UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

C. STUART BROWN,

Plaintiff,

-against-

SEGA AMUSEMENTS, U.S.A., INC. et al.,

Defendants.

13 Civ. 7558 (RMB)(HBP)

DECISION & ORDER

Having reviewed the record herein, including without limitation **(i)** Plaintiff C. Stuart Brown's ("Plaintiff") Class Action Complaint, filed on October 25, 2013 ("Compl."); **(ii)** Plaintiff's unopposed Motion for Preliminary Approval of Class Action Settlement, Conditional Certification of the Settlement Class, Designation of Plaintiff and Yael Kempe as Class Representatives, Appointment of Plaintiff's Counsel as Class Counsel, and Approval of Plaintiff's Proposed Notice of Settlement, filed on September 3, 2014 ("Plaintiff's Motion" or "Pl. Mot."); [1] **(iii)** the Memorandum of Law in Support of Plaintiff's Motion, filed on September 3, 2014 ("Pl. Mem."); **(iv)** the Declaration of Janine L. Pollack in Support of Plaintiff's Motion, dated September 3, 2014 ("Pollack Decl."), attached as Exhibit 1 to Plaintiff's Motion; **(v)** the Amended Settlement Agreement, dated November 25, 2014 ("Settlement Agreement"), attached to the Letter from Timothy Russo to Hon. Richard M. Berman, dated November 25, 2014; **(vi)** the proposed ten-page Notice of Class Action Settlement, attached as Exhibit G to the Settlement

[1] Subsequent to the filing of Plaintiff Brown's action on October 25, 2013, Ms. Kempe, on January 13, 2014, filed a substantially similar complaint in the United States District Court for the Central District of California. See Kempe v. Sega Amusements, U.S.A., Inc. et al., Case Number CV14-0281. The proposed Settlement Agreement seeks to resolve both cases.

Agreement ("Notice of Settlement"); and **(vii)** applicable legal authorities, **the Court hereby denies (without prejudice) Plaintiff's Motion, for the following reasons:**[2]

1) Background

In this action, Plaintiff alleges that Defendants' marketing and sale of the Key Master amusement game were "false, deceptive, and likely to mislead consumers because the machines are preprogrammed to prevent players from winning a prize even if they have followed the instructions on the game to effectively fit the key in the lock and 'win' the game."[3] (Pl. Mem. at 1; see Compl. ¶ 1.) Plaintiff seeks certification of "two mutually exclusive Subclasses" of individuals throughout the United States who paid between one and two dollars to play the Key Master game at arcades "or other amusement centers" between November 1, 2010 and the present. (Settlement Agreement at ¶ 3.2.) Subclass A includes an unspecified number of persons who successfully inserted the Key Arm into the Key Hole, but did not receive a prize or any other compensation. (Id. at ¶ 3.2.1.) Subclass B includes an unspecified number of persons throughout the United States who paid to play, or paid for others to play, a Sega Key Master but failed to insert the Key Arm into the Key Hole and did not receive a prize or any other form of compensation. (Id. at ¶ 3.2.2.)

Under the proposed Settlement Agreement, all class members would be compensated from a Settlement Fund which will total $650,000. (See id. at ¶¶ 3.3-3.4; Pl. Mem. at 4–6.)

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[2] The Court recognizes fully that it is unusual to deny an application for preliminary approval of a class action settlement agreement. See In re Traffic Exec. Ass'n, 627 F.2d 631, 634 (2d Cir. 1980).

[3] Attached hereto (as Exhibit A) is a photo of a Key Master arcade game, indicating rows of prizes that players might win. The photo was included as Exhibit A to the parties' proposed Settlement Agreement.

Pursuant to the Settlement Agreement, Defendants will also send a proposed "Player Notice" to all distributors and owners of a Key Master machine to "be prominently displayed on each of the [machine's] front pane of glass so they are easily visible to the player" and which describes elements of the Key Master game and the circumstances in which a player may obtain a prize. (See Player Notice, attached to Letter from F. Nara to Hon. Richard M. Berman "[o]n behalf of the Sega Defendants and Plaintiff C. Stuart Brown," dated March 5, 2015 ("Player Notice") ("This game can and may currently be set in a mode where prizes may be more difficult to win for a certain number of plays. The level of difficulty may be different or each row. Please contact the operator if you have questions regarding how frequently the difficulty changes for each row.").) By letter, dated March 5, 2015, the parties informed the Court that "[s]ince (i) the difficulty level can vary within a single machine, (ii) an operator can change the difficulty level at any time, and (iii) the likelihood of winning also depends on the skill of each individual player, the parties submit that there is no way of specifying the likelihood of winning or specific difficulty level on the [Player Notice]." (Letter from F. Nara to Hon. Richard M. Berman, dated March 5, 2015, at 2.)

The Settlement Agreement also anticipates class counsel's application for attorneys' fees. (See Settlement Agreement, at ¶¶ 4.1–4.2.) The proposed Notice of Settlement states that Class Counsel's fees will "amount to approximately $850,000." (See Notice of Settlement, at 8.)

2) Proposed Notice of Settlement

The parties have proposed a lengthy (10-page) Notice of Settlement to class members describing the proposed Settlement Agreement. In order to distribute this notice to potential class members, the parties propose to employ notice-by-publication. See Fed. R. Civ. P.

23(c)(2)(B); Jermyn v. Best Buy Stores, L.P., No. 08 Civ. 00214, 2010 WL 5187746, at *3 (S.D.N.Y. Dec. 6, 2010); see also Denney v. Jenkens & Gilchrist, 230 F.R.D. 317, 343–44 (S.D.N.Y. 2005).

Notification of prospective class members in this case—i.e., individuals who played the Key Master game at video game arcades or other amusement centers throughout the entire United States between November 1, 2010 and the present—is, for obvious reasons, problematic. The class members, other than the two proposed lead plaintiffs, are unknown. The parties propose a notice-by-publication plan consisting of advertisements which will be published "[a]s soon as practicable following entry [of this Order]," for "up to sixty days," "in sources specifically targeting Settlement Class Members, including internet and mobile phone banner ads." (Pl. Mem. at 23; Settlement Agreement at ¶ 6.3.1.) These online and mobile phone advertisements, it is proposed, will provide digital links to an Administration Website which, in turn, will contain information about the nature of the action and the Settlement Agreement (including the Notice of Settlement and Claim Form).[4] The parties' proposal further entails the publication of "a press release of up to 600 words over PR Newswire's US1 English full-national wire transmission," which will also be published in one issue of the general readership magazine, People. (See Pl. Mem. at 8 n.7; Notice of Settlement, at 11–12; Settlement Agreement at ¶ 6.3.1.)

Frankly, it is unclear to the Court what the proposed notice plan means (entails) specifically, how it will work, and how it is designed (and likely) to reach class members. Much

[4] The advertisements will appear as "various hyper-linked 'banner [ads]' across numerous Internet sites and mobile applications selected by ad serving technology companies based on marketing research on the demographics of consumers who play amusement games, such as Key Master." (Settlement Agreement at ¶ 6.3.1.)

more detail and support would be needed to persuade the Court that such manner of publication is "the best notice that is practicable under the circumstances" or, for that matter, under any circumstances. Fed. R. Civ. P. 23(c)(2)(B). Plaintiff provides no factual basis for its assertion that the various proposed "banner ads" are likely to be seen by any, much less most or all, potential class members, i.e., all individuals who have played the Key Master game between November 2010 and the present but who did not receive a prize. How many members of each subclass are there? Are they male and/or female? How old are they? Where do they live? What is their economic profile? Are they students? Do they work? If so, what do they do? Do they read People magazine? In essence, how likely are they to view the proposed "banner ads" and, even if they did so, how likely are they to subsequently follow the links to the Administration Website, view the Notice of Settlement, understand it, and file a Claim Form? The Court is unable to conclude on this record that the proposed publication notice is "reasonably . . . likely to inform persons affected." Denney, 230 F.R.D. at 343-44; see In re Fresh Del Monte Pineapples Antitrust Litig., No. 1:04–md–1628, 2008 WL 5661873, at *10 (S.D.N.Y. Feb. 20, 2008).

3) Class Certification

Conditional certification of the proposed settlement classes is governed by Federal Rule of Civil Procedure 23, which "contains an implicit requirement that the proposed class be precise, objective and presently ascertainable." Burley v. City of New York, No. 03 Civ. 735, 2005 WL 668789, at *8 (S.D.N.Y. Mar. 23, 2005) (citation and quotation marks omitted). Thus, "a proposed class must be clearly defined so that it is administratively feasible for a court to determine whether a particular individual is a member." Id.

In addition to the notice problems discussed above, the Court is concerned that the proposed subclasses may not meet the "ascertainability" requirement of Rule 23. See Schear v.

Food Scope Am., Inc., 297 F.R.D. 114, 125 (S.D.N.Y. 2014) ("An identifiable class exists if its members can be ascertained by reference to objective criteria."). In a pre-settlement letter to the Court, dated February 10, 2014, Defendants stated that "Plaintiff's proposed class will be unascertainable at all times." (Letter from F. Nara to Hon. Richard M. Berman, dated Feb. 10, 2014.) That may well be so. In any event, the parties do not provide a reliable estimate of the number of potential class members of either subclass, and/or a reliable method for identifying—and reaching—potential class members. "Lacking even a rough outline of the [sub]classes' size and composition, [the Court] cannot conclude that they are sufficiently ascertainable." EQT Production Co. v. Adair, 764 F.3d 347, 359–60 (4th Cir. 2014) ("Without even a rough estimate of the number of potential successors-in-interest, we have little conception of the nature of the proposed classes or who may be bound by a potential merits ruling."); see Bakalar v. Vavra, 237 F.R.D. 59 (S.D.N.Y. 2006); In re Fresh Del Monte Pineapples Antitrust Litig., 2008 WL 5661873, at *10 (denying class certification where "(i) Plaintiffs have not established what percentage of the Indirect Purchaser Class is likely to receive notice of the claims process . . . (ii) given the relatively small claims involved in terms of monetary value (and the proposed payment of claims in coupons), only a small percentage of Class Members would likely file claims . . . [and] (iii) many filed claims are not likely to be accurate or verifiable.").

Also, the parties do not propose an objective means to "determine whether a particular individual is a [class] member," Burley, 2005 WL 668789, at *8, apart from a "Claim Form" stating, under penalty of perjury, that the claimant meets the definition of class member. It would appear that anyone who reviews the proposed Settlement Notice may complete a Claim Form and, thereafter, receive a portion of the settlement award. See Weiner v. Snapple Beverage Corp., No. 07 Civ. 8742, 2010 WL 3119452, at *13 (S.D.N.Y. Aug. 5, 2010) (Cote, J.)

("Plaintiffs have failed to show how the potentially millions of putative class members could be ascertained using objective criteria that are administratively feasible."); Carrera v. Bayer Corp., No. 12–2621, 2014 WL 3887938, at *3 (3d Cir. May 2, 2014) (where class member affidavits were not a "reliable, administratively feasible method to determine class membership"); Stewart v. Beam Global Spirits & Wine, Inc., Civil No. 11–5149, 2014 WL 2920806, at *7 (D.N.J. June 27, 2014) ("Plaintiffs' only proposed method for identifying potential class members relies on the completely subjective [affidavits] provided by individuals claiming entitlement to class relief."). The potential for fraudulent claims is meaningful.

4) Class Action Settlement

The Court also has serious reservations regarding, at least, several features of the Settlement Agreement. These include, without limitation, the fairness of the settlement award, the language of the proposed Player Notice, and the anticipated attorneys' fees of $850,000 and service awards.

In order to grant preliminary approval of a class action settlement, the court must find that there is "probable cause to submit the [settlement] to class members and hold a full-scale hearing as to its fairness." In re Traffic Exec. Ass'n, 627 F.2d 631, 634 (2d Cir. 1980). "If the proposed settlement appears to fall within the range of possible approval, the court should order that the class members receive notice [of the] settlement." Zeltser v. Merrill Lynch & Co., No. 13 Civ. 1531, 2014 WL 2111693, at *1 (S.D.N.Y. May 12, 2014) (internal quotation marks omitted); see also Maywalt v. Parker & Parsley Petroleum Co., 67 F.3d 1072, 1079 (2d Cir. 1998). "The central question raised by the proposed settlement of a class action is whether the

compromise is fair, reasonable, and adequate." Weinberger v. Kendrick, 698 F.2d 61, 73 (2d Cir. 1982) (citation omitted).[5]

The Settlement Agreement provides for the class members' monetary recovery, as follows:

> Sega agrees to provide funds designated for payment of Subclass A and B claims. A total of Two Hundred Seventy-give Thousand Dollars ($275,000) shall be designated for payment of Valid Claims in Subclass A. A total of Three Hundred Seventy-five ($375,000) shall be designated for payment of Valid Claims in Subclass B . . . .
>
> The Individual Payment Amounts to Subclass A shall be adjusted based on the number of Valid Claims received. Upon verification of a Subclass A Claim, the Claimant shall receive an Individual Payment Amount of $50.00 from the Settlement Funds, provided that the number of Valid Claims in Subclass A does not exceed 5,500.[6]
>
> The benefits to Subclass B shall consist of a free download of a Windows-based Sega game, with a current retail value of approximately $9.99 . . . .

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[5] Ultimately, approval of a class action settlement is based upon review of the factors set forth in Detroit v. Grinnell Corp.:

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

[6] However, "[i]f the number of Valid Claims in Subclass A exceeds 5,500, the Individual Payment Amount to each Claimant shall be reduced pro rata, provided that the number of Valid Claims in Subclass A does not exceed 27,500. Should the number of Valid Claims in Subclass A exceed 27,500, in addition to a pro rata Individual Payment Amount for a Valid Claim, each Subclass A Claimant may also elect to receive a free download of a Windows-based Sega game, with a current retail value of approximately $9.99 . . . ." (Settlement Agreement, at ¶ 3.4.1.1.) Given the lack of clarity with respect to the number of potential class members, and the percentage of those potential class members who will receive the Settlement Notice and join the class, it is impossible, on the current record, for the Court to determine with any degree of likelihood the monetary recovery that each class member will receive.

(Settlement Agreement, at ¶¶ 3.3, 3.4.1.1, 3.4.1.2.)

The parties offer no viable way to gauge the reasonableness of the Settlement Agreement, and, therefore, the Settlement Agreement appears to be outside "the range of possible approval." That is, the parties make no attempt to present a factual basis for how $650,000—and the proposed sliding-scale payment structure—were arrived at. How much value did each class member lose by not receiving a prize? How much would they receive if the litigation were successful? What specifically were the risks of this litigation? The individual payment amounts described in the Settlement Agreement appear to be arbitrary, i.e., unrelated to any injury suffered by individual class members.

Player Notice

The Settlement Agreement includes a Player Notice which, presumably, is meant to be distributed to all operators of the Key Master game and to provide players with accurate information regarding the likelihood of receiving a prize for "wining" the game. The Player Notice is to be "prominently displayed on each of the owner/operators' Key Master on the game's front pane of glass so [it is] easily visible to the player." (Pl. Mem. at 6.)

But the Player Notice is confusing. It states that "[i]f you get the key into the hole, the Key Master will vend a prize," but, at the same time, it says that the game "may currently be set in a mode where prizes may be more difficult to win for a certain number of plays." (See Player Notice.) The Player Notice also—unrealistically in the Court's view—suggests to players that they "contact the operator if you have questions regarding how frequently the difficulty changes for each row." (Id.)

It is not clear to the Court whether this complicated Player Notice language reflects drafting difficulties or the parties' failure to confront core factual allegations in the Complaint, i.e., whether or not "the machines are preprogrammed to prevent players from winning a prize even if they have followed the instructions on the game to effectively fit the key in the lock and 'win' the game." It is clear to the Court that the proposed Player Notice does not provide any useful information to players of Key Master and, in fact, is likely to confuse them or simply be ignored.

Attorneys' Fees and Service Awards

The proposed Settlement Agreement, as noted above (at page 3), provides for anticipated counsel fees of $850,000—which exceed the entire settlement fund of $650,000 by $200,000. No such legal fee has ever before been approved by this Court. See Lobur v. Parker, 378 F. App'x. 63, 64 (2d Cir. 2010) (In determining the amount of attorneys' fees in a class action, a court "must be guided in its determination by the traditional criteria for awarding attorneys' fees, including '(1) the time and labor expended by counsel; (2) the magnitude and complexities of the litigation; (3) the risk of the litigation . . . ; (4) the quality of representation; (5) the requested fee in relation to the settlement; and (6) public policy considerations.'" (quoting Goldberger v. Integrated Resources, Inc., 209 F.3d 43, 50 (2d Cir. 2000)).

The Settlement Agreement also contemplates "Service Awards" of $7,500 for Plaintiff Brown and $2,500 for Ms. Kempe "to compensate them for the time and efforts expended in pursuing the Litigation . . . ." (See Settlement Agreement, at ¶¶ 4.1–4.2, 8.1.) The Court usually does not grant monetary (service) awards to lead plaintiffs in class actions, apart from their pro rata share of the settlement fund. See Ortiz v. Chop't Creative Salad Co. LLC, No. 13–CV–

2541, 2015 WL 778072, at *3 (S.D.N.Y. Jan. 16, 2015) ("Incentive awards . . . are within the discretion of the court.").

Conclusion & Order

For the foregoing reasons, Plaintiff's Motion for Preliminary Approval of Class Action Settlement, Conditional Certification of the Settlement Class, Designation of Plaintiff Brown and Yael Kempe as Class Representatives, Appointment of Plaintiff's Counsel as Class Counsel, and Approval of Plaintiff's Proposed Notice of Settlement [#48] is denied (without prejudice).

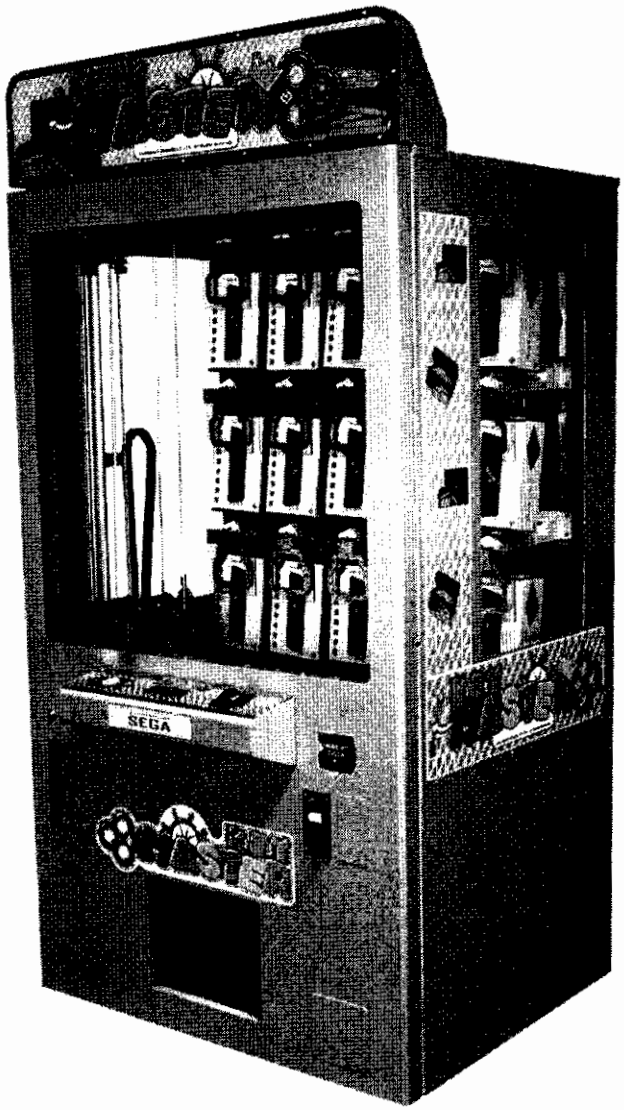
If the parties are able to overcome the Court's concerns, they may file a pre-motion letter to the Court setting forth revised settlement terms and notice procedures, and the proposed bases (factual and legal) for the Court's preliminary approval of any settlement and certification of the class.

Dated: New York, New York
March 9, 2015

RMB

RICHARD M. BERMAN, U.S.D.J.

EXHIBIT A


SEGA