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 FOR PLAINTIFF-APPELLANTS

LOCKS LAW FIRM PLLC
747 Third Avenue
New York, New York 10017
(212) 838-3333

-and-

KLAFTER, OLSEN & LESSER LLP
Two International Drive
Rye Brook, New York 10573
(914) 934-9200

Attorneys for Plaintiffs-Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes, Rules & Other Authorities:

Appellants-Plaintiffs Brenda Stanhouse, Rose Goldfine, Robert Samario, Susan Carlson, Florence Cohen, Cindy Casey, and John Robinson ("Plaintiffs"), on behalf of the class decertified in the district court's order entered on July 31, 2008 (the "Order", SPA-1 – SPA59) (Kram, *J.*), respectfully appeal from and seek reversal of that Order on the grounds that the lower court erred in its evaluation of a proposed settlement class under Federal Rule of Civil Procedure 23(b)(3) without taking into consideration the settlement nature of the class and in ruling that a multistate class' claims for violation of state consumer fraud, breach of implied warranty of merchantability and unjust enrichment claims were uncertifiable.

JURISIDCTION

The Court has jurisdiction over this appeal by virtue of its order dated April 15, 2009, which granted, pursuant to Rule 23(f) of the Federal Rules of Civil Procedure, Plaintiffs' Petition for review of the district court's decertification of a proposed settlement class.

STATEMENT OF ISSUES PRESENTED

Whether in the context of approval of a settlement class, is the predominance requirement of Rule 23(b)(3) of the Federal Rules of Civil Procedure satisfied when the proposed settlement eliminates any individualized issues that otherwise may exist, where notice has been

adequately provided to the settlement class, and where the putative settlement class members have all fully submitted completed claim forms with evidence of their consumer purchases, thereby rendering the settlement claims process complete.

STATEMENT OF THE CASE

The present putative class action lawsuits were filed in various federal courts in 2005 and 2006 after it became publicly known that a popular video game, *San Andreas*, in the video game series *Grand Theft Auto* contained code that contained a mini-sex game, thereby leading to public outcry and reclassification of the game by the Entertainment Software Ratings Board ("ESRB") from "M" (mature) to "AO" (adult oriented). *See* pages 10-11, below. In addition to the class action lawsuits, the City of Los Angeles filed a fraud action on behalf of Los Angeles citizens. On February 13, 2006, the Judicial Panel on Multidistrict Litigation coordinated and consolidated the litigation for pretrial purposes as the present proceeding, *In re Grand Theft Auto Video Game Consumer Litigation (II)*, MDL 1739.

On June 7, 2006, Plaintiffs filed a Consolidated and Amended Complaint in the MDL proceeding. It set forth four causes of action:

1. Unfair and Deceptive Trade Practices Under State Law
2. Breach of Implied Warranty

3. Unjust Enrichment

4. Violation of the Song-Beverly Act, California Civil Code, §1790, *et. seq.*

The MDL proceeded swiftly. Defendants moved partially to dismiss on July 31, 2006 (Docket No. 21), which was denied on October 25, 2006 (Docket No. 33). Discovery then proceeded through the summer and fall of 2006. On January 24, 2007, Plaintiffs filed a motion for class certification (Docket No. 60, CA-1 – CA-59), to which Defendants responded on June 8, 2007 (Docket No. 86, A-32 – A-87). In that motion, among other things, Plaintiffs argued that pursuant to choice-of-law principles, New York's unjust enrichment law could apply nationwide to the cause of action for unjust enrichment and the cause of action for consumer fraud/uniform deceptive acts and practices, or, in the alternative, these claims could be handled on a subclass basis with the named representatives representing the respective groups of states within each subclass that would be created based upon the similarity of the states' substantive law, and also that appropriately drafted jury interrogatories can be utilized (either as to the multistate consumer fraud class or subclasses of the same). (CA-35 - CA-48). Similarly, subclassification could be used for the breach of implied warranty claims and the California's Song-Beverly Act claim. (CA-49).

While the motion was being briefed, and using the services of Magistrate Judge Dolinger, the parties mediated the case. After many months of mediation, both before the Judge and between themselves, the parties ultimately reached a comprehensive settlement. The settlement included four (4) tiers of cash payments to consumers depending on what form of proof of purchase they had and/or whether they still possessed the game (the original proof of purchase was not an insignificant requirement to obtain near to full restitution because, by the time of the settlement, the game itself could be purchased for a few dollars in stores and on the internet). Thus, the settlement provided for the following forms of relief: (1) up to 75% refunds for those individuals who could demonstrate they purchased the game prior to the date if was re-rated to "AO" (*i.e.*, July 20, 2005); (2) up to 35% refunds to those individuals who exchanged the game disc and provided a generalized proof of purchase (*i.e.*, credit card statement or cancelled check payable to a known retailer of the game), together with an attestation that the game had been purchased on the date shown on the statement or check; (3) $10 to those individuals who exchanged the game disc and provided appropriate attestations; and (4) $5 to those individuals who only provided appropriate attestations. In effect, any class member who had no proof of purchase whatsoever could – on the Internet – obtain $5.00

by electronically swearing that they had purchased the game. (*See* A-138). Plaintiffs believed such a settlement, providing up to 75% recompense for those who could prove purchase and which provided an exchange of the "AO" game disc for a new "M" disc without any of the "Hot Coffee" computer code, represented an exceedingly favorable consumer class action result.

Furthermore, the settlement contained a minimum payout by the settling companies of $1,025,000.00, wherein, if the value of the class claims made fell below this settlement "floor," the remainder would be distributed to a mutually agreed upon non-profit entity or entities. The City of Los Angeles agreed to resolve its case based upon this proposed settlement, which it believed was an eminently fair and reasonable one to the consumers it sought to represent on a *parens patriae* basis. Thus, the completion and approval of this settlement would resolve all the litigation commenced as a result of the "Hot Coffee" controversy.

On December 4, 2007, the district court granted preliminary approval, certified the settlement class and ordered that notice be disseminated. (Docket No. 109). Notice was effectuated through a large publication campaign, direct emailing, online notice and web postings. Claims were submitted by settlement class members and game discs were returned for

exchange. Four objections were received, the only substantive one of which came from an avowed tort reformer who objected to the idea that anyone could have been offended by the Hot Coffee scenes or could assert a claim. *See* Docket No. 132, A-287 – A-293. None of the objections raised the issue and matter now on appeal: the propriety of a settlement class under Rule 23(b)(3).[1]

After a final approval hearing on June 25, 2008, District Court Judge Shirley Wohl Kram issued the Order under review which de-certified the Settlement Class because the court concluded that the class could not meet the predominance requirement of Rule 23(b)(3). (SPA-10). The district

[1] Admittedly, the objectors also argued (as to the settlement's adequacy) that few claims (*i.e.*, 4,073) were received and that the direct total pay-out to class members under the settlement would be but a small fraction of the settlement's overall value. This was true, but it also the case that the parties to the settlement were concerned with the possibility of a large number of claimants and claims (hence the strenuously negotiated settlement cap of $2.75 million), and that because the number of claims that might be submitted was unknown, the settlement provided for the floor of $1.025 million pursuant to which the settlement would have provided for a remainder payment of approximately $860,000 to the National PTA and the ESRB. Plaintiffs' counsel believe the low claims rate resulted from the time that elapsed between the publicity and outrage that had been expressed as to the sex scenes and the time the settlement was effectuated (which occurred, despite an expeditious MDL proceeding, over two years after the game had been released). The objectors also objected to the request for payment of attorneys' fees. Irrespective, the objections and fairness and adequacy of the settlement under a Rule 23(e) analysis were not fully reached by the lower court's decertification Order.

court (not reaching the fairness and adequacy of the settlement) ruled as a matter of law that a multistate consumer fraud, breach of implied warranty and unjust enrichment class action lawsuit could not be settled on a multistate basis (notwithstanding the many such settlements that courts have time and again approved, *see* below at pages 28-31). Specifically, the court ruled that the settlement context of the proposed class only impacted whether the case would present intractable trial management problems. (SPA-10, *see also* SPA-40, SPA-50). Aside from a choice of law analysis concluding that each state's law had to apply, the heart of the lower court's ruling was its finding, based upon *McLaughlin v. Amer. Tobacco Co.*, 522 F.3d 215 (2d Cir. 2008), that because issues of reliance were supposedly present under the consumer-protection law "of at least some of" the fifty states, predominance could not be demonstrated because of issues of individualized reliance. (SPA-11; *see also* SPA-36 - SPA-43) The lower court stated that this case was "on all fours" with *McLaughlin.* (*Id.*) The lower court also found "rife" other "substantial individualized issues" (*id.*) supposedly defeating predominance, particularly the requirement in some state consumer-fraud laws as requiring proof of "ascertainable loss" and the doctrine of unclean hands as to the claims for unjust enrichment. (SPA-43-SPA-45, SPA-51 - SPA-52) In its only recognition as to the implied

warranty claims, the lower court stated that privity requirements would bar such claims under the law of eighteen states. (SPA-54 – SPA-55).

This appeal, commenced by a petition under Rule 23(f), followed, with the Court granting the petition on April 15, 2009.

STATEMENT OF FACTS

In October 2004, Defendants brought to market a new version of their *Grand Theft Auto* video game series, *San Andreas*. While *San Andreas* was in development, Defendants' designers and programmers created a "game within the game" that contained scenes of pornography – including fellatio and intercourse. The player could control the movements and intensity of sexual activity of the game's male protagonist while he engaged in sex with female characters. The nature of the game within the game is captured by the following stills (*see* CA-14 – CA-15):


Push UP and DOWN in rhythm
LMB Change view
LSHIFT Change position
RETURN Quit
13:19
$00000374
EXCITEMENT:


Push UP and DOWN in rhythm
JOY2 Change view
JOY4 Change position
JOY1 Quit
09:29
$00000350
EXCITEMENT:
You the man! Oh yeah! You the man!

Defendants knew at the time that they were developing *San Andreas* that violence and misogyny in the *Grand Theft Auto* series was under scrutiny. In 2004, a United States federal court judge opined as to an earlier version of *Grand Theft Auto* that its "[g]raphic depictions of depraved acts of violence, such as the murder, decapitation, and robbery of women in [*Grand Theft Auto*] . . . fall well within the more general definition of obscenity." *Video Software Dealers Assoc. v. Maleng*, 325 F. Supp. 2d. 1180, 1185 (W.D. Wash. 2004) (*See also* CA-15). The elements to create the sex scenes – usually referred to as the "Hot Coffee" scenes – were inserted into the game by Defendants' programmers.

However, Defendants feared that at the time the game was to be submitted for approval to the private video games rating authority, the ESRB, the sex mini-games would cause the ESRB to assign the game an

"Adult Only" or "AO" rating – akin to an "X" rating for a movie – rather than a "Mature" or "M" rating – more akin to an "R" movie rating. (CA-16). This difference in ratings was critical to the marketing of the game because the vast majority of retailers, including the "big box" stores, such as Walmart and Toys 'R' Us, refuse to sell "AO" games. (CA-16). As was uncontested, an "AO" game is not as merchantable as an "M" game. Defendants' programmers were, therefore, told to remove the sex games from the gameplay, which they did by not actually delete the code, but by blocking it off so that it would not be normally accessible during gameplay. The code, however, remained on the discs of the game as it was presented to ESRB which, not knowing of the content, gave the game an "M" rating in September 2004. (CA-17). Inasmuch as the "Hot Coffee" code was not part of the game as it was played (but remained on game discs), to access the content and play the sex minigames, one had simply to apply a "modification" or "mod" in the personal computer version of the game or utilize a commonly available "cheat device" to modify the console versions of the game. (CA-17 – CA-18).

Likewise, the code for the sex scenes remained on the *San Andreas* game discs that were shipped to the public when the game was released in

October 2004. The game sold exceedingly well, and Defendants obtained over a quarter of billion dollars of revenue from it. (CA-16).

After the game's release, the existence of the sex minigames was discovered and a "mod" became widely available over the internet to enable players to gain access and play the minigames. Controversy arose publicly, including in Congress. As the public scrutiny grew, the ESRB, in turn, commenced an investigation. After its review, the ESRB concluded that "the sexually explicit content exists in a fully rendered, unmodified form on the final discs of all three platform versions of the game (*i.e.*, PC CD-ROM, Xbox, and PS2), that Defendants improperly failed to submit this content to the ESRB when the game was rated, and that due to the scenes' existence and the widespread availability of the 'mod', that the 'M' rating of *San Andreas* was revoked and that the game would thereafter be rated 'AO'." (*See* CA-20- CA-22).

Following the controversy, the lawsuits now at issue were commenced by consumers who were alleged defrauded. 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. (CA-23). 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. (CA-23). 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. (CA-23). 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. (CA-23). Plaintiff John Robinson is a resident of Pennsylvania who purchased *San Andreas* in or around 2004 as a gift for his son. (A-101). Plaintiff Florence Cohen is a resident of New York who purchased *San Andreas* for her minor teenage grandson in or about late 2004. (A-101).

In short, these consumer plaintiffs were all individuals who had purchased for their children as gifts (such as for Christmas) a video game containing the sex scenes and depictions illustrated above – even if difficult to access and view. This they found offensive and believed that the conduct

constituted consumer fraud, breach of implied warranty of merchantability and unjustly enriched defendants, the claims asserted in the litigation.

SUMMARY OF ARGUMENT

The district court, after preliminarily approving the class settlement and after settlement class members submitted claims for money and game discs for exchange, rejected a proposed class action settlement by denying final approval solely because the court concluded that common issues did not predominate over individual issues. After two years of litigation, after an arduous negotiation process and after full and complete notice to the putative class, the district court's decision imposed a requirement that, jurisprudentially, makes no sense and wars with class jurisprudence, particularly the United States Supreme Court's explicit holding in *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997), that "settlement is relevant to class certification" (521 U.S. at 619), and also with the Federal Rules of Civil Procedure dictate that the Rules (necessarily including Fed. R. Civ. P. 23) "should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding." Fed. R. Civ. P. 1.

For very practical and jurisprudential reasons, in the class settlement context the predominance requirement should not prevent an otherwise

negotiated and noticed class action settlement from being approved where, at least here, the settlement does not adversely impact the rights of absent class members in a prejudicial manner.[2]

The district court's Order, if undisturbed, would effect a sea change in Rule 23 jurisprudence by its essential conclusion that Rule 23's predominance requirement cannot be met in any settlement class of a multistate consumer class action brought under state consumer protection

---

[2] Notably, just over a month ago, May 20, 2009, the American Law Institute ("ALI") approved, after several years in development, the Principles of the Law of Aggregate Litigation. Section 3.06 is entitled Approval of a Settlement Class and its subsections (a) and (b) provide:

> (a) In any case in which the parties simultaneously seek certification and approval of the settlement, the case need not satisfy all of the requirements for certification of a class for purposes of litigation, but instead need satisfy only the requirements of subsections (b) and (c) of this Section.
>
> (b) Subject to subsection (c) of this Section [not applicable to the present appeal], a court may approval a settlement class if it finds that the settlement satisfies the criteria of § 3.05, and it further finds that (1) significant common issues exist, (2) the class is sufficiently numerous to warrant classwide treatment, and (3) the class definition is sufficient to ascertain who is and who is not included in the class. **The court need not conclude that common issues predominate over individual issues.**

American Law Institute, *Principles of Aggregate Litigation* (Final Draft, Approved May 20, 2009) at § 3.06 (Emphasis supplied). The concerns that underlay this Principle of Aggregate Litigation, as developed by the ALI, should be given careful consideration by this Court.

laws, notwithstanding years of precedent to the contrary by state and federal courts. The same is true where, as here, claims asserted are for breach of implied warranty and unjust enrichment – claims that the lower court referred to only in passing and essentially to conclude that because the defendant might have had affirmative defenses to those claims, they could not be certified (*see* SPA-46, SPA-54 – SPA-55) – a conclusion at odds with fundamental class action jurisprudence recognizing that affirmative defenses are not necessary bars to certification. *See, e.g., In re Nassau County Strip Search Cases*, 461 F.3d 219, 225 (2d Cir. 2006) (holding that "so long as a sufficient constellation of common issues binds the class members together, variations in the sources and application of a defense will not automatically foreclose class certification") (quotation and cites omitted).

This recognition is particularly apposite in the settlement context where the defendant can waive defenses and no harm could possibly accrue to absent members of the settlement class when a defendant does so. In effect, just as this Court has recognized that individual damage determinations need not defeat class certification because of the class action management tools available to a district court, in a settlement context the trial management techniques that might otherwise exist to handle affirmative

defenses based upon causation or privity, cause the trial management issues to merge into the settlement itself.[3]

The district court in most substantial measure relied upon this Court's decision *McLaughlin v. American Tobacco Co.*, 522 F.3d 215 (2d Cir. 2008), and concluded that even though *McLaughlin* addressed certification issues for a litigation class under the federal RICO statute, the settlement context in this case made no difference to the predominance analysis. (SPA-10). This conclusion is contrary to the Supreme Court's recognition in *Amchem* that while the requirements of Rule 23(a) and 23(b) are not jettisoned in considering a proposed class action settlement, the fact of

---

[3] The now-classic formulation in this regard was set forth in the following much-quoted language from *In re Visa Check/Mastermoney Antitrust Litig.*, 280 F.3d 124, 141 (2d Cir. 2001):

> [t]here are a number of management tools available to a district court to address any individualized damages issues that might arise in a class action, including: (1) bifurcating liability and damage trials with the same or different juries; (2) appointing a magistrate judge or special master to preside over individual damages proceedings; (3) decertifying the class after the liability trial and providing notice to class members concerning how they may proceed to prove damages; (4) creating subclasses; or (5) altering or amending the class.

As the First Circuit (among others) has recognized, these words fully apply to the handling of affirmative defenses. *Smilow v. Southwestern Bell Mobile Sys, Inc.* 323 F.3d 32, 39-40 (1st Cir. 2003) (citing *id.*).

"settlement is relevant to a class certification" and whether the Rule 23 requirements are met.

In this case, the existence of the settlement class does impact the Rule 23 predominance analysis because there will be no trial and class members have had the opportunity to make claims acceptable to the defendant (or to opt-out), and the individualized issues that a litigation class may have presented simply are not present. Many of the concerns that the lower court raised as defeating predominance – such as differences in states' laws concerning reliance or requirements for privity for implied warranty claims or the doctrine of unclean hands – do not effect the primary predominance concern – the cohesiveness of the settlement class itself, *Amchem*, 521 U.S. at 623 – but rather are potential defenses that the Defendants, having chosen to settle, no longer assert. To permit the Defendants' abnegation of defenses they may have had in a now non-existent litigation context to be a basis for denying the class the benefits of the class settlement would make neither legal nor jurisprudential sense.

Moreover, the claims here arose out of a unitary set of circumstances relating to a static number of class members causing them discrete economic injuries where the state law differences are not material to the core of the causes of action being asserted. This compares to the "enormously diverse

and problematic" kind of asbestos personal injury class that was at issue in *Amchem*, 521 U.S. at 622 n.17, where the varying state law claims presented a full range of differing types and extents of injuries and causes of action (including both personal injury and economic forms of claims sounding tort, contract, successor liability and the like encompassing physical harm, emotional distress, consortium, medical monitoring, economic loss, survivorship, and so on).[4]

The decision below, by ending the possibility of a fair, reasonable and adequate class action settlement, far from protecting and aiding the class, did a disserve to the class, the parties and the judicial system as a whole.

ARGUMENT

I. The Lower Court Failed to Accord Any Significance to The Fact That The Class Was A Settlement Class And The Court's Ruling is Contrary That of Numerous Other Courts That Have Recognized That Choice of Law Concerns, Reliance and Affirmative Defenses Should Not Defeat Certification of Cases For Settlement Purposes.

In order to certify a class, even a settlement class, the requisite elements of Rule 23(a) and (b), depending on the form of the class, must be met. *Amchem*, 521 U.S. at 620. The district court in this case believed that

[4] Absent class member's rights were not deprived of protection with this settlement but, if anything, were promoted by the settlement's requirement for payment of the remainder to a non-profit entity or entities should participation in the settlement fall below a negotiated floor.

to mean that – aside from trial manageability – the Rule 23 requirements must be applied as strictly and without regard to the settlement context as though the case was to continue to be litigated. (SPA-10).[5]

In *Amchem*, however, the Supreme Court recognized that "settlement is relevant to a class certification." 521 U.S. at 619. And while the Court specifically stated that trial manageability was not a concern, the Court's decision did not limit the relevance of settlement to that single aspect. Indeed, the Court twice stated that "[s]ettlement" is "a relevant factor" and it made it clear that settlement was a matter to be considered as part of the Rule 23 analysis. 521 U.S. at 619, 620 n.16 ("Settlement, though a relevant

[5] If litigation classes can be certified on a nationwide basis for litigation classes asserting consumer fraud and unjust enrichment claims (and they can), then, *a fortiori*, a settlement class can be so certified. *See, e.g., In re Mercedes-Benz Tele Aid Contract Litig.*, 257 F.R.D. 46 (D.N.J. 2009) (certifying, pursuant to a choice of law analysis, nationwide class for litigation purposes for consumer fraud statutory claims and for unjust enrichment and rejecting challenges to such certification based upon issues of reliance and ascertainable loss); *In Re Pharmaceutical Industry Average Wholesale Price Litig.*, 233 F.R.D. 229 (D. Mass. 2006) (certifying nationwide statutory consumer fraud class), and 230 F.R.D. 61 (D. Mass. 2005)(same); *Steinberg. v. Nationwide Mutual Ins. Co.*, 224 F.R.D. 67 (E.D.N.Y. 2004) (certifying nationwide contract class).

The issue presented for appeal, however, relates to the settlement class certification and so we will not address or repeat the various bases upon which the classes were sought to be certified prior to the settlement. *See* original Memorandum of Law in Support of Plaintiffs' Motion for Class Certification, (CA-1 – CA-59) (setting forth Plaintiffs' argument that a national litigation class should be certified). Of course, the Defendants did not agree. *See* A-32 – A-87.

factor, does not inevitably signal that class certification should be granted more readily than it would were the case to be litigated."). The Court recognized that the "other specifications" of Rule 23 had to be met, particularly those specifications "designed to protect absentees by blocking unwarranted or overbroad class definitions" which "demand undiluted, even heightened, attention in the settlement context." *Id.* at 620; *see also id.* at 620 n.16 ("proposed settlement classes sometimes warrant more, not less caution on the question of certification.").

As the rest of the *Amchem* decision made clear, the Rule 23 specifications designed to protect absentees were plainly not met in the context of the *Amchem* settlement which presented "a class so enormously diverse and problematic" as to be uncertifiable under any standard. It was a settlement class more "sprawling" than any other the Court had its "attention" called to. *Id.* at 624. The *Amchem* class would have released all the asbestos injury claims for tens of thousands of tort claimants against multiple defendants arising out of exposures "to different asbestos-containing products, for different amounts of time, in different ways, and over different periods." *Id.* at 623 (quoting lower court decision). The injuries were varied: "[s]ome class members suffer no physical injury or have only asymptomatic pleural changes, while others suffer from lung

cancer, disabling asbestosis or from mesothelioma" and there were different forms of relief that "exposure-only" and manifested injury individuals." *Id.*

On top of those variegated injuries and claims were the fact that the claims being released arose under plainly different tort law regimes of dozen states and, as the Court made even more fully apparent, the differences in the nature of claims from present-damaged and "future" injured individuals, a concern which adversely impacted the adequacy of the class representatives (a concern not even vaguely applicable in the present case). *See id.* at 624-27. Accordingly, there was no common coherent thread to the settlement class and the proffered thread put forward by the settlement's proponents – exposure to asbestos – could not suffice: "[g]iven the greater number of questions peculiar to the several categories of class members, and to individuals within each category , and the significance of those uncommon questions, any overarching dispute about the health consequences of asbestos exposure cannot satisfy the Rule 23(b)(3) predominance standard." *Id.* at 624. In other words, the claims the "class" had in *Amchem* were materially different in nature, scope, manifestation and impact, both factually and legally, and therefore the protections to absentee class members – what the Supreme Court flagged as the paramount consideration – could not be met.

The present settlement and case is entirely different, and indeed, the very kind of case – a consumer fraud class action –which the Supreme Court in *Amchem* noted is where predominance is most likely to be met. *See Amchem*, 521 U.S at 625 ("[p]redominance is a test readily met in certain cases alleging consumer … fraud….") (citing Adv. Comm. Notes, 28 U.S.C. App. at 697). In this case, none of the factual differences that were a concern in *Amchem* are present. The alleged injuries that consumers suffered by virtue of the inclusion of the "Hot Coffee" code in *San Andreas* were discrete in time and nature and were solely economic in nature. While it is rare indeed that all class members in any class action are identically situated, the differences between the claimants and the claims in this litigation were not materially different in such a way as to create absentee class members whose rights were adversely impacted by an overbroad class. To the contrary, the settlement provided a mechanism whereby all class members could obtain up to 75% of their total cost for the game and even provided approximately 10% damage recovery for individuals who had not proof whatsoever of purchase but who would attest to it. Additionally, any class member could obtain an exchange of the game disc containing the "Hot Coffee" scenes for a disc in which the "Hot Coffee" computer code was completely removed.

The district court literally ignored the settlement context and the nature of the case and attributed them no relevance whatsoever in the predominance analysis. There are several reasons why, at least in a consumer case of this sort, the settlement context must be taken into consideration and why the issues raised by the district court – the differences between the state consumer laws and issues of reliance – do not and should not foreclose a finding of predominance for a settlement class.

First, while the mere fact of settlement alone cannot provide cohesiveness (or else, the Supreme Court noted in *Amchem*, a common interest in settlement would strip predominance of "any meaning", 521 U.S. at 623), where a class is effectively asserting a single form of injury (economic injuries sounding in fraud and/or warranty) arising out of a discrete set of facts (as here), then a recognition should apply that the core injurious situation can constitute a predominate injury and claim so that settlement, by providing economic redress, can be a factor not to be ignored in determining predominance. While phrased in terms of superiority, the following explanation by Judge Richard Posner captures the predominant nature of the interest in resolution that cannot be denied in a consumer case: "The realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30. But a

class action has to be unwieldy indeed before it can be pronounced an inferior alternative – no matter how massive the fraud or other wrongdoing that will go unpunished if class treatment is denied – to no litigation at all." *Carnegie v. Household Intern., Inc.*, 376 F.3d 656, 661 (7th Cir. 2004). That is why certification of consumer class actions – especially where a settlement class is proposed – should be encouraged, rather than treated as an exceptional circumstance. *See, e.g., Watkins v. Simmons and Clark, Inc.*, 618 F. 2d 398, 404 (6th Cir. 1980) (class action certifications to enforce compliance with consumer protection laws are "desirable and should be encouraged."); *accord* H. Newberg & A. Conte, *Newberg on Class Actions* § 21.30, pp. 533-34 (4th ed. 2002) ("The desirability of providing recourse for the injured consumer who would otherwise be financially incapable of bringing suit and the deterrent value of class litigation clearly render the class action a viable and important mechanism in challenging fraud on the public.").

This is also plainly why so many courts – including multiple circuit courts – have (until the ruling below) adhered to *Amchem's* rule, found predominance, and upheld settlement class certifications of consumer

protection class actions despite the issues (such as reliance or choice of law) raised by district court.[6]

Second, the claims in a consumer case such as this one are, as noted, cohesive and the settlement in a class promotes efficiency – the two concerns most often recognized to underlay the predominance requirement. *See Amchem*, 521 U.S. at 623 (predominance tests "whether proposed classes are sufficiently cohesive to warrant adjudication by representation.") (citing 7A C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 1777, pp. 518-19 (2d ed. 1986)); *Shaw v. Toshiba American Information Systems*, 91 F. Supp. 2d 942, 955 (E.D. Tx. 2000) ("The predominance requirement serves two functions. It assures a court

[6] *See, e.g.*, *Warfarin*, 391 F.3d at 528-29 (" DuPont's alleged deceptive conduct arose from a broad-based, national campaign conducted by and directed from corporate headquarters, and individual reliance on the misrepresentations was irrelevant to liability."); *Smilow v. Southwestern Bell Mobile Sys., Inc.*, 323 F.3d 32, 41 n.9 (1st Cir. 2003) ("[t]he core purpose of Rule 23(b)(3) is to vindicate the claims of consumers … whose individual claims would be too small to warrant litigation" and "[c]lasses such as this one that are made up of consumers are especially likely to satisfy the predominance requirement."); *In re Mex. Money Transfer Litig.*, 267 F.3d 743, 747 (7th Cir. 2001) ("Given the settlement, no one need draw fine lines among state-law theories of relief…. Many opinions, of which *Amchem* is one, [] give consumer fraud as an example of a claim for which class treatment is appropriate."); *Krell v. Prudential Ins. Co. of Am. (in Re Prudential Ins. Co. Amer.*, 148 F.3d 283, 314 (3d Cir. 1998)(approving certification of a nationwide consumer fraud class action citing *Amchem*); *see also* discussion in text immediately below.

that adjudicating related claims in a single proceeding will conserve resources and yield economies of scale…. Efficiency is the traditional focus of the predominance test and the distinctive justification for Rule 23(b)(3).")

Stated otherwise, predominance, at its core, tests whether the proceedings in the case will be diverted into numerous mini-trials or diversions that will come to swamp the proceedings – *i.e.*, will the individual issues predominate. With a settlement class both manageability and predominance merge since class members are able to obtain redress and there will be no trial. In addition, the need to try some causation issues encompassed in affirmative defenses (such as lack of reliance or unclean hands) merge into the settlement itself and need not be tried (although through trial management tools they possibly could be tried, as well). Accordingly, while the court reviewing a settlement must ensure that the settlement class has afforded protections to the absent class members, an application of the predominance requirement to do nothing more than to defeat the most efficient result possible – resolution of the litigation – would be perverse. This point is well captured by the lower court's insistence that some states' laws requiring privity for breach of implied warranty claims (SPA-54 – SPA-55) or proof of "ascertainable loss" defeats any predominance review. (SPA-44). By the very nature of a settlement, the

need to "prove" loss should be obviated since each and every person in the class has the opportunity to claim against the settlement fund. With a settlement class (assuming it is otherwise fair, reasonable and adequate to the entirety of a materially cohesive class), even the possibility of a swamping of the proceedings through reliance issues or proof of loss issues will not arise because there will be no further proceedings. To the contrary, efficiency will be promoted. The class will get paid. The litigation thereupon will be at end.

Thus, if it is true, as courts have routinely recognized, that the predominance factor is met where the issues that are "applicable to the class as a whole, [] predominate over those issues that are subject only to individualized proof." *Kerr v. City of West Palm Beach*, 875 F.2d 1546, 1558 (11th Cir. 1989)), then, paradigmatically, a settlement class moves towards meeting a predominance requirement and the focus should be on whether the class has been proposed in such a way as to have materially impacted the rights of absent class members and not have a focus on finding issues, howsoever limited in scope, to defeat the settlement. *See In re Serzone Prods. Liab. Litig.*, 231 F.R.D. 221, 240 (S.D. W.Va. 2005) (certifying nationwide consumer class: "Still yet, litigation of this matter presents individual issues such as causation and differing state laws. In the

context of the settlement, however, such issues are rendered irrelevant, allowing common issues to predominate."); *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1022-23 (9th Cir. 1998) (certifying nationwide class raising state consumer protection and warranty claims); *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 529-30 (3d Cir. 2004) (approving nationwide class settlement); *In re Lorazepam & Clorazepate Antitrust Litig.*, 205 F.R.D. 369 (D.D.C. 2002) (certifying nationwide settlement class); *In re Synthroid Mktg. Litig.*, 188 F.R.D. 295 (N.D. Ill. 1999) (same); *In re Cardizem CD Antitrust Litigation*, 218 F.R.D. 508 (E.D. Mich. 2003) (same); *In re Relafen Antitrust Litigation*, 231 F.R.D 52 (D. Mass. 2005) (same).

The district court found differences between the claims of the potential claimants and then elevated those differences to the point of barring the settlement class, without according a recognition that those differences did not materially impact the class's claims in a settlement context – *i.e.*, do not render the claims non-cohesive or harmful to the rights of segments of the class. The tail of some legal differences need not wag the dog of the commonality and core identicality of the claims being asserted. To the extent that any absent class member may have been differently circumstanced – such as being from a state where "ascertainable loss" was required under a state consumer protection law or a state where privity is

required for a claim of breach of implied warranty – the settlement here, far from abridging those rights (as might have occurred in *Amchem*) actually aided such individuals, not harmed them. In effect, the settlement enabled the Defendants to achieve closure, and in order to obtain that closure the Defendants gave up rights they might have had against the class members in an individual context. But, most certainly, the rights of those absent class members were not abridged.[7]

These are the kinds of considerations that explain why, until this case, court after court has found such issues as choice of law or reliance not to bar predominance in consumer class action settlements. *See Hanlon v. Chysler*, 150 F.3d 1011 (9th Cir. 1998) ("[T]he idiosyncratic differences between state consumer protection laws are not sufficiently substantive to predominate over the shared claims" held by the class members); *see also*

[7] It is the defendants' choice to abrogate certain defenses and it would be absurd to deny the class the benefits of a settlement because of such concerns, which, in all events, do not create a "predominance" lack of coherence with a settlement. *See In re Pharmaceutical Industry Average Wholesale Price Litigation*, 230 F.R.D. 61, 81-82 (D. Mass. 2005) ("Similarly, 'where common issues otherwise predominated, courts have usually certified Rule 23(b)(3) classes even though individual issues were present in one or more affirmative defenses,'"); *see also, e.g., In Re Nassau County Strip Search Cases*, 461 F.3d 219, 225 (2d Cir. 2006) (holding that "so long as a sufficient constellation of common issues binds the class members together, variations in the sources and application of a defense will not automatically foreclose class certification") (citation omitted).

Warfarin, 391 F.3d at 529-30 ("Appellants rely principally on the Seventh Circuit's decision in *In re Bridgestone/Firestone Inc.*, 288 F.3d 1012 (7th Cir. 2002)("*Bridgestone*"), a case involving the certification of a nationwide class alleging tort claims arising under the laws of all fifty states. However, *Bridgestone* is distinguishable from the instant matter because that case concerned certification of a class for purposes of litigation, not a class solely for purposes of settlement, which is at issue in this case. 288 F.3d at 1018. The difference is key.… We agree with the District Court that the fact that there may be variations in the rights and remedies available to injured class members under the various laws of the fifty states in this matter does not defeat commonality and predominance."); *In re Manufacturers Life Insurance Company Premium Litigation*, 1998 WL 1993385, *9 (S.D. Cal. 1998) (certifying nationwide class settlement: "The Court further finds that common questions predominate. The common factual and legal thread, again, is a nationwide scheme of deceptive sales practices. Any set of claims based on this alleged wrongdoing, whether brought under common law or under state-law consumer protection statutes, would sound mainly in fraud, breach of contract, and negligence--theories whose elements do not vary much from state to state."); *Siemer v. Associates First Capital Corp.*, 2001 WL 35948712, *26 (D. Az. 2001) ("The problems with individualized

proof of reliance are eliminated if the class action pursues only the consumer fraud (Count III), breach of contract (Count V), negligent supervision (Count VII) and unjust enrichment (Count VIII) claims.").

If permitted to stand, the Order would stand in distinct contrast to this body of jurisprudence, significantly discourage class action settlements, both in the consumer fraud context – and howsoever those claims are legally brought, whether under state uniform deceptive acts and practices statutes or for breach of warranties or for unjust enrichment – and beyond. The Order would also discourage the bringing of valid consumer fraud claims at all for small recoveries – certainly a result that was not intended by court admonitions that the requirements of Rule 23 be liberally construed, nor, indeed, by Congress's enactment of the Class Action Fairness Act of 2005 ("CAFA"). CAFA statutorily promised prompt recourse in the federal courts to people who seek redress, stating explicitly that "[t]he purposes of this Act are to (1) assure fair and prompt recoveries to class members with legitimate claims.…" *Morgan v. Gay*, 471 F.3d 469, 473 (3d Cir. 2006), *cert. denied*, __ U.S. __, 128 S. Ct. 66, 2007 U.S. LEXIS 10790 (2007). Since jurisdiction in the federal court in this case was based on CAFA, the Order would have formalistic, hypothetical concerns that are not even presented when a settlement is put forward, and would defeat that promise.

Here, because the notice and claims process in this case is complete, all unnamed class members have had the opportunity to participate in or reject the settlement (and proceed on their own as opt-outs), and the claimants that now make up the totality of the settlement class proposed (who have been identified, and are now "named") stand in *identical* postures.[8] If the court had conducted a proper predominance inquiry, it would have been readily apparent that the proposed class is "sufficiently cohesive." The class members, even if their claims or remedies (both statutory and at common law) have minor differences, the claims are fundamentally the same or "shared," and are not antagonistic. To the extent that choice of laws existed that might have prevented a litigation class from being certified, in this settlement such choice of law differences (*e.g.*, ascertainable loss, reliance, privity for implied warranty claims) redounded in favor of the settlement class, not in opposition to it. The fact that the class's reaction to the settlement was all-but unanimously in favor (and certainly not antagonistic to the settlement) underlines this. Cohesiveness,

[8] Under the settlement, even a consumer who had previously owned the game disc but had discarded it and had no surviving receipt was entitled to compensation. Furthermore, any consumer could obtain an exchange of the game disc, and indeed all consumers would benefit from the floor payment to the National PTA and the ESRB, a not insubstantial point given the low claims rate that existed.

as a jurisprudential matter, and in actual fact, existed with this settlement, and, predominance should have been found.

II. The District Court's Reliance Upon *McLaughlin* Is Misplaced

In addition to all the foregoing, the district court erred in expanding this Court's opinion in *McLaughlin* far beyond its facts and holding. To the extent that *McLaughlin* provides some guidance on issues of reliance and causation generally (SPA-37 n.23) – which Plaintiffs dispute – it fails to support decertification of the settlement class proposed in this action. The settlement class here, as defined and established through the claims process, does not have any of the multitude of problems the proposed non-settlement class in *McLaughlin* had.

First, the district court, ignoring the differences between civil RICO claims at issue in *McLaughlin* and the consumer fraud, implied warranty and unjust enrichment claims at issue here, essentially grafted a RICO-like reliance requirement onto all of Plaintiffs' claims. Such a requirement has nothing whatever to do with the implied warranty and unjust enrichment claims at all. But even as to the consumer fraud claims, there is no precedent for comparing "first-party" reliance under RICO (which never existed as an element of RICO under the United States Supreme Court's decision in *Bridge v. Phoenix Bond & Indemnity Co.*, 128 S. Ct. 2131

(2008), and the reliance required under a few states' consumer protection statutes.

This case's facts, rather than being comparable to those in *McLaughlin* (as the lower court believed), are more closely comparable to the facts in *Bridge*. In *Bridge*, defendants had misrepresented their statuses in county-administered lien auctions in order to acquire a greater share of properties that were allocated by the county. The Supreme Court held that the plaintiffs, even though they did not rely in the first instance on the defendants' misrepresentations, did state a proper RICO claim because the county had relied upon such representations, thereby satisfying any reliance requirement that may exist under civil RICO. 128 S. Ct. at 2141-45.

Similarly in this case, while individual consumers may not have relied in the first instance on the "M" rating affixed to *San Andreas*, the ESRB, which granted the rating, did rely on Defendants' misrepresentations about the content of the game discs. Additionally, big-box retailers such as WalMart and BestBuy relied upon the "M" rating in deciding whether to even stock the game. The record in the case was uncontroverted that AO ratings would not have been sold in the vast majority of retail outlets. In addition, after the pornographic content became known, the ESRB cited the existence of such content and the fact that it had not previously been

disclosed as part of its rationale for re-rating the game as "Adults Only." And once re-rated as "AO," the same retailers pulled all the game discs off their shelves and the game became unavailable and unmarketable. In fact, even Defendants' own witness admitted that sales of the game ceased after its rating was revoked and changed to "AO."

Thus, the claims in this case, to the extent that reliance is required, would come within the causation holding of *Bridge*, rather than the dicta in *McLaughlin*. Contrary to the district court's explanation that "the Supreme Court's decision in *Bridge* leaves unaffected the Second Circuit's discussion of reliance, as it impacts the predominance inquiry" (SPA-37 n.23), the fact that any reliance required *can* be proven on a classwide basis as to the ESRB and/or the retailers demonstrates that this supposed individual issue does not exist and that predominance of common issues prevails.

Further, the district court, perhaps recognizing that reliance is truly not at issue here, then, in the words of the *Bridge* Court, tried to create a "back-door" reliance requirement under a causation analysis. (*See* SPA-35 n.22, SPA-41 – SPA-42 ("[I]t appears that many states' consumer fraud statutes require proof of reliance or proof of reliance-mimicking causation elements.")). There no support set forth for this supposed "requirement," which is at odds with the simplified nature of consumer protections statutes,

which were intended to alleviate the difficulties proving common law fraud. And nothing in this Court's *McLaughlin* opinion indicates that any RICO reliance requirement (or any reliance requirement) can properly be applied across-the-board to "Little FTC Act" statutes, warranty claims, and equitable claims like unjust enrichment (which focus entirely on defendant's conduct). *McLaughlin* concerned a RICO case, nothing more, and RICO bears little resemblance to state consumer protection statutes.

Furthermore, the placement of undue burdens on putative class plaintiffs by using reliance and causation as bludgeons was rejected by the Supreme Court even in the RICO context where it cautioned against using but-for causation requirements as a wedge to then require individual reliance:

> [W]e see no reason to let [reliance] in through the back door by holding that the proximate-cause analysis under RICO must precisely track the proximate-cause analysis of a common law fraud claim. "*Reliance is not a generalized limitation on civil recovery in tort*; it 'is a specialized condition that happens to have grown up with common law fraud.'" That "specialized condition," whether characterized as an element of a claim or as a prerequisite to establishing proximate causation, simply has no place in a remedial scheme keyed to the commission of mail fraud, a statutory offense that is distinct from common-law fraud and that does not require proof of reliance." . . . *Petitioners' contention that proximate cause has traditionally incorporated a first-party reliance requirement cannot be reconciled with these authorities.*

Id. at 2141-2144 (citations omitted; emphasis added).

The district court here ignored this directive. Plaintiffs alleged two statutory claims and an equitable claim – none of which are common law fraud. To the extent that the district court believed these claims "sound in tort" (SPA-17, SPA-18 n.11, SPA-19), *Bridge* establishes that it is inappropriate to require a showing of reliance simply because causation may need to be established in some instances. Thus, the district court erred in treating causation and reliance the same for purposes of class certification. And in all events, as discussed, the nature of causation would be met by how defendant's wrongful acts permitted the game to be sold in the first place.

CONCLUSION

The Order below has, not without reason, received notice because of the manner in which it seeks to rewrite the jurisprudence of class action settlements. If left unchallenged, it would prevent multistate or nationwide settlements of many, if not most, consumer class actions. The court imposed a formalistic – unreal and hypothetical – set of concerns about predominance to upend a settlement that would have resolved this MDL, and the court did so contrary to the Supreme Court's *Amchem* recognition that the fact of settlement is a factor to be considered in evaluating a Rule 23 settlement class and contrary to established jurisprudence from other circuits rejecting the exact same issues the district court pointed to in its decision. The

decision, if left to stand, would only subject the parties in this litigation to possibly years of litigation that would unlikely achieve any better result for the plaintiff consumers. For all the reasons set forth above, Plaintiffs respectfully submit that the settlement class should be reinstated and the matter remanded to the district court to consider the fairness and adequacy of the settlement.

Date: July 7, 2009

Respectfully Submitted,

Andrew P. Bell (AB-1309)
LOCKS LAW FIRM PLLC
737 Third Avenue, 37th Floor
New York, New York 10017
(212) 838-3333 (tel)

Andrew P. Bell

On the Brief

Seth R. Lesser (SL-5560)
KLAFTER, OLSEN & LESSER LLP
Two International Place
Suite 350
Rye Brook, New York 10574
(914) 934-9200 (tel)

Seth R. Lesser

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
David Maher

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

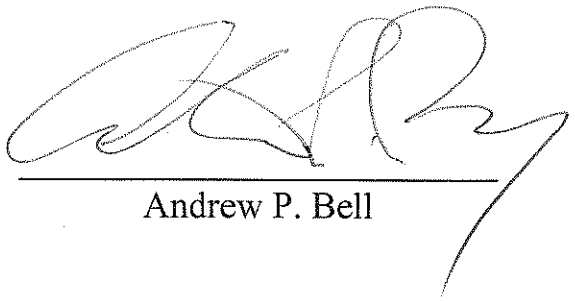
Brant Penney
E-1250 First National Bank Building
332 Minnesota Street
St. Paul, Minnesota 55101
(651) 287-2100

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

Attorneys for Plaintiffs-Appellants

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 8,776 words and therefore is in compliance with the type-volume limitation set forth in Rule 32(a)(7)(B).



Andrew P. Bell

ANTI-VIRUS CERTIFICATON FORM
Second Circuit Local Rule 32(a)(1)(E)

CASE NAME: *In Re Grand Theft Auto Video Game Consumer Litigation (No. II), MDL 1739*

DOCKET NUMBER: 09-1572-cv

I, Andrew P. Bell, certify that I have scanned for viruses the PDF version of the Brief of Plaintiffs-Appellants dated July 7, 2009; and the accompanying Affidavit of Service that was submitted in this case as an email attachment to civilcases@ca2.uscourts.gov. and that no viruses were detected. The name of the anti-virus detector that I used is Symantec Antivirus, version 10.1.4.4000.

Dated: July 7, 2009

LOCKS LAW FIRM, PLLC

By: _____
Andrew P. Bell

ATTORNEYS FOR APPELLANTS

STATE OF NEW YORK)
)
COUNTY OF NEW YORK)

ss.:

AFFIDAVIT OF PERSONAL SERVICE

I, John Laeri, being duly sworn depose and say, that deponent is not a party to the action, is over 18 years of age and am employed at the business address 747 Third Avenue, New York, New York 10017.

On July 7, 2009

Deponent served the within: **Brief of Plaintiffs-Appellants**

upon:

Jeffrey S. Jacobson, Esq.
Debevoise & Plimpton, LLP
Attorneys for Defendant-Appellee
919 Third Ave., 31st Floor
New York, New York 10022
Tel: (212) 909-6836

the attorney(s) in this action by delivering two (2) true copies thereof to said individual personally. Deponent knew this person so served to be the person mentioned and described in said papers as the attorney(s) herein.

Sworn to before me on July 7, 2009

NOTARY PUBLIC

ANDREW P. BELL
Notary Public, State of New York
No. 31-5015652
Qualified in Nassau County
Commission Expires August 16, 2009

JOHN LAERI