



hm

ORIGINAL

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Reuben Yeroushalmi (SBN 193981)
Daniel D. Cho (SBN 105409)
Ben Yeroushalmi (SBN 232540)
YEROUSHALMI & ASSOCIATES
9100 Wilshire Boulevard, Suite 240W
Beverly Hills, California 90212
Telephone: 310.623.1926
Facsimile: 310.623.1930

Attorneys for Plaintiff
Consumer Advocacy Group, Inc.

FILED
ALAMEDA COUNTY

NOV 03 2014

CLERK OF THE SUPERIOR COURT
By Christa Stewart Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ALAMEDA

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

Plaintiff,

v.

ATA RETAIL SERVICES, INC., a
California Corporation, TMD
INTERNATIONAL, LLC, a Nevada
Corporation, SAFEWAY, INC. a Delaware
Corporation; THE VONS COMPANIES,
INC. DBA VONS, a Michigan Corporation;
SMART & FINAL INC., a Delaware
Corporation; and DOES 1-20;
and DOES 1-20;;

Defendants.

CASE NO. RG13667350 **KC**
CONSENT JUDGMENT [PROPOSED]

1. INTRODUCTION

1.1 This Consent Judgment is entered into by and between plaintiff Consumer
Advocacy Group, Inc. ("CAG") acting on behalf of itself and in the interest of the public and

yn
MM

1 defendant ATA Retail Services, Inc. ("ATA"), with each a Party and collectively referred to as
2 "Parties."

3 1.2 ATA employs ten or more persons, is a person in the course of doing business for
4 purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, California Health &
5 Safety Code § 25249.5, *et seq.* ("Proposition 65"), and imports, distributes, and sells Culinary
6 Elements™ Product Bin Liner, Item #9200 ("Liner"). Liner is limited to products sold or
7 distributed by ATA only.

8 1.3 **Notice of Violation.**

9 1.3.1 On or about March 27, 2012, CAG served ATA, Smart & Final, Inc.
10 ("Smart & Final"), TMD International, LLC ("TMD"), and various public enforcement
11 agencies with a document entitled "60-Day Notice of Intent to Sue" (the "March 27, 2012
12 Notice") that provided the recipients with notice of alleged violations of Health & Safety
13 Code § 25249.6 for failing to warn individuals in California of exposures to Di (2-
14 ethylhexyl) phthalate ("DEHP") contained in Liners.

15 1.3.2 On or about August 30, 2012, CAG served ATA, TMD, Safeway Inc. and
16 The Vons Companies (collectively "Safeway"), and various public enforcement agencies
17 with a document entitled "60-Day Notice of Intent to Sue" (the "August 30, 2012
18 Notice") that provided the recipients with notice of alleged violations of Health & Safety
19 Code § 25249.6 for failing to warn individuals in California of exposures to DEHP
20 contained in Liners.

21 1.3.3 On or about June 17, 2014, CAG served ATA, TMD International, LLC,
22 and Food 4 Less of Southern California, Inc. and various public enforcement agencies
23 with a document entitled "60-Day Notice of Intent to Sue" (the "June 17, 2014 Notice")
24 that provided the recipients with notice of alleged violations of Health & Safety Code §
25 25249.6 for failing to warn individuals in California of prior exposures to DEHP
26 contained in Liners.
27
28

JN
mm

1 1.3.4 No public enforcer has commenced or diligently prosecuted the
2 allegations set forth in the March 27, 2012, August 30, 2012 or June 17, 2014 Notices.

3 **1.4 Complaint.**

4 On February 13, 2013, CAG filed a Complaint for Penalty, Injunction, and Restitution
5 ("Complaint") in Alameda Superior Court, Case No. RG13667350.

6 **1.5 Consent to Jurisdiction**

7 For purposes of this Consent Judgment, the parties stipulate that this Court has
8 jurisdiction over the allegations of violations contained in the Complaint and personal
9 jurisdiction over ATA as to the acts alleged in the Complaint, that venue is proper in the City and
10 County of Alameda and that this Court has jurisdiction to enter this Consent Judgment as a full
11 settlement and resolution of the allegations contained in the Complaint and of all claims which
12 were or could have been raised by any person or entity based in whole or in part, directly or
13 indirectly, on the facts alleged therein or arising therefrom or related to.

14 **1.6 No Admission**

15 This Consent Judgment resolves claims that are denied and disputed. The parties enter
16 into this Consent Judgment pursuant to a full and final settlement of any and all claims between
17 the parties for the purpose of avoiding prolonged litigation. This Consent Judgment shall not
18 constitute an admission with respect to any material allegation of the Complaint, each and every
19 allegation of which ATA denies, nor may this Consent Judgment or compliance with it be used
20 as evidence of any wrongdoing, misconduct, culpability or liability on the part of ATA.

21 **2. DEFINITIONS**

22 **2.1 "Effective Date"** means the date that this Consent Judgment is approved by the
23 Court.

24 **2.2 "Notices"** means the March 27, 2012, August 30, 2012 and June 17, 2014
25 Notices.
26

YN
AM

27
28

1 **3. INJUNCTIVE RELIEF/REFORMULATION**

2 3.1 Commencing on the Effective Date, ATA shall only import, distribute, or sell
3 Liners that contain less than 0.1% (1,000 parts per million) DEHP by weight.

4 **4. SETTLEMENT PAYMENT**

5 4.1 ATA shall pay a total of \$95,000 in full and complete settlement of all monetary
6 claims by CAG related to the Notices, as follows:

7 4.2 **Reimbursement of Attorneys' Fees and Costs:** ATA shall pay \$90,000 to
8 "Yeroushalmi & Associates" as reimbursement for the investigation fees and costs, testing costs,
9 expert fees, attorney fees, and other litigation costs and expenses for all work performed through
10 the approval of this Consent Judgment.

11 4.3 **Civil Penalties.** ATA shall issue two separate checks for a total amount of \$4,000
12 as penalties pursuant to Health & Safety Code § 25249.12: (a) one check made payable to the
13 State of California's Office of Environmental Health Hazard Assessment (OEHHA) in the
14 amount of \$3,000, representing 75% of the total penalty; and (b) one check to Consumer
15 Advocacy Group, Inc. in the amount of \$1,000, representing 25% of the total penalty. Two
16 separate 1099s shall be issued for the above payments: The first 1099 shall be issued to OEHHA,
17 P.O. Box 4010, Sacramento, CA 95184 (EIN: 68-0284486) in the amount of \$3,000. The
18 second 1099 shall be issued in the amount of \$1,000 to CAG.

19 4.4 **Payment In Lieu of Civil Penalties:** ATA shall pay \$1,000 in lieu of civil
20 penalties payable to "Consumer Advocacy Group, Inc." CAG will use this payment for
21 investigation of the public's exposure to Proposition 65 listed chemicals through various means,
22 laboratory fees for testing for Proposition 65 listed chemicals, expert fees for evaluating
23 exposures through various mediums, including but not limited to consumer product,
24 occupational, and environmental exposures to Proposition 65 listed chemicals, and the cost of
25 hiring consulting and retained experts who assist with the extensive scientific analysis necessary
26 for those files in litigation, in order to reduce the public's exposure to Proposition 65 listed
27 chemicals by notifying those persons and/or entities believed to be responsible for such
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.

6 4.5 All Payments in Paragraphs 4.2, 4.3, and 4.4 above shall be delivered to: Reuben
7 Yeroushalmi, Yeroushalmi & Associates, 9100 Wilshire Blvd., Suite 240W, Beverly Hills, CA
8 90212, within 10 days of the Effective Date.

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

10 5.1 This Consent Judgment is a full, final, and binding resolution between CAG, on
11 behalf of itself and in the public interest, and ATA and its officers, directors, insurers,
12 employees, parents, shareholders, divisions, subdivisions, subsidiaries, partners, affiliates, sister
13 companies, and their successors and assigns ("Defendant Releasees"), and each of its suppliers,
14 customers, distributors, wholesalers, retailers, and agents, including TMD, Safeway, Smart &
15 Final, Inc., and Food 4 Less of Southern California, Inc., or any other person in the course of
16 doing business, and the successors and assigns of any of them, who may use, maintain, distribute
17 or sell Liners ("Downstream Defendant Releasees"), for all claims for violations of Proposition
18 65 up through the Effective Date based on exposure to DEHP from Liners only distributed or
19 sold by ATA as set forth in the Notices. ATA and Defendant Releasees' compliance with this
20 Consent Judgment shall constitute compliance with Proposition 65 with respect to exposure to
21 DEHP from Liners.

22 5.2 CAG on behalf of itself, its past and current agents, representatives, attorneys,
23 successors, and/or assignees, hereby waives all rights to institute or participate in, directly or
24 indirectly, any form of legal action and releases all claims, including, without limitation, all
25 actions, and causes of action, in law or in equity, suits, liabilities, demands, obligations,
26 damages, costs, fines, penalties, losses, or expenses (including, but not limited to, investigation
27 fees, expert fees, and attorneys' fees) of any nature whatsoever, whether known or unknown,
28

JN
g
NY

1 fixed or contingent (collectively "Claims"), against ATA, Defendant Releasees, and Downstream
2 Defendant Releasees arising from any violation of Proposition 65 or any other statutory or
3 common law regarding the failure to warn about exposure to DEHP from the Liners imported,
4 distributed, or sold by ATA and Defendant Releasees. In furtherance of the foregoing, as to
5 alleged exposures to DEHP from the Liners, CAG hereby waives any and all rights and benefits
6 which it now has, or in the future may have, conferred upon it with respect to the Claims arising
7 from any violation of Proposition 65 or any other statutory or common law regarding the failure
8 to warn about exposure to DEHP from the Liners by virtue of the provisions of section 1542 of
9 the California Civil Code, which provides as follows:

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

15 CAG understands and acknowledges that the significance and consequence of this waiver of
16 California Civil Code section 1542 is that even if CAG suffers future damages arising out of or
17 resulting from, or related directly or indirectly to, in whole or in part, the Claims arising from
18 any violation of Proposition 65 or any other statutory or common law regarding the failure to
19 warn about exposure to DEHP from the Liners, including but not limited to any exposure to, or
20 failure to warn with respect to exposure to DEHP from the Liners, CAG will not be able to make
21 any claim for those damages against ATA or the Defendant Releasees or Downstream Defendant
22 Releasees. Furthermore, CAG acknowledges that it intends these consequences for any such
23 Claims arising from any violation of Proposition 65 or any other statutory or common law
24 regarding the failure to warn about exposure to DEHP from the Liners as may exist as of the date
25 of this release but which CAG does not know exist, and which, if known, would materially affect
26 their decision to enter into this Consent Judgment, regardless of whether their lack of knowledge
27 is the result of ignorance, oversight, error, negligence, or any other cause.
28

1 **6. ENFORCEMENT OF JUDGMENT**

2 6.1 The terms of this Consent Judgment shall be enforced exclusively by the parties
3 hereto. The parties may, by noticed motion or order to show cause before the Superior Court of
4 California, City and County of Alameda, giving the notice required by law, enforce the terms and
5 conditions contained herein. A Party may enforce any of the terms and conditions of this
6 Consent Judgment only after that Party first provides 30 days' notice to the Party allegedly
7 failing to comply with the terms and conditions of this Consent Judgment and attempts to resolve
8 such Party's failure to comply in an open and good faith manner.

9 6.2 **Notice of Violation.** Prior to bringing any motion, order to show cause, or other
10 proceeding to enforce Section 3 of this Consent Judgment, CAG shall provide a Notice of
11 Violation ("NOV") to ATA. The NOV shall include for each Liner: the date(s) the alleged
12 violation(s) was observed and the location at which the Liner was offered for sale, and shall be
13 accompanied by all test data obtained by CAG regarding the Liner.

14 6.2.1 **Non-Contested NOV.** CAG shall take no further action regarding the
15 alleged violation if, within 30 days of receiving such NOV, ATA serves a Notice of
16 Election ("NOE") that meets one of the following conditions:

17 (a) The Liner was shipped by ATA for sale in California before the
18 Effective Date, or

19 (b) Since receiving the NOV ATA has taken corrective action by
20 providing a clear and reasonable warning for the Liner identified in the NOV pursuant to
21 27 Cal. Code Regs. § 25603.

22 6.2.2 **Contested NOV.** ATA may serve an NOE informing CAG of its election
23 to contest the NOV within 30 days of receiving the NOV.

24 (a) In its election, ATA may request that the same sample(s) of
25 Liner(s) tested by CAG be subject to confirmatory testing at an EPA-accredited
26 laboratory.
27

JN
MM

1 (b) If the confirmatory testing establishes that the Liner does not
2 contain DEHP in excess of the level allowed in Section 3.1 CAG shall take no further
3 action regarding the alleged violation. If the testing does not establish compliance with
4 Section 3.1, ATA may withdraw its NOE to contest the violation and may serve a new
5 NOE pursuant to Section 6.2.1.

6 (c) If ATA does not withdraw an NOE to contest the NOV, the Parties
7 shall meet and confer for a period of no less than 30 days before CAG may seek an order
8 enforcing the terms of this Consent Judgment.

9 6.3 In any proceeding brought by either Party to enforce this Consent Judgment, the
10 prevailing party shall be entitled to recover its attorney's fees and costs.

11 **7. ENTRY OF CONSENT JUDGMENT**

12 7.1 CAG shall file a motion seeking approval of this Consent Judgment pursuant to
13 California Health & Safety Code § 25249.7(f). Upon entry of the Consent Judgment, CAG and
14 ATA waive their respective rights to a hearing or trial on the allegations of the Complaint, and
15 CAG shall file a request for dismissal without prejudice of all other defendants in this action,
16 including TMD, Safeway, and Smart & Final.

17 7.2 If this Consent Judgment is not approved by the Court, (a) this Consent Judgment
18 and any and all prior agreements between the parties merged herein shall terminate and become
19 null and void, and the actions shall revert to the status that existed prior to the execution date of
20 this Consent Judgment; (b) no term of this Consent Judgment or any draft thereof, or of the
21 negotiation, documentation, or other part or aspect of the Parties' settlement discussions, shall
22 have any effect, nor shall any such matter be admissible in evidence for any purpose in this
23 Action, or in any other proceeding; and (c) the Parties agree to meet and confer to determine
24 whether to modify the terms of the Consent Judgment and to resubmit it for approval.
25

JN

*J
MM*

1 **8. MODIFICATION OF JUDGMENT**

2 8.1 This Consent Judgment may be modified only upon written agreement of the
3 parties and upon entry of a modified Consent Judgment by the Court thereon, or upon motion of
4 any party as provided by law and upon entry of a modified Consent Judgment by the Court.

5 8.2 Any Party seeking to modify this Consent Judgment shall attempt in good faith to
6 meet and confer with the other Party prior to filing a motion to modify the Consent Judgment.

7 **9. RETENTION OF JURISDICTION**

8 9.1 This Court shall retain jurisdiction of this matter to implement and enforce the
9 terms of this Consent Judgment.

10 **10. DUTIES LIMITED TO CALIFORNIA**

11 10.1 This Consent Judgment shall have no effect on Liners sold outside the State of
12 California.

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

14 11.1 CAG shall serve a copy of this Consent Judgment, signed by both parties, on the
15 California Attorney General so that the Attorney General may review this Consent Judgment
16 prior to its submittal to the Court for approval. No sooner than forty five (45) days after the
17 Attorney General has received the aforementioned copy of this Consent Judgment, and in the
18 absence of any written objection by the Attorney General to the terms of this Consent Judgment,
19 the parties may then submit it to the Court for approval.

20 **12. ATTORNEY FEES**

21 12.1 Except as specifically provided in Section 4.2, each Party shall bear its own costs
22 and attorney fees in connection with this action.

23 **13. GOVERNING LAW**

24 13.1 The validity, construction and performance of this Consent Judgment shall be
25 governed by the laws of the State of California, without reference to any conflicts of law
26 provisions of California law.
27

28

JN
0
mm

1 13.2 The Parties, including their counsel, have participated in the preparation of this
2 Consent Judgment and this Consent Judgment is the result of the joint efforts of the Parties. This
3 Consent Judgment was subject to revision and modification by the Parties and has been accepted
4 and approved as to its final form by all Parties and their counsel. Accordingly, any uncertainty
5 or ambiguity existing in this Consent Judgment shall not be interpreted against any Party as a
6 result of the manner of the preparation of this Consent Judgment. Each Party to this Consent
7 Judgment agrees that any statute or rule of construction providing that ambiguities are to be
8 resolved against the drafting Party should not be employed in the interpretation of this Consent
9 Judgment and, in this regard, the Parties hereby waive California Civil Code § 1654.

10 **14. EXECUTION AND COUNTERPARTS**

11 14.1 This Consent Judgment may be executed in counterparts and by means of
12 facsimile or portable document format (pdf), which taken together shall be deemed to constitute
13 one document.

14 **15. NOTICES**

15 15.1 Any notices under this Consent Judgment shall be by personal delivery or First
16 Class Mail.

17
18 If to CAG:

19 Reuben Yeroushalmi, Esq.
20 9100 Wilshire Boulevard, Suite 240W
21 Beverly Hills, CA 90212
22 (310) 623-1926

23 If to ATA:

24 Jeroen Noordermeer, CFO
25 ATA Retail Services, Inc
26 7133 Koll Center Parkway
27 Pleasanton, CA 94566
28

YR
g
mm

1 With a copy to:

2 Jeffrey Margulies
3 Fulbright & Jaworski LLP
4 555 South Flower Street, Forty-First Floor
5 Los Angeles, CA 90071

6 **16. AUTHORITY TO STIPULATE**

7 16.1 Each signatory to this Consent Judgment certifies that he or she is fully authorized
8 by the party he or she represents to enter into this Consent Judgment and to execute it on behalf
9 of the party represented and legally to bind that party.

10 AGREED TO:

11 Date: July 30, 2014

10 AGREED TO:

11 Date: July 30, 2014

13
14 By: Michael Marcus
15 Plaintiff, CONSUMER ADVOCACY
16 GROUP, INC.

17 By: Michael Marcus

13
14 By: [Signature]
15 Defendant, ATA RETAIL SERVICES, INC.

16 by: Jeroen Noordermeer, CFO

18 **IT IS SO ORDERED.**

19
20 Date: 10-30-14

18
19
20 [Signature]

21 JUDGE OF THE SUPERIOR COURT

22 **Stephen Kaus**

Case Number: RG13667350

Case Name: Consumer Advocacy Group Inc. vs. ATA Retail Services

**CLERK'S CERTIFICATE OF MAILING
(CCP 1013a)**

I certify that the following is true and correct:

I am a Deputy Clerk employed by the Alameda County Superior Court. I am over the age of 18 years. My business address is 24405 Amador Street, Hayward, California 94544. I served this **Consent Judgment** by placing copies in envelope(s) addressed as shown below and then by sealing and placing them for collection, stamping or metering with prepaid postage, and mailing on the date stated below, in the United States mail at **Hayward**, California, following standard court practices.

Yeroushalmi & Associates
Attn: Yeroushalmi, Ben
9100 Wilshire Blvd., Ste. 240 W
Beverly Hills, CA 90212

Fulbright & Jaworski, LLP
Attn: Margulies, Jeffrey B.
555 South Flower Street, 41st Floor.
Los Angeles, CA 90071

Freeman, David G.
1801 Century Park East, 16th Floor
Los Angeles, CA 90067

Salisbury Law Group
Attn: Salisbury, Lisa G.
1600 Dove Street, Ste. 107
Newport Beach, CA 92660

Date: 11/03/2014

Executive Officer/Clerk of the Superior Court

By



Kriste Stewart, Deputy Clerk