

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

MCDONOUGH, et al.,
Plaintiffs.
v.
TOYS “R” US, INC., et al.,
Defendants.

:
:
: CIVIL ACTION
:
: NO. 06-0242
:
:
:

BABYAGE.COM, INC., et al.,
Plaintiffs.
v.
TOYS “R” US, INC., et al.,
Defendants.

:
:
: CIVIL ACTION
:
: NO. 05-6792
:
:
:

May 19, 2009

Anita B. Brody, J.

NOTICE

The following may help guide the telephone conference set for 2:00 PM today.

Regarding this case, In re Hydrogen Peroxide Antitrust Litigation, 552 F.3d 305 (3d Cir. 2008) clarified two separate things: (1) the standard for Fed. R. Civ. Pro. 23, and (2) the substance of the predominance requirement of Rule 23(b)(3). Below, I review what Hydrogen Peroxide said about each thing.

I. STANDARD FOR RULE 23

- “First, the decision to certify a class calls for findings by the court, not merely a ‘threshold showing’ by a party, that each requirement of Rule 23 is met. Factual determinations supporting Rule 23 findings must be made by a preponderance of the evidence.” Hydrogen Peroxide, 552 F.3d at 307.

- “Second, the court must resolve all factual or legal disputes relevant to class certification, even if they overlap with the merits-including disputes touching on elements of the cause of action.” Id. Thus, the defense may poke holes in the plaintiffs’ showing for class certification.
- “Third, the court’s obligation to consider all relevant evidence and arguments extends to expert testimony, whether offered by a party seeking class certification or by a party opposing it.” Id.

II. PREDOMINANCE REQUIREMENT OF RULE 23(b)(3)

- “Every essential element of each cause of action must be “susceptible to proof at trial through available evidence common to the class.” Id. at 325.
- But you cannot just use common evidence about anything. There must be common evidence for each element of the Clayton Act, 15 U.S.C. § 15 (namely: antitrust violation, antitrust impact, and measurable damages).
- Furthermore, this common evidence must be “available” and must be enough to show that the element can be proved at trial.

When I cited Hydrogen Peroxide in my order structuring the hearing set for May 27, 2009, I referred to what the case said about the predominance requirement of Rule 23(b)(3) and not what it said about the standard for Rule 23 generally. The following diagram illustrates the distinction between these two things:

Rule 23(a) and (b)(3)

Legal Standard

Substance of Requirement

Numerosity

Commonality

Typicality

Adequacy of representation

Predominance

Superiority

	<ul style="list-style-type: none">● Court must find that plaintiffs satisfy each Rule 23 requirement by a preponderance of the evidence● Court must resolve all relevant factual and legal issues, even when they overlap with the merits.● Court must consider all relevant evidence, including expert testimony offered by both sides.	
		<ul style="list-style-type: none">● Every essential element of each cause of action must be susceptible to proof at trial through available evidence common to the class.

s/Anita B. Brody

ANITA B. BRODY, J.

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

MCDONOUGH, et al.,
Plaintiffs.
v.
TOYS "R" US, INC., et al.,
Defendants.

:
:
: CIVIL ACTION
:
: NO. 06-0242
:
:
:

BABYAGE.COM, INC., et al.,
Plaintiffs.
v.
TOYS "R" US, INC., et al.,
Defendants.

:
:
: CIVIL ACTION
:
: NO. 05-6792
:
:
:

ORDER

AND NOW, this 14TH day of May 2009, it is **ORDERED** that, as stated during the telephone conference on May 12, 2009,¹ the following shall govern the hearing beginning on May 27, 2009:

- In deciding the motion for class certification, I will not certify one large class but will consider whether to certify the six separate putative classes. Each putative class will be defined to encompass Babies R Us customers who bought a certain brand and type of baby product during a certain period of time. The brands are BabyBjörn/Regal Lager, Britax, Kids Line, Maclaren, Medela, and Peg Perego. The plaintiffs shall submit their proposed class definitions by **May 20, 2009**.
- The plaintiffs have withdrawn their allegations relating to 15 U.S.C. § 2. Therefore, counts II through IV in the Fourth Amended Complaint are **DISMISSED**.

¹ If this order conflicts with what was stated during the May 12, 2009, telephone conference, what was stated during the conference shall prevail.

- At the hearing, each party shall have only one attorney who speaks on its behalf. This attorney shall sit at the counsel table. Each side's expert shall also sit at the counsel table but will be sworn.
- According to In re Hydrogen Peroxide Antitrust Litigation, 552 F.3d 305 (3d Cir. 2008), the predominance requirement of Fed. R. Civ. Pro. 23(b)(3) requires the plaintiffs to prove that they have enough available common evidence for each element of each claim.
- For their single claim under the Clayton Act, 15 U.S.C. § 15, the plaintiffs must show:
 - (1) a violation of the antitrust laws,
 - (2) individual injury resulting from that violation, and
 - (3) measurable damages.

For the first element (antitrust violation), incorporating the Sherman Act, 15 U.S.C. § 1, the plaintiffs must show:

- (1) that the defendants contracted, combined, or conspired among each other;
 - (2) that the combination or conspiracy produced adverse, anti-competitive effects within relevant product and geographic markets;
 - (3) that the objects of and the conduct pursuant to that contract or conspiracy were illegal; and
 - (4) that the plaintiffs were injured as a proximate result of that conspiracy.
- The hearing will be organized according to these elements and the six putative classes. First, the plaintiffs' attorney shall explain the common evidence that the plaintiffs will use to prove the first element (antitrust violation) for the first putative class (BabyBjörn/Regal Lager consumers). In doing so, the attorney should specify which evidence goes to each Sherman Act element. Then, the defense attorney will have an opportunity to poke holes in that evidence. Second, the plaintiffs' attorney should give a similar explanation for the next putative class (Britax consumers), and the defense attorney can respond. Thus, the evidence relating to the first element (antitrust violation) shall be presented for all six putative classes.² Once this has been completed, the evidence relating to the second element (antitrust injury) and third element (measurable damages) shall be presented and scrutinized using the same procedure.

² Unless otherwise agreed on by the attorneys, the putative classes shall be considered in this sequence: BabyBjörn/Regal Lager, Britax, Kids Line, Maclaren, Medela, and Peg Perego.

- When either side uses expert testimony, the attorney should first list and describe the arguments that the expert will present. Then, while under oath, the expert may present his arguments in greater detail. After this, the expert will respond to my questions and to those of opposing counsel.
- Consistent with the above procedure, the plaintiffs should create a concise outline of what common evidence they expect to present for each element. They must file this outline by **12:00 PM on May 26, 2009**.

s/Anita B. Brody

ANITA B. BRODY, J.