

SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No: 500-06-000599-122

DATE: September 13, 2013

BY: THE HONOURABLE CHANTAL CORRIVEAU, J.S.C.

SAMUEL CHAGNON
Petitioner

v.

CRAYOLA PROPERTIES, INC
and
HALLMARK CARDS, INC.
and
WILLIAM E. COUTTS COMPANY LIMITED
Respondents

JUDGMENT

Introduction

[1] On March 1, 2012, the Petitioner filed a Motion to Authorize the Bringing of a Class Action & to Ascribe the Status of Representative (the "Motion to Authorize") against the Respondents on behalf of the following class:

"All residents in Canada who purchased or acquired (including by gift) Crayola Washable Coloured Bubbles";

[2] The Motion to Authorize alleged, *inter alia*, that the Respondents made misrepresentations about the capacity to stain and the washable nature of its 2011 Washable Coloured Bubbles and further alleged that the 2011 Washable Coloured Bubbles caused stains and were not washable as advertised;

[3] The Petitioner sought to bring an action in damages and an injunction against the Respondents pursuant to the *Civil Code of Quebec*, R.S.Q. 1991, c. 64 and to the *Consumer Protection Act (Quebec)*, R.S.Q., c. P-40.1;

Authorization

[4] The Court must first decide if this application for class action should be authorized. The Court understands that the Respondents consent to the authorization of the present Motion as a class proceeding for settlement purposes only, which consent shall be withdrawn should the Settlement Agreement not be approved by the Court. In so consenting, the Respondents continue to deny the allegations made against them, but have nevertheless agreed to the settlement in order to avoid the costs and uncertainty of proposed class action litigation.

[5] However, in such case, it is only if the Court is satisfied that the class action proceeding meets the criteria of Article 1003 *C.c.p.* and authorizes the class action, that it will then review the terms of the proposed settlement.

[6] The Motion to Authorize dated March 1, 2012, the Exhibits in support thereof, the Affidavit of the Petitioner dated July 7, 2013, and the Petitioner's testimony at the hearing on July 11, 2013 provide sufficient reasons to grant the present Motion for Authorization in accordance with the criteria set forth at article 1003 C.C.P.

[7] The recourses of the members raise identical, similar or related questions of law or fact, namely:

- a) Did the Respondents know or should they have known that the Crayola Washable Coloured Bubbles had the capacity to stain and were not washable?
- b) Did the Respondents withhold from disclosure the true nature of the Crayola Washable Coloured Bubbles in the products' sale and promotion?
- c) Did the Respondents engage in unfair, false, misleading, or deceptive acts or practices regarding the marketing and sale of its Crayola Washable Coloured Bubbles?

- d) Are the Respondents liable to the Class Members for reimbursement of the purchase price of Crayola Washable Coloured Bubbles, cleaning costs, and property damage caused by the use of Crayola Washable Coloured Bubbles?
- e) Should an injunctive remedy be ordered to prohibit the Respondents from continuing to perpetrate their unfair, false, misleading, and/or deceptive conduct?
- f) Are the Respondents responsible to pay compensatory and/or punitive damages to class members and in what amount?

[8] The facts alleged seem to justify the conclusions sought.

[9] The composition of the group makes the application of article 59 or 67 C.C.P. difficult or impractical because:

- a) The potential Class Members are numerous and widely dispersed geographically across Canada;
- b) Given the costs and risks inherent in an action before the Courts, many people will hesitate to institute an individual action against the Respondents;
- c) Individual litigation of the factual and legal issues raised would increase delay and expenses to all parties and to the Court system.

[10] The Petitioner, who is requesting to obtain the status of representative, will fairly and adequately protect and represent the interest of the Class Members since Petitioner:

- a) Is a Class Member;
- b) Purchased the 2011 Washable Coloured Bubbles;
- c) Understands the nature of the class action and has the capacity and interest to fairly and adequately protect and represent the interests of the Members of the Class;
- d) Was instrumental in instituting this class action by discovering the existence of a class action and subsequently a settlement entailing consumer refunds related to the same issue in the United States, conducting further research on the internet, and mandating counsel with experience in consumer class actions;
- e) Provided his attorneys with relevant information and instructed them to proceed with the filing of the present case;
- f) Made sure that the Class Members would be kept up to date through his attorneys' website and collected 27 names through this method;

- g) Participated in the settlement negotiations and provided input to his attorneys;
- h) Has a good understanding of what this class action is about and what the settlement provides to Class Members;
- i) Has eagerly performed his responsibilities as a class representative and will continue to do so;
- j) Has always acted in the best interests of the Class Members;
- k) Does not have interests that are antagonistic to those of other Class Members.

[11] The class action proceeding is an efficient and expeditious procedure to resolve the claims of the Class Members, which claims would otherwise likely be uneconomic for them to assert individually.

[12] Authorization of this class action is the proper procedure for the resolution of these common issues.

[13] The proposed group applies to persons who are members of the following class:
"All Persons residing in Canada who have purchased or acquired (including by gift) in Canada 2011 Washable Coloured Bubbles, through to September 12, 2013" (the "Settlement Class").

Excluded from the Class are all Persons who timely and validly request exclusion from the Class pursuant to the Pre-Approval Notice disseminated and published in accordance with the Approval Order.

"2011 Washable Coloured Bubbles" are products identified as:

- Coloured Bubbles Wand Set (Style no. 55-3412);
- Coloured Bubbles 20 Count Tray (consists of 5 colours, each sold separately - Purple Pizazz, Sunset Orange, Screamin' Green, Wild Blue Yonder and Pink Flamingo) (Style no. 55-3413);
- Coloured Bubbles Bubble Launcher (Style no. 55-3414); and
- Coloured Bubble Machine (Style no. 55-3458);

Settlement

[14] On March 1, 2013, following arm's length negotiations between counsel for the Parties, the Petitioner and the Respondents reached a settlement agreement (the "Settlement Agreement"), a copy of which is appended hereto, to fully and finally settle all claims asserted in or related to the present class action;

[15] The following is a summary of the key terms of the Settlement Agreement, the full details of which are contained in the Settlement Agreement itself:

A. The Respondents have agreed to perform the following within 60 days after the Effective Date (i.e. 30 days after the court has issued the Approval Order):

1. 2011 Washable Coloured Bubbles: Discontinue the production of 2011 Washable Coloured Bubbles, as originally formulated and labeled;
2. 2012 Coloured Bubbles:
 - a) Introduce 2012 Coloured Bubbles with revised formulas;
 - b) Redesign the bottle for the 2012 Coloured Bubbles so as to remove the plastic shield across the bottle neck;
 - c) Revise promotional materials for 2012 Coloured Bubbles so as to remove all references or implications for indoor use;
 - d) Re-label the packaging for the 2012 Coloured Bubbles so that it:
 - (i) Does not state "Washable";
 - (ii) Does not state "Spill Resistant";
 - (iii) Increases prominence of direction for "Outdoor Use Only" and cautions
 - (iv) against indoor use;
 - (v) Increases visibility of additional guidance on product insert "Read before you play";
 - (vi) Recommends use of "play clothes" on front of packaging and labels; and
 - (vii) Advises that the product provides "messy" fun;
3. Stain Removal Guide: Correct the stain guide on the Crayola Website to remove faulty instructions regarding the use of Tilex;

B. The benefits to be provided to eligible Settlement Class Members are the following:

1. Compensation for 2011 Washable Coloured Bubble Purchase Costs:

- a) Category A Claim (No Proof of Purchase): If a Class Member does not have proof(s) of purchase in the form of a receipt or UPC, Crayola will offer the Class Member the value of the 2011 Washable Coloured Bubbles product(s) in the form of Crayola Vouchers in an amount not to exceed

\$12.00, depending on the 2011 Washable Coloured Bubbles product(s) purchased or acquired;

- b) Category B Claim (Proof of Purchase or UPC): If a Class Member has proof of purchase or a UPC for 2011 Washable Coloured Bubbles, Crayola will offer the Class Member his/her choice of:
- (i) Cash Option: The cash value of the 2011 Washable Coloured Bubbles product(s) (plus any shipping, handling and tax paid in connection with original purchase, as recorded on receipt) in the form of a cheque; or
 - (ii) Voucher Option: The value of the 2011 Washable Coloured Bubbles product(s) (plus any shipping, handling and tax paid in connection with original purchase, as recorded on receipt) plus \$5.00, all in the form of Crayola Vouchers;

Under both Category A and Category B, compensation or vouchers will not be given to more than one person for the same product;

2. Compensation for Cleaning Costs: For out-of-pocket costs for cleaning supplies or services to remediate stains caused by 2011 Washable Coloured Bubbles, Crayola will provide the cash value of such costs provided that:
- (i) The Class Member has a receipt or other reliable documentation for a 2011 Washable Coloured Bubble product;
 - (ii) The Class Member attests that the stain resulted from the 2011 Washable Coloured Bubble product; and
 - (iii) Upon request, the Class Member provides a receipt or other reliable documentation showing out-of-pocket cost for the cleaning supplies or services;
3. Compensation for Property Damage: For out-of-pocket costs to remediate damage to real or personal property caused by 2011 Washable Coloured Bubbles, Crayola will provide the reasonable cash value of such costs provided the Class Member has receipts or other reliable documentation. Crayola reserves the right to seek verification of such damage, including the possible use of a claims adjustor at Crayola's expense to personally view the

damage. The claims adjustor shall be affiliated with the global organization Lindsey Group Limited, 3030 Rocky Point Drive, Suite 530, Tampa, Florida 33607;

4. Compensation to Class Members who Received Some Compensation Prior to Implementation of the Claims Program: Class Members who received compensation from Crayola prior to the implementation of the Settlement Agreement and believe that the compensation they received was less than what they would have received under the terms of this Settlement Agreement may contact the Crayola Consumer Affairs Department to receive the difference in value;

C. In addition, the Respondents have agreed to pay the following additional amounts:

- (i) All notice and publication costs;
- (ii) All Claim Administration costs;
- (iii) Fees and disbursements of Class Counsel, in the amount of \$145,000 plus applicable taxes; and
- (iv) An amount of \$500 to the Petitioner for the time and effort he devoted to the case;

D. The Settlement Agreement includes a process to submit to this Honourable Court any dispute arising out of the claims process, if it becomes necessary;

E. The Settlement Agreement provides that with respect to Quebec residents only, the *Fonds d'aide aux recours collectifs* shall be entitled to 2% (for claims under \$2,000), 5% (for claims between \$2,000 and \$5,000) or 10% (for claims over \$5,000) on each individual amount of Compensation paid in money to Class Members residing in Quebec, pursuant to s. 1(3) of the *Règlement sur le pourcentage prélevé par le Fonds d'aide aux recours collectifs*, R.R.Q., c. R-2.1, r. 2.;

F. In order to submit a Claim, eligible Class Members can submit a claim form online at the claim website www.2011washablecolouredbubblesettlement.ca, call the Claims Administrator by phone and provide details of the claim, or complete the Claim Form in writing and mail it to Crayola, make a solemn declaration (not a sworn affidavit), and, only if applicable, attach proof of purchase or other documentation;

- G. The Claim Period runs for 60 days following the Effective Date (i.e. between 30 to 90 days after the court has issued the Approval Order);
- H. The Opt-Out Deadline expires on November 10, 2013 (i.e., 90 days after the publication of the Pre-Approval Notice);

Class Notice

[16] In accordance with this Court's Judgment approving the publication of the Pre-Approval Notice dated July 11, 2013, notice was effected on August 9, 2013 in the newspapers *The National Post*, *The Globe & Mail* and *La Presse*, as well as on the Respondents' website, on the Petitioner's attorneys' website, on the Respondent's Facebook page www.facebook.com/Crayola and on the website www.2011washablecolouredbubblesettlement.ca. Additionally, Crayola issued press releases on the Canadian newswire.

[17] All of the materials disseminated and made available to Class Members on August 9, 2013 appeared in French and English.

Approval

[18] The Court finds that the terms and provisions of the Settlement Agreement have been entered into in good faith and are hereby approved as fair, reasonable and adequate, and in the best interests of the Settlement Class Members.

[19] The Court finds that the settlement is fair, adequate and reasonable based on the following factors¹, the Court finds that:

- i. The negotiations occurred at arm's-length;
- ii. There was sufficient discovery;
- iii. The proponents of the settlement are experienced in similar litigation;
- iv. No Class Member has objected;
- v. The Petitioner's case favours approval of the settlement;

¹ Markus c. Reebok Canada inc., 2012 QCCS 3562; Richard c Volkswagen Group Canada inc., 2012 QCCS 5534.

- vi. The risk, expense, complexity and duration of further litigation weighs in favour of approval;
- vii. The risk of maintaining class action status throughout the trial favours approval;
- viii. The amount offered in settlement is fair and adequate and worthy of approval;

Fees

[20] The Court finds that Class Counsel fees are fair and reasonable based on the following factors as set out in sections 3.08.01 to 3.08.03 of the Code of ethics of advocates², particularly with a view to the objectives of class proceedings (i.e. access to justice, judicial economy, behaviour modification) and the risks assumed by Class Counsel³.

[21] The Court is of the opinion that the fees and costs provided under the Settlement Agreement in the amount of 145 000 \$ plus taxes are fair and reasonable considering:

- i) The settlement was achieved as a result of the efforts of Class Counsel and creates a claims program that sets no ceiling as to the total amount Crayola may be required to expend in handling claims pursuant to the Settlement Agreement, in addition to providing additional relief that will benefit the Settlement Class Members;
- ii) Class Counsel have conducted the litigation and achieved the settlement with skill and diligent advocacy;
- iii) In the absence of a settlement, it would involve lengthy proceedings with an uncertain resolution;
- iv) Had Class Counsel not achieved the settlement, there would remain a risk that the Petitioner and the Settlement Class Members may have recovered less than what the Settlement Agreement provides or nothing at all from the Respondents;
- v) The attorneys' fees were negotiated and will in no way reduce, the relief available to the Settlement Class Members;
- vi) The time Class Counsel dedicated to this action was reasonably necessary to achieve this settlement;

²RRQ, c. B-1, r. 1.

³*Lavoie c. Régie de l'assurance maladie du Québec*, 2013 QCCS 866.

vii) Class Counsel has proposed, and the Court agrees, that a multiplier of 1.4 is appropriate⁴;

viii) Class Counsel assumed all of the financial risks associated with initiating, financing and maintaining the litigation.

[22] Concerning the issue of the payment to the Petitioner of \$500, the Court is of the opinion that it is reasonable and should be approved since:

- a) Petitioner has adequately protected and represented the interests of the Members of the Class since the institution of the present proceedings;
- b) Petitioner has spent time working and cooperating with Class Counsel in order to prepare and file the present proceedings and in order to help negotiate and conclude the Settlement Agreement;
- c) The Respondents have agreed to pay this amount;
- d) This nominal sum of \$500 is reasonable under the present circumstances.

POUR CES MOTIFS, LE TRIBUNAL :

[24] **ACCUEILLE** la requête;

[25] **AUTORISE** un recours collectif contre les Intimées pour les fins d'un règlement hors cour seulement;

[26] **ATTRIBUE** au Requérent le statut de représentant du groupe décrit comme suit :

«toutes les personnes résidant au Canada ayant acheté ou acquis (incluant par voie de cadeaux) au Canada des Bulles de Couleur Lavables 2011, jusqu'au 12 septembre 2013. »

WHEREFORE, THE COURT:

[24] **GRANTS** the present motion;

[25] **AUTHORIZES** the bringing of a class action against the Respondents for the purposes of settlement only;

[26] **ASCRIBES** to the Petitioner the status of representative of the group herein described as:

“all Persons residing in Canada who have purchased or acquired (including by gift) in Canada 2011 Washable Coloured Bubbles, through to September 12, 2013.”

⁴Guilbert c. Sony BMG Musique (Canada) inc., 2007 QCCS 432; Sony BMG Musique (Canada) inc. c. Guilbert, 2009 QCCA 231.

[27] **DÉCLARE** que la Convention de règlement R-1 (incluant son préambule et ses Annexes) constitue une transaction au sens des articles 2631 et suivant du *Code civil du Québec*, obligeant toutes les parties et tous les Membres du recours collectif qui ne se sont pas exclus en temps utile;

[28] **DÉCLARE** que la Convention de règlement R-1 est valide, équitable et raisonnable, et qu'elle correspond au meilleur intérêt des Membres du Groupe, du Requérent et des Intimées;

[29] **APPROUVE** la Convention de règlement R-1;

[30] **DÉCLARE** que l'ensemble de la Convention de règlement R-1 (incluant son Préambule et ses Annexes) fait partie intégrante du présent jugement;

[31] **ORDONNE** aux parties et aux Membres du Groupe, sauf ceux exclus conformément à la Convention de règlement et au présent jugement, de se conformer à la Convention de règlement R-1;

[32] **APPROUVE** la forme et le contenu du Formulaire de réclamation et du Formulaire de demande d'exercice du droit d'exclusion, respectivement les Annexes A et C de la Convention de règlement R-1;

[33] **ORDONNE** que chaque Membre du Groupe qui désire s'exclure de la Convention de règlement R-1 et ainsi ne pas être lié par la Convention de règlement, soit tenu d'agir conformément à la Convention de règlement et au Formulaire de demande d'exercice du droit d'exclusion (Annexe C de la Convention de règlement);

[27] **DECLARES** that the Settlement Agreement R-1 (including its Preamble and its Schedules) constitutes a transaction within the meaning of articles 2631 and following of the *Civil Code of Quebec*, binding all parties and all Class Members who have not excluded themselves in a timely manner;

[28] **DECLARES** that the Settlement Agreement R-1, is valid, fair, reasonable and in the best interest of the Class Members, the Petitioner, and the Respondents;

[29] **APPROVES** the Settlement Agreement R-1;

[30] **DECLARES** that the Settlement Agreement R-1 in its entirety (including its Preamble and its Schedules) is an integral part of this judgment;

[31] **ORDERS** the parties and the Class Members, with the exception of those who are excluded in accordance with the terms and conditions of the Settlement Agreement and with this judgment, to abide by the terms and conditions of the Settlement Agreement R-1;

[32] **APPROVES** the form and content of the Claim Form and Opt-Out Form, respectively as Schedules A and C of the Settlement Agreement R-1;

[33] **ORDERS** that each Class Member who wishes to opt out of the Settlement Agreement R-1, and thus not be bound by the Settlement Agreement, must do so in conformity with the Settlement Agreement and the Opt-Out Form (Schedule C of the Settlement Agreement);

- [34] **DÉTERMINE** le calendrier relatif à l'administration de la Convention de règlement, à savoir :
- [34] **DETERMINES** the schedule regarding the administration of the Settlement Agreement, namely:
- a) Échéance pour exercice du droit d'exclusion : le 10 novembre 2013;
- (a) The deadline for opting out of the Settlement Agreement: November 10, 2013;
- b) Échéance pour transmettre une réclamation conforme à la Convention de règlement : 90 jours après le Jugement d'Approbation.
- (b) The deadline to file a claim under the Settlement Agreement: 90 days following the Approval Order.
- [35] **DÉCLARE** que pour être valides, les Formulaires de réclamation doivent être remplis et transmis tel que stipulé à la Convention de règlement R-1;
- [35] **DECLARES** that to be eligible, Claim Forms must be completed and submitted in the manner stipulated by the Settlement Agreement R-1;
- [36] **ORDONNE** que les prélèvements du Fonds d'aide aux recours collectifs soient effectués seulement sur chaque réclamation individuelle des membres résidents au Québec, telle que prévue à la Convention de règlement R-1, et soient remis conformément à la *Loi sur le recours collectifs*, et le *Règlement sur le pourcentage prélevé par le Fonds d'aide aux Recours collectifs*;
- [36] **ORDERS** that the levies by the *Fonds d'aide aux recours collectifs* be collected only on each claim made by Quebec residents, as provided for in the Settlement Agreement R-1, and be remitted according to the *Loi sur le recours collectifs*, and the *Règlement sur le pourcentage prélevé par le Fonds d'aide aux recours collectifs*;
- [37] **APPROUVE** le paiement forfaitaire de 500\$ au Requérant conformément à la Convention de règlement R-1;
- [37] **APPROVES** the lump sum payment of \$500 to the Petitioner in accordance with the Settlement Agreement R-1;
- [38] **APPROUVE** le versement par les Intimées aux Procureurs du Requérant des honoraires extrajudiciaires et frais tel que prévu à la Convention de règlement R-1;
- [38] **APPROVES** the payment by the Respondents to Class Counsel of its extrajudicial fees and costs as provided for in the Settlement Agreement R-1;
- [39] **RÉSERVE** le droit des parties de s'adresser au tribunal pour solutionner quelque litige que ce soit découlant de la Convention de règlement R-1;
- [39] **RESERVES** the right of parties to ask the Court to settle any dispute arising from the Settlement Agreement R-1;
- [40] **LE TOUT**, sans frais.
- [40] **ALL OF WHICH**, without costs.

Chantal Corriveau jcs
CHANTAL CORRIVEAU, J.S.C.

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Date of hearing: September 12, 2013

