

FILED
Superior Court of California
County of Los Angeles

pl MAY 25 2016

Sherri B. Carter, Executive Officer/Clerk
By *P. Horton* Deputy
P. Horton

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5 An Association of Independent Law Corporations
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10 Attorneys for Plaintiffs,
11 Consumer Advocacy Group, Inc.

12 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
13 **COUNTY OF LOS ANGELES**

14 CONSUMER ADVOCACY GROUP, INC.,
15 in the interest of the Public,

16 Plaintiff,

17 v.

18 OLIVIER NAPA VALLEY, INC., a
19 California Corporation; THE TJX
20 COMPANIES, INC., a Delaware
21 Corporation; T.J. MAXX of CA, LLC, a
22 Delaware Limited Liability Company; and
23 DOES 1-20;

24 Defendants.

CASE NO. BC580857

CONSENT JUDGMENT [PROPOSED]

Complaint filed: May 4, 2015
Department: 69
Judge: Hon. William Fahey

25 **1. INTRODUCTION**

26 **1.1** This Consent Judgment is entered into by and between plaintiff Consumer
27 Advocacy Group, Inc. ("CAG") acting on behalf of itself and in the interest of the public, and
28 defendant OLIVIER NAPA VALLEY, INC. ("Olivier"). CAG and Olivier are referred to
individually as a "Party" and collectively as "Parties."

1.2 It is alleged that Olivier 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,

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1 California Health & Safety Code §§ 25249.6 *et seq.* (“Proposition 65”), and manufactured,
2 distributed, and/or sold Vinegar which includes but is not limited to, OLIVIER Napa Valley®
3 RASPBERRY BALSAMIC VINEGAR; Net Wt. 6.75oz. (200mL); T.J. Maxx 85-4641-237553-
4 000799-08-2; COMPARE AT \$10.50; \$7.99; UPC: 7 65230 01204 8 before the Effective Date
5 of this Consent Judgment.

6 **1.3 Notice of Violation.**

7 1.3.1 On or about January 9, 2015 CAG served Olivier, The TJX Companies, Inc., T.J.
8 Maxx of CA, LLC and various public enforcement agencies with a document entitled “60-Day
9 Notice of Violation” (the “Notice”) that provided the recipients with notice of alleged violations
10 of Health & Safety Code § 25249.6 for failing to warn consumers in California of exposures to
11 Lead allegedly contained in the Covered Products (as defined herein).

12 1.3.2 No public enforcer has commenced or diligently prosecuted the allegations set forth
13 in the Notice.

14 **1.4 Complaint.**

15 On May 4, 2015, CAG filed a Complaint for civil penalties and injunctive relief
16 (“Complaint”) in Los Angeles Superior Court, Case No. BC580857, alleging that Olivier violated
17 Proposition 65 by failing to give consumers clear and reasonable warnings of exposures to Lead
18 allegedly contained in the Covered Products (the “Action”).

19 **1.5 Consent to Jurisdiction**

20 While otherwise disputed, for purposes of this Consent Judgment, the Parties consent that
21 this Court has jurisdiction over the allegations of violations contained in the Complaint and
22 personal jurisdiction over Olivier as to the acts alleged in the Complaint, that venue is proper in
23 the City and County of Los Angeles and that this Court has jurisdiction to enter and enforce the
24 provisions of this Consent Judgment.

25 **1.6 No Admission**

26 1.6.1 This Consent Judgment resolves claims that are denied and disputed by Olivier. For
27 the purpose of avoiding prolonged litigation, the Parties enter into this Consent Judgment as a full
28 settlement and resolution of the allegations contained in the Complaint and of all claims which

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1 were or could have been raised by any person or entity based in whole or in part, directly or
2 indirectly, on the prior conduct of the Parties or on the facts alleged in the Complaint or arising
3 therefrom or related to such allegations. This Consent Judgment shall not constitute an admission
4 with respect to any material allegation of the Complaint, each and every allegation of which Olivier
5 denies including jurisdiction, nor may this Consent Judgment or compliance with it be used as
6 evidence of any wrongdoing, misconduct, culpability or liability on the part of Olivier.

7 1.6.2 Nothing in this Consent Judgment shall prejudice, waive or impair any right,
8 remedy, argument, or defense the Parties may have in any other or future legal proceeding,
9 except as expressly provided in this Consent Judgment.

10 1.6.3 This Consent Judgment is the product of negotiation and compromise and is
11 accepted by the Parties, for purposes of settling, compromising, and resolving issues disputed in
12 this Action, including future compliance by Olivier with Section 3 of this Consent Judgment.

13 2. DEFINITIONS

14 2.1 "Covered Products" means all Vinegar which includes but is not limited to,
15 OLIVIER Napa Valley® RASPBERRY BALSAMIC VINEGAR; Net Wt. 6.75oz. (200mL);
16 T.J. Maxx 85-4641-237553-000799-08-2; COMPARE AT \$10.50; \$7.99; UPC: 7 65230 01204 8
17 sold, distributed, processed, packaged, produced, manufactured, and/or handled by Olivier.

18 2.2 "Effective Date" means the date that this Consent Judgment is approved by the
19 Court.

20 2.3 "Lead" means Lead and Lead Compounds.

21 3. INJUNCTIVE RELIEF/REFORMULATION

22 3.1 Within sixty (60) days of the Effective Date, Olivier shall not sell, offer for sale in
23 California, or ship for sale in California any Covered Products unless Olivier has either
24 reformulated the Covered Products to the point where the level of Lead does not exceed more
25 than 34 ppb (parts per billion) or if the Covered Products exceed 34 ppb, provided a Proposition
26 65 compliant warning on the Covered Products. Any warning provided pursuant to this section
27 shall be affixed to the packaging of, or directly on, the Covered Products, and be prominently
28 placed with such conspicuousness as compared with other words, statements, designs, or devices

1 as to render it likely to be read and understood by an ordinary individual under customary
2 conditions before purchase or use. The Parties agree that product labeling stating that:

3 **WARNING:** This product contains a chemical known to the State of California
4 to cause cancer or birth defects or other reproductive harm;

5 shall constitute compliance with Proposition 65 with respect to the Lead in the Covered
6 Products distributed and/or sold by Olivier, Defendant Releasees or Downstream Releasees (as
7 defined herein)..

8 **4. SETTLEMENT PAYMENT**

9 **Total Payment:** Olivier shall pay a total of fifty-five thousand dollars (\$55,000.00) as
10 follows:

11 **4.1 Civil Penalties.** Olivier shall issue two separate checks for a total amount of ten
12 thousand dollars (\$10,000.00) as penalties pursuant to Health & Safety Code § 25249.12: (a) one
13 check made payable to the State of California's Office of Environmental Health Hazard
14 Assessment (OEHHA) in the amount of \$7,500.00 representing 75% of the total penalty; and (b)
15 one check to Consumer Advocacy Group, Inc. in the amount of \$2,500.00 representing 25% of the
16 total penalty. Two separate 1099s shall be issued for the above payments: The first 1099 shall be
17 issued to OEHHA, P.O. Box 4010, Sacramento, CA 95184 (EIN: 68-0284486) in the amount of
18 \$7,500.00. The second 1099 shall be issued in the amount of \$2,500.00 to CAG and delivered to:
19 Yeroushalmi & Yeroushalmi, 9100 Wilshire Boulevard, Suite 240W, Beverly Hills, California
20 90212.

21 **4.2 Payments in Lieu of Civil Penalties**

22 Olivier also shall separately pay seven thousand dollars (\$7,000.00) to CAG as a payment
23 in lieu of civil penalty pursuant to Health & Safety Code §25249.7(b) and California Code of
24 Regulations, Title 11 § 3203(b). CAG will use this payment for investigation of the public's
25 exposure to Proposition 65 listed chemicals through various means, laboratory fees for testing for
26 Proposition 65 listed chemicals, expert fees for evaluating exposures through various mediums,
27 including but not limited to consumer product, occupational, and environmental exposures to
28 Proposition 65 listed chemicals, and the cost of hiring consulting and retained experts who assist

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1 with the extensive scientific analysis necessary for those files in litigation, as well as
2 administrative costs incurred during the litigation, in order to reduce the public's exposure to
3 Proposition 65 listed chemicals by notifying those persons and/or entities believed to be
4 responsible for such exposures and attempting to persuade those persons and/or entities to
5 reformulate their products or the source of exposure to completely eliminate or lower the level of
6 Proposition 65 listed chemicals, thereby addressing the same public harm as allegedly in the
7 instant Action.

8 **4.3 Reimbursement of Attorneys' Fees and Costs:** Olivier shall pay thirty-eight
9 thousand dollars (\$38,000.00) to "Yeroushalmi & Associates" as reimbursement for the
10 investigation fees and costs, testing costs, expert fees, attorney fees, and other litigation costs and
11 expenses for all work performed through the approval of this Consent Judgment.

12 **4.4** Payments pursuant to 4.1, 4.2 and 4.3 shall be delivered to: Reuben Yeroushalmi,
13 Yeroushalmi & Yeroushalmi, 9100 Wilshire Blvd., Suite 240W, Beverly Hills, CA 90212 within
14 the time agreed upon by the Parties.

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

16 **5.1** This Consent Judgment is a full, final, and binding resolution between CAG (on
17 behalf of itself, in the name of the public, and in the public interest) and Olivier and its officers,
18 directors, insurers, employees, parents, shareholders, divisions, subdivisions, subsidiaries,
19 partners, affiliates, sister companies, agents, contractors, vendors, licensors, and their respective
20 successors and assigns ("Defendant Releasees"), and each of their suppliers, customers,
21 distributors, wholesalers, retailers, including but not limited to The TJX Companies, Inc. and T.J.
22 Maxx of CA, LLC, and the successors and assigns of any of them, who may use, maintain,
23 distribute or sell Covered Products ("Downstream Defendant Releasees"), for all claims alleged,
24 or that could have been alleged, in the Complaint against Olivier, Defendant Releasees or
25 Downstream Defendant Releasees, based on the failure to warn about the alleged exposure to Lead
26 from Covered Products manufactured, distributed or sold by Olivier, Defendant Releasees or
27 Downstream Defendant Releasees prior to the Effective Date. Olivier and Defendant Releasees'

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1 compliance with this Consent Judgment shall constitute compliance with Proposition 65 with
2 respect to exposure to Lead from Covered Products.

3 **5.2** CAG on behalf of itself, its past and current agents, representatives, attorneys,
4 successors, and/or assignees, hereby waives all rights to institute or participate in, directly or
5 indirectly, any form of legal action and releases all claims, including, without limitation, all
6 actions, and causes of action, in law or in equity, suits, liabilities, demands, obligations, damages,
7 costs, fines, penalties, losses, or expenses (including, but not limited to, investigation fees, expert
8 fees, and attorneys' fees) of any nature whatsoever, whether known or unknown, fixed or
9 contingent (collectively "Claims"), against Olivier, Defendant Releasees, and Downstream
10 Defendant Releasees arising from any allegations of violation of Proposition 65 or any other
11 statutory or common law regarding the failure to warn about exposure to Lead from Covered
12 Products manufactured, distributed, or sold by Olivier, Defendant Releasees or Downstream
13 Defendant Releasees.

14 **5.3** In furtherance of the foregoing, as to alleged exposures to Lead from Covered
15 Products, CAG, on behalf of itself, its past and current agents, representatives, attorneys,
16 successors, and/or assignees, hereby waives any and all rights and benefits which it now has, or in
17 the future may have, conferred upon it with respect to the Claims arising from any violation of
18 Proposition 65 or any other statutory or common law regarding the failure to warn about exposure
19 to Lead from Covered Products by virtue of the provisions of section 1542 of the California Civil
20 Code, which provides as follows:

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

26 CAG understands and acknowledges that the significance and consequence of this waiver of
27 California Civil Code section 1542 is that even if CAG suffers future damages arising out of or
28 resulting from, or related directly or indirectly to, in whole or in part, the Claims arising from any
alleged violation of Proposition 65 or any other statutory or common law regarding the failure to
warn about exposure to Lead from Covered Products, including but not limited to any exposure

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1 to, or failure to warn with respect to exposure to Lead from the Covered Products, CAG will not
2 be able to make any claim for those damages against Defendant or the Defendant Releasees or
3 Downstream Defendant Releasees. Furthermore, CAG acknowledges that it intends these
4 consequences for any such Claims arising from any alleged violation of Proposition 65 or any
5 other statutory or common law regarding the failure to warn about exposure to Lead from Covered
6 Products as may exist as of the date of this release but which CAG does not know exist, and which,
7 if known, would materially affect their decision to enter into this Consent Judgment, regardless of
8 whether their lack of knowledge is the result of ignorance, oversight, error, negligence, or any
9 other cause.

10 **6. ENFORCEMENT OF JUDGMENT**

11 **6.1** The terms of this Consent Judgment shall be enforced exclusively by the Parties
12 hereto by means of noticed motion or order to show cause before the Superior Court of Los
13 Angeles County.

14 **6.2 Notice of Violation.** Prior to bringing any motion, order to show cause, or other
15 proceeding to enforce any alleged violation of Section 3.1 of this Consent Judgment, CAG shall
16 provide a Notice of Violation ("NOV") to Olivier. The NOV shall include for each of the Newly
17 Alleged Products ("Newly Alleged Products" means any Covered Product for which CAG alleges
18 a violation of the Consent Judgment after the Effective Date): the date(s) the alleged violation(s)
19 was observed and the location at which the Newly Alleged Products were offered for sale, and
20 shall be accompanied by all test data obtained by CAG regarding the Newly Alleged Products,
21 including an identification of the component(s) of the Newly Alleged Products that were tested.
22 Before any destructive testing of any Newly Alleged Products is conducted by or on behalf of
23 CAG, CAG shall give Olivier an opportunity to inspect and verify at reasonable times and places
24 the authenticity of any Newly Alleged Product in violation of this Consent Judgment.

25 **6.2.1 Non-Contested NOV.** CAG shall take no further action regarding the
26 alleged violation if, within 60 days of receiving such NOV, Olivier serves a Notice of
27 Election ("NOE") that meets one of the following conditions:
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1 (a) The Newly Alleged Products were shipped by Olivier for sale in
2 California before the Effective Date, or

3 (b) Since receiving the NOV Olivier has taken corrective action by
4 either (i) requesting that its customers in California remove the Newly Alleged Products
5 identified in the NOV from sale in California and destroy or return the Newly Alleged
6 Products to Olivier, or (ii) providing a clear and reasonable warning for the Newly Alleged
7 Products identified in the NOV pursuant to 27 Cal. Code Regs. § 25603.

8 6.2.2 **Contested NOV.** Olivier may serve an NOE informing CAG of its election
9 to contest the NOV within 60 days of receiving the NOV.

10 (a) In its election, Olivier may request that the sample(s) of Covered
11 Products tested by CAG be subject to additional confirmatory testing at an EPA-accredited
12 laboratory.

13 (b) If the confirmatory testing establishes that the Newly Alleged
14 Products do not contain Lead in excess of the level allowed in Section 3.1, CAG shall take
15 no further action regarding the alleged violation. If the testing does not establish
16 compliance with Section 3.1, Olivier may withdraw its NOE to contest the violation and
17 may serve a new NOE pursuant to Section 6.2.1.

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

21 6.3 In any proceeding brought by either Party to enforce this Consent Judgment, such
22 party may seek whatever fines, costs, penalties or remedies as may be provided by law for any
23 violation of this Consent Judgment.

24 **7. ENTRY OF CONSENT JUDGMENT**

25 7.1 CAG shall file a motion seeking approval of this Consent Judgment pursuant to
26 California Health & Safety Code § 25249.7(f). Upon entry of the Consent Judgment, CAG and
27 Olivier waive their respective rights to a hearing or trial on the allegations of the Complaint.
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1 7.2 If this Consent Judgment is not approved in full by the Court, (a) this Consent
2 Judgment and any and all prior agreements between the Parties merged herein shall terminate and
3 become null and void, and the actions shall revert to the status that existed prior to the execution
4 date of this Consent Judgment; (b) no term of this Consent Judgment or any draft thereof, or of the
5 negotiation, documentation, or other part or aspect of the Parties' settlement discussions, shall
6 have any effect, nor shall any such matter be admissible in evidence for any purpose in this Action,
7 or in any other proceeding; and (c) the Parties agree to meet and confer to determine whether to
8 modify the terms of the Consent Judgment and to resubmit it for approval.

9 **8. MODIFICATION OF JUDGMENT AND RIGHTS THEREUNDER**

10 8.1 This Consent Judgment may be modified only upon written agreement of the
11 Parties and upon entry of a modified Consent Judgment by the Court thereon, or upon motion of
12 any Party as provided by law and upon entry of a modified Consent Judgment by the Court. Any
13 Party may waive in writing any right it may have under this Consent Judgment.

14 8.2 Any Party seeking to modify this Consent Judgment shall attempt in good faith to
15 meet and confer with the other Party prior to filing a motion to modify the Consent Judgment.

16 **9. RETENTION OF JURISDICTION**

17 9.1 This Court shall retain jurisdiction of this matter to implement, enforce or modify
18 the terms of this Consent Judgment under Code of Civil Procedure § 664.6.

19 **10. DUTIES LIMITED TO CALIFORNIA**

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

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

23 11.1 CAG shall serve a copy of this Consent Judgment, signed by both Parties, on the
24 California Attorney General so that the Attorney General may review this Consent Judgment prior
25 to its submittal to the Court for approval. No sooner than forty five (45) days after the Attorney
26 General has received the aforementioned copy of this Consent Judgment, and in the absence of
27 any written objection by the Attorney General to the terms of this Consent Judgment, the Parties
28 may then submit it to the Court for approval.

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1 **12. ATTORNEY FEES**

2 **12.1** Except as specifically provided in Section 4.3 and 6.3, each Party shall bear its own
3 costs and attorney fees in connection with this action.

4 **13. GOVERNING LAW**

5 **13.1** The validity, construction and performance of this Consent Judgment shall be
6 governed by the laws of the State of California, without reference to any conflicts of law provisions
7 of California law.

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

17 **14. EXECUTION AND COUNTERPARTS**

18 **14.1** This Consent Judgment may be executed in counterparts and by means of facsimile
19 or portable document format (PDF), which taken together shall be deemed to constitute one
20 document.

21 **15. NOTICES**

22 **15.1** Any notices under this Consent Judgment shall be by personal delivery or First
23 Class Mail.

24 If to CAG:

25 Reuben Yeroushalmi
26 9100 Wilshire Boulevard, Suite 240W
27 Beverly Hills, CA 90212
28 (310) 623-1926

If to Olivier Napa Valley, Inc.

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1 Michael R. Leslie
2 Alison Mackenzie
3 Caldwell Leslie & Proctor, PC
4 725 South Figueroa Street, 31st Floor
5 Los Angeles, CA 90017

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:**

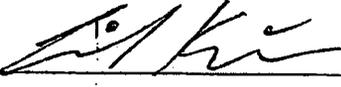
11 Date: 4-28, 2016

10 **AGREED TO:**

11 Date: 4/28/16, 2016

12
13 By: 

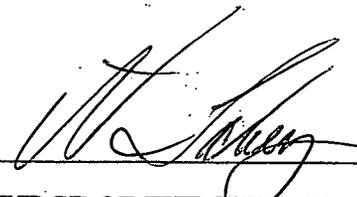
14 Plaintiff CONSUMER ADVOCACY
15 GROUP, INC.

12
13 By: 

14 Defendant OLIVIER NAPA VALLEY, INC.

16
17
18 **IT IS SO ORDERED.**

19
20 Date: 5/25/16

21 
22 JUDGE OF THE SUPERIOR COURT

23 WILLIAM F. FAHEY