

SUPERIOR COURT OF NEW JERSEY  
BERGEN COUNTY: LAW DIVISION

DOUGLAS M. SUMMER, on behalf of himself and all  
others similarly situated,

Plaintiff,

vs.

TOSHIBA AMERICA CONSUMER PRODUCTS, INC.,

Defendant.

DOCKET NO. BER L-7248-01

CIVIL ACTION

ARTHUR DIEM, JR., on behalf of himself and all others  
similarly situated,

Plaintiff,

vs.

TOSHIBA AMERICA CONSUMER PRODUCTS, INC.,

Defendant.

DOCKET NO. BER L-0078-02

CIVIL ACTION

**NOTICE OF PENDENCY AND SETTLEMENT OF CLASS ACTION  
AND NOTICE OF HEARING**

**TO: ALL PERSONS IN THE UNITED STATES WHO, PRIOR TO OCTOBER 15, 2004, PURCHASED OR  
ACQUIRED A TOSHIBA BRAND DVD PLAYER.**

**THIS NOTICE IS GIVEN TO INFORM YOU OF THE PENDENCY OF THIS CLASS ACTION AND OF ITS  
PROPOSED SETTLEMENT. IF THE SETTLEMENT IS APPROVED BY THE COURT, CERTAIN BENEFITS WILL  
BE AVAILABLE TO THE MEMBERS OF THE CLASS IN SETTLEMENT OF ALL CLAIMS RELATING TO AN  
ALLEGATION THAT TOSHIBA DVD PLAYERS SOLD DURING THE CLASS PERIOD ARE NOT FULLY  
COMPLIANT WITH THE SPECIFICATIONS SET FORTH BY THE DVD FORUM.**

**THIS NOTICE CONCERNS YOUR LEGAL RIGHTS. PLEASE READ IT CAREFULLY. NOTHING IN THIS NOTICE  
SHOULD BE CONSTRUED AS AN EXPRESSION BY THE COURT ABOUT THE MERITS OF THIS LAWSUIT OR  
THE SETTLEMENT.**

The Court, by Order dated October 18, 2004, has certified the Class for settlement purposes only, as consisting of: ALL CONSUMERS IN THE UNITED STATES, WHO, PRIOR TO OCTOBER 15, 2004 (THE "CLASS PERIOD"), PURCHASED OR ACQUIRED A "TOSHIBA DVD PLAYER," defined as a consumer electronics device bearing the "Toshiba" brand name that is capable of playing back DVD discs, but specifically excluding Toshiba brand personal laptop computers containing DVD drives or DVD capability. Excluded from membership in the Class are the following: (1) Toshiba, including employees and immediate family members; (2) retailers, wholesalers and other middlemen who purchased a Toshiba DVD Player for resale; and, (3) persons who timely and validly opt to exclude themselves from the Class.

**BACKGROUND OF THE ACTION**

1. Class Representatives Summer and Diem have commenced the above captioned class action lawsuits against Toshiba America Consumer Products, LLC ("TACP") (formerly Toshiba America Consumer Products, Inc.) in the

Superior Court of the State of New Jersey, Bergen County, on behalf of themselves and all others similarly situated, seeking economic damages and injunctive relief relating to their purchase of Toshiba DVD Players (the "Action"). The Complaint in the Action asserts that Toshiba DVD Players are not fully compliant with the specifications set forth by the DVD Forum, but that TACP nonetheless represented to Class Members that its DVD Players were, in fact, fully compliant with such specifications. The Class Representatives have thereby asserted causes of action for breach of express and implied warranty as well as claims for violation of the New Jersey Consumer Fraud Act.

2. TACP has appeared in the Action and denies that it has violated any laws, contracts or statutes, or occasioned any damages to consumers, in connection with the advertising, marketing, manufacturing and/or sale of Toshiba DVD Players; furthermore, TACP asserts that the unprecedented consumer success of DVD technology effectively refutes plaintiffs' allegations; that all Toshiba DVD Players properly bear the DVD Video Logo; that reported playback incompatibilities affect only a small fraction of the available DVD titles on the market, that reported playback incompatibilities were mostly minor and primarily caused by factors beyond TACP's control (such as improperly authored or manufactured DVD discs); and that reported playback incompatibilities were primarily limited to early-generation DVD player models no longer being sold in the United States.

### **BACKGROUND OF THE PROPOSED SETTLEMENT**

3. After the exchange of extensive discovery between the parties, the submission and argument of the plaintiffs' motion for class certification and defendant's motion for summary judgment, and the Court's decision regarding those motions, the parties began extensive settlement negotiations. In a decision issued on November 19, 2003, the Court granted in part, and denied in part, the defendant's motion for summary judgment; additionally, the Court granted the plaintiffs' motion for class certification. On February 17, 2004, the defendant filed a motion for leave to appeal the Court's summary judgment and class certification rulings. On October 15, 2004, the parties executed a Settlement Agreement, which is subject to and has been submitted for the approval of the Court.

4. The representative plaintiffs and Class counsel believe that the claims asserted in this Action have merit. Nevertheless, plaintiffs and their counsel believe that it is in the best interests of the Class to settle the pending litigation. In determining to settle the Action, Class counsel have evaluated information made available in the course of the Action and have taken into account the risks and uncertainties of proceeding with this litigation. Those risks include, but are not limited to, the outcome of defendant's pending appeal of the grant of class certification and denial of summary judgment, the outcome of further dispositive motion practice, proof of liability at trial, the existence and/or the quantum of damages provable at trial, post-trial motions and likely appeals, as well as the substantial expense, effort, and time necessary to prosecute the Action through the remainder of the litigation. Based upon their consideration of all of these factors, plaintiffs and their counsel believe it is in the best interests of the Class to settle the Action on the terms disclosed herein, which they believe confers a very substantial benefit upon the Class.

5. THE COURT HAS NOT FINALLY DETERMINED THE MERITS OF PLAINTIFFS' CLAIMS OR THE DEFENSES THERETO. THIS NOTICE DOES NOT IMPLY THAT THERE HAS BEEN OR WOULD BE ANY FINDING OF VIOLATION OF THE LAW BY TACP OR THAT RECOVERY COULD BE HAD IN ANY AMOUNT IF THE ACTION WERE NOT SETTLED.

### **TERMS OF THE PROPOSED SETTLEMENT**

6. Pursuant to the Settlement Agreement, members of the Class are entitled to receive ONE of the following four remedies, depending upon when the Toshiba DVD Player was purchased or acquired:

**If you purchased your Toshiba DVD Player prior to and including December 31, 2001**, you are entitled to either (1) a cash reimbursement for any amounts paid to TACP or a third party service center for the purpose of upgrading the firmware in the Toshiba DVD Player to cure Playback Incompatibilities (defined below); (2) a free firmware upgrade (to the latest available firmware version if such an upgrade is available for general consumer use)

or, at Toshiba's option, a replacement DVD Player; or (3) if you purchased a non-Toshiba brand DVD player prior to October 15, 2004 as a replacement for such Toshiba DVD Player specifically as a result of Playback Incompatibilities experienced on the Toshiba DVD Player, a rebate certificate valid against the purchase of Toshiba brand consumer audio or video electronics products distributed by TACP.

**If you purchased or acquired the Toshiba DVD Player from January 1, 2002 to October 15, 2004**, you are entitled to free firmware upgrades (to the latest available firmware version), to the extent such upgrades are made available by Toshiba for general consumer use, for two years from the date on which the Toshiba DVD player was purchased, or one year from October 15, 2004, whichever is longer.

These options are described further below in Paragraphs 8(A), (B), (C) and (D). Only one of the settlement benefits listed above shall be available for each Toshiba DVD Player for which a claim is made, upon satisfaction of the requirements specified in this Notice. If a Class member submits multiple claims for relief under the Settlement Agreement for the same Toshiba DVD Player, or if multiple Class members submit claims for relief under the Settlement Agreement for the same Toshiba DVD Player, TACP may, at its exclusive option, decide which claim to honor. If you have questions regarding these options, and how you may receive them, you can call the Toshiba DVD Settlement Hotline at (800) 210-5874 or visit the Toshiba DVD Settlement Website at [www.dvdnotice.com](http://www.dvdnotice.com).

7. For the purposes of this Notice and the Settlement Agreement, "Playback Incompatibilities" is defined as playback abnormalities with the audio or video playback of undamaged, Region 1 DVD video discs that were released for sale in the United States, that were specifically caused by an error in Toshiba's DVD Player firmware or decoder chips. Such Playback Incompatibilities may include, but are not limited to "skipping," "pixelating," failing to properly display or process menu functions, failure to play a disc at all, or any other abnormality related to the Toshiba DVD Players' incompatibility with undamaged, Region 1 DVD video discs that were released for sale in the United States market. "Playback Incompatibilities" does not include any playback abnormalities with Toshiba DVD Players that are caused by (1) misuse of the Toshiba DVD Player or a DVD disc; (2) contamination of the Toshiba DVD player or a DVD disc (including, but not limited to, fingerprints, exposure to water, or exposure to excess levels of dust); (3) physical damage to the Toshiba DVD Player or a DVD disc (including, but not limited to, scratches on the playback surface of a DVD disc); or, (4) any other defects or malfunctions unrelated to the firmware and decoder chip.

8. If you are a Class Member, and you have not opted out of the class, you are entitled to one, and only one, of the following remedies:

**(A) Cash Reimbursement for Firmware Upgrades**

If you paid to upgrade your Toshiba DVD Player to correct Playback Incompatibilities, you are entitled to a reimbursement of the money you paid for the upgrade. The procedures for receiving your reimbursement differ depending on whether you paid Norman's Electronics, Inc. ("Norman's"), or TACP or another repair facility for the upgrade.

**Reimbursement for Upgrades By Norman's**

For each member of the Class who previously paid Norman's to upgrade the firmware in a Toshiba DVD Player for the purpose of resolving Playback Incompatibilities, TACP will make a cash payment to those Class members in an amount equal to the amount paid to Norman's for the firmware upgrade, to the extent TACP can determine the identities of those Class members from available records. No such payments shall be made to Class members who have previously received a refund or reimbursement for such payments. No such payments shall be made to Class members to reimburse any separate shipping, packing or transportation costs that may have been incurred by consumers in connection with such upgrades, unless such expenses were levied by, and paid directly to, Norman's. Class members entitled to such funds shall not need to submit a Claim Form. If a Class member is entitled to such payment, but has changed his or her mailing address subsequent to the upgrade, then such Class member must complete a Claim Form (attached hereto) to receive such payment.

Reimbursement for Upgrades Not Done at Norman's

Each member of the Class who previously paid either TACP or a repair facility other than Norman's to replace a Toshiba DVD Player or upgrade the firmware in a Toshiba DVD Player for the purpose of resolving Playback Incompatibilities, shall be entitled to submit a Claim Form to the Claims Administrator within 90 days of the Fairness Hearing (unless such period is extended by Order of the Court) for amounts paid by them for that upgrade, and TACP shall make a cash payment for each valid claim in such an amount. Such Claim Form shall include upgrade documentation (such as receipts or invoices) setting forth payments for such upgrades. No payments shall be made to Class members who have previously received a refund or reimbursement for such payments. No such payments shall be made to Class members to reimburse any separately paid shipping, packing or transportation costs that may have been incurred by consumers in connection with such upgrades or replacements, unless such expenses were levied by, and paid directly to, TACP or a third party.

**(B) Free Firmware Upgrades Or Replacements For DVD Players Acquired Up To December 31, 2001**

For each member of the Class who purchased or acquired a Toshiba DVD Player from the beginning of the Class Period up to and including December 31, 2001, and who does not seek any other remedy under this Settlement Agreement, and who submits a completed and valid Claim Form to the Claims Administrator within 90 days of the Fairness Hearing (unless such period is extended by Order of the Court), TACP shall make available either (1) a free firmware upgrade or (2) at TACP's option, a recent-model replacement DVD player. TACP is not responsible for developing firmware upgrades in response to Playback Incompatibilities or otherwise. For Class members choosing this benefit, and to the extent such Class members ship their Toshiba DVD Player to receive the upgrade or replacement, TACP will pay ground shipping charges (but not including packing expenses) for two-way shipment of the Toshiba DVD player (or replacement Toshiba DVD player).

**(C) Rebate Certificates**

Any member of the Class who purchased or acquired a Toshiba DVD Player from the beginning of the Class Period up to and including December 31, 2001, and who does not seek any other remedy under this Settlement Agreement, and who submits a completed and valid Claim Form, and who prior to the last date of the Class Period purchased a non Toshiba-brand DVD player as a replacement for such Toshiba DVD Player specifically as a result of Playback Incompatibilities experienced on the Toshiba DVD Player, will be entitled to receive a rebate certificate (the "Rebate Certificate") from TACP if they submit a Claim Form to the Claims Administrator within 90 days of the Fairness Hearing (unless such period is extended by Order of the Court).

Terms of the Rebate Certificates

1. Rebate Certificates will be transferable, and must be redeemed within 12 months after original issuance.
2. Rebate Certificates shall entitle the bearer to a rebate against the contemporaneous (on the same receipt) aggregate purchase of any Toshiba brand consumer audio or video electronics products distributed by TACP, based upon the price that the Class member originally paid for the Toshiba DVD player, as follows:

<b>Price Paid For Toshiba DVD Player</b>	<b>Rebate Certificate Amount</b>
\$500 or more	\$125
\$400.01-\$499.99	\$100
\$300.01-\$400	\$75
\$200.01-\$300	\$50
\$0-\$200	\$25

3. Multiple Rebate Certificates may not be aggregated for use on a single purchase.

4. Rebate Certificates must be redeemed by mailing the Rebate Certificate, together with proof of purchase of a Toshiba brand consumer audio or video electronics product distributed by TACP, to the Claims Administrator.

**(D) Firmware Upgrades For DVD Players Purchased New On or After January 1, 2002.**

9. For each member of the Class who purchased or otherwise acquired a new Toshiba DVD Player from (and no earlier than) January 1, 2002 up to and including the last day of the Class Period, and who does not seek a reimbursement for a firmware upgrade pursuant to section 2 of this Settlement Agreement, and who does not seek any other remedy under this Settlement Agreement, and where appropriate for the particular DVD player given the current level of firmware on the DVD player, TACP agrees to offer free firmware upgrades (to the latest available firmware version), to the extent such upgrades are made available by Toshiba for general consumer use, for two years from the date on which the Class member's Toshiba DVD player was purchased, or one year from the date of the Settlement Agreement, whichever is longer. TACP shall not be obligated or held liable in any way to develop firmware upgrades in response to Playback Incompatibilities or otherwise.

(a) Those Class members who purchased a new Toshiba DVD player after January 1, 2002 and wish to avail themselves of the Two-Year upgrade remedy should contact Toshiba's Customer Service department to receive instructions on how to obtain the upgrade. TACP will send such an upgrade disc to the Class Members free of charge to accomplish the upgrade, if such an upgrade disc is available. If such an upgrade disc is not available, Class members may ship (at Toshiba's expense) or personally deliver their Toshiba DVD Player to a TACP-selected service center to obtain the free firmware upgrade.

10. TACP reserves the right to reasonably verify and/or cross-check the information contained on any Claim Forms that are filed pursuant to this Settlement Agreement prior to awarding any claimant relief hereunder, including, but not limited, to (1) verification of product serial numbers and documentary proofs of payment, (2) verification of any claimant's statement that the direct cause of the consumer's purchase of a non-Toshiba DVD player was the actual manifestation of one or more Playback Incompatibilities, (3) inspection (at its own expense) of any Toshiba DVD Player for which a Playback Incompatibility is claimed, (4) inspection of any consumer's DVD discs for which the consumer claims to experience a Playback Incompatibility, (5) inquiry into whether any DVD discs for which a consumer claims to have experienced a Playback Incompatibility were properly authored or manufactured and (6) any other fact that might exclude a claimant from membership in the Class.

11. If the Settlement is approved by the Court, TACP and each of its present and former, direct and indirect, subsidiaries, parents, affiliates, unincorporated entities, divisions, groups, officers, directors, shareholders, partners, partnerships, joint ventures, employees, agents, servants, assignees, successors, insurers, indemnitees, attorneys, transferees, and/or representatives, specifically including Toshiba America Inc., a corporation organized under the laws of the State of New York with its principal place of business in New York, New York, and Toshiba Corporation, a corporation organized under the laws of Japan with its principal place of business in Tokyo, Japan (collectively, the "Released Parties"), shall be released and forever discharged by the Class Representatives, for themselves and as the representatives of each Class member, and each Class member on behalf of himself, herself, or itself and their respective present and former, direct and indirect, subsidiaries, parents, affiliates, unincorporated entities, divisions, groups, officers, directors, shareholders, partners, partnerships, joint ventures, employees, agents, servants, assignees, successors, insurers, indemnitees, attorneys, transferees, and/or representatives, from claims or causes of action that have been, might have been, are now, or could have been brought arising from or related to Playback Incompatibilities (as defined above), whether in law or equity, whether seeking damages or any other relief (including attorneys' fees), of any kind or character, known or unknown, that are now recognized by law or that may be created or recognized in the future by statute, regulation, judicial decision, or in any other manner, based upon any federal or state statutory or common law, including, without limitation, claims sounding in tort, contract, and the consumer protection laws of the United States or of any state or other jurisdiction within the United States, as well as under the unfair or deceptive trade practices, trade regulation, consumer fraud, and false advertising law of the United States or any state or other jurisdiction within the United States, including but not limited to any claims relating to the alleged diminished value of or need to replace a Toshiba DVD Player, but not claims for personal injury or physical property damage (the "Released Claims").

12. Upon entry of the Final Judgment and Order Approving Settlement, and in consideration of the Settlement Agreement and the benefits extended to the Class, each Class Representative shall have, and each Class member shall be deemed to have, covenanted and agreed that he, she, or it will forever refrain from instituting, maintaining, or proceeding in any action against any Released Party with respect to any Released Claim, including Released Claims known and those not now known, suspected, or claimed, that he, she, or it had or hereafter may have. The Settlement Agreement may be pleaded by the Released Parties as a full and complete defense to, and may be used as the basis for an injunction against, any action, suit or other proceeding, which has been or may be instituted, prosecuted or attempted, asserting any Released Claim.

13. The Settlement Agreement constitutes a compromise, resolution, and settlement of the disputed claims to avoid the uncertainty, time, trouble, and expense of litigation. All parties understand and agree that this Settlement Agreement does not constitute and shall not be taken or construed as an admission of liability on the part of TACP or any of the Released Parties, but rather, such liability has been and is expressly denied. It is further understood and agreed that this Settlement Agreement shall not be taken or used, nor shall this Settlement Agreement be admissible in evidence, in any action, cause of action, or proceeding, except in an action to enforce the terms of this Settlement Agreement. The Class does not concede any infirmity or weakness in their claims. TACP does not concede any infirmity or weakness in its defenses or its products, and maintains its position that DVD technology is a resounding consumer success, and Toshiba DVD Players have performed exceptionally well since their inception.

14. Counsel for the representative plaintiffs in the related state court actions in California, Texas and Florida have indicated that the representative plaintiffs will neither exclude themselves from the Class nor object to this Agreement. Additionally, counsel for the representative plaintiffs in the related state court actions have indicated that those plaintiffs will take the appropriate actions to stay and dismiss with prejudice the related state court actions upon the Court's approval of this Agreement.

#### **THE RIGHTS OF CLASS MEMBERS**

15. The Court has certified this Action to proceed as a Class Action for New Jersey and New York residents, and further certified this Action for settlement purposes for all those residing throughout the entire United States. Class Members have the following options pursuant to the Settlement Agreement:

(a) If you wish to participate in the Settlement, you do not need to appear at the hearing discussed below. However, in order to receive the remedies discussed in paragraphs 8(A), (B) and (C), above, you must complete and return the Toshiba DVD Class Action Settlement Claim Form by May 1, 2005. Assistance in making a claim under the Settlement Agreement and completing the Claim Form can be received by calling the Toshiba DVD Settlement Hotline at (800) 210-5874.

(b) If you do not wish to remain a member of the Class you may opt out of the Class. If you request to opt out of the Class, you will NOT be entitled to receive any benefits from the Settlement Agreement, may not object to the Settlement Agreement, and will retain any individual rights you may have with respect to the claims asserted in this Action. Any Class member who wishes to opt out of the Class must do so in writing by mailing a request for exclusion to the Claims Administrator. Each such person must submit or postmark his/her request to opt out of the Class within 45 days of the later of the mailing or publication of the Class Notice. No request to opt out will be accepted unless it is postmarked on or before December 20, 2004. The request to opt out must be signed by the person seeking to opt out. All requests for exclusion that fail to satisfy the requirements of this section, and any additional requirements as the Court may impose, shall not be effective. Any Class member who does not properly and timely submit a request for exclusion as required herein shall be deemed to have waived all rights to opt out and shall be deemed a member of the Class for all purposes under this Settlement Agreement. Any Class member opting out may not be allowed to rescind or revoke such decision, without the approval of the parties and the Court.

(c) You may, if you desire, appear at the Settlement Hearing described below to object to the proposed Settlement Agreement or to the application for attorneys' fees and reimbursement of expenses, if you do not request to opt out of the Class. To do so, you must file a written notice of objection, together with a statement of your reasons for objecting, with the Court. To be considered by the Court, all objections must be received on or before January 18, 2005, and copies must also be sent to:

Bruce D. Greenberg, Esq.  
Lite, DePalma, Greenberg & Rivas LLP  
Two Gateway Center, 12 Fl.  
Newark, NJ 07102

Attorneys for Plaintiffs

Peter L. Winik, Esq.  
Latham & Watkins LLP  
555 11<sup>th</sup> Street, N.W., Suite 1000  
Washington, D.C. 20004

Attorneys for Defendant

#### **SETTLEMENT FAIRNESS HEARING**

16. On January 31, 2005, at 9:00 a.m., a hearing will be held in the Superior Court of New Jersey, located at 10 Main Street, Hackensack, New Jersey 07601, to determine whether the Settlement should be approved by the Court as fair, reasonable, and adequate, and whether judgment should be entered thereon. The Court will also consider at this Hearing the request of Class Counsel for an award of attorneys' fees and reimbursement of expenses in the amount of \$6.3 million for the services they have rendered in this litigation, which TACP has agreed to pay as part of the Settlement Agreement. Class Counsel will also seek permission from the Court to pay \$250 to each of the named plaintiffs in the Action and the related state court actions filed in California, Texas and Florida, from the award of costs and attorneys' fees, to reimburse those named plaintiffs for costs incurred in complying with discovery and participation in the litigation.

17. Your attendance at the Settlement Hearing is not required. However, you may be heard orally at the Settlement Hearing in opposition to the proposed Settlement or Class Counsels' application for attorneys' fees and expenses only if you have not requested to be excluded from the Class and have timely filed written objections in the manner described above. You may also enter an appearance through an attorney, at your own expense. If you do not do so, you will be represented in this action by Class Counsel.

#### **FURTHER INFORMATION**

18. For more details of the matters involved in this Action, reference is made to the pleadings, to the Settlement Agreement, to the Orders entered by the Court and to the other papers filed in the Action, which may be inspected at the Office of the Clerk of the Superior Court of New Jersey, Bergen County (under the Docket Number listed in the caption above) during regular business hours.

19. Inquiries regarding the settlement benefits and procedures may be directed to the Toshiba DVD Settlement Hotline at (800) 210-5874. **PLEASE DO NOT CALL, OR DIRECT ANY INQUIRIES TO THE COURT.**