NOS. 12-1165(L); 12-1166; 12-1167

In The

United States Court of Appeals

For The Third Circuit

IN RE: BABY PRODUCTS ANTITRUST LITIGATION

ON APPEAL FROM ORDERS ENTERED DECEMBER 21, 2011 IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA,
CIVIL DOCKET NOS. 06-00242-AB and 09-06151-AB

BRIEF OF APPELLEES – DEFENDANTS TOYS "R" US, INC., TOYS "R" US-DELAWARE, INC., BABIES "R" US, INC., BABYBJÖRN AB, BRITAX CHILD SAFETY, INC., KIDS LINE, LLC, MEDELA, INC., PEG PEREGO U.S.A., INC., and REGAL LAGER, INC.

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CORPORATE DISCLOSURE STATEMENT

BabyBjörn AB states that it is 100% privately held and is not owned by any corporation that is publicly traded.

Britax Child Safety, Inc. states that:

1. The parent corporation of Britax Child Safety, Inc. is Britax Child Safety Holdings, Inc., whose parent is Britax US Holdings, Inc., whose parent is Britax Childcare Holdings Limited (UK), whose parent is Britax Group Limited (UK), whose parent is Nordic Capital Fund VII.

2. No publicly held company holds 10% or more of its stock.

3. No publicly held corporation which is not a party to the proceeding before this Court has a financial interest in the outcome of the proceeding to the extent it relates to Britax Child Safety, Inc.

Kids Line, LLC states that:

1. The parent corporation of Kids, LLC is Kids Brands, Inc.

2. Kids Brands, Inc. holds 10% or more of Kids Line, LLC's stock.

Medela, Inc. states that its parent company is Medela Holding A.G. No publicly owned company holds 10% or more of the stock of Medela, Inc.

Peg Perego U.S.A., Inc. states that is a 100% privately held corporation whose parent company is Peg Perego, S.p.A. No publicly held company holds 10% or more of its stock.

Regal Lager, Inc. states that it is a 100% privately held corporation. No publicly owned company holds 10% or more of its stock.

Toys “R” Us, Inc., Toys “R” Us-Delaware, Inc. and Babies “R” Us, Inc., state that:

1. Toys “R” Us, Inc. has no parent corporation;

2. Toys “R” Us-Delaware, Inc. is a wholly owned subsidiary of Toys “R” Us, Inc.;

3. Babies “R” Us, Inc. was dissolved as of February 14, 2006;

4. Toys “R” Us, Inc. is privately owned and no publicly held corporation owns 10% or more of its stock; and

5. Affiliates of Kohlberg Kravis Roberts and Vornado Realty Trust, each of which is a publicly held corporation, own more than 10% of the stock in Toys “R” Us, Inc.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Statutes

STATEMENT OF ISSUES PRESENTED FOR REVIEW

This appeal presents the following issues:

1. Whether the District Court abused its discretion when it approved a notice of a consumer class action settlement and a claim form which include a non-exclusive list of forms of proof of purchase class members could submit with their claims but did not specify that a photograph might qualify and expressly directed class members that they could contact the Claims Administrator at a toll-free number with any questions about the requirements for submitting a claim. Suggested Answer: No.

2. Whether the District Court abused its discretion when it approved a class action settlement agreement: (i) which provided that the District Court would award undistributed settlement proceeds, if any, to cy pres recipients it would select; and (ii) any District Court order concerning cy pres recipients would be subject to appeal. Suggested Answer: No.

3. Whether the District Court abused its discretion when it approved a consumer class action settlement agreement providing that class members without documentary proof of purchase would be limited to a $5 distribution of settlement proceeds for each eligible product they purchased notwithstanding that there may be other unclaimed funds that will be distributed to cy pres recipients. Suggested Answer: No.

STATEMENT OF RELATED CASES AND PROCEEDINGS

Defendants[1] join the Statement of Related Cases and Proceedings set forth in the Brief of Appellees-Plaintiffs.[2]

[1] "Defendants" refers to Appellees-Defendants BabyBjörn AB, Britax Child Safety, Inc., Kids Line, LLC., Medela, Inc., Peg Perego U.S.A., Inc., Regal Lager, Inc., Toys "R" Us, Inc., Toys "R" Us-Delaware, Inc., and Babies "R" Us, Inc.

[2] "Brief of Appellees-Plaintiffs" refers to the brief of the class action plaintiffs, entitled "Brief of Appellees."

STATEMENT OF THE STANDARD AND SCOPE OF REVIEW

Defendants agree with the Statement of the Standard and Scope of Review set forth in the Brief of Appellees-Plaintiffs.

SUMMARY OF ARGUMENT

This appeal relates to the settlement of a consumer class action in which plaintiffs alleged that Toys "R" Us, Inc., Babies "R" Us, Inc., and Toys "R" Us-Delaware, Inc. conspired with certain manufacturers and distributors of baby products[3] to engage in resale price maintenance in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. (JA 16-19.)

In May 2010, after more than four years of contentious litigation, the parties engaged in a three-day mediation, which was followed by several months of additional negotiations and culminated in the execution of a Settlement Agreement on January 23, 2011. On December 21, 2011, the United States District Court for the Eastern District of Pennsylvania ("District Court") issued the Amended Final Order and Judgment approving the Settlement Agreement and final Allocation Order that are the subject of this appeal. (JA 10.) The Amended Final Order and Judgment found that the terms of the Settlement Agreement are "fair, reasonable, and adequate and in the best interests of the [p]laintiffs" and that the class Notice "constituted the best notice practicable under the circumstances and constituted valid, due and sufficient notice to all persons entitled thereto." (JA 13.) The Allocation Order found that the allocation of the settlement fund was "fair,

[3] The named manufacturer and/or distributor defendants are BabyBjörn AB, Britax Child Safety, Inc., Kids Line, LLC, Maclaren USA, Inc., Medela, Inc., Peg Perego U.S.A., Inc. and Regal Lager, Inc.

reasonable, and adequate and in the best interest of the [class members] . . . as a whole." (JA 3, 10.)

Objector Kevin Young ("Young") attacks three aspects of the settlement: (i) the Notice; (ii) the cy pres distribution of unclaimed settlement proceeds; and (iii) the award of attorney's fees and costs to class counsel. Defendants take no position with respect to the attorney's fees and costs issue. Defendants respond to Young's notice and cy pres arguments herein.

First, Young objects to the Notice of class action settlement on the ground that it did not apprise class members that at the Fairness Hearing the District Court allegedly modified the settlement to grant the Claims Administrator discretion to determine the amount to which class members were entitled based on the nature of the proof of purchase and purchase price submitted with their Claim Forms. More specifically, Young contends that the Notice does not disclose that if claimants submitted a picture of a Settlement Product[4] they may be entitled to a greater award than the $5 distribution to which claimants without any documentary proof of purchase are entitled. Young's objection is without merit for the simple reason that no modifications to the Settlement Agreement were made at the Fairness Hearing and the Notice and Settlement Agreement clearly and unambiguously

[4] "Settlement Product" has the meaning ascribed to in the Settlement Agreement. (JA 217.)

disclose that the Claims Administrator and the District Court retain ultimate discretion concerning the distribution of settlement proceeds. In addition, the Notice and Settlement Agreement outline a non-exclusive list of the types of documentary proof which may qualify as proof of purchase and purchase price. Moreover, the Notice specifically discloses that "other records" than those specifically listed may be sufficient. For this reason, the flaw in the Notice alleged by Young does not exist and the District Court did not abuse its discretion in approving the Settlement Agreement or the notice thereof.

Second, the Settlement Agreement contemplates a cy pres distribution of undistributed settlement proceeds. In the event that a cy pres distribution is necessary, the Settlement Agreement outlines a procedure for the parties to recommend to the District Court four potential non-profit organizations to receive any such distribution and retains for the District Court ultimate discretion to choose those or other recipients. In its Memorandum finally approving the settlement, the District Court specifically committed to choosing cy pres recipients who "serve the underlying interests of the class members." (JA 52.) Young objects on the ground that the cy pres recipients are not identified in the Settlement Agreement or the Notice of class action settlement. According to Young, in the absence of notice of the identities of cy pres recipients, class members cannot

object to potential recipients, and the selection process is immune to appellate review.

Young's objection is baseless. The Settlement Agreement and its procedure for determination of any cy pres recipients is not "unfair" simply because the identity of any such recipients has not yet been decided. Significantly, at the time the agreement was reached, January 23, 2011, the parties did not know if there would be any cy pres award. Moreover, there is nothing "unfair" about permitting the parties to make recommendations to the District Court for it to decide on the final recipients. If the present Objections/Appellants are unhappy with the District Court's future order on this point, they can appeal at that time. For this reason, the District Court did not abuse its discretion in approving the settlement or its plan for cy pres award(s) and its decision should be affirmed.

Third, Young further objects to cy pres distribution because he contends that claimants who receive only a $5 distribution should be paid more before funds are distributed to charity. Young's argument, however, is based on a faulty premise. In connection with lengthy and hard fought settlement negotiations, the parties agreed that class members who could not provide any proof of purchase or purchase price would be fully compensated with a $5 distribution from the Settlement Fund for each Settlement Product they claim to have purchased. Those class members will receive their distributions pursuant to the express terms of the

Settlement Agreement prior to any cy pres distribution. Accordingly, there is no basis for any argument that the interests of cy pres beneficiaries are being placed before those of the class. To the extent claimants without documentary proof were dissatisfied with a $5 distribution, the remedy available to them was to opt-out of the settlement and proceed independently against Defendants.

Accordingly, as set forth herein, the District Court did not abuse its discretion by approving the Settlement Agreement or Allocation Order as structured. Consequently, the District Court should be affirmed.

ARGUMENT

Defendants agree with Plaintiffs that the District Court's orders should be affirmed.[5] For the additional reasons set forth herein, the District Court should be affirmed.

A. The District Court Did Not Modify the Class Notice or Claim Form During the Fairness Hearing, Nor Did It Abuse Its Discretion by Approving a Class Notice and Claim Form Which Provided a Non-Exclusive List of Examples of Valid Proof of Purchase

The class Notice and Claim Form approved by the District Court notify class members that, to be eligible for a distribution from the Settlement Fund,[6] they are required to submit valid proof of purchase and purchase price. (JA 284, 278.) More specifically, the Notice informs class members that: (i) if they produce documentary proof of purchase and purchase price, they are eligible for a 20% refund of the actual purchase price of each Settlement Product, subject to certain enhancements; (ii) if they produce documentary proof of purchase, but not purchase price, they are eligible for a 20% refund of the estimated retail price of each Settlement Product, subject to certain enhancements; and (iii) if they can not

[5] Defendants generally agree with the arguments in Sections A and B of the Brief of Appellees-Plaintiffs. Defendants take no position with respect to the appeal of the award of attorney's fees and costs. (JA 229, ¶ 29.)

[6] "Settlement Fund" has the meaning ascribed to in the Settlement Agreement. (JA 216-217).

produce documentary proof of purchase, they are eligible for a maximum distribution of $5 for each Settlement Product. (JA 284.)

The Notice specifically discloses that the Claims Administrator "determines" whether documentation submitted by claimants constitutes "valid proof of purchase and purchase price." (JA 284.) The Notice also discloses that distributions from the Settlement Fund will not take place until "after review, determination, and audit of the Claim Forms by the Claims Administrator and approval by the Court of the Claims Administrator's recommendations as to the specific amounts to be paid to the Claimants." (JA 284.)

Consistent with the Notice, the Claim Form informs class members that "[t]o recover the maximum amount," class members are required to "attach documentation showing [their] purchase of Settlement Products from Toys "R" Us or Babies "R" Us. (JA 276.) The Claim Form additionally sets forth a non-exclusive list of examples of "[a]cceptable proof" that "may" serve as proof of such purchase and expressly contemplates that "other records" may suffice. (JA 276.) Specifically, the Claim Form provides, in relevant part, that proof of purchase:

> may include receipts, cancelled checks, credit card statements, records from Toys "R" Us or Babies "R" Us, or other records that show you purchased the baby product and when the purchase was made.

(JA 276.)

The Claim Form also expressly encourages class members to contact the Claims Administrator for free help with any questions regarding the claims process. Indeed, each page of the Claim Form contains a footer directing class members with "Questions or "Need[ing] Help" to contact the Claims Administrator at a toll-free number or at a website created solely for claims administration of this settlement. (JA 275-278.)

Despite the clear and unambiguous notice and instructions to class members concerning the claims administration process, Young appeals on the ground that the District Court allegedly modified the Settlement Agreement at the Fairness Hearing and then found that compensation to class members was adequate without informing class members of the modification. (Young Br. at 17.)[7] In particular, according to Young, the Notice did not sufficiently inform class members that: (i) the Claims Administrator retained discretion to determine the distribution to which a class member was entitled based upon the form of proof submitted; and (ii) that photographs were newly permitted as proof of purchase. Young's argument is based entirely on colloquy during the Fairness Hearing before the District Court in which counsel for the Plaintiffs indicated that a "photograph" or "other evidence" showing both that a Settlement Product was purchased at a Babies "R" Us or Toys

[7] "Young Br." refers to the Brief of Objector-Appellant Kevin Young.

"R" Us retail location (or on-line) and the date of the purchase might constitute sufficient proof of purchase. (JA 486.) The District Court then expressed the view that Young should be pleased. (JA 486.)

The colloquy did not modify the Settlement Agreement and did not add anything new. The Notice and Claim Form provide a list of examples of valid documentary proof of purchase and expressly state that "other records" may suffice. The discussion before the District Court about the fact that photographs that show a Settlement Product was purchased at Toys "R" Us or Babies "R" Us and when the purchase took place may constitute "other records" did not in any way change the terms of the Settlement Agreement, the Notice or the Claim Form. Nor did the discussion during the Fairness Hearing somehow imbue the Claims Administrator with discretion that it did not already possess, subject to final approval by the District Court, by virtue of the plain terms of the Notice, the Claim Form, the Settlement Agreement and the Allocation Order.

Contrary to Young's argument, class members were clearly notified of the Claims Administrator's role in evaluating the quality of proof of purchase submitted with a Claim Form. First, the Settlement Agreement, a publicly filed document, which also was published on the claims administration web site, specifically provided that the "Claims Administrator shall determine" whether and in what amount each claimant is entitled to a distribution from the settlement fund

"based upon review of each Authorized Claimant's Claim Form." (JA 225, ¶ 18.) Similarly, the Allocation Order directs the Claims Administrator to make determinations as to the adequacy of the documentary proof submitted with each claim. (JA 4 – 5, ¶¶ 6(a) – 6(b).) Like the Claim Form, the Allocation Order also states that:

> [v]alid proof of purchase may include but is not limited to receipts, cancelled checks, credit card statements, records from Toys "R" Us or Babies "R" Us, or other records that show the Authorized Claimant purchased the Settlement Product(s) from Toy "R" Us or Babies "R" Us, and when the purchase was made.

(JA 5, ¶ 6(d).) The Allocation Order further reserves for the District Court the power to make final determinations concerning distributions from the settlement fund, expressly stating that "[n]o payments shall be made until so ordered by the Court." (JA 7, ¶ 13.)

Therefore, consistent with the requirements of Rule 23 of the Federal Rules of Civil Procedure, class members were informed that the dollar amount of any distribution of settlement proceeds hinged on the quality of proof of purchase and purchase price submitted with the Claim Forms. Given that the Settlement Agreement, Notice, Claim Form, and Allocation Order all clearly and unambiguously disclosed the role of the Claims Administrator, and that the ultimate authority to approve distributions of settlement proceeds rests with the District Court, and that there was no modification to the Settlement Agreement at

the Fairness Hearing, there is no basis for any argument that the notice process was flawed or that there has been any abuse of discretion by the District Court.

B. The District Court Did Not Abuse Its Discretion By Approving a Class Action Settlement Which Reserved For the Court the Discretion To Choose Cy Pres Recipients After the Claims Process Is Complete

The Settlement Agreement specifies that excess settlement fund proceeds will be distributed cy pres, outlines the procedure for identifying potential recipients and reserves for the District Court the ultimate discretion to choose where any such cy pres proceeds will be distributed. In particular, the Settlement Agreement provides that, in the event a cy pres distribution is necessary:

> the parties will jointly identify up to four (two by Plaintiffs and two by Defendants) not-for-profit organizations exempt from federal taxation . . . they respectively recommend to the Court for any cy pres distribution."

(JA 226, ¶ 22.) Thus, the Settlement Agreement expressly retains for the District Court the authority to approve cy pres recipients and, indeed, in the Order approving the settlement, the District Court expressly committed to ensuring that the cy pres recipients chosen will "serve the underlying interests of the class members." (JA 52.)

Young appeals the denial of his objection that neither the Notice nor the Settlement Agreement disclosed to class members the identity of cy pres recipients. According to Young, the District Court left class members "without

any say over whether the parties and [D]istrict [C]ourt correctly follow the law in making a cy pres allocation." (Young Br. at 25.) Young also argues that the ALI principles for cy pres awards should be the law and that the settlement is somehow inconsistent with such principles. (Young Br. at 23-24.) Young further argues that, as structured, the Settlement Agreement leaves any cy pres award immune from class member commentary or scrutiny and from appellate review. (Young Br. at 27.)

Again, Young is mistaken. First, the District Court committed to choosing cy pres recipients that will "serve the underlying interests of the class members." (JA 52.) Thus, there is no danger that any cy pres award will be inconsistent with the ALI principles espoused in Young's Brief, including, that the Court consider the nature of the underlying suit and the interests of class members. (Young Br. at 27.)

Moreover, there is no provision in the Settlement Agreement that requires the District Court to approve any of the cy pres recommendations made by the parties. Thus, if the District Court finds that the recommendations of the parties do not "serve the underlying interests of class members," the District Court remains free to select whatever cy pres recipient(s) it finds appropriate. Additionally, there is no reason to believe that the District Court's order directing the cy pres distribution could not be appealed once it is entered. See, e.g., In re Holocaust

Victim Assets Litig., 424 F.3d 158 (2d Cir. 2005) (appellate review of cy pres distribution order entered after final approval of class action settlement).

For these reasons, Young's appeal of the denial of his objection to the Settlement Agreement is without merit, there has been no abuse of discretion by the District Court and the District Court's orders should be affirmed.

C. The District Court Did Not Abuse Its Discretion By Approving $5 Distributions to Claimants Without Documentary Proof of Purchase and Cy Pres Distribution of Undistributed Settlement Proceeds

Young also argues that cy pres distribution of any potential undistributed settlement proceeds is improper because certain class members – those with no documentary proof of purchase or purchase price, who are to receive a $5 distribution for each Settlement Product – will not be fully compensated. (Young Br. at 31.) According to Young, any cy pres distribution will be unfair because the money "could just as easily have gone to" class members. (Young Br. at 32.)

Young's argument, however, is based on the improper premise that class members without documentary proof of purchase are not fully compensated by their receipt of the amount provided by the settlement. After extensive negotiations on this point, the Settlement Agreement reflects a compromise intended to balance the risk of fraud by claimants with the desire to compensate, albeit to a more limited degree, those claimants who lacked documentary proof of purchase. Accordingly, the parties agreed, and the District Court approved, a

settlement providing that a $5 payment for each Settlement Product included in a claim constitutes full compensation for class members without documentary proof of purchase.[8]

Even Young essentially concedes that this payout is full compensation for such claimants and not "unfair." In fact, he acknowledges that if a cy pres distribution were not contemplated by the settlement, and instead, undistributed proceeds were to revert to defendants, than a $5 cap on compensation to class members without documentary proof would be unobjectionable. (Young Br. at 33.) Thus, according to Young, class members without documentary proof should be entitled to greater compensation simply because the settlement here contemplates cy pres distribution of undistributed settlement proceeds rather than reversion to defendants. Young makes no rational justification for such a result – and, indeed, there is none.[9]

Young's objection, therefore, was without merit and the District Court did not abuse its discretion by approving the settlement as structured.

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[8] It also would have been reasonable for the parties to agree that claimants with no documentary proof of purchase would not be entitled to any distribution. Had they done so, this issue would not exist.

[9] If class members without documentary proof of purchase and/or purchase price were dissatisfied with the distribution to which they are entitled in accordance with the plain terms of the Settlement Agreement and the Notice, then the appropriate remedy for them was to opt-out and proceed against defendants independently.

CONCLUSION

For all the reasons set forth above, the District Court's orders should be affirmed.

Respectfully submitted,

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Dated: June 6, 2012

CERTIFICATE OF BAR MEMBERSHIP

I certify that Mark Weyman and I are members of the Bar of this Court in good standing.

/s/ Melissa Rubenstein
Melissa Rubenstein

CERTIFICATE OF COMPLIANCE

I certify that the Brief of Appellees complies with the type-volume limitations of Rule 32(a)(7)(B) of the Rules of Appellate Procedure.

1. Exclusive of the portions exempted by Rule 32(a)(7)(B)(iii) of the Rules of Appellate Procedure**,** the Brief of Apellees-Defendants contains 3,227 words.

2. The Brief of Apellees-Defendants was prepared using Microsoft Word 2003 in Times New Roman with a 14 point font.

/s/ Melissa Rubenstein
Melissa Rubenstein

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IS IDENTICAL TO THE PAPER COPY FILED

I certify that the electronic version of the brief being filed on June 6, 2012, is identical to the paper copies of the brief.

/s/ Melissa Rubenstein
Melissa Rubenstein

CERTIFICATION AS TO ANTI-VIRUS SCANNING

I certify that the electronic version of the brief being filed on June 6, 2012 has been scanned for viruses on this date by way of the Trend Micro Office Scan Version 10.0, with all virus definitions updated as of this date, and found to be clean of viruses.

/s/ Melissa Rubenstein
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CERTIFICATE OF SERVICE

I certify that, on June 6, 2012, I served one true and correct copy of the foregoing Brief of Apellees-Defendants by ECF and overnight mail addressed as follows:

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