

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JEFFREY MORRIS, TARAS KICK,
REBECCA SALAWDEH and STACEY
ANTALEK, on Behalf of Themselves and All
Others Similarly Situated,

Plaintiffs,

vs.

CBS BROADCASTING, INC., CBS
CONSUMER PRODUCTS, PLANET TOYS,
INC., TOYS "R" US, INC., WALGREEN CO.
and HAMMACHER SCHLEMMER & CO.,
INC.,

Defendants.

x
: Civil Action No. 08-CV-0592(HB)
:

: CLASS ACTION
:

: [SECOND AMENDED PROPOSED]
: ORDER PRELIMINARILY APPROVING
: SETTLEMENT, CONDITIONALLY
: CERTIFYING SETTLEMENT CLASS,
: PROVIDING FOR NOTICE AND
: SCHEDULING ORDER
:

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WHEREAS, plaintiffs Jeffrey Morris, Taras Kick, Rebecca Salawdeh, Stacey Antalek and defendants CBS Broadcasting, Inc. and CBS Corporation and all of their respective parents, subsidiaries, business units and affiliated companies of CBS, including but not limited to CBS Television Distribution and CBS Enterprises (collectively "CBS");¹ Walgreen Co.; Hammacher Schlemmer & Co., Inc.; Toys "R" Us; Amazon.com, Inc.; Buy.com, Inc.; Costco Wholesale Corporation; Sears Roebuck and Co.; K Mart Corporation; and QVC, Inc.,² have entered into a Stipulation of Settlement ("Settlement Agreement"), after a full-day mediation before and several follow up telephone conferences with the Honorable Daniel Weinstein (ret.) and lengthy arms-length settlement discussions amongst the parties;

AND WHEREAS, the Settlement Agreement is subject to review under Rule 23 of the Federal Rules of Civil Procedure and together with the exhibits thereto, sets forth the terms and conditions for the proposed settlement and dismissal of the claims alleged in Plaintiffs' Amended Class Complaint on the merits and with prejudice;

AND WHEREAS, the Court has read and considered the Settlement Agreement and accompanying documents and after oral presentation by the parties to this Court on May 5, 2009, the Parties have consented to the entry of this Order.

¹ All defined terms used herein have the meanings set forth in the definition section of the Settlement Agreement.

² The parties to the Settlement Agreement include defendants named in this Federal Action as well as additional defendants named in the Related State Court Action pending in California Superior Court for the County of Los Angeles and styled *Asbestos Disease Awareness Organization, et al. v. CBS Corporation, et al.* (No. BC388918). CBS; Walgreen Co.; and Toys "R" Us are named defendants in this Federal Action as well as the Related State Court Action. Hammacher Schlemmer & Co., Inc. is a defendant in this Federal Action only. Amazon.com, Inc.; Buy.com, Inc.; Costco Wholesale Corporation; Sears Roebuck and Co.; K Mart Corporation; and QVC, Inc. are named defendants in the Related State Court Action only.

NOW, THEREFORE, IT IS HEREBY ORDERED THAT:

A. The Settlement Agreement is Preliminarily Approved and Final Approval Schedule Set

1. The Court does hereby preliminarily approve the Settlement Agreement and the terms and conditions of settlement set forth therein, subject to further consideration at the final settlement approval hearing ("Settlement Hearing") described below.

2. The Court has conducted a preliminary assessment of the fairness, reasonableness, and adequacy of the Settlement Agreement, and hereby finds that the settlement falls within the range of reasonableness meriting possible final approval. The Court therefore preliminarily approves the Settlement Agreement, subject to further consideration at the Settlement Hearing described below.

3. Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, the Court hereby sets a hearing ("Settlement Hearing") to be held on Feb. 16, ²⁰¹⁰ 2009, at 10 a.m., or as soon thereafter as counsel may be heard, at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, New York, New York, 10007-1312, for the following purposes:

(a) to make a final determination of whether this action satisfies the applicable prerequisites for class action treatment, for purposes of settlement, under Rules 23(a) and (b) of the Federal Rules of Civil Procedure;

(b) to determine whether the proposed terms of settlement are fair, reasonable, and adequate and should be approved by the Court;

(c) to determine whether Judgment as provided under the Settlement Agreement should be entered, dismissing the Amended Class Action Complaint ("Complaint") filed herein, on the merits and with prejudice, and to determine whether the release by the Settlement Class of the Settled Claims as set forth in the Settlement Agreement should be provided to Defendants;

(d) to determine whether Plaintiffs' application for an award of attorneys' fees and reimbursement of expenses to Plaintiffs should be granted; and

(e) to rule upon such other matters as the Court may deem appropriate.

4. Class Members must file and serve any objections to the proposed Settlement Agreement on or before September 14, 2009, including any memoranda and/or submissions in support of said objection, which deadline will be set forth in the Class Notice pursuant to paragraph 30(a) of this Order;

5. Memoranda, affidavits, and other materials in support of the proposed settlement, and Plaintiffs' request for an award of fees and expenses shall be filed and served on or before October 2, 2009, with any reply/final papers due to be filed and served on or before October 16, 2009.

6. The Court reserves the right to continue the date of the Settlement Hearing without further notice to the Class Members.

7. Should the Court require material modifications of the Settlement Class as defined in Paragraph 10 of this Order below or to the Notice plan described in the Settlement Agreement, the parties will be allowed the opportunity to be heard and/or to rescind the settlement based on the modifications.

8. Neither Defendants nor their counsel shall have any responsibility for the application for attorneys' fees or reimbursement of expenses, and such matters will be considered separately from the fairness, reasonableness, and adequacy of the Settlement Agreement.

9. As set forth in the Settlement Agreement, defendants named in the Related State Action, including defendants Amazon.com, Inc.; Buy.com, Inc.; Costco Wholesale Corporation; Sears Roebuck and Co.; K Mart Corporation; and QVC, Inc., have executed and agreed to be bound by the terms and conditions of the Settlement Agreement and to participate in the implementation of

the Settlement Agreement upon Final Approval of the Settlement Agreement, and are represented by the same counsel representing Defendants in this Federal Action who are parties to the Settlement Agreement.

B. The Proposed Settlement Class Is Certified for Settlement Purposes

10. Pursuant to Rules 23(a) and (b)(3) of the Federal Rules of Civil Procedure, and for the purposes of the Settlement only, the Court hereby certifies this action as a class action on behalf of the following Settlement Class:

All Persons who purchased or received (on or before the date on which Class Notice is provided) any Settlement Toy Product(s) in the United States for personal use and not for resale from CBS; Toys "R" Us, Inc.; Hammacher Schlemmer & Co., Inc.; Walgreen Co.; Amazon.com, Inc.; Buy.com, Inc.; Costco Wholesale Corporation; Sears Roebuck and Co.; K Mart Corporation; and QVC, Inc. ("Defendants"). Excluded from the Settlement Class are Defendants, any entity in which a Defendant has a controlling interest or which has a controlling interest in a Defendant, and Defendants' legal representatives, assigns and successors, as well as any person who has timely filed a Request for Exclusion from the Settlement Class with the Claims Administrator under this Agreement. Also excluded are the Judges to whom the cases are assigned and any member of their immediate family.

11. The Court certifies the claims alleged in the Complaint for class treatment for settlement purposes only, including, but not limited to, negligence; misrepresentation; unjust enrichment; breaches of implied and express warranties; strict liability for design/manufacturing defects or failure to warn; violations of §349 of the New York General Business Law; fraudulent concealment; violations of California Business and Professions Code §17200 *et seq.*; violations of California Civil Code §1750 *et seq.* and other states' similar consumer protection laws; violations of California Civil Code §§1792 and 1791.1(a); violations of California Civil Code §§1792 and 1791.1(b); and violations of California Civil Code §§1792.2 and 1791.1(b).

12. The Court finds that the prerequisites for a class action under Rules 23(a) and (b)(3) of the Federal Rules of Civil Procedure have been satisfied in that (a) the number of class members is so numerous that the joinder of all individual class members is impracticable; (b) there are

questions of law and fact common to the Settlement Class; (c) Plaintiffs' claims are typical of the claims of the Settlement Class they seek to represent; (d) Plaintiffs and their counsel will fairly and adequately represent the interests of the Settlement Class; (e) the questions of law and fact common to the class members predominate over any questions affecting only individual class members; and (f) a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

13. Pursuant to Rule 23 of the Federal Rules of Civil Procedure, the Court hereby appoints plaintiffs Jeffrey Morris, Taras Kick, Rebecca Salawdeh, and Stacey Antalek as class representatives of the Settlement Class for purposes of the Settlement.

14. Having considered the factors described in Rule 23(g)(1) of the Federal Rules of Civil Procedure, the Court hereby appoints William M. Audet, Esq. of Audet & Partners, LLP, and John J. Stoia, Jr., of Coughlin Stoia Geller Rudman & Robbins LLP, as Class Counsel to represent the Settlement Class for purposes of settlement.

C. The Court Approves the Form and Method of Class Notice

15. The Court approves the form and substance of the proposed short- and (revised) long-form Class Notices, which are Exhibits A & B, respectively, to this Order.³

16. After review of Rosenthal & Company's resume, provided at the May 5, 2009 hearing, the Court approves the designation of Rosenthal & Company LLC, 75 Rowland Way, Suite 250, Novato, CA 94945, as Court-appointed Claims Administrator. The Claims Administrator shall disseminate the Notice to be given substantially in the form of Exhibits A and B, and pursuant to the

³ At the preliminary approval hearing on May 5, 2009, the Court instructed the parties to revise the long-form notice submitted to the Court on April 24, 2009, and submit such revised long-form notice on or before May 15, 2009.

method described in the Settlement Agreement. At or before the Settlement Hearing, the Claims Administrator shall file (or cause to be filed) the with Court proof of compliance with the notice plan.

17. The Court finds that the form and content of the Notice, and the method set forth in the Settlement Agreement for notifying potential Settlement Class members of the Settlement Agreement, its terms and conditions, and the Settlement Hearing meet the requirements of Rule 23(c)(2) of the Federal Rules of Civil Procedure and due process; constitute the best notice practicable under the circumstances; and shall constitute due and sufficient notice to all persons and entities entitled thereto.

18. Settlement Class members who wish to participate in the Settlement must provide a properly completed and signed Claim Form to the Claim Administrator at the address listed on the form no later than the date provided on the Notice. Such deadline may be further extended by Court order.

19. Any Settlement Class member who does not submit a timely and valid claim form will not be entitled to receive any refund, but will otherwise be bound by all of the terms of the Settlement Agreement, including the terms of the Judgment to be entered in the Action and the releases provided for in the Settlement Agreement, and will be barred from bringing any action against the Defendants asserting Settled Claims as defined in the Settlement Agreement.

20. Each person or entity who submits a Claim Form shall be deemed to have submitted to the jurisdiction of the Court with respect to the claim, and be bound by all of the terms of the Settlement Agreement, including the terms of the Judgment to be entered in the Action and the releases provided for in the Settlement Agreement, and will be barred from bringing any action against the Defendants asserting Settled Claims as defined in the Settlement Agreement.

21. Distribution of the refunds in accordance with the Settlement Agreement shall be deemed final and conclusive against all Class Members. All Settlement Class members whose claims are not approved by the Claims Administrator shall be barred from receiving a refund, but otherwise shall be bound by all of the terms of the Settlement Agreement, including the terms of the Judgment and releases provided therein.

22. All proceedings with respect to the administration, processing, and determination of claims submitted by Settlement Class members pursuant to the Settlement Agreement and the determination of all controversies relating thereto, including disputed questions of law and fact with respect to the validity of claims, shall be subject to the jurisdiction of the Court.

23. Refunds to Settlement Class members shall be distributed in accordance with the Settlement approved by the Court only after the Effective Date and after (i) all timely and valid claim forms have been processed; (ii) all Class Members who have submitted timely but otherwise deficient claims forms have, at the discretion of the Claims Administrator, been notified of the defects and given an opportunity to correct them; and (iii) all matters with respect to attorneys' fees, costs, and disbursements have been resolved by the Court and all appeals there from have been resolved or the time for such appeals has expired.

24. The Court preliminary finds that the Plaintiffs' designee of the *cy pres* payment – the *Asbestos Disease Awareness Organization* (“*ADAO*”) is appropriate and compatible with the purposes and intent of the litigation, as *ADAO* is a non-profit education and advocacy organization dedicated to raising public awareness about the dangers of asbestos exposure and the often deadly asbestos-related diseases, and has agreed to dedicate the *cy pres* funds in furtherance of this purpose.

D. Procedure for Requesting Exclusion from the Settlement Class

25. Settlement Class members shall be bound by all determinations and judgments in this action, whether favorable or unfavorable, unless such persons or entities request exclusion from the

Settlement Class in a timely and proper manner, as provided in the Settlement Agreement. A Settlement Class member requesting exclusion shall mail the request in written form by U.S. mail, postmarked no later than the date set forth in the Notice and to the address designated therein. The exclusion request must (i) state the name, address, and telephone number of the person or entity seeking exclusion; (ii) state that the person or entity wishes to be excluded from the class in *Morris v. CBS Broadcasting, Inc.*, Case No. 08-CV-0592(HB) (S.D.N.Y.); (iii) be signed by the submitting person; and (iv) state the submitting person's name.

26. If more than 150 Settlement Class Members file timely Opt-Out Requests, Defendants may, at their discretion, nullify the Settlement Agreement by notice to Plaintiffs' counsel no more than 10 days after the Opt-Out Period has expired and by providing notice to the Class in accordance with Paragraph VIII of the Settlement Agreement.

27. If, following the date of this Order, any action brought by a Settlement Class member seeking to prosecute any Settled Claims, is filed with any court, arbitration panel, or other such forum, the Defendants may seek an order preliminarily enjoining any such action pending final approval of the Settlement and exhaustion of all appeals concerning final approval of the Settlement and/or expiration of the time to initiate such appeal; except that, if such an action is brought by a person or entity who has timely and validly requested exclusion from the Settlement Class, a party may seek an order preliminarily enjoining such action only if the party determines that it threatens this Court's jurisdiction or its ability to implement the Settlement.

E. Procedure for Objecting to the Settlement

28. The Court will consider comments in support of, or in opposition to, the Settlement and/or Plaintiffs' application for an award of attorneys' fees and reimbursement of expenses only if such comments and any supporting papers are submitted in writing to the Clerk of the Court, United States District Court for the Southern District of New York, Daniel Patrick Moynihan United States

Courthouse, 500 Pearl Street, New York, New York 10007-1312, *and* copies of all such papers are served, postmarked no later than the date set forth in the Notice to *each* of the following:

COUGHLIN STOIA GELLER
RUDMAN & ROBBINS LLP
Rachel L. Jensen
655 West Broadway, Suite 1900
San Diego, CA 92101

ROGERS JOSEPH O'DONNELL
Renee D. Wasserman
311 California St., 10th Floor
San Francisco, CA 94104

Class Counsel

Counsel for Defendants

29. All comments or objections must include a reference to *Morris v. CBS Broadcasting, Inc.*, Case No. 08-CV-0592(HB) (S.D.N.Y.); the name of the person or entity on whose behalf they are submitted; and the person's or entity's address and telephone number. Attendance at the hearing is not necessary; however, persons wishing to be heard orally with respect to approval of the Settlement and/or the application for attorneys' fees and expenses are required to provide written notice of their intention to appear at the hearing as set forth in the Notice. Persons who intend to oppose the Settlement and/or the application for attorneys' fees and expenses need not appear at the hearing. Persons who do not intend to oppose the Settlement of fees application need not take any action to indicate their approval. A person's failure to submit a written objection to the proposed Settlement and/or application for attorneys' fees and expenses in accordance with the deadline and procedure set forth above and in the Notice waives any right the person may have to appeal from any order or judgment of the Court granting approval of the matter to which the person fails to object as required.

F. Relevant Deadlines for Class Member Procedures

30. Pursuant to the parties' agreement, and the direction of the Court, the following deadlines shall apply:

(a) Class Notice shall be disseminated by publication in *Parents* magazine, the Claims Administrator website, and on the websites of Class Counsel and ADAO no later than July 14, 2009, pursuant to the terms of the Settlement Agreement;

(c) Class Members must file and serve any objections to the proposed Settlement Agreement on or before September 14, 2009, including any memorandum and/or submissions in support of said objection;

(c) Class Members must submit any Request for Exclusion on or before September 28, 2009; and

(d) Class Members must submit any Claims Form on or before January 14, 2010.

G. Miscellaneous Provisions

31. Pending final determination of whether the Settlement should be approved, neither Plaintiffs nor any Settlement Class member, nor anyone who acts or purports to act on their behalf, shall institute, commence, or prosecute any action asserting any Settled Claim against Defendants as defined herein and in the Settlement Agreement.

32. Neither the Settlement Agreement, nor any stipulation contained therein, nor Defendants' compliance with this Order or any subsequent court order in furtherance of the Settlement Agreement, constitutes an admission of, or evidence of, any liability on the part of Defendants for claims asserted or that could have been asserted, or a lack thereof on the part of Plaintiffs.

33. If the Settlement is not ultimately consummated, then (a) the Settlement Agreement, including any amendments thereof, and this Order certifying the Settlement Class and appointing Plaintiffs as Settlement Class representatives for purposes of the Settlement shall be null and void, of no further force or effect, and without prejudice to any party, and may not be introduced as evidence or referred to in any actions or proceedings by any person or entity; (b) each party shall be restored

to its respective position as it existed immediately prior to the commencement of settlement discussions; (c) Defendants shall be free to contest class certification, notwithstanding certification of the Settlement Class for purposes of settlement only.

34. If the Settlement is finally approved at the Settlement Hearing, the Court shall enter a Final Judgment dismissing this case with prejudice, which shall be binding on all Settlement Class members who have not previously made a Request for Exclusion in accordance with this Order and the terms of the Settlement Agreement.


35. All proceedings in this action are stayed until further order of the Court, except as may be necessary to implement the Settlement or comply with the terms of the Settlement Agreement.

36. The Court retains exclusive jurisdiction over the action to consider all further matters arising out of or in connection with the Settlement.

IT IS SO ORDERED.

DATED:

5/18/09



THE HONORABLE HAROLD BAER, JR.
UNITED STATES DISTRICT JUDGE