

LEXSTAT 1-1200 CACI 1200

Judicial Council of California Civil Jury Instructions (CACI)

© 2008 by the Judicial Council of California. All rights reserved. No copyright is claimed by the Judicial Council of California to the Table of Contents, Table of Statutes, Table of Cases, Index, or the Tables of Related Instructions.
 © 2008, Matthew Bender & Company, Inc., a member of the LexisNexis Group. No copyright is claimed to the text of the jury instructions, and verdict forms, directions for use, sources or authorities, or other Advisory Committee commentary, user's guide, life expectancy tables, or disposition table.

Series 1200 PRODUCTS LIABILITY

1-1200 CACI 1200

1200 Strict Liability-Essential Factual Elements

[*Name of plaintiff*] claims that [he/she] was harmed by a product [distributed/manufactured/sold] by [*name of defendant*] that:

[contained a manufacturing defect;] [or]

[was defectively designed;] [or]

[did not include sufficient [instructions] [or] [warning of potential safety hazards].]

New September 2003

Sources and Authority

- The Supreme Court has stated the doctrine of strict products liability as follows: "A manufacturer, distributor, or retailer is liable in tort if a defect in the manufacture or design of its product causes injury while the product is being used in a reasonably foreseeable way." (*Soule v. GM Corp.* (1994) 8 Cal 4th 548, 560 [34 Cal Rptr. 2d 607, 882 P.2d 298] , internal citations omitted.)
- "Strict liability has been invoked for three types of defects- manufacturing defects, design defects, and 'warning defects,' i.e., inadequate warnings or failures to warn." (*Anderson v. Owens-Corning Fiberglas Corp.* (1991) 53 Cal 3d 987, 995 [281 Cal Rptr. 528, 810 P.2d 549] .)
- The doctrine was originally stated as follows: "A manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being. ... The purpose of such liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves." (*Greenman v. Yuba Power Products, Inc.* (1963) 59 Cal.2d 57, 62-63 [27 Cal Rptr. 697, 377 P.2d 897] .)
- Strict products liability applies to manufacturers, distributors, lessors, and bailors. (*Price v. Shell Oil Co.* (1970) 2 Cal 3d 245, 251-252 [85 Cal Rptr. 178, 466 P.2d 722] .)

Secondary Sources

1-1200 CACI 1200

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1428-1437

California Products Liability Actions, Ch. 2, Liability for Defective Products, § 2.10 (Matthew Bender)

40 *California Forms of Pleading and Practice, Ch. 460, Products Liability, § 460.11* (Matthew Bender)

19 California Points and Authorities, Ch. 190, *Products Liability* (Matthew Bender)

LEXSTAT 1-1200 CACI 1205

Judicial Council of California Civil Jury Instructions (CACI)

© 2008 by the Judicial Council of California. All rights reserved. No copyright is claimed by the Judicial Council of California to the Table of Contents, Table of Statutes, Table of Cases, Index, or the Tables of Related Instructions.
© 2008, Matthew Bender & Company, Inc., a member of the LexisNexis Group. No copyright is claimed to the text of the jury instructions, and verdict forms, directions for use, sources or authorities, or other Advisory Committee commentary, user's guide, life expectancy tables, or disposition table

Series 1200 PRODUCTS LIABILITY

1-1200 CACI 1205

1205 Strict Liability-Failure to Warn-Essential Factual Elements

[*Name of plaintiff*] claims that the [*product*] lacked sufficient [instructions] [or] [warning of potential [risks/side effects/allergic reactions]]. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. That [*name of defendant*] [manufactured/distributed/sold] the [*product*];
2. That the [*product*] had potential [risks/side effects/allergic reactions] that were [known] [or] [knowable by the use of scientific knowledge available] at the time of [manufacture/distribution/sale];
3. That the potential [risks/side effects/allergic reactions] presented a substantial danger to users of the [*product*];
4. That ordinary consumers would not have recognized the potential [risks/side effects/allergic reactions];
5. That [*name of defendant*] failed to adequately warn [or instruct] of the potential [risks/side effects/allergic reactions];
6. That the [*product*] was used [or misused] in a way that was reasonably foreseeable to [*name of defendant*];
7. That [*name of plaintiff*] was harmed; and
8. That lack of sufficient [instructions] [or] [warnings] was a substantial factor in causing [*name of plaintiff*]'s harm.

[The warning must be given to the prescribing physician and must include the potential risks, side effects, or allergic reactions that may follow the foreseeable use of the product. [*Name of defendant*] had a continuing duty to warn physicians as long as the product was in use.]

New September 2003

Directions for Use

A fuller definition of "scientific knowledge" may be appropriate in certain cases. Such a definition would advise that the defendant did not adequately warn of a potential risk, side effect, or allergic reaction that was "knowable in light of the generally recognized and prevailing best scientific and medical knowledge available." (*Carlin v. Superior Court* (1996) 13 Cal 4th 1104, 1112 [56 Cal Rptr 2d 162, 920 P 2d 1347])

The last bracketed paragraph should be read only in prescription product cases: "In the case of prescription drugs and implants, the physician stands in the shoes of the 'ordinary user' because it is through the physician that a patient learns of the properties and proper use of the drug or implant. Thus, the duty to warn in these cases runs to the physician, not the patient." (*Valentine v. Baxter Healthcare Corp.* (1999) 68 Cal App 4th 1467, 1483 [81 Cal Rptr 2d 252])

Some cases state that product misuse must be pleaded as an affirmative defense. (See, e.g., *Williams v. Beechnut Nutrition Corp.* (1986) 185 Cal App 3d 135, 141 [229 Cal Rptr 605]) However, the advisory committee feels that absence of unforeseeable misuse is an element of plaintiff's claim and that foreseeable misuse is more properly asserted by defendant in support of a claim of contributory negligence. But see below:

- "[P]roduct misuse [is] a defense to strict products liability only when the defendant prove[s] that an unforeseeable abuse or alteration of the product after it left the manufacturer's hands was the *sole* reason that the product caused injury." (*Campbell v. Southern Pacific Co.* (1978) 22 Cal 3d 51, 56 [148 Cal Rptr 596, 583 P 2d 121] , internal citations omitted)
- "'Misuse' is a defense only when that misuse is the actual cause of the plaintiff's injury, not when some other defect produces the harm. This causation is one of the elements of the 'misuse' affirmative defense and thus the burden falls on the defendant to prove it." (*Huynh v. Ingersoll-Rand* (1993) 16 Cal App 4th 825, 831 [20 Cal Rptr 2d 296] , internal citation omitted.)

Sources and Authority

- "[A] manufacturer or a supplier of a product is required to give warnings of any dangerous propensities in the product, or in its use, of which he knows, or should know, and which the user of the product would not ordinarily discover." (*Groll v. Shell Oil Co.* (1983) 148 Cal App 3d 444, 448 [196 Cal Rptr 52] , internal citations omitted)
- "Even though the product is flawlessly designed and manufactured, it may be found defective within the general strict liability rule and its manufacturer or supplier held strictly liable because of the failure to provide an adequate warning." (*Persons v. Salomon N. Am.* (1990) 217 Cal App 3d 168, 174 [265 Cal Rptr 773] , internal citations omitted)
- "Strict liability is not concerned with the standard of due care or the reasonableness of a manufacturer's conduct. The rules of strict liability require a plaintiff to prove only that the defendant did not adequately warn of a particular risk that was known or knowable in light of the generally recognized and prevailing best scientific and medical knowledge available at the time of manufacture and distribution. ... [T]he manufacturer is liable if it failed to give warning of dangers that were known to the scientific community at the time it manufactured or distributed the product." (*Anderson v. Owens-Corning Fiberglas Corp.* (1991) 53 Cal 3d 987, 1002-1003 [281 Cal Rptr 528, 810 P 2d 549])
- "The actual knowledge of the individual manufacturer, even if reasonably prudent, is not the issue. We view the standard to require that the manufacturer is held to the knowledge and skill of an expert in the field; it is obliged to keep abreast of any scientific discoveries and is presumed to know the results of all such advances." (*Carlin v. Superior Court* (1996) 13 Cal 4th 1104, 1113, fn 3 [56 Cal Rptr 2d 162, 920 P 2d 1347])

- "[A] defendant in a strict products liability action based upon an alleged failure to warn of a risk of harm may present evidence of the state of the art, i.e., evidence that the particular risk was neither known nor knowable by the application of scientific knowledge available at the time of manufacture and/or distribution." (*Anderson, supra*, 53 Cal 3d at p. 1004.)
- "[T]here can be no liability for failure to warn where the instructions or warnings sufficiently alert the user to the possibility of danger." (*Aguayo v. Crompton & Knowles Corp.* (1986) 183 Cal.App.3d 1032, 1042 [228 Cal Rptr. 768], internal citation omitted.)
- "A duty to warn or disclose danger arises when an article is or should be known to be dangerous for its intended use, either inherently or because of defects." (*DeLeon v. Commercial Manufacturing and Supply Co.* (1983) 148 Cal.App.3d 336, 343 [195 Cal Rptr. 867], internal citation omitted.)
- "... California is well settled into the majority view that knowledge, actual or constructive, is a requisite for strict liability for failure to warn" (*Anderson, supra*, 53 Cal 3d at p. 1000.)
- "[T]he duty to warn is not conditioned upon [actual or constructive] knowledge [of a danger] where the defectiveness of a product depends on the adequacy of instructions furnished by the supplier which are essential to the assembly and use of its product." (*Midgley v. S S Kresge Co.* (1976) 55 Cal.App.3d 67, 74 [127 Cal Rptr. 217].)
- Under *Cronin*, plaintiffs in cases involving manufacturing and design defects do not have to prove that a defect made a product unreasonably dangerous; however, that case "did not preclude weighing the degree of dangerousness in the failure to warn cases." (*Cavers v. Cushman Motor Sales, Inc.* (1979) 95 Cal.App.3d 338, 343 [157 Cal Rptr. 142].)
- "[T]he warning requirement is not limited to unreasonably or unavoidably dangerous products. Rather, directions or warnings are in order where reasonably required *to prevent the use of a product from becoming unreasonably dangerous*. It is the lack of such a warning which renders a product unreasonably dangerous and therefore defective." (*Gonzales v. Carmenita Ford Truck Sales, Inc.* (1987) 192 Cal.App.3d 1143, 1151 [238 Cal Rptr. 18], italics in original.)
- "In most cases, ... the adequacy of a warning is a question of fact for the jury." (*Jackson v. Deft, Inc.* (1990) 223 Cal.App.3d 1305, 1320 [273 Cal Rptr. 214].)
- "[A] pharmaceutical manufacturer may not be required to provide warning of a risk known to the medical community." (*Carlin, supra*, 13 Cal.4th at p. 1116.)
- "We are aware of no authority which requires a manufacturer to warn of a risk which is readily known and apparent to the consumer, in this case the physician." (*Plenger v. Alza Corp.* (1992) 11 Cal.App.4th 349, 362 [13 Cal.Rptr.2d 811].)
- "'A manufacturer's duty to warn is a continuous duty which lasts as long as the product is in use.' ... [T]he manufacturer must continue to provide physicians with warnings, at least so long as it is manufacturing and distributing the product." (*Valentine v. Baxter Healthcare Corp.* (1999) 68 Cal.App.4th 1467, 1482 [81 Cal Rptr.2d 252].)
- "[T]he law now requires a manufacturer to foresee some degree of misuse and abuse of his product, either by the user or by third parties, and to take reasonable precautions to minimize the harm that may result from misuse and abuse." (*Self v. General Motors Corp.* (1974) 42 Cal.App.3d 1, 7 [116 Cal Rptr. 575], disapproved and overruled on another issue in *Soule v. GM Corp.* (1994) 8 Cal.4th 548, 580 [34 Cal Rptr.2d 607, 882 P.2d 298].)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1467-1479

California Products Liability Actions, Ch. 2, Liability for Defective Products, § 2.11, Ch. 7, Proof, § 7.05 (Matthew Bender)

40 *California Forms of Pleading and Practice, Ch. 460, Products Liability, §§ 460.11, 460.164* (Matthew Bender)

19 California Points and Authorities, Ch. 190, *Products Liability* (Matthew Bender)

1 of 1 DOCUMENT

Judicial Council of California Civil Jury Instructions (CACI)

© 2008 by the Judicial Council of California. All rights reserved. No copyright is claimed by the Judicial Council of California to the Table of Contents, Table of Statutes, Table of Cases, Index, or the Tables of Related Instructions. © 2008, Matthew Bender & Company, Inc., a member of the LexisNexis Group. No copyright is claimed to the text of the jury instructions, and verdict forms, directions for use, sources or authorities, or other Advisory Committee commentary, user's guide, life expectancy tables, or disposition table.

Series 400 NEGLIGENCE

1-400 CACI 400

400 Essential Factual Elements

[*Name of plaintiff*] claims that [he/she] was harmed by [*name of defendant*]'s negligence. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. That [*name of defendant*] was negligent;
2. That [*name of plaintiff*] was harmed; and
3. That [*name of defendant*]'s negligence was a substantial factor in causing [*name of plaintiff*]'s harm.

New September 2003; Revised June 2005, December 2007

Directions for Use

In medical malpractice or professional negligence cases, the word "medical" or "professional" should be added before the word "negligence" in the first paragraph.

The word "harm" is used throughout these instructions, instead of terms like "loss," "injury," and "damage," because "harm" is all-purpose and suffices in their place.

Sources and Authority

- *Civil Code section 1714(a)* provides, in part: "Everyone is responsible, not only for the result of his or her willful acts, but also for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself or herself." This statute is the foundation of negligence law in California. (*Rowland v. Christian* (1968) 69 Cal.2d 108, 111-112 [70 Cal. Rptr. 97, 443 P.2d 561])
- The basic elements of a negligence action are: (1) The defendant had a legal duty to conform to a standard of conduct to protect the plaintiff, (2) the defendant failed to meet this standard of conduct, (3) the defendant's failure was the proximate or legal cause of the resulting injury, and (4) the plaintiff was

damaged. (*Ladd v. County of San Mateo* (1996) 12 Cal 4th 913, 917 [50 Cal Rptr 2d 309, 911 P 2d 496] ; *Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal 4th 666, 673 [25 Cal Rptr 2d 137, 863 P 2d 207])

- *Restatement Second of Torts, section 328A*, provides:

In an action for negligence the plaintiff has the burden of proving:

- (a) facts which give rise to a legal duty on the part of the defendant to conform to the standard of conduct established by law for the protection of the plaintiff,
- (b) failure of the defendant to conform to the standard of conduct,
- (c) that such failure is a legal cause of the harm suffered by the plaintiff, and
- (d) that the plaintiff has in fact suffered harm of a kind legally compensable by damages.

- The issue of whether a legal duty exists is an issue of law, not an issue of fact for the jury. (*Ky. Fried Chicken of Cal. v. Superior Court* (1997) 14 Cal 4th 814, 819 [59 Cal Rptr 2d 756, 927 P 2d 1260] ; *Isaacs v. Huntington Memorial Hospital* (1985) 38 Cal 3d 112, 124 [211 Cal Rptr 356, 695 P 2d 653]) The trier of fact ordinarily determines whether the defendant breached the standard of care, causation, and the amount of damages, if any.

Secondary Sources

6 Witkin, *Summary of California Law* (10th ed. 2005) Torts, §§ 831-838, 860-862, 865, 866

California Tort Guide (Cont Ed Bar 3d ed) §§ 1.4-1.18

1 Levy et al., *California Torts, Ch. 1, Negligence: Duty and Breach*, §§ 1.01-1.31, *Ch. 2, Causation*, §§ 2.01-2.11, *Ch. 3, Proof of Negligence*, §§ 3.01-3.34 (Matthew Bender)

33 *California Forms of Pleading and Practice, Ch. 380, Negligence*, § 380.10 (Matthew Bender)

16 *California Points and Authorities, Ch. 165, Negligence*, §§ 165.10, 165.20 (Matthew Bender)

1 of 1 DOCUMENT

Judicial Council of California Civil Jury Instructions (CACI)

© 2008 by the Judicial Council of California. All rights reserved. No copyright is claimed by the Judicial Council of California to the Table of Contents, Table of Statutes, Table of Cases, Index, or the Tables of Related Instructions.
 © 2008, Matthew Bender & Company, Inc., a member of the LexisNexis Group. No copyright is claimed to the text of the jury instructions, and verdict forms, directions for use, sources or authorities, or other Advisory Committee commentary, user's guide, life expectancy tables, or disposition table.

Series 400 NEGLIGENCE

1-400 CACI 401

401 Basic Standard of Care

Negligence is the failure to use reasonable care to prevent harm to oneself or to others.

A person can be negligent by acting or by failing to act. A person is negligent if he or she does something that a reasonably careful person would not do in the same situation or fails to do something that a reasonably careful person would do in the same situation.

You must decide how a reasonably careful person would have acted in | *name of plaintiff/defendant* |'s situation.

New September 2003

Sources and Authority

- "The formulation of the standard of care is a question of law for the court. Once the court has formulated the standard, its application to the facts of the case is a task for the trier of fact if reasonable minds might differ as to whether a party's conduct has conformed to the standard." (*Ramirez v. Plough, Inc.* (1993) 6 Cal 4th 539, 546 [25 Cal Rptr. 2d 97, 863 P.2d 167] , internal citations omitted.)
- *Restatement Second of Torts*, section 282, defines negligence as "conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm."
- *Restatement Second of Torts*, section 283, provides: "Unless the actor is a child, the standard of conduct to which he must conform to avoid being negligent is that of a reasonable man under like circumstances."
- The California Supreme Court has stated: "Because application of [due care] is inherently situational, the amount of care deemed reasonable in any particular case will vary, while at the same time the standard of conduct itself remains constant, i.e., due care commensurate with the risk posed by the conduct taking into consideration all relevant circumstances. [Citations]." (*Flowers v. Torrance Memorial Hospital Medical Center* (1994) 8 Cal 4th 992, 997 [35 Cal Rptr. 2d 685, 884 P.2d 142] ; see also *Tucker v. Lombardo* (1956) 47 Cal 2d 457, 464 [303 P.2d 1041] .)
- The proper conduct of a reasonable person in a particular situation may become settled by judicial decision or may be established by statute or administrative regulation. (*Ramirez, supra*, 6 Cal 4th at p. 547 .) (See CACI Nos. 418 to 421 on negligence per se.)

- Negligence can be found in the doing of an act, as well as in the failure to do an act. (*Rest 2d Torts*, § 284.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 867, 868

California Tort Guide (Cont.Ed.Bar 3d ed.) § 1.3

1 Levy et al., *California Torts*, Ch. 1, *Negligence: Duty and Breach*, §§ 1.01, 1.02, 1.30 (Matthew Bender)

33 California Forms of Pleading and Practice, Ch. 380, *Negligence* (Matthew Bender)

16 *California Points and Authorities*, Ch. 165, *Negligence*, § 165.31 (Matthew Bender)

Used consumer goods—Obligation of distributor or retail seller same—Exceptions. §1795.5.
Tolls period of warranty for consumer goods selling for \$50 or more—When warranty not deemed expired—Receipt—Work order. §1795.6.
Extension of warranty regarding liability of manufacturer to retail seller performing repairs or service. §1795.7.
Application of chapter to motor vehicle purchase by member of Armed Forces. §1795.8.

§1792. Implied Warranty to Accompany Every Sale or Consignment.

Unless disclaimed in the manner prescribed by this chapter, every sale of consumer goods that are sold at retail in this state shall be accompanied by the manufacturer's and the retail seller's implied warranty that the goods are merchantable. The retail seller shall have a right of indemnity against the manufacturer in the amount of any liability under this section. **Leg.H.** 1970 ch. 1333, 1971 ch. 1523, 1978 ch. 991.

Ref.: Cal Fms Pl. & Pr., Ch. 91, "Automobiles: Actions Involving Defects and Repairs," Ch. 502, "Sales: Warranties"; MB Prac. Guide: Cal. Contract Lit., §§24.03; 24.05[2], [3]; 24.10; 24.13[2]; 24.33; 24.37; 24.39; 24.42[1], [12]; CACI No. 3210 (Matthew Bender); W Cal Sum., 4 "Sales" §§70.98, 314, 5 "Torts" §666

§1792.1. Implied Warranty of Fitness to Accompany Goods Required for Particular Purpose.

Every sale of consumer goods that are sold at retail in this state by a manufacturer who has reason to know at the time of the retail sale that the goods are required for a particular purpose and that the buyer is relying on the manufacturer's skill or judgment to select or furnish suitable goods shall be accompanied by such manufacturer's implied warranty of fitness. **Leg.H.** 1970 ch. 1333, 1971 ch. 1523, 1978 ch. 991.

Ref.: Cal Fms Pl. & Pr., Ch. 91, "Automobiles: Actions Involving Defects and Repairs," Ch. 502, "Sales: Warranties"; MB Prac. Guide: Cal. Contract Lit., §§24.03; 24.05[2], [3]; 24.10; 24.13[4]; 24.33; 24.37; 24.39; 24.42[1], [12]; CACI No. 3211 (Matthew Bender); W Cal Sum., 4 "Sales" §72.98

§1792.2. Implied Warranty That Goods Fit for Particular Purpose.

(a) Every sale of consumer goods that are sold at retail in this state by a retailer or distributor who has reason to know at the time of the retail sale that the goods are required for a particular purpose, and that the buyer is relying on the retailer's or distributor's skill or judgment to select or furnish suitable goods shall be accompanied by such retailer's or distributor's implied warranty that the goods are fit for that purpose.

(b) Every sale of an assistive device sold at retail in this state shall be accompanied by the retail seller's implied warranty that the device is specifically fit for the particular needs of the buyer. **Leg.H.** 1970 ch. 1333, 1971 ch. 1523, 1978 ch. 991, 1979 ch. 1023

Ref.: Cal Fms Pl. & Pr., Ch. 91, "Automobiles: Actions Involving Defects and Repairs," Ch. 502, "Sales: Warranties"; MB Prac. Guide: Cal. Contract Lit., §§24.03; 24.05[2], [3]; 24.10; 24.13[4]; 24.33; 24.37; CACI No. 3211 (Matthew Bender); W Cal Sum., 4 "Sales" §§72.90, 98

§1792.3. Waiver of Implied Warranty of Merchantability Not Allowed—Exception.

No implied warranty of merchantability and, where applicable, no implied warranty of fitness shall be waived, except in the case of a sale of consumer goods on an "as is" or "with all faults" basis where the provisions of this chapter affecting "as is" or "with all faults" sales are strictly complied with. **Leg.H.** 1970 ch. 1333.

Ref.: Cal Fms Pl. & Pr., Ch. 91, "Automobiles: Actions Involving Defects and Repairs," Ch. 502, "Sales: Warranties"; MB Prac. Guide: Cal. Contract Lit., §§24.10; 24.13[2], [4]; 24.15[2]-[4]; 24.16[1]-[3]; 24.39; 24.42[2], [4]-[8], [12]; CACI Nos. 3211, 3221 (Matthew Bender); W Cal Sum., 4 "Sales" §90.92

§1792.4. Conspicuous Writing Informing Buyer That Sale Is "As Is" or "With All Faults"—Mail Order Catalog to Contain Notice.

(a) No sale of goods, governed by the provisions of this chapter, on an "as is" or "with all faults" basis, shall be effective to disclaim the implied warranty of merchantability or, where applicable, the implied warranty of fitness, unless a conspicuous writing is attached to the goods which clearly informs the buyer, prior to the sale, in simple and concise language of each of the following:

(1) The goods are being sold on an "as is" or "with all faults" basis.

(2) The entire risk as to the quality and performance of the goods is with the buyer.

(3) Should the goods prove defective following their purchase, the buyer and not the manufacturer, distributor, or retailer assumes the entire cost of all necessary servicing or repair.

(b) In the event of sale of consumer goods by means of a mail order catalog, the catalog offering such goods shall contain the required writing as to each item so offered in lieu of the requirement of notification prior to the sale. **Leg.H.** 1970 ch. 1333, 1971 ch. 1523.

Ref.: Cal Fms Pl. & Pr., Ch. 502, "Sales: Warranties"; MB Prac. Guide: Cal. Contract Lit., §§24.13[2], [4]; 24.15[4]; 24.16[3]; 24.39; 24.42[4], [8]; CACI No. 3221 (Matthew Bender); W Cal Sum., 4 "Sales" §90

§1792.5. Notice to Buyer of Goods "As Is" or "With All Faults" to Constitute a Waiver.

Every sale of goods that are governed by the provisions of this chapter, on an "as is" or "with all faults" basis, made in compliance with the provisions of this chapter, shall constitute a waiver by the buyer of the implied warranty of merchantability and, where applicable, of the implied warranty of fitness. **Leg.H.** 1970 ch. 1333, 1971 ch. 1523.

Ref.: Cal Fms Pl. & Pr., Ch. 502, "Sales: Warranties"; MB Prac. Guide: Cal. Contract Lit., §§24.10; 24.15[4]; 24.16[3]; CACI No. 3221 (Matthew Bender); W Cal Sum., 4 "Sales" §90

§1793. Right to Make Express Warranties But Not to Limit Implied Warranties.

Except as provided in Section 1793.02, nothing in this chapter shall affect the right of the manufacturer, distributor, or retailer to make express warranties with respect

to consume or retailer, ties are given implied warranty of consumer 1978 ch. 9

Ref.: Cal. Prac. Guide: 24.17[1]; 24. Cal Sum., 4

§1793.02. Assistive

(a) All in this stat written language: "Typically fit for device is may be re of actual seller, whi the seller promptly r not affect other laws may speci (b) Th appear on bold type. at the tim

(c) If specified i charge an if appropri fit for the not adjust fit for the promptly transactio promptly tive devic the transa cancelled ments ex When a s penalty, c the purch

(d) W to an ind seller to t this secti be constr for the p

(e) T shall not devices:

(1) A (q) of Se

(2) / than fift

(3) /

(1) The court will exclude the member notified from the class if he so requests by a specified date.

(2) The judgment, whether favorable or not, will include all members who do not request exclusion.

(3) Any member who does not request exclusion, may, if he desires, enter an appearance through counsel.

(f) A class action shall not be dismissed, settled, or compromised without the approval of the court, and notice of the proposed dismissal, settlement, or compromise shall be given in such manner as the court directs to each member who was given notice pursuant to subdivision (d) and did not request exclusion.

(g) The judgment in a class action shall describe those to whom the notice was directed and who have not requested exclusion and those the court finds to be members of the class. The best possible notice of the judgment shall be given in such manner as the court directs to each member who was personally served with notice pursuant to subdivision (d) and did not request exclusion. **Leg.H.** 1970 ch. 1550.

Ref.: Cal. Fms Pl & Pr, Ch. 14, "Advertising," Ch. 127, "Consumer Contracts and Loans," Ch. 501, "Sales: Retail Installment Sales," Ch. 504, "Sales: Consumers Legal Remedies Act"; MB Prac. Guide: Cal. Contract Lit., §§5 07[2][a]; 10 01; 10 03; MB Prac. Guide: Cal. Pretrial Proc., §§33 01, 33 21, 33 22, 33 24, 33 34, 33 35; MB Prac. Guide: Cal. Unfair Comp. & Bus. Torts, §§3 08[2]; W. Cal. Ev., "Discovery" §64; W. Cal. Pro., "Pleading" §§255, 268, 270, 272, 286; W. Cal. Sum., 4 "Sales" §296.

§1782. Necessary Steps for Consumer Before Commencement of Action—Action for Injunctive Relief—Attempts to Comply.

(a) Thirty days or more prior to the commencement of an action for damages pursuant to this title, the consumer shall do the following:

(1) Notify the person alleged to have employed or committed methods, acts, or practices declared unlawful by Section 1770 of the particular alleged violations of Section 1770.

(2) Demand that the person correct, repair, replace, or otherwise rectify the goods or services alleged to be in violation of Section 1770.

The notice shall be in writing and shall be sent by certified or registered mail, return receipt requested, to the place where the transaction occurred or to the person's principal place of business within California.

(b) Except as provided in subdivision (c), no action for damages may be maintained under Section 1780 if an appropriate correction, repair, replacement, or other remedy is given, or agreed to be given within a reasonable time, to the consumer within 30 days after receipt of the notice.

(c) No action for damages may be maintained under Section 1781 upon a showing by a person alleged to have employed or committed methods, acts, or practices declared unlawful by Section 1770 that all of the following exist:

(1) All consumers similarly situated have been identified, or a reasonable effort to identify such other consumers has been made.

(2) All consumers so identified have been notified that upon their request the person shall make the appropriate

correction, repair, replacement, or other remedy of the goods and services.

(3) The correction, repair, replacement, or other remedy requested by the consumers has been, or, in a reasonable time, shall be, given.

(4) The person has ceased from engaging, or if immediate cessation is impossible or unreasonably expensive under the circumstances, the person will, within a reasonable time, cease to engage, in the methods, act, or practices.

(d) An action for injunctive relief brought under the specific provisions of Section 1770 may be commenced without compliance with subdivision (a). Not less than 30 days after the commencement of an action for injunctive relief, and after compliance with subdivision (a), the consumer may amend his or her complaint without leave of court to include a request for damages. The appropriate provisions of subdivision (b) or (c) shall be applicable if the complaint for injunctive relief is amended to request damages.

(e) Attempts to comply with this section by a person receiving a demand shall be construed to be an offer to compromise and shall be inadmissible as evidence pursuant to Section 1152 of the Evidence Code. Furthermore, these attempts to comply with a demand shall not be considered an admission of engaging in an act or practice declared unlawful by Section 1770. Evidence of compliance or attempts to comply with this section may be introduced by a defendant for the purpose of establishing good faith or to show compliance with this section. **Leg.H.** 1970 ch. 1550, 1999 ch. 1000.

Ref.: Cal. Fms Pl & Pr, Ch. 14, "Advertising," Ch. 504, "Sales: Consumers Legal Remedies Act"; W. Cal. Pro., "Pleading" §§268, 269, 272; MB Prac. Guide: Cal. Contract Lit., §§1 33[2]; 10 01; 10 03; 10 04[3]; MB Prac. Guide: Cal. Unfair Comp. & Bus. Torts, §3 08[2].

§1783. Limitation Period for Bringing Action.

Any action brought under the specific provisions of Section 1770 shall be commenced not more than three years from the date of the commission of such method, act, or practice. **Leg.H.** 1970 ch. 1550.

Ref.: Cal. Fms Pl. & Pr., Ch. 504, "Sales: Consumers Legal Remedies Act"; MB Prac. Guide: Cal. Contract Lit., §§5 07[2][a]; 10 01; 10 03.

§1784. No Award If Violation Not Intentional and Correction Made.

No award of damages may be given in any action based on a method, act, or practice declared to be unlawful by Section 1770 if the person alleged to have employed or committed such method, act, or practice (a) proves that such violation was not intentional and resulted from a bona fide error notwithstanding the use of reasonable procedures adopted to avoid any such error and (b) makes an appropriate correction, repair or replacement or other remedy of the goods and services according to the provisions of subdivisions (b) and (c) of Section 1782. **Leg.H.** 1970 ch. 1550.

Ref.: Cal. Fms Pl & Pr, Ch. 504, "Sales: Consumers Legal Remedies Act"; W. Cal. Pro., "Pleading" §§268, 270, 272; MB Prac. Guide: Cal. Contract Lit., §§10 01; 10 03.

knowledge of the deceptive methods, acts or practices declared to be unlawful by Section 1770. **Leg.H.** 1970 ch. 1550.

Ref.: Cal Fms Pl. & Pr. Ch. 504, "Sales: Consumers Legal Remedies Act"; W. Cal. Pro., "Pleading" §§268, 272; MB Prac Guide: Cal Contract Lit., §§10 01; 10 03

§1756. Effective Date.

The substantive and procedural provisions of this title shall only apply to actions filed on or after January 1, 1971. **Leg.H.** 1970 ch. 1550.

Ref.: MB Prac Guide: Cal Contract Lit., §§10 01; 10 03

CHAPTER 2 CONSTRUCTION AND DEFINITIONS

Title to be liberally construed—Underlying purposes. §1760. Definitions. §1761.

§1760. Title to Be Liberally Construed—Underlying Purposes.

This title shall be liberally construed and applied to promote its underlying purposes, which are to protect consumers against unfair and deceptive business practices and to provide efficient and economical procedures to secure such protection. **Leg.H.** 1970 ch. 1550.

Ref.: Cal Fms Pl. & Pr. Ch. 127, "Consumer Contracts and Loans," Ch. 504, "Sales: Consumers Legal Remedies Act"; MB Prac Guide: Cal Contract Lit., §§1 30; 1 33[2]; 10 01; 10 03; 10 04[1].

§1761. Definitions.

As used in this title:

(a) "Goods" means tangible chattels bought or leased for use primarily for personal, family, or household purposes, including certificates or coupons exchangeable for these goods, and including goods that, at the time of the sale or subsequently, are to be so affixed to real property as to become a part of real property, whether or not they are severable from the real property.

(b) "Services" means work, labor, and services for other than a commercial or business use, including services furnished in connection with the sale or repair of goods.

(c) "Person" means an individual, partnership, corporation, limited liability company, association, or other group, however organized.

(d) "Consumer" means an individual who seeks or acquires, by purchase or lease, any goods or services for personal, family, or household purposes.

(e) "Transaction" means an agreement between a consumer and any other person, whether or not the agreement is a contract enforceable by action, and includes the making of, and the performance pursuant to, that agreement.

(f) "Senior citizen" means a person who is 65 years of age or older.

(g) "Disabled person" means any person who has a physical or mental impairment that substantially limits one or more major life activities.

(1) As used in this subdivision, "physical or mental impairment" means any of the following:

(A) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss substantially affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; or endocrine.

(B) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities "Physical or mental impairment" includes, but is not limited to, such diseases and conditions as orthopedic, visual, speech, and hearing impairment, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, and emotional illness.

(2) "Major life activities" means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(h) "Home solicitation" means any transaction made at the consumer's primary residence, except those transactions initiated by the consumer. A consumer response to an advertisement is not a home solicitation. **Leg.H.** 1970 ch. 1550, 1988 ch. 823, 1994 ch. 1010, 1995 ch. 255, 2006 ch. 538 (SB 1852) §44.

1995 Note: The provisions of this act shall be applicable to contracts entered into on or after January 1, 1996. Stats. 1995 ch. 255 §3.

Ref.: Cal Fms Pl. & Pr. Ch. 14, "Advertising," Ch. 369, "Mobilehomes and Mobilehome Parks," Ch. 504, "Sales: Consumers Legal Remedies Act"; MB Prac Guide: Cal Contract Lit., §§1 30; 1 33[1]; [2]; 10 01; 10 03; 10 05[4][a]

CHAPTER 3 DECEPTIVE PRACTICES

§1770. Unlawful Methods of Competition, Unfair or Deceptive Acts.

(a) The following unfair methods of competition and unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or which results in the sale or lease of goods or services to any consumer are unlawful:

(1) Passing off goods or services as those of another.

(2) Misrepresenting the source, sponsorship, approval, or certification of goods or services.

(3) Misrepresenting the affiliation, connection, or association with, or certification by, another.

(4) Using deceptive representations or designations of geographic origin in connection with goods or services.

(5) Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have or that a person has a sponsorship, approval, status, affiliation, or connection which he or she does not have.

(6) Representing that goods are original or new if they have deteriorated unreasonably or are altered, reconditioned, reclaimed, used, or secondhand.

(7) Representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another

(8) Disparaging another by 1

(9) Advertising and selling them as

(10) Advertising and supplying reassembly or disassembly instructions

(11) Advertising and selling them as new

(12) Advertising and selling them as new without clear disclosure of the fact that the seller

(13) Making a statement concerning reductions

(14) Representing that one involves rights which have or involve

(15) Representing that service is new

(16) Representing that one has been supplied with information when it

(17) Representing that one has a rebate, discount, or other benefit of the benefit to the

(18) Misrepresenting a representative transaction v

(19) Involving a contract

(20) Advertising a specific price unless (1) the price may be displayed, and other price in plus a specific markup from of the product

(21) Advertising and selling them as new without clear disclosure of the fact that the seller

(22)(A) Disparaging another by 1

(23) Advertising and selling them as new without clear disclosure of the fact that the seller

(24) Advertising and selling them as new without clear disclosure of the fact that the seller

(25) Advertising and selling them as new without clear disclosure of the fact that the seller

(26) Advertising and selling them as new without clear disclosure of the fact that the seller

(27) Advertising and selling them as new without clear disclosure of the fact that the seller

(28) Advertising and selling them as new without clear disclosure of the fact that the seller

(29) Advertising and selling them as new without clear disclosure of the fact that the seller

(30) Advertising and selling them as new without clear disclosure of the fact that the seller

(8) Disparaging the goods, services, or business of another by false or misleading representation of fact.

(9) Advertising goods or services with intent not to sell them as advertised.

(10) Advertising goods or services with intent not to supply reasonably expectable demand, unless the advertisement discloses a limitation of quantity.

(11) Advertising furniture without clearly indicating that it is unassembled if that is the case.

(12) Advertising the price of unassembled furniture without clearly indicating the assembled price of that furniture if the same furniture is available assembled from the seller.

(13) Making false or misleading statements of fact concerning reasons for, existence of, or amounts of price reductions.

(14) Representing that a transaction confers or involves rights, remedies, or obligations which it does not have or involve, or which are prohibited by law.

(15) Representing that a part, replacement, or repair service is needed when it is not.

(16) Representing that the subject of a transaction has been supplied in accordance with a previous representation when it has not.

(17) Representing that the consumer will receive a rebate, discount, or other economic benefit, if the earning of the benefit is contingent on an event to occur subsequent to the consummation of the transaction.

(18) Misrepresenting the authority of a salesperson, representative, or agent to negotiate the final terms of a transaction with a consumer.

(19) Inserting an unconscionable provision in the contract.

(20) Advertising that a product is being offered at a specific price plus a specific percentage of that price unless (1) the total price is set forth in the advertisement, which may include, but is not limited to, shelf tags, displays, and media advertising, in a size larger than any other price in that advertisement, and (2) the specific price plus a specific percentage of that price represents a markup from the seller's costs or from the wholesale price of the product. This subdivision shall not apply to in-store advertising by businesses which are open only to members or cooperative organizations organized pursuant to Division 3 (commencing with Section 12000) of Title 1 of the Corporations Code where more than 50 percent of purchases are made at the specific price set forth in the advertisement.

(21) Selling or leasing goods in violation of Chapter 4 (commencing with Section 1797.8) of Title 1.7.

(22)(A) Disseminating an unsolicited prerecorded message by telephone without an unrecorded, natural voice first informing the person answering the telephone of the name of the caller or the organization being represented, and either the address or the telephone number of the caller, and without obtaining the consent of that person to listen to the prerecorded message.

(B) This subdivision does not apply to a message disseminated to a business associate, customer, or other person having an established relationship with the person or organization making the call, to a call for the purpose of collecting an existing obligation, or to any call generated at the request of the recipient.

(23) The home solicitation, as defined in subdivision (h) of Section 1761, of a consumer who is a senior citizen where a loan is made encumbering the primary residence of that consumer for the purposes of paying for home improvements and where the transaction is part of a pattern or practice in violation of either subsection (h) or (i) of Section 1639 of Title 15 of the United States Code or subsection (e) of Section 226.32 of Title 12 of the Code of Federal Regulations.

A third party shall not be liable under this subdivision unless (1) there was an agency relationship between the party who engaged in home solicitation and the third party or (2) the third party had actual knowledge of, or participated in, the unfair or deceptive transaction. A third party who is a holder in due course under a home solicitation transaction shall not be liable under this subdivision.

(b)(1) It is an unfair or deceptive act or practice for a mortgage broker or lender, directly or indirectly, to use a home improvement contractor to negotiate the terms of any loan that is secured, whether in whole or in part, by the residence of the borrower and which is used to finance a home improvement contract or any portion thereof. For purposes of this subdivision, "mortgage broker or lender" includes a finance lender licensed pursuant to the California Finance Lenders Law (Division 9 (commencing with Section 22000) of the Financial Code), a residential mortgage lender licensed pursuant to the California Residential Mortgage Lending Act (Division 20 (commencing with Section 50000) of the Financial Code), or a real estate broker licensed under the Real Estate Law (Division 4 (commencing with Section 10000) of the Business and Professions Code).

(2) This section shall not be construed to either authorize or prohibit a home improvement contractor from referring a consumer to a mortgage broker or lender by this subdivision. However, a home improvement contractor may refer a consumer to a mortgage lender or broker if that referral does not violate Section 7157 of the Business and Professions Code or any other provision of law. A mortgage lender or broker may purchase an executed home improvement contract if that purchase does not violate Section 7157 of the Business and Professions Code or any other provision of law. Nothing in this paragraph shall have any effect on the application of Chapter 1 (commencing with Section 1801) of Title 2 to a home improvement transaction or the financing thereof. **Leg.H.** 1970 ch. 1550, 1975 ch. 379, 1979 ch. 819, effective September 19, 1979, 1984 ch. 1171, 1986 ch. 1497, 1990 ch. 1641, 1995 ch. 255, 1996 ch. 684.

1995 Note: The provisions of this act shall be applicable to contracts entered into on or after January 1, 1996. Stats. 1995 ch. 255 §3.

Ref.: Cal. Fms. Pl. & Pr., Ch. 14, "Advertising." Ch. 127, "Consumer Contracts and Loans," Ch. 129, "Consumer Credit Reporting," Ch. 369, "Mobilehomes and Mobilehome Parks," Ch. 501, "Sales: Retail Installment Sales," Ch. 504, "Sales: Consumers Legal Remedies Act"; MB Prac. Guide: Cal. Contract Lit., §§133[2]; 507[1][e]; 1001; 1003; 1005[4][a]; 1816[4][f]; 2153; MB Prac. Guide: Cal. Unfair Comp. & Bus. Torts, §308[1]; W. Cal. Pro., "Pleading" §§269, 270; W. Cal. Sum., 4 "Sales" §296, 4 "Security Transactions in Real Property" §38.

LEXSEE 917 SO.2D 1143

**GERALD J. ROCCAFORTE AND SALLY ROCCAFORTE, INDIVIDUALLY
AND ON BEHALF OF THEIR MINOR SON, GERALD "JOEY" ROCCAFORTE
VERSUS NINTENDO OF AMERICA, INC., ALFALFA MOVIES AND MUSIC,
INC. AND BLOCKBUSTER, INC.**

NO. 05-CA-239

COURT OF APPEAL OF LOUISIANA, FIFTH CIRCUIT

05-239 (La. App. 5 Cir. 11/29/05); 917 So. 2d 1143; 2005 La. App. LEXIS 2517

November 29, 2005, Decided

SUBSEQUENT HISTORY: [**1] Released for Publication January 19, 2006.

PRIOR HISTORY: ON APPEAL FROM THE TWENTY-FOURTH JUDICIAL DISTRICT COURT, PARISH OF JEFFERSON, STATE OF LOUISIANA. NO. 474-165, DIVISION "M". HONORABLE HENRY G. SULLIVAN, JR., JUDGE PRESIDING.

Roccaforte v. Nintendo of Am., Inc., 802 So. 2d 764, 2001 La. App. LEXIS 2676 (La App 5 Cir., Nov. 14, 2001)

DISPOSITION: AMENDED AND AFFIRMED AS AMENDED.

COUNSEL: RICHARD C. TRAHANT, Attorney at Law, Metairie, Louisiana, SCOTT LaBARRE, Attorney at Law, Metairie, Louisiana, COUNSEL FOR PLAINTIFFS/APPELLEES, GERALD ROCCAFORTE, SALLY ROCCAFORTE AND GERALD "JOEY" ROCCAFORTE.

EDWARD F. KOHNKE, IV, MICHAEL B. NORTH, AMANDA L.C. BRADLEY, SCOTT S. PARTRIDGE, Frilot, Partridge, Kohnke & Clements, L.C., Attorneys at Law, New Orleans, Louisiana, COUNSEL FOR DEFENDANT/APPELLANT, NINTENDO OF AMERICA, INC.

JUDGES: Panel composed of Judges Marion F. Edwards, Susan M. Chehardy, and Walter J. Rothschild.

OPINION BY: SUSAN M. CHEHARDY

OPINION

[*1145] [Pg 2]

Nintendo of America, Inc., defendant, appeals a ruling that assessed damages against it for contempt and sanctions, and also awarded attorneys' fees to the plaintiffs. The plaintiffs have answered the appeal, seeking additional attorneys' fees for this appeal. We amend to grant additional attorneys' fees and, as amended, we [**2] affirm.

BACKGROUND

This is the second appeal in this personal injury lawsuit, in which Gerald and Sally Roccaforte allege that their son, Gerald "Joey" Roccaforte, developed epilepsy as a result of playing Nintendo video games.

¹ The plaintiffs sought recovery under the Louisiana Products Liability Act against the video game manufacturer, Nintendo of America, Inc. ("Nintendo"). ² The case went to trial in January 2000.

1 When the suit was filed, Joey was still a minor. Since then, however, he has attained majority and appears as a plaintiff in his own right.

2 The suit also made two video rental companies defendants, but they settled prior to trial.

During the trial, Nintendo belatedly produced hundreds of pages of documents that should have been produced in response to a pretrial order compelling production of documents. Plaintiffs sought and obtained a contempt [Pg 3] ruling and an order for monetary sanctions against Nintendo, but the ruling did not specify an amount.

After a seven-day trial, the jury [**3] returned a verdict in favor of Nintendo. The jury found that Nin-

tendo did not provide an adequate warning of the seizure risk from playing video games, but that the products were not unreasonably dangerous in design, and that the failure to provide adequate warning was not the proximate cause of Joey's injuries. Accordingly, the trial court entered judgment dismissing the claims. The court subsequently denied the plaintiffs' motions for judgment notwithstanding the verdict and for new trial.

On appeal, the plaintiffs' primary contention was that Nintendo's persistent failure to respond fully to discovery orders had damaged their case.

In *Roccaforte v. Nintendo of America, Inc.*, 01-210 (La App 5 Cir. 11/14/01), 802 So. 2d 764, we held that Nintendo had deliberately misled the court and counsel by withholding evidence that should have been disclosed during discovery and that materially affected the plain-

tiffs' ability to present their case. We vacated the jury verdict, reversed the trial court's denial of the plaintiffs' motion for new trial, upheld the trial court's grant of sanctions against the defendant, and ordered the trial court to impose a specific [**4] amount of monetary sanctions on remand of the matter. The supreme court denied writs. *Roccaforte v. Nintendo of America, Inc.*, 01-3301 (La 3/8/02), 811 So. 2d 884.

On remand, on April 20, 2004 the trial court ordered that as an appropriate sanction [**1146] for the defendant's contempt, the defendant was to pay a total of \$ 181,620.86, comprising \$ 31,620.80 for the plaintiffs' costs and expenses, and \$ 150,000.00 attorneys' fees.

The judgment itemized the amounts as follows: [Pg 4]

Airfare	\$ 2,807.67
Auto	307.54
Court Costs	1,483.50
Delivery	1,886.60
Expert Expense	53.00
Expert Fees	22,290.00
Hotels and Meals	1,914.88
Interest Charge	99.89
Trial Expenses	777.78
Attorney Fees	150,000.00
TOTAL	\$ 181,620.86

In separate rulings on the same date, the trial court denied the plaintiffs' Third Motion for Contempt and also denied the plaintiffs' Motion for Default and/or To Strike Nintendo's Defenses.

CURRENT APPEAL

In the appeal now before us, Nintendo asserts the April 2004 judgment must be set aside. Nintendo argues the judgment substantively amended the July 18, 2000 judgment by awarding trial-related costs and fees rather [**5] than costs and fees related to the motion to compel and the motion for contempt. Further, Nintendo asserts the award of \$ 150,000.00 in attorneys' fees has no evidentiary basis and should be vacated.

The trial court's July 18, 2000 judgment awarded to plaintiffs "all attorneys' fees and costs associated with the necessary motions and hearings which resulted from Nintendo's failure to properly comply with discovery." Our decision in the prior appeal affirmed the July 18, 2000 judgment, but ordered the trial court to impose a

specific amount of monetary sanctions on remand. *Roccaforte v. Nintendo of America, Inc.*, 01-210 at pp 13-14, 802 So. 2d at 772.

Nintendo now argues that the trial court erred in assessing the sanctions award, because the July 2000 judgment did not award to plaintiffs any costs or fees associated with the trial and our affirmation of the July 2000 judgment did not modify the substance or scope of that judgment.

Nintendo blames the trial court's action on the plaintiffs' post-remand filing of a Motion to Have the Court Assess Specific Monetary Amounts for Contempt and Sanctions Rulings. That motion specifically asked the trial court to award [**6] the plaintiffs all costs relative to the first trial and appeal, attorneys' fees in an amount equal to fees charged by defense counsel for trial and appeal, and "the largest sanction against a corporate defendant in the history of Louisiana jurisprudence." Nintendo argues the motion asked the trial court to amend

and expand upon the July 2000 judgment, which this Court had refused to do on the appeal.

[Pg 5] Nintendo asserts the \$ 181,620.86 award to the plaintiffs is "a staggering amount far exceeding any conceivable expense incurred in the 'motions and hearings' that were the subject of the original July 2000 Trial Court Judgment." Nintendo avers the trial court's award of trial-related costs and fees constituted a substantive amendment of the final July 2000 judgment and is therefore a nullity under Louisiana law. In addition, Nintendo contends the trial court abused its discretion by awarding the plaintiffs a flat \$ 150,000.00 attorneys' fee award without the benefit of any supporting evidence or documentation.

In opposition, the plaintiffs argue they are entitled to be paid the reasonable expenses, including attorneys' fees, caused by the failure of the defendant to respond [**7] to their discovery request. They contend that Nintendo's contumacious behavior resulted in a miscarriage of justice throughout discovery and the two-week jury trial. [*1147] Therefore, they maintain, the plaintiffs' expenses, costs, and attorneys' fees for the entire proceeding may reasonably be assessed against Nintendo.

Similarly, they assert "Nintendo's actions prompted an appeal by plaintiffs and plaintiffs' opposition to Nintendo's writ application to the Louisiana Supreme Court, which would not have occurred as they did, but for Nintendo's misconduct." [Pg 6] The plaintiffs contend all their costs and attorneys' fees relative to appeal and opposition of Nintendo's writ application to the Louisiana Supreme Court are "reasonable expenses" as contemplated by *La. C.C.P. art. 1471*.

The plaintiffs frame the issue on the appeal as whether the trial court "abused its vast discretion by sanctioning a corporate defendant \$ 150,000 for crippling plaintiffs' best opportunity to present their case to a jury by engaging in gross misconduct that caused Nintendo to be held in contempt of court twice, as well as causing this Court to grant a new trial."

The plaintiffs contradict [**8] Nintendo's claim that the July 2000 judgment was final (and, hence, could not be changed by the trial judge). They contend the July 2000 judgment's status as an interlocutory judgment is law of the case, so that the trial court was not limited in what it could award as monetary sanctions against Nintendo.³

³ We stated in the prior appeal that the sanctions judgment was interlocutory rather than final because no monetary amount was assessed. *Roccaforte*, 01-210 at p. 3, n. 3, 802 So. 2d at 771, n. 3.

LAW AND ANALYSIS

La. C.C.P. Art. 1471 provides:

If a party... fails to obey an order to provide or permit discovery..., the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

* * *

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the *reasonable expenses*, including [**9] attorney's fees, caused by the failure... [Emphasis added.]

A determination of the type and amount of sanctions is reviewed under the abuse of discretion standard. *Sternberg v. Sternberg*, 97-101, p. 6 (*La. App. 5 Cir. 5/28/97*), 695 So. 2d 1068, 1071, writ denied, 97-1737 (*La. 10/13/97*), 703 So. 2d 618.

[Pg 7] A court's decision to impose sanctions for failure to comply with a discovery order, as well as its choice of sanctions, will not be reversed absent a clear showing of abuse of discretion. *Reeder v. New York Life Ins. Co.*, 01-148 (*La. App. 5 Cir. 6/27/01*), 790 So. 2d 712, 715.

"Each case must be decided upon its own facts and circumstances, and the trial judge is vested with much discretion in determining the penalty for violation of pre-trial or discovery orders." *Benware v. Means*, 99-1410, p. (*La. 1/19/00*), 752 So. 2d 841, 847.

Courts may inquire as to the reasonableness of the attorney fee as part of their prevailing, inherent authority to regulate the practice of law. *City of Baton Rouge v. Stauffer Chemical Co.*, 500 So. 2d 397, 401 (*La. 1987*).

Factors to be taken into consideration [**10] in determining the reasonableness of attorney fees include: (1) the ultimate result obtained; (2) the responsibility incurred; [*1148] (3) the importance of the litigation; (4) amount of money involved; (5) extent and character of the work performed; (6) legal knowledge, attainment, and skill of the attorneys; (7) number of appearances made; (8) intricacies of the facts involved; (9) diligence and skill of counsel; and (10) the court's own knowledge.

State, Dept. of Transp. and Development v. Williamson, 597 So. 2d 439, 442 (La. 1992).

The trial judge's own language in the original judgment awarded the plaintiffs "all attorneys' fees and costs associated with the necessary motions and hearings which resulted from Nintendo's failure to properly comply with discovery." (Emphasis added.) *Roccaforte*, 01-210 at p. 7, 802 So. 2d at 768.

In compliance with our remand order, the trial court held a hearing on the plaintiffs' motion to have the court assess specific monetary amounts for the contempt and sanctions ruling. At the hearing, plaintiffs' counsel filed a sheaf of papers listing all the costs and expenses that had been incurred on [**11] behalf of the [Pg 8] plaintiffs during the entire proceedings, showing total expenses and costs of \$ 128,496.72, covering all aspects of the proceedings to date. There were separate pages for each type of cost/expense listed, but the itemization did not indicate to which phase of the case each cost/expense listed should be attributed.

As for attorneys' fees, plaintiffs' counsel have a contingency fee arrangement with their clients. Hence, they have no hourly billing records to submit in connection with the sanctions retrial.

The parties dispute whether the remanded sanctions judgment gave the trial judge authority to expand upon his judgment as it existed prior to the remand. The parties agree that the judgment is "law of the case," but they disagree on interpreting that principle as applied to the judgment.⁴

4 "The 'law of the case' is a doctrine whereby an appellate court will not reconsider its prior rulings on an issue in a subsequent appeal in the same case. The 'law of the case' doctrine applies to previous decisions on writ applications as well as full appellate proceedings." *Franklin Southland Printing Co., Inc. v. New Orleans Aviation Bd.*, 99-60 (La.App. 5 Cir. 7/27/99), 739 So. 2d 977, 982.

[**12] The trial judge obviously did not accept the plaintiffs' argument that all the costs and expenses from

the first trial should be included, since the costs awarded were \$ 31,620.86 rather than the much higher figure sought by the plaintiffs. Nevertheless, he included many items that arose during discovery, such as experts' expenses and fees, airfares, hotels and meals, and interest charges. In addition, the judge awarded \$ 150,000.00 attorneys' fees, without specific evidence as to how much time the attorneys spent on the discovery motions or as to an hourly rate for their services.

This case has been in litigation for ten years and the record now comprises sixteen volumes. The trial judge clearly concluded that many of the costs and expenses incurred by the plaintiffs are reasonably attributable to Nintendo's discovery violations. Similarly, the trial judge is in the best position to observe and evaluate the work performed by plaintiffs' counsel.

[Pg 9] The ruling was the trial judge's interpretation of his own order issued earlier, and upheld by us on the prior appeal. We cannot say the trial judge abused his wide discretion in his determination that the amounts he included [**13] were related to "the necessary motions and hearings that resulted [1149] from Nintendo's failure to comply with discovery." It cannot be disputed that much of the past proceedings need not have taken place if Nintendo had disclosed the evidence it withheld.

In the same way, because the trial judge has seen the development and evolution of the case as a whole, we are unable to say he abused his discretion in the amount of attorneys' fees awarded.

The dispute about the applicability of law-of-the-case is irrelevant, because the trial judge neither went beyond the scope of the July 2000 judgment, nor abused his discretion in his ruling on the remand. Accordingly, we affirm the judgment.

In response to the plaintiffs' answer to the appeal, we find that plaintiffs' counsel are entitled to an additional \$ 5,000.00 in attorney's fees for this appeal. The judgment is amended to include that amount and, as amended, affirmed. The cost of this appeal is assessed against Nintendo of America, Inc.

AMENDED AND AFFIRMED AS AMENDED

FILED
USDC, WESTERN DISTRICT OF LA
ROBERT H. SHERWELL, CLERK
DATE 12/10/04
BY [Signature]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

ERIC MARTIN, ET AL * **CONSOLIDATED CIVIL NO. 01-0246**
VERSUS * **CHIEF JUDGE HAIK**
NINTENDO OF AMERICA, INC. * **MAGISTRATE METHVIN**

JUDGMENT AND REASONS FOR RULING

The above captioned matter was tried before this court from February 9 through February 11, 2004; was recessed until February 25, 2004; the trial resumed from February 25, 2004 until March 4, 2004, at which time the trial (other than the completion of the trial testimony of Dr. Robert Fisher) concluded. Dr. Fisher's testimony was completed on March 25, 2004. Following this, the transcripts of the trial proceedings were filed into the record, and the parties submitted their Proposed Findings of Facts and Conclusions of Law in September 2004. [Docs. # 373 and #378] In keeping, the court files its Judgement and the written reasons therefore.

RULING: This court finds that plaintiff failed to prove entitlement to the remedies sought in this matter.

BACKGROUND

The basis of this matter is plaintiff, Eric Martin's, allegation that as a result of playing particular video games manufactured by defendant Nintendo of America (Nintendo), seizures or similar symptoms may be provoked in individuals with a pre-existing condition known as photosensitivity. Plaintiff brings this claim against defendant Nintendo of America (Nintendo) under the Consumer Product Safety Act (CPSA), namely 15 U.S.C. § 2073, which authorizes an

interested person to bring an action to enforce violations of consumer product safety rules and orders under section 2064 of the CPSA. In this regard, plaintiff's two basic assertions herein are as follows: (1) that Nintendo violated the CPSA's reporting requirements found at 15 U.S.C. § 2064(b); and, (2) that Nintendo's video game software cartridges fail to comply with 16 C.F.R. § 1505.4, known as the Electrically Operated Toy Regulation (EOTR), which provides manufacturing requirements for electrically-operated toys.

REASONS FOR JUDGMENT

15 U.S.C. § 2073, the "umbrella" under which plaintiff's claim is brought, provides in pertinent part:

Any interested person (including an individual or nonprofit, business, or other entity) may bring an action in any United States district court for the district in which the defendant is found or transacts business to enforce a consumer product safety rule or an order under section 2064 of this title, and to obtain appropriate injunctive relief.

In conjunction with the above, it is necessary to look at the specific section of 15 U.S.C. § 2064 which plaintiff claims was violated by defendant, namely § 2064(b). This section imposes a safety reporting requirement on manufacturers and distributors of consumer products to immediately notify the U.S. Consumer Product Safety Commission (CPSC) upon receipt of certain information. The Act specifically requires:

Every manufacturer of a consumer product distributed in commerce, and every distributor and retailer of such product, who obtains information which reasonably supports the conclusion that such product—

1. Fails to comply with an applicable consumer product safety rule or with a voluntary

consumer product safety standard upon which the Commission has relied under section 2058 of this title;

2. Contains a defect which could create a substantial product hazard described in subsection (a)(2) of this section; or

3. Creates an unreasonable risk of serious injury or death;

shall immediately inform the Commission of such failure to comply, or such defect, or of such risk, unless such manufacturer, distributor, or retailer has actual knowledge that the Commission has been adequately informed of such defect, failure to comply, or such risk.

Thus, § 2073 provides for a private right of enforcement for a violation of § 2064 only to enforce a consumer product safety rule or an order under § 2064. Therefore, the court must determine whether the reporting requirements of § 2064(b) constitute either a consumer product safety rule or an order under § 2064, the violation of which would allow for a private right of enforcement. Clearly, § 2064 is not a consumer product safety rule. More specifically, the CPSA sets out a three-step process for issuing a consumer product safety rule. First, the Commission must issue an Advance Notice of Proposed Rulemaking that identifies the product, the risk of injury associated with it, and the regulatory options, and then solicit comments. Next, if the Commission finds existing and voluntary standards insufficient to reduce the risk, it may publish a proposed consumer product safety rule, accompanied by a preliminary regulatory analysis discussing the rule's potential benefits and potential costs, and by a statement of any reasonable alternatives. Third, within sixty days of the proposed rule's publication, the Commission must promulgate or withdraw the rule. *See*, § 2058. Based on the criteria delineated above, there is no question but that the reporting obligation found in section 2064(b) was not promulgated as a

consumer product safety rule as that term is used in § 2073.

Neither is the reporting obligation found in section 2064(b) an order under section 2064. In this regard, the “orders” referred to in section 2073 and available under section 2064 are orders that can be issued by the Commission under sections 2064(c) and (d). These subsections authorize the Commission to order, among other options (and only after finding that a product distributed in commerce presents a substantial product hazard...and after affording interested persons, including consumers and consumer organizations, an opportunity for a hearing) a manufacturer...to give public notice of the defect or failure to comply, to bring the product into conformity with the requirements of the applicable consumer product safety rule or to repair the defect in such product, to replace such product with a product that...does not contain the defect, or to refund the purchase price of such product. *See*, § 2064(c) and (d).

As is evidenced by the above, the reporting obligation discussed herein does not constitute an order of the Commission or a consumer product safety rule as those terms are used in § 2073. As the prerequisites of plaintiff’s section 2073 action to enforce section 2064 are not present, it follows that plaintiff cannot maintain his § 2064 (b) claims as there is no private right of enforcement under the circumstances of this matter. ¹

¹Further, reported case law (albeit none from the Fifth Circuit) from the 7th Circuit, 8th Circuit, 9th Circuit, and 10th Circuit supports the conclusion that the reporting requirements are not enforceable as private causes of action. *See, Avery v. Mapco Gas Products, Inc.*, 18 F.3d 448 (7th Cir. 1994); *Zepik v. Tidewater Midwest, Inc.*, 856 F.2d 936 (7th Cir. 1988); *In Re All Terrain Vehicle Litigation*, 979 F.2d 755 (9th Cir. 1992); *Kloepfer v. Honda Motor Company, Ltd.*, 898 F.2d 1452 (10th Cir. 1990); *Drake v. Honeywell, Inc.*, 797 F.2d 603 (8th Cir. 1985). In this regard, the court agrees with the arguments advanced by defendant at trial and in its Proposed Findings of Fact and Conclusions of Law (pp. 7-11). The Court also finds the language of *Simpson v. Bio-Wash Products, Inc.*, 172 F.Supp. 2d 373 (D. Conn. 2001) instructive. In *Simpson*, the plaintiff claimed that the defendant violated the reporting requirements of the CPSA, specifically that defendant failed to inform the CPSC as required by 15 U.S.C. § 2064 (b). Plaintiff brought claims under §§ 2069, 2071, 2072, and for attorneys’ fees pursuant to § 2073. In dismissing plaintiff’s federal claims for damages (§ 2072), injunctive relief (§ 2071), civil

Electrically Operated Toy Regulation (16 C.F.R. § 1505.4)

The claims² and defenses raised by the parties in this matter relative to the Electrically Operated Toy Regulation (EOTR) have been argued and briefed extensively, and do not need to be reiterated at length here.³ This is especially true given the fact that the court's ruling in this regard is relatively straightforward. First, the court finds the discussion of the Federal Hazardous Substances Act (FHSA) and CPSC given by the Fifth Circuit in *IQ Products Company v Pennzoil Products Company*, 305 F.3d 368 (5th Cir. 2002) instructive in the present matter.

penalties (§ 2069), and attorneys' fees (§§ 2072 & 2073), the court stated: The Second Circuit has not reviewed whether the Consumer Product Safety Act creates a private cause of action for an injury allegedly resulting from noncompliance with the statute's reporting rules. However, several circuits that have considered the issue have answered in the negative. *See Kloepfer*.... Most courts have adopted the analysis of *Drake*, in which the Eighth Circuit held that Section 2072 did not create a "private right of action" based upon violation of the statutory reporting requirements in light of the absence of specific statutory language and legislative history to that effect. *Drake* instructs that the Commission's interpretive rules of the Act's reporting requirements, 16 C.F.R. Part 1115.10 *et seq.*, cannot constitute a basis for liability under Section 2072. As the court elaborated, interpretive rules amount to no more than restatements of statutory provisions, and failure to distinguish between legislative and interpretive rules would frustrate the congressional intent evidenced by Section 2072's omission of a right to sue for statutory violations. In light of this analysis and the weight of authority adopting *Drake*, the court is persuaded that Section 2072 does not confer a private right of action for violation of the statutory reporting requirements.

The court in the present matter believes that the reasoning applied in *Simpson* is applicable to plaintiff's § 2073 claims herein. Along these lines, this court is not persuaded by plaintiff's attempts to distinguish between claims brought pursuant to § 2072 and § 2073 given the circumstances of this case. In fact, the court agrees with defendant's contention that section 2072 is actually broader in scope than section 2073, and despite that fact, the published case law supports a finding that the reporting requirement of section 2064(b) does not fall within section 2072's definition of rules or orders the violation of which would support a private right of action. It therefore follows that neither would the reporting requirement of section 2064(b) fall within section 2073's definition of consumer product safety rules and orders the violation of which would support a private right of action.

² Namely that Nintendo's video game software cartridges fail to comply with 16 C.F.R. § 1505.4, known as the Electrically Operated Toy Regulation (EOTR), which provides manufacturing requirements for electrically-operated toys.

³ That the EOTR was promulgated under the Federal Hazardous Substances Act is not in dispute.

Although *IQ Products* involved the interplay of the Lanham Act (not a factor in the case at bar), the FHSA and the CPSA, the reasoning applied by the Fifth Circuit in *IQ Products* is nevertheless applicable herein. In *IQ Products* the court stated:

The FHSA establishes a comprehensive scheme of product regulation and labeling. The Consumer Product Safety Commission (CPSC) is responsible for enforcing the FHSA and promulgating, interpreting, and enforcing regulation under the FSHA. The CPSC has the discretion to exempt substances from the FHSA's full requirements and to determine whether to prosecute FHSA violations. The FHSA does not authorize a private cause of action. Since 1994, IQ has complained about Fix-A-Flat to the Federal Trade Commission (FTC) and the CPSC....the CPSC investigated and refused to take further action....The district court explained that by bringing a Lanham Act claim against defendants for failing to properly label Fix-A-Flat, 'IQ is impermissibly attempting to circumvent the FHSA by converting the Lanham Act into a vehicle to enforce the FHSA, which bars private actions, and to usurp the regulatory function of the CPSC here' *Id.*, at 373.

As stated in *IQ Products*, the CPSC, not private individuals, is vested with the responsibility of enforcing the regulations of the FHSA. Also, as in *IQ Products*, the CPSC herein has been informed of plaintiff's allegations and has been provided substantial documentation regarding the incidents at question but has not taken further action relative to the incidents. To take such action, under the facts of the present case, rests within the providence of the CPSC, rather than

with the plaintiff or this court.⁴

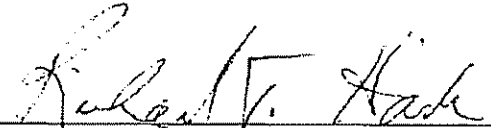
Next, although the court has determined that the plaintiff does not have a private right of enforcement for his EOTR claim, the court will nevertheless discuss other arguments raised concerning the EOTR. More specifically, under the facts present in this matter, the court finds it unnecessary to determine whether or not defendant's software cartridges are included in section 1505's video game exemption.⁵ This is so as the court finds that under the plain intent of the statute, a risk associated with the content of software programming is not the type of electrical, thermal or mechanical hazard contemplated by the regulation. The regulation deals with quality assurance issues such as material and production specifications (i.e., the physical substance of products to protect against such things as shock, fire, vibration, heat, and explosion). These "manufacturing requirements" require that "only materials safe and suitable for the particular use for which the electrically operated toy is intended shall be employed." 16 C.F.R. § 1505.4(a)(1). As to plaintiff's contention that the term "materials" should include the cartridge chips containing the programming, such argument runs counter to the fact that "material" in the context of section 1505 clearly refers to physical substances not the programming content contained on the software.

⁴ In any event, for the reasons given in this court's discussion of the reporting obligations of § 2064(b), this court finds that the EOTR is not a consumer product safety rule nor an order under section 2064 of the CPSA.

⁵ However, the court can envision possible scenarios in which such decision must be reached. The court does note that it finds the exclusion language of section 1505.1(a)(1) (which expressly states that "this definition does not include...video games" which is defined in section 1505.1(a)(2) as "video game hardware systems") somewhat ambiguous. Nevertheless, plaintiff's arguments in this regard are, at best, a stretch. Defendant's contention that non-electrical software was never within the purview of the electrically operated toy regulation to begin with appears to be a more plausible argument.

THEREFORE, based on the above findings, the court hereby renders Judgment in favor of defendant Nintendo of America, Inc., against plaintiff Eric Martin. Each party to bear its own costs.

THUS DONE AND SIGNED in Lafayette, Louisiana, on the 10th day of
December, 2004.


CHIEF JUDGE RICHARD T. HAIK, SR.
WESTERN DISTRICT OF LOUISIANA

COPY SENT
DATE 12/10/04
BY ME
by fax TO Dougherty
A. Murray / Ieyoub / S. Murray
Abel / Gauthier
Trahan
North / Kohuke, IV

1 of 21 DOCUMENTS

JOE JAMES, et al., Plaintiffs-Appellants, v. MEOW MEDIA, INC., et al., Defendants-Appellees.

No. 00-5922

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

300 F.3d 683; 2002 U.S. App. LEXIS 16185; 2002 FED App. 0270P (6th Cir.); 30 Media L. Rep. 2185; CCH Prod. Liab. Rep. P16,386

November 28, 2001, Argued

August 13, 2002, Decided

August 13, 2002, Filed

PRIOR HISTORY: [**1] Appeal from the United States District Court for the Western District of Kentucky at Paducah. No. 99-00096. Edward H. Johnstone, Senior District Judge.

James v. Meow Media, Inc., 90 F. Supp. 2d 798, 2000 U.S. Dist. LEXIS 5330 (W.D. Ky. 2000).

DISPOSITION: Affirmed.

COUNSEL: ARGUED: Michael A. Breen, MIKE BREEN ATTORNEYS AT LAW, Bowling Green, Kentucky, for Appellants.

Paul M. Smith, JENNER & BLOCK, Washington, D.C., Kevin T. Baine, WILLIAMS & CONNOLLY, Washington, D.C., for Appellees.

ON BRIEF: Michael A. Breen, Kerry S. Morgan, MIKE BREEN ATTORNEYS AT LAW, Bowling Green, Kentucky, for Appellants.

Paul M. Smith, Deanne E. Maynard, David C. Belt, Elizabeth A. Cavanagh, JENNER & BLOCK, Washington, D.C., Kevin T. Baine, WILLIAMS & CONNOLLY, Washington, D.C., Mark P. Bryant, BRYANT & KAUTZ, Paducah, Kentucky, Steven C. Jackson, JACKSON & JAGGERS, Paducah, Kentucky, Joel N. Kreizman, EVANS, OSBORNE & KREIZMAN, Ocean, New Jersey, Gerald O. Sweeney, Jr., John T. Williams, LORD, BISSELL & BROOK, Chicago, Illinois, Elizabeth U. Mendel, Richard H. C. Clay, Patrick Shane O'Bryan, WOODWARD, HOBSON & FULTON, Louisville, Kentucky, John David Cole, Sr., Matthew P. Cook, COLE, MOORE & BAKER, Bowling Green, Kentucky, Paul E. Salamanca, Lexington, Kentucky, D. Wade Cloud, Jr., James T. Drakeley, HIERSCHE, [**2]

MARTENS, HAYWARD, DRAKELEY & URBACH, Addison, Texas, Stephen E. Smith, Jr., McMURRY & LIVINGSTON, Paducah, Kentucky, V. Thomas Fryman, Jr., GREENEBAUM, DOLL & McDONALD, Lexington, Kentucky, Mark S. Riddle, GREENEBAUM, DOLL & McDONALD, Louisville, Kentucky, Barry R. Ostrager, Mary E. McGarry, SIMPSON, THACHER & BARTLETT, New York, New York, Ronald G. Sheffer, SHEFFER, HUTCHINSON & KINNEY, Louisville, Kentucky, for Appellees.

JUDGES: Before: GUY and BOGGS, Circuit Judges; and CARR, District Judge.*

* The Honorable James G. Carr, United States District Judge for the Northern District of Ohio, sitting by designation.

OPINION BY: BOGGS

OPINION

[**3] [**687] BOGGS, Circuit Judge. On December 1, 1997, Michael Carneal walked into the lobby of Heath High School in Paducah, Kentucky, and shot several of his fellow students, killing three and wounding many others. The parents and estate administrators of Carneal's victims -- Jessica James, Kayce Steger, and Nicole Hadley -- (hereinafter collectively referred to as "James") appeal the judgment of the district court dismissing, for failing to state claims on which relief could be granted, their actions against several video game, movie production, [**3] and internet content-provider firms. According to James's complaint, Carneal regularly played video games, watched movies, and viewed internet sites produced by the defendant firms. These activities, James argues, "desensitized" Carneal to violence and "caused" him to kill the students of Heath High

School. James claims that the distribution of this material to impressionable youth like Carneal constitutes actionable negligence under Kentucky law, entitling James to recover wrongful death damages from the distributing firms. Moreover, James contends that the defendant firms purveyed defective "products," namely the content of video games, movies, and internet sites, triggering strict product liability under Kentucky law.

The defendant firms argue that they owe no duty to protect third parties from how players, watchers or viewers process the ideas and images presented in their video games, movies, and internet sites. Specifically, the defendants contend that Carneal's actions were not sufficiently foreseeable to trigger the defendants' liability. Even if they were to owe such a duty to protect third parties from the consumers of their ideas and images, the defendants argue that Carneal's [***4] independent decision to kill his fellow students constitutes a superseding cause of the claimed damages and defeats the proximate cause element of James's *prima facie* case. The defendants further contend that tort liability for the non-defamatory ideas and images communicated in their respective media would raise [***4] significant *First Amendment* questions that ought to be avoided. Finally, the defendants note that James's theory of product liability is flawed as they have not distributed "products" under Kentucky law.

For the reasons set forth below, we affirm the district court's dismissal of James's actions.

I

On December 1, 1997, Michael Carneal brought a .22-caliber pistol and five shotguns into the lobby of Heath High School in Paducah, Kentucky. At the time, Carneal was a 14-year-old freshman student at the school. Upon his arrival, Carneal began shooting into a crowd of students, wounding five. His shots killed an additional three: Jessica James, Kayce Steger, and Nicole Hadley. Carneal was arrested and convicted of murdering James, Steger, and Hadley.

Subsequent investigations revealed that Carneal regularly played "Doom," "Quake," "Castle Wolfenstein," "Redneck [**5] Rampage," "Nightmare Creatures," "Mech Warrior," "Resident Evil," and "Final Fantasy," which are interactive computer games that, in various ways, all involve the [*688] player shooting virtual opponents. Carneal also possessed a video tape containing the movie, "The Basketball Diaries," in a few minutes of which the high-school-student protagonist dreams of killing his teacher and several of his fellow classmates. Investigators examined Carneal's computer and discovered that he had visited "www.persiankitty.com," which appears to catalogue and link to sites with sexually-suggestive material. It also

appeared that through "www.adultkey.com," a site operated by Network Authentication Systems and designed to restrict access to certain websites to viewers over certain ages, Carneal was granted age verification sufficient to visit many other pornographic sites.

The parents, who also are the estate administrators, of James, Steger, and Hadley filed this action in the United States District Court for the Western District of Kentucky. James's complaint named as defendants the companies that [***5] produce or maintain the above-mentioned movie, video games, and internet sites. James stated essentially [**6] three causes of action against the defendants. First, James alleged that the defendants had been negligent in that they either knew or should have known that the distribution of their material to Carneal and other young people created an unreasonable risk of harm to others. James alleged that exposure to the defendants' material made young people insensitive to violence and more likely to commit violent acts. But for Carneal's steady diet of the defendants' material, James contended, Carneal would not have committed his violent acts.

Second, James asserted that the video game cartridges, movie cassettes, and internet transmissions that the defendants produced and distributed were "products" for purposes of Kentucky product liability law. According to James, the violent features of the movie, games, and internet sites were product defects. The defendants, as producers and distributors of the "products," are strictly liable under Kentucky law for damages caused by such product defects.

The third claim that James raised was that some of the defendants' conduct had violated the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.* According [**7] to James, the defendant firms that maintained internet sites engaged in a pattern of racketeering activity by distributing obscene material to minors.

The defendants moved to dismiss all of James's actions for failing to state any claim on which relief could be granted. See *Fed. R. Civ. P.* 12(b)(6). The district court granted the defendants' motion. The district court held that Carneal's actions were not sufficiently foreseeable to impose a duty of reasonable care on the defendants with regard to Carneal's victims. Alternatively, the district court held that even if such a duty existed, Carneal's actions constituted a superseding cause of the victims' injuries, defeating the element of proximate causation notwithstanding the defendants' negligence. With regard to James's second cause of action, [***6] the district court determined that the "thoughts, ideas and images" purveyed by the defendants' movie, video games, and internet sites were not "products" for pur-

poses of Kentucky law and therefore the defendants could not be held strictly liable for any alleged defects. Finally, the district court held that James had not stated a viable RICO claim against the defendant internet [**8] firms. Among other reasons, the district court explained that James had alleged RICO predicate acts, but had failed to identify an organization that had been corrupted, and had failed to show any injury [*689] to "business or property" as required for standing under RICO.

James now appeals the district court dismissal of his negligence and product liability claims. We can discern no argument in James's brief assigning error to the district court's dismissal of his RICO claim, and therefore consider such an argument waived. Accordingly, this appeal raises questions of only Kentucky law.

II

In this case, we review a district court's dismissal of a case for failure to state a claim on which relief may be granted. *Fed. R. Civ. P. 12(b)(6)*. In deciding a *Rule 12(b)(6)* motion to dismiss, the district court is required to assume that all allegations in the complaint are true and to decide whether those allegations provide a basis for legal relief. See *Mayer v. Mylod*, 988 F.2d 635, 638 (6th Cir. 1993). "A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which [**9] would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957). This court reviews *de novo* a district court's granting of such a motion to dismiss. *Helfrich v. PNC Bank, Kentucky, Inc.*, 267 F.3d 477, 480-81 (6th Cir. 2001).

The legal questions under review in this case are questions of Kentucky law. When faced with the resolution of these state law issues, our inquiry is in part hypothetical. Specifically, we are charged to decide these questions of Kentucky state law as Kentucky state courts would. See *Miles* [***7] v. *Kohli & Kaliher Assocs.*, 917 F.2d 235, 241 (6th Cir. 1990). Although we can find no decision of Kentucky courts that decides precisely the issues presented in this case, we are confident that Kentucky appellate courts would uphold the dismissal of James's action, based on their existing decisions. We elaborate on our conclusion below, considering first James's negligence action and second his products liability action.

III

James contends that the defendants in this case acted negligently, perhaps in producing, but at least in distributing to young people, their [**10] materials. It was this negligence, according to James, that caused Carneal to

undertake his violent actions and that thereby caused the deaths of the plaintiffs' daughters. In order to establish an actionable tort under Kentucky law, the plaintiff must establish that the defendant owed a duty of care to the plaintiff, that the defendant breached that duty of care, and that the *defendant's breach* was the proximate cause of the plaintiff's damages.

A. The Existence of a Duty of Care

The district court held that James's allegations, even if assumed to be true, failed to establish the first element of the *prima facie* case. Specifically, the district court determined that the defendants were under no duty to protect James, Steger, and Hadley from Carneal's actions. James argues that the district court erred as a matter of Kentucky law in this regard.

The "existence of a duty of care" as an element of a tort cause of action is of relatively recent vintage. At early English common law, the existence of a duty of care was not considered as an element of an actionable tort. Then, tort law attached strict liability for any damages that resulted from "wrongful acts." Prosser [**11] on Torts § 53. The requirement that the plaintiff establish that he was owed a specific duty of care by the defendant came with the advent of negligence in place of strict [*690] liability. See generally Percy H. Winfield, *Duty in* [***8] *Tortious Negligence*, 34 Colum. L. Rev. 41 (1934). As a separate basis of liability, negligence was simply too broad, according to later English courts. Accordingly, the concept of limited duty disciplined the concept of negligence, requiring the plaintiff to establish a definite legal obligation.

At first, the limited duty of care concerned the persons to whom a defendant owed an obligation of care. See, e.g., *Shore v. Town of Stonington*, 187 Conn. 147, 444 A.2d 1379 (Conn. 1982) (holding that a police officer owed no duty to protect a citizen who was killed by a drunk driver that the officer had stopped, but released). The dilemma was that it became nearly impossible categorically to demarcate the universe of people to whom a person would owe a duty to abstain from negligence. With regard to the existence of duty between specific persons, the answer always was dependent on the circumstances.

Kentucky courts [**12] resolved this dilemma by establishing a "universal duty of care." *Grayson Fraternal Order of Eagles v. Claywell*, 736 S.W.2d 328 (Ky. 1987); *M&T Chems., Inc. v. Westrick*, 525 S.W.2d 740 (Ky. 1974); *Greyhound Corp. v. White*, 323 S.W.2d 578 (Ky. 1959). Under the universal duty of care, "every person owes a duty to every other person to exercise ordinary care in his activities to prevent foreseeable injury." *Grayson*, 736 S.W.2d at 332. James argues that Ken-

tucky's universal duty of care would foreclose the defendants' argument that they had no duty to protect James, Steger, and Hadley. It is clear to us, however, that Kentucky's rule of a universal duty of care simply recognizes the obvious in determining the existence of a duty of care. Of course, there are conceivable circumstances under which there would be legally enforceable duties to act without negligence between any two people. What Kentucky courts have recognized through the "universal duty of care" rule is that the existence of a duty of care is circumstantially limited: the duty is to exercise ordinary care to prevent *foreseeable* harm.

Thus, Kentucky courts [**13] have held that the determination of whether a duty of care exists is whether the harm to the [***9] plaintiff resulting from the defendant's negligence was "foreseeable." Foreseeability is an often invoked, but not terribly well defined, concept in the common law of tort. Some common law tort regimes use foreseeability as the standard for determining proximate causation. *See, e.g., Fu v. State*, 263 Neb. 848, 643 N.W.2d 659, 669 (Neb. 2002); *Haliw v. City of Sterling Heights*, 464 Mich. 297, 627 N.W.2d 581, 588 (Mich. 2001). Compare *Bodkin v. S.P., Inc.*, 263 Ill. Dec. 434, 768 N.E.2d 194, 202 (Ill. Ct. App. 2002) (attempting to identify different forms of foreseeability for the proximate cause and the existence of a duty inquiries). Kentucky's particular use of foreseeability in the duty inquiry finds its roots in perhaps the most famous application of the foreseeability principle. In *Palsgraf v. Long Island Railroad Co.*, 248 N.Y. 339, 162 N.E. 99 (N.Y. 1928), then-Judge Cardozo determined that the defendant's duty is to avoid "risks reasonably to be perceived." 162 N.E. at 100. As every former law student remembers, the plaintiff [**14] in *Palsgraf* had bought a train ticket to travel to the Rockaways for the afternoon and was waiting on the station platform. Two men were rushing to catch a departing train, one easily hopped on board and the other struggled to pull himself onto the rear car. A conductor on the train pulled him on board, but in the process, the struggling passenger dropped onto the rails the brown-paper package he was carrying. The package was full of fireworks and exploded. The explosion overturned a [**691] large set of scales on the platform, which struck Palsgraf, and Palsgraf sued the railroad for her injuries.

Cardozo determined that the railroad simply did not owe a duty to Palsgraf to protect against *the injury that she suffered*. For Cardozo, the harm that Palsgraf suffered was not sufficiently probable that the railroad employees could have been expected to anticipate it occurring from their actions. Cardozo's reasoning, although implying that Palsgraf was the unforeseeable plaintiff, rested on the improbability of the *harm* that she suffered arising from the defendant's particular actions. 162 N.E.

at 101. For Cardozo too, the existence of a duty of care was a creature of circumstance.

[**15] [***10] Cardozo's opinion in *Palsgraf*, while cited as the cornerstone of the American doctrine of a limited duty of care, has been criticized for its conclusory reasoning regarding whether Palsgraf's harm really was sufficiently unforeseeable. *See* William L. Prosser, *Palsgraf Revisited*, 52 Mich. L. Rev. 1, 7-9 (1953). Such conclusory reasoning has been endemic in the jurisprudence of determining duty by assessing foreseeability. Courts often end up merely listing factual reasons why a particular harm, although having materialized, would have appeared particularly unlikely in advance and then simply asserting that the harm was too unlikely to be foreseeable and to create a duty to exercise due care in protecting against it. What has not emerged is any clear standard regarding what makes a projected harm too improbable to be foreseeable.

Kentucky courts have struggled with the formless nature of this inquiry. At bottom, Kentucky courts have conceded, deciding the existence of a duty of care is "essentially a policy determination." *Mullins v. Commonwealth Life Ins. Co.*, 839 S.W.2d 245, 248 (Ky. 1992); *Sheehan v. United Servs. Auto. Ass'n*, 913 S.W.2d 4, 6, 43:1 Ky. L. Summary 13 (Ky. Ct. App. 1996). [**16] Rather than the sophisticated weighing of probabilities, the content of that policy determination "is but a conclusion of whether a plaintiff's interests are entitled to legal protection against the defendant's conduct." *Sheehan*, 913 S.W.2d at 6.

The parties in this case have argued at length over whether the foreseeability inquiry required to determine the existence of a duty of care is a pure question of law for the court or a question of fact that should generally be submitted to a jury. Under Kentucky law, it is clear that the existence of a duty of care to the plaintiff, and its underlying foreseeability inquiry, is a pure question of law for the court. *Mullins*, 839 S.W.2d at 248 ("The question of duty presents an issue of law"); *Sheehan*, 913 S.W.2d at 6. *See also* 57A Am. Jur. 2d *Negligence* § 20 (listing other jurisdictions in which the duty [***11] inquiry is a question of law).¹ The allocation of responsibility [**692] for determining this question to the courts, rather than to juries, reveals that the duty inquiry contains an important role for considering the policy consequences of imposing liability on a certain class [**17] of situations. Essentially, the foreseeability inquiry requires courts to determine questions inexorably tied to the ultimate question of whether the defendant was negligent. After all, the probability of the harm is a significant factor in traditional assessment of negligence.² By placing the foreseeability analysis in the hands of courts, the existence of duty element of the *prima facie*

case serves as a gatekeeper for the otherwise extremely broad concept of negligence.

1 James directs us to several cases that, he argues, stand for the proposition that foreseeability of harm is a question of fact for the jury under Kentucky law, when reasonable minds can differ. Most of the cited cases, however, pertain to the question of foreseeability in the context of proximate causation. *Watts v. K, S, & H*, 957 S.W.2d 233, 239, 44:11 Ky. L. Summary 37 (Ky. 1998) ("The question of foreseeable risk is covered by the usual instruction relating to proximate cause."). Proximate cause, and its underlying foreseeability inquiry, is a question of fact for the jury. See Part III.B. *infra*. The only other Kentucky case cited for this proposition has nothing to do with the common law of tort. See *Finney Co. v. Monarch Constr. Co.*, 670 S.W.2d 857, 862-63 (Ky. 1984) (discussing the concept of reasonably foreseeable reliance in a breach of contract case). James also directs us to *Workman v. Columbia Nat. Res.*, 864 F. Supp. 638 (E.D. Ky. 1994), which holds that foreseeability for determining the existence of a duty is a question of fact for the jury. The federal district court in *Workman*, however, erred in its interpretation of Kentucky law on this issue, and we choose to follow the clear rulings of the Kentucky courts in *Mullins* and *Sheehan*.

[**18]

2 Learned Hand's famous conception of negligence would hold conduct negligent if the harm that the conduct threatens to create, discounted by the *ex ante* probability of the harm's non-occurrence, outweighs the utility created by the conduct. See *United States v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947).

Thus, we are called, as best we can, to implement Kentucky's duty of care analysis in this case. Our inquiry is whether the deaths of James, Steger, and Hadley were the reasonably foreseeable result of the defendants' creation and [***12] distribution of their games, movie, and internet sites. Whether an event was reasonably foreseeable is not for us to determine with the assistance of hindsight. *Mitchell v. Hadl*, 816 S.W.2d 183, 186 (Ky. 1991). The mere fact that the risk may have materialized does little to resolve the foreseeability question.

Kentucky courts, in resolving foreseeability questions, have consistently inquired into the relative likelihood of the injuries produced. Of particular interest in this case are cases in which plaintiffs [**19] have sought to hold defendants liable for the actions of third parties, allegedly enabled or encouraged by the defen-

dants. A line of cases in this vein concerns dram shops. In *Grayson*, the Kentucky Supreme Court held that an automobile accident injuring third parties was a reasonably foreseeable result of the negligent act of serving alcohol to an intoxicated individual. 736 S.W.2d at 332. In contrast, the court later held that an intoxicated patron fighting with and shooting a fellow customer was simply not a foreseeable result of continuing to serve the patron alcohol. *Isaacs v. Smith*, 5 S.W.3d 500, 502 (Ky. 1999). According to the court, the violent fighting and shooting was so much less likely a result from the serving of alcohol than the negligent operation of a motor vehicle that it was not reasonably foreseeable. *Ibid*. Accordingly, the court held that dram shops, although negligent in serving alcohol to the obviously intoxicated, do not have a duty to protect third parties from the intentional violent acts of their intoxicated patrons. *Ibid*.

Intentional violence is less likely to result from intoxication than negligent operation of a motor vehicle. [**20] Yet, the Kentucky Supreme Court never makes clear how unlikely is too unlikely for a particular type of harm to be unforeseeable. The cases do not create a principle, portable to the context of this case, for evaluating the probability of harm.

This court has encountered this foreseeability inquiry under Kentucky law before in a situation similar to this case. In *Watters v. TSR, Inc.*, 904 F.2d 378 (6th Cir. 1990), the mother of a suicide victim sued TSR for manufacturing the game [***13] "Dungeons and Dragons." The suicide victim regularly played the game. The mother contended that the game's violent [*693] content "desensitized" the victim to violence and caused him to undertake the violent act of shooting himself in the head. We held that the boy's suicide was simply not a reasonably foreseeable result of producing the game, notwithstanding its violent content. To have held otherwise would have been "to stretch the concepts of foreseeability and ordinary care to lengths that would deprive them of all normal meaning." *Id* at 381.

Foreseeability, however, is a slippery concept. Indeed, it could be argued that we ourselves confused it with some concept [**21] of negligence. We noted in *Watters*: "The defendant cannot be faulted, obviously, for putting its game on the market without attempting to ascertain the mental condition of each and every prospective player." *Ibid*. We almost appeared to say that the costs of acquiring such knowledge would so outweigh the social benefits that it would not be negligent to abstain from such an investigation. We can put the *foreseeability* point a little more precisely, however. It appears simply impossible to predict that these games, movie, and internet sites (alone, or in what combinations) would incite a young person to violence. Carneal's reaction to the games and movies at issue here, assuming that his

violent actions were such a reaction, was simply too idiosyncratic to expect the defendants to have anticipated it. We find that it is simply too far a leap from shooting characters on a video screen (an activity undertaken by millions) to shooting people in a classroom (an activity undertaken by a handful, at most) for Carneal's actions to have been reasonably foreseeable to the manufacturers of the media that Carneal played and viewed.

At first glance, our conclusion also appears to be [**22] little more than an assertion. Mental health experts could quite plausibly opine about the manner in which violent movies and video games affect viewer behavior. We need not stretch to imagine some mixture of impressionability and emotional instability that might unnaturally react with the violent [***14] content of the "Basketball Diaries" or "Doom." Of course, Carneal's reaction was not a normal reaction. Indeed, Carneal is not a normal person, but it is not utter craziness to predict that someone like Carneal is out there.

We return, however, to the Kentucky court's observation that the existence of a duty of care reflects a judicial policy judgment at bottom. From the Kentucky cases on foreseeability, we can discern two relevant policies that counsel against finding that Carneal's violent actions were the reasonably foreseeable result of defendants' distribution of games, movies, and internet material.

1. The Duty to Protect Against Intentional Criminal Actions

First, courts have held that, except under extraordinary circumstances, individuals are generally entitled to assume that third parties will not commit intentional criminal acts. *See Restatement (Second) of Torts* § 302(B), *comment d* [**23] ("Normally the actor has much less reason to anticipate intentional misconduct than he has to anticipate negligence. In the ordinary case he may reasonably proceed upon the assumption that others will not interfere in a manner intended to cause harm to anyone. This is true particularly where the intentional conduct is a crime, since under ordinary circumstances it may reasonably be assumed that no one will violate the criminal law."). *See also Gaines-Tabb v. ICI Explosives USA, Inc.*, 995 F. Supp. 1304 (D. Okla. 1996) (holding that fertilizer and blasting cap manufacturers were not liable for Murrah Federal Building bombing, as they were entitled to believe that third [*694] parties would not engage in intentional criminal conduct); *Henry v. Merck & Co.*, 877 F.2d 1489, 1493 (10th Cir. 1989). The reasons behind this general rule are simple enough. The first reason is a probabilistic judgment that foreseeability analysis requires. Individuals generally are significantly deterred from undertaking intentional criminal conduct given the sanctions that can follow. The threatened sanctions make the third-party intentional criminal conduct

[**24] sufficiently less likely that, [***15] under normal circumstances, we do not require the putative tort defendant to anticipate it. Indeed, this statistical observation explains the distinction drawn by Kentucky courts in the dram shop liability cases.

The second reason is structural. The system of criminal liability has concentrated responsibility for an intentional criminal act in the primary actor, his accomplices, and his co-conspirators. By imposing liability on those who did not endeavor to accomplish the intentional criminal undertaking, tort liability would diminish the responsibility placed on the criminal defendant. The normative message of tort law in these situations would be that the defendant is not entirely responsible for his intentional criminal act.

Does this case involve the extraordinary circumstances under which we would require the defendants to anticipate a third party's intentional criminal act? Kentucky courts have found such circumstances when the tort defendant had previously developed "a special relationship" with the victim of a third-party intentional criminal act. *See, e.g., Fryman v. Harrison*, 896 S.W.2d 908, 910, 42:05 Ky. L. Summary 33 (Ky. 1995) (requiring [**25] that the victim be in state custody in order to trigger governmental duty to protect her from third-party violence as a matter of Kentucky tort law). *Cf. DeShaney v. Winnebago County Dep't of Soc. Serv.*, 489 U.S. 189, 103 L. Ed. 2d 249, 109 S. Ct. 998 (1989) (articulating the special relationship test to trigger a governmental duty to protect persons from private violence under the *Fourteenth Amendment*). This duty to protect can be triggered by placing the putative plaintiff in custody or by taking other affirmative steps that disable the plaintiff from protecting himself against third-party intentional criminal acts. Of course, a special relationship can be created by a contract between the plaintiff and the defendant. Finally, some states have imposed a duty to protect others from third-party intentional criminal acts on members of discrete professions who become aware of the third-party's intention to engage in criminal conduct against a specific person. *See Tarasoff v. Board of Regents of the Univ. of Cal.*, 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (Cal. 1976); *Evans v. Morehead Clinic*, 749 S.W.2d 696 (Ky. Ct. of App. 1988).

[**26] [***16] We can find nothing close to a "special relationship" in this case. The defendants did not even know James, Steger, and Hadley prior to Carneal's actions, much less take any affirmative steps that disabled them from protecting themselves.

Courts have held, under extremely limited circumstances, that individuals, notwithstanding their relationship with the victims of third-party violence, can be liable when their affirmative actions "create a high degree

300 F.3d 683, *; 2002 U.S. App. LEXIS 16185, **;
2002 FED App. 0270P (6th Cir.), ***; 30 Media L. Rep. 2185

of risk of [the third party's] intentional misconduct." *Restatement of Torts (Second)* § 302B, cmt. e H. Generally, such circumstances are limited to cases in which the defendant has given a young child access to ultra-hazardous materials such as blasting caps, *Vills v. City of Cloquet*, 119 Minn. 277, 138 N.W. 33 (Minn. 1912), or firearms. *Spivey v. Sheeler*, 514 S.W.2d 667 (Ky. 1974). Even in those cases, courts have relied on the third party's severely diminished capacity to handle the ultra-hazardous materials. With older third [*695] parties, courts have found liability only where defendants have vested a particular person, under circumstances that made his nefarious plans clear, with the [**27] tools that he then quickly used to commit the criminal act. See *Meers v. McDowell*, 110 Ky. 926, 62 S.W. 1013, 23 Ky. L. Rptr. 461 (Ky. 1901). Arguably, the defendants' games, movie, and internet sites gave Carneal the ideas and emotions, the "psychological tools," to commit three murders. However, this case lacks such crucial features of our jurisprudence in this area. First, the defendants in this case had no idea Carneal even existed, much less the particular idiosyncrasies of Carneal that made their products particularly dangerous in his hands. In every case that this court has discovered in which defendants have been held liable for negligently creating an unreasonably high risk of third-party criminal conduct, the defendants have been specifically aware of the peculiar tendency of a particular person to commit a criminal act with the defendants' materials.

Second, no court has ever held that ideas and images can constitute the tools for a criminal act under this narrow exception. Beyond their intangibility, such ideas and images [***17] are at least one step removed from the implements that can be used in the criminal act itself. In the cases supporting this exception, the item [**28] that the defendant has given to the third-party criminal actor has been the direct instrument of harm.

2. First Amendment Problems

Moreover, we are loath to hold that ideas and images can constitute the tools for a criminal act under this exception, or even to attach tort liability to the dissemination of ideas. We agree with the district court that attaching tort liability to the effect that such ideas have on a criminal actor would raise significant constitutional problems under the *First Amendment* that ought to be avoided. See *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 500, 59 L. Ed. 2d 533, 99 S. Ct. 1313 (1979) (suggesting that non-constitutional questions of law ought to be construed, where possible, to avoid significant constitutional problems). Although the plaintiffs' contentions in this case do not concern the absolute proscription of the defendants' conduct, courts have made clear that attaching tort liability to protected speech can

violate the *First Amendment*. See *New York Times v. Sullivan*, 376 U.S. 254, 265, 11 L. Ed. 2d 686, 84 S. Ct. 710 (1964) ("Although this is a civil lawsuit between private parties, the Alabama [**29] courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms of speech and press. It matters not that that law has been applied in a civil action and that it is common law only, though supplemented by statute.").

The first inquiry is whether the defendants' activity constitutes protected speech under the *First Amendment*. One thing is perfectly clear to this court: the plaintiffs' argument does not seek to attach liability to the cassettes and cartridges distributed by the defendants, but the ideas and images communicated to Carneal by those products. Although the defendants' products may be a mixture of expressive and inert content, the plaintiffs' theory of liability isolates the expressive content of the defendants' products.

Expression, to be constitutionally protected, need not constitute the reasoned discussion of the public affairs, but [***18] may also be for purposes of entertainment. See *Time, Inc. v. Hill*, 385 U.S. 374, 388, 17 L. Ed. 2d 456, 87 S. Ct. 534 (1967). Clearly, the various media distributed in this case fall along a spectrum of expressive content. It is long settled that movies [**30] [*696] can constitute protected speech. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501, 96 L. Ed. 1098, 72 S. Ct. 777 (1952). Of more recent, but no less definitive, resolution is that internet sites are similarly entitled to protection. See *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997) (striking down the Communications Decency Act regulating indecent material on the internet). The constitutional status of video games has been less litigated in federal courts. Yet most federal courts to consider the issue have found video games to be constitutionally protected. *American Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572 (7th Cir. 2001) (Posner, J.); *Wilson v. Midway Games, Inc.*, 198 F. Supp. 2d 167 (D. Conn. 2002); *Sanders v. Acclaim Entm't, Inc.*, 188 F. Supp. 2d 1264 (D. Colo. 2002). But see *Interactive Digital Software Ass'n v. St. Louis County, Mo.*, 200 F. Supp. 2d 1126 (E.D. Mo. 2002) (holding that video games were not protected expression under the *First Amendment*).

Extending *First Amendment* protection to video games certainly presents some thorny issues. After all, there [**31] are features of video games which are not terribly communicative, such as the manner in which the player controls the game. The plaintiffs in this case, however, complain about none of those non-expressive features. Instead, they argue that the video game, somehow, communicated to Carneal a disregard for human life and an endorsement of violence that persuaded him to commit three murders. Because the plaintiffs seek to

attach tort liability to the communicative aspect of the video games produced by the defendants, we have little difficulty in holding that the *First Amendment* protects video games in the sense uniquely relevant to this lawsuit. Our decision here today should not be interpreted as a broad holding on the protected status of video games, but as a recognition of the particular manner in which James seeks to regulate them through tort liability.

[**19] To say that the features of the defendants' products of which the plaintiffs complain are protected by the *First Amendment* is not necessarily to say that attaching tort liability to those features raises significant constitutional problems. The plaintiffs' argument is more nuanced: they do not seek to hold the defendants [**32] responsible merely for distributing their materials to anyone, but to young, impressionable children or, even more specifically, to Carneal. The protections of the *First Amendment* have always adapted to the audience intended for the speech. Specifically, we have recognized certain speech, while fully protected when directed to adults, may be restricted when directed towards minors. See, e.g., *Sable Communications v. FCC*, 492 U.S. 115, 126, 106 L. Ed. 2d 93, 109 S. Ct. 2829 (1989); *Connection Distrib. Co. v. Reno*, 154 F.3d 281, 291-92 (6th Cir. 1998). We have also required, however, that such regulations be narrowly tailored to protecting minors from speech that may improperly influence them and not effect an "unnecessarily broad suppression of speech" appropriate for adults. *Reno v. American Civil Liberties Union*, 521 U.S. 844, 874-75 (1997); *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 812-13, 146 L. Ed. 2d 865, 120 S. Ct. 1878 (2000); *Connection Distrib.*, 154 F.3d at 292.

Of course, the measure here intended to protect minors from the improper influence of otherwise protected speech [**33] is quite different from the regulations that we have countenanced in the past. Those regulations were the product of the reasoned deliberation of democratically elected legislative bodies, or at least regulatory agencies exercising authority delegated by such [**697] bodies. It was legislative bodies that had demarcated what otherwise protected speech was inappropriate for children and that had outlined in advance the measures that speakers were required to take in order to protect children from the speech.

In contrast, the question before us is whether to permit tort liability for protected speech that was not sufficiently prevented from reaching minors. At trial, the plaintiff would undoubtedly argue about the efficient measures that the defendants should have taken to protect the children. But at [***20] the end of this process, it would be impossible for reviewing courts to evaluate whether the proposed protective measures would be narrowly tailored regulations. Who would know what omis-

sion the jury relied upon to find the defendants negligent? Moreover, under the concept of negligence, there is no room for evaluating the value of the speech itself. The question before a jury evaluating [**34] James's claim of negligence would ask whether the defendants took efficient precautions, in keeping their material from Carneal, that would be less expensive than the amount of the loss, the three deaths.

We cannot adequately exercise our responsibilities to evaluate regulations of protected speech, even those designed for the protection of children, that are imposed pursuant to a trial for tort liability. Crucial to the safeguard of strict scrutiny is that we have a clear limitation, articulated in the legislative statute or an administrative regulation, to evaluate. "Whither our children," as Appellant's brief states at 3, is an important question, but their guidance through the regulation of protected speech should be directed in the first instance to the legislative and executive branches of state and federal governments, not the courts.

Our concerns about adequately evaluating the narrow tailoring of regulations wane if the underlying expression is completely unprotected. Whether certain speech is not protected at all is a question that courts are regularly called upon to answer. James argues that to the extent that the content distributed by the defendants is at all expressive, [**35] it constitutes obscene material that is unprotected by the *First Amendment*. See *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 69, 37 L. Ed. 2d 446, 93 S. Ct. 2628 (1973). It would be novel to argue that the video games and *The Basketball Diaries* are obscene. As we understand James's complaint, he complains that the video games and the movie are excessively violent - yet we have generally applied our obscenity jurisprudence only to material of a sexual nature, appealing only to prurient interest and lacking any other socially redeeming value. See *Miller v. California*, 413 U.S. 15, 23-24, 37 L. Ed. 2d 419, 93 S. Ct. 2607 (1973) ("We now confine the scope of [obscene material] to works which depict or [***21] describe sexual conduct."); *United States v. Thoma*, 726 F.2d 1191, 1200 (7th Cir. 1984) (holding that because depictions of violence are not sexual, obscenity jurisprudence does not apply).

With the sexually-oriented internet defendants, James has an arguable basis to allege that the material is unprotected speech under our conventional obscenity jurisprudence. Nevertheless, where the *First Amendment* concerns wane the most [**36] with the possibility of obscenity, the foreseeability problems loom the largest. In his complaint, James contends that the sexual content displayed by the internet sites made "virtual sex pleasurable and attractive" for Carneal and caused him to undertake his violent actions. To us, however, James's allega-

tions regarding his exposure to violence seem much closer to the mark. After all, James does not seek to hold the internet defendants responsible [*698] for a sexual crime: Carneal never endeavored sexually to abuse his victims, just to kill them.

With the movie and video game defendants, James contends that their material is excessively violent and constitutes obscene, non-protected speech. We decline to extend our obscenity jurisprudence to violent, instead of sexually explicit, material. Even if we were to consider such an expansion, James's arguments are not conceptually linked to our obscenity jurisprudence. The concept of obscenity was designed to permit the regulation of "offensive" material, that is, material that people find "disgusting" or "degrading." See *American Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572, 574 (7th Cir. 2002). James's argument, on the other [*37] hand, is that the violent content of these video games and the movie shapes behavior and causes its consumers to commit violent acts. This is a different claim than the obscenity doctrine, which is a limit on the extent to which the community's sensibilities can be shocked by speech, not a protection against the behavior that the speech creates. *Id.* at 574-75 (holding that the law of obscenity does not apply to the argument that violence in video games causes players to commit violent acts).

***22] This is not to say that protecting people from the violence that speech might incite is a completely impermissible purpose for regulating speech. However, we have generally handled that endeavor under a different category of our *First Amendment* jurisprudence, excluding from constitutional protection those communicated ideas and images that incite others to violence. Speech that falls within this category of incitement is not entitled to *First Amendment* protection. See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 384-85, 120 L. Ed. 2d 305, 112 S. Ct. 2538 (1992). The Court firmly set out the test for whether speech constitutes unprotected incitement to [*38] violence in *Brandenburg v. Ohio*, 395 U.S. 444, 23 L. Ed. 2d 430, 89 S. Ct. 1827, 48 Ohio Op. 2d 320 (1969). In protecting against the propensity of expression to cause violence, states may only regulate that speech which is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Id.* at 447 (emphasis added).

The violent material in the video games and *The Basketball Diaries* falls well short of this threshold. First, while the defendants in this case may not have exercised exquisite care regarding the persuasive power of the violent material that they disseminated, they certainly did not "intend" to produce violent actions by the consumers, as is required by the *Brandenburg* test. *Hess v. Indiana*, 414 U.S. 105, 108, 38 L. Ed. 2d 303, 94 S. Ct. 326 (requiring evidence that the speaker "intended" his words to

produce violent conduct under the *Brandenburg* test). Second, the threat of a person like Carneal reacting to the violent content of the defendants' media was not "imminent." Even the theory of causation in this case is that persistent exposure to the defendants' media gradually [*39] undermined Carneal's moral discomfort with violence to the point that he solved his social disputes with a gun. This glacial process of personality development is far from the temporal imminence that we have required to satisfy the *Brandenburg* test. *Ashcroft v. Free Speech Coalition*, 152 L. Ed. 2d 403, 122 S. Ct. 1389, 1394 (2002) ("The mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it absent some showing of a direct connection between the speech and imminent illegal conduct"); *McCoy v. Stewart*, 282 F.3d 626, 631 (9th Cir. 2002) (holding that incitement is not imminent [***23] if it risks third-party violence at some "indefinite future time"). [*699] Third, it is a long leap from the proposition that Carneal's actions were foreseeable to the *Brandenburg* requirement that the violent content was "likely" to cause Carneal to behave this way.

James contends that the *Brandenburg* test for speech inciting violence does not apply to depictions of violence, but instead only to political discourse advocating imminent violence. James suggests that the suppression of expression that is not advocacy, but does [*40] tend to inspire violence in its viewers or consumers, is governed by a less stringent standard. Federal courts, however, have generally demanded that all expression, advocacy or not, meet the *Brandenburg* test before its regulation for its tendency to incite violence is permitted. See *Dworkin v. Hustler Magazine, Inc.*, 867 F.2d 1188, 1199-1200 (9th Cir. 1989) (applying the *Brandenburg* test to arguments that pornography causes viewers to engage in conduct that is violent and degrading to women); *Herceg v. Hustler Magazine, Inc.*, 814 F.2d 1017, 1024 (5th Cir. 1987) (rejecting suggestion "that a less stringent standard than the *Brandenburg* test be applied in cases involving non-political speech that has actually produced harm.").

Like the district court, we withhold resolution of these constitutional questions given the adequacy of the state law grounds for upholding the dismissal. Attaching such tort liability to the ideas and images conveyed by the video games, the movie, and the internet sites, however, raises grave constitutional concerns that provide yet an additional policy reason not to impose a duty of care between the defendants and [*41] the victims in this case.

B. Proximate Causation

Even if this court were to find that the defendants owed a duty to protect James, Steger, and Hadley from

Carneal's violent actions, the plaintiffs likely have not alleged sufficient facts to establish the third element of a *prima facie* tort case: proximate causation. The defendants argue that even if they were negligent, Carneal's intentional, violent actions [***24] constitute a superseding cause of the plaintiffs' damages and sever the defendants liability for the deaths of Carneal's victims. Generally, a third party's criminal action that directly causes all of the damages will break the chain of causation.

Yet, Kentucky courts have held that an intervening third-party criminal act will not be a superseding cause breaking the chain of causation if the act was reasonably foreseeable. *See, e.g., Britton v Wooten*, 817 S.W.2d 443, 449-50 (Ky. 1991). In *Britton*, the plaintiff had been injured by a fire in his leased store. The fire started when trash piled next to the building by the landlord was ignited by an arsonist. The court held that the arsonist's intervening act was not a superseding cause [**42] of the fire because the act was a reasonably foreseeable result of the landlord's piling of flammable material next to the building. *Ibid*

The court reached the question of causation in *Britton* because of the landlord's well established duty of care to protect its tenants from injury. *See, e.g., Waldon v. Housing Auth. of Paducah*, 854 S.W.2d 777, 779 (Ky. Ct. App. 1991) (holding landlord liable for failing to protect tenant from being shot by a third-party intruder). As we have noted above, the duty of the media defendants in this case is far from as firmly established. Outside of the landlord-tenant context, Kentucky courts are far more likely to determine that an intervening criminal act is a superseding cause. *See Briscoe v. Amazing Prod., Inc.*, 23 S.W.3d 228, 229-30 (Ky. Ct. App. 2000). Compare *House v. Kellerman*, 519 S.W.2d 380 (Ky. Ct. App. 1975) (confronting the question of [700] superseding cause in the context of the well established duty of driver to protect his passenger). In *Briscoe*, the plaintiff was injured by a third party who battered her by spraying corrosive drain cleaner in her face. The plaintiff contended [**43] that the manufacturer of the drain cleaner was negligent and should have anticipated that it could be used as a weapon. The court held that batterer's reaction to and use of drain cleaner as a weapon was sufficiently unforeseeable to constitute a superseding cause. *Briscoe*, 23 S.W.3d at 230. [***25]

A similar analysis is applicable here. Our determination regarding the idiosyncratic nature of Carneal's reaction to the defendants' media would likely compel us to hold that his action constitutes a superseding cause. We, however, need not reach this question because we have determined that the defendants did not owe a duty to protect the decedents.

IV

James also contends that the district court erred in dismissing his products liability claims. In his complaint, James alleged that the defendants' video games, movie, and internet transmissions constitute "products," and their violent content "product defects." Under Kentucky law, manufacturers, distributors, and retailers of "products" are strictly liable for damages caused by "defects" in those products. *Clark v. Hauck Mfg. Co.*, 910 S.W.2d 247, 250, 42:12 Ky. L. Summary 28 (Ky. 1995); *Restatement (Second) of Torts* § 402A [**44]. If this theory of liability were to apply, James's failure to establish a duty to exercise ordinary care to prevent the victims' injuries (See Part III.A) would be irrelevant. Under strict liability, James would only be required to establish causation.³

3 Of course, James would continue to encounter proximate causation problems. *See* Part III.B.

James's theory of product liability in this case is deeply flawed. First, and something none of the parties have mentioned, the "consumers or ultimate users" of the alleged products are not the ones claiming physical harm in this case. *Restatement (Second) of Torts* § 402A. Carneal was the person who "consumed" or "used" the video games, movie, and internet sites. Allegedly because of Carneal's consumption of the products, he killed the victims in this case. In early products liability law, courts had required privity between the final retailer of the product and the injured plaintiff for strict liability to attach. Eventually, courts broadened the class [**45] of plaintiffs who could avail themselves of strict liability to include those who consumed or ultimately [***26] used the product. Kentucky courts, but certainly not all courts, have extended the protection of products liability to "bystanders" who are injured by the product, but are not "using" or "consuming" the product. *Embs v. Pepsi-Cola Bottling Co. of Lexington*, 528 S.W.2d 703 (Ky. Ct. App. 1975) (holding that bystander could recover on strict liability basis for injuries caused by exploding soda bottle); *Restatement (Second) of Torts* § 402A, n 1 (noting the split in authority regarding whether bystanders may recover on a strict liability basis). Imposing strict liability for the injuries suffered in this case would be an extension of Kentucky's bystander jurisprudence, as the decedents were not directly injured by the products themselves, but by Carneal's reaction to the products.

We place this open question of Kentucky law aside as the parties apparently have. James has failed to demonstrate a prior requirement, that the video games, [701] movies, and internet sites are "products" for purposes of strict liability. This was the basis on which the district court [**46] dismissed James's products liability claims, holding that the video games, movie, and internet

transmissions were not "products," at least in the sense that James sought to attach liability to them.

This court has already substantially resolved the question of Kentucky law presented. In *Watters v. TSR*, 904 F.2d 378 (6th Cir. 1990), this court held that "words and pictures" contained in a board game could not constitute "products" for purposes of maintaining a strict liability action. We cannot find any intervening Kentucky authority that persuades us that *Watters* no longer correctly states Kentucky law. James's theory of liability, that the ideas conveyed by the video games, movie cassettes and internet transmissions, caused Carneal to kill his victims, attempts to attach product liability in a nearly identical way.

James argues that, at least in this case, we are not just dealing with "words and pictures." Carneal, of course, had video game cartridges and movie cassettes. James argues that the test for determining whether an item is a product for [***27] purposes of Kentucky law is whether it is "tangible," and that the cartridges and cassettes are "tangible. [**47] " As for the internet sites, James points us to a court that has held that "electricity" is a "product" for purposes of strict liability under Kentucky law. See *C G Bryant v. Tri-County Elec Membership Corp.*, 844 F. Supp. 347, 352 (W.D. Ky. 1994). Internet sites are nothing more than communicative elec-

trical pulses, James contends. James argues that there is no relevant difference between the internet transmissions and the electricity.

And of course James is partially correct. Certainly if a video cassette exploded and injured its user, we would hold it a "product" and its producer strictly liable for the user's physical damages. In this case, however, James is arguing that the words and images purveyed on the tangible cassettes, cartridges, and perhaps even the electrical pulses through the internet, caused Carneal to snap and to effect the deaths of the victims. When dealing with ideas and images, courts have been willing to separate the sense in which the tangible containers of those ideas are products from their communicative element for purposes of strict liability. See, e.g., *Winter v. G.P. Putnam's Sons*, 938 F.2d 1033, 1036 (9th Cir. 1991); [**48] *Jones v. J.B. Lippincott Co.*, 694 F. Supp. 1216, 1217-18 (D. Md. 1988). We find these decisions well reasoned. The video game cartridges, movie cassette, and internet transmissions are not sufficiently "tangible" to constitute products in the sense of their communicative content.

V

For all the foregoing reasons, we AFFIRM the district court's dismissal of all James's claims.

10 of 21 DOCUMENTS

LINDA SANDERS, CONSTANCE ADAMS and CYNTHIA THIROUIN, ON THEIR OWN BEHALF AND AS REPRESENTATIVES OF WILLIAM DAVID SANDERS THEIR STEP FATHER AND HUSBAND OF LINDA SANDERS THRU NEXT FRIEND & PERSONAL ATTORNEY, JOHN W. DECAMP, ON THEIR OWN BEHALF & ON BEHALF OF ALL OTHER COLUMBINE VICTIMS INCLUDING, PARENTS, TEACHERS, STUDENTS LIVING, INJURED & DECEASED, Plaintiffs, v. ACCLAIM ENTERTAINMENT, INC., ACTIVISION, INC., APOGEE SOFTWARE, INC., ATARI CORPORATION, CAPCOM ENTERTAINMENT, INC., EIDOS INTERACTIVE, ID SOFTWARE, INC., ISLAND PICTURES, INFOGRAMES, INC. f/k/a GT INTERACTIVE SOFTWARE CORP., INTERPLAY ENTERTAINMENT CORP., MIDWAY HOME ENTERTAINMENT, NEW LINE CINEMA, NINTENDO OF AMERICA, MEOW MEDIA, INC., d/b/a WWW. PERSIANKITTY.COM, NETWORK AUTHENTICATION SYSTEMS, INC. d/b/a WWW. ADULTKEY.COM and PORNTech.COM, PALM PICTURES, POLYGRAM, SEGA OF AMERICA, INC., SONY COMPUTER ENTERTAINMENT AMERICA, INC., SQUARE SOFT, INC., d/b/a SQUARE USA, INC., TIME WARNER, INC., and VIRGIN ENTERTAINMENT GROUP, INC., Defendants.

Civil Case No. 01-B-728

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

188 F. Supp. 2d 1264; 2002 U.S. Dist. LEXIS 3997; CCH Prod. Liab. Rep. P16,310

March 4, 2002, Decided

March 4, 2002, Filed

DISPOSITION: [**1] Defendants' motions to dismiss GRANTED.

For ID SOFTWARE, INC., defendant: James T. Drakeley, Don Wade Cloud, Jr., Hiersche, Hayward, Drakeley & Urbach, P.C., Addison, TX USA.

COUNSEL: For LINDA H. SANDERS, CONSTANCE ADAMS, CYNTHIA THIROUIN, plaintiffs: John W. DeCamp, DeCamp Legal Services, P.C., Lincoln, NE USA.

For ACCLAIM ENTERTAINMENT, INC., NINTENDO OF AMERICA, ACTIVISION, INC., CAPCOM ENTERTAINMENT, INC., SONY COMPUTER ENTERTAINMENT, EIDOS INTERACTIVE, defendants: Thomas B. Kelley, Faegre & Benson, United States District Court, Denver, CO USA.

For MIDWAY HOME ENTERTAINMENT, defendant: Gerald Owen Sweeney, Jr., John Thomas Williams, Lord, Bissell & Brook, Chicago, IL USA.

For ACCLAIM ENTERTAINMENT, INC., NINTENDO OF AMERICA, ACTIVISION, INC., CAPCOM ENTERTAINMENT, INC., SONY COMPUTER ENTERTAINMENT, EIDOS INTERACTIVE, defendants: Paul March Smith, Jenner & Block, Washington, DC USA.

For MIDWAY HOME ENTERTAINMENT, defendant: David B. Higgins, Higgins, Hopkins, McLain & Roswell, [**2] LLC, Lakewood, CO USA.

For ID SOFTWARE, INC., defendant: James W. Hubbell, Kelly/Haglund/Garnsey & Kahn LLC, John R. Mann, Kennedy & Christopher, P.C., Denver, CO USA.

For TIME WARNER, INC., defendant: Andrew M. Low, Davis, Graham & Stubbs LLP, United States District Court, Denver, CO USA.

For PALM PICTURES, defendant: Stefan Darrell Stein, Peter A. Cal, Sherman & Howard, United States District Court, Denver, CO U.S.A.

For PALM PICTURES, defendant: Christopher Michael Caparelli, Mary Elizabeth McGarry, Simpson Thacher & Bartlett, New York, NY U.S.A.

JUDGES: LEWIS T. BABCOCK, [**3] CHIEF JUDGE.

OPINION BY: LEWIS T. BABCOCK

OPINION

[*1268] MEMORANDUM OPINION AND ORDER

Babcock, C.J.

In this diversity wrongful death action controlled by Colorado tort law, Defendants Acclaim Entertainment, Inc., Activision, Inc., Capcom Entertainment, Inc., EIDOS Interactive, ID Software, Inc., Infogrames, Inc., f/k/a GT Interactive Software Corp., Interplay Entertainment, Corp., Midway Home Entertainment, Nintendo of America, Palm Pictures, Sony Computer Entertainment America, and Time Warner, Inc. move, pursuant to *Fed.R.Civ.P. 12(b)(6)*, to dismiss for failure to state a claim upon which relief can be granted as to all claims brought against them by Plaintiffs Linda Sanders, Constance Adams and Cynthia Thirouin (collectively, Plaintiffs) the widow and stepchildren of William David Sanders, a teacher killed in the April 20, 1999 attack on Columbine High School. Oral argument would not materially assist in determination of the motions. After consideration of the motions, briefs and pertinent case law and for the following reasons, I grant the *Rule 12(b)(6)* motions.

I.

Facts

Plaintiffs allege that Columbine High School (Columbine) students Dylan Klebold and/or Eric Harris, both approximately [**4] 17 years of age, were co-conspirators in a plot and scheme to assault, terrorize and kill Columbine teachers and students. On April 20, 1999 at approximately 11:20 a.m., Klebold and Harris approached the school armed with multiple guns and other "weapons of destruction" including explosive devices. *See* Amended C/O, P 3-4.

After shooting at people outside the school, the pair entered the school building and continued their deadly assault inside Columbine. Twelve students and teacher

William Sanders were killed. Dozens of others were injured. *Id.* at P 4.

In the aftermath of the massacre the police allegedly learned that Harris and Klebold were avid, fanatical and excessive consumers of violent . . . video games . . . [and] consumers of movies containing obscenity, obscenity for minors, pornography, sexual violence, and/or violence. Amended C/O PP 6-7. One movie the pair viewed was "The Basketball Diaries" in which "a student massacres his classmates with a shotgun." Amended C/O P 7.

According to Plaintiffs, "but for the actions of the Video Game Defendants and the Movie Defendants, in conjunction with the acts of the other defendants herein, the multiple killings at Columbine [**5] High School would not have occurred." *Id.* at PP 17, 32. Based on the foregoing, Plaintiffs filed this action on April 19, 2001.

II

Claims and Defendants

Plaintiffs bring the following claims against Defendants:

1. Claim One for negligence and strict liability against Defendants Time Warner, Palm Pictures, Island Pictures, New Line Cinema and Polygram;

2. Claim Two for negligence and strict liability against Defendants Acclaim Entertainment, Inc., Activision, Inc., Apogee Software, Inc., Atari Corporation, Capcom Entertainment, Inc., EIDOS Interactive; ID Software, Inc., Infogrames, Inc., f/k/a GT Interactive Software Corporation, Interplay Entertainment Corp., Midway Home Entertainment, Nintendo of America, Sega of America, Inc., and Sony Computer Entertainment America Inc.; Square Soft, [*1269] Inc. d/b/a Square USA, Inc. and Virgin Entertainment Group, Inc.,

3. Claim Three for negligence and strict liability against Defendants Meow Media, Inc. d/b/a www.persiankitty.com and Network Authentication Systems, Inc. d/b/a www.adultkey.com and www.pornotech.com; and

4. RICO activity by Defendants Meow Media, Inc. d/b/a www.persiankitty.com and Network Authentication [**6] Systems, Inc. d/b/a www.adultkey.com and www.pornotech.com.

III.

Claims and Allegations

A. Claim One for Negligence and Strict Liability

Plaintiffs sue Defendants Time Warner, Palm Pictures, Island Pictures, New Line Cinema, and Polygram as the makers and distributors of "The Basketball Diaries." Defendants Time Warner and Palm Pictures (Movie Defendants) filed *Rule 12(b)(6)* motions which I resolve in this Memorandum Opinion and Order.

According to Plaintiffs, in "The Basketball Diaries," the protagonist inexplicably guns down his teacher and some of his classmates in cold blood, among other acts of gratuitous violence." Amended C/O P 11. Purportedly, this had the effect of "harmfully influencing impressionable minors such as Harris and Klebold and of thereby causing the shootings." *Id.* at P 12.

B. Claim Two for Negligence and Strict Liability

Plaintiffs sue Defendants Acclaim Entertainment, Inc. (Mortal Kombat and Mortal Kombat II), Activision, Inc. (Wolfenstein, Mech Warrior, Mech Warrior 2, and Nightmare Creatures), Apogee Software, Inc. (Wolfenstein and Doom), Atari Corporation (Doom), Capcom Entertainment, Inc. (Resident Evil), EIDOS Interactive [**7] (Final Fantasy), ID Software, Inc. (Quake and Doom), Infogrames, Inc. f/k/a GT Interactive Software Corp. (Doom), Interplay Entertainment Corp., (Redneck Rampage), Midway Home Entertainment (Quake and Doom), Nintendo of America (Nightmare Creatures), Sega of America, Inc. (Quake), Sony Computer Entertainment America (Final Fantasy), Square Soft, Inc. d/b/a Square USA, Inc. (Final Fantasy) and Virgin Entertainment Group, Inc. (Resident Evil) for manufacturing and/or supplying the designated violent video games allegedly frequently played by Harris and Klebold. *See* Am C/O PP 20-21

Video Game Defendants Acclaim Entertainment, Inc., Activision, Inc., Capcom Entertainment, Inc., EIDOS Interactive, ID Software, Inc., Infogrames, Inc. f/k/a GT Interactive Software Corp., Interplay Entertainment Corp., Midway Home Entertainment, Nintendo of America, Sony Computer Entertainment America, Inc., filed *Rule 12(b)(6)* motions addressed in this Memorandum Opinion and Order.

Plaintiffs allege that the Video Game Defendants manufactured and/or supplied to Harris and Klebold these video games which made violence pleasurable and attractive and disconnected the violence from the natural consequences [**8] thereof, thereby causing Harris and

Klebold to act out the violence . . . [and] trained [them] how to point and shoot a gun effectively without teaching either of them any of the constraints, responsibilities, or consequences necessary to inhibit such an extremely dangerous killing capacity." Amended C/O PP 25-25.

C. Claim Three for Negligence and Strict Liability and Claim Four for RICO Activity

Plaintiffs bring Claims Three and Four against Defendants Meow Media, Inc. [*1270] d/b/a www. persiankitty.com and Network Authentication Systems, Inc. d/b/a www. adultkey.com and www. porntech.com. (Internet Defendants). No *Rule 12(b)(6)* motions have been filed by the Internet Defendants. Consequently, I do not address Claims Three or Four in this Memorandum Opinion and Order.

D. Allegations Common to the Movie and Video Game Defendants

The negligence and strict products liability Claims One and Two against the Movie and Video Game Defendants contain the following common allegations:

1. Defendants knew that copycat violence would result from the use of their products and materials. *See* Amended C/O PP 16(a), 29(b);

2. Defendants knew that their products and [**9] materials created an unreasonable risk of harm because minors would be influenced by the effect of their products and materials and then would cause harm. *See* Amended C/O PP 16(k), 29(h);

3. Defendants knew or should have known that their products and materials were in an unreasonably defective condition and likely to be dangerous for the use for which they were supplied. *See* Amended C/O PP 16(v), 29(v); and

4. Defendants failed to exercise reasonable care to inform consumers of the dangerous condition of their products and materials or of the facts which made their products and materials likely to be dangerous. *See* Amended C/O PP 16(i), 29(k).

5. Scientific research shows that children who witness acts of violence often tend to act more violently themselves and to sometimes recreate those violent acts. *See* Amended C/O P 13 (Movie Defendants); and

6. Massive volumes of scientific research show that children who witness acts of violence and/or who are interactively involved with creating violence or violent images often act more violently themselves and sometimes recreate the violence to which they have been exposed. See Amended C/O P 24 (Video [**10] Game Defendants).

IV.

Fed.R.Civ.P. 12(b)(6)

Under *Rule 12(b)(6)*, a district court may dismiss a complaint for failure to state a claim upon which relief can be granted if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957). If the plaintiff has pleaded facts that would support a legally cognizable claim for relief, a motion to dismiss should be denied. *Id.* I accept as true all well-pleaded facts, as distinguished from conclusory allegations, and view those facts in the light most favorable to the nonmoving party. *Maher v. Durango Metals*, 144 F.3d 1302, 1304 (10th Cir.1998). All reasonable inferences must be construed in the plaintiff's favor. See *Dill v. City of Edmond*, 155 F.3d 1193, 1201 (10th Cir.1998). *Id.*

Fed.R.Civ.P. 12(b) provides that if matters outside the complaint are presented to and not excluded by the court, it should treat the motion to dismiss as a summary judgment motion. *Fed.R.Civ.P. 12(b)*; *Carter v. Stanton*, 405 U.S. 669, 671, 31 L. Ed. 2d 569, 92 S. Ct. 1232 (1972); [**11] *Foremaster v. St. George*, 882 F.2d 1485, 1491 (10th Cir. 1989). Failure to convert a motion to dismiss so postured to a motion for summary judgment under *Fed.R.Civ.P. 56* is reversible error. *Miller v. Glanz*, 948 F.2d 1562, 1565 (10th Cir. 1991).

Several Video Game Defendants and Movie Defendant Palm Pictures attached [**1271] exhibits to briefs in support of their *Rule 12(b)(6)* motions. These exhibits include the complaint filed in *James v. Meow Media, Inc.*, 90 F. Supp. 2d 798 (W.D. Ky. 2000), a copy of a hearing transcript, copies of several opinions, and portions of the Restatement of (Third) Torts relied on in their briefs by Defendants. I have not read or relied on the *James v. Meow Media* complaint or on the hearing transcript. Defendants' exhibits containing copies of case law and Restatement (Third) of Torts merely supplement and inform my legal research. Also, Plaintiffs attached a letter to its response briefs to Defendants ID Software's

and Midway Home Entertainment's *Fed.R.Civ.P. 12(b)(6)* opening briefs. I have not read or relied on the content of the attached letter. Thus, I need not treat the motions to dismiss as summary judgment [**12] motions. See *Fed.R.Civ.P. 12(b)*; *Carter v. Stanton*, 405 U.S. at 671; *Foremaster*, 882 F.2d at 1491.

The *Rule 12(b)(6)* motions, briefs in support and briefs in opposition were filed before Plaintiffs filed their Amended Complaint as a matter of right. After careful review I conclude that further briefing is unnecessary. The motions and briefs before me can be fully applied to and resolved in light of the Amended Complaint.

V.

Claims Analysis

A. Negligence

Plaintiffs allege negligence in Claim One against the Movie Defendants and in Claim Two against the Video Game Defendants. Under Colorado law, to recover for the negligent conduct of another, a plaintiff must establish: 1) the existence of a legal duty owed to the plaintiff by the defendant; 2) breach of that duty; 3) injury to the plaintiff; and 4) actual and proximate causation. *Leake v. Cain*, 720 P.2d 152, 155 (Colo. 1986).

1. Duty

"The court determines, as a matter of law, the existence and scope of [any] duty. . . ." *Metropolitan Gas Repair Serv., Inc. v. Kulik*, 621 P.2d 313, 317 (Colo. 1980). See *Perreira v. Colorado*, 768 P.2d 1198, 1208 (Colo. 1989). [**13] If the law imposes no duty of care under the circumstances, a negligence claim cannot be sustained even though injury may have occurred. *University of Denver v. Whitlock*, 744 P.2d 54 (Colo. 1987).

In resolving the threshold legal question whether the Video Game and Movie Defendants have a cognizable duty to the Plaintiffs, I consider: 1) foreseeability of the injury or harm that occurred; 2) the social utility of Defendants' conduct; 3) the magnitude of the burden of guarding against the injury or harm; and 4) the consequences of placing the burden on the Defendants. See *Bailey v. Huggins Diagnostic & Rehabilitation Center*, 952 P.2d 768 (Colo. App. 1997), cert. denied, (Colo. 1998); *Smith v. City & County of Denver*, 726 P.2d 1125, 1127 (Colo. 1986). No single factor is controlling. *Whitlock*, 744 P.2d at 57.

The question whether a duty should be imposed in a particular case is "essentially one of fairness under contemporary standards -- whether reasonable persons would recognize a duty and agree that it exists." *Taco Bell, Inc. v. Lannon*, 744 P.2d 43, 46 (Colo. 1987). Generally, a person does not [**14] have a duty to prevent a

third person from harming another absent special circumstances warranting imposition of such a duty. See *Davenport v. Community Corrections*, 962 P.2d 963, 967 (Colo. 1998), cert. denied, 526 U.S. 1068, 143 L. Ed. 2d 547, 119 S. Ct. 1461 (1999).

a. Foreseeability

The Colorado Supreme Court teaches that foreseeability is "based on common sense [*1272] perceptions of the risks created by various conditions and circumstances and includes whatever is likely enough in the setting of modern life that a reasonably thoughtful person would take account of it in guiding practical conduct." *Perreira*, 768 P.2d at 1209.

Generally, under Colorado law a person has no responsibility to foresee intentional violent acts by others. See *Walcott v. Total Petroleum, Inc.*, 964 P.2d 609, 612 (Colo. App. 1998), cert. denied, (Colo. 1999) (Gas station owner could not reasonably foresee that a purchaser would intentionally throw gasoline on a victim and set the victim on fire); see also *Solano v. Goff*, 985 P.2d 53, 54-55 (Colo. App.), cert. denied, 1999 Colo. LEXIS 934 (Colo. 1999) (a murder committed by an escaped inmate who had not committed any prior [*15] violent crimes was not foreseeable by the sheriff).

In the circumstances alleged here, the Video Game and Movie Defendants likewise had no reason to suppose that Harris and Klebold would decide to murder or injure their fellow classmates and teachers. Plaintiffs do not allege that these Defendants had any knowledge of Harris' and Klebold's identities, let alone their violent proclivities. Nor, for that matter, did the Video Game and Movie Defendants have any reason to believe that a shooting spree was a likely or probable consequence of exposure to their movie or video games. At most, based on Plaintiffs' allegations that children who witness acts of violence and/or who interactively involved with creating violence or violent images often act more violently themselves and sometimes recreate the violence, see Amended C/O P 24, these Defendants might have speculated that their motion picture or video games had the potential to stimulate an idiosyncratic reaction in the mind of some disturbed individuals. A speculative possibility, however, is not enough to create a legal duty. See *Davenport*, 962 P.2d at 968 ("While it is foreseeable that reintroducing convicted [*16] criminals into the community will result in some aberrant behavior, the dangers associated with community corrections in general are insufficient to establish the requisite foreseeability needed to impose a duty of care [on community corrections facility]").

Although other courts have addressed this question, the Colorado courts have not had the occasion to consider foreseeability in the similar circumstances alleged

here. Applying analogous foreseeability principles, two federal courts have rejected imposition of any such duty on video game makers and movie producers or their distributors. In *Watters v. TSR, Inc.*, 904 F.2d 378 (6th Cir. 1990), the Sixth Circuit held that a game manufacturer did not have any duty under Kentucky tort law to anticipate and prevent the suicide of a disturbed player because such idiosyncratic reactions are not legally foreseeable. The Court held that to impose liability in such circumstances "would be to stretch the concept of foreseeability . . . to lengths that would deprive them of all normal meaning." *Id.* at 381.

More recently, in *James v. Meow Media, Inc.*, 90 F. Supp. 2d 798, the Court dismissed [*17] Plaintiffs' complaint asserting virtually identical claims filed by Plaintiffs in this case. *James v. Meow Media, Inc.* involved a student shooting at a Kentucky high school during which three students were killed and several others seriously injured. The Court accepted as true, as do I, the identical allegations in this case that: 1) the shooter[s] viewed "The Basketball Diaries" film; 2) were "avid consumer[s]" of video games; and 3) were influenced by the film and video games. Stating that "nothing Defendants did or failed to do could have been reasonably foreseen as a cause of injury," the Court held that reasonable people could not conclude [*1273] that the shooter's exposure to video games and the movie made the shooter's actions foreseeable to the video game makers and the movie producers and distributors. See *id.* at 804, 806.

Courts around the country have rejected similar claims brought against media or entertainment defendants. In *Zamora v. Columbia Broadcasting System*, 480 F. Supp. 199 (S.D. Fla. 1979), the Court held that it was not foreseeable to three television networks that a teenager would shoot and kill his neighbor after viewing [*18] comparable violence on television over a ten year period. Plaintiff alleged also that watching television had desensitized the teenager to violence and caused him to develop a sociopathic personality. In granting the defendants' motion to dismiss, the *Zamora* Court noted that the three major networks are charged with anticipating: 1) the minor's alleged voracious intake of television violence; 2) his parents' apparent acquiescence in his television viewing, presumably without recognition of any problem; and 3) that Zamora would respond with a violent criminal act. See *id.* at 202. Based in part on the lack of foreseeability, the Court declined to "create such a wide expansion in the law of torts." *Id.* at 203. See also *Brandt v. Weather Channel, Inc.*, 42 F. Supp. 2d 1344, 1345-46 (S.D. Fla. 1999), *aff'd*, 204 F.3d 1123 (11th Cir. 1999) (rejecting "novel and unprecedented expansion of . . . tort law [] to impose on a television broadcaster of weather forecasts" a duty to viewer of forecast who

drowned when unpredicted adverse weather conditions caused him to be thrown from a fishing boat); *Davidson v. Time Warner, Inc.*, 1997 U.S. Dist. LEXIS 21559, 1997 WL 405907 [**19] *13 (S.D. Tex. 1997) (rejecting claim that "rap" song caused listener to commit murder because murder "was an irrational and illegal act," the defendants had no duty "to foresee and plan against such conduct"); *McCollum v. CBS, Inc.* 202 Cal. App. 3d 989, 996, 1005, 249 Cal. Rptr. 187 (1988) (dismissing claim against defendants who created and disseminated a song called "Suicide Solution" and who allegedly knew or should have known the song might influence susceptible individuals because decedent's suicide was unforeseeable); *Way v. Boy Scouts of America*, 856 S.W.2d 230, 236, 239 (Tex. App. Dallas 1993) (holding decedent's fatal experimentation with gun was not reasonably foreseeable consequence of publishing a shooting sports supplement); *Sakon v. PepsiCo, Inc.*, 553 So. 2d 163, 166 (Fla. 1989) (concluding, at pleadings stage, that young viewer's injury, which allegedly was inspired by defendant's television advertisement depicting dangerous activity, was not foreseeable consequence of advertisement, even though advertisement targeted audience of young viewers).

I find persuasive the reasoning set out in these cases. Consequently, I [**20] conclude under similar Colorado tort law, there is no basis for determining that violence would be considered the likely consequence of exposure to video games or movies. This factor weighs heavily against imposing a duty on the Movie and Video Game Defendants.

b. Social Utility of Defendants' Conduct

Creating and distributing works of imagination, whether in the form of video games, movies, television, books, visual art, or song, is an integral component of a society dedicated to the principle of free expression. See U.S. CONST., amend. 1; COLO. CONST., art. 11, § 10 ("no law shall be passed impairing the freedom of speech [and] that every person shall be free to speak, write or publish whatever he will on any subject"); see also U.S. CONST. art. I, § 8 (giving Congress the power to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive [*1274] Right to their respective Writings and Discoveries."). Accordingly, the creation of such works significantly contributes to social utility. See, e.g., *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 96 L. Ed. 1098, 72 S. Ct. 777 (1952) (recognizing that [**21] movies are a significant medium for the communication of ideas because "they may affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression," and that

movies are an important "organ of public opinion."). *Id.* at 501.

Plaintiffs' characterization of the Video Game and Movie Defendants' creative works as "violent" does not alter the social utility analysis. In the context of ordering entry of a preliminary injunction against a city ordinance that limited minors' access to violent video games, the Seventh Circuit observed, 'violence has always been and remains a central interest of humankind and a recurrent, even obsessive theme of culture both high and low.' *American Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572, 577 (7th Cir. 2001), cert. denied, U.S. , 122 S. Ct. 462, 151 L. Ed. 2d 379 (2001). Indeed, "classic literature and art, and not merely today's popular culture, are saturated with graphic scenes of violence, whether narrated or pictorial." *Id.* at 575. [**22] Moreover, the *Kendrick* Court acknowledged that video games that include pictorial representations of violence are "stories" and contain "age-old themes of literature." *Id.* at 577-78. The Court flatly rejected the notion that society is better served by insulating the vulnerable from exposure to such images:

To shield children . . . from exposure to violent descriptions and images would not only be quixotic, but deforming; it would leave them unequipped to cope with the world as we know it.

Id. at 577.

Setting aside any personal distaste, as I must, it is manifest that there is social utility in expressive and imaginative forms of entertainment even if they contain violence. See *Kendrick*, 244 F.3d at 577. Hence, the social utility factor weighs heavily against imposing a duty against the Video Game and Movie Defendants.

c. and d. Magnitude of the Burden of Guarding against Injury or Harm and Consequences of Placing the Burden on the Defendant

In *Bailey*, 952 P.2d at 772-73, the Colorado Court of Appeals analyzed the question of tort law duty where imposition of such a duty would seriously encroach [**23] upon First Amendment values. There, the author of a book appeared on a television program to discuss his controversial views about a particular dental procedure. The plaintiff followed his advice and was injured. In the resulting lawsuit, the Court held that as a general rule, "an author or interviewee on a public television program owes [no] legal duty of due care to those members of the public who may read the book or view the program." *Id.* at 772. Furthermore, the Court expressed serious doubts about the foreseeability of the harm. See *id.* at 772-73.

The Court then explained that even if the harms were foreseeable, the *First Amendment* values at stake counseled against imposing a tort duty based on the contents of an author's ideas. *See id.* at 773.

Colorado courts have repeatedly rejected efforts to impose overly burdensome and impractical obligations on defendants, including the obligation to identify potential dangers. This is especially so where those obligations would interfere with the social utility of a defendant's conduct or [*1275] other important societal values. *See e.g., Davenport, 962 P.2d at 969* (rejecting [**24] duty on community corrections program to screen out offenders posing a threat to the public and to restrict offenders' community access where such measures would make the program the "insurer of its residents" and would subvert the effectiveness of the program). *See also Observatory Corp. v. Daly, 780 P.2d 462, 469 (Colo. 1989)* (rejecting imposition of a duty on tavern owners to all persons on its premises because "to impose such a duty would be tantamount to requiring a tavern employee to divine future violence on the part of a tavern patron notwithstanding the absence of any objective evidence indicating that the patron constituted an unreasonable risk to the safety of others," thereby making the tavern owner a "virtual insurer of the safety of all persons").

Given the *First Amendment* values at stake, the magnitude of the burden that Plaintiffs seek to impose on the Video Game and Movie Defendants is daunting. Furthermore, the practical consequences of such liability are unworkable. Plaintiffs would essentially obligate these Defendants, indeed all speakers, to anticipate and prevent the idiosyncratic, violent reactions of unidentified, vulnerable individuals to [**25] their creative works. As the Sixth Circuit recognized in *Watters*:

The defendant cannot be faulted, obviously, for putting its game on the market without attempting to ascertain the mental condition of each and every prospective player. The only practicable way of insuring that the game could never reach a "mentally fragile" individual would be to refrain from selling it at all.

904 F.2d at 381; McCollum, 202 Cal. App. 3d 989, 249 Cal. Rptr. 187. ("It is simply not acceptable to a free and democratic society to impose a duty upon performing artists to limit and restrict their creativity in order to avoid the dissemination of ideas in artistic speech which may adversely affect emotionally troubled individuals.") *Id.* at 1005-06; *Zamora, 480 F. Supp. at 202* (recognizing the "impositions pregnant" in charging television networks with the duty of anticipating minors' criminal

response to television programs). Because Plaintiffs' legal theory would effectively compel Defendants not to market their works and, thus, refrain from expressing the ideas contained in those works, the burden imposed would be immense and the consequences [**26] dire for a free and open society.

In this case, Plaintiffs do not allege that the Video Game and Movie Defendants illegally produced or distributed the movie and video games Harris and Klebold allegedly viewed or played. Finding that these Defendants owed Plaintiffs a duty of care would burden these Defendants' *First Amendment* rights to freedom of expression. These considerations compel the conclusion that makers of works of imagination including video games and movies may not be held liable in tort based merely on the content or ideas expressed in their creative works. Placing a duty of care on Defendants in the circumstances alleged would chill their rights of free expression. Therefore, these factors also weigh heavily against imposing a duty on Defendants.

All four factors weigh heavily against imposing a duty of care on Defendants. Consequently, I hold that the Video Game and Movie Defendants owed no duty to Plaintiffs as a matter of law. Thus, the Video Game and Movie Defendants are entitled to *Rule 12(b)(6)* dismissal of Plaintiffs' negligence claims.

2) Causation

Even assuming a duty, the Video Game and Movie Defendants argue that they [*1276] were not the legal cause of [**27] Plaintiffs' injuries. I agree.

To prevail on their negligence claim, Plaintiffs must show that Defendants' tortious conduct proximately caused Mr. Sanders' death. *See Leake, 720 P.2d at 155.* "[Proximate cause] is the cause without which the claimed injury would not have been sustained." *City of Aurora v. Loveless, 639 P.2d 1061, 1063 (Colo. 1981).* In Colorado, causation is generally a question of fact for a jury. But a court may decide the issue as a matter of law where the alleged chain of causation is too attenuated to impose liability. *See Largo Corp. v. Crespino, 727 P.2d 1098, 1103 (Colo. 1986); Smith v. State Compensation Ins. Fund, 749 P.2d 462, 464 (Colo. App. 1987).* Here, proximate cause requires that Defendants' conduct produced Mr. Sanders' death "in the natural and probable sequence of things." *See Loveless, 639 P.2d at 1063; Schneider v. Midtown Motor Co., 854 P.2d 1322 (Colo. App. 1992).*

Where the circumstances make it likely that a defendant's negligence will result in injuries to others and where this negligence is a substantial factor in causing the injuries sustained, [**28] proximate causation is satisfied. The intervening or superseding act of a third

party, in this case Harris and Klebold, including a third-party's intentionally tortious or criminal conduct does not absolve a defendant from responsibility if the third-party's conduct is reasonably and generally foreseeable. See *Ekberg v. Greene*, 196 Colo. 494, 496-97, 588 P.2d 375, 376-77 (1978).

It is undisputed that Harris and Klebold murdered or injured the Columbine victims including Mr. Sanders. The issue is whether Harris' and Klebold's intentional criminal acts constitute a superseding cause of the harm inflicted by them, thus relieving the Movie and Video Game Defendants' of liability.

A superseding cause exists when: 1) an extraordinary and unforeseeable act intervenes between a defendant's original tortious act and the injury or harm sustained by plaintiffs and inflicted by a third party; and 2) the original tortious act is itself capable of bringing about the injury. Just as foreseeability is central to finding that a duty is owed, it is also "the touchstone of proximate cause" and of the superseding cause doctrine. *Walcott*, 964 P.2d 609; see also *Smith*, 749 P.2d at 462-63; [**29] *Ekberg*, 588 P.2d at 376. Moreover, a superseding cause relieves the original actor of liability when "the harm is intentionally caused by a third person and is not within the scope of the risk created by the actor's conduct." *Webb v. Dessert Seed Co.*, 718 P.2d 1057, 1062-63 (Colo. 1986) (quoting *Restatement (Second) of Torts* § 442B).

I hold in this case that Harris' and Klebold's intentional violent acts were the superseding cause of Mr. Sanders' death. Moreover, as I have determined, their acts were not foreseeable. Their criminal acts, therefore, were not within the scope of any risk purportedly created by Defendants. In this case as in *James v. Meow Media, Inc.*, 90 F. Supp. 2d at 806-08, the school shooting was not a normal response to dissemination of movies and videos.

I conclude as a matter of law that no reasonable jury could find that the Video Game and Movie Defendants' conduct resulted in Mr. Sanders' death in "the natural and probable sequence of events." See *Loveless*, 639 P.2d at 1063. Therefore, Defendants were not a proximate cause of Mr. Sanders' injuries. Defendants are entitled to *Rule 12(b)(6)* dismissal [**30] as to the negligence claims in Claims One and Two.

B. Strict Liability

Plaintiffs also assert strict liability in Claims One and Two. Plaintiffs allege that [*1277] the Movie and Video Game Defendants produced and distributed their "products" in "a defective . . . and unreasonably dangerous condition." See Amended C/O PP 16(v), 29(v); *Restatement (Second) of Torts* § 402A.

Plaintiffs allege that these Defendants manufactured and/or supplied to Harris and Klebold video games:

[that] trained Harris and Klebold how to point and shoot a gun effectively without teaching either of them any of the constraints, responsibilities or consequences necessary to inhibit such an extremely dangerous killing capacity.

Amended C/O PP 25-26.

There is no allegation that anyone was injured while Harris and Klebold actually played the video games or watched "The Basketball Diaries." The actual use of the movie and video games, then, did not result in any injury. Rather, Plaintiffs contend that Mr. Sanders' death was caused by the way Harris and Klebold interpreted and reacted to the messages contained in the movie and the video games. So, any alleged defect stems from the intangible [**31] thoughts, ideas and messages contained within the movie and video games but not their tangible physical characteristics.

To recover on a theory of strict products liability under Colorado law, Plaintiffs must establish that the: 1) products are in a defective condition unreasonably dangerous to the user or consumer; 2) products were expected to and did reach Harris and Klebold without substantial change in the condition in which they were sold; 3) alleged defects caused Mr. Sanders' death; 4) Video Game and Movie Defendants sold the product and are engaged in the business of selling products; and 5) Plaintiffs sustained damages as a result of the Video Game and Movie Defendants' acts. See *Barton v. Adams Rental*, 938 P.2d 532, 536-37 (Colo. 1997). This strict liability theory requires the existence of a "product" within the meaning of the law. *St. Luke's Hospital, v. Schmaltz*, 188 Colo. 353, 358, 534 P.2d 781, 783-84 (1975). The threshold question is whether Mr. Sanders' death was caused by a "product." See *Hidalgo v. Fagen, Inc.*, 206 F.3d 1013, 1018 (10th Cir. 2000) citing *Schmaltz*, 534 P.2d at 784.

1. Definition [**32] of Product

Colorado's products liability statute does not define the term "product." See § 13-21-401, C.R.S. Section 402A of the *Restatement (Second) of Torts*, adopted by the Colorado courts, see e.g., *Camacho v. Honda Motor Co.*, 741 P.2d 1240, 1244 (Colo. 1987), also does not define "product." As a result, whether something is a "product" is a question of law for the Court to answer. *Smith v. Home Light & Power & Power Co.*, 695 P.2d 788, 789-90 (Colo.App. 1985). Therefore, as an initial matter I must determine whether thoughts, images, ideas,

and messages contained in movies and video games constitute "products" for purposes of strict products liability.

Colorado courts have not yet considered whether thoughts, images, ideas, and messages are "products" pursuant to the strict liability doctrine. Significantly, however, in considering whether to recognize a new tort recovery theory, the Colorado courts give great weight to the theory's impact on free expression. See *Bailey*, 952 P.2d 768. (dentist did not owe duty of care to patients with respect to statements made on television program and in book in light of free speech implications).

[**33] To aid my anticipation as to how Colorado courts would resolve this question, I look to other jurisdictions which have addressed whether the content of video games and movies is a "product" for purposes of determining strict liability. In *Watters*, the Court reviewed existing precedents [*1278] and concluded, "as far as we have been able to ascertain, . . . the doctrine of strict liability has never been extended to words or pictures. Other courts have looked in vain for decisions so expanding the scope of the strict liability doctrine." 904 F.2d at 381. For this reason, the *Watters* Court rejected plaintiff's contention that the video game defendant was strictly liable for causing her son, who had repeatedly played defendant's fantasy adventure game, to commit suicide. *Id.* Based in part on *Watters*' reasoning, the *James v. Meow Media, Inc.* Court also rejected as a matter of law the plaintiffs' claims, identical to the claims asserted in this case, that The Basketball Diaries and the video games were "products" for purposes of the strict liability doctrine. See *James v. Meow Media, Inc.*, 90 F. Supp. 2d at 811.

Plaintiffs argue that "intangibles" such as images, [*34] thoughts, ideas, and messages are products and "subject to strict liability [when] the 'intangibles' are sold to and consumed by the public." Plaintiffs rely on *Comshare, Inc. v. United States*, 27 F.3d 1142 (6th Cir. 1994) and *Advent Systems Ltd. v. Unisys Corp.*, 925 F.2d 670 (3d Cir. 1991). These cases are distinguishable.

In *Comshare*, a computer software company sued the government to obtain an income tax refund because the company had spent millions of dollars purchasing computer program source codes but had not been given a tangible property investment tax credit. See *id.* The Sixth Circuit held that *Comshare* was entitled to the tangible property tax credit because "the intangible information on *Comshare*'s master source code tapes and discs could not exist in usable form without the tangible medium." 27 F.3d at 1149. In *Advent Systems*, a commercial transactions case, the Third Circuit held that once a computer program is downloaded onto a diskette, it becomes a "good" under the Uniform Commercial Code. See 925 F.2d at 675.

Contrary to Plaintiffs' analysis, these holdings are inapposite because they do not discuss strict liability theories [**35] and are unrelated to products liability law. While computer source codes and programs may be construed as "tangible property" for tax purposes and as "goods" for commercial purposes, these classifications do not establish that intangible thoughts, ideas, and messages contained in computer video games or movies should be treated as products for purposes of strict liability.

Plaintiffs fail to appreciate the critical distinction between intangible properties and tangible properties for which strict liability can be imposed. The Ninth Circuit explained this distinction in *Winter v. G.P. Putnam's Sons*, 938 F.2d 1033 (9th Cir. 1991):

A book containing Shakespeare's sonnets consists of two parts, the material and the print therein, and the ideas and expression thereof. The first may be a product, but the second is not. The latter, were Shakespeare alive, would be governed by copyright laws; the laws of libel to the extent consistent with the *First Amendment*; and the laws of misrepresentation, negligent misrepresentation, negligence, and mistake. These doctrines applicable to the second part are aimed at the delicate issues that arise with respect to intangibles such [**36] as ideas and expression. Products liability law is geared to the tangible world.

Id. at 1034.

The reasoning of *Watters* and *Meow Media* is buttressed by the Restatement (Third) of Torts. Although Colorado courts have yet to adopt sections of Restatement (Third) of Torts, I predict that the Colorado Supreme Court, as it has often done in the past, will selectively adopt relevant sections in the Restatement [*1279] (Third) of Torts. There, the word "product" is defined and a distinction is made between tangible and intangible properties. See Restatement (Third) of Torts 19(a); comment d. to § 19(a). Moreover, the commentary for § 19(a) of the Restatement (Third) of Torts notes that courts "have, appropriately refused to impose strict product liability" in cases where the plaintiff's grievances were "with the information, not with the tangible medium." *Id.* at comment d.

Based on the persuasive reasoning set out in *Watters*, *James*, *Winter*, and the Restatement (Third) of Torts, I hold that intangible thoughts, ideas, and expres-

sive content are not "products" as contemplated by the strict liability doctrine.

2. Causation

Assuming *arguendo* that [**37] the strict liability doctrine could be extended to include the thoughts, ideas, images and messages contained in video games and movies, Plaintiffs nevertheless would be required to allege adequately causation in order to state a claim based on strict liability. As I have stated, causation is trumped by an intervening act that constitutes a superseding cause. I determined as a matter of law that Harris' and Klebold's actions constituted a superseding cause which broke any chain of causation. See § V (A)(1)(a). Therefore, in the alternative, Plaintiffs' strict liability claims fail for lack of causation.

C. First Amendment Considerations

1. Protection of Video Games

Relying on the following cases, Plaintiffs contend that video games are not protected by the *First Amendment*. See *America's Best Family Showplace Corp. v. New York*, 536 F. Supp. 170 (E.D.N.Y. 1982); *Rothner v. Chicago*, 929 F.2d 297 (7th Cir. 1991) (affirming district court ruling that video games lack a vital informative element and therefore are not protected by the *First Amendment*). These cases are not persuasive because they have been superseded or are directly contrary [**38] to established precedent. *Rothner* was superseded by the Seventh Circuit's recent decision in *Kendrick*, 244 F.3d at 577-78 (recognizing that video games contain stories, imagery, "age-old themes of literature," and "messages, even an 'ideology,' just as books and movies do"). The *America's Best* Court expressed the premise that video games are not protected by the *First Amendment* because they contain "pure entertainment with no informational element." This premise is directly contrary to the Supreme Court's teaching that the distinction between information and entertainment is so minuscule, that both forms of expression are entitled to *First Amendment* protection. See *Time, Inc. v. Hill*, 385 U.S. 374, 388, 17 L. Ed. 2d 456, 87 S. Ct. 534 (1967). Plaintiffs have failed to show that video games deserve anything less than full *First Amendment* protection.

2. *Brandenburg* Test

Whether expressive content is protected under the *First Amendment* is subject to the test set forth in *Brandenburg v. Ohio*, 395 U.S. 444, 23 L. Ed. 2d 430, 89 S. Ct. 1827 (1969). Under *Brandenburg*, even speech that expressly advocates criminal activity [**39] cannot be the basis for liability, unless the speech is "directed to

inciting or producing imminent lawless action and is likely to incite or produce such action." *Id.* at 447.

The *Brandenburg* test is exacting. Other courts uniformly reject claims similar to those of Plaintiffs' here. I reject Plaintiffs' invitation to dilute the *Brandenburg* test in this case.

Plaintiffs contend that *Brandenburg* protects only "marginalized political speakers." See Resp., p. 16. I disagree. *Brandenburg* [*1280] did not limit its test to political speech or political speech of marginalized speakers. Nor have lower courts accepted such a limitation. See e.g. *Herceg v. Hustler Magazine, Inc.*, 814 F.2d 1017 (5th Cir. 1987), cert. denied, 485 U.S. 959, 99 L. Ed. 2d 420, 108 S. Ct. 1219 (1988) in which the Fifth Circuit stated:

The Supreme Court generally has not attempted to differentiate between different categories of protected speech for the purposes of deciding how much constitutional protection is required. Such an endeavor would not only be hopelessly complicated but would raise substantial concern that the worthiness of speech [**40] might be judged by majoritarian notions of political and social propriety and morality. If the shield of the *First Amendment* can be eliminated by proving after publication that an article discussing a dangerous idea negligently helped bring about a real injury simply because the idea can be identified as "bad," all free speech becomes threatened. An article discussing the nature and danger of "crack" usage--or of hang-gliding-- might lead to liability just as easily. As is made clear in the Supreme Court's decision in *Hess*, the "tendency to lead to violence" is not enough.

Id. at 1024.

Alternatively, Plaintiffs argue that *Brandenburg's* imminence requirement is met by the advocacy of illegal action "at some future time. . . ." See Resp., p. 17. This argument is contrary to binding precedent. "The *First Amendment* does not permit someone to be punished for advocating illegal conduct at some indefinite future time." *National Gay Task Force v. Board of Education*, 729 F.2d 1270, 1274 (10th Cir. 1984) citing *Hess v. Indiana*, 414 U.S. 105, 38 L. Ed. 2d 303, 94 S. Ct. 326 (1973), aff'd, 470 U.S. 903 (1985). [**41] *Hess* holds that speech cannot be deemed unprotected when, as is

the case here, defendants' speech, is "not directed to any person or group of persons." *See Hess, 414 U.S. at 108.*

Plaintiffs rely also on *Rice v. Paladin Enterprises, Inc.*, 128 F.3d 233 (4th Cir. 1997), cert. denied, 523 U.S. 1074, 140 L. Ed. 2d 668, 118 S. Ct. 1515 (1998) in which the Fourth Circuit held that the publisher of a book entitled "Hit Man: A Technical Manual for Independent Contractors" might be held liable in a wrongful death action. However, the defendant stipulated that

[it] not only knew that its instructions might be used by murderers, but that it actually intended to provide assistance to murderers and would-be murderers which would be used by them 'upon receipt,' and that it in fact assisted [the murderer] in particular in the commission of the murders [at issue]

Id. at 242. Largely based on this stipulation, the *Rice* Court reached the narrow holding that civil liability for aiding and abetting criminal conduct is constitutionally permissible where a publisher "has the specific purpose of assisting and [**42] encouraging commission of such conduct and the alleged assistance and encouragement takes a form other than abstract advocacy." *Id. at 243.*

Plaintiffs' Complaint is devoid of any allegation that the Movie and Video Game Defendants had any intent, let alone a specific intent, to assist and encourage anyone to engage in acts of criminal violence. Moreover, *Rice* distinguished the "copycat" theory presented here, where "someone imitates or 'copies' conduct . . . described or depicted in their broadcasts, publications, or movies." *Id. at 265.* The *Rice* Court stated that "it will presumably never be the case that the broadcaster or publisher actually intends" to assist or encourage a crime. Consequently "an inference [*1281] of impermissible intent on the part of the producer . . . would be unwarranted as a matter of law." *Id. at 265-66.* *Rice's* limited holding is inapplicable in this case.

Plaintiffs do not discuss compliance with *Brandenburg's* second requirement that the speech at issue must be "likely" to produce imminent lawless action. *See Brandenburg, 395 U.S. at 447-48.* As explained in section V (A)(1)(a), [**43] Plaintiffs cannot, as a matter of law, demonstrate that the video games and movie were "likely" to cause any harm, let alone imminent lawless action.

3. Restriction of the First Amendment Rights of Children

Next, Plaintiffs contend that even if video games invoke *First Amendment* protections, the right to free

speech of children may be restricted in a reasonable manner. I disagree.

It is well-established that *Brandenburg* remains the applicable standard even where the individual allegedly incited to commit unlawful acts is a minor. *See e.g. Miller v. California, 413 U.S. 15, 33, 37 L. Ed. 2d 419, 93 S. Ct. 2607 (1973)* ("likely" impact of speech must be judged by its effect on "average person[s], rather than a particularly susceptible or sensitive person").

Assuming the State of Colorado has a compelling interest in broadly extending its tort law to protect the physical and psychological well-being of minors, the restriction must be "narrowly tailored" to serve that compelling interest in order to withstand *First Amendment* scrutiny. *See Reno v. ACLU, 521 U.S. 844, 879, 138 L. Ed. 2d 874, 117 S. Ct. 2329 (1997)*. The United States Supreme Court [**44] has been particularly wary of governmental restrictions, such as those seemingly advocated by Plaintiffs here, that rest "on a common law concept of the most general and undefined nature." *See Bridges v. California, 314 U.S. 252, 260, 86 L. Ed. 192, 62 S. Ct. 190 (1941) quoting Cantwell v. Connecticut 310 U.S. 296, 308, 84 L. Ed. 1213, 60 S. Ct. 900 (1940)*

Plaintiffs' theory fails the narrow tailoring test because it is not limited to the protection of minors. It would apply even when an adult allegedly commits violence in response to video games or movies. Thus, adults' access to movies and video games would be restricted as well. The theory is, as a matter of law, overbroad. *See Reno, 521 U.S. at 875, 878-89.*

Furthermore, because the Movie and Video Game Defendants cannot possibly control who gains access to their games and movies, they could avoid liability under Plaintiffs' theory only by ceasing production and distribution of their creative works. *See Watters, 904 F.2d at 381.* Such a sweeping theory of liability and the chilling of free expression cannot be considered narrowly tailored.

VI.

Conclusion

A. [**45] Negligence Claims

Plaintiffs' negligence claims fail because as a matter of law the Video Game and Movie Defendants owed no duty to Plaintiffs or Mr. Sanders. In the alternative, Plaintiffs' negligence claims cannot stand because Harris' and Klebold's actions on April 20, 1999 were a superseding cause of Mr. Sanders' death.

B. Strict Liability Claims

Plaintiffs' strict liability claims against the Video Game and Movie Defendants fail as a matter of law be-

cause the intangible thoughts, ideas, images, and messages contained in "The Basketball Diaries" and video games allegedly played by Harris and Klebold are not products as required by the strict liability doctrine. Furthermore, [*1282] I have determined that Harris' and Klebold's actions on April 20, 1999 constituted a superseding cause relieving Defendants of liability.

C. First Amendment

Plaintiffs' negligence and strict liability claims fail the *Brandenburg* test.

Accordingly, IT IS ORDERED that:

1. the *Fed.R.Civ.P. 12(b)(6)* motions to dismiss Claim One for negligence and Claim Two for strict liability filed by Defendants Time Warner, Inc. and Palm Pictures are GRANTED;

2. the *Fed.R.Civ.P. 12(b)(6)* motions [**46] to dismiss Claim One for negligence and Claim Two for strict liability filed by the following Defendants are GRANTED:

- a. Acclaim Entertainment, Inc.;
- b. Activision, Inc.;
- c. Capcom Entertainment, Inc.;

- d. EIDOS Interactive;
- e. ID Software, Inc.;
- f. Infogrames, Inc. f/k/a GT Interactive Software Corporation;
- g. Interplay Productions, Inc.;
- h. Midway Home Entertainment;
- i. Nintendo of America;
- j. Sony Computer Entertainment America, Inc.; and
- k. Square Soft, Inc. d/b/a Square USA, Inc.

3. Claims One and Two are DISMISSED as to the above named Defendants; and

4. upon submission of a bill of costs within 10 days from the date judgment enters, the above named Defendants are granted costs.

Dated: March 4, 2002 in Denver, Colorado

BY THE COURT:

LEWIS T. BABCOCK, CHIEF JUDGE

8 of 21 DOCUMENTS

Andrea WILSON, individually and in her capacity as administratrix of the Estate of
Noah Wilson, Plaintiff, v. MIDWAY GAMES, INCORPORATED, Defendant.

No. 3:00cv2247 (JBA)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

198 F. Supp. 2d 167; 2002 U.S. Dist. LEXIS 6070; CCH Prod. Liab. Rep. P16,314

March 27, 2002, Decided

DISPOSITION: [**1] Defendant's motion to dismiss
was GRANTED.

COUNSEL: For ANDREA WILSON, plaintiff: Joseph
A. Moniz, Moniz, Cooper & McCann, Hartford, CT.

For MIDWAY GAMES, INC, defendant: David L. Belt,
Jacobs, Grudberg, Belt & Dow, P.C., New Haven, CT.
Gerald O. Sweeney, Jr., John T. Williams, Lord Bissell
& Brook, Chicago, IL.

JUDGES: Janet Bond Arterton, United States District
Judge.

OPINION BY: Janet Bond Arterton

OPINION

[*169] *Ruling on Motions to Dismiss [Doc. # 25 & # 43]*

On November 22, 1997, thirteen-year-old Noah Wilson died when his friend, identified as Yancy S., stabbed him in the chest with a kitchen knife. Noah's mother, Andrea Wilson, filed this suit against Midway Games, Inc., alleging that at the time Yancy stabbed Noah, Yancy was addicted to a video game manufactured by Midway called Mortal Kombat, and that Yancy was so obsessed with the game that he actually believed he was the character Cyrax.

Wilson claims that Midway's design and marketing of Mortal Kombat caused her son's death. She alleges that she is entitled to damages under theories of product liability, unfair trade practices, loss of consortium, and negligent and intentional infliction of emotional distress. Jurisdiction [**2] is predicated on diversity of citizenship.

Midway has moved to dismiss the complaint under *Fed. R. Civ. P. 12(b) (6)*, on the grounds that even if eve-

rything Wilson alleges is true, she has not stated a claim for which relief can be granted. The first motion to dismiss [Doc. # 25] claims that Wilson's allegations fail as a matter of state tort law. Specifically, Midway argues that: Mortal Kombat is not a "product" that can give rise to a product liability claim; Wilson's CUTPA action is time-barred; a loss of consortium claim cannot be maintained by a parent based on the death of her child; and Wilson cannot recover for negligent or intentional emotional distress because Midway owed no duty to her or Noah and Midway's design and marketing of Mortal Kombat was not the legal cause of any injury sustained by her or her son. After oral argument on the first motion, Midway filed a second motion to dismiss [Doc. # 43] addressed to what Midway claims are constitutional infirmities in plaintiff's complaint. Midway claims that both the Connecticut constitution and the U.S. constitution bar an action to recover damages from the maker of a video game such as Mortal Kombat, when the basis [**3] for liability is alleged to be the expressive content of the game.

For the reasons set out below, the Court concludes that Wilson's complaint, while artfully drafted and skillfully defended at oral argument and in the briefing, nonetheless fails to state a claim upon which relief can be granted: the product liability counts fail because Mortal Kombat is not a "product" within the purview of the CPLA; the unfair trade practices claim is time-barred; the loss of consortium claim is not recognized under Connecticut law in this context; and the negligent and intentional infliction of emotional distress claims are precluded by the *First Amendment*. Thus, the Court grants Midway's motions, and Wilson's claims are dismissed in their entirety.

I. Facts

In her complaint, Wilson describes Mortal Kombat as a virtual reality video game that uses sophisticated

technology to make players physically feel as if they are killing the characters in the game, and rewards players when they tap their "killer responses." ¹ [*170] She alleges that "Mortal Kombat was designed with the use of extremely sophisticated futuristic technology that was intended to cause the user to believe and physically feel that [*4] he is actually participating in the violent battles," ² and describes the vast technological advances in video game technology that have taken place since the advent of the medium thirty years ago: "The games have gone from bouncing a little white ball from side to side on a screen to games of virtual reality in which the player has an active role within the game." ³

1 Am. Compl. P3 & 4.

2 Am. Compl. P4.

3 Am. Compl. P7.

Wilson describes the game as having seven fictional characters, each of which has a unique fighting style, including method of killing opponents, or "finishing move." ⁴ The characters advance through the various levels of the game by using increasing levels of violence, which Wilson claims presents violence as a viable problem-solving technique. ⁵ Significantly, Wilson states that Mortal Kombat differs from media such as motion pictures and music "in one significant respect - they are interactive, permitting the [player] to control, or even assume the identity of, a digitalized [*5] game character." ⁶

4 Am. Compl. P3.

5 Am. Compl. P8.

6 Am. Compl. P6.

One of the characters, "Cyrax," kills his opponents by grabbing them around the neck in a "headlock" and stabbing them in the chest. ⁷ Wilson claims that Yancy used this same maneuver to stab her son, and that Yancy was addicted to Mortal Kombat when he killed Noah. She further alleges that Midway designed Mortal Kombat to addict players to the exhilaration of violence, ⁸ and specifically targeted a young audience, intending to addict them to the game. ⁹

7 Am. Compl. PP18 & 19.

8 Am. Compl. P5.

9 Am. Compl. P15.

II. Standard

Courts dismiss complaints at the 12(b) (6) stage "only if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *D'Alessio v. New York Stock Exchange, Inc.*, 258 F.3d 93, 99 (2d Cir. 2001) [*6] (internal citations and quotations omitted). It is important to remember that "the issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *County of Suffolk v. First Am. Real Estate Solutions*, 261 F.3d 179 (2d Cir. 2001) (internal citations and quotations omitted).

When considering a motion to dismiss for failure to state a claim under *Fed. R. Civ. P. 12(b)(6)*, the Court must accept all allegations in the complaint as true and draw all inferences in the non-moving party's favor. *Patel v. Contemporary Classics of Beverly Hills*, 259 F.3d 123, 127 (2d Cir. 2001). The case will not be dismissed unless the Court is "satisfied that the complaint cannot state any set of facts that would entitle [the plaintiff] to relief." *Id.* However, because "bald assertions and conclusions of law will not suffice to state a claim," *Tarshis v. Riese Org.*, 211 F.3d 30, 35 (2d Cir. 2000) (citation omitted), the Court "need not accept averments which are legal conclusions unsupported by the facts alleged elsewhere in the complaint." *K-Mart Corp. v. Midcon Realty Group of [171] Conn., Ltd.*, 489 F. Supp. 813, 814 (D. Conn. 1980) [*7] (citations omitted).

III. Product Liability Claim

The first and second counts of Wilson's complaint are brought under Connecticut's product liability statute. The first count is styled as a failure to warn of Mortal Kombat's "inappropriate level of violent content" and "mentally-addictive" nature, while the second count is a defective design claim.

The Connecticut Product Liability Act ("CPLA" or "Act"), *Conn. Gen. Stat. §§ 52-572m et seq.*, is the exclusive remedy for all claims of injury and property damage alleged to have been caused by defective products. CPLA merges the various theories of liability - including strict liability and failure to warn - into one cause of action: the "product liability claim." *Conn. Gen. Stat. § 52-572m(b)*. ¹⁰ "The legislature clearly intended to make [CPLA] an exclusive remedy for claims falling within its scope." *Winslow v. Lewis-Shepard, Inc.*, 212 Conn. 462, 471, 562 A.2d 517 (1989).

10 "'Product liability claim' includes all claims or actions brought for personal injury, death or property damage caused by the manufacture, construction, design, formula, preparation, assembly, installation, testing, warnings, instructions, marketing, packaging or labeling of any product.

'Product liability claim' shall include, but is not limited to, all actions based on the following theories: Strict liability in tort; negligence; breach of warranty, express or implied; breach of or failure to discharge a duty to warn or instruct, whether negligent or innocent; misrepresentation or nondisclosure, whether negligent or innocent."

[**8] There are several substantive elements that must be present for a claim to fall within the scope of CPLA. Specifically, a CPLA claim can only be asserted against a "product seller," *Conn. Gen. Stat. § 52-572n(a)* - and whether the defendant in any given case is a product seller is an issue that often turns, as it does here, on whether the item involved is considered a "product." *Conn. Gen. Stat. § 52-572m.*¹¹

11 "Product seller' means any person or entity, including a manufacturer, wholesaler, distributor or retailer who is engaged in the business of selling such products whether the sale is for resale or for use of consumption" *Conn. Gen. Stat. § 52-572m(a)*. "Product" is never defined. *See generally* James H. Rotundo & Paul D. Williams, *Connecticut Product Liability Law* 3 (1998).

Apart from the definitional prerequisites to bringing a CPLA claim and several other provisions not at issue here, CPLA contains little in the way of substance regarding liability for injuries caused by products. [**9] *See Lamontagne v. E.I. Du Pont De Nemours & Co.*, 41 F.3d 846, 856 (2d Cir. 1994) ("CPLA was not meant to eliminate [common law] substantive rights [and] does not itself spell out the types of claims it consolidates"). Thus, although a product liability claim is a single cause of action and certain uniform provisions apply, different common law theories of liability undergird this statutorily-created cause of action.¹²

12 *See, e.g.*, Robert B. Adelman & Mary Ann Connors, *The Legal Framework of a Products Liability Case in Connecticut*, 67 Conn. B.J. 355, 361 (1993) ("The purpose of [CPLA] cannot be to abolish the common law theories of liability. Instead, our Act unites the common law theories in one cause of action within its procedural framework [and] creates uniform procedures and remedies for product claims.") (footnotes omitted).

Wilson's complaint asserts product liability claims, thereby necessarily alleging that *Mortal Kombat* is a "product" within the [**10] scope of the CPLA. She supports her CPLA claim with two separate theories of liability. First, she asserts a "failure to warn" theory, claiming that her [**172] son's injuries and death "were the result of the defendant's failure to warn of the inap-

propriate level of violent content and mentally-addictive nature of the products it marketed and sold and the foreseeable risks that are likely to result from use of its products by individuals in decedent's age group." ¹³ Second, she advances a design defect theory, claiming that the interactive video game was "negligently and/or intentionally designed by defendant Midway," and that her son's injuries and death "were the result of defendant Midway's negligent and/or intentional design of a dangerous product, and its reckless disregard for the safety of its products." ¹⁴

13 Am. Compl. P30.

14 Am. Compl. PP32-33.

In its motion to dismiss, Midway argues that Wilson's CPLA claim cannot be maintained at all, because *Mortal Kombat* is not a "product" within the meaning [**11] of CPLA. "Apart from the statutes that define 'product' for the purposes of determining products liability, in every instance it is for the court to determine as a matter of law whether something is, or is not, a product." *Restatement (Third) Torts: Products Liability § 19 cmt. a* (1998). Midway contends that although the term "product" is never defined in CPLA, it "cannot be contorted to include ideas or expression." ¹⁵ In support of this proposition, Midway relies on cases from other jurisdictions in which courts refused to permit strict product liability claims based on information contained in books, magazines and motion pictures. *See, e.g., Winter v. G.P. Putnam's Sons*, 938 F.2d 1033 (9th Cir. 1991) (mushroom enthusiasts who relied on erroneous information in encyclopedia of mushrooms had no strict products liability claim against publisher when they became ill); *Watters v. TSR, Inc.*, 904 F.2d 378, 380-381 (6th Cir. 1990) (mother of teenage boy who played *Dungeons and Dragons* game had no strict products liability claim against game manufacturer for son's suicide); *Sanders v. Acclaim Entm't, Inc.*, 2002 U.S. Dist. LEXIS 3997, F. Supp. 2d [**12], Civ. No. 01-B-72B, 2002 WL 338294, at *12-*13 (D. Colo. March 4, 2002) (victims of school shooting perpetrated by students who watched violent motion pictures and played violent video games had no strict liability claim against manufacturers and distributors of video games and motion pictures).

15 Def.'s Mot. Dismiss at 17.

While Midway never draws the distinction, these cases can be roughly divided into two analytically distinct classes. The first are cases similar to the mushroom enthusiasts' claim in *Winter*: they involve harm resulting from reliance on instruction manuals, cookbooks, navigational charts and similar materials. While persuasive arguments can be raised both in support of and in opposi-

tion to the imposition of products liability for misinformation in various circumstances,¹⁶ Wilson's claim is not a [*173] "commercial intellect" or faulty instruction case of the *Winter* variety, and Midway's reliance on those cases is misplaced.

16 One commentator has called for the creation of a "commercial intellect products liability" doctrine that would provide a remedy for the harm that befalls a cook, for example, when preparing a recipe from a cookbook that calls for the use of a poisonous root. Jonathan B. Mintz, *Strict Liability for Commercial Intellect*, 41 *Cath. U. L. Rev.* 617 (1992), discussing *Cardozo v. True*, 342 *So.2d* 1053 (Fla. Dist. Ct. App. 1977) (plaintiff failed to state a claim under UCC implied warranty theory of strict liability regarding recipe which called for use of root that was poisonous when uncooked, and plaintiff was injured when she tasted the raw root while preparing the dish). These "commercial intellect" cases are about misinformation, and "most courts, expressing concern that imposing strict liability for the dissemination of false and defective information would significantly impinge on free speech have, appropriately, refused to impose strict products liability in these cases." *Restatement (Third) Torts: Products Liability* § 19 cmt. d (1998). There are, however, exceptions. See, e.g., *Saloomey v. Jeppesen & Co.*, 707 *F.2d* 671 (2d Cir. 1983) (navigational chart used by pilots is a product for § 402A purposes).

[*13] The second class of cases involves claims more akin to the game player's claim in *Watters*. While these claims also involve harm allegedly resulting from the intellectual aspects of magazine articles, games, motion pictures and internet web sites, that harm is a result of alleged exhortation, inspiration or "brainwashing" rather than the result of simply following the instructions.¹⁷ Courts that have addressed the proposition that this 'inciting' media speech is a "product" for the purposes of strict liability have rejected it. *Watters v. TSR, Inc.*, 904 *F.2d* 378, 380-381 (6th Cir. 1990) (role-playing Dungeons and Dragons game not a product); *Herceg v. Hustler Magazine, Inc.*, 565 *F. Supp.* 802, 803 (S.D. Tex. 1983) ("inflammatory article on the practice of 'autoerotic asphyxiation'" not a product); *James v. Meow Media, Inc.*, 90 *F. Supp. 2d* 798, 811 (W.D. Ky. 2000) ("intangible thoughts, ideas and messages contained within games, movies, and website materials are not products for the purposes of strict products liability"); *Sanders*, 2002 *U.S. Dist. LEXIS* 3997, 2002 *WL* 338294 at *11-13 ("thoughts, images, ideas, and messages contained in movies [*14] and video games" not products). The line drawn in these cases is whether the properties of the item

that the plaintiff claimed to have caused the harm was "tangible" or "intangible." This line is reflected in the Restatement, which defines a product as "tangible personal property distributed commercially for use or consumption." *Restatement (Third) Torts: Products Liability* § 19 (1998).

17 Cf. Andrew B. Sims, *Tort Liability for Physical Injuries Allegedly Resulting From Media Speech: A Comprehensive First Amendment Approach*, 34 *Ariz. L. Rev.* 231 (1992) (dividing "media speech" tort cases into four categories: instruction, exhortation [which includes subliminal messages], inspiration and facilitation).

While there are no Connecticut cases on point, the Court finds the cases cited above to be both analogous and persuasively reasoned. Additionally, they reflect the Restatement, which is frequently relied on by the Connecticut Supreme Court, see, e.g., *Williams Ford, Inc. v. Hartford Courant Co.*, 232 *Conn.* 559, 575-578, 657 *A.2d* 212 (1995), [*15] especially in the strict liability context, see, e.g., *Hoelter v. Mohawk Service, Inc.*, 170 *Conn.* 495, 500-502, 365 *A.2d* 1064 (1975); *Wagner v. Clark Equipment Co., Inc.*, 243 *Conn.* 168, 189, 700 *A.2d* 38 (1997). For these reasons, the Court concludes that the Connecticut Supreme Court would similarly hold that "inciting" media speech is not a product within the scope of the CPLA.

In her opposition to Midway's motion, Wilson does not attempt to persuade the Court to deviate from the weight of authority on either the commercial intellect or the inciting media speech analyses. Rather, she seeks to distinguish *Mortal Kombat* from the books, magazines and motion pictures that have been at issue in the cases decided to date by pointing to *Mortal Kombat*'s sophisticated technology: "the nature of today's virtual reality technology . . . merges the idea or expression . . . with the technology . . . such that the 'product' is the combination of the expression and the technology." ¹⁸

18 Pl.'s Opp'n Mot. Dismiss at 19.

[*16] Stated differently, Wilson essentially claims that the ideas and expressions in the game are wrapped into a technology so sophisticated that the line drawn in the cases between, for example, the ink and [*174] paper upon which Shakespeare's sonnets were penned and the ideas expressed in the sonnets themselves, simply collapses, because there is no longer any way to distinguish between the physical "container" of the ideas and the ideas themselves. This is reminiscent of Marshall McLuhan's famous maxim that "the medium is the message," ¹⁹ which posits that "the sociological and psychological impact of a medium lies as much in the way it

delivers content as it does in the content itself." Dan L. Burk, *Patenting Speech*, 79 *Tex. L. Rev.* 99, 113 (2000).

19 Marshall McLuhan, *Understanding the Media: The Extensions of Man* 7 (1964).

In distinguishing *Mortal Kombat* from books, motion pictures and television shows, Wilson has focused her complaint on the interactive nature of the game. It is this interactive [**17] feature, then, that must be a "product" if Wilson's CPLA claim is to survive. While Wilson has skillfully argued that *Mortal Kombat* is something more than motion pictures or television programs, the "something more" is its interactivity. She offers no persuasive reason for distinguishing the technological advances that led to *Mortal Kombat*'s creation from developments at the turn of the twentieth century that ushered in the motion picture. The pictorial representation that evokes the viewer's response is the essence of the claimed "product," regardless of whether that representation is viewed passively, as in a motion picture, or is controlled by the viewer.

Mortal Kombat is not sufficiently different in kind to fall outside the "intangible" category that is demarcated in the case law, and thus the video game if proved as Wilson has described it in her pleadings cannot be a product within the ambit of the CPLA. Therefore, the first and second counts of the complaint fail to state a claim upon which relief can be granted.

IV. CUTPA Claim

Wilson's complaint also alleges that Midway's "aggressive marketing tactics to adolescents" violate the Connecticut Unfair Trade Practices Act [**18] ("CUTPA"), *Conn. Gen. Stat. §§ 42-110b et seq.*²⁰ Midway argues that Wilson's CUTPA allegations must fail for either of two reasons: first, they are time-barred by the statute of limitations; and second, CUTPA is a "penal statute" so any action founded upon it does not survive Noah's death by virtue of *Conn. Gen. Stat. § 52-599(c)(3)*, which provides that actions "brought upon a penal statute" cannot be brought by a decedent's executor or administrator.

20 Am. Compl. P37.

CUTPA has a three year statute of limitations. *Conn. Gen. Stat. § 42-110g(f)*. Midway argues that because any cause of action accrued on or before November 22, 1997, when Yancy killed Noah, Wilson's CUTPA claim is time-barred if commenced after November 22, 2000. Because Wilson's complaint was filed on November 22, 2000, but not served until December 19, 2000, the dispositive question on this point is whether filing or service of the complaint commences an action.

When a federal court adjudicates state law claims, "state statutes of [**19] limitations govern the timeliness of state law claims', and state law 'determines the related questions of what events serve to commence an action and to toll the statute of limitations'." *Diffley v. Allied-Signal, Inc.*, 921 F.2d 421, 423 (2d Cir. 1990), quoting *Personis v. Oiler*, 889 F.2d 424, 426 (2d Cir. 1989); accord *Converse v. General Motors Corp.*, 893 F.2d 513 (2d Cir. 1990) ("It is well established that the doctrine [**175] enunciated in *Erie R.R. v. Tompkins*, 304 U.S. 64, 82 L. Ed. 1188, 58 S. Ct. 817 (1938), applies to the manner in which a diversity action is considered commenced for purposes of state statutes of limitations."); *Walker v. Armco Steel Corp.*, 446 U.S. 740, 64 L. Ed. 2d 659, 100 S. Ct. 1978 (1980). Because Wilson's claims against Midway are all state law claims, Connecticut law determines whether filing or service of the complaint "commences" an action for tolling purposes. See *id*.

Wilson's action would be timely if commencement were governed by the Federal Rules of Civil Procedure, which provide that an action is commenced upon the filing of the complaint. *Fed. R. Civ. P.* 3. However, "the Connecticut Supreme Court [**20] has long adhered to the rule that only actual service upon the defendant will satisfy the state statutes of limitations." *Converse*, 893 F.2d at 516, citing, *inter alia*, *Consolidated Motor Lines, Inc. v. M & M Transp. Co.*, 128 Conn. 107, 20 A.2d 621 (1941) and *Jencks v. Phelps*, 4 Conn. 149, 152 (1822). Under this standard, Wilson's action was not commenced until December 19, 2000, after the applicable time limit.

Wilson argues that the three year statute of limitations should be tolled by *Conn. Gen. Stat. § 52-595* because Midway fraudulently concealed the dangerous nature of its product.²¹ She asserts that at first, she believed Noah tripped and fell into the knife that Yancy was holding, and only later did she learn of what she now alleges are the true facts of the case.²²

21 *Conn. Gen. Stat. § 52-595* provides: "If any person, liable to an action by another, fraudulently conceals from him the existence of the cause of such action, such cause of action shall be deemed to accrue against such person so liable therefor at the time when the person entitled to sue thereon first discovers its existence."

[**21]

22 Pl.'s Opp'n Mot. Dismiss at 22.

Under Connecticut case law, "to prove fraudulent concealment, the plaintiff [is] required to show: (1) [the] defendant's actual awareness, rather than imputed knowledge, of the facts necessary to establish the plaintiff[s] cause of action; (2) [the] defendant's intentional concealment of these facts from the [plaintiff]; and (3) that

[the] defendant's concealment of the facts [was] for the purpose of obtaining delay on the plaintiff[s] part in filing a complaint on their cause of action. *Bartone v. Robert L. Day Co., Inc.*, 232 Conn. 527, 533, 656 A.2d 221 (1995). "The defendant[s] actions must have been directed to the very point of obtaining the delay in filing the action of which [it] afterward seek[s] to take advantage by pleading the statute." *Gibbons v. NER Holdings, Inc.*, 983 F. Supp. 310, 316 (D. Conn. 1997), quoting verbatim *Bound Brook Ass'n v. Norwalk*, 198 Conn. 660, 665-666 (1986).

Wilson asserts that the basis of her CUTPA claim is the defendant's practice of marketing [**22] Mortal Kombat. In her brief in opposition, she alleges that the defendant "intentionally concealed this information from the plaintiff and public in general in order to prevent plaintiffs such as here from pursuing causes of action for such unfair trade practices" ²³

23 Pl.'s Opp'n Mot. Dismiss at 22

Wilson's complaint alleges no facts suggestive of concealment, however. The claimed deceptive marketing practices include "saturating other industries with products made in the likeness of the characters in the video game," ²⁴ marketing and advertising Mortal Kombat "in devices [**176] that they were certain children and adolescents would be exposed to including, but not limited to, teen television shows," ²⁵ and supplying Mortal Kombat to "outside vendors, such as video game rental establishments, video arcades and local businesses." ²⁶

24 Am. Compl. P34.

25 Am. Compl. P35.

26 Am. Compl. P37.

[**23] All of these practices are open and public, and they form the basis for Wilson's alleged CUTPA violation. The concealment, which is never actually identified, is logically inconsistent with the complained-of activity. As the complaint contains no facts which if proven could show that Wilson meets the *Bartone* elements of fraudulent concealment, Wilson's tolling argument fails. Her CUTPA claim is thus time-barred, and it is not necessary to address Midway's claim that the CUTPA action did not survive Noah's death.

V. Filial Loss of Consortium

Wilson seeks damages in her own right for loss of filial consortium as a result of the death of her son. Midway moves to dismiss Wilson's loss of consortium claim on the ground that Connecticut does not recognize a parent's claim for loss of consortium following the death of

his or her child. Both parties agree that there are no Connecticut Supreme Court cases on point, and the lower courts are divided on the issue. Compare *Mahoney v. Lensik*, 17 Conn. App. 130, 550 A.2d 1088 (1988), rev'd on other grounds, 213 Conn. 548, 569 A.2d 518 (1990) (loss of consortium claim arises out of marital contract only), [**24] with, e.g., *Pacelli v. Dorr*, 1998 Conn. Super. LEXIS 2192, No. CV 960382547S, 1998 WL 470580 (Conn. Super. July 31, 1998) (recognizing loss of filial consortium claim); see also *id.* (acknowledging split in lower court decisions and collecting cases).

In *Belliveau v. Stevenson*, 123 F.3d 107 (2d Cir. 1997), the Second Circuit made a so-called "Erie prediction" ²⁷ that the Connecticut Supreme Court would not recognize such a claim. *Belliveau* begins with the proposition that at common law, there is no recovery for wrongful death and resulting damages. *Id.* 123 F.3d at 108-109, citing *Ecker v. Town of West Hartford*, 205 Conn. 219, 530 A.2d 1056 (1987) and *Lucier v. Hittleman*, 125 Conn. 635, 7 A.2d 647 (1939) ("We have recognized it as a rule of the common law generally applicable that no action lies for damages resulting from the death of a human being"). Instead, "death and its direct consequences can constitute recoverable elements of damage only if, and to the extent that, they are made so by statute." *Foran v. Carangelo*, 153 Conn. 356, 359-360, 216 A.2d 638 (citations omitted). ²⁸ Given that there is no [**25] Connecticut statute providing for a filial loss of consortium claim, the *Belliveau* court reasoned that such a claim is not viable in Connecticut. 123 F.3d at 110 ("Connecticut law plainly does not recognize any postmortem claims absent express [**177] statutory authorization - authorization which, for loss of filial consortium claims, does not now exist. Thus there is no cause of action for postmortem loss of filial consortium under Connecticut law.").

27 Under *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 82 L. Ed. 1188, 58 S. Ct. 817 (1938), courts sitting in diversity apply the substantive law of the state to outcome-determinative questions. Where there is no controlling case law from the state's highest court, a federal court sitting in diversity must predict how the highest court would resolve the issue. *McCarthy v. Olin Corp.*, 119 F.3d 148, 153 (2d Cir. 1997). On the difficulty of making these predictions, see generally Dolores K. Sloviter, *A Federal Judge Views Diversity Jurisdiction Through the Lens of Federalism*, 78 Va. L. Rev. 1671 (1992).

[**26]

28 Connecticut's wrongful death statute makes death "an element of damage for which recovery may be obtained pursuant to the procedure specified in that statute. But the statutory right of ac-

tion belongs, in effect, to the decedent, and to the decedent alone." *Id.* at 360 (citations omitted).

In *Ladd v. Douglas Trucking Co.*, 203 Conn. 187, 523 A.2d 1301 (1987), the Connecticut Supreme Court applied the same analysis and found that no claim for postmortem loss of spousal consortium was available under Connecticut law. This result was later abrogated by statute, when the legislature amended Connecticut's wrongful death act to include loss of spousal consortium claims. See Conn. Gen. Stat. §§ 52-555a through 52-555c. However, while recognizing a spousal loss of consortium claim, this statute is silent as to any filial loss of consortium claim.

As the court in *Belliveau* recognized, 123 F.3d at 110, some Connecticut trial courts have nonetheless recognized a claim for filial loss of consortium, relying on public policy concerns. See, e.g., *Pacelli*, 1998 Conn. Super. LEXIS 2192, 1998 WL 470580 [*27] ("The decisions supporting filial consortium claims draw a parallel between the legal contract of marriage and the constitutionally protected right of a parent to the companionship, care, custody and management of his child."). While these are valid concerns, a determination of the appropriateness and scope of a parent's remedy for his or her child's wrongful death is one to be made by the legislature. Cf. *Belliveau*, 123 F.3d at 110-111. Wilson's claim in her individual capacity as Noah's mother for loss of filial consortium must, therefore, be rejected.

VI. Intentional and Negligent Infliction of Emotional Distress Claims

In response to Wilson's claims for negligent and intentional infliction of emotional distress, Midway has advanced arguments based on two general grounds. First, it argues that Wilson cannot recover as a matter of state tort law, as Midway owed no duty and, alternatively, Yancy's criminal act of stabbing Noah constitutes an intervening cause that breaks the legal chain of causation and relieves Midway of liability. Second, Midway argues that both the Connecticut and federal constitutions preclude a recovery of damages in this context, because [*28] *Mortal Kombat* is protected speech that poses no imminent threat of lawless activity.

A. Connecticut Tort Law

The Second Circuit has noted that "where possible, courts will render decisions on federal constitutional questions unnecessary by resolving cases on the basis of state law (whether statutory or constitutional)." *Allstate Ins. Co. v. Serio*, 261 F.3d 143, 150 (2d Cir. 2001), citing *Bell v. Maryland*, 378 U.S. 226, 237, 12 L. Ed. 2d 822, 84 S. Ct. 1814 (1964) (referring to the Supreme Court's "policy of refusing to decide a federal question in

a case that might be controlled by a state ground of decision"). Having reviewed Midway's arguments regarding duty and causation, the Court concludes that given the extensive allegations in the complaint regarding foreseeability, dismissal on the state tort law grounds advanced by Midway without a more fully developed record would violate the spirit of the notice pleading requirements of the Federal Rules of Civil Procedure. See, e.g., *Fed. R. Civ. P. 8(a)* ("A pleading which sets forth a claim for relief . . . shall contain . . . a short and plain statement of the claim showing that the pleader [*29] is entitled to relief."); *Swierkiewicz v. Sorema N.A.*, 152 L. Ed. 2d 1, 122 S. Ct. 992 (2002) (describing the liberal standard of notice pleading).²⁹

29 An extended discussion of the basis of the conclusion that Midway's duty and causation arguments are unavailing at this stage of the litigation is unnecessary and perhaps unwise, since it would constitute only unreviewable dicta given the Court's conclusion that the claims are completely barred by the Constitution. Cf. *Horne v. Coughlin*, 191 F.3d 244, 246 (2d Cir. 1999); *Mollica v. Volker*, 229 F.3d 366 (2d Cir. 2000).

[*178] B. State Constitutional Issues

"Ordinarily," a federal court is "obliged to address any state constitutional claims before reaching the merits of . . . federal constitutional claims." *Harlan Assoc. v. Village of Mineola*, 273 F.3d 494, 497 n.1 (2d Cir. 2001), citing *Serio*, 261 F.3d at 150. If the issue is novel and the state constitutional terrain uncertain, [*30] prudence is required:

Where a decision is to be made on the basis of state law, however, the Supreme Court has long shown a strong preference that the controlling interpretation of the relevant statute be given by state, rather than federal, courts. This preference is rooted in basic principles of federalism, for a federal court risks friction-generating error when it endeavors to construe a novel state Act not yet reviewed by the State's highest court.

Serio, 261 F.3d at 150, citing *Arizonans for Official English v. Arizona*, 520 U.S. 43, 76, 137 L. Ed. 2d 170, 117 S. Ct. 1055 (1997); *Lehman Bros. v. Schein*, 416 U.S. 386, 391, 40 L. Ed. 2d 215, 94 S. Ct. 1741 (1974); *Poe v. Ullman*, 367 U.S. 497, 526, 6 L. Ed. 2d 989, 81 S. Ct. 1752 (1961) (Harlan, J., dissenting); and *In re Joint Eastern and Southern District Asbestos Litig.*, 78 F.3d 764, 776 (2d Cir. 1996) (quotations omitted).

As set out below, the *First Amendment* analysis wholly resolves the issue, so even if the Connecticut constitution gives higher protection to expressive conduct, as Midway alleges, there is no need for this [**31] Court, sitting in diversity, to outline the exact contours of that heightened protection. Given these circumstances and the strong preference noted in *Allstate* that state courts interpret state constitutional law, the Court's analysis will proceed along federal constitutional lines.³⁰

30 In some instances, "the Connecticut constitution, under article first, §§ 4, 5 and 14, provides greater protection for expressive activity than that provided by the *first amendment to the federal constitution*." *Leydon v. Town of Greenwich*, 257 Conn. 318, 348, 777 A.2d 552 (2001), citing *State v. Linares*, 232 Conn. 345, 380-81, 655 A.2d 737 (1995). In determining whether the Connecticut constitution affords greater protection in any particular case than that provided by the federal constitution, the Connecticut Supreme Court recognizes "that federal constitutional law sets minimum national standards," but "may determine that the protections afforded to the citizens of this state by [the Connecticut] constitution go beyond those provided by the federal constitution." *Leydon*, 257 Conn. at 347 n.34 (citations omitted).

[**32] C. Applicability of *First Amendment* to Wilson's Claims

Although Wilson is a private party seeking legal redress on a common law theory of liability, the *First Amendment* nonetheless has bearing and applicability here, as the State of Connecticut cannot provide a remedy, either by its common law or by statute, that violates Midway's free speech rights. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 11 L. Ed. 2d 686, 84 S. Ct. 710 (1964) (discussed below); *Shelley v. Kraemer*, 334 U.S. 1, 92 L. Ed. 1161, 68 S. Ct. 836 (1948) (while race-based restrictive covenants in land conveyances do not themselves violate the *Fourteenth Amendment* because that Amendment applies only to state action, state court enforcement of such covenants would be unconstitutional state action).

[*179] *New York Times* is particularly on point. There, the Supreme Court reviewed a libel judgment secured under the common law of Alabama against the *New York Times*. The Court "disposed at the outset" of Alabama's contention, which had been relied on by the Alabama Supreme Court, that because the *Fourteenth Amendment* (which makes the *First Amendment* applicable to the states) is directed [**33] against state action

and not private action, the *First Amendment* had no bearing on the private civil dispute between two citizens:

Although this is a civil lawsuit between private parties, the Alabama courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms of speech and press. It matters not that that law has been applied in a civil action and that it is common law only The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised.

376 U.S. at 265, citing *Ex parte Virginia*, 100 U.S. 339, 346-347, 25 L. Ed. 676 (1879); *American Federation of Labor v. Swing*, 312 U.S. 321, 85 L. Ed. 855, 61 S. Ct. 568 (1941).

D. *First Amendment* Protection Accorded Video Games

The Second Circuit recently addressed the "elusive" nature of what constitutes *First Amendment* expression in *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 466 (2nd Cir. 2001), a case involving the *First Amendment* protection to be accorded to computer software. The court noted that while "some would confine *First Amendment* [**34] protection to political speech," *id.* at 446, citing Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind. L.J. 1 (1971), "the law has not been so limited," as "even dry information, devoid of advocacy, political relevance, or artistic expression, has been accorded *First Amendment* protection." 273 F.3d at 446, citing, *inter alia*, *Roth v. United States*, 354 U.S. 476, 484, 1 L. Ed. 2d 1498, 77 S. Ct. 1304 (1957) (*First Amendment* embraces "all ideas having even the slightest redeeming social importance").

While there are no U.S. Supreme Court or Second Circuit decisions directly on point, several courts in other jurisdictions have addressed the scope of *First Amendment* protection enjoyed by video game manufacturers in a variety of contexts. In *American Amusement Machine Assoc. v. Kendrick*, 115 F. Supp. 2d 943 (S.D. Ind. 2000) ("*Kendrick I*"), the court was asked to enjoin enforcement, on *First Amendment* grounds, of an Indianapolis ordinance that restricted minors' access to violent and sexually explicit video games. The *Kendrick I* court noted that there is no "precise [**35] test for determining how the *First Amendment* protects a given form of expression." *Id.* at 952; see also *Rothner v. City of Chicago*, 929 F.2d 297, 303 (7th Cir. 1991) (assuming *arguendo* that the video games at issue were protected by the *First Amendment*). "Instead, the [Supreme] Court has

stated generally: 'Each medium of expression . . . must be assessed for *First Amendment* purposes by standards suited to it, for each may present its own problems.' Any given form of entertainment, activity, or interaction may or may not be protected under the *First Amendment*." *Kendrick I* 115 F.S.2d at 952, quoting *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557, 43 L. Ed. 2d 448, 95 S. Ct. 1239 (1975) and citing David B. Goroff, *The First Amendment Side Effects of Curing Pac-Man Fever*, 84 Colum. L. Rev. 744 (1984).

The district court in *Kendrick I* concluded that at least some video games impacted by the ordinance at issue constituted [*180] expression protected by the *First Amendment*. *Id.* In reaching this conclusion, the court noted the difficulty of finding a "meaningful distinction between the Gauntlet³¹ game's [*36] ability to communicate a story line and that of a movie, television show, book, or - perhaps the best analogy - a comic book. Certainly the distinction cannot simply be that the game is interactive. The internet is an interactive medium and receives *First Amendment* protection." *Id.*, citing *Reno v. ACLU*, 521 U.S. 844, 138 L. Ed. 2d 874, 117 S. Ct. 2329 (1997).

31 "Gauntlet" was one video game at issue in the case.

The result in *Kendrick I* - a denial of the preliminary injunction sought by the video game manufacturer plaintiffs - was reversed in *American Amusement Machine Ass'n v. Kendrick*, 244 F.3d 572 (7th Cir. 2001), cert. denied, 151 L. Ed. 2d 379, 122 S. Ct. 462 ("Kendrick II"), in which the Seventh Circuit seemed to go even farther than the district court in recognizing the *First Amendment* protection afforded video games. In *Kendrick II*, the court made the following literary-qua-constitutional pronouncement: "All literature (here broadly [*37] defined to include movies, television, and the other photographic media, and popular as well as highbrow literature) is interactive; the better it is, the more interactive. Literature when it is successful draws the reader into the story, makes him identify with the characters, invites him to judge them and quarrel with them, to experience their joys and sufferings as the reader's own." 244 F.3d at 577.

Wilson argues that *Mortal Kombat* is not protected expression, relying principally on *America's Best Family Showplace v. City of New York*, 536 F. Supp. 170 (E.D.N.Y. 1982), in which the court likened video games to mechanical entertainment devices, such as pinball machines, and recreational pastimes, such as chess and baseball, consisting of rules and implements:

In no sense can it be said that video games are meant to inform. Rather, a

video game, like a pinball game, a game of chess, or a game of baseball, is pure entertainment with no informational element. That some of these games "talk" to the participant, play music, or have written instructions does not provide the missing element of "information." I find, therefore, that although video game [*38] programs may be copyrighted, they "contain so little in the way of particularized form of expression" that video games cannot be fairly characterized as a form of speech protected by the *First Amendment*. Accordingly, there is no need to draw that "elusive" line "between the informing and the entertaining" referred to in *Winters v. People of New York*, 333 U.S. 507, 510, 92 L. Ed. 840, 68 S. Ct. 665 (1948).

536 F. Supp. at 174 (citations omitted).

While the *America's Best* court's comparison of video games to pinball, chess and baseball seems to belie the *America's Best* plaintiff's own description of the video games at issue as "visual and aural presentations on a screen involving a fantasy experience in which the player participates," 536 F. Supp. at 173 (quoting from plaintiff's memorandum of law), the court was ruling on a motion for a preliminary injunction, and appears to have rejected as a factual matter the plaintiff's claim that the games at issue were similar to motion pictures, based on the evidentiary record before it demonstrating that the games were nothing more than digital pinball machines.

[*181] In sum, the cases [*39] are reconcilable on this point: While video games that are merely digitized pinball machines are not protected speech, those that are analytically indistinguishable from other protected media, such as motion pictures or books, which convey information or evoke emotions by imagery, are protected under the *First Amendment*. As recently suggested by the Second Circuit in *Corley*, the inquiry must be context-specific. Because a pinball machine is not protected speech, a video game that only simulated a pinball machine would not be protected speech. Conversely, comic books and movies are protected speech, so interactive versions of the same genre are also protected, even though they are labeled "games." In short, the label "video game" is not talismanic, automatically making the object to which it is applied either speech or not speech.

The question then becomes which criteria *Mortal Kombat* meets under the allegations in Wilson's complaint. Wilson distinguishes *Mortal Kombat* from pro-

tected media only by virtue of its interactivity. The nature of the interactivity set out in Wilson's complaint, however, tends to cut in favor of *First Amendment* protection, inasmuch as it is alleged to [**40] *enhance* everything expressive and artistic about *Mortal Kombat*: the battles become more realistic, the thrill and exhilaration of fighting is more pronounced. *See* Am. Compl. P5 ("The [interactive] technology utilized in [*Mortal Kombat*] was designed to have an immediate and lasting impact on the senses of the users as they used the product, this causing said users to feel exhilarated to such an extent that they would become obsessed by and addicted to the violent actions they were led to believe they were actually performing.").

Taking Wilson's allegations as true, the Court concludes that *Mortal Kombat*, as Wilson describes it, is protected *First Amendment* speech. Wilson's allegations about the game - that it presents violence as a problem solving technique and encourages players to "act out" the violence they see on screen - demonstrates that what her suit is targeting are the expressive elements of the game: its plot (i.e., the fact that advancing to different levels of the game requires increased violence), its characters (all of which are alleged to be violent), and the visual and auditory milieu in which the story line is played out (one character's 'finishing move' [**41] or method of killing opponents is "tearing off his opponent's head leaving his spinal cord still dangling" ³²).

32 Am. Compl. P3.

American Bookseller's Assoc., Inc. v. Hudnut, 771 F.2d 323 (7th Cir. 1985), is instructive. At issue in *Hudnut* was the City of Indianapolis's ordinance providing, *inter alia*, a private remedy for "victims" of pornography, defined as "the graphic sexually explicit subordination of women." *Id.* 771 F.2d at 324. For the purposes of deciding the case, the court "accepted the premises of this legislation": "Depictions of subordination tend to perpetuate subordination[, which in turn] leads to affront and lower pay at work, insult and injury at home, battery and pay on the streets." *Id.* 771 F.2d at 329 (footnote omitted). However, the court found that such a starting premise actually undercut the City's argument for according less protection to pornography:

This simply demonstrates the power of pornography as speech. All of these unhappy [**42] effects depend on mental intermediation. Pornography affects how people see the world, their fellows, and social relations. If pornography is what pornography does, so is other speech

[*182] *Id.* In the same way, Wilson complains of the addictive power of portrayals of violence on the adolescent mind. ³³ What she challenges as having warped Yancy's mind is not a pinball machine, board game or sport; rather, it is a gratuitously violent cross between a comic book and a Saturday morning cartoon, with the player having some control over the sequence of events and choice of weapon-wielding characters.

33 The scientific literature in this regard is apparently somewhat equivocal. *Compare* Craig A. Anderson & Brad J. Bushman, *Effects of Violent Video Games on Aggressive Behavior, Aggressive Cognition, Aggressive Affect, Psychological Arousal, and Prosocial Behavior: A Meta-Analytic Review of the Scientific Literature*, 12 *Psychological Science* 353 (Sep. 2001) (concluding, based on review of research literature and studies, that violent video games increase aggressive behavior in children and young adults) *with*, e.g., Michele J. Fleming & Debra J. Rickwood, *Effects of Violent Versus Nonviolent Video Games on Children's Arousal, Aggressive Mood, and Positive Mood*, 31 *Journal of Applied Psychology* 2047 (Oct. 2001) (finding no significant increase in aggressive mood scores for either boys or girls after playing a violent video game).

[**43] Even accepting Wilson's allegations that *Mortal Kombat* caused violence and physical harm to be visited upon her son and despite the seemingly minimal utility of such depictions of violence, the *First Amendment* precludes Wilson's action for damages unless *Mortal Kombat*'s images or messages are "directed to inciting or producing imminent lawless action and [be] likely to incite or produce such action." *Brandenburg v. Ohio*, 395 U.S. 444, 447, 23 L. Ed. 2d 430, 89 S. Ct. 1827 (1969); accord *Herceg v. Hustler Magazine, Inc.*, 814 F.2d 1017, 1020 (5th Cir. 1987); *Hudnut*, 771 F.2d at 333; *Sanders*, 2002 U.S. Dist. LEXIS, 2002 WL 338294, at *13-*14. Applying *Brandenburg* to the facts Wilson alleges, she cannot prevail. Midway's speech - an interactive video story depiction in game form - is not alleged to be "directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action," *Brandenburg*, 395 U.S. at 447. Even with all inferences drawn in Wilson's favor, the complaint alleges conduct by Midway that at worst "amounted to nothing more than advocacy of illegal action at some indefinite [**44] future time[, which] is not sufficient," *Hess v. Indiana*, 414 U.S. 105, 108, 38 L. Ed. 2d 303, 94 S. Ct. 326 (1971).

Plaintiff's only argument under *Brandenburg* is based on *Byers v. Edmondson*, 712 So.2d 681, 686 (La. 1998), in which the Louisiana Supreme Court held that the allegations in plaintiff's complaint against the makers

of the film "Natural Born Killers" were sufficient to overcome the Brandenburg test. The Court notes that *Byers* is clearly distinguishable, since the complaint in that case "alleged that the [movie makers] intended to incite viewers of the film to begin, shortly after viewing the film, crime sprees such as the one that led to the shooting of [the plaintiff]." *Id.* at 690. Such an allegation is understandably absent here, and Wilson claims only that Midway intended to addict players, and knew or should have known that its conduct would bring about harm.

The Court concludes, therefore, that the *First Amendment* is a complete bar to Wilson's negligent and intentional infliction of emotional distress claims against Midway.

VIII. Conclusion

For the reasons set out above, Wilson's complaint fails [**45] to state a claim upon which relief can be

granted. The product liability counts fail because Mortal Kombat is not a "product" within the purview of the CPLA; the unfair trade practices claim is time-barred; the loss of consortium claim [*183] is not recognized under Connecticut law in this context; and the negligent and intentional infliction of emotional distress claims are precluded by the *First Amendment*.

Midway's motions to dismiss [Doc. # 25 & 43] are GRANTED. The Clerk is directed to close this case.

IT IS SO ORDERED.

/s/

Janet Bond Arterton

United States District Judge

Dated at New Haven, Connecticut, this 27th day of March, 2002.

12596D

***** Print Completed *****

Time of Request: Tuesday, February 26, 2008 14:47:05 EST

Print Number: 1822:77782187

Number of Lines: 667

Number of Pages:

Send To: BAISINGER, ROSACLARE
IDELL & SEITEL LLP
465 CALIFORNIA ST STE 300
SAN FRANCISCO, CA 94104-1810

LEXSEE

**VIDEO SOFTWARE DEALERS ASSOCIATION, et al., Plaintiffs, v. NORM
MALENG, et al., Defendants.**

No. C03-1245L

**UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF
WASHINGTON, SEATTLE DIVISION**

325 F. Supp. 2d 1180; 2004 U.S. Dist. LEXIS 13533; 33 Media L. Rep. 1017

July 15, 2004, Decided

DISPOSITION: [**1] Defendants' motion to strike and plaintiffs' motion for a continuance denied. Plaintiffs' motion for summary judgment granted and defendants' cross-motion granted in part. Complaint dismissed as to counts III and IV. Defendants were permanently enjoined from enforcing statute found to be unconstitutional.

COUNSEL: For Video Software Dealers Association, Interactive Digital Software Association, Washington Retail Association, Interactive Entertainment Merchants Association, International Game Developers Association, Hollywood Entertainment Corporation, Plaintiffs: Darren H Lubetzky, LEAD ATTORNEY, JENNER & BLOCK (DC), Deanne E Maynard, Kathleen R Hartnett, Paul M Smith, LEAD ATTORNEYS, JENNER & BLOCK, WASHINGTON, DC.

For Video Software Dealers Association, Interactive Digital Software Association, Washington Retail Association, Interactive Entertainment Merchants Association, International Game Developers Association, Hollywood Entertainment Corporation, Plaintiffs: David J. Burman, Signe Brunstad, LEAD ATTORNEYS, PERKINS COIE, SEATTLE, WA.

For Norm Maleng, Defendant: Oma L. LaMothe, LEAD ATTORNEY, KING COUNTY PROSECUTING ATTORNEY'S OFFICE, SEATTLE, WA.

For Norm Maleng, Gary Locke, Christine O Gregoire, Defendants: William [**2] G Clark, LEAD ATTORNEY, ATTORNEY GENERALS OFFICE, SEATTLE, WA.

For Norm Maleng, Gary Locke, Christine O Gregoire, Defendants: Carol A Murphy, LEAD ATTORNEY,

Carol A Murphy, ATTORNEY GENERAL'S OFFICE, OLYMPIA, WA.

For Gary Locke, Christine O Gregoire, Defendants: Laura J Watson, LEAD ATTORNEY, ATTORNEY GENERAL'S OFFICE, OLYMPIA, WA.

American Booksellers Foundation of Free Expression, Association of American Publishers Inc, Comic Book Legal Defense Fund, Feminists for Free Expression, Freedom to Read Foundation, International Periodical Distributors Association, National Association of Recording Merchandisers, Publishers Marketing Association, Amici: Michael A Bamberger, LEAD ATTORNEY, AARON LEVINE & ASSOCIATES, WASHINGTON, DC.

Lion & Lamb Project, Mothers Against Violence in America, WA Council of Police and Sheriffs, National Assoc of School Psychologists, Alliance for Childhood, WA Chapter of American Academy of Pediatrics, Amici: Kevin Wall Saunders, LEAD ATTORNEY, MICHIGAN STATE UNIVERSITY, EAST LANSING, MI.

JUDGES: Robert S. Lasnik, United States District Judge.

OPINION BY: Robert S. Lasnik

OPINION

[*1183] ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND GRANTING IN PART [**3] DEFENDANTS' CROSS-MOTION

This matter comes before the Court on "Plaintiffs' Motion for Summary Judgment" and defendants' "Cross Motion for Summary Judgment." Plaintiffs are compa-

nies and associations of persons that create, publish, distribute, sell, rent, and/or make available to the public computer and video games. Plaintiffs brought this action seeking to enjoin enforcement of *RCW 9 91 180* (previously identified as Washington House Bill No. 1009, 58th Leg., Reg. Sess. (2003) and hereinafter identified as "the Act") on the ground that the Act violates the *First Amendment* by creating penalties for the distribution of computer and video games to minors based solely on their content and viewpoint. Similar disputes have erupted across the country as state and local governments have attempted to regulate the dissemination of violent video games to children. As of this date, no such regulation has passed constitutional muster. See *Interactive Digital Software Ass'n v. St. Louis County*, 329 F.3d 954 (8th Cir. 2003); *American Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572 (7th Cir. 2001); *Video Software Dealers Ass'n v. Webster*, 968 F.2d 684 (8th Cir. 1992). [**4] See also *James v. Meow Media, Inc.*, 300 F.3d 683 (6th Cir. 2002) (private party's attempt to impose tort liability based on the dissemination of video games fails in light of countervailing *First Amendment* interests); *Wilson v. Midway Games, Inc.*, 198 F. Supp.2d 167 (D. Conn. 2002) (same); *Sanders v. Acclaim Entm't, Inc.*, 188 F. Supp.2d 1264 (D. Colo. 2002) (same). Having reviewed the memoranda, declarations, and exhibits submitted by the parties, having considered the arguments of counsel, and having reviewed the record as a whole,¹ the Court finds as follows:

1 Defendants' motion to strike the statement of Dr. Goldstein and plaintiffs' motion for a continuance under *Rule 56(f)* are DENIED.

I. STANDING

As an initial matter, defendants argue that plaintiffs do not have standing to challenge the Act on any ground other than overbreadth because plaintiffs have not alleged that their *First Amendment* rights would be violated if the Act were enforced. If [**5] plaintiffs were not asserting personal injuries, they might bear the heavy burden of proving that there is no limiting construction that could be placed on the Act to avoid the alleged constitutional infirmity. See *Broadrick v. Oklahoma*, 413 U.S. 601, 610-13, 37 L. Ed. 2d 830, 93 S. Ct. 2908 (1973). Defendants' underlying assertion is incorrect, however: plaintiffs have asserted their own *First Amendment* rights (Complaint at P 20) and, in the context of the preliminary injunction motion, identified various injuries that they as game creators, distributors, and retailers would suffer if the Act became effective. Those potential injuries have not changed and plaintiffs have standing to challenge the constitutionality of the Act insofar as it directly affects the content and distribution of their speech. In addition, plaintiffs have standing to as-

sert the *First Amendment* rights of their consumers, the minors who would be deprived of access under the Act. See *Broadrick*, 413 U.S. at 612 (in the *First Amendment* area, the Supreme Court has "altered its traditional rules of standing to permit ... 'attacks on overly broad statutes with no requirement that the person making [**6] the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite [**1184] narrow specificity.' *Dombrowski v. Pfister*, 380 U.S. [479, 486, 14 L. Ed. 2d 22, 85 S. Ct. 1116 (1965)]."); *American Amusement Mach. Ass'n*, 244 F.3d at 576-77 (allowing video game manufacturers to champion the *First Amendment* rights of children).

Defendants also suggest that this Court should refrain from ruling on the constitutionality of the Act until the courts of the State of Washington have had an opportunity to construe it. In the circumstances of this case (where enforcement of the Act has been enjoined), the only way the state courts would have an opportunity to interpret the Act is through the certification process. Defendants have not, however, asked the Court to certify questions to the state Supreme Court or identified issues of state law the resolution of which would overcome the *First Amendment* issues discussed below. To the extent defendants are arguing that the Court should abstain from deciding the constitutional issues under *Railroad Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496, 85 L. Ed. 971, 61 S. Ct. 643 (1941), the significant risks of irreparable injury to plaintiffs' [**7] *First Amendment* rights while the parties wait for cases to wend their way through the state court system make abstention inappropriate. See *Porter v. Jones*, 319 F.3d 483, 486-87 (9th Cir. 2003) ("It is rarely appropriate for a federal court to abstain under *Pullman* in a *First Amendment* case, because there is a risk in *First Amendment* cases that the delay that results from abstention will itself chill the exercise of the rights that the plaintiff seek to protect by suit.").

II. PROTECTED SPEECH

The party claiming the protections of the *First Amendment* has the burden of showing that the conduct at issue expresses some idea or thought. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 n.5, 82 L. Ed. 2d 221, 104 S. Ct. 3065 (1984). Communications designed to entertain the listener, rather than to impart information or debate public affairs, are eligible for constitutional protections. *Time, Inc. v. Hill*, 385 U.S. 374, 388, 17 L. Ed. 2d 456, 87 S. Ct. 534 (1967). In evaluating a person's claim that conduct is expressive, the Court considers "whether an intent to convey a particularized message is present, and whether the likelihood is great [**8] that the message would be understood by those who viewed it." *Nordyke v. King*, 319

F.3d 1185, 1189 (9th Cir. 2003) (citation and internal quotation marks omitted), reh'g en banc denied, *364 F.3d 1025 (9th Cir. 2004)*.

The early generations of video games may have lacked the requisite expressive element, being little more than electronic board games or computerized races. The games at issue in this litigation, however, frequently involve intricate, if obnoxious, story lines, detailed artwork, original scores, and a complex narrative which evolves as the player makes choices and gains experience. All of the games provided to the Court for review are expressive and qualify as speech for purposes of the *First Amendment*. In fact, it is the nature and effect of the message being communicated by these video games which prompted the state to act in this sphere. As noted by the Eighth Circuit: "Whether we believe the advent of violent video games adds anything of value to society is irrelevant; guided by the *First Amendment*, we are obliged to recognize that 'they are as much entitled to the protection of free speech as the best of literature.'" *Interactive Digital Software Ass'n*, 329 F.3d at 958 [**9] (citing *Winters v. New York*, 333 U.S. 507, 510, 92 L. Ed. 840, 68 S. Ct. 665 (1948)). The Court finds that the games at issue are expressive and [*1185] qualify for the protections of the *First Amendment*.

Defendants argue that, even if the video games regulated under the Act are expressive, they fall into one of the few categories of speech that have been historically unprotected, in this case, obscenity. Defendants correctly point out that the phrase "obscene material" is not inherently limited to sexually-explicit materials. The Latin root "obscaenus" literally means "of filth" and has been defined to include that which is "disgusting to the senses" and "grossly repugnant to the generally accepted notions of what is appropriate." See *Miller v. California*, 413 U.S. 15, 18 n.2, 37 L. Ed. 2d 419, 93 S. Ct. 2607 (1973). Graphic depictions of depraved acts of violence, such as the murder, decapitation, and robbery of women in *Grand Theft Auto: Vice City*, fall well within the more general definition of obscenity. Nevertheless, the Supreme Court has found that, when used in the context of the *First Amendment*, the word "obscenity" means material that deals with sex. *Id.* Only "works which [**10] depict or describe sexual conduct" are considered obscene and therefore unprotected. State statutes designed to regulate obscene material must be drafted narrowly to cover only "works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value." *Miller*, 413 U.S. at 24.

Defendants acknowledge that the Act does not regulate works that depict sexual conduct. Undaunted by the clear pronouncements of the Supreme Court regarding

the limited scope of materials that are subject to regulation as obscene, defendants argue that the Court should expand the definition of obscenity to include graphic portrayals of violence. No court has accepted such an argument, probably because existing case law does not support it. In addition to the fact that the Supreme Court has expressly limited "obscenity" to include only sexually-explicit materials, the historical justifications for the obscenity exception simply do not apply to depictions of violence. Sexually-explicit materials were originally excluded from the protections [**11] of the *First Amendment* because the prevention and punishment of lewd speech has very little, if any, impact on the free expression of ideas and government regulation of the sexually obscene has never been thought to raise constitutional problems. *Roth v. United States*, 354 U.S. 476, 484-85, 1 L. Ed. 2d 1498, 77 S. Ct. 1304 (1957). The same cannot be said for depictions of violence: such depictions have been used in literature, art, and the media to convey important messages throughout our history, and there is no indication that such expressions have ever been excluded from the protections of the *First Amendment* or subject to government regulation. The Court declines defendants' invitation to expand the narrowly-defined obscenity exception to include graphic depictions of violence.

Finally, defendants argue that the state should be permitted to determine what speech or ideas are wholesome enough to disseminate to minors, even if the speech is protected under the *First Amendment* and does not satisfy the imminent lawlessness analysis of *Brandenburg v. Ohio*, 395 U.S. 444, 23 L. Ed. 2d 430, 89 S. Ct. 1827 (1969). Defendants rely heavily on *Ginsberg v. New York*, 390 U.S. 629, 20 L. Ed. 2d 195, 88 S. Ct. 1274 (1968), [**12] to support their theory that the state can regulate any speech that is "harmful to minors." Although the Supreme Court has used a "harmful to minors" analysis to broaden the definition of obscene material, the decision in *Ginsberg* is based on the [*1186] fact that sexually-explicit material is not entitled to the protections of the *First Amendment*. The statute at issue in *Ginsberg* did not create an entirely new category of unprotected speech: rather, it adjusted the *Roth* definition of obscene material to capture that which is of sexual interest to minors.

Defendants have not identified, and the Court has not found, any case in which a category of otherwise protected expression is kept from children because it might do them harm. Defendants' cannot prohibit the dissemination of otherwise protected speech simply because the audience consists of minors. "Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideals or images that a legislative body thinks unsuitable for them. In most circumstances,

the values protected by the *First Amendment* are no less applicable when the government seeks [**13] to control the flow of information to minors." *Erznoznik v. Jacksonville*, 422 U.S. 205, 213-14, 45 L. Ed. 2d 125, 95 S. Ct. 2268 (1975).

III. STRICT SCRUTINY

Because the video and computer games at issue in this litigation are expressive speech that is entitled to the full protections of the *First Amendment*, strict scrutiny applies. It is undisputed that the Act seeks to regulate plaintiffs' speech based on its content (as opposed to the time, manner, and place in which it is published).² Content-based regulations are presumptively invalid (*R.A.V. v. City of St. Paul*, 505 U.S. 377, 382, 120 L. Ed. 2d 305, 112 S. Ct. 2538 (1992)) and are rarely permitted (*United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 818, 146 L. Ed. 2d 865, 120 S. Ct. 1878 (2000)). Under this analysis, the Act will be upheld only if defendants can show that the regulation is necessary to serve a compelling state interest and that it is narrowly tailored to achieve that interest. *Republican Party of Minn. v. White*, 536 U.S. 765, 774-75, 153 L. Ed. 2d 694, 122 S. Ct. 2528 (2002).

2 In a footnote, defendants acknowledge that the Act is a content-based restriction, but argue that the restrictions are viewpoint neutral. It is not clear what relevance this distinction has in this case. In order to justify restrictions on speech in a limited public forum, the state must show that it has not discriminated on the basis of viewpoint. See *Good News Club v. Milford Central Sch.*, 533 U.S. 98, 106-07, 150 L. Ed. 2d 151, 121 S. Ct. 2093 (2001). The forum at issue does not fall within that category, however, and the fact that the restriction is content-based is sufficient to give rise to strict scrutiny. In addition, the fact that the Act regulates only speech that is anti-law enforcement (*i.e.*, depicting violence against law enforcement officers is prohibited but the portrayal of the same acts against children is not) makes the claim of viewpoint neutrality doubtful.

[**14] A. Compelling State Interest

In enacting House Bill 1009, the Legislature noted two compelling interests: (1) "to curb hostile and antisocial behavior in Washington's youth" and (2) "to foster respect for public law enforcement officers." Apparently recognizing the constitutional problems associated with attempting to regulate speech because it is anti-government, defendants have merged these two purposes, arguing that "the Legislature was motivated to curb hostile and antisocial behavior of youths, including

violence and aggression toward law enforcement officers." Response at 21.

Federal courts have repeatedly recognized that the state has a legitimate and compelling interest in safeguarding both the physical and psychological well-being of minors. See *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126, 106 L. Ed. 2d 93, 109 S. Ct. 2829 (1989); *Interactive Digital*, 329 F.3d at 958. One [**1187] could argue that the Act is intended to protect youth from psychological desensitization and the development of aggressive feelings/behaviors. Simply identifying a compelling state interest is not enough, however:

When the Government defends a regulation [**15] on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply "posit the existence of the disease sought to be cured." *Quincy Cable TV, Inc. v. FCC*, 248 U.S. App. D.C. 1, 768 F.2d 1434, 1455 (D.C. Cir. 1985). It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way. See *Edenfield v. Fane*, 507 U.S. 761, 770-71, 123 L. Ed. 2d 543, 113 S. Ct. 1792 (1993); *Los Angeles v. Preferred Communications, Inc.*, 476 U.S. [488, 496, 90 L. Ed. 2d 480, 106 S. Ct. 2034 (1986)] ("This Court may not simply assume that the ordinance will always advance the asserted state interests sufficiently to justify its abridgment of expressive activity") (internal quotation marks omitted)

Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 664-65, 114 S. Ct. 2445, 129 L. Ed. 2d 497 (1994). See also *Playboy*, 529 U.S. at 816-17. If the state is able to show that the psychological well-being of Washington's youth is in genuine jeopardy, it has the additional burden of showing that the regulation is narrowly tailored to address that problem "without unnecessarily [**16] interfering with *First Amendment* freedoms." *Sable Communications*, 492 U.S. at 126.

The disease the Legislature apparently seeks to cure is the game-related increase in hostile and antisocial behavior in minors, particularly toward law enforcement officers. Defendants rely heavily on the Legislature's finding that "there has been an increase in studies showing a correlation between exposure to violent video and computer games and various forms of hostile and antisocial behavior." ³ In general, courts must "accord substan-

tial deference to the predictive judgments" of the legislature. *Turner Broad Sys.*, 512 U.S. at 665 (citing *Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 103, 36 L. Ed. 2d 772, 93 S. Ct. 2080 (1973)). Where the challenged legislation restricts or limits freedom of speech, however, the courts must ensure that the legislature's judgments are based on reasonable inferences drawn from substantial evidence. *Turner Broad Sys.*, 512 U.S. at 666; *Century Communications Corp. v. F.C.C.*, 266 U.S. App. D.C. 228, 835 F.2d 292, 304 (D.C. Cir. 1987) ("when trenching on First Amendment interests, even incidentally, [*17] the government must be able to adduce either empirical [*1188] support or at least sound reasoning on behalf of its measures").

3 To the extent the Act is designed to prevent future, rather than immediate, acts of violence, the Supreme Court and the Ninth Circuit have expressly rejected the idea that the possibility of future harm can justify the regulation of speech. See *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 245, 152 L. Ed. 2d 403, 122 S. Ct. 1389 (2002) ("The prospect of crime, however, by itself does not justify laws suppressing protected speech."); *Kinglsey Int'l Pictures Corp. v. Regents of Univ. of N.Y.*, 360 U.S. 684, 689, 3 L. Ed. 2d 1512, 79 S. Ct. 1362 (1959) ("Among free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law, not abridgment of the rights of free speech.") (internal quotation marks and citation omitted); *Dworkin v. Hustler Magazine Inc.*, 867 F.2d 1188, 1199-1200 (9th Cir. 1989) ("Numerous cases establish that speech may not be suppressed simply because it is offensive Instead, a large body of case law sharply limits the reach of these categories by requiring that the speech be directed toward and likely to incite imminent unlawful action.") (internal citations omitted). Defendants have expressly disavowed any attempt to satisfy the Brandenburg analysis and cannot justify the Act by asserting the possibility of future harm.

[**18] Defendants have produced expert reports and a number of studies which find a correlation between a minor's exposure to depictions of violence and the development of aggressive tendencies and anti-social behaviors. Plaintiffs have produced their own expert report, a like number of studies, and a presentation by the State's Department of Health which conclude that no causal connection between playing violent video games and real-life violence has been established. As discussed above, this Court must ensure that the predictive judgments that prompted the legislature to act are based on reasonable inferences drawn from substantial evidence.

Having reviewed all of the evidence provided by the parties in the light most favorable to defendants, the Court finds that defendants have presented research and expert opinions from which one could reasonably infer that the depictions of violence with which we are constantly bombarded in movies, television, computer games, interactive videos games, etc., have some immediate and measurable effect on the level of aggression experienced by some viewers and that the unique characteristics of video games, such as their interactive qualities, the first-person [*19] identification aspect, and the repetitive nature of the action, makes video games potentially more harmful to the psychological well-being of minors than other forms of media. In addition, virtually all of the experts agree that prolonged exposure to violent entertainment media is one of the constellation of risk factors for aggressive or anti-social behavior (other factors include family problems, problems with peers at school and in the neighborhood, biological factors, etc.).

Nevertheless, the Court finds that the current state of the research cannot support the legislative determinations that underlie the Act because there has been no showing that exposure to video games that "trivialize violence against law enforcement officers" is likely to lead to actual violence against such officers. Most of the studies on which defendants rely have nothing to do with video games, and none of them is designed to test the effects of such games on the player's attitudes or behavior toward law enforcement officers. Where the studies do involve exposure to video games, the subjects are often asked to play games selected by the researcher and are then evaluated for behaviors that serve as [*20] proxies for actual aggression. Assuming, for sake of argument, that the frustrations inherent in learning a new game or console system are not responsible for any measurable increase in hostility, neither causation nor an increase in real-life aggression is proven by these studies. ⁴ That is not to say that the video games presented to the Court are unobjectionable. To the contrary, many of them promote hateful stereotypes and portray levels of violence and degradation that are repulsive. The Court, along with virtually every entity that has considered this issue, hopes that more research is done to determine the long-term effects of playing violent video games on children and adolescents. Although "we do not demand of legislatures scientifically certain criteria of legislation" (*Ginsberg*, 390 U.S. at 642 (internal quotation marks omitted)), given the state of the existing research [*1189] in this area, the Court finds that the Legislature's belief that video games cause violence, particularly violence against law enforcement officers, is not based on reasonable inferences drawn from substantial evidence.

4 Even if one accepts the basic premise that interactive games involving repetitive actions

"teach" the player certain skills, the evidence as it currently exists suggests only that players are taught improved reaction time, eye/hand coordination, and how to score points in the game. Dr. Provenzo's concern that a person playing *Grand Theft Auto: Vice City* will learn how to shoot a police officer is little more than conjecture: a proven ability to manipulate a controller and push buttons will not teach a person to load, aim, or fire a gun.

[**21] In the absence of substantial evidence supporting the Legislature's prediction that the regulation of violent video games will curb hostile and anti-social behavior in youths, particularly toward law enforcement officers, it is virtually impossible to conclude that "the regulation will in fact alleviate [the identified] harms in a direct and material way." *Turner Broad. Sys.*, 512 U.S. at 664-65. Defendants argue that the Act is just the first step toward stamping out all game-related aggression and that they should not be faulted for focusing their first regulatory efforts on just one type of violence. The problem with this approach is that the Act is both over-inclusive and under-inclusive. If the Legislature hopes to prevent game-inspired hostility toward law enforcement officers, the Act sweeps too broadly in that it would restrict access to games that reflect heroic struggles against corrupt regimes, involve accidental injuries to officers, and/or contain disincentives for violence against law enforcement officers. At the same time, the Act is too narrow in that it will have no effect on the many other channels through which violent representations are presented [**22] to children. As a step toward reducing game-related aggression as a whole, the Act would be particularly ineffective because it would not keep minors from playing some of the most offensive and violent video games. Only those games involving law enforcement officers would be off-limits, leaving vile portrayals of mutilation and murder of other persons (often women and minorities) unregulated and widely available to minors. Even if defendants were able to show a causal connection between violent video games and real-life aggression in minors, the record does not support a finding that the Act is likely to curb such aggression in a direct and material way.

B. Narrowly Tailored to Further Compelling State Interest

Where strict scrutiny applies, courts strike down speech restrictions "if a less restrictive alternative would serve the Government's interest." *Playboy*, 529 U.S. at 813. Even the less exacting test applied to content-neutral regulations requires that the state show "that the remedy it has adopted does not 'burden substantially more speech than is necessary to further the govern-

ment's legitimate interests.'" *Turner Broad. Sys.*, 512 U.S. at 665 [**23] (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 799, 105 L. Ed. 2d 661, 109 S. Ct. 2746 (1989)). The Court finds that, even if the state's interest in preventing video game-related violence toward law enforcement officers were compelling, the limitations imposed by the Act impact more constitutionally protected speech than is necessary to achieve the identified ends and are not the least restrictive alternative available.

As this litigation has progressed, defendants and their experts have asserted that "ultra-violent" video games cause aggression and must be regulated in order to further the state's compelling interests. The Act, however, does not simply regulate games "in which a high level of realistic violence is sustained" throughout play (Opposition at 2) and is not limited to the most vile portrayals of violence. Rather, the Act regulates all "video or computer game[s] that contain[] realistic or photographic-like depictions of aggressive conflict in which the player kills, injures, or otherwise causes physical harm to a human form in the game who is depicted, by dress or other recognizable symbols, as a [*1190] public law enforcement officer." This definition is expansive [**24] and does not attempt to regulate the dissemination of video games on the basis of the extremity of the violence portrayed -- even the most loathsome acts are not covered as long as the victim is anyone other than a "public law enforcement officer." Where the victim is identified as a law enforcement officer, however, the distribution of games that contain even relatively common forms of violence, reflect laudable struggles against evil authority figures, depict unintentional harm, or have very limited violent content, is restricted. In short, the regulation of speech at issue here is not limited to the ultra-violent or the patently offensive and is far broader than what would be necessary to keep filth like *Grand Theft Auto III* and *Postal II* out of the hands of children.

For all of the foregoing reasons, the Act "does not satisfy the rigorous constitutional standards that apply when government attempts to regulate expression." *Erznoznik*, 422 U.S. at 217. Given the nationwide, ongoing dispute in this area, it is reasonable to ask whether a state may ever impose a ban on the dissemination of video games to children under 18. The answer is "probably yes" if the games [**25] contain sexually explicit images (see *Ginsberg*, 390 U.S. at 634-38; *American Amusement Mach.*, 244 F.3d at 574-76, 579), and "maybe" if the games contain violent images, such as torture or bondage, that appeal to the prurient interest of minors (see *Miller*, 413 U.S. at 24). State attempts to regulate ultra-violent video games that have no sexual component have failed for a number of reasons, including those set forth above. While the Court cannot give

advisory opinions on cases or controversies not before it, future attempts to regulate video games on the basis of their content will be analyzed under a framework such as the Court has undertaken here. Key considerations will be:

-- does the regulation cover only the type of depraved or extreme acts of violence that violate community norms and prompted the legislature to act?

-- does the regulation prohibit depictions of extreme violence against all innocent victims, regardless of their viewpoint or status? and

-- do the social scientific studies support the legislative findings at issue?

IV. VAGUENESS

Legislative enactments must "give the person of ordinary [**26] intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned v. City of Rockford*, 408 U.S. 104, 108, 33 L. Ed. 2d 222, 92 S. Ct. 2294 (1972). Defendants steadfastly refuse to identify the range of video games the state seeks to regulate under the Act, leaving many unanswered questions for the Court, retailers, and authors to ponder. The language of the statute itself is broad and covers all "video or computer game[s] that contain[] realistic or photographic-like depictions of aggressive conflict in which the player kills, injures, or otherwise causes physical harm to a human form in the game who is depicted, by dress or other recognizable symbols, as a public law enforcement officer." Would a game built around *The Simpsons* or the *Looney Tunes* characters be "realistic" enough to trigger the Act? Is the level of conflict represented in spoofs like the *Dukes of Hazard* sufficiently "aggressive?" Do the Roman centurions of *Age of Empires*, the enemy officers depicted in *Splinter Cell*, or the conquering forces of *Freedom Fighters* qualify as "public law enforcement officers?" When pressed at oral argument, defense counsel was unable to determine whether firefighters [**27] were "public law enforcement officers," [*1191] suggesting that such issues should be determined by the state courts. As noted above, however, there is a substantial risk that plaintiffs'

exercise of their *First Amendment* rights would be chilled while each issue of interpretation is presented to the state courts, thereby depriving plaintiffs of the very rights they seek to protect in this suit.

The problem is not, as defendants suggest, that a retail clerk might be unaware of the contents of a particular game: such a situation may give rise to a defense to an action brought under the Act but it is not a vagueness issue. The real problem is that the clerk might know everything there is to know about the game and yet not be able to determine whether it can legally be sold to a minor. The effects of such vagueness are particularly troublesome where *First Amendment* rights are implicated. Not only is a conscientious retail clerk (and her employer) likely to withhold from minors all games that could possibly fall within the broad scope of the Act, but authors and game designers will likely "steer far wider of the unlawful zone ... than if the boundaries of the forbidden area were clearly marked. [**28] " *Grayned*, 408 U.S. at 109 (internal quotation marks omitted). Given the fact that rights of free expression are at stake, the Court finds that the Act is unconstitutionally vague.

V. PRIOR RESTRAINT

Defendants' request for dismissal of plaintiffs' claim that the Act constitutes a prior restraint on speech is unopposed. Count III of plaintiffs' complaint is therefore, dismissed.

IV. EQUAL PROTECTION

Defendants' request for dismissal of plaintiffs' claim that the Act violates their right to equal protection under the law is unopposed. Count IV of plaintiffs' complaint is therefore, dismissed.

For all of the foregoing reasons, defendants and their officers, employees, and representatives are permanently enjoined from enforcing *RCW 9 91 180*. Counts III and IV of plaintiffs' complaint are hereby DISMISSED. The Clerk of Court is directed to enter judgment in the above-captioned matter in favor of plaintiffs and against defendants.

DATED this 15th day of July, 2004.

Robert S. Lasnik

United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

SHANNON SMITH, KEITH A. KAY and
ORLANDO PEREZ, On Behalf of Themselves
and All Others Similarly Situated

v.

MICROSOFT CORPORATION

§
§
§
§
§
§
§
§
§

CIVIL ACTION NO. _____
(JURY)

PLAINTIFFS ORIGINAL COMPLAINT

TO THE HONORABLE JUDGE OF SAID COURT:

Plaintiffs SHANNON SMITH, KEITH A. KAY and ORLANDO PEREZ, bring this lawsuit, individually and on behalf of all class members, complaining of MICROSOFT CORPORATION and would respectfully show:

**I.
PARTIES**

1. Plaintiff SHANNON SMITH ("Smith") is a resident of Beaumont, Jefferson County, Texas.
2. Plaintiff KEITH A. KAY ("Kay") is a resident of Houston, Harris County, Texas.
3. Plaintiff ORLANDO PEREZ ("Perez") is a resident of Pearland, Brazoria County, Texas.
4. Defendant, MICROSOFT CORPORATION, is a Washington corporation authorized to do business in the state of Texas and with its principal place of business in Washington. Defendant may be served via its registered agent for service, Corporation Service Company, 701 Brazos St., Austin, Travis County, Texas 78701.

**II.
JURISDICTION**

5. The court has jurisdiction over the lawsuit under 28 U.S.C. § 1332(d), the Class Action Fairness Act, because the suit is a class action with an amount in controversy exceeding \$5 million. The parties are minimally diverse because at least one party is a citizen of a state other than Washington, the citizenship state of Defendant.

**III.
VENUE**

6. Venue is proper in this district under 28 U.S.C. § 1391(c) because Defendant's acts took place in this judicial district and because Defendant does business in this judicial district.

**IV.
CONDITIONS PRECEDENT**

7. All conditions precedent have been performed or have occurred as required by Federal Rule of Civil Procedure 9(c).

**V.
FACTS**

8. In December 2007, XBOX Live crashed and prevented Plaintiffs around the world from accessing online play for several weeks. XBOX Live is Microsoft's gaming membership that provides gamers to access Microsoft's servers for online gaming. XBOX Live continues to deny subscribers access and has even issued apologies for their failure to correct server problems. Over eight (8) million gamers worldwide subscribe to XBOX Live.

9. Specifically, interruptions in game-play kicked many Plaintiffs offline of XBOX Live and displayed messages such as "Server Error." Other Plaintiffs have been unable sign into

XBOX Live at all or use the advertised features such as "match-make" or "account recovery," despite paying for these services in their yearly subscription dues. Many Plaintiffs purchased new subscriptions specifically to play online during the holidays. In the last three months of 2007, Microsoft sold over four (4) million XBOX console units. This increase in console purchases led to a substantial increase in XBOX Live subscriptions. Microsoft knew the increase in subscriptions would increase game-play on its servers yet failed to provide adequate access and service to XBOX Live and its subscribers.

10. Plaintiffs purchased XBOX Live accounts in expectation of enhancing their gaming experience via online play, usually costing each Plaintiff between \$30 and \$50 per year for a subscription. Subscribers can then play their XBOX console online amongst other subscribers. Plaintiffs represent a class of subscribers that have been denied access to XBOX Live beginning in December 2007.

VI. CLASS ACTION ALLEGATIONS

11. The named Plaintiffs bring this action on their own behalf and on behalf of a class of individuals under Federal Rule of Civil Procedure 23. One or more of the class members may sue as a representative party on behalf of the class, if the following requirements are met¹:

- The class is so large that joinder of all members is impracticable;
- There are questions of law or fact common to the class;
- The claims or defenses of the representative parties are typical of the class; and
- The representative party will fairly and adequately protect the interests of the class

¹FED. R. CIV. PRO. 23(a)

12. The class of Plaintiffs in this case are so numerous that joinder of all members is impracticable. Over eight (8) million gamers subscribe to XBOX Live worldwide. Joinder of a class this size would be impracticable, if not impossible.

13. The class members all have common questions of law and fact. Each member is a subscriber who paid annual subscription fees to access XBOX Live through their XBOX console system. These members were denied access beginning in December of 2007 when Microsoft's servers failed.

14. The claims of Shannon Smith, Keith A. Kay and Orlando Perez, proposed class representatives, are typical of the claims of all the class members. Each has the same interests and has generally suffered the same type of injury as the rest of the class. Microsoft prevented Smith, Kay, Perez and each class member from accessing XBOX Live despite paying a yearly premium for that purpose.

15. Smith, Kay and Perez will fairly and adequately protect the interests of the class. Each is a member of the class, has the same interests as, and no conflicts with, the class members, suffered identical injuries as the class members, has the means to pursue the case, and has competent counsel.

16. The common questions of law and fact predominate over any questions affecting only individual members, and the class action is superior to other available methods for the fair and efficient adjudication of the controversy. Furthermore, separate actions by each individual class member would create a risk of inconsistent or varying adjudications for individual class members. This would establish incompatible standards of conduct for Defendant.

**VII.
BREACH OF CONTRACT**

17. Plaintiffs and Defendant, Microsoft, entered into subscription contracts for access to Defendant's servers in connection with XBOX Live. Plaintiffs annually paid between \$30 and \$50 for their subscriptions. In return, Defendant would provide an online gaming center for the subscribing Plaintiffs to play their XBOX console online with other subscribers. Defendant has not performed its contractual obligations. Defendant's breach includes:

- Failing to allow Plaintiffs to sign on or use XBOX Live,
- Failing to provide Plaintiffs with the full features paid for, including, but not limited to, "match-making" and "account recovery;" and
- Failing to provide uninterrupted service to online gamers.

18. As a direct and proximate result of Defendant's breach, Plaintiffs suffered damages including expenses associated with XBOX Live memberships.

**VIII.
BREACH OF WARRANTY**

19. An implied warranty existed between Defendant and Plaintiff regarding the XBOX Live subscription. Plaintiffs had a reasonable expectation that the purchased subscription would allow access to an online gaming center through their XBOX console systems.

20. Defendant, as a seller, is considered a merchant with respect to the product sold. The product which Defendant sold was not fit for the ordinary purposes for which such goods are used.

21. Furthermore, Defendant had reason to know of the particular purpose for which the product it sold would be used, as well as the knowledge that persons such as Plaintiffs would rely on the seller's skill to furnish a suitable product. Defendant breached this

warranty by failing to provide adequate access to XBOX Live.

22. Plaintiff's injuries and damages were proximately caused by Defendant's defective product and subsequent breach of warranty.

**IX.
NEGLIGENT MISREPRESENTATION**

23. Defendant Microsoft made representations to Plaintiffs in the course of business, supplied false information for the guidance of Plaintiffs, and failed to exercise reasonable care or competence in obtaining or communicating the information. Plaintiffs justifiably relied on the representations made by Microsoft which were the proximate cause of Plaintiffs' damages.

24. Microsoft represented a subscription to XBOX Live would allow subscribers to access Microsoft servers for online gaming through an XBOX console. Plaintiffs reasonably believed they would receive access to the servers. Plaintiffs relied to their detriment on Microsoft's representations by paying annual dues but not receiving XBOX Live access.

25. Microsoft failed to exercise reasonable care or competence in communicating information regarding the nature of the services offered through XBOX Live. Plaintiffs reasonably relied on Microsoft's representations and suffered damages as a result.

**X.
ATTORNEY FEES**

26. It was necessary for Plaintiffs to hire the undersigned attorney to file this lawsuit. Upon judgment, Plaintiff respectfully requests an award of attorney fees and costs.

**XI.
JURY DEMAND**

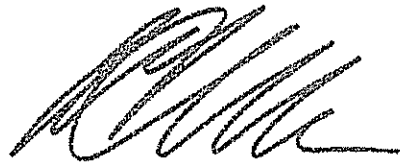
27. Plaintiffs assert their rights under the Seventh Amendment to the United States Constitution and demands, in accordance with Federal Rule of Civil Procedure 38, a trial by jury on all issues.

**XII.
PRAYER**

28. For the above reasons, Plaintiffs pray Defendant be cited to appear and answer, that upon final trial and hearing, Plaintiffs have their judgment against Defendant, together with interest on the judgment at the legal rate, prejudgment interest, costs of court, and for such other and further relief, both in law and equity, to which Plaintiffs may show themselves justly entitled.

Respectfully Submitted,

THE GIBSON LAW FIRM



Jason A. Gibson
State Bar No. 24000606
3800 Buffalo Speedway Suite 550
Houston, Texas 77098
Ph: (713) 650-1010
Fax: (713) 650-1011

ATTORNEY FOR PLAINTIFFS

GTA Class Action Settlement

Home

Notice of
Proposed Class
Action Settlement

File a Claim
Online

Motion for
Preliminary
Approval

Settlement
Agreement

Order Granting
Preliminary
Approval

Order Appointing
Special Master

Welcome to the Information Web Site for the Grand Theft Auto Class Action Settlement

www.gtasettlement.com

(Last updated on January 4, 2008)

This website was established to provide information about the Settlement of a class action lawsuit involving *Grand Theft Auto: San Andreas First Edition*.

A proposed settlement of a class action lawsuit will provide a replacement disc and/or cash to consumers who purchased a valid copy of the Grand Theft Auto: San Andreas video game.

What is this lawsuit about?

Plaintiffs claim that copies of Grand Theft Auto: San Andreas First Edition manufactured before July 20, 2005 contained parts that could be modified and combined to display scenes of a sexual nature that have come to be referred to as the "Hot Coffee" content. According to Plaintiffs, the game should have been rated as "AO" (Adults Only) because of the Hot Coffee content. Plaintiffs claim that, by including the Hot Coffee content on the discs and marketing the game under an "M" (Mature) rating, Defendants violated consumer fraud statutes and misled consumers as to the game disc's content.

Defendants do not dispute that the parts that were modified and combined to display the Hot Coffee content were present in the code of the game discs. However, Defendants vigorously deny each and every allegation of improper conduct, and they deny all liability.

The notice and other settlement documents provide information about the lawsuit, the settlement, your legal rights, what benefits are available, who is eligible for them, and how to get them. To download a notice package, please [click here](#).

If you are eligible, the following is what you may obtain under the settlement:

AVAILABLE BENEFITS

If you have and submit:

What you may get:

Grand Theft Auto: San Andreas First Edition Disc

Replacement Disc

Detailed Store Receipt

Cash payment up to \$35.00

General Credit Card Statement or Check

Cash payment up to \$17.50

Disc/Purchase Details	Cash payment up to \$10.00
No Disc/Purchase Details	Cash payment up to \$5.00

Note that the different relief requires different levels of proof. All cash benefits may be pro-rated to a lesser amount, depending on the total number of people who claim benefits. Details are set out fully in the notice package. [Click here for the package.](#)

You may obtain further information about this Settlement by clicking on the links at left.

Certain documents are in Adobe Acrobat PDF format. If your computer is not already configured with the Acrobat software to view and print these documents, you may get Acrobat for free by clicking the logo below.



Adobe Acrobat reader is free and is required to view and print the documents on this website. Download it [here](#).

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

----- X
:
:
In re Grand Theft Auto Video Game :
Consumer Litigation :
:
:
----- X

No 1:06-md-1739 (SWK) (mhd)

SETTLEMENT AGREEMENT

This Settlement Agreement is made by and among individual and representative Plaintiffs Brenda Stanhouse, Rose Goldfine, Robert Samario, Susan Carlson, Florence Cohen, Cindy Casey and John Robinson ("Plaintiffs"), on behalf of themselves and, on the terms set forth herein, the Settlement Class as defined herein, and Take-Two Interactive Software, Inc. and its wholly-owned subsidiary Rockstar Games, Inc. ("Defendants," and Plaintiffs and Defendants being collectively referred to herein as the "Parties"), by and through their respective counsel and representatives, as of the 7th day of November 2007, to settle and compromise the claims of Plaintiffs and the Settlement Class asserted in this matter (the "Action") on the terms and conditions set forth below:

I. CLAIMS OF THE PARTIES

A. Defendants market and indirectly, including through retailers, sell, among other things, the *Grand Theft Auto* series of video game titles. In or about October 2004, Defendants released a game in this series entitled *Grand Theft Auto. San Andreas* for use on the Sony "PlayStation 2"TM video game console. In or about June 2005, Defendants released versions of *Grand Theft Auto. San Andreas* playable on personal computers and on Microsoft XboxTM video game consoles.

B. Plaintiffs contend that the copies of *Grand Theft Auto: San Andreas* manufactured and distributed before July 20, 2005, contained elements that, if modified and combined by a player using third-party modification software and/or hardware, could display the clothed 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” scenes.

C. Plaintiffs contend that Defendants defrauded Plaintiffs and violated consumer fraud statutes by misleading consumers of *Grand Theft Auto: San Andreas* as to the game discs’ content by including the Hot Coffee elements on the distributed discs and by marketing the game under an “M” (Mature) rating, when, Plaintiffs allege, the disc should have been rated as “AO” (Adults Only) because of the existence of the Hot Coffee elements on the distributed game discs. Plaintiffs also contend that Defendants were unjustly enriched because Defendants received consumers’ money that would not rightly be Defendants because, had the game disc been rated properly as 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 negligent by including the Hot Coffee elements in the distributed game, rather than removing the Hot Coffee elements entirely.

D. Defendants do not dispute that the elements that were modified and combined to display the Hot Coffee content were present on the *Grand Theft Auto: San Andreas* game discs manufactured before July 20, 2005, but Defendants vigorously deny each and every one of Plaintiffs’ allegations of improper conduct and deny having any

liability to the purported Plaintiff class. The Hot Coffee elements were (a) inaccessible to users until a third-party developed and released software to modify, combine, and display the elements and (b) only accessible to consumers that purposefully took steps to modify their game with third party hardware and/or software. In order to display the Hot Coffee content, a user who possessed the personal computer version of the game (about 1% of total units sold) had to download and install a third-party modification, while a user of one of the two console versions of the game (playable on Microsoft's "Xbox" or Sony's "PlayStation 2" consoles), had to purchase and correctly program a third-party device that attached to their console. (All of these methods of modifying the *Grand Theft auto: San Andreas* game have become known collectively as the "Hot Coffee Mod.") Defendants contend that (i) these "Hot Coffee" elements were not part of the intended game experience; (ii) these elements were unused or had been disabled by programmers in a way that prevented consumers from accessing them during unaltered gameplay of *Grand Theft Auto: San Andreas*; (iii) the elements were discovered, and the Hot Coffee Mod created, by a highly skilled computer programming professional without knowledge of or authorization by Defendants; and (iv) the Hot Coffee elements 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.

E. The individual actions, which were eventually transferred by the Judicial Panel on Multidistrict Litigation to the United States District Court for the Southern District of New York, which consolidated them into the Action, were brought by the following plaintiffs against the Defendants:

1. Florence Cohen, commenced in the U.S. District Court for the Southern District of New York, Case No. 05-cv-6734;
2. Robert Samario, commenced in the U.S. District Court for the Southern District of New York, Case No. 05-cv-6767;
3. Susan Carlson, commenced in the U.S. District Court for the Southern District of New York, Case No. 05-cv-6907;
4. Cindy Casey, commenced in the U.S. District Court for the Eastern District of Pennsylvania, Case No. 05-cv-4268;
5. Brenda Stanhouse, commenced in the U.S. District Court for the Southern District of Illinois, Case No. 05-721
6. Rose Goldfine, commenced in the U.S. District Court for the Southern District of New York, Case No. 06-cv-6537; and
7. John Robinson, commenced in the U.S. District Court for the Eastern District of Pennsylvania, Case No. 06-cv-5263.

F. The Parties were assisted in reaching this Settlement Agreement by United States Magistrate Judge Michael H. Dolinger of the United States District Court for the Southern District of New York.

G. Plaintiffs, through their counsel, have conducted an investigation of the facts and analyzed the relevant legal issues. Although Plaintiffs and their counsel believe that the claims asserted in the Complaint have substantial merit, they also have examined the benefits to be obtained under the proposed Settlement, including allowing consumers with pre-July 20, 2005 copies of *Grand Theft Auto: San Andreas*, and who claim to have been offended by the existence of the Hot Coffee elements on their game discs, to exchange their present copies of the game for copies without the Hot Coffee elements and also, under certain circumstances, to obtain cash benefits, and have considered the risks,

costs and delays associated with the continued prosecution of this litigation and the likely appeals of any rulings in favor of either Plaintiffs or Defendants.

H. Defendants have conducted an investigation of the facts and analyzed the relevant legal issues. Defendants deny all liability with respect to any and all facts or claims alleged in the Complaint, and believe that their defenses both to Plaintiffs' pending motion for certification of a nationwide class and to the claims asserted in the Complaint itself have substantial merit. Defendants also have weighed the potential risks, costs and delays associated with continued litigation of the Action against the benefits of the proposed Settlement.

I. Each of the Parties and counsel believes, in consideration of all the circumstances and after substantial arms' length settlement negotiations between counsel, that its interests are best served by entering into the proposed Settlement set forth in this Settlement Agreement, and that this proposed Settlement is fair, reasonable, adequate and in the best interests of the Settlement Class.

NOW, THEREFORE, IT IS HEREBY AGREED by and between the Parties, that:

- (a) the Action be settled and compromised as between Plaintiffs, on behalf of themselves and all Settlement Class Members, and the Defendants, subject to approval of the Court after a hearing (or hearings) as provided for in this Settlement Agreement; and
- (b) upon Court approval of the settlement and compromise of the Action, a Final Order and Judgment, substantially in the form annexed hereto as Exhibit A (the "Judgment") be entered: (1) dismissing the Action with

prejudice; and (2) barring and enjoining the prosecution by Settlement Class Members of all Released Claims, as defined below, against the Defendants with prejudice.

(c) All of the foregoing shall be subject to the following terms and conditions:

II. DEFINITIONS

In addition to the foregoing defined terms, for purposes of the Settlement Agreement and all Exhibits thereto, the following terms shall have the meanings given to them below:

A. “Class Period” means the period from August 1, 2004 through the date on which the Court preliminarily approves this Settlement Agreement and directs Defendants to provide notice of the proposed Settlement to the Settlement Class (the “Preliminary Approval Date”).

B. The “Effective Date” of the Settlement is the date on which the Judgment becomes Final. “Final,” when used in connection with any court order or judgment, means (a) if no appeal is taken from a court order or judgment, the date ten calendar days after the time to appeal therefrom (including any potential extension of time) has expired; or (b) if any appeal is taken from a court order or judgment, the date ten calendar days after all appeals therefrom, including petitions for rehearing or reargument, petitions for rehearing *en banc*, and petitions for *certiorari* or any other form of review, have been finally disposed of, such that the time to appeal therefrom (including any potential extension of time) has expired, in a manner resulting in an affirmance of the relevant order or judgment.

C. A “GTA:SA First Edition Disc” is any original copy of *Grand Theft Auto: San Andreas* manufactured before July 20, 2005 that contained the elements for the Hot Coffee content.

D. “Plaintiffs’ Class Counsel” means the firms of Locks Law Firm, PLLC; Bromberg Law Offices, P.C.; Burstein Law Firm, P.C.; Glancy Binkow & Goldberg, LLP; Harke & Clasby LLP; Nestor & Constance; Reinhardt Wendorf & Blanchfield and Williams Cuker & Berezofsky.

E. “Released Parties” means each and all of the Defendants and each and all of the Defendants’ direct and indirect subsidiaries, affiliates, partners, joint ventures, predecessors and successor corporations and business entities, and each and all of their past and present officers, directors, servants, licensees, joint ventures, sureties, attorneys, agents, consultants, advisors, contractors, employees, controlling or principal shareholders, general or limited partners or partnerships, divisions, insurers, designated management companies, and each and all of their successors or predecessors in interest, assigns, or legal representatives, and any persons or entities that have designed, manufactured, supplied, advertised, and marketed the *Grand Theft Auto: San Andreas* video game.

F. “Settlement Agreement” refers to this Settlement Agreement and “Settlement” refers to the terms of the settlement described herein.

G. “Settlement Class” means the named Plaintiffs in the Action and all natural persons or entities in the United States who purchased a GTA:SA First Edition Disc, except for authorized resellers of the game, Defendants’ current or former employees, and any persons or entities that have previously executed releases discharging Defendants from

liability concerning or encompassing any or all claims that are the subject of the Complaint, between August 2004 and the date on which the Court preliminarily approves this proposed settlement.

H. “Settlement Class Member” means any person who falls within the definition of the Settlement Class and who does not validly and timely elect exclusion from the Settlement Class under the conditions and procedures for exclusion as determined by the Court and described in any Notice of Pendency and Settlement of Class Action approved by the Court.

I. The “Eligibility Averments” are those that Settlement Class Members must make, under penalty of perjury, in order to obtain benefits under this settlement. Those averments are that the class member (a) bought a GTA:SA First Edition Disc prior to July 20, 2005; (b) was offended and upset by the ability of consumers to use third party software and/or hardware to modify and alter the GTA:SA First Edition Disc to display the Hot Coffee content; (c) would not have bought the GTA:SA First Edition Disc had they known that consumers could so modify and alter the game content; and (d) upon learning the game could be so modified and altered, would have returned it to the place of purchase for a refund if he or she thought this possible.

J. The “Claims Deadline” shall be the date 120 days after which notice is provided to Settlement Class Members, as provided below in Section V.B.

K. “Released Claims” means any and all claims, rights, damages, losses, demands, obligations, actions, causes of action, suits, cross-claims, matters, issues, debts, liens, contracts, liabilities, agreements, costs, or expenses, of any nature whatsoever,

ascertained or unascertained, suspected or unsuspected, existing or claimed to exist, including Unknown Claims, of any and all Plaintiffs and/or Settlement Class Members arising out of any purchase or use by them of the *Grand Theft Auto: San Andreas* video game, to the extent that such claims: (a) arise out of the Action; (b) relate to any allegations that were asserted in the Action; or (c) which could have been asserted in this Action based upon the operative facts as alleged in the Complaint, or which might in the future be asserted by any Plaintiff or Settlement Class Member against any of the Released Parties, either of which would arise out of, or relate to in any manner, directly or indirectly, any acts, facts, transactions, occurrences, conduct, representations or omissions alleged in the Action. Released Claims also include claims for abuse of process, malicious prosecution or any other claim arising out of, relating to, or in connection with the institution, prosecution, assertion or resolution of the Action.

L. “Unknown Claims” means all claims arising out of facts relating to any matter covered by the Released Claims which all persons or entities providing releases under this Settlement Agreement, including all Settlement Class Members, do not know or suspect to exist in their favor at the time of the release of the Released Parties and which, if known by them, might have affected their decision to settle with Defendants and release the Released Parties or to take any other action including, but not limited to, objecting or not objecting to the Settlement. All persons or entities providing releases under this Settlement Agreement may hereafter discover facts other than or different from those which such persons now know or believe to be true with respect to the subject matter of the Released Claims. Upon the Effective Date, each person or entity providing releases under

this Settlement Agreement, including all Settlement Class Members, shall be deemed to have waived any and all rights that he, she, it or they may have under any statute, regulation, administrative adjudication or common law principle that would otherwise limit the effect of the foregoing releases to those claims actually known or suspected to exist at the time of execution of this Settlement Agreement, including, but not limited to, the provisions of Section 1542 of the California Civil Code, to the extent deemed applicable, which provides as follows:

1542. "GENERAL RELEASE-CLAIMS EXTINGUISHED.
A GENERAL RELEASE DOES NOT EXTEND TO
CLAIMS WHICH THE CREDITOR DOES NOT
KNOW OR SUSPECT TO EXIST IN HIS FAVOR
AT THE TIME OF EXECUTING THE RELEASE,
WHICH IF KNOWN BY HIM MUST HAVE
MATERIALLY AFFECTED HIS SETTLEMENT
WITH THE DEBTOR."

III. TERMS AND CONDITIONS OF THE SETTLEMENT BENEFITS

A. 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 in this section (the "Settlement Benefits"), in accordance with the procedures set forth below.

B. ***Grand Theft Auto: San Andreas Exchange Program.***

1. Any Settlement Class Member in possession of a copy of GTA:SA First Edition Disc, who provides the Eligibility Averments, may return the game disc to Defendants and receive in exchange a copy of the *Grand Theft Auto: San Andreas* game disc without Hot Coffee elements. The program described in this sub-section B shall be referred to hereafter in this Settlement Agreement as the "Exchange Program."

2. Defendants will establish a mechanism by which Settlement Class Members may send in GTA:SA First Edition Discs for exchange, and Defendants will replace them with copies of the *Grand Theft Auto: San Andreas* game discs without Hot Coffee elements, without Settlement Class Members having to incur or forward any postage costs. Defendants may, for example, contract with United Parcel Service or another carrier to print out prepaid mailing labels that Settlement Class Members can use to return their GTA:SA First Edition Discs. (The above example is illustrative only; Defendants may choose other means to accomplish this requirement.) In the event a Settlement Class Member elects to return the game disc by a means other than that established by Defendants, that Settlement Class Member will be responsible for all associated postage and mailing costs for returning his or her GTA:SA First Edition Disc.
3. The exchange contemplated herein is of the game disc only. Settlement Class Members need not return the game packaging or artwork to Defendants. Defendants will not provide game packaging or artwork when fulfilling the exchange and will not return to Settlement Class Members any game packaging or artwork those Settlement Class Members elect to include when returning game discs for exchange.
4. Settlement Class Members will not need to provide any proof of purchase in order to receive this exchange.
5. Defendants will honor every properly-completed claim for an exchange under this Exchange Program.
6. For purposes of calculating Defendants' out-of-pocket costs, as required by Paragraph III.E., below, each fulfillment of a claim under the Exchange Program shall be deemed to cost Defendants Fifteen Dollars (\$15.00).
7. Fulfillments under the Exchange Program shall be made within eight weeks of the Claims Deadline or, if the Claims Deadline occurs before the Settlement becomes Final, then benefits will be provided within eight weeks of the Settlement becoming Final.

C. Other Benefits

1. Settlement Class Members, may, if they meet the criteria specified below, be eligible for cash benefits. Such persons will be referred to hereafter as "Benefits-Eligible Settlement Class Members." The

series of benefits described below will be referred to herein as the "Benefit Program."

2. Any Settlement Class Member who submits a detailed receipt clearly showing the purchase of *Grand Theft Auto: San Andreas* prior to July 20, 2005, and who provides the Eligibility Averments, 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 Settlement Class Member also participates in the Exchange Program. *This benefit may be pro-rated to a lesser amount as provided below.*
3. Any Settlement 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, provides the Eligibility Averments, 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, 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. *This benefit may be pro-rated to a lesser amount as provided below.*
4. Any Settlement Class Member who participates in the Exchange Program, who does not have any proof of purchase of the game, but who provides the Eligibility Averments, and also attests under penalty of perjury to the place and approximate date of his or her purchase, may receive a benefit of \$10.00. *This benefit may be pro rated to a lesser amount as provided below.*
5. Any Settlement Class Member who does not have any proof of purchase of the game, or the game itself, but provides the Eligibility Averments, and also attests under penalty of perjury to (a) the place and approximate date of his or her purchase and (b) the approximate date on which he or she discarded the disc, may receive a benefit of \$5.00. *This benefit may be pro rated to a lesser amount as provided below.* Defendants may request that the claims process for this benefit include a requirement that claimants state the manner by which they discarded the disc. If they do so, plaintiffs will consider that request but need not accept it.
6. Plaintiffs will request that the Court authorize incentive payments of no more than Five Thousand Dollars (\$5,000) to each of the four (4) individual plaintiffs in this matter, Brenda Stanhouse, Rose

Goldfine, Robert Samario and Susan Carlson. Plaintiffs will request that the Court authorize incentive payments of no more than One Thousand Five Hundred Dollars (\$1,500) to each of the other individual class action plaintiffs in this matter, Florence Cohen, Cindy Casey and John Robinson. These payments to the named plaintiffs, if the Court directs Defendants to make them, will be considered part of Defendants' costs under the Benefit Program.

7. 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, then benefits will be provided within eight weeks of the Settlement becoming Final.

D. A Settlement Class Member may claim only one of the above benefits under the Benefit Program. Only one application for benefits under the Benefit Program and/or the Exchange Program will be honored per person, household or address.

E. Defendants' total out-of-pocket costs in fulfilling claims under the Exchange Program and the Benefit Program, as those terms are defined below, 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 a professional settlement administration firm 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").

F. In the event that the costs of claims filed by the Claims Deadline under the Exchange Program (valued at \$15.00 each) and the cash requested in claims under the Benefit Program collectively total more than Two Million Seven Hundred Fifty Thousand Dollars (\$2,750,000.00), the benefits actually paid to Benefits Eligible Settlement Class Members under the Benefit Program will be reduced pro rata, such that the total amount of

the Exchange Program and the Benefit Program shall be exactly Two Million Seven Hundred Fifty Thousand Dollars (\$2,750,000.00). However, in the event that Class Members submit more than 183,333 claims under the Exchange Program (such that the costs of fulfilling all Exchange Program claims themselves exceed Two Million Seven Hundred Fifty Thousand Dollars), the total benefits actually paid to Benefits Eligible Settlement Class Members under the Benefit Program will be the lesser of Five Hundred Thousand Dollars (\$500,000) or the amount actually claimed by those Benefits Eligible Settlement Class Members. For avoidance of doubt, this provision, combined with the requirement that Defendants fulfill all claims under the Exchange Program, means that Defendants' out-of-pocket costs may exceed Two Million Seven Hundred Fifty Thousand Dollars (\$2,750,000.00). Should that occur, however, the total amount of cash compensation Defendants shall pay to Benefits-Eligible Settlement Class Members will not exceed Five Hundred Thousand Dollars (\$500,000).

G. If it becomes necessary for benefits to be reduced as required above in Paragraph III.E., the cash payments will be reduced pro rata weighted by the aggregate claims received for each tier of Cash Benefits.

H. In the event that the value of claims under the Exchange Program and the Benefit Program filed on or before the Claims Deadline collectively have a cost to Defendants of less than One Million Twenty Five Thousand Dollars (\$1,025,000) (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 pay 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) to a charitable entity or entities to be agreed upon by the parties and subject to court approval once the value of the charitable contribution has been determined. Plaintiffs contend that this payment constitutes a *cy pres* remedy; Defendants do not necessarily agree with that characterization.

IV. CERTIFICATION OF SETTLEMENT CLASS

A. For settlement purposes only, the Parties will jointly request, as part of the Settlement Notice and Hearing Order, that the Court make preliminary findings and enter an Order granting conditional certification of the Settlement Class subject to final findings and ratification in the Judgment, and appointing Plaintiffs and Plaintiffs' Class Counsel as representatives of the Settlement Class.

B. Defendants do not consent to certification of the Settlement Class for any purpose other than to effectuate the settlement of the Action. If this Settlement Agreement is terminated pursuant to its terms, or if the Effective Date for any reason does not occur, the order certifying the Settlement Class and all preliminary and/or final findings regarding the Court's provisional class certification order shall be automatically vacated upon notice to the Court of the termination of the Settlement Agreement or the failure of the Effective Date to occur, and the Action shall proceed as though the Settlement Class had never been certified and such findings had never been made, without prejudice to the ability of any Party thereafter to request, oppose or seek the granting of or denial of class certification on any basis.

V. ENTRY OF SETTLEMENT NOTICE AND HEARING ORDER AND
NOTICES TO THE SETTLEMENT CLASS

A. Promptly upon execution of the Settlement Agreement, the Plaintiffs in the Action shall apply to the Court for entry of an Order, substantially in the form annexed hereto as Exhibit B:

1. Finding that the requirements for conditional certification of the Settlement Class have been satisfied, appointing Brenda Stanhouse, Rose Goldfine, Robert Samario and Susan Carlson and Plaintiffs' Class Counsel as representatives of the Settlement Class, and preliminarily approving the Settlement as being within the range of reasonableness such that notice thereof should be given to members of the Settlement Class;
2. Approving the Notice of Pendency and Settlement of Class Action (the "Full Settlement Notice"), substantially in the form of Exhibit C annexed hereto, which will contain instructions for Settlement Class Members to obtain the Settlement Benefits, and a summary form of that Settlement Notice, substantially in the form of Exhibit D, annexed hereto (the "Summary Settlement Notice"); and ordering that the Full Settlement Notice and Summary Settlement Notice be disseminated in the manner set forth below and in the Hearing Order;
3. Providing that all members of the Settlement Class who do not, in accordance with the terms of the Settlement Notice, file valid and timely requests for exclusion from the Settlement Class be bound by the Judgment dismissing the Action on the merits and with prejudice;
4. Finding that the form and method of notice to be given in accordance with the terms of this Settlement Agreement and the Hearing Order constitute the best notice practicable under the circumstances and constitute valid, due and sufficient notice to the members of the Settlement Class, satisfying the requirements of the Federal Rules of Civil Procedure, the Constitution of the United States, and any other applicable law;
5. Providing that, pending final determination of whether the Settlement should be approved, neither the Plaintiffs nor any member of the Settlement Class, either directly, representatively or

in any other capacity, shall commence or prosecute any action or proceeding in any court or tribunal asserting any of the Released Claims against Defendants or any other of the Released Parties;

6. Scheduling a hearing or hearings (collectively, the “Fairness Hearing”) to be held by the Court to consider and determine whether the requirements for certification of the Settlement Class have been met and whether the proposed settlement of the Action in accordance with the terms set forth in this Settlement Agreement should be approved as fair, reasonable and adequate, and whether the Judgment approving the Settlement and dismissing the Action on the merits and with prejudice against Plaintiffs and Settlement Class Members should be entered;
7. Providing that the Fairness Hearing may, from time to time and without further notice to the Settlement Class (except those Settlement Class Members who file timely and valid objections), be continued or adjourned by order of the Court;
8. Providing a procedure for members of the Settlement Class to request exclusion from the Settlement Class and to file papers in support of the Settlement with the Court;
9. Establishing the Claims Deadline as the date by which, if a Settlement Class Member has not sought to receive one or more of the Settlement Benefits available under this Settlement Agreement, that Settlement Class Member shall forever be barred from participating or receiving the Settlement Benefits set forth herein, but shall in all other respects be subject to the provisions of this Settlement Agreement, the releases contained in Section VIII, and the Judgment;
10. Providing that any objections by any Settlement Class Member to:
(i) the certification of the Settlement Class and the proposed Settlement, as described in the Full Settlement Notice, (ii) any request by Plaintiffs’ Class Counsel for an award of attorneys’ fees and reimbursement of expenses, and/or (iii) entry of the Judgment, shall be heard and any papers submitted in support of said objections shall be considered by the Court at the Fairness Hearing only if, on or before a date (or dates) to be specified in the Hearing Order, such objector files with the Court a notice of the objector’s intention to appear, submits documentary proof that the objector is a Settlement Class Member, states in writing the basis for such objections, and serves copies of the foregoing and all other papers in support of such

objections upon counsel for the Parties identified in the Full Settlement Notice so that such papers are actually received by the date set by the Court;

11. Requiring notice to be provided to the authorities that are required to be notified of prospective class action settlements under the Class Action Fairness Act of 2005, as set forth in Section X.D; and
12. Establishing a date (or dates) by which the Parties shall file and serve all papers in support of the application for final approval of the Settlement and/or in response to any valid and timely objections received by the designated counsel for the Parties identified in the Full Settlement Notice.

B. The Settlement Class shall be given notice of the proposed Settlement (collectively, the "Notice") as set forth below, subject to the approval of the Court:

1. Within five business days after the date on which the Court grants preliminary approval to this Settlement Agreement (the "Preliminary Approval Date"), Defendants shall cause the Full Settlement Notice to be sent by electronic mail, on or before a date to be set forth in the Hearing Order, to individuals on Rockstar's email mailing list.
2. Within five business days after the Preliminary Approval Date, Defendants shall post a link to the Full Settlement Notice on the www.take2games.com website and the settlement website. The Full Settlement Notice will remain posted on these websites until the Claims Deadline or until this Settlement Agreement is terminated by its terms.
3. Defendants shall cause the Summary Settlement Notice to be published, on or before a date to be set forth in the Hearing Order in the publications, websites and, newswire, and in the frequency and sizes set forth in the spreadsheet, attached hereto as Exhibit E.
4. Plaintiffs' Class Counsel may continuously post the Summary Settlement Notice and the Full Settlement Notice on their firm websites, beginning two business days after the Preliminary Approval Date and ending on the date of the Claims Deadline or the date of the Fairness Hearing, whichever is later. Any costs associated with this notice item shall be borne by Plaintiffs' Class Counsel and will not be reimbursed by Defendants.

C. The publications specified above in Paragraph V.B.3. were recommended by Judge Dolinger after hearing presentations from Plaintiffs and Defendants, and reflect Judge Dolinger's determination that publication in these periodicals, combined with the other forms of notice set forth in this Section, constitute the best notice practicable under the circumstances. Should the Court order this plan of Notice, Defendants will provide the Notice as directed by the Court, and will pay all costs associated with the provision of notice. The design and placement of advertisements under this program of Notice will be handled by Rust Consulting, Inc. (hereafter the "Claims Administrator"), and its sister firm, Kinsella/Novak Communications, LLC.

D. The Parties agree that if, for any reason, Notice is not or cannot be provided within the dates specified in this Settlement Agreement or in the Hearing Order, the Parties will confer in good faith and recommend to the Court that the Claims Deadline be extended correspondingly.

VI. COSTS OF NOTICE AND ADMINISTRATION

A. Defendants agree to effectuate the dissemination of the Full Settlement Notice and publication of the Summary Settlement Notice, and to pay all costs of doing so, in accordance with the terms of this Settlement Agreement. In the event this Settlement Agreement does not become final or the Effective Date does not occur for any reason, Plaintiffs shall have no obligation to reimburse Defendants for any costs or expenses paid, incurred or obligated for notice of this Settlement to the Settlement Class. In the event the Settlement Agreement does not become final or the Effective Date does not occur as the result of the Claims Administrator having failed to take some action required by this

Settlement Agreement or by an Order of the Court promulgated pursuant to it, or having taken an action precluded by this Settlement Agreement or such Order, Plaintiffs' Class Counsel shall have the right to review any correspondence between Defendants' counsel and the Claims Administrator relating to that action by the Claims Administrator.

B. Defendants agree to be responsible for paying all costs incurred in connection with providing the Settlement Benefits and otherwise complying with the procedures set forth in the Judgment and this Settlement Agreement. All procedures followed to provide the Notice to the Settlement Class shall be subject to approval by Plaintiffs' Class Counsel and subject to review for completeness and compliance by Plaintiffs' Class Counsel.

C. Plaintiffs' Class Counsel will have the right to monitor the actions of the Claims Administrator, including the fulfillment and payment of Settlement Benefits to Settlement Class Members, and to receive copies of all correspondence between the Claims Administrator and Settlement Class Members. Pursuant to the terms and conditions included in this Settlement Agreement, Plaintiffs' Class Counsel may act on behalf of Settlement Class Members to assist in their receipt of the Settlement Benefits. Defendants shall cooperate in such effort consistent with the provisions of this Settlement Agreement.

D. Defendants shall have the responsibility to prepare and provide the notices required by the Class Action Fairness Act of 2005, Pub. L. 109-2 (2005), including, but not limited to, the notices to the United States Department of Justice and to the Attorneys General of all states in which Settlement Class Members reside, as specified in 28 U.S.C.

§ 1715. Plaintiffs' Class Counsel will cooperate in the drafting of such notices and shall provide Defendants with any and all information in its possession necessary for the preparation of these notices.

VII. THE JUDGMENT

If, at or after the Fairness Hearing, the Settlement Agreement is approved by the Court, Plaintiffs shall promptly submit to the Court the Judgment:

1. Ratifying the certification of the Settlement Class and approving the Settlement, judging its terms to be fair, reasonable, adequate and in the best interests of the Settlement Class Members, directing its consummation in accordance with its terms, and reserving continuing jurisdiction to implement, enforce, administer, effectuate, interpret, monitor and ensure compliance with the provisions of this Settlement Agreement and the Judgment;
2. Dismissing the Action on the merits, with prejudice and without costs (except as otherwise provided herein), and releasing the Released Claims; and
3. Permanently barring and enjoining Plaintiffs and Settlement Class Members from asserting, commencing, prosecuting or continuing any of the Released Claims.

VIII. RELEASES

A. In accordance with the provisions of the Judgment, for good and sufficient consideration, the receipt of which is hereby acknowledged, on the Effective Date, each Plaintiff and each Settlement Class Member shall be deemed to have, and by operation of the Judgment shall have, fully, finally, and forever released, relinquished and discharged each and all of the Released Claims against each and all of the Released Parties, in the manner(s) set forth above.

B. In accordance with the provisions of the Judgment, for good and sufficient consideration, the receipt of which is hereby acknowledged, on the Effective Date, the Defendants shall be deemed to have, and by operation of the Judgment shall have, fully, finally and forever released, relinquished and discharged all of the Plaintiffs, Plaintiffs' Class Counsel and all agents of and expert witnesses retained by Plaintiffs' Class Counsel from any claims (including Unknown Claims) for abuse of process, malicious prosecution or any other claim arising out of, relating to, or in connection with the institution, prosecution, assertion or resolution of the Action.

IX. PLAINTIFFS' CLASS COUNSEL'S ATTORNEYS' FEES

A. Defendants and counsel for the Settlement Class have agreed that Class Counsel is entitled to an amount for attorneys' fees and costs; however, the parties have not reached agreement on an amount that Defendants would pay to Plaintiffs' Class Counsel in respect of attorneys' fees and costs, if ordered to do so by the Court. The Summary Settlement Notice and Full Settlement Notice will reflect the intent of Plaintiffs' Class Counsel to seek a fee and reimbursement of expenses for a specified amount, and that Defendants intend to seek a substantial reduction in Plaintiff's Class Counsel's request. Defendants reserve all rights in this regard, including rights, if any, under Federal Rule of Civil Procedure 68.

B. Both Plaintiffs' Class Counsel and Defendants also expressly reserve their respective rights of appeal from any decision on fees that the Court may render. It is understood between the Parties that if an appeal is filed by any of the Parties that challenges only the amount of fees or costs awarded to Plaintiffs' Class Counsel, the

Parties will not contend that the pendency of such an appeal prevents the Settlement from becoming Final.

X. OTHER PROVISIONS

A. Upon execution of this Settlement Agreement, the Parties agree to cooperate and use all reasonable efforts to achieve approval of the Settlement in accordance with the terms of this Settlement Agreement, and to implement the Settlement and comply with, confirm the bases for and effectuate the terms of this Settlement Agreement. All Parties agree that they will not take any action to encourage any individual, institution or governmental entity to object or seek modifications to this Settlement Agreement or to opt out of the Settlement Class.

B. Whether the Effective Date does or does not occur, this Settlement Agreement, all negotiations and papers related to it, and any proceedings in connection with the Settlement: (1) are not and shall not be construed as evidence of an admission or concession of wrongdoing or liability by Defendants or any other Released Party as to any claim or allegation asserted in the Action; and (2) are not and shall not be construed as evidence or an admission or concession by Plaintiffs that claims or allegations asserted in the Action against Defendants lack merit.

C. Plaintiffs and Defendants agree that the terms of this Settlement Agreement were not based solely on the amount of consideration to be paid, but were based on (1) vigorous arm's-length negotiations between counsel for the Parties; (2) the assessment of Plaintiffs' Class Counsel and Defendants' counsel of the strengths and weaknesses of the various claims asserted in the Action against Defendants, based on the various claims

asserted or which could be asserted; and (3) the expense and risks of ongoing litigation. Moreover, the amount of damages that Plaintiffs could prove is a matter of serious and genuine dispute, and the terms of the Settlement do not constitute a finding, admission or concession with respect to the measure of damages that could be proved at trial. The Parties further acknowledge that no determination has been made by the Court as to the amount, if any, of damages suffered by members of the Settlement Class or of the proper measure of any such damages, and that the determination of damages, like the determination of liability, is a complicated and uncertain process, typically involving conflicting expert opinions.

D. At all times during the course of this litigation, Defendants have denied and continue to deny any liability to Plaintiffs and Settlement Class Members, and have denied and continue to deny that Plaintiffs or any Settlement Class Members were damaged by any alleged wrongful conduct, or that, even if damaged, any compensable damages could be measured or recovered.

E. Within five (5) business days after the deadline established by the Court in the Hearing Order for members of the Settlement Class to request exclusion from the Settlement Class, Plaintiffs' Class Counsel shall furnish to Defendants' counsel a complete list of all timely and valid requests for exclusion they have received (the "Opt-Out List").

F. Defendants shall have the option to withdraw from this Settlement Agreement if the number of timely and valid requests for exclusion exceeds the amount specified in the "Opt-Out Agreement" the parties have negotiated.

G. This Settlement Agreement is conditioned upon the Judgment in the Action becoming Final. If the Judgment is reversed or vacated, or if the Effective Date does not occur for any other reason, the Defendants shall have the right to terminate this Settlement Agreement. If the Judgment is modified in any manner that limits the scope of releases given to the Released Parties as provided in Section VIII of this Settlement Agreement, or if the Hearing Order imposes obligations on Defendants substantially different from those stated above in Sections III-V, each of Plaintiffs and Defendants shall separately have the right either to affirm this Settlement Agreement as modified, or to terminate this Settlement Agreement by filing and serving a Withdrawal Notice.

H. The signatories to this Settlement Agreement agree to assist Defendants in seeking and obtaining the dismissal of all other actions alleging Released Claims.

I. If the Effective Date does not occur or this Settlement Agreement is otherwise terminated in accordance with its provisions, the Parties shall be restored to their respective positions as of November 1, 2007, except that any extensions of time granted since that date by one Party to the other shall continue to have force and effect, and neither Party shall seek an order of default against any other Party for actions not taken while approval of the Settlement was pending. The terms and provisions of the Settlement Agreement shall at that time have no further force and effect with respect to the Parties and, to the extent permitted by law, shall not be used in any action or proceeding for any purpose. Any Judgment entered in accordance with the terms of the Settlement Agreement shall be treated as vacated, nunc pro tunc.

J. The Parties agree that, to the fullest extent permitted by law, neither the Settlement Agreement nor the fact of the Settlement, nor any act performed nor document executed pursuant to or in furtherance of the Settlement Agreement or the Settlement, is or may be deemed to be or may be used as an admission of, or evidence of: (1) the validity of any claim of any Settlement Class Member, or (2) any wrongdoing, fault, omission, or liability of the Defendants in any proceeding in any court, administrative agency or other tribunal. Nothing in this paragraph shall preclude any Party from using the Settlement Agreement, the Judgment, or any act performed or document executed pursuant thereto in a proceeding to consummate, monitor or enforce the Settlement Agreement, the terms of the Settlement or the Judgment.

K. All of the Exhibits to this Settlement Agreement are material and integral parts hereof.

L. The undersigned signatories represent that they are fully authorized to execute and enter into the terms and conditions of this Settlement Agreement on behalf of the respective persons or entities for whom they have signed this Settlement Agreement.

M. This Settlement Agreement contains the entire agreement among the Parties hereto and supersedes any prior agreements or understandings between them. All terms of this Settlement Agreement are contractual and not mere recitals and shall be construed as if drafted by all Parties. All provisions of this Settlement Agreement are and shall be binding upon each of the Parties hereto, their agents, attorneys, employees, successors and assigns, and upon all other persons claiming any interest in the subject matter hereto through any of

the Parties hereto, including Plaintiffs and any Settlement Class Member who does not validly opt out of membership in the Settlement Class.

N. The Settlement Agreement may be amended or modified only by a written instrument signed by or on behalf of all Parties hereto or their successors-in-interest.

O. The Settlement Agreement may be executed in one or more counterparts. All executed counterparts and each of them shall be deemed to be one and the same instrument. Counsel for the Parties to the Settlement Agreement shall exchange among themselves copies of the original signed counterparts, and a complete set of original signed counterparts shall be filed with the Court.


P. The Parties agree that the Court shall have exclusive and continuing jurisdiction over the Parties for all purposes relating to the implementation, effectuation, interpretation, administration, monitoring and enforcement of this Settlement Agreement and all provisions thereof with respect to all Parties hereto and all beneficiaries hereof, including all Plaintiffs, Plaintiffs' Class Counsel, Defendants, Settlement Class Members and Released Parties. Any and all disputes, requests or petitions regarding or arising out of the enforcement, construction, administration or interpretation of the Settlement Agreement, any provisions of the Settlement Agreement or the Judgment, must be made, if at all, to this Court by motion to the Court.

Q. The terms and conditions of this Settlement Agreement shall be construed and enforced in accordance with, and governed by, the laws of the State of New York, without regard to any applicable choice of law or conflicts rules.

DATED: November 7, 2007

DEBEVOISE & PLIMPTON LLP

Case 1:06-md-01739-SWK Document 406-2 Filed 11/19/2007 Page 28 of 29


Jeffrey S. Jacobson, Esq.
909 Third Avenue
New York, New York 10022
(212) 909-6000

*Attorneys for Defendants
Take-Two Interactive Software, Inc. and
Rockstar Games, Inc.*

LOCKS LAW FIRM PLLC



Seth R. Lesser, Esq.
110 East 55th Street
New York, New York 10022
(212) 838-3333

Plaintiffs' Lead Counsel

1 BONNETT, FAIRBOURN, FRIEDMAN
& BALINT, P.C.

2 Andrew S. Friedman (to be admitted *pro hac vice*)
Garrett W. Wolkyns (to be admitted *pro hac vice*)
3 2901 North Central Avenue, Suite 1000
Phoenix, Arizona 85012

4 Telephone: (602) 274-1100
5 Facsimile: (602) 274-1199

07 NOV 20 AM 11:10

RECEIVED
U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

DEPUTY

6 BONNETT, FAIRBOURN, FRIEDMAN
& BALINT, P.C.

7 Todd D. Carpenter (CA 234464)
501 West Broadway Suite 1450
8 San Diego, California 92101
Telephone: (619) 756-6978
9 Facsimile: (602) 274-1199

10 Attorneys for Plaintiff

11 UNITED STATES DISTRICT COURT
12 FOR THE SOUTHERN DISTRICT OF CALIFORNIA

13 RANDY NUNEZ, on Behalf of Himself, and
14 All Others Similarly Situated.

15 Plaintiff,

16 vs.

17 MICROSOFT CORPORATION, a
18 Washington corporation, and BLUNGIE,
L.L.C., a Delaware Limited Liability
19 Company.

20 Defendants

Case No. 07 CV 2209

L (WMC)

15) CLASS ACTION

16) COMPLAINT FOR DAMAGES AND
17) EQUITABLE RELIEF

- 18) 1. Breach of Statutory Implied
19) Warranty of Merchantability;
20) 2. Breach of Statutory Implied
21) Warranty of Fitness for a Particular
22) Purpose
23) 3. Violation of Cal. Bus. & Prof. Code
Section 17200

24) Demand for Jury Trial

25 Plaintiff RANDY NUNEZ ("Nunez"), by and through his undersigned attorneys, based
26 on his individual experience and the investigation of counsel, alleges on behalf of himself and on
27 on behalf of the proposed plaintiff Class as defined herein against Defendants MICROSOFT

28 Class Action Complaint For Damages and Equitable Relief

1 CORPORATION (hereinafter individually referred to as "Microsoft") and BUNGIE L.L.C.
2 (hereinafter individually referred to as "Bungie") as follows:

3
4 **NATURE OF THE ACTION**

5 1. Microsoft and Bungie (collectively referred to as "Defendants") manufacture a "first
6 person" science fiction video game ("*Halo 3*") made and sold for exclusive use on Microsoft's video
7 game console (the "Xbox 360"). The container in which *Halo 3* is sold expressly states that *Halo 3*
8 is compatible with the Xbox 360.

9 2. Defendants knew or had reason to know that *Halo 3* was being purchased by
10 consumers for use on an Xbox 360, and that the buyers of *Halo 3* were relying on Defendants' skill
11 and judgment to furnish goods suitable for that purpose.

12 3. Since the release of *Halo 3* in September 2007, tens of thousands of the *Halo 3*
13 video game have been sold to California consumers.

14 4. However, *Halo 3* does not function with the Xbox 360, and to the contrary, attempted
15 use of *Halo 3* consistently causes the Xbox 360 to "crash," "freeze" or "lock up" while the game is
16 being played.

17 5. Although faced with repeated and mounting consumer complaints and inquiries
18 concerning this operational flaw in the *Halo 3*, Defendants have failed to recall *Halo 3* or otherwise
19 remedy its failure to function on the Xbox 360.

20 6. Under California statutory law, the Song-Beverly Consumer Warranty Act (Civ. Code
21 Sec 1790 *et seq.*), Defendants as manufacturers of *Halo 3* impliedly warrant:

- 22 a. that *Halo 3* is merchantable, that is, that *Halo 3* (i) is fit for
23 the ordinary purpose of operating on the Xbox 360, and (ii)
24 conforms to the affirmations of fact made on the *Halo 3*
25 container; and
26 b. that *Halo 3* is fit for the particular purpose of being played
27 on the Xbox 360.

28 Cal Civ. Code §1791.1(a).

1 14. Bungie is incorporated under the laws of the State of Delaware and maintains its
2 principle executive offices at 434 Kirkland Way, Kirkland, Washington. Bungie is also responsible
3 for the manufacture and sale of *Halo 3*.

4 15. Nunez resides in the County of San Diego, State of California.

5 16. At all times herein mentioned, there existed a unity of interest in ownership between
6 the Defendants such that any individuality and separateness between them with respect to the
7 manufacture and sale of *Halo 3* has ceased.

8 JURISDICTION AND VENUE

9 17. This Court has jurisdiction over this matter pursuant to the 15 U.S.C. §1121 and
10 subject matter jurisdiction pursuant to 28 U.S.C. §1332(a)(1) and (d)(2)(A), in that this action seeks
11 monetary relief in excess of \$5,000,000, exclusive of costs and attorneys' fees and interest and is
12 between citizens of different states.

13 18. This Court has jurisdiction over Microsoft, a Washington corporation, because it is
14 authorized to conduct business in California and has intentionally availed itself of the laws and
15 markets of California in the promotion and marketing of its video games, including *Halo 3*, in
16 California.

17 19. This Court has jurisdiction over Bungie, a Delaware corporation, because it is
18 authorized to conduct business in California and has intentionally availed itself of the laws and
19 markets of California in the promotion and marketing of *Halo 3* in California.

20 20. Venue is proper within this District pursuant to 28 U.S.C. §1391(b)(2) because
21 Defendants both conduct substantial business in this County and Nunez resides in this County.
22 Venue is also proper in this Court because a substantial part of the acts and practices giving rise to
23 Nunez's claims occurred or will occur in this County. Defendants have received substantial
24 compensation from their sale of the *Halo 3* product in this County, and Nunez in particular
25 purchased his *Halo 3* in this County.

26 GENERAL ALLEGATIONS

27 21. "Halo" video games are a series of science fiction games originally created by Bungie
28 Software Products Corporation, which was acquired by Microsoft in May 1991. *Halo 3*, the third

1 edition of the game, is designed, manufactured, marketed, and sold by Defendants to be played
2 exclusively on the Xbox 360 video game console.

3 22. The story line of the *Halo 3* video game builds upon the previous version of the Halo
4 series of video games. The first Halo video game, entitled "*Halo: Combat Evolved*," was released in
5 November of 2001 exclusively for the Xbox gaming system. Following the success of the original
6 game, Microsoft released the second Halo video game, entitled "*Halo 2*" in November of 2004. The
7 game's sales generated over \$125 million dollars on its premiere day, making it the fastest selling
8 U.S. media product in history. (See "Microsoft raises estimated first day *Halo 2* sales to \$125
9 million-plus," Tor Thorsen, *Gamespot*, Nov. 10, 2004;
10 http://www.gamespot.com/news/2004/11/10/news_6112915.html (last viewed on November 10,
11 2007).) As of August 30, 2007, 8 million units of the game have been sold worldwide." (See "Grand
12 Theft Auto, *Halo 3* headed to Xbox 360," Chris Morris, *CNNMoney.com* May 9, 2006;
13 http://money.cnn.com/2006/05/09/technology/c3_microsoft/index.htm (last viewed on November 10,
14 2007).)

15 23. On September 25, 2007, Microsoft released *Halo 3*, generating over \$170 million in
16 sales in the first 24 hours following its release. Microsoft reported that worldwide sales of over \$300
17 million in the first week of its release. (See "Microsoft says '*Halo*' 1st-week sales were \$300
18 million," San Francisco *Reuters*, October 4, 2007;
19 <http://uk.reuters.com/article/technology/News/idUKN043877720071005> (last viewed on November
20 10, 2007).)

21 24. On October 1, 2007, six days following the release of *Halo 3*, Bungie split from
22 Microsoft and became a privately held limited liability company. On information and belief,
23 Microsoft retains an ownership interest in Bungie, and Defendants collectively continue to
24 manufacture and sell the *Halo 3*

25 25. At all time herein mentioned, Defendants manufactured, marketed, advertised, and
26 represented on the *Halo 3* product packaging that the *Halo 3* video game was compatible with
27 Microsoft's Xbox 360 video game console (See Product Packaging attached as Exhibit, "A") The
28 front of the product packaging represents "Only on XBOX 360" and the back of the packaging

1 represents that *Halo 3* is for exclusive use on the Xbox 360 in the NTSC format, representing the
2 format for all Xbox 360 consoles sold for use in the United States.

3 26. Defendants thus unquestionably knew or had reason to know that *Halo 3* was being
4 purchased by consumers for use on an Xbox 360, and that the buyers of *Halo 3* were relying on
5 Defendants' skill and judgment to furnish goods suitable for that purpose.

6 27. After consumers, including Mr. Nunez, inserted the *Halo 3* video game into their
7 respective Xbox 360 video game consoles and began game play, however, the *Halo 3* video game
8 routinely, consistently, and systematically "froze," "crashed" or "locked up" – disrupting game play
9 and rendering the game inoperable.

10 28. Many consumers have reported that the *Halo 3* video game has caused their Xbox
11 video game consoles to crash and remain totally inoperable after playing the *Halo 3* video game.
12 Manifold recent consumer complaints on industry Internet websites, weblogs and message boards
13 reflect the existence of the design and/or manufacturing defect in the Defendants' *Halo 3* video game

14 29. Defendants have also received numerous complaints directly from their customer
15 service forums on-line, directly from consumers of the game via their telephone customer service
16 line, and in writing. However, Defendants have failed to acknowledge the propensity of *Halo 3* to
17 freeze, lock up and/or crash the Xbox 360.

18 NUNEZ'S PURCHASE OF *HALO 3*

19 30. Nunez purchased the *Halo 3* video game on or around the middle of October, 2007 at
20 "Gamestop," a video game retail store located at 530 Horton Plaza, San Diego, California 92101.

21 31. Defendants knew or had reason to know that *Halo 3* was being purchased by Nunez
22 for use on an Xbox 360, and that Nunez was relying on Defendants' skill and judgment to furnish
23 goods suitable for that purpose.

24 32. Nunez paid \$59.99, plus tax, for *Halo 3*.

25 33. Following his purchase of the *Halo 3* video game, Nunez attempted to play it on his
26 Xbox 360 video game console. However, Nunez's *Halo 3* video game repeatedly locked up, froze
27 and/or crashed while being operated on Mr. Nunez's Xbox 360 game console.

CLASS ALLEGATIONS

34. Nunez brings this action pursuant to Fed. R. Civ. P. 23(b)(2) and/or (b)(3), on behalf of all California consumers who, at any time from August of 2007 and the date of class certification, purchased the *Halo 3* video game. Excluded from the class are Defendants and any of their officers, predecessors, successors, directors, affiliates and employees.

35. The Class is so numerous that joinder of their members is impracticable.

36. The exact number of Class members is unknown to Nunez at this time and can only be ascertained through appropriate discovery.

37. There are numerous questions of law and fact common to Nunez and the Class members as set forth above, including:

- Whether the implied warranty of merchantability under Cal. Civ. Code §1791.1 applies to *Halo 3*;
- Whether *Halo 3* as sold by Defendants is in fact merchantable within the meaning of Sec. Cal. Civ. Code §1791.1;
- Whether the implied warranty of fitness under Cal. Civ. Code §1791.1 applies to *Halo 3*;
- Whether *Halo 3* as sold by Defendants is in fact fit for a particular purpose within the meaning of Sec. Cal. Civ. Code §1791.1;
- Whether Defendants breached the implied warranty of merchantability;
- Whether Defendants breached the implied warranty of fitness;
- Whether purchasers of *Halo 3* are entitled to damages under Cal. Civ. Code §1794; and
- Whether purchasers of *Halo 3* are entitled to other alternative forms of relief under Cal. Civ. Code §1794;
- Whether Defendants' business acts and practices violated Cal. Bus. & Prof. Code §§17200 et seq.;
- Whether Nunez and the Class are entitled to injunctive, declaratory and other equitable relief under Cal. Bus. & Prof. Code §§17200 et seq..

1 38. Nunez's claims are typical of the claims of the Class members. If brought and
2 prosecuted individually, the claims of each Class member would require proof of many of the same
3 material and substantive facts, rely upon the same remedial theories and seek the same relief.

4 39. Nunez's claims are sufficiently aligned with the interests of the absent Class members
5 to ensure that the Class claims will be prosecuted with diligence and care by Nunez as
6 representatives of the Class.

7 40. Nunez will fairly and adequately protect the interests of the Class and have no
8 interests antagonistic to those of the other Class members.

9 41. Nunez is willing and prepared to serve the Court and proposed Class in a
10 representative capacity with all the obligations and duties material thereto.

11 42. Nunez has retained attorneys experienced in class actions and complex litigation as
12 counsel.

13 43. Class certification is appropriate under Fed. R. Civ. P. 23(b)(2) in that Defendants
14 have acted or refused to act on grounds generally applicable to the Class, making final declaratory or
15 injunctive relief appropriate.

16 44. Class certification is appropriate under Fed. R. Civ. P. 23(b)(3) in that common
17 questions of law and fact predominate over any questions affecting only individual members.

18 45. A class action is superior to other available methods for the fair and efficient
19 adjudication of this controversy for at least the following reasons:

- 20 • Given the size of individual Class members' claims and the expense of litigating
21 those claims, few, if any, Class members could afford to or would seek legal redress
22 individually for the wrongs Defendants have committed against them, and absent
23 Class members have no substantial interest in controlling the prosecution of
24 individual actions;
- 25 • This action will promote an orderly and expeditious administration and adjudication
26 of the Class's claims;
- 27 • Economies of time, effort and resources will be fostered and uniformity of decisions
28 will be ensured; and

- 1 • Without a class action, Defendants' violations of law will proceed without remedy
2 while Defendants continue to reap and retain the substantial proceeds of their
3 wrongful conduct.

4 46. Nunez knows of no difficulty that will be encountered in the management of this
5 litigation that would preclude its maintenance as a class action.

6 **COUNT 1:**

7 **BREACH OF STATUTORY IMPLIED WARRANTY OF MERCHANTABILITY**
8 **(VIOLATION OF THE SONG-BEVERLY CONSUMER WARRANTY ACT,**
9 **CAL. CIV. CODE §1791.1(a))**

10 47. Nunez repeats and re-alleges the allegations contained in the paragraphs above, as if
11 fully set forth herein.

12 48. Nunez is a "buyer" within the meaning of the Song-Beverly Consumer Warranty Act,
13 Cal. Civ. Code §1791.

14 49. *Halo 3* is a "consumer good" within the meaning of the Song-Beverly Consumer
15 Warranty Act. Cal. Civ. Code §1791.

16 50. Defendants are "manufacturers" of *Halo 3* within the meaning of Cal. Civ. Code
17 §1791.

18 51. Defendants impliedly warranted to Nunez and the Class that *Halo 3* was
19 "merchantable" within the meaning of Cal. Civ. Code §§1791.1(a) and 1792.

20 52. In particular, Defendants impliedly warranted that *Halo 3* was fit for the ordinary
21 purpose of operating on the Xbox360, and conformed to the affirmation of that fact made on the
22 *Halo 3* container.

23 53. Defendants have breached the implied warranty of merchantability, because the *Halo*
24 *3* video games freeze, lock up and/or crash the Xbox 360 video game console when operated in their
25 intended use on the Xbox 360. Defendants continue to breach the implied warranty of
26 merchantability to this day because they have failed to correct the defect in *Halo 3*.

27 54. As a proximate result of Defendants' breach of the implied warranty of
28 merchantability, Nunez and the Class sustained damages including, but not limited to, the purchase
price of *Halo 3*.

1 55. Pursuant to Cal. Civ. Code §1791(d) and §1794(a), Nunez and the Class are entitled
2 to damages and other legal and equitable relief including, at their election, the rights of replacement
3 and reimbursement.

4 **COUNT 2:**
5 **BREACH OF IMPLIED WARRANTY OF FITNESS**
6 **(VIOLATION OF THE SONG-BEVERLY CONSUMER WARRANTY ACT,**
7 **CAL. CIV. CODE §1791.1(b))**

8 56. Nunez re-alleges and incorporates by reference the allegations contained in the
9 paragraphs above as if fully set forth herewith.

10 57. Defendants impliedly warranted to Nunez and the Class that *Halo 3* was fit for the
11 particular purpose of being operated on the Xbox 360 within the meaning of Cal. Civ. Code
12 §§1791.1(b).

13 58. Defendants knew or had reason to know that *Halo 3* was being purchased by Nunez
14 and the Class for use on an Xbox 360, and that the buyers of *Halo 3* were relying on Defendants'
15 skill and judgment to furnish goods suitable for that purpose.

16 59. Defendants have breached the implied warranty of fitness, because the *Halo 3* video
17 games freeze, lock up and/or crash the Xbox 360 video game console when operated in their
18 particular purpose of use on the Xbox 360. Defendants continue to breach the implied warranty of
19 fitness to this day because they have failed to correct the defect in *Halo 3*.

20 60. As a proximate result of Defendants' breach of the implied warranty of fitness, Nunez
21 and the Class sustained damages including, but not limited to, the purchase price of *Halo 3*.

22 61. Pursuant to Cal. Civ. Code §1791(d) and §1794(a), Nunez and the Class are entitled
23 to damages and other legal and equitable relief including, at their election, the rights of replacement
24 and reimbursement.

25 **COUNT 3:**
26 **CALIFORNIA UNFAIR COMPETITION LAW**
27 **(VIOLATION OF CAL. BUSINESS & PROFESSIONS CODE §§ 17200)**

28 62. Nunez re-alleges and incorporates by reference the allegations contained in the
paragraphs above as if fully set forth herewith.

1 63. The conduct alleged in this complaint constitutes unlawful and unfair business acts
2 and practices within the meaning of the California Unfair Competition Law, §§17200, *et seq.* of the
3 California Business and Professions Code. Nunez and the Class have suffered injury in fact and lost
4 money or property as a result of Defendants' violations of law and wrongful conduct.

5 64. Defendants' actions are unlawful and unfair because they have violated, *inter alia*, the
6 Song-Beverly Act, and because in their pursuit of profit, Defendants have made their product
7 defective and inoperable in its intended use.

8 65. Defendants' actions are unfair because they did not inform the purchasers of their
9 product that the *Halo 3* video game freezes, locks up and/or crashes when it is utilized in its intended
10 use on Defendant Microsoft's Xbox 360 video game console. Defendants have deceived consumers
11 who reasonably believed that the *Halo 3* video game would perform reliably in its intended use and
12 permit purchasers to play the video game without substantial interruption.

13 66. Defendants' acts, omissions, misrepresentations, practices and non-disclosures, as
14 alleged herein, also constitute "unfair" business acts and practices within the meaning of Cal. Bus. &
15 Prof. Code §§17200, *et seq.* Defendants' practices offend public policy and are unethical,
16 oppressive, unscrupulous, and violate the laws stated. Defendants' conduct caused and continues to
17 cause substantial injury to consumers, including Nunez and the Class and was not reasonably
18 avoidable by the consumers themselves. The gravity of Defendant's alleged wrongful conduct
19 outweighs any purported benefits attributable to such conduct. There also were reasonably available
20 alternatives to the Defendants to further their business interests other than the wrongful practices
21 described herein. As a result, Defendants engaged in unfair business practices prohibited by Cal.
22 Bus. & Prof. Code §17200, *et seq.* Finally, Defendants' conduct, acts and omissions violate public
23 policy against sharp and deceptive practices, false advertising, fraud and deception.

24 67. Defendants' acts, omissions, misrepresentations, practices and non-disclosures, as
25 alleged herein, also constitute "fraudulent" business acts or practices within the meaning of Cal. Bus.
26 & Prof. Code §17200. Defendants' misrepresentations, non-disclosures and concealments were
27 false, misleading, untrue, deceptive and likely to deceive and in fact did deceive Nunez and members
28

1 of the class. Defendants either knew, recklessly disregarded, or should have known their product
2 representations were untrue and/or misleading.

3 68. Accordingly, Defendants have violated the Unfair Competition Law's proscription
4 against engaging in unlawful, unfair, and fraudulent business practices.

5 69. As a result of this unlawful, unfair, and fraudulent conduct, Nunez and other members
6 of the Class have been damaged.

7 70. Defendants' conduct is continuing and unless equitable relief is granted, the sale of
8 *Halo 3* video games for exclusive use on Xbox 360 game consoles will continue unabated.

9 71. Defendants are in addition liable for restitutionary disgorgement and all other relief
10 available under California law to remedy violations of §17200.

11 **PRAYER FOR RELIEF**

12 WHEREFORE, PLAINTIFF AND THE CLASS pray for judgment and relief as follows:

13 A. For an Order that this action may be maintained as a class action pursuant to Rule
14 23(b)(2) of the *Federal Rules of Civil Procedure* with respect to Nunez's claims for equitable relief,
15 and Rule 23(b)(3) of the *Federal Rules of Civil Procedure* with respect to Nunez's incidental claims
16 for damages and other monetary relief, and declaring Nunez as representative of the Class and his
17 counsel as counsel for the Class;

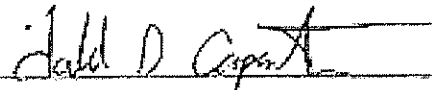
18 B. For an Order determining that the conduct alleged herein violates the Song-Beverly
19 Consumer Warranty Act and entering appropriate monetary and equitable relief pursuant to that law;

20 C. For an Order determining that the conduct alleged herein violates the California
21 Unfair Competition Law, §§17200, *et seq.* of the California Business and Professions Code and
22 entering appropriate monetary and equitable relief pursuant to that law;

23 D. For costs of suit, including reasonable attorneys' fees, and pre- and post-judgment
24 interest;

25 E. For such other, further, and different relief as the nature of the case may require or as
26 may be determined to be just, equitable, and proper by this Court.

1 DATED: November 20, 2007

2
3 

4 BONNETT, FAIRBOURN, FRIEDMAN
5 & BALINT, P.C.

6 ANDREW S. FRIEDMAN
7 GARRETT W. WOTKYNs
8 2901 N. Central Avenue, Suite 1000
9 Phoenix, AZ 85012
10 Telephone: 602/274-1100
11 602/274-1199 (fax)

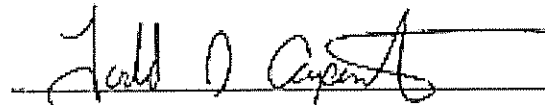
12 BONNETT, FAIRBOURN, FRIEDMAN
13 & BALINT, P.C.

14 TODD D. CARPENTER
15 501 West Broadway Suite 1450
16 San Diego, CA 92101
17 Telephone: 619/756-6978
18
19
20
21
22
23
24
25
26
27
28

1
2 JURY TRIAL DEMAND

3 Nunez demands a trial by jury on all issues so triable.
4

5 DATED: November 20, 2007
6

7 

8 BONNETT, FAIRBOURN, FRIEDMAN
9 & BALINT, P.C.

10 ANDREW S. FRIEDMAN
11 GARRETT W. WOTKYN
12 2901 N. Central Avenue, Suite 1000
13 Phoenix, AZ 85012
14 Telephone: 602/274-1100
15 602/274-1199 (fax)

16 BONNETT, FAIRBOURN, FRIEDMAN
17 & BALINT, P.C.

18 TODD D. CARPENTER
19 501 West Broadway Suite 1450
20 San Diego, CA 92101
21 Telephone: 619/756-6978
22
23
24
25
26
27
28