

**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 MOTION
FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT,
CERTIFICATION OF CONDITIONAL SETTLEMENT
CLASS, AND APPROVAL OF SETTLEMENT NOTICE**

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I. INTRODUCTION

Plaintiffs and the Class respectfully submit this memorandum in support of their motion for an order preliminarily approving the proposed settlement of this litigation (The fully executed settlement agreement dated November 7, 2007 (“Settlement”) is attached to the Declaration of Lead Counsel, Seth R. Lesser (“Lesser Decl.”) submitted herewith, as Exhibit 1). The Settlement being proposed is an excellent result for the Class. The Settlement would resolve all cases pending against Defendants Take-Two Interactive Software, Inc. and its wholly-owned subsidiary Rockstar Games, Inc. (collectively “Defendants”) regarding the sale and marketing of all copies of the Defendants’ *Grand Theft Auto: San Andreas* (“*San Andreas*”).

As more fully described below, the Settlement achieves, to a significant degree, the relief sought by this litigation. This lawsuit, which was commenced in August 2005, sought to obtain compensatory relief because copies of *San Andreas* that were sold prior to July 20, 2005 contained elements that a player could alter and modify could display scenes of a sexual nature that have come to be known as of the “Hot Coffee” scenes. The games were sold for approximately \$50 each from late 2004 into the summer of 2005. The relief provided in the Settlement will include a replacement disc that does not contain the Hot Coffee scenes and/or cash, which can amount to as much as \$35 (or 75% of the cost of the original disc).

The amount of cash being made available to compensate consumers is substantial and would provide potential relief to virtually every member of the Class. There are four categories of cash benefits. Which category a consumer falls into depends on submission of some evidence of his or her purchase of the game – ranging from the top tier (up to \$35), a detailed receipt reflecting purchase of the actual game, to the lowest tier (up to \$5), an affirmation that the game was purchased. For example, a consumer who qualifies to get a cash benefit, but who no longer has specific proof of purchase of the game itself (such as a receipt setting forth the name of the

game), is still able to obtain \$15 by returning their game disc for an exchange and submitting a credit card statement or copy of a check, which evidences a purchase in an amount in excess of the game's original cost from any of the game's many retailers. Indeed, the lowest tier's cash relief is provided to qualifying consumers who have neither a receipt for the game nor the game disc itself. Such a consumer is still able to receive \$5 upon providing a sworn statement setting forth the approximate time and place of purchase of the game and how it was discarded.¹ Again, the cash relief is in addition to a full replacement disc (in a non-Hot Coffee version).

Among consumer settlements of class actions, this universal kind of relief is extraordinary. It is particularly unprecedented in a case where the alleged wrongful behavior was not even known to the vast majority of purchasers, nor was affected in any manner the normal uses of the product.² As such, the Settlement resolves the core goals of this litigation.

The Settlement was the product of many months of negotiation, and Plaintiffs respectfully submit that in light of the litigation risks further prosecution of these actions would inevitably entail, it would be proper for the Court: (1) preliminarily approve the proposed settlement; (2) preliminarily certify a nationwide settlement class; (3) approve the proposed form and method of notice to the settlement class; and (4) schedule a hearing at which the Court will consider final approval of the settlement.

1. The possibility of fraudulent claims being submitted is minimized by a Settlement provision that provides that only one claim can be submitted per person, household or address.

2. As Defendants have so often pointed out, the Hot Coffee scenes were hidden content, not accessible during normal playing of the game and only accessible through manipulation of the disc and/or the purchase and use of specific hardware to access the content.

II. THE CLAIMS IN THE CASE

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 San Andreas playable on personal computers and on Microsoft Xbox™ video game consoles. (All these games are referred collectively herein as “San Andreas”).

Plaintiffs contend that the copies of *San Andreas* manufactured and distributed before July 20, 2005 contained elements that could be displayed, if modified, 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 a modification that soon became available on the Internet 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, when the disc should have been rated as “AO” (Adults Only) because of the existence of the Hot Coffee computer code on the distributed game discs.³ The Hot Coffee Mod, of course, was produced by a third-party from the “hacker” community.

Plaintiffs also assert that Defendants were unjustly enriched because Defendants received consumers’ money that would not rightly be Defendants because, had the game disc been rated AO, Defendants would not have been able to sell the game at all through mass retailers, who would not have carried an AO game. Finally, Plaintiffs also contend that Defendants were

3. “AO” video games are much less merchantable than “M” games. Certain “big box” stores, such as Wal-Mart, will not sell “AO” rated video games at all.

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 volitional acts by a consumer to purposefully 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.

When the sexual nature of the hidden Hot Coffee scenes became known, an outcry arose that led to the filing of the present actions. The Named Plaintiffs represent the segment of the population most likely to be concerned with, and offended by, the game's hidden sexual content – parents and grandparents who purchased the game for their teenaged children. Each of the named Plaintiffs – the putative Class Representatives – are individuals who purchased *San Andreas* during the period while it was produced, 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 *San Andreas* for Xbox as a present for her teen-age 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 in Maple Grove, Minnesota. Plaintiff Rose Goldfine is a resident of New York who purchased *San Andreas* for PlayStation2 as a present for her teen-age 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 in California for his teen-age 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 Mr. Robinson who purchased *San Andreas* in or around 2004 as a gift for his son, who at the time was 20 or 21 years old and the primary user of the game. Plaintiff Florence Cohen is a resident of New York who purchased *San Andreas* for her minor teenage grandson in or about late 2004. Thus, all the named Plaintiffs are members of the Settlement Class.

A. The Actions

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 cases were consolidated and transferred to this Court pursuant to an order of the federal Multi-District Litigation Panel 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 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 following putative class representatives – Barbara Stanhouse, Susan Carlson, Rose Goldfine, and Robert Samario – were deposed.

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. Spirited negotiations and discussion of nearly every aspect of the Settlement has, quite literally, continued to the present day. In fact, the very last piece, the agreement on attorneys' fees and costs was not settled until this past Friday – three days ago.

III. THE TERMS OF 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 shall make 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, must make the following averments under penalty of perjury:

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.

Plaintiffs' counsel expects that most of the claims will be submitted electronically, the product being a video game. Therefore, the averments will be done by simply clicking applicable boxes on a computer screen. If a Class Member can make such averments, then they are entitled to the benefits described below.

B. The Exchange Program.

Any Class Member in possession of a copy of *San Andreas* who completes a claim form and swears under the penalty of perjury that he or she is an eligible Class Member may return the game disc to Defendants and receive in exchange a copy of the *San Andreas* game disc without

the Hot Coffee content. By using a claims administrator (here, Rust Consulting, Inc.), Class Members will be able to effect the exchange without having to incur postage costs. An important component of the Exchange Program is that Class Members will not need to provide any proof of purchase in order to receive this exchange.

C. The Benefit Program.

In addition to the ability to exchange their *San Andreas* games, Class Members, may, if they meet certain criteria, be eligible for cash benefits. The tiers of cash benefits described below will be referred to herein as the “Benefit Program.” The Benefit Program is broken down into four tiers.

The first tier consists of any Class Member who submits a detailed receipt clearly showing the purchase of *San Andreas* prior to July 20, 2005. Such a Class Member may receive a cash payment of up to 75% of the purchase price shown on the receipt, or Thirty-Five Dollars (\$35.00), whichever is less. This benefit will be available whether or not the Class Member also participates in the Exchange Program.

The second tier consists of any Class Member who does not have a detailed proof of purchase, but who participates in the Exchange Program, submits 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. This Class Member may receive a cash payment of up to 35% of the asserted purchase price, or Seventeen Dollars and Fifty Cents (\$17.50), whichever is less.

The third tier is comprised of any Class Members who participates in the Exchange Program and does not have any proof of purchase of the game, but who attests under penalty of

perjury to the place and approximate date of his or her purchase. A third-tier Class Member may receive a benefit of Ten Dollars (\$10.00).

The fourth and final tier includes the remainder of the Class – any Class Member who has 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. These Class Members may receive benefits of Five Dollars (\$5.00) each.

Payments under the Benefit Program will be made within eight weeks of the Claims Deadline or, if the Claims Deadline occurs before the Settlement becomes final, *i.e.*, the Effective Date as defined in the Settlement, then benefits will be provided within eight weeks of that date.

The Settlement also provides a “ceiling” and “floor” for the value of the benefits provided by Defendants. As to the ceiling, Defendants’ total out-of-pocket costs in fulfilling claims under the Exchange Program⁴ and the Benefit Program, shall not exceed Two Million Seven Hundred Fifty Thousand Dollars (\$2,750,000.00), excluding the Defendants’ costs of: (a) providing notice to Settlement Class Members; (b) paying administrative/managerial fees to the professional settlement Claims Administrator to administer the Exchange Program and the Cash Benefit Program; and (c) paying an attorneys’ fee and costs to counsel for the Settlement Class, should such payments be ordered by the Court (together referred to herein as the “Defendants’ Costs”). Significantly, however, Defendants have agreed to fulfill every claim for a replacement disc under the Exchange Program even if the total value of such exchanges would cause the total value of the Settlement Benefits to exceed the ceiling.

4. The parties have negotiated, determined and agreed, based upon the actual cost, that each replacement made by Defendants under the Exchange Program will be valued for purposes of the Settlement at Fifteen Dollars (\$15.00).

As to the floor, in the event that the value of claims under the Exchange Program and the Benefit Program filed on or before the Claims Deadline collectively do not exceed One Million Twenty Five Thousand Dollars (\$1,025,000.00) (excluding the Defendants' Costs, but including any amounts Defendants have distributed to charitable organizations pursuant to the settlement of any case or controversy that was or has been consolidated or coordinated with this action by the Judicial Panel on Multidistrict Litigation), then Defendants shall make charitable contributions of the difference between the collective value of claims filed on or before the Claims Deadline and One Million Twenty Five Thousand Dollars (\$1,025,000.00) to entities to be agreed upon by the parties once the value of the charitable contribution has been determined.

In short, the Settlement provides for the exchange of discs and/or the receipt of cash benefits, in an amount of a value to the Class of up to \$2.75 million (subject to the Defendants' replacement costs, which itself is a Class benefit). In the event that the Settlement is not over-subscribed (in which case the cash benefits will be pro rated, but in no case will their total value be less than Five Hundred Thousand Dollars (\$500,000.00)), there is, at a minimum, a floor of \$1.025 million that will be paid to appropriate charitable entities – in effect, Plaintiffs contend, *cy pres* recipients that will be subject to Court approval.

D. Notice and Incentive Awards.

The Defendants have agreed to pay for all notice costs and the costs of administration of the Settlement. Defendants have also agreed to pay the four (4) individual plaintiffs in this matter who were put forward and deposed as class representatives, Brenda Stanhouse, Rose Goldfine, Robert Samario and Susan Carlson, incentive payments in the amount of Five-Thousand Dollars (\$5000) 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 is relatively 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 One-Thousand Five Hundred Dollars (\$1,500) for their roles in stepping forward and bringing their actions.

E. Attorneys' Fees, Costs and Disbursements.

Finally, as mentioned above, only this past Friday, the Parties agreed on an amount to compensate Plaintiffs' Counsel for attorneys' fees and costs and disbursements in the amount of One Million Dollars (\$1,000,000), the entire amount of which will be paid separate and apart from any amounts made available for payment to the Class and Class Representatives, as set forth above. This agreed upon amount includes approximately Forty-Five Thousands Dollars (\$45,000) for costs and disbursements and approximately Nine Hundred Fifty Five Thousand Dollars (\$955,000) for attorneys' fees, a highly reasonable request and well within the range previously approved by this and other courts. A full and formal application for attorneys' fees and costs and disbursements will be made prior to the proposed final fairness hearing for approval of this Settlement.

F. Summary.

The proposed Settlement balances the risks, costs, and uncertainties of continuing litigation with the certainty of benefits that provide meaningful and reasonable recovery for the consumer class. The Settlement is the result of months of extensive, arm's-length negotiations, including several sessions with Magistrate Judge Dolinger. Plaintiffs' Counsel believes the proposed settlement is fair, adequate, and reasonable and in the best interest of the Class. The Settlement is particularly favorable in light of the risks of obtaining any meaningful recovery for the Class considering the multiple pending class certification and liability issues. The relief that

would be provided by the Settlement is adequate and reasonably well within what it might have been possible to obtain through extended litigation and trial.

IV. ARGUMENT

A. General Governing Principles

In determining whether preliminary approval is warranted, the sole issue before the Court is whether the proposed settlement is within the range of what might be found fair, reasonable and adequate, so that notice of the proposed settlement should be given to class members, and a hearing scheduled to consider final approval. The Court reviews the proposal preliminarily to determine whether it is sufficient to warrant public notice and a hearing. If so, the final decision on approval is made after the hearing. *Manual for Complex Litigation, Fourth*, § 13.14, at 172-73 (Fed. Jud. Ctr. 2004) (“*Manual Fourth*”). The Court is not required at this point to make a final determination:

The judge must make a preliminary determination on the fairness, reasonableness, and adequacy of the settlement terms and must direct the preparation of notice of the certification, proposed settlement, and date of the final fairness hearing.

Id. at § 21.632, at 321. Preliminary approval is the first step in a two-step process required before a class action may be finally settled. *Id.* at 320. Courts first make a preliminary evaluation of the fairness of the settlement, prior to notice. *Id.* at 320-21. In some cases this initial assessment can be made on the basis of information already known to the court and then supplemented by briefs, motions and an informal presentation from the settling parties. *Id.*

There is an initial strong presumption that a proposed class action settlement is fair and reasonable when it is the result of arm’s length negotiations. *See In re EVCI Career Colleges Holding Corp. Sec. Litig.*, 2007 U.S. Dist. LEXIS 57918, at *11 (S.D.N.Y. July 27, 2007); *see*

also *Newberg on Class Actions* § 11.41 at 11-88 (3d ed. 1992). The proposed Settlement here is the result of particularly lengthy, contentious and complex arm's-length negotiations between all parties. Counsel on both sides here are experienced and thoroughly familiar with the factual and legal issues presented. Courts recognize that the opinion of experienced and informed counsel supporting settlement is entitled to considerable weight. *See In re Global Crossing, Sec. & ERISA Litig.*, 225 F.R.D. 436, 461 (S.D.N.Y. 2005).

“Once the judge is satisfied as to the certifiability of the class and the results of the initial inquiry into the fairness, reasonableness, and adequacy of the settlement, notice of a formal Rule 23(e) fairness hearing is given to the class members.” *Manual Fourth* at § 21.633, at 321. Preliminary approval permits notice of the hearing on final settlement approval to be given to the class members, at which time class members and the settling parties may be heard with respect to final approval. *Id.* at 322. As explained above, the proposed Settlement now before this Court and on file herein falls squarely within the range of reasonableness warranting the approval notice apprising class members of the Settlement and establishing a hearing on final approval.

The Second Circuit has listed the following factors that courts should consider in deciding whether to preliminarily approve a proposed class settlement. *See, e.g., In re EVCI Sec. Litig.*, 2007 U.S. Dist. LEXIS 57918, at *14-30 (*citing City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974) (leading decision)):⁵

1. The complexity, expense and likely duration of the litigation. The instant lawsuit was, as a consumer case, complex in several respects. First, on a technical level, it presented a number of issues respecting the programming of a video game, the feasibility and limitations of such programming, and the ability of consumers to unlock the content of the game using

5. The *Grinnell* factors are still used to “examine the fairness, adequacy, and reasonableness of a class settlement” in the Second Circuit. *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 117 (2d Cir. 2005).

computer programs available through internet downloads and/or utilizing add-on computer hardware. Second, as a liability matter, the case presented subtle issues of Defendants' knowledge and/or intent that required proof of wrongdoing through implication – *e.g.*, Defendants' knowledge of the likelihood that the hidden content would be discovered, then unlocked and then commonly known. Direct evidence of this knowledge was not forthcoming, notwithstanding the evidence adduced after careful review of the entirety of Defendants' massive document production and after several depositions. Further litigation would have consumed substantial resources in time and money to attempt to substantiate this inferential knowledge and ultimately may well have hinged on expert, rather than direct, testimony or evidence.

Third, the actions presented novel legal issues. This is one of the first consumer class actions in the federal system that has brought the “multistate” class certification issue to the fore (a result of the Class Action Fairness Act), and Defendants' spirited and dogged opposition to the class certification motion highlighted the legal difficulties and obstacles posed by certification in such a case. In light of this substantial settlement, resolving, in a fair manner, the core claims in the litigation, taking a chance of losing class certification was not an insubstantial risk to the Class. Indeed, of course, any certification by this Court could well have been subject to a Rule 23(f) appeal and substantial delays in achieving trial or resolution for several years, at best.

2. The reasonableness of the proposed class settlement in light of the likelihood of liability being imposed on defendants and the probable range of remedies. The proposed settlement meets the criteria for notice and is well within the range of what might be approved as fair, adequate, and reasonable.

Plaintiffs sued in various courts to seek compensation for their video game purchases as well as disgorgement of all ill-gotten profits. Plaintiffs pursued various state statutory and

common law claims. As noted, there are presently significant hurdles to class certification under these claims, much less nationwide class certification. Moreover, core claims of unjust enrichment would have turned on, as previously noted, indirect proof of knowledge and intent. As Defendants pointed out at every opportunity, this case involves claims that – while of significance to some individuals – were entirely unknown to many (if not most) members of the class, and indeed, the product in question worked as it was intended to. Only through a series of volitional steps could a person even unlock the hidden content that Plaintiffs contend constituted the fraud, thereby making this case present a most unusual, if not unique, question of consumer fraud.

Furthermore, an appeal of any rulings – favorable or unfavorable – would certainly have taken place, the results of which necessarily would likewise be uncertain in this novel field of law.

Plaintiffs' Counsel, it is fair to say, have great expertise in the area of consumer law and class actions, and have successfully achieved substantial results in numerous cases. In this case, Plaintiffs' counsel has, by virtue of their investigations, their consultations with experts, and their handling and review of the discovery, a well-informed knowledge of the strengths and weaknesses of the case, and based upon such knowledge and their expertise and experience in such cases, urge, right now preliminary but ultimately final, approval of the proposed Settlement.

B. The Proposed Conditional Settlement Class Should Be Certified.

To be approved for certification, even as a settlement class, a case must meet the requirements of Fed. R. Civ. P. 23. In this case, the requirements that have to be met are those of Rules 23(a), (b) and (e), inasmuch as the Court already rendered a determination for lead counsel under Rule 23(g) [D.E. 15].

1. Rule 23(a) Is Easily Satisfied.

Certification of the proposed Class is clearly appropriate here, particularly since it is a settlement class. Before an action may be certified as a class action, the following requirements of Rule 23(a) must be satisfied:

- (a) the class is so numerous that joinder of all members is impracticable;
- (b) there are questions of law or fact common to the class;
- (c) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
- (d) the representative parties will fairly and adequately protect the interests of the class.

a. The Class Is Sufficiently Numerous

To meet the requirement of numerosity, the Class representatives need only show that it is difficult or inconvenient to join all the members of the Class. *In re J.P. Morgan Chase Cash Balance Litig.*, 242 F.R.D. 265, 272 (S.D.N.Y. 2006) (citing *Robidoux v. Celani*, 987 F.2d 931, 935 (2d Cir. 1993)). The Second Circuit, like almost all federal courts, has adopted the generally accepted standard that classes in excess of 40 members presumptively satisfy the numerosity requirement. *Toure v. Cent. Parking Sys.*, 2007 U.S. Dist. LEXIS 74056, at *13-14 (S.D.N.Y. Sept. 27, 2007)(citing *Consolidated Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995)). Here, numerosity is clearly satisfied given that the proposed class consists of over seven million game purchasers scattered across the country, as has been admitted by Defendants.

b. Common Questions of Law Or Fact Exist

In order to maintain a class action, there must be “questions of law or fact common to the class....” Fed. R. Civ. P. 23(a)(2) (emphasis added). Generally, courts have “liberally construed” the commonality prerequisite, requiring only a “minimum of one issue common to all

class members.” See *Trinidad v. Breakaway Courier Sys.*, 2007 U.S. Dist. LEXIS 2914, at *12-13 (S.D.N.Y. Jan. 12, 2007) (quoting *Trief v. Dun & Bradstreet Corp.*, 144 F.R.D. 193, 198-99 (S.D.N.Y. 1992)). “The commonality requirement is satisfied even where there is not a complete identity of facts . . . so long as the party opposing the class has engaged in some course of conduct that affects the proposed class and gives rise to causes of action requiring similar elements.” *Zupnick v. Thompson Parking Partners Ltd.*, 1990 U.S. Dist. LEXIS 9881, at *9 (S.D.N.Y. July 31, 1990) (citations omitted). The claims of the Plaintiffs in this action arise from the same alleged illegal practices and course of conduct that underlies the Settlement Class’ claims: Defendants’ undisclosed inclusion of the Hot Coffee content on *San Andreas* discs.

This action centers on the marketing and sale of *San Andreas* without disclosing that the Hot Coffee scenes were present on the game disc. Every Class Member’s claim involves the same set of operative facts and objective determination of what members of the public would or would not have known. The same facts that give rise to the individual Plaintiffs’ claims also give rise to each Class Member’s claims. Defendants engaged in a common course of conduct toward all Class Members because Defendants failed to disclose the Hot Coffee content to all Class Members and all Class Members purchased a game that Plaintiffs contend was incorrectly rated “M.” This common behavior causes a common effect and similar damages to the entire class. In fact, if absent Class Members were to pursue their claims individually, they would have to prove the same facts and answer the same legal questions as the Plaintiffs, at their own cost. These are the very hallmarks of an action warranting class certification. See *In re Livent Noteholders Sec. Litig.*, 210 F.R.D. 512, 517 (S.D.N.Y. 2002) (“[I]f each class member were to file a separate claim, . . . the legal and factual questions in each case would be essentially the

same, thus subject to generalized proof and amenable to resolution through a single class action.”).

That commonality exists is almost unquestionable. Indeed, while Defendants vigorously opposed class certification, they did not even challenge commonality. This requirement is therefore met.

c. Plaintiffs’ Claims are Typical of Those of the Class

The typicality requirement is satisfied where, as here, “each class member’s claim arises from the same course of events, and each class member makes similar legal arguments to prove the Defendant’s liability.” *In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285, 291 (2d Cir. 1992). *Accord Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147, 155 (2001); *Sumitomo Copper Litig. v. Credit Lyonnais Rouse, Ltd.*, 262 F.3d 134, 141 (2d Cir. 2001). Typicality does not require that the interests of the named representatives and the class members be identical. *Trief*, 144 F.R.D. at 200.

For all the reasons discussed above regarding the presence of common issues, the representative Plaintiffs’ claims are typical of the Class because all members of the Class were victims of Defendants’ alleged uniform wrongful course of conduct. Plaintiffs meet the typicality requirement as each Plaintiff was a purchaser of *San Andreas* and a victim of the same practices alleged in the Complaint. Plaintiffs’ claims, which arise from the same course of conduct and are predicated on the same legal theories as the claims of all other Class members, easily satisfy the typicality requirement of Rule 23(a).

d. Adequacy is Easily Satisfied

The adequacy requirement “serves to uncover conflicts of interest between named parties and the class they seek to represent.” *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625

(1997). In the Second Circuit, the test for adequacy of representation requires that (1) the class representatives' interests are not antagonistic to the interests of other members of the class, and (2) that the plaintiffs' counsel be qualified, experienced and capable of handling the litigation. *Cordes & Co. Fin. Servs. v. A.G. Edwards & Sons, Inc.*, 502 F.3d 91, 2007 U.S. App. LEXIS 21720, at *18 (2d Cir. 2007) (citing *Baffa v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 222 F.3d 52, 60 (2d Cir. 2000)).

Plaintiffs' counsel are well qualified to prosecute this litigation. Lead Counsel and the other firms that have been active in the litigation, including The Locks Law Firm and Harke & Clasby LLP, have extensive experience conducting class action and consumer litigation. *See* Lesser Decl., Exhibit 3. They have successfully represented large numbers of consumers, pressing a variety of claims, in courts across the country and there can be no doubt that they have prosecuted this case vigorously and aggressively. Although this Court already made a Rule 23(g) determination in appointing Lead Counsel, and therefore, a second Rule 23(g) determination is not required, even if such a determination were required, the same demonstration of adequacy, pursuant to Rule 23(g), would apply.

Further, Plaintiffs do not have any interests antagonistic with the Class. "A conflict or potential conflict alone will not, however, necessarily defeat class certification – the conflict must be 'fundamental.'" *Denney v. Deutsche Bank AG*, 443 F.3d 253, 268 (2d Cir. 2006) (citation omitted). Plaintiffs' claims present no such conflict. To the contrary, each Class member, as well as each Plaintiff, has a mutual interest in establishing liability and obtaining relief from defendant. Moreover, Plaintiffs have diligently represented the Class thus far, as demonstrated by the fact that they have produced documents, sat for depositions (in Mr. Samario's case, having traveled across the country to do so), answered interrogatories and other

discovery, and have aggressively prosecuted the various actions. Thus, Plaintiffs' actions have clearly demonstrated that they are more than adequate representatives for the Class.

2. Rule 23(b)(3) is also Satisfied

Once Plaintiffs satisfy the four requirements of Rule 23(a), in order to be certified under Rule 23(b)(3), plaintiffs must (1) demonstrate that common "questions of law or fact" predominate over "any questions affecting only individual members"; and (2) establish that the class action mechanism is "superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3). This consumer case eminently meets these criteria.

Turning first to predominance, the Second Circuit instructs that:

[a]s a general matter, the Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation. The Rule encompasses those cases in which a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results.

Augustin v. Jablonsky (In re Nassau County Strip Search Cases), 461 F.3d 219, 225 (2d Cir. 2006) (quotations and citations omitted). "[C]ourts generally focus on the liability issue . . . and if the liability issue is common to the class, common questions are held to predominate over individual questions." *In re Sumitomo Copper Litig.*, 182 F.R.D. 85, 91 (S.D.N.Y. 1998). Here, there are common questions which clearly predominate, including (1) whether the game discs, as produced and sold by Defendants, contained the Hot Coffee content, which was undisclosed by Defendants; (2) whether the games contained a game rating of "M" on their packaging when, in actuality, they should have originally been rated "AO"; (3) whether Defendants' failure to ensure the accurate labeling of their games resulted from negligent, reckless or intentional behavior; (4) whether Defendants' actions respecting *San Andreas* lead to liability under state consumer

protection and/or uniform deceptive acts and practices statutes in effect in the various States; (5) whether Defendants' actions breached the implied warranty of merchantability; and (6) whether Defendants' labeling of the games as "M" rated caused Defendants to be unjustly enriched when the totality of the circumstances are considered. The resolution of these issues in Plaintiffs' favor would necessarily operate to resolve questions of Defendants' liability – for all Class members. Hence, these common issues, arising from Defendants' identical course of conduct, predominate. *In re Livent Noteholders Sec. Litig.*, 210 F.R.D. at 517-18.

To the extent that Defendant challenged the class certification motion, it was, in most substantial measure on grounds of choice of law and individualized manageability issues – neither of which defeats certification of a settlement class, as is present here. *See Amchem*, 521 U.S. at 620 (“Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems, *see* Fed. Rule Civ. Proc. 23(b)(3)(D), for the proposal is that there be no trial.”).

Second, when considering the superiority of a class action, numerous courts have come to the logical conclusion that the class action device is the superior method of adjudicating multiple relatively small claims in complex cases. *See, e.g., Sumitomo*, 182 F.R.D. at 97 (“If the case were not handled as a class, thousands of small claims would be either brought or unjustly abandoned. The first possibility would be a flood of cases, the second would involve individual claims abandoned because of cost.”); *In re NASDAQ Market-Makers Antitrust Litig.*, 169 F.R.D. 493, 527 (S.D.N.Y. 1996) (“Separate proceedings would produce duplicate efforts, unnecessarily increase the costs of litigation, impose an unwarranted burden on this Court and other courts throughout the country, and create the risk of inconsistent results for similarly situated parties.”). This is paradigmatically true with a consumer class action like the present where the value of the

product was only \$50 to begin with. Accordingly, certifying this Settlement Class is far superior to forcing individual Plaintiffs to proceed with duplicative claims or to abandon their legitimate claims against the Defendants.

In sum, for the reasons set forth above, the requirements of Rule 23 are satisfied, and this Court should conditionally certify this case as a class action for settlement purposes so that notice may be disseminated.

C. The Proposed Form of Notice and Methods of Dissemination Should be Approved.

Under Rules 23(c)(2) and (e)(1)(B) of the Federal Rules of Civil Procedure, notice must be given to members of the Class of certification of the Class and of a proposed class action settlement. Rule 23(e)(1)(B) provides only that “[t]he court must direct notice in a reasonable manner to all class members who would be bound by a proposed settlement.” The Second Circuit has interpreted this provision as follows:

The standard for the adequacy of a settlement notice in a class action under either the Due Process Clause or the Federal Rules is measured by reasonableness. There are no rigid rules to determine whether a settlement notice to the class satisfies constitutional or Rule 23(e) requirements; the settlement notice must “fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with the proceedings.” Notice is “adequate if it may be understood by the average class member.”

Masters v. Wilhelmina Model Agency, Inc., 473 F.3d 423, 438 (2d Cir. 2007) (citing *Wal-Mart Stores, Inc.*, 396 F.3d at 113-14). Moreover, a district court’s decision regarding the form and content of notices sent to class members is reviewed only for an abuse of discretion. 473 F.3d at 438 (citing *In re “Agent Orange” Prod. Liab. Litig.*, 818 F.2d 145, 168 (2d Cir. 1987)).

Here, direct mail notice is impossible and impracticable inasmuch as the Class is a disparate group of consumers across the United States who purchased *San Andreas* through

thousands of commercial retail outlets and for whom names and addresses are unavailable. However, Defendants do have electronic mail addresses for some Class Members, and accordingly, Plaintiffs' propose and the Settlement provides that notice be given by direct electronic mail communication to Class Members on the Defendants' mailing lists, through a program of publication in major national periodicals, and throughout the Internet, including the establishment of the www.gtasanadreassettlement.com website. The proposed notice program, which combines direct electronic mailing, major print publications, and widespread Internet broadcasting more than meets the relevant notice standards.

Specifically, the publication notice will be provided as follows:

<i>Consumer Publications</i>			
<u>Name</u>	<u>Circulation</u>	<u>Frequency</u>	<u>Size</u>
<i>Parade</i>	32,000,000	Weekly	2/5 pg.6
<i>USA Weekend</i>	23,442,692	Weekly	2/5 pg.7
<i>People</i> (2 insertions)	3,750,548	Weekly	½ pg.
<i>Maxim</i>	<u>2,501,175</u>	Monthly	½ pg.
	61,694,415		

<i>Computer Gaming Publications</i>			
<u>Name</u>	<u>Circulation</u>	<u>Frequency</u>	<u>Size</u>
<i>Electronic Gaming Monthly</i>	554,600	Monthly	½ pg.
<i>Games for Windows</i>	205,156	Monthly	½ pg.
<i>Game Informer</i>	2,286,270	Monthly	½ pg.
<i>GamePro</i>	3,499,000	Monthly	½ pg.
<i>Official Xbox Magazine</i>	425,243	13x/year	½ pg.
<i>PC Gamer</i>	225,688	13x/year	½ pg.
<i>PSM: PlayStation Mag.</i>	<u>300,453</u>	13x/year	½ pg.
	7,496,410		

<i>Websites</i>		
<u>Name</u>	<u>URL</u>	<u>Est. Impressions</u>
GameSpot.com	www.gamefaq.com	800,000
GameFAQ.com	www.gamestats.com	628,500
GorillaNation	various	<u>1,619,047</u>
		3,047,547

See Settlement Agreement, Ex. E, annexed to the Lesser Decl. as Exhibit 1-E.

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6. May be reduced to 3/10 of a page depending on the number of words in the notice.
 7. May be reduced to ¼ page depending on the number of words in the notice.

Indeed, after hearing at length from the Parties about notice and how it can be achieved as a part of the settlement notice procedure, on October 1, 2007, when presented with the proposed notice that is included in the Settlement, Magistrate Judge Dolinger recommended it to this Court as providing proper notice. *See* Lesser Decl., Ex. 2.⁸ Moreover, the form and content of the notice was developed in conjunction with a leading notice and claims administrator, Rust Consulting, Inc., who will, pursuant to the Settlement Agreement, act as claims administrator for the proposed Settlement. The forms of notice (Lesser Decl., Exhibits 1-C and 1-D), fully comply with the requirements of Rule 23 and due process inasmuch as they fairly provide the “level of detail [that] apprises the class members of the salient terms of the settlement and affords them a reasonable opportunity to present any objections.” *In re Painwebber Ltd. Pshps. Litig.*, 171 F.R.D. 104, 123-24 (S.D.N.Y. 1997)(quoting *In re Michael Milken & Assoc. SEC Litig.*, 150 F.R.D. 57, 60 (S.D.N.Y. 1993)) (also appropriate, “by design [to be] only a summary of the litigation and of the proposed settlement, and [to] incorporate[] by reference all remaining documents on file with this court.”). The Notice informs Class Members of: (a) the existence of the Class; (b) the opportunity to be excluded from the Class; (c) the terms of the Settlement; (d) the time and place of the hearing on the Settlement; and (e) the opportunity to appear and be heard regarding the proposed Settlement. *Accord In re Merrill Lynch & Co. Research Reports Sec. Litig.*, 2007 U.S. Dist. LEXIS 9450, at *14-15 (S.D.N.Y. Feb. 1, 2007); *Hicks v. Morgan Stanley & Co.*, 2005 U.S. Dist. LEXIS 24890, at *8-10, Fed. Sec. L. Rep. (CCH) P93,579

8. Notably, notice does not need to be “highly specific,” and indeed numerous decisions, no doubt recognizing that notices to class members can practicably contain only a limited amount of information, have approved very general description(s) of the proposed settlement. *In re PaineWebber, Ltd., Partnerships Litig.*, 171 F.R.D. 104, 124 (S.D.N.Y.1997) (quoting *Weinberger v. Kendrick*, 698 F.2d 61, 70 (2d Cir. 1982). In addition to a fair recital of “the pertinent information, due process requires that the notice afford a reasonable time for those interested to make their appearance.” *Luessenhop v. Clinton County*, 466 F.3d 259, 269 (2d Cir. 2006) (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)).

(S.D.N.Y. Oct. 24, 2005). Moreover, the notice “fairly apprises” the Class members of the terms of the Settlement. *Masters*, 473 F.3d at 438. Finally, the notice complies with due process because it affords interested Class members a reasonable time to make their appearance and be heard if they so desire.

In sum, the proposed notice program is the best notice practicable under the circumstances and satisfies the content requirements in this Circuit. Accordingly, the proposed notice and notice program are more than adequate and should be approved.

V. CONCLUSION

As discussed above, the Settlement was reached after extensive arms-length negotiations. As in the litigation itself, both sides aggressively presented their positions, and the negotiations required continuous efforts over a number of months to bear fruit. There was nothing collusive about any of the settlement negotiations or the ultimate agreement reached. The Settlement Agreement is fully supported and recommended by counsel for all parties. There are no terms in the Settlement that militate against preliminary approval.

The Settlement will produce substantial benefits for the Class. The significant value of the financial benefits to the Settlement Class is enhanced by the fact that it will be provided to Class Members now, without the delay, burden, or risks of continued litigation. The Proposed Order on Motion for Preliminary Approval of the Settlement (Lesser Decl., Exhibit 1-B), grants preliminary approval of the Settlement and approves the form and content of the proposed Notice to the Class of the Proposed Settlement (Lesser Decl., Exhibits 1-C and 1-D). The Proposed Order also states that Class Members who wish to exclude themselves from the Settlement or who object to the Settlement must submit their objections or requests for exclusion by first class mail or hand delivery within the time specified by the Court. The proposed timetable will provide an orderly process for giving notice to Class Members, for Class Members to respond to

the notice, for the Court to determine the fairness, reasonableness and adequacy of the Settlement, and for Class Members to submit their claims.

For the reasons set forth above, Plaintiffs respectfully request that this Court grant preliminary approval of the Settlement, direct that notice be given to the Class members in the forms submitted with the Settlement Agreement, and schedule a final fairness hearing, at which time the Court will definitely determine whether the settlement is fair, adequate, and reasonable and in the best interests of the Class.

Date: November 19, 2007

Respectfully Submitted,

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