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ENDORSED
FILED
ALAMEDA COUNTY

NOV 06 2014

CLERK OF THE SUPERIOR COURT
By Christina Momon, Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ALAMEDA

CONSUMER ADVOCACY GROUP, INC., in the public interest, Plaintiff, v. FORTUNE DYNAMIC, INC., a California Corporation; ROSS DRESS FOR LESS, INC., a Virginia Corporation; ROSS STORES, INC., a Delaware Corporation; and DOES 1-20; Defendants.	CASE NO. RG13697300 **CONSENT JUDGMENT [PROPOSED]** Health & Safety Code § 25249.5 *et seq.* Dept. 24 Judge: Hon. Frank Roesch Complaint filed: September 27, 2013

I. INTRODUCTION

1.1 This Consent Judgment is entered into by and between plaintiff, Consumer Advocacy Group, Inc. (referred to as "CAG") acting on behalf of itself and in the interest of the public, and defendant, Fortune Dynamic, Inc. (hereinafter "Defendant"), with each referred to as "Party" and collectively referred to as "Parties."

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1.2 **Defendants and Products**

1.2 Defendant employs ten or more persons, is a person in the course of doing business for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, California Health & Safety Code §§ 25249.6 et seq. ("Proposition 65"), and manufacture, distribute, or sell Soda® Black Flip Flop with Floral and Chain Strap, Size 7 ½ ("Covered Products").

1.3 **Chemicals Of Concern**

1.3.1 Diethyl Hexyl Phthalate ("DEHP") is known to the State of California to cause cancer and/or birth defects or other reproductive harm.

1.3.2 Di-n-butyl Phthalate ("DBP") is known to the State of California to cause birth defects or other reproductive harm.

1.4 **Notice of Violation.**

1.4.1 On or about October 19, 2012, CAG served Defendant, Ross Stores, Ross Dress, and various public enforcement agencies with a document entitled "60-Day Notice of Violation" (the "October 19, 2012 Notice") that purported to provide the recipients with notice of alleged violations of Health & Safety Code § 25249.6 for failing to warn individuals in California of exposures to DEHP and DBP in Footwear, including but not limited to Soda® Black Flip Flop with Floral and Chain Strap, Size 7 ½. (The "Covered Products"). No public enforcer has commenced or diligently prosecuted the allegations set forth in the October 19, 2012 Notice.

1.5 **Complaint.**

On September 27 2013, CAG filed a Complaint for civil penalties and injunctive relief ("Complaint") in Alameda Superior Court, Case No. RG13697800. The Complaint alleges, among other things, that Defendant violated Proposition 65 by failing to give clear and reasonable warnings of exposure to DEHP and DBP from the Covered Products.

1.6 **Consent to Jurisdiction**

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

1.7 **No Admission**

This Consent Judgment resolves claims that are denied and disputed. The Parties enter into this Consent Judgment pursuant to a full and final settlement of any and all claims between the Parties for the purpose of avoiding prolonged litigation. Nothing in this Consent Judgment shall be construed as an admission by the Parties as to the adequacy or the legal sufficiency of any notice, or of any material allegation of the Complaint (each and every allegation of which Defendants deny), any fact, conclusion of law, issue of law or violation of law, including without limitation, any admission concerning any violation of Proposition 65 or any other statutory, regulatory, common law, or equitable doctrine, or the meaning of the terms "knowingly and intentionally expose" or "clear and reasonable warning" as used in Health and Safety Code section 25249.6. Nothing in this Consent Judgment, nor compliance with its terms, shall constitute or be construed as an admission by the Parties of any fact, conclusion of law, issue of law, or violation of law, or of fault, wrongdoing, or liability by any Defendant, its officers, directors, employees, or parent, subsidiary or affiliated corporations, or be offered or admitted as evidence in any administrative or judicial proceeding or litigation in any court, agency, or forum. Furthermore, nothing in this Consent Judgment shall prejudice, waive or impair any right, remedy, argument, or defense the Parties may have in any other or future legal proceeding, except as expressly provided in this Consent Judgment.

2. **DEFINITIONS**

2.1 "Covered Products" means Soda® Black Flip Flop with Floral and Chain Strap, Size 7 ½ and all footwear manufactured, distributed, or sold by Fortune Dynamic, Inc. "Covered Products" are limited to only those products which were actually sold through or by Fortune Dynamic, Inc.

2.2 "Effective Date" means the date that this Consent Judgment is signed by all Parties.

2.3 "Notice" means the October 19, 2012, 60 Day Notice of Violation sent by CAG as specified in Section 1.4 above.

3. **INJUNCTIVE RELIEF / REFORMULATION / CLEAR AND REASONABLE WARNINGS.**

3.1 As of the Effective Date, Defendant will not manufacture, distribute, or sell the Covered Products in California unless the Covered Products have been reformulated to contain less than 0.1% by weight of DEHP and less than 0.1% by weight of DBP. Any Covered Products remaining in Defendant's existing inventory as of the Effective Date, with the exception of those having less than 0.1% of DEHP AND less than 0.1% of DBP, shall not be sold in California unless they have compliant Proposition 65 warnings.

4. **SETTLEMENT PAYMENT**

4.1 **Payment and Due Date:** Within ten (10) business days of the approval of the Consent Judgment, Defendant shall pay a total of sixty-five thousand dollars and zero cents ($65,000) in full and complete settlement of all monetary claims by CAG related to the Notices, as follows:

4.1.1 **Civil Penalty:** Defendant shall issue separate checks totaling five thousand dollars ($5,000.00) as penalties pursuant to Health & Safety Code § 25249.12:

(a) Defendant will issue a check made payable to the State of California's Office of Environmental Health Hazard Assessment ("OEHHA") in the amount of three

thousand seven hundred and fifty dollars ($3,750.00) representing 75% of the total penalty and Defendant will issue a check to "Consumer Advocacy Group, Inc." in the amount of one thousand two hundred and fifty dollars ($1,250.00) representing 25% of the total penalty; and

(b) Separate 1099s shall be issued for each of the above payments: Defendant will issue a 1099 to OEHHA, P.O. Box 4010, Sacramento, CA 95184 (EIN: 68-0284486) in the amount of $3,750.00. Defendant will also issue a 1099 to CAG c/o Yeroushalmi & Associates, 9100 Wilshire Boulevard, Suite 240W, Beverly Hills, California 90212 in the amount of $1,250.00.

4.1.2 **Payment In Lieu of Civil Penalties:** Defendant shall pay five thousand dollars ($5,000.00) in lieu of civil penalties to "Consumer Advocacy Group, Inc." CAG will use this payment for investigation of the public's exposure to Proposition 65 listed chemicals through various means, including laboratory fees for testing for Proposition 65 listed chemicals, administrative costs and fees related to such activities, expert fees for evaluating exposures through various mediums, including but not limited to consumer product, occupational, and environmental exposures to Proposition 65 listed chemicals, and the cost of hiring consulting and retained experts who assist with the extensive scientific analysis necessary for those files in litigation, as well as administrative costs and fees related to such activities in order to reduce the public's exposure to Proposition 65 listed chemicals by notifying those persons and/or entities believed to be responsible for such exposures and attempting to persuade those persons and/or entities to reformulate their products or the source of exposure to completely eliminate or lower the level of Proposition 65 listed chemicals, thereby addressing the same public harm as allegedly in the instant Action. Further, should the court require it, CAG will submit under seal, an accounting of these funds as described above as to how the funds were used. The check shall be made payable to "Consumer Advocacy Group, Inc." and delivered to Reuben Yeroushalmi, Yeroushalmi & Associates, 9100 Wilshire Boulevard, Suite 240W, Beverly Hills, California 90212.

4.1.3 **Reimbursement of Attorneys Fees and Costs:** Defendant shall pay fifty-five thousand dollars ($55,000.00) to "Yeroushalmi & Associates" as reimbursement for reasonable investigation fees and costs, attorneys' fees, and any other costs incurred as a result of investigating, bringing this matter to Defendant's attention, litigating, and negotiating a settlement in the public interest. The check shall be made payable to "Yeroushalmi & Associates" and delivered to Reuben Yeroushalmi, Yeroushalmi & Associates, 9100 Wilshire Boulevard, Suite 240W, Beverly Hills, California 90212.

4.2 All payments shall be delivered to: Reuben Yeroushalmi, Yeroushalmi & Associates, 9100 Wilshire Blvd., Suite 240W, Beverly Hills, CA 90212.

5. MATTERS COVERED BY THIS CONSENT JUDGMENT

5.1 This Consent Judgment is a full, final, and binding resolution between CAG on behalf of itself and in the public interest and Defendant and its officers, directors, insurers, employees, parents, shareholders, divisions, subdivisions, subsidiaries, partners, affiliates, sister companies and their successors and assigns ("Defendant Releasees"), also including but not limited to each of its suppliers, customers, distributors, wholesalers, retailers, including Ross Stores, Inc., Ross Dress for Less, Inc., or any other person in the course of doing business, and the successors and assigns of any of them, who may use, maintain, distribute or sell Covered Products ("Downstream Defendant Releasees"), for all claims for violations of Proposition 65 up through the Effective Date based on exposure to DEHP and DBP from Covered Products as set forth in the Notice. Defendant's compliance with this Consent Judgment shall constitute compliance with Proposition 65 with respect to DEHP and DBP from Covered Products as set forth in the Notice.

5.2 CAG on behalf of itself, its past and current agents, representatives, attorneys, successors, and/or assignees, hereby waives all rights to institute or participate in, directly or indirectly, any form of legal action and releases all claims, including, without limitation, all actions, and causes of action, in law or in equity, suits, liabilities, demands, obligations,

damages, costs, fines, penalties, losses, or expenses (including, but not limited to, investigation fees, expert fees, and attorneys' fees) of any nature whatsoever, whether known or unknown, fixed or contingent (collectively "Claims"), against Defendant, Defendant Releasees, and Downstream Defendant Releasees arising from any violation of Proposition 65 or any other statutory or common law regarding the failure to warn about exposure to DEHP and DBP from Covered Products manufactured, distributed, or sold by Defendant and Defendant Releasees. In furtherance of the foregoing, as to alleged exposures to DEHP and DBP from Covered Products, CAG hereby waives any and all rights and benefits which it now has, or in the future may have, conferred upon it with respect to the Claims arising from any violation of Proposition 65 or any other statutory or common law regarding the failure to warn about exposure to DEHP and DBP from Covered Products by virtue of the provisions of section 1542 of the California Civil Code, which provides as follows:

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

CAG understands and acknowledges that the significance and consequence of this waiver of California Civil Code section 1542 is that even if CAG suffers future damages arising out of or resulting from, or related directly or indirectly to, in whole or in part, the Claims arising from any violation of Proposition 65 or any other statutory or common law regarding the failure to warn about exposure to DEHP and DBP from Covered Products, including but not limited to any exposure to, or failure to warn with respect to exposure to DEHP and DBP from the Covered Products, CAG will not be able to make any claim for those damages against Defendant or the Defendant Releasees or Downstream Defendant Releasees. Furthermore, CAG 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 exposure to DEHP and DBP from Covered Products as may exist as of the date of this release but which CAG does

not know exist, and which, if known, would materially affect their decision to enter into this Consent Judgment, regardless of whether their lack of knowledge is the result of ignorance, oversight, error, negligence, or any other cause.

6. ENFORCEMENT OF JUDGMENT

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

6.2 After the Effective Date, if CAG discovers any Covered Products that are not in compliance with Section 3 of this Consent Judgment, CAG shall provide a Notice of Violation ("NOV") to Defendant. The NOV shall include for each of the Covered Products: the date(s) the alleged violation(s) was observed and the location at which the Covered Products were offered for sale, and shall be accompanied by all test data obtained by CAG regarding the Covered Products. CAG shall make available the Covered Products that are the subject of the NOV for testing by Defendant upon Defendant's request. Multiple units of Covered Products sold in California by Downstream Defendant Releasees that were part of the same batch or shipment received by Defendant shall only support one NOV.

Within thirty (30) days of receiving the NOV, Defendant shall provide written notice to CAG stating whether it elects to contest the allegations contained in the NOV ("Notice of Election"). Failure to provide a Notice of Election shall be deemed an election not to contest the NOV.

(a) Non-Contested NOV: If the NOV is not contested, Defendant shall issue a check in the amount of three thousand dollars ($3,000.00) payable to "Consumer Advocacy Group,

Inc." and take immediate steps to ensure compliance with the terms of Section 3.0 of this Consent Judgment.

(b) **Contested NOV:** If the Notice of Violation is contested, the parties shall meet and confer to attempt to resolve their dispute. Should such attempts at meeting and conferring fail, CAG may file an enforcement motion or other application as set forth herein. If Defendant withdraws its Notice of Election to contest the NOV before any motion concerning the violations alleged in the NOV is heard by the court, Defendant shall issue a check in the amount of ten thousand dollars ($10,000.00) payable to "Consumer Advocacy Group, Inc." and take immediate steps to ensure compliance with the terms of Section 3.1 of this Consent Judgment. CAG shall thereafter withdraw the motion or application.

6.3 In any proceeding brought by either Party to enforce this Consent Judgment, the prevailing party shall be entitled to its reasonable attorneys' fees and costs.

7. ENTRY OF CONSENT JUDGMENT

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

7.2 Upon approval of the Consent Judgment by the Court, and payment of the settlement sums by Fortune Dynamic, CAG shall dismiss the Complaint without prejudice as against all other defendants (other than Fortune Dynamic) within 10 calendar days.

8. MODIFICATION OF JUDGMENT

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

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

9. RETENTION OF JURISDICTION

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

10. DUTIES LIMITED TO CALIFORNIA

10.1 This Consent Judgment shall have no effect on Covered Products sold by Defendants outside the State of California.

11. SERVICE ON THE ATTORNEY GENERAL

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

12. ATTORNEY FEES

12.1 Except as specifically provided in Section 4.1.3, each Party shall bear its own costs and attorney fees in connection with this action.

13. ENTIRE AGREEMENT

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

14. GOVERNING LAW

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

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

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

15. EXECUTION AND COUNTERPARTS

15.1 This Consent Judgment may be executed in counterparts and by means of facsimile or portable document format (pdf), which taken together shall be deemed to constitute one document and have the same force and effect as original signatures.

16. NOTICES

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

If to CAG:

Reuben Yeroushalmi
9100 Wilshire Boulevard, Suite 240W
Beverly Hills, CA 90212
(310) 623-1926

If to Fortune Dynamic, Inc.:

Current President or CEO
Fortune Dynamic, Inc.
21923 Ferrero Parkway
City of Industry, CA 91789

With a copy to:

Danton K. Mak, Esq.
Sheldon Mak & Anderson PC
100 Corson Street, Ste 300
Pasadena, CA 91103

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: 7-3, 2014

Name: Michael Sansoon

Title: Executive Director
CONSUMER ADVOCACY GROUP, INC.

AGREED TO:

Date: July 2, 2014

Name: Joan Lee

Title: Chief Financial Officer
FORTUNE DYNAMIC, INC.

IT IS SO ORDERED.

Date: 11/6/2014

JUDGE OF THE SUPERIOR COURT