

CANADA

PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

NO: 500-06-000599-122

(Class Action)
SUPERIOR COURT

S. CHAGNON

Petitioner

-vs.-

CRAYOLA PROPERTIES, INC., legal person duly constituted, having its head office at 1100 Church Lane, City of Easton, State of Pennsylvania, 18042, U.S.A.

and

HALLMARK CARDS, INC., legal person duly constituted, having its head office at 2501 McGee Trafficway, City of Kansas, State of Missouri, 64108, U.S.A.

and

WILLIAM E. COUTTS COMPANY LIMITED, legal person duly constituted, having its head office at 501 Consumer Road, City of North York, Province of Ontario, M2J 5E2

Respondents

**MOTION TO AUTHORIZE THE BRINGING OF A CLASS ACTION
&
TO ASCRIBE THE STATUS OF REPRESENTATIVE
(Art. 1002 C.C.P. and following)**

TO ONE OF THE HONOURABLE JUSTICES OF THE SUPERIOR COURT,
SITTING IN AND FOR THE DISTRICT OF MONTREAL, YOUR PETITIONER
STATES AS FOLLOWS:

I. GENERAL PRESENTATION

A) The Action

1. Petitioner wishes to institute a class action on behalf of the following group, of which he is a member, namely:

- all residents in Canada who purchased or acquired (including by gift) Crayola Washable Coloured Bubbles, or any other group to be determined by the Court;

Alternately (or as a subclass)

- all residents in Quebec who purchased or acquired (including by gift) Crayola Washable Coloured Bubbles, or any other group to be determined by the Court;

2. “Crayola Washable Coloured Bubbles” is herein defined as the following products:

- individual bottles of bubble solution
- the “Washable Coloured Bubbles Bubble Launcher”
- the “Washable Coloured Bubbles Wand Set,”
- the “Washable Coloured Bubbles” three-pack
- the “Washable Coloured Bubbles Play Pack,” hereinafter

B) The Respondents

2. Respondent Crayola Properties Inc. is an American company with its head office in Pennsylvania. It is a multinational corporation that manufactures artists’ supplies including Crayola Washable Coloured Bubbles. It is the owner of several “Crayola” trade-marks in Canada, the whole as appears more fully from a copy of said trade-marks from the CIPO database, produced herein as **Exhibit R-1**;

3. Respondent Hallmark Cards, Inc. is an American company with its head office in Missouri. It is the parent company of Crayola Properties Inc.;

4. Respondent William E. Coutts Company Limited is a wholly-owned subsidiary of Hallmark Cards, Inc. and who does business throughout Canada, including the province of Quebec, the whole as appears more fully from a copy of an extract from the *Registre des enterprise*, produced herein as **Exhibit R-2**;

5. Respondents Crayola Properties Inc., Hallmark Cards, Inc. and William E. Couitts Company Limited manufacture, market, distribute, promote and/or sell Crayola Washable Coloured Bubbles;
6. As widely recognized consumer brands, Respondents placed both Hallmark's and Crayola's logos on the Crayola Washable Coloured Bubbles thereby signifying the endorsement and participation in the design, manufacture and/or distribution of the product;
7. Given the close ties between the Respondents and considering the preceding, all Respondents are solidarily liable for the acts and omissions of the other. Unless the context indicates otherwise, all Respondents will be referred to as "Crayola" for the purposes hereof;

C) The Situation

8. On or about late 2010 Crayola began manufacturing, marketing and distributing Washable Coloured Bubbles. They were sold nationwide in the such major retail stores as Toys R Us, Walmart, Canadian Tire, as well as, smaller kids and/or toy stores;
9. The Crayola Washable Coloured Bubbles bottles are pictured below, with the term "washable" in large type;



10. Crayola Washable Coloured Bubbles are intended for use by children ages three and up (and four and up for the Washable Coloured Bubbles Bubble Launcher). The product is offered in five colours: Sunset Orange, Purple Pizzazz, Wild Blue Yonder, Screamin' Green, and Pink Flamingo;
11. Crayola has promoted Washable Coloured Bubbles as "washable", which by definition means "soluble in water". The crucial attribute, "Washable", appears as the first word of the product's name on containers, packaging, and advertisements in large, prominent letters;



12. Crayola also claimed on its website that the stains left by Crayola Washable Coloured Bubbles are “temporary and washable”. This, however, has not been the experience of consumers who purchased these products;
13. Given that it is impossible to control where bubbles land, “washability” is the key to Crayola Washable Coloured Bubbles’ marketing strategy. Brightly coloured unwashable bubbles that stain everything on contact would be a hard sell;
14. In contrast to the large print used to inform consumers about Crayola Washable Coloured Bubbles, the Respondents’ misrepresentations become compounded by the fact that the “Washing and Care Information” is buried amongst other information and in extremely small font, making a consumer unlikely to read it. The discrepancy between the size of the text on the front and back of the packages is more fully illustrated from a copy of the product labelling, produced herein as **Exhibit R-3**;
15. Importantly, even assuming that a consumer did read all of the small print included in Respondents’ packaging for the Crayola Washable Coloured Bubbles, the fine print itself is deceptive and/or misleading. It reads as follows:



“FOR BEST RESULTS: Keep bottles tightly capped after use. Dip wand into bubble solution and blow bubbles. Do not mix colors or add water to the bubble solution. Before use, test on an inconspicuous area and let dry. Wash off to make sure bubble solution does not stain. WASHING AND CARE INFORMATION: Washes from skin with soap and water. Normal laundering removes stains from most children’s clothing. Wash immediately in hot water. Do not use prewash, as they may set stains. Repeat laundering may be required. Rinse colored bubbles away from asphalt and concrete sidewalks and driveway using the water pressure from a garden hose. STAIN ADVISEMENT: Crayola Washable Colored Bubbles are designed for outdoor use. Do not leave bubble solution on surfaces longer than 1 week. Do not use on surfaces less than 6 months old. Colored Bubbles are not intended for indoor use, as they may stain household surfaces. Keep away from brick, vinyl, finished and unfinished wood, wallpaper, painted walls, carpeting, draperies, and other materials that cannot be laundered.”

The whole as appears more fully from an actual bottle which is available for viewing and is herein produced as material **Exhibit R-4**;

16. The label clearly states that the Crayola Washable Coloured Bubbles solution “[w]ashes from skin with soap and water,” and that “[n]ormal laundering removes stains from most children’s clothing.” The label further instructs consumers to “rinse coloured bubbles away from asphalt and concrete sidewalks and driveway using the water pressure from a garden hose”;
17. In addition, the bottle is manufactured with a plastic cover over the opening, which is cut into quadrants. This design of the bottle creates an extra mess with every use because when users pull out the wand, the coloured solution flicks up and out splattering the staining bubble solution all over the user and areas of use every time the wand is pulled out of the bottle, as illustrated below;



18. Crayola Washable Coloured Bubbles stain everything they touch; sometimes the stains can be removed with considerable expense, time, and effort, and sometimes not;
19. To whitewash the problems with its unwashable bubbles, the Respondents direct their customers to a section of their 564-page “Stain Removal Suggestions” manual on Crayola Washable Coloured Bubbles or to an interactive menu on its website that pulls selections from the Stain Manual, detailing different procedures to remove stains caused by Respondents’ products from various household surfaces. Nineteen pages of the Stain Manual are dedicated to removing stains caused by Crayola Washable Coloured Bubbles listing random surfaces and naming 25 different types of cleaning products from fifteen different parent companies. The Crayola Washable Coloured Bubbles are creating a market for cleaning products, many of which cost more than the bubbles, the whole as appears more fully from extracts of the Respondents’ Stain Manual, produced herein as **Exhibit R-5**;
20. The term “washable” used in the name “Washable Coloured Bubbles” and the Respondents’ advertising for the bubbles does not disclose to consumers that they face long periods employing expensive specialty cleaning products in an attempt to remove stains from common household surfaces – efforts that often prove futile. A reasonable customer would believe that “washable” means the product will wash off with general use cleaners, if not water alone. “Washable” does not imply requiring research and consulting a manual;
21. When consumers must read a manual to remove Crayola Washable Coloured Bubbles stains from their property with specialty cleaning products, they have not acquired a reasonably “washable” product (“soluble in water”). Respondents’ extensive Stain Manual contradicts the Respondents’ express representations about the washability of Crayola Washable Coloured Bubbles;

22. While Respondents knew that some cleaning products were inadequate to remove their dyes, and that the product's "washability" fluctuates according to the material that it encounters, this information was not disclosed on the product packaging or advertisements;
23. Despite Respondents' knowledge that their Crayola Washable Coloured Bubbles are not in fact washable, they have not taken responsibility for damage caused by the Washable Coloured Bubbles;
24. The Wall Street Journal reported how difficult it is to remove Crayola Washable Coloured Bubbles from skin, and that Crayola Washable Coloured Bubbles do not fully wash off of outdoor surfaces: "according to angry posts on product-review sites such as Amazon.com and Twitter, it is best to keep the floating bubbles away from walls, carpets, driveways, decks, grout — and just about everything else," the whole as appears more fully from a copy of the article entitled "Crayola's Colorful Soapy Bubbles Leave Indelible Memories" dated April 1st 2011, produced herein as **Exhibit R-6**;
25. Because Crayola Washable Coloured Bubbles are not washable, but rather leave long-lasting stains, consumers gained nothing of value from their purchases; instead, their property was damaged and they lost significant time and money trying to remove stains the product left behind;
26. A list of Crayola Washable Coloured Bubbles reviews wherein parents have vented their anger and disapproval can be found on the websites of Canadian Tire, Toys R Us, and Amazon.com, the whole as appears more fully from a copy of said complaints, produced herein as **Exhibit R-7**;

II. FACTS GIVING RISE TO AN INDIVIDUAL ACTION BY THE PETITIONER

27. Petitioner purchased Crayola Washable Coloured Bubbles purple pizzazz on or about August 2011 from the store Oink Oink, on Greene Ave., in Westmount, Quebec for the price of \$4.99 plus taxes;
28. Petitioner believed, after reading the Respondents' labelling, that Crayola Washable Coloured Bubbles were "washable", meaning that soap and water could remove it from clothing and surfaces;
29. Petitioner gave the product to his son, who was 4 1/2 at the time to play with, and he used it in the presence of his other daughter who was 1 1/2 at the time;
30. Upon using this product the younger daughter got it on her skin, arms, face, and fingers, which took a long time and many washings to remove;

31. The product also got on the Petitioner's son's pants and shoes, which did not come out after numerous attempts to wash them, forcing the Petitioner to throw these items away;
32. The product also stained the driveway, which has now dulled, but only after many months and after being hosed down several times;
33. Petitioner has since discovered, while researching online, that a class action was filed in the United States for this same product due to false advertising related to the representation "washable" on the labelling and that it had been settled with each parent receiving their money back for the product, as well as, cleaning costs, and property damage, the whole as appears more fully from a copy of said Class Action Complaint and Settlement Agreement, produced herein as **Exhibit R-8**;
34. Had he known the true facts, the Petitioner would not have purchased Crayola Washable Coloured Bubbles;
35. Petitioner's damages are a direct and proximate result of the Respondents' conduct and the companies' false and misleading advertising;
36. In consequence of the foregoing, Petitioner is justified in claiming damages;

III. FACTS GIVING RISE TO AN INDIVIDUAL ACTION BY EACH OF THE MEMBERS OF THE GROUP

37. Every member of the class has purchased Crayola Washable Coloured Bubbles believing that it was washable, due to the Respondents' marketing, advertising, and labelling;
38. The class members were, therefore, induced into error by the Respondents' false and misleading advertising;
39. Had the Respondents disclosed the truth about Crayola Washable Coloured Bubbles, reasonable consumers would not have bought them;
40. Each member of the class is justified in claiming at least one or more of the following as damages:
 - a. The purchase price of Crayola Washable Coloured Bubbles;
 - b. Cleaning costs to remove the colour from their personal property;
 - c. Compensatory damages for personal items that were ruined by stains;



d. Punitive damages;

41. Respondents engaged in wrongful conduct, while at the same time obtaining, under false pretences, significant sums of money from class members;
42. All of these damages to the class members are a direct and proximate result of the Respondents' conduct and their false and misleading advertising;

IV. CONDITIONS REQUIRED TO INSTITUTE A CLASS ACTION

- A) The composition of the class renders the application of articles 59 or 67 C.C.P. difficult or impractical
43. Petitioner is unaware of the specific number of persons who purchased Crayola Washable Coloured Bubbles, however, it is safe to estimate that it is in the tens of thousands (if not hundreds of thousands);
 44. Class members are numerous and are scattered across the entire province and country;
 45. In addition, given the costs and risks inherent in an action before the courts, many people will hesitate to institute an individual action against the Respondent. Even if the class members themselves could afford such individual litigation, the court system could not as it would be overloaded. Further, individual litigation of the factual and legal issues raised by the conduct of the Respondent would increase delay and expense to all parties and to the court system;
 46. Also, a multitude of actions instituted in different jurisdictions, both territorial (different provinces) and judicial districts (same province), risks having contradictory judgements on questions of fact and law that are similar or related to all members of the class;
 47. These facts demonstrate that it would be impractical, if not impossible, to contact each and every member of the class to obtain mandates and to join them in one action;
 48. In these circumstances, a class action is the only appropriate procedure for all of the members of the class to effectively pursue their respective rights and have access to justice;
- B) The questions of fact and law which are identical, similar, or related with respect to each of the class members with regard to the Respondent and that which the Petitioner wishes to have adjudicated upon by this class action



49. Individual questions, if any, pale by comparison to the numerous common questions that predominate;
50. The damages sustained by the class members flow, in each instance, from a common nucleus of operative facts, namely, Respondents' misconduct;
51. The recourses of the members raise identical, similar or related questions of fact or law, namely:
- a) Did the Respondents know or should have known that the Crayola Washable Coloured Bubbles had the capacity to stain and were not washable?
 - b) Did the Respondents withheld 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?
52. The interests of justice favour that this motion be granted in accordance with its conclusions;

V. NATURE OF THE ACTION AND CONCLUSIONS SOUGHT

53. The action that the Petitioner wishes to institute on behalf of the members of the class is an action in damages and an injunctive remedy;
54. The conclusions that the Petitioner wishes to introduce by way of a motion to institute proceedings are:

GRANT the class action of the Petitioner and each of the members of the class;

ORDER the Defendants to cease from continuing their unfair, false, misleading, and/or deceptive conduct;

DECLARE the Defendants solidarily liable for the damages suffered by the Petitioner and each of the members of the class;

CONDEMN the Defendants to pay to each member of the class a sum to be determined in compensation of the damages suffered, and ORDER collective recovery of these sums;

CONDEMN the Defendants to pay to each of the members of the class, punitive damages, and ORDER collective recovery of these sums;

CONDEMN the Defendants to pay interest and additional indemnity on the above sums according to law from the date of service of the motion to authorize a class action;

ORDER the Defendants to deposit in the office of this court the totality of the sums which forms part of the collective recovery, with interest and costs;

ORDER that the claims of individual class members be the object of collective liquidation if the proof permits and alternately, by individual liquidation;

CONDEMN the Defendants to bear the costs of the present action including expert and notice fees;

RENDER any other order that this Honourable court shall determine and that is in the interest of the members of the class;

A) The Petitioner requests that he be attributed the status of representative of the Class

55. Petitioner is a member of the class;

56. Petitioner is ready and available to manage and direct the present action in the interest of the members of the class that they wish to represent and is determined to lead the present dossier until a final resolution of the matter, the whole for the benefit of the class, as well as, to dedicate the time necessary for the present action before the Courts of Quebec and the *Fonds d'aide aux recours collectifs*, as the case may be, and to collaborate with his attorneys;

57. Petitioner has the capacity and interest to fairly and adequately protect and represent the interest of the members of the class;
58. Petitioner has given the mandate to his attorneys to obtain all relevant information with respect to the present action and intends to keep informed of all developments;
59. Petitioner, with the assistance of his attorneys, is ready and available to dedicate the time necessary for this action and to collaborate with other members of the class and to keep them informed;
60. Petitioner is in good faith and has instituted this action for the sole goal of having his rights, as well as the rights of other class members, recognized and protected so that they may be compensated for the damages that they have suffered as a consequence of the Respondent's conduct;
61. Petitioner understands the nature of the action;
62. Petitioner's interests are not antagonistic to those of other members of the class;
- B) The Petitioner suggests that this class action be exercised before the Superior Court of justice in the district of Montreal
63. A great number of the members of the class reside in the judicial district of Montreal and in the appeal district of Montreal;
64. The Petitioner's attorneys practice their profession in the judicial district of Montreal;
65. The present motion is well founded in fact and in law.

FOR THESE REASONS, MAY IT PLEASE THE COURT:

GRANT the present motion;

AUTHORIZE the bringing of a class action in the form of a motion to institute proceedings in damages and for injunctive relief;

ASCRIBE the Petitioner the status of representative of the persons included in the class herein described as:

- all residents in Canada who purchased or acquired (including by gift) Crayola Washable Coloured Bubbles, or any other group to be determined by the Court;

Alternately (or as a subclass)

- all residents in Quebec who purchased or acquired (including by gift) Crayola Washable Coloured Bubbles, or any other group to be determined by the Court;

IDENTIFY the principle questions of fact and law to be treated collectively as the following:

- Did the Respondents know or should have known that the Crayola Washable Coloured Bubbles had the capacity to stain and were not washable?
- Did the Respondents withheld from disclosure the true nature of the Crayola Washable Coloured Bubbles in the products' sale and promotion?
- Did the Respondents engage in unfair, false, misleading, or deceptive acts or practices regarding the marketing and sale of its Crayola Washable Coloured Bubbles?
- 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?
- Should an injunctive remedy be ordered to prohibit the Respondents from continuing to perpetrate their unfair, false, misleading, and/or deceptive conduct?
- Are the Respondents responsible to pay compensatory and/or punitive damages to class members and in what amount?

IDENTIFY the conclusions sought by the class action to be instituted as being the following:

GRANT the class action of the Petitioner and each of the members of the class;

ORDER the Defendants to cease from continuing their unfair, false, misleading, and/or deceptive conduct;



DECLARE the Defendants solidarily liable for the damages suffered by the Petitioner and each of the members of the class;

CONDEMN the Defendants to pay to each member of the class a sum to be determined in compensation of the damages suffered, and ORDER collective recovery of these sums;

CONDEMN the Defendants to pay to each of the members of the class, punitive damages, and ORDER collective recovery of these sums;

CONDEMN the Defendants to pay interest and additional indemnity on the above sums according to law from the date of service of the motion to authorize a class action;

ORDER the Defendants to deposit in the office of this court the totality of the sums which forms part of the collective recovery, with interest and costs;

ORDER that the claims of individual class members be the object of collective liquidation if the proof permits and alternately, by individual liquidation;

CONDEMN the Defendants to bear the costs of the present action including expert and notice fees;

RENDER any other order that this Honourable court shall determine and that is in the interest of the members of the class;

DECLARE that all members of the class that have not requested their exclusion, be bound by any judgement to be rendered on the class action to be instituted in the manner provided for by the law;

FIX the delay of exclusion at thirty (30) days from the date of the publication of the notice to the members, date upon which the members of the class that have not exercised their means of exclusion will be bound by any judgement to be rendered herein;

ORDER the publication of a notice to the members of the group in accordance with article 1006 C.C.P. within sixty (60) days from the judgement to be rendered herein in LA PRESSE and the NATIONAL POST;

ORDER that said notice be available on the Respondent's website with a link stating "Notice to Crayola Washable Coloured Bubbles users";

RENDER any other order that this Honourable court shall determine and that is in the interest of the members of the class;

THE WHOLE with costs, including all publications fees.

Montreal, March 1, 2012

(S) Jeff Orenstein

CONSUMER LAW GROUP INC.

Per: Me Jeff Orenstein

Attorneys for the Petitioner