

**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:

*Samario 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 FINAL  
APPROVAL OF CLASS ACTION SETTLEMENT**

Seth R. Lesser (SL-5560)  
Andrew P. Bell (AB-1309)  
LOCKS LAW FIRM PLLC  
110 East 55<sup>th</sup> Street  
New York, N.Y. 10022  
(212) 838-3333 (tel)  
(212) 838-3735 (fax)  
[slesser@lockslawny.com](mailto:slesser@lockslawny.com)  
[www.lockslaw.com](http://www.lockslaw.com)

*Plaintiffs' Lead Counsel*

[Other Counsel Listed On Signature Pages]

## TABLE OF CONTENTS

TABLE OF AUTHORITIES .....	iii
I. BACKGROUND TO THE PROPOSED SETTLEMENT AND ITS TERMS .....	1
A. Introduction .....	1
B. Background of this Litigation Settlement .....	4
C. The Actions .....	8
II. THE PROPOSED SETTLEMENT .....	9
A. Eligibility Averments .....	9
B. The Exchange Program .....	10
C. The Benefit Program .....	10
D. Class Representatives Enhancements .....	11
E. <i>Cy Pres</i> Recipients .....	12
F. Preliminary Approval and Class Certification .....	14
G. Notice to the Class .....	15
H. Objectors' Allegations Are Without Merit .....	15
1. Objector Theodore Frank .....	16
a. Objector's Counsel Schonbrun .....	17
b. Objector Frank Lacks Standing to Object Because He Is Not Aggrieved .....	18
2. The Objections Raised by the Other Objectors Should Also Be Overruled .....	23
a. The Magnan Objection .....	23
b. The Schmutz Objection .....	23
c. The Fulford Objection .....	24

III.	THE SETTLEMENT MERITS FINAL APPROVAL .....	26
A.	Applicable Legal Standard .....	24
B.	The Settlement Satisfies the Second Circuit Standard for Approval .....	26
1.	The Settlement Is the Product of Arm’s- length Negotiations And Is Entitled to a Presumption of Fairness .....	28
2.	The Complexity, Expense and Likely Duration Of the Litigation Favor Approval .....	29
3.	The Reaction of the Class to the Settlement Strongly Favors Approval .....	30
4.	The Stage of the Proceedings and the Amount of Discovery Completed Favor Approval of the Settlement .....	30
5.	The Risks of Establishing Liability Strongly Favor Approval of the Settlement .....	31
6.	The Risks of Establishing Damages Strongly Favor Approval .....	33
7.	The Risk of Maintaining the Class Action Through Trial .....	34
8.	The Ability of Defendant to Withstand Greater Judgment and the Likelihood of Recovery .....	34
9.	The Range of Reasonableness In Light of Possible Recovery .....	34
IV.	CONCLUSION .....	35

## TABLE OF AUTHORITIES

<i>In re “Agent Orange” Product Liability,</i> 818 F.2d 179 (2d Cir. 1987) .....	13
<i>Air Line Stewards &amp; Stewardesses Ass’n v. Trans World Airlines, Inc.,</i> 630 F.2d 1164 (7th Cir. 1980) .....	24
<i>In re Auction Houses Antitrust Litigation,</i> 2001 U.S. Dist. LEXIS 1713 (S.D.N.Y. Feb. 22, 2001) <i>aff’d</i> , 42 Fed. Appx. 511, 2002 U.S. App. LEXIS 15327 (2d Cir. 2002) .....	24- 25
<i>In re Austrian and German Bank Holocaust Litig.,</i> 80 F. Supp.2d 164 (S.D.N.Y. 2000) .....	28
<i>Berger v. Xerox Corp. Retirement Income Guarantee Plan,</i> 2004 WL 287902 (S.D. Ill. 2007) .....	18
<i>Bullock v. Adm’r of Estate of Kircher,</i> 84 F.R.D. 1 (D.N.J. 1979) .....	29
<i>Bynum v. Government of Dist. Of Columbia,</i> 384 F. Supp. 2d 342 (D.D.C. 2005) .....	22
<i>D’Amato v. Deutsche Bank,</i> 236 F.3d 78 (2d Cir. 2001) .....	28
<i>Detroit v. Grinnell Corp.,</i> 495 F.2d 448 (2d Cir. 1974) .....	25, 26, 35
<i>In re First Capital Holdings Corp. Fin. Prods. Sec. Litig.,</i> 33 F.3d 29 (9th Cir. 1994) .....	18
<i>Fisher Bros. v. Cambridge-Lee Indus., Inc.,</i> 630 F. Supp. 482 (E.D. Pa. 1985) .....	28
<i>Girsch v. Jepson,</i> 521 F.2d 153 (3d Cir. 1975) .....	31
<i>In re Intelligent Electronics Securities Litigation,</i> 1997 WL 786984 (E.D. Pa. Nov. 26, 1997) .....	18
<i>Malchman v. Davis ,</i>	

761 F.2d 893 (2d Cir. 1985) .....	26
<i>Miller v. Republic Nat'l Life Ins. Co.</i> , 559 F.2d 426 (5th Cir. 1977) .....	24
<i>Milstein v. Huck</i> , 600 F. Supp. 254 (E.D.N.Y. 1984) .....	29
<i>Mirfasihi v. Fleet Motg. Corp.</i> , 356 F.3d 781 (7th Cir. 2004) .....	13
<i>Nalley v. Nalley</i> , 53 F.3d 649 (4th Cir. 1995) .....	33
<i>In re NASDAQ Market - Makers Antitrust Litig.</i> , 187 F.R.D. 465 (S.D.N.Y. 1998) .....	25, 28
<i>Newman v. Stein</i> , 464 F.2d 689 (2d Cir. 1972) .....	17, 25, 35
<i>In re Omnivision Technologies, Inc.</i> , 2007 WL 4293467 (N.D. Cal. 2007) .....	18
<i>In re Painewebber Limited Partnerships Litig.</i> , 171 F.R.D. 104 (S.D.N.Y. 1997) .....	34
<i>In re Painewebber Limited Partnerships Litig.</i> , 147 F.3d 132 (2d Cir. 1998) .....	24
<i>Powers v. Eichen</i> , Case No. 96CV1431-B, 2001 U.S. Dist. LEXIS 13561 (S.D. Cal. 2001) <i>aff'd</i> 51 Fed. Appx. 259, 2002 U.S. App. LEXIS 24159 (9th Cir. 2002) .....	17
<i>Protective Comm. for Indepn. Stockholders of TMT Trailer Ferry, Inc. v. Anderson</i> , 390 U.S. 414 (1968) .....	25
<i>In re Prudential Sec. Inc., Ltd. Partnership Litig.</i> , 1995 U.S. Dist. LEXIS 22103 (S.D.N.Y. 1995) .....	17
<i>Republic National Life Insurance Company v. Beasley</i> , 73 F.R.D. 658 (S.D.N.Y. 1977) .....	34
<i>Reynolds v. Spears</i> , 93 F.3d 428 (8th Cir. 1996) .....	33

<i>Scott v. Blockbuster, Inc.</i> , 2001 WL 1763966 (D. Tex. Dec. 21, 2001) .....	16, 17
<i>Shaw v. Toshiba</i> , 91 F. Supp.2d 942 (E.D.Tex.2000) .....	17, 22
<i>Six (6) Mexican Mine Workers v. Arizona Citrus Growers</i> , 904 F.2d 1301 (9th Cir. 1990) .....	13
<i>Southern Federal Power Customers, Inc. v. Caldera</i> , 301 F. Supp. 2d 26 (D.D.C. 2004) .....	24
<i>Steinnerg v. Carey</i> , 470 F. Supp. 471 (S.D.N.Y. 1979) .....	25
<i>In re Sumitomo Copper Litig.</i> , 189 F.R.D. 274 (S.D.N.Y. 1999) .....	28
<i>In re Vitamins Antitrust Litig.</i> , 305 F. Supp. 2d 100 (D.D.C. 2004) .....	25
<i>Vizcaino v. Microsoft Corp.</i> , No. C93-178C (W.D. Wa. Feb. 15, 2001) .....	17
<i>Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.</i> , 396 F.3d 96 (2d Cir. 2005) .....	25, 26
<i>In re Warner Communications Sec. Litig.</i> , 618 F. Supp. 735 (S.D.N.Y. 2005). .....	28, 29, 30, 33
<i>Weinberger v. Kendrick</i> , 698 F.2d 61 (2d Cir. 1982) .....	26, 31
<i>Weissman v. Quail Lodge, Inc.</i> , 179 F.3d 1194 (9th Cir. 1999) .....	17
<i>West Virginia v. Chas. Pfizer &amp; Co.</i> , 314 F. Supp. 710 (S.D.N.Y. 1970) .....	30
<i>West Virginia v. Chas. Pfizer &amp; Co.</i> , 440 F.2d 1079 (2d Cir. 1971) .....	24, 25

<i>Williams v. First Nat'l Bank</i> , 216 U.S. 582 (1910) .....	24
<i>Young v. Katz</i> , 447 F.2d 431 (5th Cir. 1971) .....	25
<i>Zipes v. Trans World Airlines</i> , 455 U.S. 385 (1982) .....	24

**STATUTES**

Fed. R. Civ. P. 23 .....	1
Fed. R. Civ. P. 23(e) .....	24
Fed. R. Civ. P. 23(f) .....	29

**PUBLICATIONS**

Howard, Trisha, L., <i>More lawyers cash in on class-actions</i> , St. Louis Post Dispatch, C1 (June 22, 2003) .....	18
---	----

Pursuant to the terms of this Court's December 4, 2007 Order Regarding Preliminarily and Conditionally Approving the Proposed Settlement, Prescribing Notice of Proposed Settlement of Class Action and Setting Hearing [D.E. 109] ("December 4 Order"), Plaintiffs respectfully submit this memorandum and the accompanying Declaration of Seth R. Lesser ("Lesser Decl.") in support of Plaintiffs' Motion for Final Approval of the Settlement of these actions.<sup>1</sup> As discussed below, all the prerequisites for settlement and for Fed. R. Civ. P. 23 are met here. The Settlement provides real benefits to the Settlement Class, falls well within the range of reasonableness, and should be approved.

## **I. BACKGROUND TO THE PROPOSED SETTLEMENT AND ITS TERMS**

### **A. Introduction.**

The Settlement between Plaintiffs and Defendants Take-Two Interactive Software, Inc and its wholly-owned subsidiary Rockstar Games, Inc. ("Defendants") is a fair, reasonable and adequate conclusion to this litigation. The Settlement establishes a non-reversionary fund of \$1,025,000 to pay to consumers who were offended by the existence of the pornographic content (the "Hot Coffee content") on their computer discs. It requires Defendants to compensate virtually any consumer who filed a claim and attested, *inter alia*, that he or she was offended by the Hot Coffee content on Defendants' video game discs that were sold during the August 2004 to July 2005 time period. The five different tiers of compensation in the Settlement provide for, from the top tier, a direct cash refund to class members of up to approximately 70% of the game's price or \$35, even though the game's actual value (a few years after its release) is but a fraction of that, down to the lowest tier, those consumers who no longer have a game disc because it was discarded, a \$5 cash refund based upon the consumer's attestation alone.

---

<sup>1</sup> All terms used herein are the same as those in the December 4 Order which, in turn, used terms as defined in the Settlement Agreement dated November 7, 2007 [D.E. 106, Ex. 1].

Additionally, those consumers who still have the game discs containing the pornographic computer code can get a completely free exchange of the disc for a new disc without such code (even round-trip postage is provided free of charge).

No less importantly, given the facts that this had to be a claims-made settlement for a product sold several years earlier and that the Settlement could not provide direct benefits without proof of claim (indeed, the settlement had to be designed to discourage fraud because the game at issue can be purchased for but a few dollars on the resell market), the possibility of a small number of claims always was possible. The Settlement thus was designed to provide for a substantial *cy pres* component to effectuate and address the concerns of the many class members who would not necessarily make claims. Accordingly, assuming approval, the unused portion of the \$1.025 million will be made available as a *cy pres* remedy<sup>2</sup> to the National PTA and the ESRB in order to publicize better the ESRB ratings systems and educate parents and children of the existence and nature of those ratings.

As it turned out, as of the May 16, 2008 cut-off date established by the December 4 Order, a total of 2,676 claims were received. *See* Lesser Decl. at 17, ¶ 26. The claims broke down by category as follows:

---

<sup>2</sup> Defendants have also agreed to distribute \$50,000 to charitable organizations pursuant to an agreement in principle to settle the City of Los Angeles individual action, which was also transferred and coordinated with this litigation by the JPML. Thus, pursuant to Section III.H of the Settlement Agreement, that amount counts toward the \$1.025 million floor.

Special Master Katsiris's fees and expenses are charged, pursuant to this Court's December 4 Order, to Defendants and would be considered part of the costs of the Benefit Program and count toward the \$1.025 million floor negotiated by Class Counsel. Likewise, the enhancements requested for the Class Representatives would also be considered part of the costs of the Benefit Program and count toward the floor.

<b>Tiers of Benefits</b>	<b>Number of Claims</b>
Tier 1 (up to \$35.00) (no exchange required)	416
Tier 2 (up to \$17.50) (exchange required)*	22
Tier 3 (\$10.00) (exchange required)*	131
Tier 4 (\$5.00) (no exchange required)	2,050
Disc Exchange w/o cash*	57

\* The parties had negotiated, determined and agreed, based upon the actual cost, that each replacement made by Defendants under the Exchange Program would be valued for purposes of the Settlement at \$15.00.

Since the funds available for payment are well more than enough to pay all these Class Members – a fraction of what the Settlement could have paid – Class Counsel respectfully request the Court to authorize payment to all such Class members who, as of May 16, 2008, have filed claims, which are complete or which are in the process of being cured through the Claims Administrator. That will leave approximately \$870,000 to be distributed equally to the National PTA and the ESRB, as described above.

Finally, the recovery for the Class just described is separate and apart from the payment of Class Counsel’s attorneys’ fees and costs, which were negotiated entirely separately after agreement was reached concerning the recovery for the Class.<sup>3</sup>

The Settlement is fair, adequate and reasonable. Given the law relating to the claims in this case, the result is a singularly favorable one for the Class – indeed, it quite fairly can be said that this Settlement provides essentially all that was reasonably obtainable had the case been litigated to trial. Accordingly, Plaintiffs respectfully request that the Court approve the Settlement for the reasons set forth at greater length below.

---

<sup>3</sup> Class Counsel’s Memorandum in Support of their Application for Attorneys’ Fees and Reimbursement of Litigation Expenses and for the Class Representative’s enhancements is submitted concurrently with this motion.

**B. Background of this Litigation and Settlement.**

Defendants are the entities that develop, produce and market the highly popular Grand Theft Auto series of video game titles. In October 2004, Defendants released a game in this series entitled *Grand Theft Auto: San Andreas* for use on the Sony “PlayStation 2”™ video game console. In June 2005, Defendants released versions of the game playable on personal computers and on Microsoft Xbox™ video game consoles. (All these games are referred collectively herein as “*San Andreas*”).

Unbeknownst to consumers, the *San Andreas* game discs manufactured and distributed contained elements that could be displayed depicting the animated male protagonist of the game engaging in simulated sexual intercourse with nude animated women. These scenes have come to be referred to as the “Hot Coffee” content. The Hot Coffee content was accessible by downloading from the internet a modification that third-party “modders” or “hackers” had created and which became known as the “Hot Coffee Mod”. Plaintiffs contend that Defendants defrauded Plaintiffs and violated consumer fraud statutes by misleading consumers of *San Andreas* as to the game disc’s content by marketing the game under an “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. The distinct substantive difference is captured by the fact that the majority of retailers, and virtually every major commercial retail entity, will not sell “AO” games. Like traditional forms of pornography, one generally has to purchase them in adult-oriented stores or (today) online.

Plaintiffs asserted that Defendants had committed consumer fraud by their actions in selling such an “AO” game as “M” and were unjustly enriched when they received consumers’ money that would not rightly be Defendants’ under these circumstances. Plaintiffs contended that Defendants were negligent by selling and distributing *San Andreas* with the Hot Coffee content on the game discs, rather than removing the Hot Coffee computer code entirely.

Defendants do not dispute that the elements that were modified and combined to display the Hot Coffee content were present in the code of *San Andreas* game discs manufactured before July 20, 2005, but contend that (i) these elements were not part of the intended game experience; (ii) these elements were unused or had been disabled by Defendants’ programmers specifically to prevent their being accessed by consumers playing *San Andreas*; (iii) the elements were discovered, and the Hot Coffee Mod created, by a highly skilled computer professional who, unknown to the Defendants, spent many years decompiling and studying the proprietary scripting language used to create the *Grand Theft Auto* series of games; and (iv) the Hot Coffee content could not be accessed by any consumer without the consumer taking purposeful, volitional acts to alter the game with third party software and/or hardware. Defendants have vigorously denied Plaintiffs’ allegations of negligence, unjust enrichment and fraud and deny having any liability to Plaintiffs or to the Settlement Class.

Only one substantive objector, Mr. Theodore Frank, has shown up in opposition to the Settlement. Mr. Frank is an avowed tort reformer at the American Enterprise Institute who filed an objection with an attorney who is the best known – some would say notorious, given his repeated sanctioning by courts – “professional objector.” Aside from having done little or no investigation of the record in the case and having failed to attempt to contact Class Counsel

(although he could have) before filing what is a blunderbuss objection with multiple meritless points, essentially he simply does not believe that a claim exists – or should exist – for what occurred here. His avowed position has been that Defendants should not pay anything at all and that he would hope the lawsuit failed as a whole. But Mr. Frank’s personal dislike for the Settlement is just that – a personal and political one that necessarily demonstrates that the terms of the Settlement are fair, reasonable and adequate because relief was obtained for claims that the objector does not believe have merit. And while the objector might be willing to purchase AO games or X-rated movie tickets for his own children (supposing he had any), others would not (regardless of whether their children might even view the pornography), and that is, at the core, what this case was about: the inclusion of a pornographic game-within-a-game on the *San Andreas* game discs and the commensurate mislabeling of it as a “M” game, containing a “Mature” level of violence and sexuality, rather than, as it ultimately came to be re-rated, an “AO” game, meaning an “Adult Only” game having such a heightened level of sexuality – or pornography – that almost no mainstream commercial retailers would sell it.<sup>4</sup>

Here, in contrast to the objector’s personal and political views, when the sexual nature of the hidden Hot Coffee content became known, Defendants’ conduct was castigated on the floor of the Senate by New York’s junior Senator. Hillary Rodham Clinton, an FTC investigation was launched, the ESRB investigated, and the City of Los Angeles itself — hardly an idiosyncratic government actor — filed what was essentially a *paren patriae* disgorgement action on behalf of Californians victimized by Defendants’ wrongdoing. While Mr. Frank (the objector) may not

---

<sup>4</sup> After the ESRB changed the rating for *San Andreas* from “M” to “AO”, Wal-Mart, Best Buy and Target, among others, pulled the game from their shelves.

have cared, certainly others did, including the claims-filing members of the Settlement Class and the appointed representatives of the Settlement Class themselves.

The named Plaintiffs in these actions, which were filed after the outcry over the Hot Coffee content, represent the segment of the population most likely to be concerned with, and offended by, the game disc's hidden sexual content – parents and grandparents who purchased the game for their teenage children. Each of the named Plaintiffs – the representatives of the Settlement Class – are individuals who purchased *San Andreas* during the period while it was marketed and sold as an M-rated game prior to the re-rating of the game to “AO” in July 2005. Plaintiff Brenda Stanhouse is an Illinois resident who purchased an Xbox version of *San Andreas* as a present for her teenage son “towards the end of June 2005” at either Target or Best Buy. Plaintiff Susan Carlson is a Minnesota resident who purchased *San Andreas* for her 19-year old son as a Christmas present in late 2004 at a Target store. Plaintiff Rose Goldfine is a resident of New York who purchased *San Andreas* for PlayStation 2 as a present for her teenage son at the end of 2004 at a discount store, Family Discount, in Bedford Hills, New York. Plaintiff Robert Samario is a resident of California who purchased *San Andreas* for PlayStation2 in December 2004 at Target for his teenage son. Plaintiff Cindy Casey is a resident of New York who purchased *San Andreas* in December 2004 for her then 15 year old son. Plaintiff John Robinson is a resident of Pennsylvania who purchased *San Andreas* in or around 2004 as a gift for his son. Plaintiff Florence Cohen is a resident of New York who purchased *San Andreas* for her minor teenage grandson in or about late 2004.

### **C. The Actions<sup>5</sup>**

Beginning in the fall of 2005, Plaintiffs brought seven (7) actions in different federal courts against Defendants alleging various state statutory and common law claims. On February 13, 2006, the JPML ordered that these actions be consolidated and transferred to this Court for pre-trial proceedings. After the undersigned requested and obtained a status conference before the Magistrate Judge on April 12, 2006 and after the Court appointed the undersigned as Lead Counsel on May 1, 2006, the case began to be litigated in earnest.

On June 8, 2006, Plaintiffs filed a comprehensive Amended Consolidated Complaint (“Complaint”) [D.E. 18]. Defendants then moved to dismiss portions of the Complaint, which motion was denied on October 25, 2006 [D.E. 33].

Thereafter, the parties proceeded to class certification discovery. After substantial pressing for discovery both between the two sides and before the Magistrate Judge, Plaintiffs during the fall of 2006 and into 2007 reviewed thousands of pages of documents, took numerous depositions and, pursuant to a schedule established by the Court, on January 24, 2007, filed an omnibus motion for class certification of a national class. This was all done after Defendants had filed a motion to deny class certification and/or strike the class allegations from the Complaint (on November 10, 2006), and accompanied their motion with a fulsome expert report (which Plaintiffs, having obtained their own expert on consumer surveying, moved to strike). Defendants thereupon replaced their earlier motion to deny class certification with an opposition to Plaintiffs’ motion for class certification. In addition, as part of the pre-certification decision, the class representatives Stanhouse, Carlson, Goldfine, and Samario were deposed.

---

<sup>5</sup> A more complete description of the issues and work performed by Class Counsel in this litigation is set forth in the Declaration of Seth R. Lesser, filed together with this memorandum and in support of the instant motion.

Following further motion practice, and while Defendants were preparing the opposition papers to Plaintiffs' class certification motion, the parties commenced settlement discussions. After some initial discussion between the parties themselves, the settlement discussions were overseen by Magistrate Judge Michael H. Dolinger. Between themselves and with Magistrate Dolinger, the two sides held numerous meetings and discussions – some of which were quite adversarial. There can be no doubt that the settlement discussions were extended, rigorous and at arm's length. Indeed, ultimately, it is fair to say that there is a hardly a substantive clause in the Settlement Agreement which was not the subject of extended, arm's length negotiations.

## **II. THE PROPOSED SETTLEMENT**

In exchange for the dismissal of the Action and for entry of the Judgment as provided for in this Settlement Agreement, Defendants are making available to Settlement Class Members the benefits described below (the "Settlement Benefits").

### **A. Eligibility Averments**

The core purpose of this lawsuit was to provide relief to those Class Members who were offended by the presence of the Hot Coffee content on their *San Andreas* video game discs. Accordingly, in order to receive benefits under this Settlement, all Class Members, when submitting a claim for benefits, had to make the following averments:

1. That they bought the *San Andreas* game prior to July 20, 2005;
2. That they were offended and upset by the ability of consumers to use third party software and/or hardware to modify and alter the *San Andreas* game to display the Hot Coffee content;
3. That they would not have bought the *San Andreas* game had they known that the game could be so modified and altered; and

4. That upon learning that the game could be so modified and altered, they would have returned it to the place of purchase for a refund if they had thought this was possible.

As expected, most of the claims were submitted electronically, the product being a video game. Therefore, the averments were done by simply clicking applicable boxes on a computer screen. The Class Members who could make such averments would be entitled, if this Court approves the Settlement, to the benefits described below.

**B. The Exchange Program.**

Any Class Member in possession of a copy of *San Andreas* who completed a claim form and swore under the penalty of perjury that he or she is an eligible Class Member could return the game disc to Defendants and receive in exchange a copy of the *San Andreas* game disc without the Hot Coffee content. The claims administrator, Rust Consulting, Inc., provided methods that enabled Class Members to effect exchanges without having to incur postage costs.

**C. The Benefit Program.**

In addition to being able to exchange their *San Andreas* game discs, Class Members are also eligible for cash benefits. The tiers of cash benefits described below are referred to herein as the “Benefit Program.” The Benefit Program is broken down into four tiers: (1) a cash payment of up to 75% of the purchase price shown on the receipt, or \$35.00, whichever is less for those individuals who can actually demonstrate the purchased the game; (2) a cash payment of up to 35% of the asserted purchase price or \$17.50 for someone who does not have a detailed proof of purchase, but submits their copy of the game and a copy of a credit card statement or canceled check showing a purchase at a seller of the game before July 20, 2005, and also attests under penalty of perjury that the game was purchased at the seller and on the date shown on the

submitted credit card statement or check; (3) \$10 for those class members who do not have any proof of purchase of the game, but who sends back their game disc and attests under penalty of perjury to the place and approximate date of his or her purchase; and (4) for those Class Members who have neither any proof of purchase of the game nor the game itself, but attests under penalty of perjury to: (a) the place and approximate date of his or her purchase, and (b) the approximate date on which and manner in which he or she discarded the disc. The number of claims received for each of these categories is set out above.

Payments under the Benefit Program will be made within eight weeks of the Effective Date as defined in the Settlement.

While the proposed Settlement also provided a “ceiling” and “floor” for the value of the benefits provided by Defendants, the number of claims means that the provisions concerning the floor will come into effect should this Court approve the Settlement because the value of the claims filed under the Exchange Program and the Benefit Program filed on or before the Claims Deadline (*i.e.*, May 16, 2008) collectively do not exceed \$1,025,000 (excluding the Defendants’ Costs, but including the amounts that Defendants have agreed to distribute to charitable organizations pursuant to the agreement in principle to settle the City of Los Angeles action). Defendants shall pay the difference between the collective value of the filed claims and \$1,025,000 to the entities agreed upon by the parties, namely, subject to this Court’s approval, the National PTA and the ESRB. This difference amounts to approximately \$870,000.

**D. Class Representatives Enhancements**

Finally, the Defendants have also agreed to pay the four (4) individual plaintiffs in this matter – Brenda Stanhouse, Rose Goldfine, Robert Samario and Susan Carlson – who came

forward, filed these actions, responded to Defendants' discovery demands, and were deposed as class representatives, incentive payments in the amount \$5,000 each, an amount well in line with precedent recognizing the value of individuals' stepping forward to represent classes – particularly in a case, like the present, where the value to any individual was small. In addition, plaintiffs Florence Cohen, Cindy Casey, and John Robinson, who also brought their own suits and were named in the consolidated actions, will be receiving, if approved by the Court, \$1,500 for their roles in stepping forward and bringing their actions in their respective states.

**E. *Cy Pres* Recipients.**

It is respectfully submitted that this Court should approve and order the remainder of the settlement proceeds guaranteed by the provisions concerning a floor be distributed equally to the *cy pres* recipients agreed to by the parties, The National PTA and the ESRB.

As previously discussed, a central element of Plaintiffs' claims against Defendants was that the mislabeling of *San Andreas* as "M" for Mature lead many so-called "big box" retailers, such as Wal-Mart, Best Buy and other similar stores, to carry the game who would not have carried it had it been rated "AO" since its original release in October 2004. Accordingly, the availability of the game to parents and the imprimatur of these nationally renowned retailers by their acts of distributing the game help lead to the game's commercial success and the sales if it to consumers, like the Class Representatives and class members who filed claims during the Claims Period. All these persons testified or attested that they would not have purchased the game had they known that such pornographic content existed on the game discs. It is readily apparent that by making the required averments, such consumers – and however many Class Members who did not make a claim but felt the same way – objected to having any explicit

pornographic content like the “Hot Coffee” sex mini-games on merchandise they bought and kept in their homes.

The National PTA and the ESRB already have worked together to promote and publicize the software ratings system to parents in the United States by distributing pamphlets to PTA organizations throughout the United States. This *cy pres* that the parties propose distributing to these entities will enable them to expand these efforts and to try to ensure that parents are better informed about the content of videogames they purchase so they can judge for themselves and their families whether certain content is appropriate or inappropriate for them. As such, the *cy pres* in this case represents the epitome of what *cy pres* awards are under the law – substituted compensation where the settlement proceeds cannot or will not be fully distributed. *See, e.g., In re “Agent Orange” Product Liability Litigation*, 818 F.2d 179, 185 (2d Cir. 1987) (“a district court may, in order to maximize the beneficial impact of the settlement fund on the needs of the class, set aside a portion of the settlement proceeds for programs designed to assist the class.”) (quotations and citations omitted); *Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 784 (7th Cir. 2004) (in class actions, *cy pres* payments may be made “to prevent the defendant from walking away from the litigation scot-free because of the infeasibility of distributing the proceeds of the settlement . . . to the class members.”); *Six (6) Mexican Mine Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1305 (9th Cir. 1990) (noting that “[f]ederal courts have frequently approved [the *cy pres*] remedy in the settlement of class actions where the proof of individual claims would be burdensome or the distribution of damages costly”).

## **F. Preliminary Approval and Class Certification**

On December 4, 2007, the Court entered the Order Granting Preliminary Approval of Class Action Settlement, preliminarily approving the Settlement, conditionally certifying the Settlement Class, directing the form and manner in which notice would be disseminated to Class Members, and establishing procedures and deadlines for Class members to file claims, opt-out of the Class or submit objections to the proposed Settlement.

In provisionally certifying the settlement Class and Subclasses, the Court found that: (a) the number of Settlement Class Members is so numerous that joinder of all members is impracticable; (b) there are questions of law and fact common to the Settlement Class; (c) the claims of the named representatives are typical of the claims of the Settlement Class they seek to represent; (d) the Plaintiffs and Class Counsel will fairly and adequately represent the interests of the Settlement Class; (e) the questions of law and fact common to the Settlement Class predominate over any questions affecting only individual members of the Settlement Class; and (f) a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

Accordingly, the Court conditionally certified the following Settlement Class:

[A]ll natural persons or entities in the United States who purchased a *Grand Theft Auto: San Andreas* First Edition Disc between August 2004 and the date of this Order, except for authorized resellers of the game, Defendants' current or former employees, and any persons or entities that have previously executed releases discharging Defendants from liability concerning or encompassing any or all claims that are the subject of the Complaint.

For the reasons set forth in Plaintiffs' Memorandum in Support of Preliminary Approval (D.E. 105, at 15-22), this archetypal (b)(3) class can properly be certified as a class for settlement purposes and there is no need to repeat that demonstration herein.

**G. Notice to the Class**

Furthermore, the Defendants agreed to pay for all notice costs and the costs of administration of the Settlement. These costs are separate and apart from the \$1.025 million floor negotiated by the parties.

The notice of this Settlement has been widespread. Notice was provided to the Class in accordance with the Court's December 4 Order as follows:

- (1) Defendants sent by e-mail the Full Settlement Notice to Settlement Class members on Rockstar Games Inc.'s e-mail mailing list [D.E. 111, Ex. 2, ¶¶ 4, 5];
- (2) Defendants have posted a link to the Full Settlement Notice on the [www.take2games.com](http://www.take2games.com) website, and Rust, the Claims Administrator, has posted a similar link on the Settlement website. These postings remain on these websites today [*Id.*, Ex. 2, ¶¶ 2, 3; *Id.*, Ex. 1, ¶ 6]; and
- (3) Rust has caused the Summary Settlement Notice to be published in all the publications, websites and newswires (in the required frequencies and sizes) [*Id.*, Ex. 1, ¶ 8].

As just one example demonstrating the widespread reach and effectiveness of the Notice, the settlement website itself experienced over 100,000 unique visitors during the Class Period. Lesser Decl. at 16, ¶ 24.

**H. Objectors' Allegations Are Without Merit**

Only four objections have been filed, an exceedingly low number given the notice here. It is respectfully submitted that these four objections filed in opposition to approval of the

Settlement and/or in opposition to Class Counsel's application for attorneys' fees and costs,<sup>6</sup> should be rejected by this Court. Class Counsel shall address each objector below.

**1. Objector Theodore Frank**

The only substantive objection to the Settlement comes from known tort "reform" advocate Theodore Frank ("Frank") and his attorney the professional objector Lawrence W. Schonbrun ("Schonbrun"). A simple review of the objection [D.E. 115] ("Frank Obj.") confirms that it is boilerplate and without merit. Indeed, several key arguments are in direct opposition to longstanding Second Circuit controlling authority, and, in at least one instance, grossly and misleadingly miscited relevant authority.

What is most striking is that while Mr. Frank, an attorney who decries supposed abuses of the legal system, put forward his objections without having apparently done the slightest attempt to investigate their validity. Had Mr. Frank or Mr. Schonbrun even had bothered to pick up the telephone or write a letter, they could have learned a good deal more about the Settlement without having had to waste Class Counsel or the Court's time in dealing with some of their objections. For instance, the objection complains that insufficient time to file an objection to the fee request has been provided but, most certainly, as the undersigned has done in other cases, information about the request could have provided to this class member. Instead, the attitude here has been "file first" and "hope to find points that will stick, second."

Additionally (and emblematic of the slipshod manner in which Frank's attorney has handled this objection), Schonbrun failed to file (or have another local counsel file) a Notice of Appearance on or before April 25, 2008 as required by this Court December 4, 2008 Order at 9,

---

<sup>6</sup> All specific objections concerning attorneys' fees and costs are addressed in Class Counsel's Memorandum in Support of their Application for Attorneys' Fees and Reimbursement of Litigation Costs, filed together herewith.

¶ 16(i). As such, Frank has no standing to appear before this Court, either personally or by counsel – the only Notice of Appearance having been filed by an Attorney Stein on May 13, 2008 – some three weeks after this Court’s deadline.

**a. Objector’s Counsel Schonbrun.**

Schonbrun – “aptly described by the moniker ‘Professional Objector’”<sup>7</sup> – has been “repeatedly found by courts across the country to have filed and made frivolous, groundless, contrived, or misplaced objections to class action settlements.”<sup>8</sup> The number of such decisions is almost extraordinary.<sup>9</sup> In one instance, his “inappropriate litigation conduct” caused a one federal court Judge to revoke his *pro hac* status and ordered him to submit one week before any further appearance in any court in the Eastern District of Texas a written motion for admission *pro hac vice*. See *Shaw v. Toshiba*, 91 F. Supp. 2d 942, 975 (E.D. Tex. 2000). As relevant here, another Judge found that his objections were “indiscriminate” and “meritless,” and for “the improper purpose of obstructing class action settlements in general, and the settlement of this case in particular,” and to further Schonbrun’s own “stated desire to do away with class actions altogether.” See *Scott*, 2001 WL 1763966, at \* 2-4. Still another judge wrote that Mr.

---

<sup>7</sup> See *Scott v. Blockbuster*, 2001 WL 1763966 at \*3 (Tex. Dist. 2001); *Weissman v. Quail Lodge, Inc.*, 179 F.3d 1194, 1196 n.2 (9th Cir. 1999) (Schonbrun is a class action “gadfly” who opposes class counsel’s fees).

<sup>8</sup> See, e.g., *Scott, supra*; *In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 479-81 (S.D.N.Y. 1998) (finding that all of Schonbrun’s objections lacked merit); *Powers v. Eichen*, Case No. 96CV1431-B, 2001 U.S. Dist. LEXIS 13561 at \*6-8 (S.D. Cal 2001), *aff’d* 51 Fed. Appx. 259, 2002 U.S. App. LEXIS 24159 (9th Cir. 2002) (objector “did not assist the Court”, “did not enhance the recovery”, and “[i]n fact, the class members were deprived of their portion of the settlement for a period of delay caused by objector’s appeal.”).

<sup>9</sup> See, e.g. *Scott*, 2001 WL 1763966; *In re Prudential Sec. Inc. Ltd. Partnership Litig.*, 1995 U.S. Dist. LEXIS 22103 at \*19 (S.D.N.Y. 1995) (“Lawrence W. Schonbrun has acknowledged that the persons who he claimed to represent are not Class Members and he has withdrawn his objection; *In re First Capital Holdings Corp. Financial Prod. Sec. Litig.*, 33 F.3d 29, 30 (9th Cir. 1994) (“*First Capital Sec. Litig.*”) (dismissing appeal because Schonbrun’s client lacked standing); see also *Vizcaino v. Microsoft Corp.*, No. C93-178C (W.D. Wa. Feb. 15, 2001) (attached at Lesser Decl., Ex. I) (“Mr. Schonbrun’s conduct thus far has been questionable, at the very least, therefore, during the balance of this litigation, Mr. Schonbrun’s conduct will be carefully scrutinized for compliance with the local rules for this district, as well as the relevant rules of ethics”). There exist numerous other unpublished decisions, which Class Counsel can provide to the Court should it so desire.

Schonbrun's "true reason and purpose" was to extract extortionate fees for himself. *See In re Intelligent Electronics Sec. Litig.*, 1997 WL 786984 (E.D. Pa. Nov. 26, 1997) (denied Schonbrun's requests for fees which threw a light on the true purpose for objection).<sup>10</sup> Certainly, the boilerplate and indiscriminate objections made here – made without apparent investigation as to applicability to the facts here and apparently cut-and-pasted out of other briefs – strongly suggest such improper purposes may lie behind the objections.

**b. Objector Frank Lacks Standing  
To Object Because He Is Not Aggrieved.**

Mr. Frank's objection should be rejected because Mr. Frank is not an aggrieved class member and therefore lacks standing to object to approval of the Settlement. As an exhibit to the Objection, Frank attaches an affidavit which asserts his membership in the class. (Frank Obj., Ex. A). Frank declares that he purchased *San Andreas* for his X-Box video game console. *Id.* However, Frank was "not 'offended and upset'" at the inclusion of the pornographic material in the games. *See* Frank Obj. at 3, ¶ 2(a). Indeed, he never submitted a claim – nor could he have based upon his admission that he was not offended – for any relief pursuant to the Settlement.

Simply being a member of a class is not enough to establish standing to object. One must be an "aggrieved" class member. *See First Capital Sec. Litig.*, 33 F.3d at 30 (holding that Schonbrun's client, although a class member, did not have standing to object because she did not suffer any injuries); *see also Berger v. Xerox Corp. Retirement Income Guarantee Plan*, 2004 WL 287902 (S.D. Ill 2007); *In Re Omnivision, Technologies, Inc.*, 2007 WL 4293467 (N.D. Cal. 2007). The word "aggrieved" is a necessary, not merely a descriptive, term. *See In Re First*

---

<sup>10</sup> Schonbrun flaunts his profiteering from professional objecting explaining that objecting is "a niche where a certain limited number of lawyers who are crazy and have got nothing better to do can make some money." *See* "More lawyers cash in on class-actions," by Trisha L. Howard St. Louis Post Dispatch C1 (June 22, 2003).

*Capital*, 33 F.3d 29, 30 (9th Cir. 1994). “It is necessary to make the statement compatible with Article III requirements and is a recognition that not all class members will be aggrieved by all decisions.”*Id.*

In fact, Frank has mocked the damages suffered by consumers in this case in his postings on the website that he maintains, [www.overlawyered.com](http://www.overlawyered.com):

Me, I’m just amused by the thought of class action attorneys trolling for a named plaintiff parent who will testify that ... she is shocked, *shocked* to learn that the game also includes an animation at about the level of a Ken doll rubbing up against an unclothed Barbie doll with X-rated sound effects, and is thus a victim of both consumer fraud and intense emotional distress...

<http://www.overlawyered.com/2005/07/grand-theft-auto-hot-coffee-mo.html> (Lesser Decl., Ex. A).

[T]he ridiculous lawsuits over the Grand Theft Auto video game “scandal” have begun. The lead plaintiff in the putative class action is an 85-year-old grandmother, Florence Cohen, who bought the game for her 14-year-old grandson, who may have his own claims for emotional distress when his ninth-grade classmates beat him up. I suspect the eventual lead-plaintiff deposition I imagined is likely to be more entertaining than the game itself.

<http://www.overlawyered.com/2005/07/and-now-the-lawsuits.html> (Lesser Decl., Ex. B).

Frank’s interests are actually antagonistic with the Class members who filed claims, because he has repeatedly given his opinion that the case should be dismissed and class members should get nothing:

One hopes the lawsuit will be thrown out eventually....

<http://www.overlawyered.com/2005/07/more-on-the-grand-theft-auto-l.html> (Lesser Decl., Ex.

C). In a recent interview, Frank continues to illustrate that he personally believed the suit did not have any merit and that he suffered no damages as a result of the Defendant’s conduct:

The underlying litigation was meritless. Lawsuits allege that the “Hot Coffee mod” is consumer fraud, damaging the class. This is dishonest nonsense: no one can identify a single human being who... bought the game knowing about the sexual innuendo and violence... but would not have bought the game had they known that it was conceivably possible to modify the game... [with] additional content that wasn’t any more explicit...

The lawsuit is simply extortion: threaten Take Two with expensive litigation unless they agree to pay off the lawyers who brought the lawsuit. But the lawyers are supposed to be representing the class, not themselves, and the lawsuit injured the class of *Grand Theft Auto* customers, the vast majority of whom would have preferred that Take Two not be harassed.

See <http://gamepolitics.com/2008/04/29/overlawyered-blog-doesnt-think-much-of-hot-coffee-class-action-settlement/#more-2441> (Lesser Decl., Ex. D).

Mr. Frank may not care, but there are many in our society who would not wish to purchase pornography for their children. To many – including (simply by way of example) Senator Clinton, the City of Los Angeles, the Class Representatives and undoubtedly many Class Members who cared but did not file claims given the amount of money involved – a strong element of principle exists here. It may not be a principle that matters to Mr. Frank personally, but it is a reasonable and real one. It is also a principle of law and hardly a “dishonest” matter to recognize and assert that it is indeed fraud to sell pornography – demonstrably, objectively “Adult Only” pornography – under the guise of something significantly less to consumers. The marketplace disagrees with Mr. Frank: what was included in Hot Coffee (and the Court has been provided with examples of those scenes in connection with the class certification motion) was of a kind and nature different from the rest of the game. That is why the game was re-rated and that is why Wal-Mart, Best Buy, and Target pulled the game from their shelves. Maybe Mr. Frank does not see a substantive difference between Hot Coffee and the rest of the game, but, objectively speaking, the American economic marketplace did.

**c. Objector Frank Lacks Standing  
To Object Because He Is Not Aggrieved.**

Since it is clear that Objector Frank is not a bona fide “aggrieved” objector, but a tort reform advocate attempting to alter existing class action jurisprudence (here, by derailing a class action in which he alleges to be a class member), the Court should reject his entire objection. In any event, we address his specific objections one by one:

In “Objection No. 2” (Frank Obj. at 3), Frank, citing the fact that he was “not offended and upset” by the pornographic material, objects because he cannot obtain certain relief under the settlement. As set forth above in Section III.A.1, Frank’s admission that he was not “offended and upset” by the existence of the “Hot Coffee” content (Frank Objection at 3, ¶ 2(a)), strips him of any standing to object to this settlement. This objection contradicts itself: he does not care about the case but complains that he cannot obtain redress from it. Here, the Settlement obtained both monetary and non-monetary relief for those who did care. If Mr. Frank was not offended by the content of the game and does not desire a refund or a cleansed version, then he has no objection to the relief provided to consumers and no standing to challenge the compensation to the Class. Frank’s “Objection No. 2” should be rejected.

In “Objection No. 5” (Frank Obj. at 8-9), Frank opposes the approval of any class action without the parties providing the number of claims made to the Court. Had he bothered to ask whether the information would be made available, he would not know Class Counsel intended to provide this information and, as shown, has now done so. This objection is moot.

In “Objection No. 6” (Frank Obj. at 10), Frank objects to providing his address and telephone number, rather he states that this information may be obtained through counsel. Frank does not provide the Court with any law or jurisprudence which finds the request of this

information as unreasonable. To the contrary, such information has been deemed completely proper and reasonable to insure that a proposed objector is in fact a bona fide class member. *See Shaw*, 91 F. Supp. 2d at 974-75 (sanctioning Frank's attorney, Mr. Schonbrun, after he provided fabricated address and telephone information on behalf of his objector client).

This Court approved the Notice and the requirements for objecting. Since Frank has not complied by refusing to provide his address and telephone number as required by the Notice, Frank's entire objection is invalid and should be rejected. *See v. Government of Dist. of Columbia*, 384 F.Supp.2d 342 (D.D.C. 2005) (failure to provide address and other personal information would result in denial of objection).

Finally, in "Objection No. 7" (Frank Obj. at 10-11), Frank opposes this Court granting final approval of the Settlement without an expert opinion as to the value of the settlement. Such an expert is wholly unnecessary (this is clearly an objection Mr. Schonbrun cribbed from cases to which he has objected where this might matter). If successful on the ultimate merits of this action under any of the claims, the relief that all Class Members would have been entitled to would have been their purchase price damages. Here, the Settlement provides for a substantial proportion of those damages. In addition, Class Counsel would be entitled to their attorneys' fees and costs pursuant to the various consumer protection statutes this action has been brought under (which is what is being sought – and, as noted in the fee memorandum, in actuality, Class Counsel would lose money under what they request).

In short, Mr. Frank's objections are all without merit and, if anything, demonstrate that a fair settlement was obtained.

**2. The Objections Raised by the Other Objectors Should Also Be Overruled**

**a. The Magnan Objection.**

The objection filed by DanileDamionMagnan is based upon his belief that because the game was rated “M”, “no minors should have been playing it in the first place” and because a “mod” – or modification of the code – had to be employed in order to view the “Hot Coffee” content. Magnan Objection (Lesser Decl., Ex. E), ¶¶ 2 and 3. Obviously, this is not an objection to the Settlement as much as it is an objection to the ESRB’s rating system and to the case. The fact that Mr. Magnan does not believe the suit has merit and that “no one has grounds to receive compensation for buying Grand Theft Auto: San Andreas” simply means he is not an aggrieved class member, and thus, lacks standing to assert his objection. *See* Discussion, *supra*, at 18-20. The Magnan Objection should be rejected.

**b. The Schmugge Objection.**

The objection filed by Jonathan Schmugge is based upon his belief that the proposed Settlement “imposes an unreasonable burden of proof upon the class to obtain ‘full compensation’ & ‘second tier’ compensation” and that the “settlement is insufficient in amount and eligibility for certain class members.” Schmugge Objection (Lesser Decl., Ex. F), Sec. 1 and 2. Yet, Mr. Schmugge actually filed a claim here, *see* Lesser Decl. Ex. G, and the provisions regarding claims were obviously reasonably necessary to prevent fraud (inasmuch as the game can be purchased on the resale market, such as eBay for a few dollars) and prevent individuals from purchasing the game on the resale market to make fraudulent claims. In actuality, a settlement where someone can obtain 75% of their costs should they demonstrate inclusion in the class (and commensurately less if they can offer lesser proof, down to \$5 if they do absolutely

nothing more than swear on-line that they were in the class and cared) must be considered a singularly fair and reasonable one.

**c. The Fulford Objection.**

Mr. Fulford's objection was simply (and is quoted in full) "Because the disc had Adult content and I was a minor." Fulford Objection (Lesser Decl., Ex. H). This is not even an objection to the proposed Settlement, but merely an objection to Defendants' conduct. Thus, as much as it constitutes an objection to the Settlement, it should be overruled.

**III. THE SETTLEMENT MERITS FINAL APPROVAL**

**A. Applicable Legal Standard**

Courts favor the settlement of disputed claims. *Williams v. First Nat'l Bank*, 216 U.S. 582, 595 (1910). Class action suits readily lend themselves to compromise because of inherent difficulties of proof, uncertainties of the outcome and the typical length of such litigation. "Federal courts look with great favor upon the voluntary resolution of litigation through settlement.... This rule has particular force regarding class action lawsuits." *Southern Federal Power Customers, Inc. v. Caldera*, 301 F. Supp. 2d 26, 30 (D.D.C. 2004); accord *Air Line Stewards & Stewardesses Ass'n v. Trans World Airlines, Inc.*, 630 F.2d 1164, 1166-67 (7th Cir. 1980), *aff'd sub nom. Zipes v. Trans World Airlines*, 455 U.S. 385 (1982); see also *In re Painewebber Limited Partnerships Litig.*, 147 F.3d 132, 138 (2d Cir. 1998) ("there is a 'strong judicial policy in favor of settlements, particularly in the class action context'").

Under Rule 23(e), the Court should grant final approval to a class settlement if it determines that (a) there was no fraud or collusion in reaching the settlement; and (b) the settlement is "fair, adequate and reasonable." *Miller v. Republic Nat'l Life Ins. Co.*, 559 F.2d

426, 428-29 (5th Cir. 1977); *see also In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 473 (S.D.N.Y. 1998); *Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424-25 (1968). In determining the adequacy of a proposed settlement, a court should ascertain whether the settlement is within a range that responsible and experienced attorneys could accept, considering all relevant risks. *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 119 (2d Cir. 2005); *Detroit v. Grinnell Corp.*, 495 F.2d 448, 455 (2d Cir. 1974) (“*Grinnell*”). That range “recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion.” *Newman v. Stein*, 464 F.2d 689, 693 (2d Cir. 1972).

In making these determinations, the district court enjoys wide discretion, and in exercising its discretion, the court should not decide the merits of the action or attempt to substitute its own judgment for that of the parties. *Young v. Katz*, 447 F.2d 431, 433 (5th Cir. 1971); *In re Vitamins Antitrust Litig.*, 305 F. Supp. 2d 100, 103 (D.D.C. 2004); *see also Steinberg v. Carey*, 470 F. Supp. 471, 474 (S.D.N.Y. 1979). That is why the court should not attempt to approximate a litigated determination of the merits of the case. *See West Virginia v. Chas. Pfizer & Co.*, 440 F.2d 1079, 1085 (2d Cir.); *accord In re Auction Houses Antitrust Litigation*, 2001 U.S. DIST. LEXIS 1713 at \*26 & n.23 (S.D.N.Y. Feb. 22, 2001) (Kaplan, J.) (citing *id.*), *aff’d*, 42 Fed. Appx. 511, 2002 U.S. APP. LEXIS 15327 (2d Cir. 2002).

Although there are several factors for the Court to consider, the function of a settlement hearing is not to engage in a trial on the merits or an extended inquiry into the claims asserted by Plaintiffs, but to focus on both procedural and substantive aspects of the settlement. *In re Auction House Antitrust Litig.*, 2001 U.S. DIST. LEXIS at \*25 (citing cases). The procedural

aspect looks to such matters as the “negotiating process by which the settlement was reached.” *Weinberger v. Kendrick*, 698 F.2d 61, 74 (2d Cir. 1982). “A presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arm’s-length negotiations between experienced, capable counsel after meaningful discovery.” *Wal-Mart Stores, Inc.*, 396 F.3d at 119. Because a settlement represents the result of a process by which opposing parties attempt to weigh and balance the factual and legal issues that neither chooses to risk litigating to final resolution, courts give considerable weight to the views of experienced counsel as to the merits of a settlement. *West Virginia v. Chas. Pfizer & Co.*, 314 F. Supp. 710 (S.D.N.Y. 1970), *aff’d*, 440 F.2d 1079 (2d Cir. 1971); *Malchman v. Davis*, 761 F.2d 893, 903 (2d Cir. 1985); *see also In re Auction House Antitrust Litig.*, 2001 U.S. DIST. LEXIS at \*25 (similar statement).

Application of these standards warrants the approval of the Settlement as fair, reasonable, adequate and non-collusive.

#### **B. The Settlement Satisfies the Second Circuit Standard for Approval**

In *Grinnell*, its seminal decision on point, the Second Circuit Court of Appeals held that the following factors should be considered in evaluating the fairness of a class action settlement:

(1) the complexity, expense and likely duration of the litigation, (2) the reaction of the class to the settlement, (3) the stage of the proceedings and the amount of discovery completed, (4) the risks of establishing liability, (5) the risks of establishing damages, (6) the risks of maintaining the class action through the trial, (7) the ability of the defendants to withstand a greater judgment, (8) the range of reasonableness of the settlement fund in light of the best possible recovery, [and] (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

495 F.2d at 463 (citations omitted). An analysis of these factors demonstrates that the proposed Settlement clearly satisfies the *Grinnell* criteria.

In reaching the decision that the Settlement is fair and reasonable, Plaintiffs, through their counsel, considered the following:

- o the strength of the liability case and the Settlement benefits to the Class members;
- o the monetary relief provided by the Settlement relative to the relief sought;
- o the likelihood of class certification, and the issues concerning choice of law questions inherent in a national consumer fraud class;
- o the likelihood of demonstrating that Defendants' actions were "willful" thereby entitling the Settlement Class to punitive or exemplary damages within the meaning of the different states' UDAP statutes; and
- o the complexity, expense and likely duration of further litigation in this case – necessitating discovery on essentially a global basis, the extensive work of experts to decipher and reconstruct the game computer code).

Counsel for Plaintiffs and Defendants have had substantial opportunity to weigh the strengths and weaknesses of the parties' respective positions in the event these actions were to proceed to trial (and, indeed, spirited discussions concerning the same marked the settlement negotiations, *see* Lesser Decl. at 5-10, 12-14, ¶¶ 8-9, 13, 14, 18, 20) and to reach an informed compromise based on their respective analyses. The Settlement is preferable to continued litigation considering the issues presented as to whether Plaintiffs could show that Defendants acted "willfully" within the law, whether a class could be certified, the difficulties that would be posed in showing entitlement to any punitive damages (which, while asserted, pose a significant evidentiary burden at trial); the amount of damages that the Class could obtain even were the case successfully was certified; the possibility of an interlocutory appeal as to any certification, and the delay in any recovery that was certain if the case had proceeded to trial and appeal. If approved, the Settlement will soon provide the Class with a significant proportion of any relief

they might have eventually recovered at a much later date and further will provide non-monetary relief that will address the matters of principle involved.

**1. The Settlement Is the Product of Arm's-length Negotiations and Is Entitled to a Presumption of Fairness**

When evaluating the settlement, the Court must ensure that the settlement was not the product of fraud or overreaching by, or collusion between, the negotiating parties. The Court should find that the proposed settlement is the product of arm's-length negotiations by experienced counsel, knowledgeable in complex class actions, and therefore enjoys a presumption of fairness. *See In re Austrian and German Bank Holocaust Litig.*, 80 F. Supp. 2d 164, 174 (S.D.N.Y. 2000), *aff'd sub nom. D'Amato v. Deutsche Bank*, 236 F.3d 78 (2d Cir. 2001); *In re Sumitomo Copper Litig.*, 189 F.R.D. 274, 280-81 (S.D.N.Y. 1999); *In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. at 474.

As set forth above and as evidenced by paragraphs 8-9, 13, 14, 18, 20 of the Lesser Declaration, the negotiations here were unquestionably adversarial, informed and arm's-length.

Experienced counsel, negotiating at arm's length and informed about the case, weighed the litigation and risk and benefit factors discussed herein and endorse the Settlement. The view of the attorneys actively conducting the litigation, while not conclusive, "is entitled to significant weight." *Fisher Bros. v. Cambridge-Lee Indus., Inc.*, 630 F. Supp. 482, 488 (E.D. Pa. 1985). In approving a settlement, courts often focus on the "negotiating process by which the settlement was reached." *Weinberger*, 698 F.2d at 74 (cited in *In re Warner Communications Sec. Litig.*, 618 F. Supp. 735, 741 (S.D.N.Y. 2005). Here, it is the considered judgment of experienced counsel based on the discovery produced to date and the substantive negotiations held that this Settlement is a fair, reasonable and adequate resolution of the litigation. Lesser Decl. at 14, 15

¶¶ 19-21, 23. The law firms representing the Plaintiffs are known for their consumer class action experience. That qualified and well-informed counsel, operating at arm's length, all endorse the Settlement as being fair, reasonable and adequate to the class weighs in favor of this Court's approval of the Settlement.

**2.     **The Complexity, Expense and Likely Duration Of the Litigation Favor Approval****

To determine whether a proposed Settlement is fair, adequate and reasonable, the Court must balance the continuing risks of litigation against the benefits afforded to members of the class and the immediacy and certainty of a substantial recovery. *In re Warner Communications Sec. Litig.*, 618 F. Supp. at 741. A balancing of these factors supports approval of the Settlement.

The immediacy and certainty of a recovery is an important factor in determining whether the proposed settlement is fair, adequate and reasonable. Courts recognize that “[t]he expense and possible duration of the litigation are major factors to be considered in evaluating the reasonableness of [a] settlement.” *Milstein v. Huck*, 600 F. Supp. 254, 267 (E.D.N.Y. 1984); *Bullock v. Adm’r of Estate of Kircher*, 84 F.R.D. 1, 10 (D.N.J. 1979).

Approval of the Settlement will mean a prompt and certain recovery for Class members. If not for this Settlement, these cases would continue to be litigated with a decision on Class Certification and certainly Defendants’ putting forth multiple motions for summary judgment, followed by the possibility of a Rule 23(f) appeal could have been a real one either way the Court decided. Even if a trial – individual or class – could be promptly held, there could certainly be a substantial likelihood of appeal. Thus, from Plaintiffs’ perspective, class certification or a judgment favorable to the Plaintiffs would be the subject of motions and

appeals, which could prolong the case for at least another year (or more). *See, e.g., Warner Communications*, 618 F. Supp. at 745 (delay from appeals is a factor to be considered). Delay, not just at the trial stage but also through post-trial motions and the appellate process as well, could force members of the class to wait many years for any relief, reducing any value and leaving continued uncertainty in its wake. Accordingly, settlement of this litigation, before yet more time and resources have been expended, benefits the Class.

When the strengths of Plaintiffs' claims are weighed against the potential obstacles ahead of them, it is clear that the proposed Settlement is in the best interests of the class. As observed in the long-cited *West Virginia* decision:

It is known from past experience that no matter how confident one may be of the outcome of litigation, such confidence is often misplaced. Merely by way of example, two instances in this Court may be cited where offers of settlement were rejected by some plaintiffs and were disapproved by this Court. The trial in each case then resulted unfavorably for plaintiffs; in one case they recovered nothing and in the other they recovered less than the amount which had been offered in settlement.

314 F. Supp. at 743-44. This is obviously such a case. Consideration of the risks supports approval of the Settlement as fair, adequate and reasonable.

### **3. The Reaction of the Class to the Settlement Strongly Favors Approval**

Settlement notice was provided on a broad scale. As described, notice was provided to the Class through a comprehensive notice campaign. In response to the breadth of coverage of the Settlement Notice, *only two persons requested exclusion from the Class*. Moreover, *only four objections* were received and while two of the objectors view the case as a whole to be wrong, the fact is that there were only two such individuals. The overwhelming majority of the Class plainly supports (or does not disagree with) this Court's approval of the Settlement.

**4. The Stage of the Proceedings and the Amount of Discovery Completed Favor Approval of the Settlement**

“[T]he stage of the proceedings and the amount of discovery completed” is another important factor that courts consider in determining the fairness, reasonableness and adequacy of a settlement. *Warner Communications*, 618 F. Supp. at 741 (citation omitted); *Girsh v. Jepson*, 521 F.2d 153, 157 (3d Cir. 1975); *see also Weinberger*, 698 F.2d at 74.

Class Counsel conducted sufficient pretrial discovery to become fully well-versed in the facts relating to the claims in the case (as was demonstrated, we would submit, by our motion for class certification), and at the time the parties reached agreement to settle, Class Counsel had more than sufficient information to assess the merits of Plaintiffs’ claims. Thus, the litigation had reached the stage where “the parties certainly have a clear view of the strengths and weaknesses of their cases.” *Warner Communications*, 618 F. Supp. at 745; *Ellis*, 87 F.R.D. at 18. Sufficient evidence was certainly before the parties and their counsel to allow them to consider the strengths and weaknesses of the case and thereby make a reasoned decision concerning the merits of this Settlement.

**5. The Risks of Establishing Liability Strongly Favor Approval of the Settlement**

While the Settlement represents a favorable result under any measure, this is especially so in light of the litigation risks Plaintiffs faced had the case proceeded. The risks were significant:

*First*, at the time of settlement, Plaintiffs had yet to achieve class certification. In opposing the Plaintiffs’ motion for class certification, Defendants continued to raise a host of manageability and predominance issues and merits-based defenses. While Plaintiffs were comfortable with their legal and factual arguments, one cannot predict whether the issues that

would have been raised by Defendants would have resulted in either (i) the denial of certification or (ii) certification of only a portion of the current proposed Settlement Class.

*Second*, had the case been tried on the merits against Defendants, substantial other difficulties were likely. Defendants here have, from the inception of this case, contended that class members were not harmed because the “Hot Coffee” content could only be viewed by volitional acts by its users and was not a part of the normal, intended game-play. Plaintiffs have never thought much of that contention because of the re-rating of the game to “AO”, but certainly it cannot be said defense counsel in this case are inexperienced litigators. Certainly, it would have presented a distinct issue for appeals were a judgment even rendered.

*Third*, from Plaintiffs’ perspective, Class Counsel intended to prove at trial that Defendants’ conduct was “willful” thereby justifying exemplary or punitive damages. Whether Class Counsel could succeed in doing this not certain given that the voluminous discovery provided up to the time of settlement gave hints to Defendants’ scienter, as such, but the strength of that position at trial would have been questionable. *See also* Lesser Decl. at 12, ¶ 12.

*Fourth*, Plaintiffs at trial would have had to rely on expert testimony, written documents and notes. Defendant made clear that it intended to challenge the admissibility of Plaintiffs’ experts (as well as some documents) under the Federal Rules of Evidence; in turn, Plaintiffs intended to challenge several of Defendants’ experts. There was no certainty that the Court would have agreed that Plaintiffs’ experts would be admissible or that challenges to Defendants’ experts would have succeeded. The exclusion possibilities made continuation to trial and the range of possible recoveries and proof appear uncertain.

All these factors – and others – were considered in weighing the strengths and weaknesses of the case and evaluating the terms of the proffered Settlement. Given that the relief obtained and made available approximated what Plaintiffs think would they might have reasonably been likely to obtain at trial, the real matters of litigation risk militate heavily in favor of the proposed Settlement.

**6. The Risks of Establishing Damages Strongly Favor Approval**

Assuming Plaintiffs were to overcome obstacles to establishing liability, Class Counsel are mindful of the risk in proving substantial harm at trial. While Plaintiffs believe, and the number of claims filed indicates, that harm resulted to at least some consumers from Defendants' practices, proving that at trial would have been no simple task. Defendants' experts would likely have contended that much or all of the harm experienced by class members were *de minimus* or speculative, and thus *no* actual damages were obtainable. *See, e.g., Reynolds v. Spears*, 93 F.3d 428, 434 (8th Cir. 1996); *Nalley v. Nalley*, 53 F.3d 649, 652 (4th Cir. 1995); *see also In re Warner Communications Sec. Litig.*, 618 F. Supp. at 744-45 (approving settlement where “it is virtually impossible to predict with any certainty which testimony would be credited, and ultimately, which damages would be found to have been caused by actionable, rather than the myriad of non-actionable factors”). In light of these facts, and especially combined with the favorable terms of the Settlement, this Settlement falls within the range of reasonableness necessary to warrant final court approval.

**7. The Risk of Maintaining the Class Action through Trial**

The risks of maintaining a comprehensive national class action through trial are great because of the potential choice of law issues. Hence, this litigation risk strongly cuts in favor of the proposed Settlement.

**8. The Ability of Defendant to Withstand a Greater Judgment and the Likelihood of Recovery**

Class Counsel does not believe there are any problems in collecting a judgment against Defendants. Since the parties are not seeking approval of the settlement on the basis of a limited ability to pay, this factor is neutral. *In re PaineWebber Ltd. Partnerships Litig.*, 171 F.R.D. 104, 129 (S.D.N.Y. 1997).

**9. The Range of Reasonableness In Light of Possible Recovery**

Pursuant to *Grinnell*, the Court may consider the relief obtained by the proposed Settlement in light of the potential recovery. As already stated, this is a settlement where the recovery here is akin to what reasonably could have been expected at trial. Monetarily that is almost undeniably so, and even if some greater amount of statutory damages could have been obtained, the litigation risks and time expended to get that increase would hardly appear to be worthwhile. Balanced against such a recovery has to be the possibility – even if only, say, 25% – that a judgment could have found no liability as to Defendants and, hence, *no benefit* would have accrued to anyone (monetary or through the *cy pres* component). “In evaluating the proposed settlement, the Court is not to compare its terms with a hypothetical or speculative measure of a recovery that might be achieved by prosecution of the litigation to a successful conclusion.” *Republic National Life Insurance Company v. Beasley*, 73 F.R.D. 658, 668

(S.D.N.Y. 1977) (Pollack, *J.*). Given such a standard, it would appear undeniable that the Settlement falls within the range of reasonableness.

The point here is that in settling any lawsuit, “there is a range of reasonableness with respect to a settlement.” *Newman v. Stein*, 474 F.2d 689, 693 (2d Cir. 1972). As the Second Circuit has observed, “[t]here is no reason, at least in theory, why a satisfactory settlement could not amount to a hundredth or even a thousandth part of a single percent of the potential recovery.” *Grinnell*, 495 F.2d at 455 n.2. The results obtained here are vastly in excess of what is fair, reasonable and adequate under the law.

#### **IV. CONCLUSION**

For all the reasons set forth above, Plaintiffs respectfully submit that the Settlement here meets all the requirements for being fair, adequate and reasonable. Continued litigation would avail no one and Class Members who sought compensation will be provided with it, non-monetary relief will be provided in a form that Plaintiffs (and, here, indeed, Defendants would support), and the litigation will conclude. Therefore, Plaintiffs respectfully request that this Court grant final approval to the Settlement of this litigation.

Date: May 23, 2008

Respectfully Submitted,

/s/ Seth R. Lesser

Seth R. Lesser (SL-5560)  
Andrew P. Bell (AB-1309)  
LOCKS LAW FIRM PLLC  
110 East 55th Street  
New York, New York 10022  
(212) 838-3333 (tel)

Seth R. Lesser  
Andrew P. Bell

*On the Brief*

*Lead Class Counsel*

HARKE & CLASBY  
Lance A. Harke  
Howard Bushman  
155 South Miami Avenue, Suite 600  
Miami, Florida 33130  
(305) 536-8220

Lance A. Harke  
Howard Bushman

*On the Brief*

WILLIAMS CUKER & BEREZOFSKY  
Mark Cuker (MK-4718)  
1617 JFK Boulevard, Suite 800  
Philadelphia, PA 19103  
(215) 557-0099

BROMBERG LAW OFFICE, P.C.  
Brian L. Bromberg  
40 Exchange Place, Suite 2010  
New York, NY 10005  
(212) 248-7906

NESTER & CONSTANCE  
David A. Nester  
123 West Washington Street  
Belleville, IL 62220  
(618) 234-4440

GLANCY BINKOW & GOLDBERG, LLP  
Marc L. Gordino  
1801 Avenue of the Stars, Suite 311  
Los Angeles, California 90067  
(310) 201-9150

REINHARDT, WENDORF &  
BLANCHFIELD  
Mark Reinhardt  
Brant Penney  
E-1250 First National Bank Building  
332 Minnesota Street  
St. Paul, Minnesota 55101  
(651) 287-2100

John S. Steward

225 South Meramec, Suite 925  
Clayton, MO 63105  
(314) 725-6060  
Fax: (314) 862-9895

*Class Counsel*

MAGER & GOLDSTEIN, LLP  
Jayne Goldstein  
One Liberty Place  
21st Floor  
1650 Market Street  
Philadelphia, PA 19103  
(215) 640-3280

MEISELMAN, DENKLEA, PACKMAN,  
CARTON & EBERZ  
David Douglas  
John D'Amico  
1311 Mamaroneck Avenue  
White Plains, New York 10605  
(914) 517-5000

PASKOWITZ & ASSOCIATES  
Laurence Paskowitz  
60 East 42nd Street, 46th Floor  
New York, New York 10165  
(212) 685-0969

WEBER, GALLAGHER, SIMPSON,  
STAPLETON, FIRES & NEWBY, LLP  
Joseph Goldberg  
2000 Market Street, 13th Floor  
Philadelphia, PA. 19103  
(215) 825-7225

*Attorneys for Plaintiffs*