

COPY

DEC 13 2013

1 Reuben Yeroushalmi (SBN 193981)
Daniel D. Cho (SBN 105409)
2 Ben Yeroushalmi (SBN 232540)
YEROUSHALMI & ASSOCIATES
3 9100 Wilshire Boulevard, Suite 610E
Beverly Hills, California 90212
4 Telephone: 310.623.1926
5 Facsimile: 310.623.1930

ENDORSED
FILED
San Francisco County Superior Court

FEB 08 2014

6 Attorneys for Plaintiffs,
Consumer Advocacy Group, Inc.

CLERK OF THE COURT
BY: LESLEY FISCELLA
Deputy Clerk

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 COUNTY OF SAN FRANCISCO

12 CONSUMER ADVOCACY GROUP, INC.,
13 in the public interest,

14 Plaintiff,

15 v.

17 WIESNER PRODUCTS, INC., a New York
Corporation, MYSTIC APPAREL LLC; and
18 DOES 1-50,

19 Defendants.

CASE NO. CGC-12-521346

CONSENT JUDGMENT (PROPOSED)

Second Amended Complaint filed:
August 23, 2013

BY FAX

20 1. INTRODUCTION

21 1.1 This Consent Judgment is entered into by and between plaintiff Consumer
22 Advocacy Group, Inc. ("CAG") acting on behalf of itself and in the interest of the public and
23 defendants Wiesner Products, Inc. ("Wiesner") and Mystic Apparel, LLC ("Mystic Apparel"),
24 with each a Party and collectively referred to as "Parties" and Wiesner and Mystic Apparel
25 collectively referred to as "Defendants."

26 1.2 Wiesner employs ten or more persons, is a person in the course of doing business
27 for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, California Health
28

CONSENT JUDGMENT (PROPOSED)

1 & Safety Code §§ 25249.6 et seq. ("Proposition 65"), and manufactures, distributes, and sells
2 Footwear, Children's Slippers, Rene Rofe Sandals, and Children's Sandals. Mystic Apparel
3 employs ten or more persons, is a person in the course of doing business for the purposes of
4 Proposition 65, and manufactures, distributes and sells Bath Mats.

5 **1.3 Notices of Violation.**

6 1.3.1 On or about June 7, 2011, CAG served Wiesner, Hasbro, Inc. and various
7 public enforcement agencies with a document entitled "60-Day Notice of Violation" (the
8 "June 7, 2011 Notice") that provided the recipients with notice of alleged violations of
9 Health & Safety Code § 25249.6 for failing to warn individuals in California of
10 exposures to di-butyl phthalate (DBP) contained in Children's Slippers.

11 1.3.2 On or about December 5, 2011, CAG served Wiesner, Big Lots Stores,
12 Inc., Big Lots, Inc., Big Lots!, International Intimates dba Rene Rofe and various public
13 enforcement agencies with a document entitled "60-Day Notice of Violation" (the
14 "December 5, 2011 Notice") that provided the recipients with notice of alleged violations
15 of Health & Safety Code § 25249.6 for failing to warn individuals in California of
16 exposures to di-butyl phthalate (DBP) contained in Rene Rofe Sandals.

17 1.3.3 On or about March 6, 2012, CAG served Wiesner, International Intimates
18 dba Rene Rofe and various public enforcement agencies with a document entitled "60-
19 Day Notice of Violation" (the "March 6, 2012 Notice") that provided the recipients with
20 notice of alleged violations of Health & Safety Code § 25249.6 for failing to warn
21 individuals in California of exposures to DBP and Di (2-ethylhexyl) phthalate (DEHP)
22 contained in Footwear.

23 1.3.4 On or about March 6, 2012, CAG served Wiesner, Big Lots, Inc., Big Lots
24 Stores, Inc. and various public enforcement agencies with a document entitled "60-Day
25 Notice of Violation" (the "March 6, 2012 Notice") that provided the recipients with
26 notice of alleged violations of Health & Safety Code § 25249.6 for failing to warn
27
28

1 individuals in California of exposures to Di n-Hexyl Phthlate (DNHP) contained in
2 Footwear.

3 1.3.5 On or about April 23, 2012, CAG served Wiesner, Viacom, Inc.,
4 Burlington Coat Factory Warehouse Corporation and various public enforcement
5 agencies with a document entitled "60-Day Notice of Violation" (the "April 23, 2012
6 Notice") that provided the recipients with notice of alleged violations of Health & Safety
7 Code § 25249.6 for failing to warn individuals in California of exposures to DBP
8 contained in Children's Sandals.

9 1.3.6 On or about May 3, 2013, CAG served Mystic Apparel and various public
10 enforcement agencies with a document entitled "60-Day Notice of Violation" (the "May
11 3, 2013 Notice") that provided the recipients with notice of alleged violations of Health
12 & Safety Code § 25249.6 for failing to warn individuals in California of exposures to
13 DEHP contained in Bath Mats.

14 1.3.7 No public enforcer has commenced or diligently prosecuted the
15 allegations set forth in the June 7, 2011, December 5, 2011, March 6, 2012, April 23,
16 2012, and May 3, 2013 Notices.

17 **1.4 Complaint.**

18 On June 7, 2012, CAG filed a Complaint for civil penalties and injunctive relief in San
19 Francisco Superior Court, Case No.CGC-12-521346 as to the Footwear products. On February
20 20, 2013, CAG filed a First Amended Complaint. On August 23, 2013, CAG filed a Second
21 Amended Complaint ("Complaint"). The Complaint alleges, among other things, that Wiesner
22 violated Proposition 65 by failing to give clear and reasonable warnings of exposure to DEHP,
23 DBP, and DNHP (hereinafter "Noticed Chemicals"), and that Mystic Apparel violated
24 Proposition 65 by failing to give clear and reasonable warnings of exposure to DEHP.
25

26 **1.5 Consent to Jurisdiction**

27 For purposes of this Consent Judgment only, the parties stipulate that this Court has
28

1 jurisdiction over the allegations of violations contained in the Complaint and personal
2 jurisdiction over Wiesner and Mystic Apparel as to the acts alleged in the Complaint, that venue
3 is proper in the City and County of San Francisco and that this Court has jurisdiction to enter this
4 Consent Judgment as a full settlement and resolution of the allegations contained in the
5 Complaint and of all claims which were or could have been raised by any person or entity based
6 in whole or in part, directly or indirectly, on the facts alleged therein or arising therefrom or
7 related to.

8 **1.6 No Admission**

9 This Consent Judgment resolves claims that are denied and disputed. The parties enter
10 into this Consent Judgment pursuant to a full and final settlement of any and all claims between
11 the parties for the purpose of avoiding prolonged litigation. This Consent Judgment shall not
12 constitute an admission with respect to any material allegation of the Complaint, each and every
13 allegation of which Wiesner and Mystic Apparel deny, nor may this Consent Judgment or
14 compliance with it be used as evidence of any wrongdoing, misconduct, culpability or liability
15 on the part of Wiesner or Mystic Apparel.

16 **2. DEFINITIONS**

17 2.1 "Covered Products" means Footwear, Children's Slippers, Children's Sandals,
18 and Rene Rofe Sandals manufactured, distributed, sold or offered for sale by Wiesner, and Bath
19 Mats manufactured, distributed, sold or offered for sale by Mystic Apparel.

20 2.2 "Effective Date" means the date that this Consent Judgment is entered by the
21 Court.

22 **3. INJUNCTIVE RELIEF/REFORMULATION**

23 3.1 Within 30 days of the Effective Date Wiesner and Mystic Apparel shall not sell or
24 offer for sale in California Covered Products that contain the Noticed Chemicals with more than
25 0.1% by weight.
26
27
28

1 4. SETTLEMENT PAYMENT

2 4.1 Reimbursement of Attorneys' Fees and Costs: Within ten (10) days of the
3 Effective Date, Defendants shall pay a total of eighty thousand dollars ~~(\$80,000)~~ ^{\$60,000} to
4 "Yeroushalmi & Associates" as reimbursement for the investigation fees and costs, testing costs,
5 expert fees, attorney fees, and other litigation costs and expenses for all work performed through
6 the approval of this Consent Judgment.

7 4.2 Civil Penalties. Within ten (10) days of the Effective Date, Defendants shall issue
8 two separate checks for a total amount of four thousand dollars (\$4,000): \$4,000 as penalties
9 pursuant to Health & Safety Code § 25249.12: (a) one check made payable to the State of
10 California's Office of Environmental Health Hazard Assessment (OEHHA) in the amount of
11 \$3,000 representing 75% of the total penalty; and (b) one check to Consumer Advocacy Group,
12 Inc. in the amount of \$1,000 representing 25% of the total penalty. Two separate 1099s shall be
13 issued for the above payments: The first 1099 shall be issued to OEHHA, P.O. Box 4010,
14 Sacramento, CA 95184 (EIN: 68-0284486) in the amount of \$3,000. The second 1099 shall be
15 issued in the amount of \$1,000 to CAG and delivered to: Yeroushalmi & Associates, 9100
16 Wilshire Boulevard, Suite 610E, Beverly Hills, California 90212.

17 4.3 Payment In Lieu of Civil Penalties: Within ten (10) days of the Effective Date,
18 Defendants shall pay a total of \$1,000 in lieu of civil penalties to "Consumer Advocacy Group,
19 Inc." CAG will use this payment for investigation of the public's exposure to Proposition 65
20 listed chemicals through various means, laboratory fees for testing for Proposition 65 listed
21 chemicals, expert fees for evaluating exposures through various mediums, including but not
22 limited to consumer product, occupational, and environmental exposures to Proposition 65 listed
23 chemicals, and the administrative and litigation costs and fees (excluding attorneys' fees), the
24 cost of hiring consulting and retained experts who assist with the extensive scientific analysis
25 necessary for those files in litigation, in order to reduce the public's exposure to Proposition 65
26 listed chemicals by notifying those persons and/or entities believed to be responsible for such
27

28

1 exposures and attempting to persuade those persons and/or entities to reformulate their products
2 or the source of exposure to completely eliminate or lower the level of Proposition 65 listed
3 chemicals, thereby addressing the same public harm as allegedly in the instant Action. Further,
4 should the court require it, CAG will submit under seal, an accounting of these funds as
5 described above as to how the funds were used. The check shall be made payable to "Consumer
6 Advocacy Group, Inc." and delivered to Reuben Yeroushalmi, Yeroushalmi & Associates, 9100
7 Wilshire Boulevard, Suite 610E, Beverly Hills, California 90212.

8 4.4 Other than the payment to OEHHA identified in Section 4.2, payments shall be
9 delivered to: Reuben Yeroushalmi, Yeroushalmi & Associates, 9100 Wilshire Blvd., Suite
10 610E, Beverly Hills, CA 90212.

11 **5. MATTERS COVERED BY THIS CONSENT JUDGMENT**

12 5.1 This Consent Judgment is a full, final, and binding resolution between CAG on
13 behalf of itself and in the public interest and Defendants Wiesner and Mystic Apparel and their
14 officers, directors, insurers, employees, parents, shareholders, divisions, subdivisions,
15 subsidiaries, partners, affiliates, sister companies and their successors and assigns ("Defendant
16 Releasees"), including but not limited to each of its suppliers, customers, distributors,
17 wholesalers, retailers, licensors, licensees, or any other person in the course of doing business,
18 and the successors and assigns of any of them, who may use, maintain, distribute or sell Covered
19 Products ("Downstream Defendant Releasees"), for all claims for violations of Proposition 65 up
20 through the Effective Date based on exposure to the Noticed Chemicals from Covered Products
21 as set forth in the Notices. Wiesner, Mystic Apparel and Defendant Releasees' compliance with
22 this Consent Judgment shall constitute compliance with Proposition 65 with respect to the
23 Noticed Chemicals in Defendants' Covered Products.

24 5.2 CAG on behalf of itself, its past and current agents, representatives, attorneys,
25 successors, and/or assignees, hereby waives all rights to institute or participate in, directly or
26 indirectly, any form of legal action and releases all claims, including, without limitation, all
27
28

1 actions, and causes of action, in law or in equity, suits, liabilities, demands, obligations,
2 damages, costs, fines, penalties, losses, or expenses (including, but not limited to, investigation
3 fees, expert fees, and attorneys' fees) of any nature whatsoever, whether known or unknown,
4 fixed or contingent (collectively "Claims"), against Wiesner, Mystic Apparel, Defendant
5 Releasees, and Downstream Defendant Releasees arising from any violation of Proposition 65 or
6 any other statutory or common law regarding the failure to warn about exposure to Noticed
7 Chemicals from Covered Products manufactured, distributed, or sold by Wiesner, Mystic
8 Apparel and Defendant Releasees. In furtherance of the foregoing, as to alleged exposures to
9 Noticed Chemicals from Covered Products, CAG hereby waives any and all rights and benefits
10 which it now has, or in the future may have, conferred upon it with respect to the Claims arising
11 from any violation of Proposition 65 or any other statutory or common law regarding the failure
12 to warn about exposure to Noticed Chemicals from Covered Products by virtue of the provisions
13 of section 1542 of the California Civil Code, which provides as follows:

14
15 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE
16 CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS FAVOR AT
17 THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM,
18 MUST HAVE MATERIALLY AFFECTED HIS SETTLEMENT WITH THE
19 DEBTOR.

20 CAG understands and acknowledges that the significance and consequence of this waiver of
21 California Civil Code section 1542 is that even if CAG suffers future damages arising out of or
22 resulting from, or related directly or indirectly to, in whole or in part, the Claims arising from
23 any violation of Proposition 65 or any other statutory or common law regarding the failure to
24 warn about exposure to Noticed Chemicals from Covered Products, including but not limited to
25 any exposure to, or failure to warn with respect to exposure to Noticed Chemicals from the
26 Covered Products, CAG will not be able to make any claim for those damages against Wiesner
27 or the Defendant Releasees or Downstream Defendant Releasees. Furthermore, CAG
28 acknowledges that it intends these consequences for any such Claims arising from any violation
of Proposition 65 or any other statutory or common law regarding the failure to warn about

1 exposure to Noticed Chemicals from Covered Products as may exist as of the date of this release
2 but which CAG does not know exist, and which, if known, would materially affect their decision
3 to enter into this Consent Judgment, regardless of whether their lack of knowledge is the result of
4 ignorance, oversight, error, negligence, or any other cause.

5 **6. ENFORCEMENT OF JUDGMENT**

6 6.1 The terms of this Consent Judgment shall be enforced exclusively by the parties
7 hereto. The parties may, by noticed motion or order to show cause before the Superior Court of
8 California, City and County of San Francisco, giving the notice required by law, enforce the
9 terms and conditions contained herein. A Party may enforce any of the terms and conditions of
10 this Consent Judgment only after that Party first provides 30 days' notice to the Party allegedly
11 failing to comply with the terms and conditions of this Consent Judgment and attempts to resolve
12 such Party's failure to comply in an open and good faith manner.

13 6.2 Notice of Violation. Prior to bringing any motion, order to show cause, or other
14 proceeding to enforce Section 3.1 of this Consent Judgment, CAG shall provide a Notice of
15 Violation ("NOV") to Wiesner and/or Mystic Apparel. The NOV shall include for each of the
16 Covered Products: the date(s) the alleged violation(s) was observed and the location at which the
17 Covered Products were offered for sale, and shall be accompanied by all test data obtained by
18 CAG regarding the Covered Products, including an identification of the component(s) of the
19 Covered Products that were tested.

20 6.2.1 Non-Contested NOV. CAG shall take no further action regarding the
21 alleged violation if, within 30 days of receiving such NOV, Wiesner and/or Mystic
22 Apparel serves a Notice of Election ("NOE") that meets one of the following conditions:

23 (a) The Covered Products were shipped by Wiesner and/or Mystic
24 Apparel for sale in California before the Effective Date, or

25 (b) Since receiving the NOV Wiesner and/or Mystic Apparel has taken
26 corrective action by either (i) requesting that its customers in California remove the
27

1 Covered Products identified in the NOV from sale in California and destroy or return the
2 Covered Products to Defendant, or (ii) providing a clear and reasonable warning for the
3 Covered Products identified in the NOV pursuant to 27 Cal. Code Regs. § 25603.

4 6.2.2 Contested NOV. Wiesner and/or Mystic Apparel may serve an NOE
5 informing CAG of its election to contest the NOV within 30 days of receiving the NOV.

6 (a) In the election, Wiesner and/or Mystic Apparel may request that
7 the sample(s) Covered Products tested by CAG be subject to confirmatory testing at an
8 EPA-accredited laboratory.

9 (b) If the confirmatory testing establishes that the Covered Products do
10 not contain Noticed Chemicals in excess of the level allowed in Section 3.1 CAG shall
11 take no further action regarding the alleged violation. If the testing does not establish
12 compliance with Section 3.1, Wiesner and/or Mystic Apparel may withdraw its NOE to
13 contest the violation and may serve a new NOE pursuant to Section 6.2.1.

14 (c) If Wiesner and/or Mystic Apparel does not withdraw an NOE to
15 contest the NOV, the Parties shall meet and confer for a period of no less than 30 days
16 before CAG may seek an order enforcing the terms of this Consent Judgment.

17 6.3 In any proceeding brought by either Party to enforce this Consent Judgment, such
18 party may seek whatever fines, costs, penalties or remedies as may be provided by law for any
19 violation of Proposition 65 or this Consent Judgment.
20

21 **7. ENTRY OF CONSENT JUDGMENT**

22 7.1 CAG shall file a motion seeking approval of this Consent Judgment pursuant to
23 California Health & Safety Code § 25249.7(f). Upon entry of the Consent Judgment, CAG and
24 Defendants waive their respective rights to a hearing or trial on the allegations of the Complaint.

25 7.2 If this Consent Judgment is not approved by the Court, (a) this Consent Judgment
26 and any and all prior agreements between the parties merged herein shall terminate and become
27 null and void, and the actions shall revert to the status that existed prior to the execution date of
28

1 this Consent Judgment; (b) no term of this Consent Judgment or any draft thereof, or of the
2 negotiation, documentation, or other part or aspect of the Parties' settlement discussions, shall
3 have any effect, nor shall any such matter be admissible in evidence for any purpose in this
4 Action, or in any other proceeding; and (c) the Parties agree to meet and confer to determine
5 whether to modify the terms of the Consent Judgment and to resubmit it for approval.

6 **8. MODIFICATION OF JUDGMENT**

7 8.1 This Consent Judgment may be modified only upon written agreement of the
8 parties and upon entry of a modified Consent Judgment by the Court thereon, or upon motion of
9 any party as provided by law and upon entry of a modified Consent Judgment by the Court.

10 8.2 Any Party seeking to modify this Consent Judgment shall attempt in good faith to
11 meet and confer with the other Party prior to filing a motion to modify the Consent Judgment.

12 **9. RETENTION OF JURISDICTION**

13 9.1 This Court shall retain jurisdiction of this matter to implement and enforce the
14 terms of this Consent Judgment.

15 **10. DUTIES LIMITED TO CALIFORNIA**

16 This Consent Judgment shall have no effect on Covered Products sold outside the State of
17 California.

18 **11. SERVICE ON THE ATTORNEY GENERAL**

19 11.1 CAG shall serve a copy of this Consent Judgment, signed by both parties, on the
20 California Attorney General so that the Attorney General may review this Consent Judgment
21 prior to its submittal to the Court for approval. Further, CAG will file the Motion to Approve the
22 Consent Judgment and will provide the Attorney General with at least forty-five (45) days notice
23 of that Motion.
24

25 **12. ATTORNEY FEES**

26 12.1 Except as specifically provided in Section 4, each Party shall bear its own costs
27 and attorney fees in connection with this action.
28

1 **13. ENTIRE AGREEMENT**

2 13.1 This Consent Judgment contains the sole and entire agreement and understanding
3 of the parties with respect to the entire subject matter hereof and any and all prior discussions,
4 negotiations, commitments and understandings related hereto. No representations, oral or
5 otherwise, express or implied, other than those contained herein have been made by any party
6 hereto. No other agreements not specifically referred to herein, oral or otherwise, shall be
7 deemed to exist or to bind any of the parties.

8 **14. GOVERNING LAW**

9 14.1 The validity, construction and performance of this Consent Judgment shall be
10 governed by the laws of the State of California.

11 14.2 In the event that Proposition 65 is repealed, preempted, or is otherwise rendered
12 inapplicable by reason of law generally, or if any of the provisions of this Consent Judgment are
13 rendered inapplicable or are no longer required as a result of any such repeal or preemption, or
14 rendered inapplicable by reason of law generally as to the Covered Products, then either
15 Defendant may provide written notice to CAG of any asserted change in the law, and shall have
16 no further obligations pursuant to this Consent Judgment with respect to, and to the extent that,
17 the Covered Products are so affected. Nothing in this Consent Judgment shall be interpreted to
18 relieve a Defendant from any obligation to comply with any pertinent state or federal law or
19 regulation.

20 14.3 The Parties, including their counsel, have participated in the preparation of this
21 Consent Judgment and this Consent Judgment is the result of the joint efforts of the Parties. This
22 Consent Judgment was subject to revision and modification by the Parties and has been accepted
23 and approved as to its final form by all Parties and their counsel. Accordingly, any uncertainty
24 or ambiguity existing in this Consent Judgment shall not be interpreted against any Party as a
25 result of the manner of the preparation of this Consent Judgment. Each Party to this Consent
26 Judgment agrees that any statute or rule of construction providing that ambiguities are to be
27

28

1 resolved against the drafting Party should not be employed in the interpretation of this Consent
2 Judgment and, in this regard, the Parties hereby waive California Civil Code § 1654.

3 **15. EXECUTION AND COUNTERPARTS**

4 15.1 This Consent Judgment may be executed in counterparts and by means of
5 facsimile or portable document format (pdf), which taken together shall be deemed to constitute
6 one document.

7 **16. NOTICES**

8 16.1 Any notices under this Consent Judgment shall be by personal delivery or First
9 Class Mail.

10
11 If to CAG:

12 Reuben Yeroushalmi, Esq.
13 9100 Wilshire Boulevard, Suite 610E
14 Beverly Hills, CA 90212
(310) 623-1926

15 If to Wiesner:

16 Wiesner Products, Inc.
17 34 W. 33rd Street, Floor 11
New York, NY 10001

18 With a copy to:

19 Melissa Jones
20 Stoel Rives LLP
21 500 Capitol Mall, Suite 1600
Sacramento, CA 95814

22 If to Mystic Apparel:

23 Mystic Apparel, LLC
24 34 W. 33rd Street, Floor 11
New York, NY 10001

25 With a copy to:

26 Melissa Jones
27 Stoel Rives LLP

28

500 Capitol Mall, Suite 1600
Sacramento, CA 95814

17. AUTHORITY TO STIPULATE

17.1 Each signatory to this Consent Judgment certifies that he or she is fully authorized by the party he or she represents to enter into this Consent Judgment and to execute it on behalf of the party represented and legally to bind that party.

AGREED TO:

Date: 10-14-13, 2013

By: 
Plaintiff, CONSUMER ADVOCACY
GROUP, INC.

AGREED TO:

Date: 10/14/, 2013

By: 
Defendant, WIESNER PRODUCTS, INC.

AGREED TO:

Date: 10/14/, 2013

By: 
Defendant, MYSTIC APPAREL, LLC

IT IS SO ORDERED.

Date: FEB 03 2014

A. JAMES ROBERTSON, II

JUDGE OF THE SUPERIOR COURT

13
CONSENT JUDGMENT (PROPOSED)