Pfizer & Co.*, 481 F.2d 1045, 1050 (2d Cir. 1973).

Here, an award represents of a negative multiplier of .72. This means Class Counsel lost time on the case – the books and records of the firms in the case will have to write off time. And this is so in a situation, of course, where a Settlement has been achieved in favor of the Class.

Further, this litigation posed significant risk of non-payment is clear. Class certification by a federal court for a nationwide consumer case based on state law claims is almost non-existent. It compelled the researching of three causes of action -- – statutory consumer fraud, unjust enrichment and implied warranty of merchantability – across the country. It involved putting forward a novel manner for proceeding with multistate certification through jury molding. On the merits and in terms of proving the case, Defendants had substantial defenses on the merits and Plaintiffs had to undertake the discovery set out above in order to set forth, in their class certification brief, a compelling statement of the case. Given the novel aspects of this litigation and the appurtenant risks and difficulties that it posed – and were known at the outset – Class Counsel’s request represents, we submit, a most reasonable request for services rendered to the Class by their counsel.

C. Contingent Nature of the Fee and Time and Labor Spent

The fee request is further reasonable given the fact that the work undertaken by the law firms was entirely on a contingent basis. It is well-established that an attorney is entitled to a larger fee when that fee is contingent than when it is fixed on a time or contractual basis.

It is an established practice in the private legal market to reward attorneys for taking the risk of non-payment by paying them a premium over their normal hourly rates for winning contingency cases. See Richard Posner, *Economic Analysis of Law* 21.9, at 534-35 (3d ed. 1986). Contingent fees that may far exceed the market value of the services if rendered on a non-contingent basis are accepted in the legal profession as a legitimate way of assuring competent representation for plaintiffs who could not afford to pay on an hourly basis regardless whether they win or lose.

In re Washington Public Power Supply System Sec. Litig., 19 F.3d 1291, 1299 (9th Cir. 1994); see also *Paris v. Metropolitan Life Ins. Co.*, 94 F. Supp. 356, 358 (S.D.N.Y. 1950) (“[t]he fact that petitioners’ compensation was contingent upon recovery must be taken into account”).

When Class Counsel undertook to prosecute Plaintiffs’ claims, it was with the knowledge that they might have to spend substantial time and resources in the litigation of these claims without any assurance of achieving any recovery at all given the legal risks outlined just above.

Even the most vigorous and diligent efforts by counsel do not guarantee victory at trial or a settlement. There are numerous cases prosecuted on a contingent basis where plaintiffs’ counsel have spent thousands of hours and received no payment. See, e.g., *Robbins v. Koger Props., Inc.*, 116 F.3d 1441 (11th Cir. 1997) (verdict of \$81 million for plaintiffs against an accounting firm reversed on loss causation grounds and judgment entered for defendant); see also, *Washington Fed.*, 90 Misc. 2d at 231, 394 N.Y.S.2d at 776.

The effective lawyer will not win all of his cases, and any determination of the reasonableness of his fees in those cases in which his client prevails must take account of the lawyer’s risk of receiving nothing of his services. Charges on the basis of a minimal hourly rate are surely inappropriate for a lawyer who has performed creditably when payment of any fee is so uncertain.

McKittrick v. Gardner, 378 F.2d 872, 875 (4th Cir. 1967). Unlike counsel for Defendants, Class Counsel have not been compensated for their time and effort during the course of this litigation. As is sometimes stated, it would be correct to observe that while defense counsel are generally paid *per diem*, plaintiffs' counsel are paid "perhaps."

All of the services rendered by Plaintiffs' counsel required a level of expertise and the ability to provide services in demanding circumstances against sophisticated corporate defendants. There can be little question in the present case that Plaintiffs' counsel faced risk throughout this litigation. A number of difficult issues, the adverse resolution of some of which could have doomed the successful prosecution of the action, were present here; indeed, on some of the core issues, by dint of their continued pressing the case and showing their unquestionable intention to litigate to a successful result – be it on a national class, state-by-state class or even individual by individual basis – Class Counsel obtained the relief that had been sought from the very beginning. In short, Class Counsel accepted the risk that they could prosecute this complex case for years, yet ultimately receive nothing for their efforts. Having taken this risk, and succeeding despite them, counsel should be fairly compensated. Most certainly, a multiplier of .72 is, at the very least, a reasonable compensation under the circumstances.

D. Standing And Ability of Plaintiffs' And Defendants' Counsel

The result achieved and the quality of the services provided are also important factors to be considered in determining the amount of reasonable attorneys' fees under a lodestar/multiplier analysis. *See, e.g., Hensley*, 461 U.S. at 436 ("most critical factor is the degree of success obtained"); *Brown v. Phillips Petroleum Co.*, 838 F.2d 451, 456 (10 Cir. 1988); *Lindy Bros. Builders Inc. of Philadelphia v. Am. Radiator & Std. Sanitary Corp.*, 540 F.2d 102, 112, 117-18

(3rd Cir. 1976). To reiterate, Class Counsel believe the results they achieved are commendable under the circumstances.

In addition, Class Counsel, respectfully submit that they conducted themselves in this action in a professional, diligent manner. There was little duplication of effort and the bulk of the work was performed by a small number of attorneys fully familiar with the factual and legal issues presented by this litigation. The litigation efforts were focused on the main goals and undertaken to avoid waste.

Class Counsel, moreover, were able to work efficiently in this case given the separate experiences each brought to the table. Mr. Lesser and his colleague at the Locks Law Firm, Mr. Bell, have national reputations for their experience and successful prosecution of complex class action litigation and have also won significant victories in a number of cases – like the present – where claims are novel. Other Class Counsel, especially including Harke & Clasby LLP, are similarly experienced and successful attorneys of complex class actions and consumer fraud litigation. *See generally* Comp. Decl. As set forth above, the services rendered by Class Counsel were rendered efficiently and expeditiously, reflecting their knowledge and practical experience in litigating claims of this nature. Their expertise and demonstrated willingness to pursue discovery wherever it might lead and to proceed with the case on a serious and concerted basis was obtained as a primary factor, we submit, in bringing about the expeditious resolution of this litigation on.

The quality of opposing counsel is also important in evaluating the quality of the services rendered by Class Counsel. *See, e.g., In re Warner Communications Sec. Litig.*, 618 F. Supp. 735, 749 (S.D.N.Y. 1985), *aff'd*, 798 F.2d 35 (2d Cir. 1986); *In re King Resources Co. Sec. Litig.*, 420 F. Supp. 610, 634 (D. Colo. 1976); *Arenson v. Board of Trade*, 372 F. Supp. 1349, 1351 (N.D. Ill. 1974). Defendants here were vigorously represented by two national law firms, Debevoise &

Plimpton LLP and Blank Rome LLP, both of which showed no lack of tenacity in their clients' defense. The ability of Class Counsel to obtain such favorable results in the face of formidable and dogged legal opposition further evidences the quality of their work.

E. Public Policy Considerations Support the Reasonableness of the Requested Fees

Important public policy considerations also support approval of the requested fees. In considering attorneys' fees, courts are mindful that such awards serve the dual purpose of encouraging representatives acting as "private attorneys' general," to seek redress for damages to entire classes of persons and discouraging future misconduct of a similar nature. *See Dolgow v. Anderson*, 43 F.R.D. 472, 487 (E.D.N.Y. 1968), *rev'd on other grounds*, 438 F.2d 825 (2d Cir. 1970) ("Every successful suit duly rewarded encourages other suits to redress misconduct and by the same token discourages misconduct which would occasion suit.") (citations omitted). *See also In re RJR Nabisco Inc. Sec. Litig.*, [1992 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,984, at 94,268 (S.D.N.Y. Aug. 24, 1992) ("The prospect of handsome compensation is held out as an inducement to encourage lawyers to bring such suits") (quoting *Dolgow*, 43 F.R.D. at 494); *New York Life*, 1995 N.Y. Misc. LEXIS 652, at *93; *Sternberg*, 110 Misc. 2d at 808, 442 N.Y.S.2d at 1020.

Patently, this has been such a litigation from the beginning and this consideration should apply with considerable force in this case.

F. The Reaction of the Class Confirms that the Requested Fees are Reasonable

Finally, and perhaps not least, the reaction or absence of such by the vast majority of Class Members demonstrates the reasonableness of Class Counsel's fees and expenses. The notice, told the Class that counsel would apply for the fee and expense award now requested. Yet, even

though two objectors filed objections relating to Class Counsel’s request for attorneys’ fees and reimbursements of litigation expenses – both of which have no merit as is described below – this still represents a singularly minute fraction of the number of Class Members, who view the Notice or filed claims under the Settlement. As such, this factor alone supports the requested fees and expenses request, and, accordingly, the Court should approve the requested fee application.⁵

⁵ This overwhelming acceptance of the Settlement by Class members is convincing evidence of its fairness and adequacy. See *Bell Atl. Corp. v. Bolger*, 2 F.3d 1304, 1313-1314 (3d Cir. 1993); *General Pub. Utils.*, [1983-1984 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 99,556 at 97,231 (D.N.J. Nov. 16, 1983) (“The lack of objection[s] from the members of the class is one of the most important reasons leading the court to the conclusion that the settlement should be approved”); *Stoetzer v. U.S. Steel Corp.*, 897 F.2d 115, 118-19 (3d Cir. 1990) (“only” 29 objections in 281 member class “strongly favors settlement”).

III. CLASS COUNSEL SHOULD BE REIMBURSED FOR THEIR OUT-OF-POCKET EXPENSES

Class Counsel have incurred out-of-pocket costs and expenses in an aggregate amount of \$46,695.11 in prosecuting this litigation on behalf of the class. *See* Lesser Decl., ¶22. These expenses are categorized in the declarations submitted to the Court herewith.

Class Counsel is entitled to reimbursement for various standard out-of-pocket expenses that an attorney would ordinarily bill a fee paying client. *See, e.g., Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994) (“Harris may recover as part of the award of attorney’s fees those out-of-pocket expenses that ‘would normally be charged to a fee paying client.’”) (citation omitted). These expenses include discovery costs (including copying and deposition transcripts), plaintiffs’ expert consultants, express mail and delivery services, travel and lodging, computerized research, all of which are separately totaled in counsels’ declarations. *Id.* As the categorization in the fee declarations shows, these expenses here are reasonable.

For all these reasons, Class Counsel respectfully submits that the expense request should be approved.

IV. THE CLASS REPRESENTATIVE SHOULD BE AWARDED THEIR REQUESTED ENHANCEMENTS

It is well-accepted that individuals who step forward in class actions that resolve successfully can be entitled to obtain an award beyond that of the other class members for their willingness to serve as class representatives.⁶ While the range of awards in cases can range from

⁶ *See, e.g., Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998) (incentive award of \$25,000 for named plaintiff); *In re Immunex Sec. Litig.*, 864 F. Supp. 142 (W.D. Wash. 1994) (11 named plaintiffs shared \$25,000 paid); *In re Presidential Life Securities*, 857 F. Supp. 331, 333, 337 (S.D.N.Y. 1994) (five plaintiffs shared \$10,000 taken out of attorney fees); *In re Dun & Bradstreet Credit Services Customer Litig.*, 130 F.R.D. 366 (S.D. Ohio 1990) (various incentive awards to named plaintiffs; highest individual award \$55,000); *see also In re GNC Shareholder Litig.: All Actions*, 668 F. Supp. 450, 451 (W.D. Pa. 1987); *Troncelliti v. Minolta Corp.*, 666 F. Supp. 750, 752 (D. Md. 1987); *In re Jackson Lockdown/MCO Cases*, 107 F.R.D. 703, 709-10 (E.D. Mich. 1985); *GMAC Mortgage Corp. v. Stapleton*,

the modest to the quite substantial (*see* citations n.6, above), in this case the requested awards are reasonable and should be awarded. There are two proposed tiers for such payments: (a) for those class representatives Brenda Stanhouse, Rose Goldfine, Robert Samario and Susan Carlson who not only agreed to “step up” and undertake class representation on behalf of the putative class(es) their complaints set out but who also responded to discovery and who were deposed as part of the action (in Mr. Samario’s case, flying from California to New York), the proposed award is \$5,000, an amount well in line with precedent (*see* note 6, above); and (b) for those putative class representatives, Florence Cohen, Cindy Casey, and John Robinson, who stepped forward but who did not face discovery or deposition, a most modest award of \$1,500. These amounts are reasonable and, if anything, less than the current norm for such undertakings by representative plaintiffs and should be approved.

A. The Objections of the Objectors Should Be Overruled

1. Frank Fee Objection

The reputation and notoriety of Objector Frank’s Attorney is set forth in the Approval Brief filed concurrently with this application (*See* Approval Brief at pages 17-18), and is hereby incorporate in full herein and therefore does not need to be reiterated at this point. Little more need be said.

Moreover, the specific objections to the application for attorneys’ fees and reimbursement of litigation expenses are without merit as set forth below.

236 Ill. App. 3d 486, 603 N.E.2d 767, 776 (1992); C. Krislov, *Scrutiny of the Bounty: Incentive Awards for Plaintiffs in Class Litigation*, 78 Ill. B.J. 286 (June 1990). *Cf. Ingram v. The Coca-Cola Co.*, 200 F.R.D.685, 694 (N.D. Ga. 2001) (approving incentive awards of \$300,000 to class representatives in lieu of compensation from settlement in highly-publicized discrimination lawsuit).

a. Frank's "Objection No. 1"

The first objection advanced by Frank is that the settlement violates class members' due process rights because Class Counsel's full motion for attorneys' fees will not be filed prior to the objection deadline. Objection at ¶ 1. Of course, as an initial matter, it would have been far more expedient, sensible and in keeping with the precepts of this Court for a simple request to Class Counsel for this information – which Class Counsel has often provided to class members in other cases. Instead, a boilerplate and legally wrong proposition begins the objection.⁷

Legally, Frank does not cite any law in support of his motion, and case law makes clear that this objection is without merit. In *In Re Bisys Sec. Litig.*, Case No. 04 Civ. 3840, 2007 U.S. Dist. LEXIS 51087 (S.D.N.Y. July 16, 2007) (Rakoff, *J.*), the Court dealt with this exact issue and held that Rule 23(h)(1) was satisfied if the notice sent to class members included the amount of the attorneys' fees sought even though the actual motion for attorney's fees was filed after the objection deadline. *Id.* at *4-*6 (“Nonetheless, members of the class were plainly on notice that the attorneys' fees might be as much as one-third of the fund and so had every reason to raise an objection if they thought this was excessive.”).⁸ Other federal courts have similarly held. *See, e.g., Bessey v. Packerland Plainwell, Inc.*, 2007 WL 3173972 (W.D. Mich. 2007) (It was sufficient that “reasonable notice of the maximum amount counsel intended to seek was included in the Class

⁷ One suspects that had Class Counsel given Mr. Frank information, he would have found it inadequate no matter what but it is the tenor of “object first and hope to find a point that sticks” that permeates the objection that is rather improper and should not be countenanced.

⁸ The Notice in this case included actual amounts of the attorneys' fees and costs, while the notice in *In Re Bisys* merely included a percentage, rather than actual amounts. Indeed, in *In re Bisys*, the Court held that the fact that only one objection was lodged at the attorneys' fee request “is a strong indication that the information about attorneys' fees was presented in a ‘reasonable manner.’” *Id.* Providing Notice in this manner is very common and not “unusual.” *See id.*

Notice describing the settlement... [and is] consistent with the requirement of Fed. R. Civ. P. 54(d)(2)(B)... Under the circumstances, notice of the request for attorney's fees was provided to the class in a reasonable manner.").

In any event, the Notice published clearly gave notice to Class Members concerning the exact terms and total amount of attorneys' fees that would be sought by Class Counsel:

Class Counsel will ask the Court for an award of attorneys' fees and reimbursement of expenses in the total amount of \$1,000,000.00. This amount includes approximately \$955,000 in attorneys' fees and approximately \$45,000 for reimbursement of expenses. Defendants have agreed to and will not oppose this request. A copy of the request, after it is filed with the Court, will be available at www.gtasettlement.com. The Court may consider the request at a Settlement Fairness Hearing on **June 25, 2008**. The amount of fees and expenses awarded to Plaintiffs' Counsel by the Court are separate and apart from any money and/or benefits made available to the Class or the Class Representatives and will not affect in any way the settlement benefits to which you are entitled.

See Notice of Proposed Class Action Settlement at ¶ 12. The Court has already found, in conditionally approving the Settlement, that the Notice meets the standard set forth in by Rule 23 and the United States Constitution:

The Court finds that such notice to the members of the Settlement Class as described above: (a) is the best notice practicable to members of the Settlement Class; (b) is reasonably calculated, under the circumstances, to apprise Settlement Class Members of the pendency of the Action, conditional certification of the Settlement Class, the proposed Settlement, the rights of Settlement Class Members to object to the Settlement and to request exclusion from the Settlement Class, and the application of Plaintiff's counsel for an award of attorney's fees and reimbursement of expenses; (c) is reasonable and constitutes due, adequate, and sufficient notice to all persons and entities entitled to receive notice; and (d) meets all applicable requirements of law including, but not limited to, Federal Rule of Civil Procedure 23(c) and the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

Preliminary Approval Order at ¶12.

Thus, Frank's objection is not supported by the relevant law or the facts of this case and should be denied.⁹ Accordingly, Frank's first objection should be overruled.

b. Frank's Third Objection.

Frank's third objection suggests that Class Counsel did not adequately represent the interests of the Class when they separately negotiated their attorneys' fees after reaching a settlement on behalf of the Class. Frank suggests that this procedure was contrary to the law and Class Counsel should have negotiated their fees along with the class settlement.

Such an assertion is absurd and clearly contrary to the law. Indeed, the Manual for Complex Litigation Third, §30.42, expressly provides that "the simultaneous negotiation of class relief and attorneys' fees creates a potential for conflict."

In addition, except in circumstances not present here (such as where the defendant will not negotiate otherwise), simultaneous negotiation of benefits to the class and class counsel's attorneys' fees is disfavored by the case law because of the very real potential for conflict that it creates, and Class Counsel here appropriately upheld their responsibility to the Class by separately negotiating their attorney's fees after a settlement on behalf of the class had been reached. *See Thompson v. Metropolitan Life Ins. Co.*, 216 F.R.D. 55 (S.D.N.Y. 2003) (negotiating attorney's

⁹ A final request concerning his objection to the Notice by Frank's failed objection is the suggestion that a "class guardian" be appointed. Since the Notice is clearly not defective, no "class guardian" is required. As observed in *In re Intelligent Electronics Securities Litigation*, 1997 WL 786984 (E.D. Pa. Nov. 26, 1997), "[t]he appointment of a class guardian would only further increase costs, extend indefinitely the time before distribution to the class and further needlessly complicate the procedures." 1997 WL 786984 at *10. "Not only would such an appointment be duplicative, but it would derogate the duty of the court which is to illuminate and resolve any meritorious disputes and to insure a fair and just resolution." *In re NASDAQ Market-Makers Antitrust Litigation*, 187 F.R.D. 465 (S.D.N.Y. 1998) (rejecting Schonbrun's request for a class guardian); *In Re Rite Aid Corp. Sec. Litig.*, 269 F. Supp. 2d 603 (E.D. Pa 2003) (denying Schonbrun's request for a class guardian).

Further, had Frank even conducted a cursory review the record in this matter, he would have known that the Court has already appointed Special Master Katsiris to oversee the settlement of this matter along with the Court. *See also Shaw v. Toshiba*, 91 F. Supp. 2d 942, 974-75 (E.D. Tex. 2000) (Schonbrun admitting that the Court is the guardian of the class).

fees separately and after the settlement amount had been decided, considerably removes the danger that attorneys' fees would unfairly swallow the proceeds that should go to class members); *Dembski v. Fairchild Industries, Inc.*, 1989 WL 159510 (E.D.N.Y. 1989) (a conflict of interest between the class and class counsel does not exist when the amount of the fees are negotiated after an agreement was reached on all substantive aspects for the class); *Manners v. American General Life Ins. Co.*, 1999 WL 33581944 (M.D.Tenn.1999) (agreements to pay attorney's fees between plaintiffs and defendants in class actions are encouraged, particularly where the attorneys' fees are negotiated separately and only after all terms of the settlement have been agreed to between the parties); *Klingensmith v. Max & Erma's Restaurants, Inc.*, 2007 WL 3118505 (W.D. Pa., 2007) (approved as proper the concluding negotiations of the class's relief prior to negotiating fees and stated that "absent evidence of collusion, a negotiated fee that does not diminish the class recovery is entitled to substantial weight and deference."); *Bussie v. Allmerica Financial Corp.*, 50 F.Supp.2d 59 (D. Mass. 1999) (parties not addressing the issue of lead counsel's remuneration until after reaching consensus on the terms of the Settlement also suggests that the settlement process was fair).

For his proposition, Frank relied solely on a quote from *Piambino v. Bailey*, 757 F.2d 1112, 1143 (11th Cir. 1985). However, Frank changes the quote from *Piambino* by adding words in brackets that completely change its meaning to the exact opposite of what the Court held;¹⁰ the original language, set forth as follows, makes clear that class benefits and attorneys' fees should not be negotiated simultaneously:

"When counsel for the [plaintiff] class negotiates simultaneously for the settlement fund and for individual counsel fees there is an inherent conflict of interest." The

¹⁰ Frank quoted, in relevant part, *Piambino* as follows: "When counsel for the [plaintiff] class [negotiates their fees after the class's recovery], there is inherent conflict..." Frank Objection at 5.

defendant, and therefore its counsel, is “uninterested in what portion of the total payment will go to the class and what percentage will go to the class attorney;” accordingly, the defense operates as no brake against the invidious effects of such a conflict of interest.

757 F.2d at 1143 (citations omitted) (brackets in original). Regarding this flat-out false citation, Class Counsel submits that this Court should inquire of Frank, himself an attorney with no slight credentials, and no less importantly his counsel, Lawrence Schonbrun – a self-avowed expert in the area of the propriety of class action settlements – regarding what can only have been an deliberate (or at a minimum deliberately reckless) attempt at misdirection on the Court, and decide whether any type of sanction is warranted. To ride into the Court on a steed of moral dudgeon and yet to present a federal circuit opinion as saying one thing when it specifically says the contrary is hardly the kind of behavior that should be countenanced.

Frank’s suggestion that Class Counsel should have negotiated its fees along with the rest of the settlement is improper and against the overwhelming jurisprudence on this issue. Accordingly, Frank’s objection in this regard should be denied in its entirety.

c. Frank’s Fourth Objection

Frank next objects to Class Counsel’s final fee award to the extent it is not linked to “actual class member receipt of settlement benefits.” Aside from the fact that Class Counsel is not calculating their fees as a percentage of a common fund, Frank’s requested method of calculation for class action attorney’s fees has been expressly rejected by the Second Circuit for common fund settlements (which, as noted, Defendants’ adamantly refused to negotiate). *See Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423 (2d Cir. 2007) (it was error for district court to award fees based on the amount of claims made and therefore “[a]n allocation of fees by percentage should therefore be awarded on the basis of the total funds made available, whether

claimed or not.”); *see also Williams v. MGM-Pathe Communications Co.*, 129 F.3d 1026 (9th Cir. 1997) (district court abused its discretion when it based Plaintiff’s attorney’s fees on the total amount of claims rather than the total settlement created); *In re Mexico Money Transfer Litigation*, 164 F.Supp.2d 1002 (N.D.Ill. 2000) (declining to base attorney’s fees on coupons redeemed). The one time where such an approach is proper is when, as a result of the Class Action Fairness Act, Congress required it for – and only for – coupon settlement. This is not such a case.

Class Counsel does believe that the overall value of the settlement should be considered, including the total results obtained, however this should not be the only factor. As described above, Class Counsel has sought their fees based upon Rule 23(h) and the lodestar attorneys’ fees generated in this litigation.

In view of the law to the contrary, Frank’s objection which requests that this Court depart from Second Circuit precedent should be rejected.

d. Frank’s Eighth Objection

Frank next argues that the Court cannot take any potential *cy pres* charitable contribution into consideration in any fee award to Class Counsel. Here, Frank seems to assume (wrongly) that counsel are seeking fees based upon a dollar value conferred which, of course, they are not. Moreover, Frank fails to provide any law in support of his position. Instead, Frank references (although never provides the citation) the attorney fee provisions for *cy pres* contributions in coupon settlements under the Class Action Fairness Act. *See* 28 U.S.C.A. § 1712(e) (“The court, in its discretion, may also require that a proposed settlement agreement provide for the distribution of a portion of the value of unclaimed coupons to 1 or more charitable or governmental organizations, as agreed to by the parties. The distribution and redemption of any proceeds under this subsection shall not be used to calculate attorneys’ fees under this section.”). Frank also cites

to an article he himself wrote which criticizes *cy pres* recovery in general. *See Cy Pres Settlements*, Class Action Watch by Theodore Frank, March 2008 at 1, 21-23 (“CAFA bases fee awards in coupon settlements on the actual redeemed value of the coupons; if coupons are donated to charity, those coupons cannot be used to calculate a fee award. The same principle should apply when cash is involved.”).

As this Court is aware, this settlement is not a coupon settlement. Each class member is entitled to cash benefits, and if those benefits are not claimed by the class, a *cy pres* remedy will be created. As noted above in his article, Objector Frank wishes that a *cy pres* recovery in a cash settlement not be considered in making a final attorney fee determination, however, both Objector Frank and Schonbrun know that this is not the current state of the law, nor should it be. *See Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423 (2d Cir. 2007) (where excess funds were to be distributed via a *cy pres* remedy, attorney’s fees are to be determined by the total funds made available in the settlement); *Reade-Alvarez v. Eltman, Eltman, & Cooper, P.C.*, 2006 WL 3681138 (E.D.N.Y. 2006) (awarded fees based on lodestar in case where only *cy pres* recovery to class).

Class Counsel seek their attorneys’ fees under a lodestar calculation, and the Court certainly can consider the total recovery for the class, including the significant *cy pres* remedies, in its determination of Class Counsel’s fees. For this reason, Frank’s objection should be overruled.

e. Frank’s Ninth Objection.

Frank objects to the court approval of Class Counsel’s fee request because Class Counsel failed to disclose any fee sharing agreements the various Plaintiff’s attorneys’ have. Frank’s objection should be overruled as Class Counsel does not have any hidden fee sharing agreements. Each Plaintiff’s firm has supplied its lodestar attorneys’ fees to Lead Class Counsel, who will

allocate the fees according to the percentage of work performed. The only agreement that has been made is that Lead Class Counsel has informed Plaintiffs' counsel that the allocation of fees will be done fairly and in accordance with the value and amount of work done – nothing more. Thus, the objection is meritless and was, again, apparently, a blunderbuss hope to find something to complain about that could have been avoided through simple inquiry.

f. Frank's Tenth Objection

Frank objects to the payment of class representative awards to the seven Class Representative Plaintiffs who took the time and effort to litigate this matter.¹¹ “The practice of awarding cash awards to class representatives is well-established in class actions” *In re Western Union Money Transfer Litigation*, 2004 WL 3709932 (E.D.N.Y. 2004). Class Representative awards are clearly proper in this action and numerous examples are set forth above at note 6. *See also, e.g., Thompson v. Metropolitan Life Ins. Co.*, 216 F.R.D. 55 (S.D.N.Y. 2003) (the burden placed on the class representatives warrants a representative award of \$5000); *Strougo ex rel. Brazilian Equity Fund, Inc. v. Bassini*, 258 F.Supp.2d 254, 263-64 (S.D.N.Y.2003) (reviewing court-approved awards to class representatives); *Klingensmith v. Max & Erma's Restaurants, Inc.*, 2007 WL 3118505 (W.D. Pa. 2007) (“the class representative’s award of \$2,500 in this action raises no “red flag” when it is properly considered as a necessary incentive to aid in enforcement of legislation, and as compensation to an individual willing to contribute her name and time to this purpose.”).

¹¹ Frank also argues that the settlement “denies any benefits to the overwhelming majority of class members” but does not provide any examples of this denial. No class member of which we are aware contacted us or the claims administrator to protest the denial and, to the extent, Frank is objecting to the provision that the class member had to assert they were aggrieved by defendants’ conduct, he certainly must have it backwards since his primary view is that no one should have had a claim in this case. Would he believe the Settlement would have been better if anyone who purchased the game could have put in a claim even if they believed they were not even harmed?

In this matter, four of the Class Representatives were deposed and all of the class representatives took efforts to respond to discovery. *Thompson*, 216 F.R.D. 55 (S.D.N.Y. 2003) (class representatives were required to respond to interrogatories, search and retrieve documents, sit through lengthy depositions, and spend personal time consulting with class counsel are entitled to \$5,000 award). The Class Representatives are clearly entitled to their representative awards.

Frank also requests that this Court inquire as to whether the Class Representatives were “solicited” by Class Counsel to participate in this litigation. Again, Frank does not cite any law in support of this request. As this Court is aware, the defense of this litigation was contentious and aggressive. The Defendants had ample opportunity to conduct significant discovery regarding all of the named plaintiffs. There was not even a hint of solicitation or champerty raised. Therefore, Frank’s request should be denied.¹²

g. Frank’s “Objection No. 11”

Frank’s final objection relates to approval of the Settlement is his opposition of any consideration of the Exchange Program portion of the Settlement in determining Class Counsel’s attorney’s fees. Apparently he does not wish that to be considered part of the value provided to the Class but it is not being counted in any manner as part of a common fund justification – which is rather apparent and he would have known had he inquired. In any event, to assert that the ability to obtain a new game disc does not have value is absurd. Of course, it has some economic value. And Mr. Frank is wrong when he contends that the Defendants had such a program in

¹² Finally, Frank argues that the Court determine whether the “claims of the Representative Plaintiffs are typical of the settlement class.” That demonstration was previously made in connection with preliminary approval – those papers were available for Mr. Frank’s review and this, yet again, blunderbuss complaint is being made in the hope of finding something, however unlikely.

place prior to the actions by Class Counsel being brought. And, finally and not surprisingly, no law or precedent is cited in support of this argument.

Aside from the factual and logical inaccuracies in Frank's objection, the law clearly supports the award of attorney's fees based upon non-monetary recoveries. See *In re Western Union Money Transfer Litigation*, 2004 WL 3709932 (E.D.N.Y. 2004); *Koppel v. Wien*, 743 F.2d 129 (2d Cir.1984) (non-monetary benefits were held to form the basis for a fee award); *In re Mexico Money Transfer Litigation*, 164 F.Supp.2d 1002 (N.D.Ill. 2000) ("Even where the relief accorded is non-monetary, an award of cash for attorneys fees is appropriate.").

Accordingly, Frank's eleventh objection should be overruled.

2. The Magnan Objection

The objection filed by DanileDamionMagnan as against Class Counsel's fee application is based upon his belief that "this is a frivolous and opportunistic lawsuit... that is trying to capitalize on a political and social climate that is biased against the media of video games, which for some reason is held to a different standard than other forms of media like film, music , and literature.

Magnan Objection, ¶4.

Mr. Magnan, like Mr. Frank, has the facts wrong: at issue in this case is the point that video games are – and should be -- held to the same standards of other media. Here, in effect, an X rated movie was sold as an R one. *Grand Theft Auto* was a game that was rated "M" when it should have been rated "AO". Mislabelling is not permitted for games nor for movies. Whether the rating systems for movies or video games appropriately weigh sex and violence properly (a matter about which, implicitly, both Mr. Frank and Mr. Magnan appear to disagree) hardly justifies mislabeling.

In any event, personal views as to how society operates generally and relatively weighs what is or is not “adult only” material is not a basis to a fee objection.

Accordingly, the Magnan Objection should be overruled.

V. CONCLUSION

For all of the reasons set forth above, Class Counsel respectfully request the Court to approve both the Settlement and the Fee Application in all respects.

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Respectfully Submitted,

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