IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

CASE NO. 07-20693-CIV-ALTONAGA

TAKE-TWO INTERACTIVE SOFTWARE, INC.,

Plaintiff/Counterdefendant,

v.

JOHN B. THOMPSON,

Defendant/Counterplaintiff
_____/

AMENDED ANSWER AND AFFIRMATIVE DEFENSES AND COUNTERCLAIM

COMES NOW Defendant/counter-plaintiff, John B. Thompson, (hereinafter Thompson)on his own behalf and by and through undersigned co-counsel, and files this is Amended Answer to the Complaint of Plaintiff Take-Two Interactive Software, Inc., (hereinafter Take-Two) and also files this his counterclaim against Take-Two as well (pursuant to Federal Rule of Civil Procedure Number 15), stating:

ANSWER

Thompson responds as follows, below, to the various paragraphs of the complaint, with the numbers of the responses corresponding to the numbers of the complaint, to-wit:

1. Admitted.

2. Denied. No one is a citizen of a state. People are citizens of countries, and Thompson is a citizen of the United States. He is a resident of Florida, living in Miami-Dade County, Florida.

3. Admitted.

4. Without knowledge.

5. Admitted.

6. Denied.

7. Denied.

8. Denied.

9. Denied.

10. Denied.

11. Denied.

12. Denied.

13. If the court has jurisdiction, which it does not, then this would be the proper venue.

14. Admitted as to this allegation in its recitation of a portion of the First Amendment. Plaintiff has omitted the "right of the people to petition the government for a redress of grievances," which petitioning activity has generated the constitutional nuisances laws of Florida and elsewhere.

15. Denied.

16. Denied.

17. Denied.

18. Denied.

19. Admitted.

20. Admitted.

21. Admitted.

22. Denied. Thompson sought to enjoin the sale of *Bully* to minors, not to the general public. Further, Thompson brought a similar lawsuit much earlier against Best

Buy, Inc., which was successful and resulted in Best Buy's changing of its policy, nationwide. As a result of Thompson's suit using Florida's nuisance laws, Best Buy agreed not to sell Mature-rated games to anyone under seventeen years of age anywhere in the country.

23. Admitted.

24. Denied.

25. Denied.

26. Denied.

27. Denied.

28. Denied.

29. Denied.

30. Denied.

31. Denied.

32. Denied.

33. Denied.

34. Denied.

35. Denied.

36. Denied.

37. Denied.

38. Admitted or denied or without knowledge as applicable.

39. Denied.

40. Denied.

41. Denied.

42. Denied.

43. Denied.

44. Denied.

45. Denied.

46. Denied.

47. Admitted, denied, or without knowledge, as applicable.

48. Denied.

49. Denied.

50. Denied.

AFFIRMATIVE DEFENSES TO COMPLAINT

Thompson's affirmative defenses are set forth below:

1. The public nuisance laws of the State of Florida afford a citizen the legal right to proceed against a public nuisance by attempting to secure a temporary injunction against it. If and only if Thompson or any citizen is successful at that initial stage, then the state attorney is to take over the prosecution of this criminal activity, as set forth by statute. Take-Two in bringing this preemptive action against Thompson, then, seeks unconstitutionally to infringe upon Thompson's First Amendment right "to petition the government for a redress of grievances." Thompson thereby would simply initiate the process that the State Attorney must then, if Thompson were persuasive, continue and complete.

Engaging in activity that constitutes a public nuisance is literally a "crime," and is listed as such in the Florida Statutes. Thus, this lawsuit itself is an attempt to infringe upon Thompson's civil rights, specifically his right to report a crime to the courts and to

the State Attorney, who would then presumably do something about it. Thus, this affirmative defense rests upon Thompson's absolute right to petition the government.

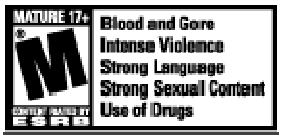
2. Should Thompson improperly bring such an action against the nuisance of selling adult material to children under 17 years of age, there is an adequate remedy available to Take-Two to defeat such an action *and* to assess costs against Thompson, as provided by the statute itself. Thus, the attempt in this federal action to preempt the state approach which adequately protects both the public and the defendant in such an action if it has been improperly brought.

3. Additionally, should Thompson bring such an action in state court without a basis in law or in fact, then Take-Two has a fully adequate remedy to recover attorney's fees improperly incurred. It would be a claim under Florida Statute 57.105, which is the state equivalent of a federal "Rule 11" claim. Take-Two did just that in the prior suit over *Bully*.

4. Thompson never, as Take-Two has incorrectly alleged, proceeded against Take-Two's *Bully* nor threatened to similarly come against *Grand Theft Auto IV* and *Manhunt 2* in an attempt to prevent either game's commercial release. Thompson seeks to apply the meaning and purpose of the games' rating of "Mature," which Take-Two itself admits will be the rating, unlike the rating on *Bully*. This "Mature" rating means that such games are, by definition, harmful to anyone under 17 and should not be sold to anyone under 17. That is the purported purpose of the label which Take-Two actively seeks to circumvent. Indeed, Take-Two brazenly states in its complaint that it wants to be free to sell these "Mature" games to children.

There is a huge difference between Take-Two's fallacious assertion to this court that Thompson is seeking to enjoin either game's release altogether, and the fact that he is simply trying to make Take-Two adhere to the meaning of the label, which is indicative of the harmful to minors content of the games. Thus, this affirmative defense rests upon the fact that Thompson is seeking to enforce what is actually an industry standard which Take-Two routinely violates.

5. Thompson has never indicated to Take-Two that he was proceeding against these two games on the basis of "violent content" alone, as alleged in paragraph 6 of the complaint. As Take-Two knows all of the *Grand Theft Auto* games contain sexual material that most juries would consider to be "sexual material harmful to minors." The "descriptors" that are affixed to the *Grand Theft Auto: San Andreas* "Mature" rated game, state right on the package that the content in this Take-Two game includes "Strong Sexual Content." Here is the label from that game itself:



Thus, if and when Thompson brings a suit under Florida nuisance law, then he shall be addressing in both games the possible and likely sexual content, not just the violent content. Distribution of sexual material harmful to minors is a crime. In all of the *Grand Theft Auto* games, the protagonist (who is the surrogate for the person playing the game) has sex with prostitutes and then kills them to get his money back. Take-Two's position, then, in this attempt to preempt Thompson's legal right to stop the distribution of that sexual material harmful to minors, which is also a crime under Florida law, is that a game whose previous incarnations contain "Strong Sexual Content" could not possibly

contain such material that may be harmful to minors. Take-Two wants this court to adjudge the content of the game, then, without even seeing it. This is a practical and legal absurdity.

6. Once either or both of these games are released and sold to kids under 17, the "horse will be out of the barn," and it will be too late to protect children from the harm resulting from direct sales to them with no parents involved in the sales transaction. Take-Two is upfront about this. It wants to release these games, sight unseen, to an unsuspecting public despite the documented failings of the rating system as well as Take-Two's circumvention of the whole rating system. Thus, this affirmative defense rests upon the need and Thompson's right to inspect these two games prior to their release to assure that they are not harmful to minors.

7. The Federal Trade Commission has recently found that 42% of the sales of "Mature" rated video games, such as *Grand Theft Auto* and *Manhunt* are to children under 17, despite empty promises by Take-Two and retailers and others to stop this harmful practice. Thus, the game rating system, as Senator Clinton has repeatedly pointed out, is utterly broken and needs to have the force of law behind it. Thus, Take-Two is already aggressively marketing these two "Mature" games to children well before their release. Just last holiday season, despite Take-Two's and the industry's promises to the contrary, Take-Two was running ads on the sides of public transportation in major metropolitan areas, having promised not to do any such thing because the juvenile demand for these adult products that would be created thereby. Thus, this affirmative defense rests upon the fact that the game rating system is ineffectual and designed to be just that, and Take-Two has a documented history of violating it.

8. As to Thompson's allegedly unsuccessful suit against Take-Two and Wal-Mart which sought to enjoin the sale of *Bully* to anyone under 17, the suit was unsuccessful because Take-Two representatives misrepresented to the Miami-Dade Circuit Court as to what was actually in the game. As proof, after this "Teen" game was released, the leading public interest organization regarding video games and their harmfulness, the National Institute on Media and the Family, played the game and reported that its "Teen" rating was an utter sham and that it contained levels of violence so extreme that it should have received a "Mature" rating. This same organization provides to the U.S. Congress, at its request, the "Annual Video Game Report Card" which reports on the most dangerous games and the video game industry's most dangerous practices. Thus, this affirmative defense rests upon the specific instance of Take-Two's deception in the context of a lawsuit that Take-Two seeks to prevent the filing of.

9. Take-Two's representations notwithstanding, Thompson has been very successful against it and the video game industry generally. He filed a Florida nuisance suit against Best Buy over two years ago which stopped Best Buy from selling "Mature" games to kids and persuaded Best Buy to initiate a new policy by which it age IDs anyone who appears to be 21 years of age or less in order to stop sales of "Mature" games to anyone under 17. This procedure is working at Best Buy. Take-Two refuses to participate in such a voluntary plan because it is making too much money going around parents who are not at the point of sale and selling, by collaboration with unscrupulous retailers like Wal-Mart, "Mature" games to underage kids with no parents in sight. Thus,

this affirmative defense rests substantially on the fact that such a state suit by Thompson has been very successful and its results agreed to by Best Buy through agreement.

10. Thompson has repeatedly offered to Take-Two to cease all future efforts against this company if it would simply instruct retailers not to sell its "Mature" products to children under 17. Take-Two refuses. Yet here is Take-Two, in this suit, presenting to this court how unreasonable Thompson is being. Thus, the gravamen of this affirmative defense is that Take-Two is corporately set upon collaborating with retailers to sell adult products to children, and they will not abide even voluntary restrictions on that harmful activity. Thus, the force of law must be brought to bear upon this illegal activity.

11. There is no constitutional right under the First Amendment to market and sell adult material to children. The Alabama Supreme Court has struck down Take-Two's First Amendment defenses in the aforementioned cop-killer wrongful death case. Thus, this affirmative defense rests upon the fact that the First Amendment protects what Thompson does and does not protect what Take-Two does.

12. Take-Two is asking this court to adjudicate both of these games perfectly safe and harmless to children *without ever seeing them*. That is absurd, as it asks this court to accede to the following: "Trust us. We're Take-Two. You can trust us that this material is not harmful to minors." Thus, this company seeks, in effect, prior restraint upon what it wrongly calls "prior restraint." Take-Two seeks to thwart the petition clause of the First Amendment.

13. Contrary to the representations by Take-Two, the settled, overwhelming conclusion of the law enforcement, scientific, education, public health, psychiatric, medical, and psychological communities is that there is a *direct causal link* between

games like *Grand Theft Auto* and *Manhunt* and increased teen aggression and even violence. Just one finding in that regard is that of the American Psychological Association in August 2005 of a direct causal link (not a mere correlation) between such games and teen aggression. Indiana and Harvard Universities, for example, have done brain scan studies that show that teens process this type of material in a different part of the brain than do adults, and it is the part that leads to copycatting. Take-Two is saying to this court: Don't believe the largest association of psychologists in the world. Don't believe Harvard or Indiana Universities. Don't believe MRIs. Don't believe a joint statement of the heads of six health care organizations, including the AMA, to Congress about this copycat phenomenon. And surely don't believe the US Supreme Court in *Roper v. Simmons* which two years ago struck down the juvenile death penalty in part because of brain scan studies that show the processing of violent information in the brains of teens in a different cranial sector. Believe, instead, Take-Two. We have no financial interest in skewing this debate, but all of these public health and other organizations do!" This affirmative defense then, is that the settled opinion of the scientific community is that what Take-Two proposes to do with these two games is dangerous.

14. Take-Two's request for attorney's fees and costs under 42 USC 1988 is not authorized by statute. Take-Two is bringing this preemptive action, trying to thwart Thompson's mere bringing of an action, which he has not even brought, and thus its scope and nature is not yet known, claiming that it will be as baseless as Take-Two says it is, asking also that damages be awarded based upon mere speculation as to what Thompson's lawsuit will look like.

We have already seen that Take-Two has misrepresented to this court that Thompson has tried to stop the release of *Bully* for sale to everyone, which is false. We have already seen that Take-Two has falsely stated that Thompson is trying to prevent the release to everyone of *these* two games. He is not. Thus, this affirmative defense rests upon the fact that Take-Two is falsely characterizing a lawsuit that Thompson has not yet brought and which he might in fact win. Take-Two seeks punishment, then, for an act yet untaken and which, if taken, might be successful. This is prior restraint of a citizen not because he surely won't be successful but because Take-Two fears he will be. The filing of this preemptive suit informs this court, then, of just how much this company fears a lone citizen. What Thompson would seek, if he seeks it at all, is not prior restraint but rather the enjoining, not by him but by the State of Florida, of a public nuisance.

15. This court lacks jurisdiction to enjoin a state action not yet even taken. "Abstention" prohibits the federal judiciary from interfering, unnecessarily and improperly, with state actions and remedies.

16. Any action brought by Thompson under the nuisance laws of Florida will in fact not chill any First Amendment right of Take-Two. All Take-Two would have to do is submit each game to a court of law to see if it contains material harmful to minors or if it does in fact constitute a nuisance of any kind under Florida law. The games are finished. There is plenty of time to submit the games, and doing so will not in fact impede their release—unless they are in fact harmful to children.

17. Contrary to Take-Two's assertions, purveyors of obscenity and sexual material harmful to minors are specifically identified as constituting possible public nuisances under Florida law. Take-Two's assertion that the nuisance laws cannot be used

to enjoin such operations and establishments is patently false, as Florida Nuisance Statute 823.13 prohibits trafficking in this kind of sexual material. Further, the nuisance laws enable the enjoining of the distribution of materials that either impair "public morals" or pose a public safety hazard, as these two games most assuredly will if sold to minors who as a class of individuals are far more likely to have their behavior modified than would adults.

18. Take-Two is asking this court to enjoin Thompson even from seeking the application of Florida's nuisance laws *after* the release of these games. That is what their complaint says. This position posits the notion that even an ongoing criminal activity or nuisance activity cannot be enjoined and Thompson, a citizen, cannot even seek a post-release injunction. This not only stands the First Amendment on its head. This position obliterates the First Amendment petition right.

19. The relief sought by Take-Two is counter to public policy, as it attempts to limit the right of a citizen to petition his government for a redress of grievances *before* he even does so.

20. There is nothing "vague" about the question of whether a game that contains sex with prostitutes and a killing of them to get your money back is "sexual material harmful to minors." Juries decide obscenity and sexual material harmful to minors cases all the time, applying the three prongs of *Miller v. California*.

21. Thompson is not seeking in any fashion to limit the artistic or other First Amendment expression of Take-Two or anyone else. These folks can create "Mature" games to their hearts' content. They just should not sell adult material to children, and they should not tell the court system of the State of Florida that it can do absolutely

nothing about it. The claim of prior restraint and the chilling of artistic freedom is a fabrication.

22. The placement of a "Mature" label on a video game is a clear admission that that product is inappropriate for anyone under 17 and thus also harmful to such a minor person. Distributing it directly to children under 17 would in fact undermine public morals. Why else is the label on the game? Further, the sale of such a labeled game to someone under 17 constitutes a public safety hazard, as the evidence is clear that such material leads to increased aggression and violence, particularly in minor. Thus, there is a compelling state interest—public safety—in prohibiting the sale of adult material to children which those children literally process differently in their immature brains, which differential leads to copycat violence. Thus, the strict scrutiny test in restricting the sale of such otherwise First Amendment-protected material to children under 17 is met because there is a compelling state interest in providing for and assuring public safety. This case is primarily about public safety and welfare, which Take-Two wants Thompson and the state of Florida powerless to assure.

23. A state judicial system is the best judicial system in which to interpret and apply state laws. The federal system should defer to the state judicial system in this instance, as in others, not only for abstention grounds but on the common sense notion that state judges are adequately equipped to apply state laws.

24. Nearly all of the case authorities cited to this court in their paragraph 7 that purportedly explain the basis for striking down state video game laws turn on whether the games in question were in fact *harmful to minors* and detrimental to public safety. In nearly every instance, and possibly in every instance, the various attorneys

general and other state officials defending these laws didn't have a clue as to the scientific and other evidence that proves these games harmful. Harm must be shown to survive the strict scrutiny test that is applied to efforts to restrict speech.

COUNTERCLAIM

COMES NOW Defendant/counterplaintiff, and files this counterclaim against Plaintiff/counterdefendant, stating:

If the Court finds that it has jurisdiction over this matter, it should review the video games in question, allow a review of those games by this Defendant and then hear argument if requested by this Defendant as to wherein the Plaintiff, should be enjoined from distributing video games to minors.

DEMAND FOR JURY TRIAL

Thompson demands a trial by jury of all issues so triable.

/S/

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