IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CAROL M. McDONOUGH, *et al.*	:	**CIVIL ACTION**
Plaintiffs	:	
	:	**NO. 06-242**
v.	:	
	:	
TOYS "R" US, INC., d/b/a BABIES "R" US, *et al.*	:	
Defendants	:	

ARIEL ELLIOTT, *et al.*	:	**CIVIL ACTION**
Plaintiffs	:	
	:	**NO. 09-6151**
v.	:	
	:	
TOYS "R" US, INC., d/b/a BABIES "R" US, *et al.*	:	
Defendants	:	

DISTRIBUTION ORDER

WHEREAS, on May 13, 2014, Plaintiffs Julie Lindemann, Melissa Nuttall, Sara Shuck, Lawrence McNally, Stephanie Bozzo, Yossi Zarfati, Darcy Trzupek, and Carol McDonough (collectively, the "McDonough Class Representatives")[1] and Plaintiffs Ariel Elliott, Beth Hellman, Christine Brooke Logan, Kristi Monville, Sarah Otazo, Kelly Pollock, and Elizabeth Starkman (collectively, the "Elliott Class Representatives"),[2] on behalf of themselves and the Settlement Classes,[3] entered into the Settlement Agreement with Defendants Toys "R" Us, Inc., d/b/a Babies

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[1] The McDonough Class Representatives represent the subclasses that were certified in the matter filed in the United States District Court for the Eastern District of Pennsylvania, captioned *McDonough, et al. v. Toys "R" Us, et al.*, CIV. A. 06-cv-242 (hereinafter "*McDonough*").

[2] The Elliott Class Representatives represent the subclasses that were certified in the matter of *Elliott, et al. v. Toys "R" Us, et al.*, CIV. A. 09-cv-6151 (hereinafter "*Elliott*"), filed in the United States District Court for the Eastern District of Pennsylvania on behalf of proposed subclasses of additional purchasers of baby products from Babies "R" Us.

[3] All Capitalized Terms in this memorandum will have the same meaning as set forth in the Fourth Amended Settlement Agreement (the "Settlement Agreement"). [*See McDonough* at ECF 896; *Elliott* at ECF 177]. Hereafter, this Court will cite only to the docket for *McDonough* when referencing the filings in both cases.

"R" Us, Babies "R" Us, Inc., and Toys "R" Us-Delaware, Inc.; BabyBjörn AB; Britax Child Safety, Inc.; Kids Line, LLC; American Baby Products, Inc. f/k/a MacLaren USA, Inc.; Medela, Inc.; Peg Perego U.S.A., Inc.; and Regal Lager, Inc. (collectively, "Defendants"). Excluded from the Settlement Subclasses are: (i) any judge, justice or judicial officer presiding over this matter and the members of their immediate families and judicial staffs; and (ii) any subclass member who submitted a timely exclusion request;

WHEREAS, a hearing on the fairness of the terms and conditions of the Settlement Agreement was held on October 6, 2014, at which time all Settlement Class Members were provided with an opportunity to be heard;

WHEREAS, on January 21, 2015, the Court entered a final judgment and order ("Final Judgment") and approved the Settlement Agreement,[4] finding, *inter alia*, that the Settlement Agreement was fair, just, reasonable, and adequate and that the Notice to the Class satisfied all applicable requirements of the Federal Rules of Civil Procedure and any other applicable law;

WHEREAS, on January 21, 2015, the Court entered an allocation order ("Allocation Order") and approved the allocation of the Net Settlement Fund, finding, *inter alia*, that the allocation was fair, reasonable, adequate, and in the best interest of Plaintiffs and the Settlement Subclasses as a whole, as well as each Settlement Class individually and the Settlement Class Members;

WHEREAS, on January 21, 2015, the Court entered a fee and expense order and approved the payment of Class Counsel's attorney fees and expenses from the Settlement Fund;

WHEREAS, pursuant to the Final Judgment, the Court retained jurisdiction over this action;

WHEREAS, on October 30, 2015, the Final Judgment became a final order as defined in the Settlement Agreement;

WHEREAS, Class Counsel and their independent claims administrator, Garden City Group, LLC ("GCG"), have now completed all steps required for the administration, review, processing, and validation of claims set forth in the Settlement Agreement, and have calculated, pursuant to the

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[4] Both matters were originally assigned to the Honorable Anita B. Brody ("Judge Brody") and reassigned to the undersigned on February 11, 2016. [ECF 911]. Those actions taken by Judge Brody will be attributed herein to "the Court," whereas actions undertaken by the undersigned will be attributed herein to "this Court."

terms of the Allocation Order, each Authorized Claimant's *pro rata* share of the Net Settlement Fund;

WHEREAS, on April 20, 2016, Class Counsel filed a motion to approve the distribution of the Settlement Fund and payment of GCG's fees and expenses pursuant to the terms and conditions of the Settlement Agreement ("the Initial Motion"), [ECF 912];

WHEREAS, by Order dated November 17, 2016, the Initial Motion was denied without prejudice, and Plaintiffs were ordered to renew their motion with additional support for GCG's fees and expenses;[5]

WHEREAS, Class Counsel and GCG have reported, by way of the Affidavit of Susan A. Mancuso in Support of Motion for Distribution of the Settlement Funds ("Mancuso Affidavit"), dated April 19, 2016, [ECF 912-2], on the administration, review, processing, validation and calculation of claims, and have provided a final report listing all valid and complete claims;

WHEREAS, as directed in this Court's November 17, 2016 Order, Class Counsel and GCG have submitted invoices and receipts to substantiate GCG's request for its outstanding fees and expenses incurred during the administration of this settlement, and have also submitted the Affidavit of Stephen Cirami in Support of Renewed Motion for Distribution of the Settlement Fund (the "March Affidavit"), [ECF 925-1], which further details the work undertaken by GCG as claims administrator for this settlement;

WHEREAS, Plaintiffs have renewed their motion to approve the distribution of the Settlement Fund pursuant to the terms and conditions of the Settlement Agreement;

WHEREAS, Plaintiffs have renewed their motion for permission to pay GCG's outstanding

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[5] By Order dated November 17, 2016, [ECF 918], upon consideration of Defendants' motion in opposition, this Court denied, *without prejudice*, Plaintiffs' initial *motion for distribution of the settlement fund*, [ECF 912], based on a finding of a lack of adequate documentation to support GCG's request for outstanding fees and expenses alleged to have been incurred during the administration of this settlement. The Order allowed Plaintiffs to file a renewed motion for distribution and required any such motion to be supported by sufficient documentation to support GCG's requests. Thereafter, Plaintiffs filed a renewed motion for said distribution ("the Renewed Motion"), [ECF 920], which included additional supportive documentation. Inexplicably, however, Plaintiffs did not file a reply to Defendants' objections to Plaintiffs' renewed motion, [ECF 921]. By Order dated February 21, 2017, [ECF 922], this Court held the Renewed Motion in abeyance pending the submission of specific additional documentation requested by this Court as an attempt to provide Plaintiffs a last opportunity to support the distribution requests and to specifically respond to Defendants' objections. Thereafter, the parties filed supplemental memoranda, [ECF 925, 926], in support of their respective positions on the Renewed Motion.

fees and expenses of $2,977,434.01;

WHEREAS, this Court has duly considered the parties' submissions, included in the Renewed Motion, [ECF 920], Defendants' response thereto, [ECF 921], Plaintiffs' *Supplemental Submission in Support of Renewed Motion for Distribution of the Settlement Fund*, [ECF 925], Defendants' response thereto, [ECF 926], and Plaintiffs' sur-reply in support of its renewed motion, [ECF 929];

AND NOW, this 31st day of May, 2017, it is hereby **ORDERED,** as follows:

1. This Court directs payment of each Authorized Claimant's *pro rata* share from the proceeds of the Net Settlement Fund (which is defined as the Settlement Fund net of, *inter alia*, all administrative fees and expenses allowed herein and taxes due or owing), to all such Authorized Claimants in the proportions set forth in the Mancuso Affidavit. The checks for distribution to the claimants shall bear the notation "CASH PROMPTLY. VOID AND SUBJECT TO RE-DISTRIBUTION IF NOT CASHED WITHIN 90 DAYS AFTER ISSUE DATE," or words of similar import.

2. This Court directs Class Counsel, together with GCG, to continue administration of the Settlement Fund pursuant to the Settlement Agreement, the Final Judgment, and this Order.

3. Checks not cashed within 90 days of the issuance date will be voided. Attempts to contact the Settlement Class Members with Recognized Claims will be made ***at the discretion of Class Counsel*** in consultation with GCG.[6]

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[6] As noted *supra,* on March 23, 2017, Defendants filed a Supplemental Response to Plaintiffs' Renewed Motion for Distribution of Settlement Funds, [ECF 926], and renewed two previous objections to Plaintiffs' proposed distribution order which were first raised in Defendants' response to the Plaintiffs' Initial Motion, [ECF 913]. This Court will address each objection individually.

In their first objection, which pertains to Paragraph 3 of Plaintiffs' Proposed Distribution Order, Defendants argue that said provision gives Plaintiffs' the "unfettered" discretion to communicate with Settlement Class Members with Recognized Claims in contravention of the Settlement Agreement and Federal Rule of Civil Procedure 23 ("Rule 23"). [*See* ECF 913 at 6]. Defendants contend that this Court should supervise any and all future communication initiated by Class Counsel or GCG and directed to Settlement Class Members, and in so arguing, rely on *Sch. Dist. of Lancaster Manheim Twp. v. Lake Asbestos of Quebec, Ltd. (In re School Asbestos Litig.)*, 842 F.2d 671 (3d Cir. 1988).

This Court finds Defendants' objection meritless. An order that bans communications between Class Counsel and Settlement Class Members, particularly where such a ban would interfere with efforts to inform Settlement Class Members of their rights under the settlement, would be so broad as to constitute a prior restraint on speech inconsistent with the general policies embodied in Rule 23. Although Rule 23 gives district courts "both the duty and broad discretion to limit communications between parties and putative class

4. If there is any balance remaining in the Settlement Fund at a date ninety (90) days from the issuance date, by reason of uncashed checks or otherwise, GCG shall distribute the remaining balance (the "Final Remaining Amount") to Defendants in accordance with Paragraphs 7 and 8 of the Allocation Order.

5. The request of GCG for payment of its unpaid fees and expenses incurred and expected to be incurred in administration of the Settlement of $2,977,434.01 is granted *in part* and denied *in part*.[7] GCG is authorized to pay itself $2,754,547.11 from the Settlement Fund, which

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members in the class action context, such discretion is not without limits." *Bobryk v. Durand Glass Mfg. Co.*, 2013 WL 5574504, at *3 (D.N.J. Oct. 9, 2013) (citing *Gulf Oil Co. v. Bernard,* 452 U.S. 89, 100 (1981)). An order limiting communications between parties and class members must be based on a "clear record and specific findings that reflect the weighing of the need for a limitation and the potential interference with the rights of the parties," *Gulf Oil,* 452 U.S. at 101, and must be carefully drawn to limit as little speech as possible. *Id.* at 102. Federal courts have restricted communications with class or representative plaintiffs where such communications are misleading or coercive, *see, e.g., In re School Asbestos Litig.,* 842 F.2d at 681 (holding that district could restrict an association of corporate defendants from disseminating an information booklet to putative class members because it did not disclose authors' interest in litigation), but have rejected sweeping restraints when there is no clear record that a party's communications with the putative class members were misleading or coercive. *See Bobryk,* 2013 WL 5574504, at *8.

Specifically, Defendants asked this Court to strike the portion of Plaintiffs' proposed distribution order that gives Class Counsel or GCG the discretion to initiate contact with class members once the settlement checks are issued. In this Court's opinion, an order imposing such a restraint would be overbroad and contravene the Supreme Court's holding in *Gulf Oil.* Further, to the extent that Defendants rely on *In re School Asbestos Litig.*, such reliance is misplaced. The communications at issue therein were directed from defendants to putative class members *before* the relevant class was certified. *See In re School Asbestos Litig.,* 842 F.2d at 676 (noting that plaintiffs moved for preliminary injunction to prohibit association of corporate defendants, not class counsel, from communicating with putative class members). Defendants are asking this Court to impose a restraint on speech directed by Class Counsel to members of a certified class. Class Counsel is the legal representative of Settlement Class Members, and any restraint on communications could potentially interfere with their attorney-client relationship. *See Van Gemert v. Boeing Co.,* 590 F.2d 433, 440 n.15 (1980) ("A certification under Rule 23(c) makes the class the [class counsel's] client for all practical purposes."). Further, there has been absolutely no evidence adduced that Class Counsel or GCG intend to mislead or coerce Settlement Class Members with the communications at issue; rather, the intent is to communicate with those Settlement Class Members who have not yet cashed their checks to remind them of the void date. Neither the Settlement Agreement nor Third Circuit precedent supports a complete ban on this type of communication. Accordingly, Defendants' first objection is overruled.

[7] Defendants' second objection pertains to certain fees and expense reimbursements claimed by GCG in connection with the services it has rendered in the administration of this settlement. Specifically, Plaintiffs request an order directing the payment of an additional $2,977,434.01 from the Settlement Fund to GCG for unpaid fees and expenses it alleges to have incurred as the claims administrator of the settlement agreement. To substantiate this request, Plaintiffs have submitted two affidavits from Stephen Cirami ("Cirami"), GCG's executive vice president and chief operating officer; one attached to the first affidavit as Exhibit 1 to the Renewed Motion ("the December Affidavit"), [ECF 920-2-3], and the other to their most

recent sur-reply in support of the Renewed Motion ("the March Affidavit"), [ECF 925-1]. In the December Affidavit, Cirami contends that GCG has earned a total of $4,325,589.07 since November 2010 for its work in connection with the administration of this settlement, of which $1,348.155.06 has been paid from the Settlement Fund. [ECF 920-2 at ¶ 11]. GCG's latest application seeks payment of the outstanding balance of $2,977,434.01, which consists of $79,962.21 in additional publication fees and expenses; $1,443,424.22 for other administrative work; $422,964.42 in out-of-pocket expenses for work unrelated to publication; and $1,011,083.16 in fees for all distribution work, including, *inter alia*, $188,788.75 for work related to the Initial Distribution that was completed after the Initial Distribution (the "Post-Initial Distribution Work"). Defendants dispute only a portion of GCG's application; specifically, the $222,886.90 invoiced for commissions and the $188,788.75 invoiced for the Post-Initial Distribution Work.

Plaintiffs argue that Defendants waived the opportunity to object to these calculations since they did not voice any objections prior to the approval of the Settlement Agreement. This Court disagrees. Clearly, GCG's request for unpaid fees and expenses is a new application that falls within the purview of Paragraph 27 of the Settlement Agreement, which preserves Class Counsel's right to make additional fee and expense applications to the court prior to any distribution of the Net Settlement Fund to Authorized Claimants "for fees and expenses actually incurred in administration of the Settlement." However, nothing in the Settlement Agreement relieves Plaintiffs of the burden of substantiating any additional fee or expense application. This Court has an ongoing, independent duty to scrutinize fee applications, *see In re SmithKline Beckman Corp. Secs. Litg.*, 751 F. Supp. 525, 533 (3d Cir. 1990), and must function as a "quasi-fiduciary to safeguard the corpus of the fund for the benefit of the plaintiff class." *In re Fidelity/Micron Secs. Litig.*, 167 F.3d 736, 737 (1st Cir. 1999). In considering a request for the reimbursement of fees and/or expenses incurred in the administration of a settlement, this Court must consider whether the request is reasonable, necessary to the prosecution of the litigation, and adequately documented. *In re SmithKline,* 751 F. Supp. at 533.

As indicated, GCG seeks reimbursement for $222,886.90 in commissions it claims it charged, in lieu of hourly rates, for approximately 500 hours of work expended on two publication campaigns. Defendants object to this specific expense on the grounds that GCG never disclosed this commission structure to either Defendants or this Court and, further, that the commissions sought are excessive and inadequately documented. While GCG argues that the dollar amount for the commissions was charged at a rate "commonly charged in the industry," GCG has not submitted any documentation, aside from the self-serving Cirami affidavits, this Court can consider to determine the reasonableness of GCG requests, despite the repeated opportunities provided to Class Counsel and GCG to cure the deficiencies in their documentation. Accordingly, the request for reimbursement of $222,886.90 in commissions is denied.

Additionally, Defendants argue that GCG's request for the reimbursement of $188,788.75 for the Post-Initial Distribution Work be denied. The total amount of GCG's proposed fees for all distribution work is $1,011,083.16, as reflected in the invoice dated April 7, 2016. Of this total amount, the portion attributed to the Initial Distribution and related Post-Initial Distribution Work was $961,083.16; and of that amount, $188,788.75 was dedicated to Post-Initial Distribution Work, which consisted of, *inter alia*, reissuing checks to Class Members, handling undeliverable checks, handling claimant calls and correspondence, and maintaining the case website. Defendants contend that Paragraph 26 of the Settlement Agreement provides that GCG is to receive a $50,000.00 flat fee for any Post-Initial Distribution Work. Specifically, Paragraph 26 provides, in its relevant part:

> Class Counsel will move, pursuant to a Fee and Expense Applications submitted prior to the Fairness Hearing, for: . . . reimbursement of notice and administrative expenses actually incurred and not paid or reimbursed pursuant to Paragraph 15, including, *but not limited to*, a fixed fee of $50,000.00 in administrative expenses relating to the distribution of the Final

represents the reasonable fees and expenses it actually incurred during the administration of this settlement minus any undisclosed commissions.

6. All persons involved in the review, validation, calculation or who are otherwise involved in the administration or taxation of the Settlement Fund are released and discharged from any and all claims arising out of such involvement, and all Settlement Class Members, whether or not they have submitted claims or are to receive payment from the Settlement Fund are barred from making any further claims against the Settlement Fund or the released parties beyond the amount allocated to them pursuant to this Order.

7. This Court continues to reserve jurisdiction over all matters relating to the administration of the Settlement Agreement in accordance with the Final Judgment.

BY THE COURT:

NITZA I. QUIÑONES ALEJANDRO
Judge, United States District Court

Remaining Amount and the Coupons described in paragraph 20 above, ...

[*See* ECF 857-1 at ¶ 26]. Notably, Paragraph 20 refers to those expenses incurred in the distribution of the Settlement Fund and the coupons to Settlement Class Members. After a careful consideration of the arguments made, this Court agrees with Plaintiffs that the $50,000.00 fixed fee, described in Paragraph 26, was intended to reimburse GCG for work related to the coupon distribution *only,* and was not intended to include any additional Post-Initial Distribution Work, such as, *inter alia*, the maintenance of the case website, or the fielding of claimant calls and correspondence. Having reviewed GCG's invoices itemizing its Post-Initial Distribution Work, this Court finds these expenses are adequately documented and reasonable. Accordingly, GCG's request for the reimbursement of $188,788.75 for fees and expenses related to the Post-Initial Distribution Work is granted.

Therefore, based upon this Court's determinations, Defendants' second objection is overruled, *in part*, and sustained, *in part*.