09-1572-cv

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

In re GRAND THEFT AUTO VIDEO GAME
CONSUMER LITIGATION (No. II)

_____

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF PLAINTIFF-OBJECTOR-APPELLEE THEODORE H. FRANK

Theodore H. Frank, *in pro. per*.
1718 M. Street NW
No. 23-6
Washington, DC 20036
Tel: (703) 203-3848
E-mail: tedfrank@gmail.com

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

COUNTERSTATEMENT OF ISSUES PRESENTED 1

COUNTERSTATEMENT OF THE CASE 1

COUNTERSTATEMENT OF FACTS 2

SUMMARY OF ARGUMENT 5

I. The Settlement Class Is Irrelevant, Because The Proposed Settlement Does Not Meet Rule 23 Standards.. 6

A. The Settlement Is Impermissibly Self-Dealing 6

B. The *Grinnell* Factors Do Not Support The Settlement.. 9

1. This is not a "successful" settlement meriting positive consideration under *Grinnell*. 10

2. The "reaction of the class to the settlement" was one of disdain.....11

C. Without A Tenable Settlement Class, The Class Must Be Decertified.. 12

II. Putative Class Attorneys Have Failed To Provide Adequate Representation To The Majority Of The Class.....14

A. Putative Class Attorneys Ensured That The Majority Of Class Members Could Not Recover.....14

B. The Attorneys' Fees And Costs To Twelve Law Firms Reflects Self-Dealing At The Expense Of The Class And Demonstrate That The Class Representatives Are Not Adequate.....15

C. Putative Class Attorneys Also Fail Rule 23(a)(4) By Bringing A Socially Wasteful Lawsuit.....15

III. The Charitable Award Cannot Be Justified As *Cy Pres*, As A Benefit To The Class, Or As A Ground For Attorneys' Fees. 16

CONCLUSION.....18

TABLE OF AUTHORITIES

CASES

Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997) 6, 13, 19

Blair v. Equifax Check Services, Inc., 181 F.3d 832 (7th Cir. 1999).....7

Crawford v. Equifax Payment Services, 201 F.3d 877 (7th Cir. 2000).....7, 8, 18

Detroit v. Grinnell Corp., 495 F.2d 448 (2d Cir. 1974)..... 8-12

Grant v. Bethlehem Steel Corp., 823 F.2d 20 (2d Cir. 1987).....6

In re Findley, 993 F.2d 7 (2d Cir. 1993).....15

In re Joint Eastern and Southern Dist. Asbestos Litig., 982 F.2d 721 (2d Cir. 1992).....15

Masters v. Wilhemina Model Agency, Inc., 473 F.3d 423 (2d Cir. 2007)...16, 17, 18

McLaughlin v. American Tobacco Co., 522 F.3d 215 (2d Cir. 2008) 5, 12, 19

Mirfasihi v. Fleet Mortgage Corp., 356 F.3d 781 (7th Cir. 2004).....6, 15, 16

Molski v. Gleich, 318 F.3d 937 (9th Cir. 2003) 8

Murray v. GMAC, 434 F.3d 948 (7th Cir. 2006) .....*passim*

Silberblatt v. Morgan Stanley, 2007 WL 4145403 (S.D.N.Y. Nov. 19, 2007).....17

Synfuel Tech. v. DHL Indus., Inc., 463 F.3d 646 (7th Cir. 2006).....17

STATUTES AND FEDERAL RULES

Class Action Fairness Act, Pub.L. 109-2, § 2(a)(3)(A) 17

Fed. R. Civ. Proc. 23.....6

Fed. R. Civ. Proc. 23(a)(4) 1, 5, 15, 19

Fed. R. Civ. Proc. 23(e) 1, 9, 18, 19

Fed. R. Civ. Proc. 23(h) 18

ACADEMIC, NEWSPAPER, AND WEBLOG COMMENTARY

Frank, Theodore H.,
Cy Pres Settlements, Class Action Watch, March 2008 17-18

Glater, Jonathan D., "Hidden Sex Scenes Draw Ho-Hum, Except From Lawyers," New York Times (Jun. 25, 2008) 4

Jacobson, Jeffrey S.,
Defining "Coupon" Under the Class Action Fairness Act,
Product Liability Law 360, Jan. 15, 2008 17

Liptak, Adam, "Doling Out Other People's Money," New York Times (Nov. 26, 2007) 18

Plaintiff-objector Theodore H. Frank, on behalf of the class, respectfully requests affirmance of the lower court's order. While the district court failed to address the difference between a settlement class and a litigation class, this court can affirm on other grounds given that the settlement in question failed to meet the standard of Fed. R. Civ. Proc. 23(e); moreover, even as a settlement class, this court could affirm the decertification order below on Rule 23(a)(4) grounds.

COUNTERSTATEMENT OF ISSUES PRESENTED

1. Whether a class action settlement that returned under $27,000 in relief to the class, made the majority of the class ineligible for relief, and sought $1,000,000 in attorneys' fees was "fair, adequate, and reasonable" under Fed. R. Civ. Proc. 23(e).

2. Whether, once the settlement was rejected, the district court could have decertified the class because individualized issues predominated on the underlying consumer fraud claims.

COUNTERSTATEMENT OF THE CASE

Appellants' statement of the case is incomplete. In December 2007, the Plaintiffs, represented by ***twelve*** law firms in ***thirteen*** different offices, negotiated a settlement that has paid at most $26,505 to the ten million unnamed members of the class—an average of less than a quarter of a penny per class member. In doing so,

they spent over $31 in administrative expense per dollar delivered to class members, a total of $830,000. The settlement, which bound the class of at least ten million American purchasers of the first edition of *Grand Theft Auto:San Andreas* ("GTA"), excluded the vast majority of class members from relief by requiring a class member to certify under penalty of perjury that he or she was "offended" by the unlockable content, though "offense" is not an element of a consumer fraud claim. By requirement of this additional element, the plaintiffs were effectively arguing that many members of the class suffered no injury, and effectively admitting that members of the class were not similarly situated.

COUNTERSTATEMENT OF FACTS

Appellants' statement of the facts is incomplete.

GTA is a video game rated M for "blood and gore," "intense violence," "use of drugs" and "strong sexual content." Take-Two warns its users of strong sexual content and recommends that the game is not appropriate for those under 17. The game itself contains the following scenes:

- The main character engages in violent and vocal sexual bondage acts, flagellation, and torture with the character "Catalina," bringing her to a screaming orgasm, a requirement to advance in the game. *See* GTA, "Gone

Courting Mission," available at http://www.youtube.com/watch?v=ML0Ca6qBLtw.

- After the main character visits a strip club, a prostitute offers to perform the sexual act of a "half-and-half" upon the player. *See* GTA, "Jizzy Mission," available at http://www.youtube.com/watch?v=7MJ0NtjfWHs at 1:15 to 3:30.
- A Christian preacher complaining about an ex-prostitute's use of teeth while performing oral sex. *See* GTA, "Jizzy Mission."[1] (The player is required to murder the preacher, the ex-prostitute, and their bodyguard and their driver to advance.)
- Two criminals, "OG Loc" and "Freddy," discussing their homosexual relationship in prison. *See* GTA, "OG Loc Mission," *available at* http://www.youtube.com/watch?v=DAb-FovDuCg. (To advance in the game, the player is required to chase and kill Freddy to satisfy OG Loc's sense of honor.)
- In another mission, the player is required to follow a character, "the croupier," to a sex shop, watch another character pose in a topless bustier,

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

kill the croupier's boyfriend "master" and disguise in his leather "gimp" outfit, pick up a purple dildo, and then have sex with the croupier, who has a screaming orgasm. *See* GTA, "Key to Her Heart Mission," available at http://www.youtube.com/watch?v=ZHEac6pCLFk.

- The player can choose to receive a lap dance at a strip club.
- Throughout the game, the player can choose to regain "health" by purchasing sex with prostitutes, who have vocal orgasms; the player can choose to regain the money spent by killing the prostitute. *See, e.g.*, http://www.youtube.com/watch?v=xSjl0_jJyb0.

All of this is aside from the game's extraordinary profanity, references to drug use, and explicit violence, which includes the ability of the main character to vividly and bloodily kill innocent civilians and police with, *inter alia*, automatic weapons, sawed-off shotguns, baseball bats, hand grenades, Molotov cocktails, rocket launchers, flamethrowers, farm threshers, and chainsaws.

The sequence made possible by the download of the Hot Coffee modification, is not reasonably distinguishable from the other content in the game such as the Catalina sex scene. In depositions, named plaintiffs acknowledged that they were not aware of the unmodified content in the game, and that they were offended by the

sex and violence. *See generally* Jonathan D. Glater, "Hidden Sex Scenes Draw Ho-Hum, Except From Lawyers," *New York Times* (Jun. 25, 2008).

Moreover, the Hot Coffee sequence is available ***only*** if a player modifies the game using non-approved downloadable content from the Internet. (To install the modification on the Playstation 2 edition of the game requires a $30 piece of equipment for hacking.) None of the plaintiffs have downloaded the Hot Coffee modification.

SUMMARY OF ARGUMENT

Even if this court determines that it was inappropriate for the lower court to decertify the settlement class on *McLaughlin* grounds, this court can affirm on either of two alternative grounds.

First, the settlement negotiated by plaintiffs is "untenable." *Murray v. GMAC*, 434 F.3d 948, 952 (7th Cir. 2006). As such, it would have been an abuse of discretion for the lower court to approve the settlement. While it would have been clearer legally for the district court to reject the settlement and then decertify the class, rather than decertify the settlement class first, it is within the power of this court to do things in the least controversial sequence, and affirm on other grounds.

In the second alternative, the lower court could have decertified the class under Rule 23(a)(4). Plaintiffs' attorneys negotiated a settlement that benefited

themselves, and discriminated against the vast majority of the class. As such, they have demonstrated that they are not adequate representatives of the class they seek ot bind.

I. The Settlement Class Is Irrelevant, Because The Proposed Settlement Does Not Meet Rule 23 Standards.

"The fact that many class members remained silent is of little import. The district court ha[s] a fiduciary responsibility to the silent class members." *Grant v. Bethlehem Steel Corp.*, 823 F.2d 20, 23 (2d Cir. 1987). Where a court is confronted with a settlement-only class certification, the court must look to factors "designed to protect absentees." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997); "Because class actions are rife with potential conflicts of interest between class counsel and class members, district judges presiding over such actions are expected to give careful scrutiny to the terms of proposed settlements in order to make sure that class counsel are behaving as honest fiduciaries for the class as a whole." *Mirfasihi v. Fleet Mortgage Corp.*, 356 F.3d 781, 785 (7th Cir. 2004).

A. The Settlement Is Impermissibly Self-Dealing.

The seven named class members seek $24,500 of payments to themselves, in some cases 100 times what they paid for the game, though their depositions reveal they have suffered no legally cognizable injury. Another $870,000 will be distributed to the National PTA and the ESRB, neither of whom are class members

or have suffered any class injury. For this, the twelve law firms ask for $1 million in fees, or more than 37 times what was paid in cash to the unnamed class members—a contingent fee of 3772%, well above the market rate of 25% to 40%.

In *Murray, supra*, the Seventh Circuit held that a similar settlement was beyond the pale of approval:

> This looks like the sort of settlement that we condemned in *Blair v. Equifax Check Services, Inc.*, 181 F.3d 832 (7th Cir.1999), and *Crawford v. Equifax Payment Services*, 201 F.3d 877 (7th Cir.2000), two appeals arising from the same litigation. That suit had been settled for $2,000 to the named plaintiff, $5,500 to a legal-aid society that had not been injured by the defendant's conduct, and $78,000 in legal fees. We treated the disproportion—$2,000 one class member, nothing for the rest—as proof that the class device had been used to obtain leverage for one person's benefit. [citations omitted] Here the proposed award is $3,000 to the representative while other class members are frozen out. The payment of $3,000 to Murray is three times the statutory maximum, while others don't get even the $100 that the Act specifies as the minimum. …
>
> Such a settlement is untenable. We don't mean by this that all class members must receive $100; risk that the class will lose should the suit go to judgment on the merits justifies a compromise that affords a lower award with certainty. [citation omitted] But if the reason other class members get relief worth about 1% of the minimum statutory award is that the suit has only a 1% chance of success, then how could Murray personally accept 300% of the statutory maximum? And, if the chance of success really is only 1%, shouldn't the suit be dismissed as frivolous and no one receive a penny? If, however, the chance of success is materially greater than 1%, as the proposed payment to Murray implies, then the failure to afford effectual relief to any other class member makes the deal look like a sellout.

Murray, 434 F.3d at 952.

Murray is not an outlier. The settlement proposed by Plaintiffs is substantially worse than other settlements rejected by the Seventh and Ninth Circuits under Rule 23(e) as "untenable." Compare this case with *Murray*, 434 F.3d at 952 ("untenable"); *Molski v. Gleich*, 318 F.3d 937, 956 (9th Cir. 2003) ("unfair, inadequate, and unreasonable"); and *Crawford v. Equifax Payment Services, Inc.*, 201 F.3d 877 (7th Cir. 2000) ("substantively troubling"):

	Murray	*Molski*	*Crawford*	*GTA*
Unnamed class recovery	Up to $947,000	$0	$0	$26,505
Size of class	~1,200,000	Unstated	214,000	>10,000,000
Alleged damages	$120,000,000-$1.2 billion	Unstated	$500,000	$500,000,000 + alleged punitive damages
Rep. plaintiff payments	$3,000	$2000	$2,000	$24,500
Attorney fees	~$400,000	$50,000	$78,000	$953,304.90
Approved?	Rejected on appeal; remanded.	Reversed as abuse of discretion.	Reversed as abuse of discretion.	?

The GTA settlement is inferior to other settlements rejected by the Seventh Circuit: though alleged damages are higher, and the class is larger, the unnamed class members recover less money, and the attorneys and named class representatives receive more money. There is ample precedent that not only should the court reject the settlement, but that approving the settlement would be an abuse of discretion. Any "presumption of fairness" is rebutted by the self-dealing nature of the settlement. There is no need to consider the nine-factor *Grinnell* test (*Detroit*

v. Grinnell Corp., 495 F.2d 448 (2d Cir. 1974)), because on its face, the GTA settlement is unacceptable self-dealing that violates Rule 23(e): more than 98% of the cost of the settlement goes to the Putative Class Attorneys, to class representatives, and to third parties, with less than 2% of the total going to unnamed class members.

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

B. The *Grinnell* Factors Do Not Support The Settlement.

Because the settlement is so transparently self-serving there is no need to evaluate it under *Grinnell*. But even if one considers the *Grinnell* factors, Putative Class Attorneys fail to justify the settlement.

1. This is not a "successful" settlement meriting positive consideration under *Grinnell.*

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

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

In *Murray*, the 1% ratio of recovery to alleged damages and a 3000-1 ratio of representative-to-individual recovery was enough to call the settlement untenable: "if the reason other class members get relief worth about 1% of the minimum statutory award is that the suit has only a 1% chance of success, then how could Murray personally accept 300% of the statutory maximum? And, if the chance of

success really is only 1%, shouldn't the suit be dismissed as frivolous and no one receive a penny?" 434 F.3d at 952. Here, the "success" of plaintiffs is abysmal failure of an even larger magnitude than the failure criticized in *Murray*, and representative plaintiffs are seeking $5000 rewards after winning less than a penny for the average class member. Plaintiffs are either breaching their fiduciary duties by selling the class short or are bringing an extortionate "strike suit" for their own selfish benefit. Neither should be condoned by approving the settlement or attorneys' fees. Because Plaintiffs cannot be said to have succeeded or justified the low value of the settlement relative to their original claims, and because Plaintiffs continue to insist that their case is meritorious, the first, third, fourth, fifth, sixth, seventh, and eighth factors of *Grinnell* count against the settlement.

2. The "reaction of the class to the settlement" was one of disdain.

The second *Grinnell* factor is the "reaction of the class to the settlement." Plaintiffs falsely claim that the settlement is approved of by the class. In reality, the "reaction of the class to the settlement" was one of disdain. Out of over 10 million class members, only 2,676, or under 0.03%, submitted claims. Given that over 99.97% of the class members will receive no benefit from the settlement, in part because the settlement creates legally irrelevant barriers such as "offense" to recovery, this factor weighs strongly against approval. True: only a handful of

people jumped through the hoops to submit an objection: no surprise, given the formal objection is quite expensive relative to the small sums at issue. Had the court reduced the barriers to objection by setting up a dedicated e-mail address to accept e-mailed objections, it would have been inundated with objections. Plaintiffs have made no effort to poll a representative sample of the ten million class members, and have no basis to claim that the class has a positive reaction to the settlement.

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

C. Without A Tenable Settlement Class, The Class Must Be Decertified.

As the District Court correctly noted, *McLaughlin v. American Tobacco Co.*, 522 F.3d 215 (2d Cir. 2008), precludes a finding that common issues predominate.

It is inconceivable that a consumer "offended and upset" by the Hot Coffee modification is unconcerned about the content on the replacement disc. Indeed, not a single named plaintiff indicates in their deposition that they were not "offended

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

> Q: Would you have purchased the game for your son if you knew that part of the game entails entering into an adult novelty store?
> A: No.
>
> *See also id.* at 66 *ff.*

Individualized issues include, *inter alia*, to what extent consumers relied upon the ESRB rating (many purchases were pre-orders made before the ESRB decision), to what extent the presence of downloadable content was material (every named plaintiff who has been deposed has acknowledged that they were offended and unaware of the game's content), and damages (many consumers voluntarily chose to modify their game with the additional content, and thus were better off by its presence). Only through the *Amchem* analysis of a settlement class do Putative Class Attorneys have any conceivable argument that a class could be certified. But even under the *Amchem* analysis, the Putative Class Attorneys and the named

plaintiffs have failed to provide adequate representation to the majority of the class, meriting decertification as a matter of law.

II. Putative Class Attorneys Have Failed To Provide Adequate Representation To The Majority Of The Class.

A. Putative Class Attorneys Ensured That The Majority Of Class Members Could Not Recover.

Though the defined class is all GTA purchasers, a class that consists of millions of adults who play the game because they enjoy its over-the-top satiric escapism, the only GTA purchasers eligible for cash settlement were those who were "offended and upset" by the availability of a Hot Coffee modification. But Plaintiffs give no legal or factual reason why class members who were "offended and upset" should be treated any differently than the vast majority of class members given that being "offended and upset" is not a distinguishing ground for recovery under the relevant consumer fraud statutes, and that there was no hope of a class certification on the highly individualized claim of intentional infliction of emotional distress.

Plaintiffs have made no showing and can make no showing that the claims of one sub-class are legally stronger than the claims of the vast majority of the class. Because the settlement was gerrymandered to favor the named class plaintiffs, the vast majority of the class was effectively unrepresented, making the settlement

inherently indefensible given the disparate treatment of class members with identical claims that plaintiffs claim merit class certification. *In re Joint Eastern and Southern Dist. Asbestos Litig.*, 982 F.2d 721, 741-43 (2d Cir. 1992) (decertifying class under Rule 23(a)(4) because of conflicts of interest between different segments of class), *modified on reh'g on other grounds sub nom. In re Findley*, 993 F.2d 7 (2d Cir. 1993); *Mirfasihi*, 356 F.3d at 786.

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

Putative Class Attorneys have never justified why they needed twelve private law firms in ***addition*** to the government agencies conducting discovery to litigate this action. Class representatives acting for the benefit of the class rather than the benefit of the attorneys would have insisted on paring down this redundancy. Two or three firms would be required at most. The very fact of twelve law firms demonstrates that the class representatives cannot meet the Rule 23(a)(4) standard.

C. Putative Class Attorneys Also Fail Rule 23(a)(4) By Bringing A Socially Wasteful Lawsuit.

The injunctive relief sought by Putative Class Attorneys is pointless. Any teenager with the technical sophistication to download and install a highly pixellated sex scene with computer drawings will have a much easier time viewing any of the hundreds of thousands explicit pornographic videos and photos available on the

Internet featuring real people—or simply looking up various sex acts and body parts on Wikipedia. (Indeed, video of the decidedly unerotic Hot Coffee sequence itself is readily available on Youtube.)

The objector, like the vast majority of class members who did not file claims, receives consumer surplus from his purchase and enjoyment of Take-Two videogames such as GTA. Self-dealing settlements like those of Putative Class Attorneys raise the costs to Take-Two of producing videogames, and raise prices to class members like Frank without concomitant benefits, thus reducing their consumer surplus. Consumer welfare would be improved if courts rejected such settlements and deterred socially inefficient rent-seeking litigation.

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

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

In *Masters v. Wilhemina Model Agency, Inc.*, 473 F.3d 423 (2d Cir. 2007), the Second Circuit address the distribution of *cy pres* awards, rejecting as an abuse of discretion the trial court's awarding a common fund to third parties. The Second

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

The lessons of the Class Action Fairness Act ("CAFA") apply to more than just coupons. As CAFA itself states, a concern of Congress in enacting the statute is that "counsel are awarded large fees, while leaving class members with coupons ***or other awards of little or no value***." Pub.L. 109-2, § 2(a)(3)(A) (emphasis added); *Synfuel Tech. v. DHL Indus., Inc.*, 463 F.3d 646, 654 (7th Cir. 2006); Jeffrey S. Jacobson, *Defining "Coupon" Under the Class Action Fairness Act*, Product Liability Law 360, Jan. 15, 2008. This case, offering a settlement of "little or no value" to the class, is squarely within the concern of CAFA. It is perfectly appropriate to omit noncash compensation to the class when considering the fairness of the settlement or the calculation of a reasonable fee. *E.g., Silberblatt v. Morgan Stanley*, 2007 WL 4145403 (S.D.N.Y. Nov. 19, 2007).

Cy pres awards to third parties are poor public policy, create conflicts of interest and unseemly political lobbying of judges by third-party charities, and are a means for plaintiffs' attorneys to exaggerate the benefit to the class. Theodore H.

Frank, *Cy Pres Settlements*, Class Action Watch, March 2008 at 1; Adam Liptak, "Doling Out Other People's Money," *New York Times* (Nov. 26, 2007). As such, the determination of whether a settlement is fair, adequate, or reasonable settlement under Rules 23(e) and 23(h) should not include attorneys' fees based on *cy pres* awards to third parties except when explicitly authorized by the legislature.

To the extent this court reads *Masters* as requiring a court to use a *cy pres* award to a third party to justify the reasonableness of the settlement and of the attorneys' fees, even when the *cy pres* award does not benefit the class, there is a circuit split, as the Seventh Circuit has repeatedly explicitly held that *cy pres* awards are not to be construed as a benefit to the class. *Murray v. GMAC*, 434 F.3d at 952; *Crawford v. Equifax Payment Services, Inc.*, 201 F.3d 877 (7th Cir. 2000). *Masters* does not cite or consider these cases, or the circuit split it may have created, and Frank raises the good-faith argument to preserve this issue for further appeal.

CONCLUSION

The Putative Class Attorneys have brought either (1) a meritorious case that is being settled for an infinitesimal fraction of the case's real value in a "sellout" of the attorneys' and class representatives' fiduciary duties to the class, or (2) a meritless lawsuit where the "class device had been used to obtain leverage for one

person's benefit." *Murray*, 434 F.3d at 952. In either instance, the Putative Class Attorneys' actions should be deterred, rather than rewarded; the court should reject the settlement as a matter of law for failing to comply with the requirements of Rule 23(a)(4) and Rule 23(e).

Without a settlement class, *Amchem* provides no protection to the decertification decision, which is on all fours with *McLaughlin*. Moreover, the Putative Class Attorneys flunk Rule 23(a)(4), and the class decertification can be upheld on that alternative ground.

Dated: August 4, 2009

Respectfully submitted,

/s/Theodore H. Frank
Theodore H. Frank, *in pro. per*.
1718 M. Street NW
No. 23-6
Washington, DC 20036
Tel: (703) 203-3848
E-mail: tedfrank@gmail.com

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, I certify that, according to the word-count feature of the word processing program, this brief contains 4244 words and therefore is in compliance with the type-volume limitation set forth in Rule 32(a)(7)(B).

/s/Theodore H. Frank
Theodore H. Frank, *in pro. per*.

ANTI-VIRUS CERTIFICATION FORM

Second Circuit Local Rule 32(a)(1)(E)

Case Name: In re *Grand Theft Auto Video Game Consumer Litigation (No. II)*
Docket Number: 09-1572-cv

I, Theodore H. Frank, certify that I have scanned for viruses the PDF version of Brief Of Plaintiff-Objector-Appellee Theodore H. Frank dated August 4, 2009 that was submitted in this case as an email attachment to civilcases@ca2.courts.gov and prosecases@ca2.uscourts.gov and that no viruses were detected. The name of the anti-virus detector I used was Symantec Norton Internet Security Version 10.2.0.30.

Dated: August 4, 2009

Respectfully submitted,

/s/Theodore H. Frank
Theodore H. Frank, *in pro. per.*

PROOF OF SERVICE

I declare that:

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

On August 4, 2009, I served the attached:

BRIEF OF PLAINTIFF-OBJECTOR-APPELLEE THEODORE H. FRANK

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

Andrew P. Bell, Esq.
LOCKS LAW FIRM PLLC
747 Third Avenue
New York, New York 10017

Jeffrey S. Jacobson, Esq.
Debevoise & Plimpton LLP
919 Third Avenue
New York, NY 10022

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

Executed on August 4, 2009.

/s/Luci Hague
Luci Hague