

FILED
Superior Court of California
County of Los Angeles

07/07/2021

Sherri R. Carter, Executive Officer / Clerk of Court

By: R. Navarro Deputy

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Attorneys for Plaintiff,
CONSUMER ADVOCACY GROUP, INC.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

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

Plaintiff,

v.

SAKS & COMPANY, LLC, a Delaware
Limited Liability Company;
E.S. ORIGINALS, INC., a New York
Corporation;
and DOES 1-10,

Defendants.

CASE NO. 20STCV27943

[Assigned for All Purposes to the Hon.
Michael P. Linfield, Dept. 34]

~~**[PROPOSED]**~~ **CONSENT JUDGMENT**

Health & Safety Code § 25249.5 *et seq.*

Complaint filed: July 23, 2020

1. 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 public interest, and Defendant E.S. Originals, Inc. (“Defendant”) with each a Party to the action and collectively referred to as “Parties.”

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1 1.2 **Defendants and Covered Products**

2 1.2.1 CAG alleges that Defendant is a New York Corporation which employs ten or
3 more persons. For purposes of this Consent Judgment only, Defendant is deemed a person in the
4 course of doing business in California and subject to the provisions of the Safe Drinking Water
5 and Toxic Enforcement Act of 1986, California Health & Safety Code §§ 25249.6 et seq.
6 (“Proposition 65”).

7 1.2.2 CAG alleges that Defendant manufactures, sells, or distributes Flip Flops with
8 Plastic Components (“Flip Flops”) in California.

9 1.3 **Listed Chemicals**

10 1.3.1 Diisononyl phthalate (“DINP”), has been listed by the State of California as a
11 chemical known to cause cancer.

12 1.4 **Notices of Violation**

13 1.4.1 On or about October 23, 2019, CAG served a “60-Day Notice of Intent to Sue for
14 Violation of the Safe Drinking Water and Toxic Enforcement Act of 1986” that provided
15 Defendant with notice of alleged violations of Health & Safety Code § 25249.6 for failing to
16 warn individuals in California of exposures to DINP contained in Flip Flops sold by Defendant
17 in California. No public enforcer has commenced or diligently prosecuted the allegations set
18 forth in the Notice.

19 1.5 **Complaint**

20 1.5.1 On July 23, 2020 CAG filed a Complaint for civil penalties and injunctive relief
21 (“Complaint”) in Los Angeles County Superior Court, Case No. 20STCV27943, against
22 Defendant. The Complaint alleges, among other things, that Defendant violated Proposition 65
23 for allegedly failing to give clear and reasonable warnings of alleged exposure to DINP in Flip
24 Flop products that Defendant distributed and/or sold in California.

25 1.6 **Consent to Jurisdiction**

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

6 **1.7 No Admission**

7 This Consent Judgment resolves claims that are denied and disputed. The Parties enter into
8 this Consent Judgment pursuant to a full and final settlement of any and all claims between the
9 Parties for the purpose of avoiding prolonged litigation. Nothing in this Consent Judgment shall
10 be construed as an admission by the Parties of any material allegation in the Notice or the
11 Complaint, or of any fact, conclusion of law, issue of law or violation of law of any kind, including
12 without limitation, any admission concerning any alleged or actual violation of Proposition 65 or
13 any other statutory, regulatory, common law, or equitable doctrine, including but not limited to the
14 meaning of the terms “knowingly and intentionally expose” or “clear and reasonable warning” as
15 used in Health and Safety Code section 25249.6. Nothing in this Consent Judgment, nor
16 compliance with its terms, shall constitute or be construed as an admission by the Parties of any
17 fact, conclusion of law, issue of law, or violation of law, or of fault, wrongdoing, or liability by
18 Defendant, its officers, directors, employees, or parent, subsidiary or affiliated corporations, or be
19 offered or admitted as evidence in any administrative or judicial proceeding or litigation in any
20 court, agency, or forum. Furthermore, nothing in this Consent Judgment shall prejudice, waive or
21 impair any right, remedy, argument, or defense the Parties may have in any other or future legal
22 proceeding, except as expressly provided in this Consent Judgment.

23 **2. DEFINITIONS**

24 2.1 “Covered Products” means Flip Flops, which includes but is not limited to: “Juicy
25 Couture los angeles, California;” “ES0505;” “PO#343369;” “MADE IN CHINA;” “0914 077;”
26 “191045826769;” “JC PALMDALE METALLIC EVA BLUE PINK 1;” “1 91045 82676 9”,
27 sold by or supplied by Defendant.
28

1 2.2 “Effective Date” means the date that this Consent Judgment is approved by the
2 Court.

3 2.3 “DINP” means Diisononyl phthalate


4 2.4 “Listed Chemical” means DINP.

5 2.5 “Notice” means the October 23, 2019 notice.

6 **3. INJUNCTIVE RELIEF/REFORMULATION**

7 3.1 After the Effective Date, Defendant shall not sell, offer for sale in California, or
8 ship for sale in California any Covered Products unless the level of DINP in the Covered
9 Products does not exceed more than 0.1% (1,000 parts per million) by weight.

10 3.2 For any Covered Products still existing in Defendant inventory as of the Effective
11 Date, Defendant shall place a Proposition 65 compliant warning on them. Any warning provided
12 pursuant to this section shall be affixed to the packaging of, or directly on, the Covered Products,
13 and be prominently placed with such conspicuousness as compared with other words, statements,
14 designs, or devices as to render it likely to be read and understood by an ordinary individual
15 under customary conditions before purchase or use. The equilateral triangle pictogram shall be
16 in yellow with a black exclamation mark; provided however, the pictogram may be in white
17 instead of yellow if the Covered Product label does not contain the color yellow. The warning
18 shall state:

19  **WARNING:** This product can expose you to chemicals including DINP, known to
20 the State of California to cause cancer. For more information go to www.P65Warnings.ca.gov

21 **4. SETTLEMENT PAYMENT**

22 4.1 **Payment and Due Date:** Within thirty (30) days of the Effective Date,
23 Defendant shall pay a total of ninety-eight thousand dollars (\$98,000) in full and complete
24 settlement of any and all claims for civil penalties, damages, attorney’s fees, expert fees or any
25 other claim for costs, expenses or monetary relief of any kind for claims that were or could have
26 been asserted in the Notice or Complaint, as follows:
27
28

1 4.1.1 **Civil Penalty:** Defendant shall issue two separate checks totaling thirty thousand
2 three hundred dollars (\$30,300) as follows for alleged civil penalties pursuant to Health & Safety
3 Code § 25249.12:

4 (a) Defendant will issue one check made payable to the State of California’s Office of
5 Environmental Health Hazard Assessment (“OEHHA”) in the amount of twenty-two thousand
6 seven hundred and twenty-five dollars (\$22,725) representing 75% of the total civil penalty and
7 Defendant will issue a second check to CAG in the amount of seven thousand five hundred and
8 seventy-five dollars (\$7,575) representing 25% of the total civil penalty;

9 (b) Separate 1099s shall be issued for each of the above payments: Defendant will issue a
10 1099 to OEHHA, P.O. Box 4010, Sacramento, CA 95184 (EIN: 68-0284486) in the amount of
11 \$22,725. Defendant will also issue a 1099 to CAG in the amount of \$7,575 and deliver it to CAG
12 c/o Yeroushalmi & Yeroushalmi, 9100 Wilshire Boulevard, Suite 240W, Beverly Hills,
13 California 90212.

14 4.1.2 **Additional Settlement Payments:** Defendant shall issue one check for twenty-two
15 thousand seven hundred dollars (\$22,700) to “Consumer Advocacy Group, Inc.” pursuant to
16 Health & Safety Code § 25249.7(b) and California Code of Regulations, Title 11 § 3203(d). CAG
17 will use this portion of the Total Settlement Payment as follows, eighty five percent (85%) for fees
18 of investigation, purchasing
19 and testing for the Proposition 65 Listed Chemical in various products, and for expert fees for
20 evaluating exposures through various mediums, including but not limited to consumer product,
21 occupational, and environmental exposures to the Proposition 65 Listed Chemical, and the cost
22 of hiring consulting and retaining experts who assist with the extensive scientific analysis
23 necessary for those files in litigation and to offset the costs of future litigation enforcing
24 Proposition 65 but excluding attorney fees; fifteen percent (15%) for administrative costs
25 incurred during investigation and litigation to reduce the public’s exposure to the Proposition 65
26 Listed Chemical by notifying those persons and/or entities believed to be responsible for such
27 exposures and attempting to persuade those persons and/or entities to reformulate their products
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1 or the source of exposure to completely eliminate or lower the level of the Proposition 65 Listed
2 Chemical including but not limited to costs of documentation and tracking of products
3 investigated, storage of products, website enhancement and maintenance, computer and software
4 maintenance, investigative equipment, CAG’s member’s time for work done on investigations,
5 office supplies, mailing supplies and postage Within 30 days of a request from the Attorney
6 General, CAG shall provide to the Attorney General copies of documentation demonstrating how
7 the above funds have been spent. CAG shall be solely responsible for ensuring the proper
8 expenditure of such additional settlement payment.

9 4.1.3 **Reimbursement of Attorney Fees and Costs:** Defendant shall issue a check in
10 the amount of forty-five thousand dollars (\$45,000) payable to “Yeroushalmi & Yeroushalmi”
11 as complete reimbursement for any and all reasonable investigation fees and costs, attorneys’
12 fees, expert fees, and any and all other costs and expenses incurred as a result of investigating,
13 bringing this matter to the Defendant’s attention, litigating, negotiating a settlement in the public
14 interest, and seeking and obtaining court approval of this Consent Judgment.

15 4.2 Other than the payment to OEHHA described above, all payments referenced in
16 paragraphs 4.1.1, 4.1.2, and 4.1.3 above, shall be delivered to: Reuben Yeroushalmi,
17 Yeroushalmi & Yeroushalmi, 9100 Wilshire Blvd., Suite 240W, Beverly Hills, CA 90212. The
18 payment to OEHHA shall be delivered directly to Office of Environmental Health Hazard
19 Assessment, Attn: Mike Gyurics, 1001 I Street, Mail Stop 12-B, Sacramento, California 95812.
20 Defendant shall provide written confirmation to CAG concurrently with payment to OEHHA.

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

22 5.1 This Consent Judgment is a full, final, and binding resolution between CAG, on
23 behalf of itself and in the public interest, and Defendant and their owners, officers, directors,
24 insurers, employees, parents, shareholders, divisions, subdivisions, subsidiaries, partners,
25 affiliates, sister companies, predecessors, and their successors and assigns (“Defendant
26 Releasees”), and all entities to whom Defendant directly or indirectly distribute or sell Covered
27 Products, including, but not limited to, Saks & Company LLC and any affiliated entities and all
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1 downstream distributors, wholesalers, customers, retailers, marketplace hosts, franchisees,
2 cooperative members, licensees, and the successors and assigns of any of them, who may use,
3 maintain, distribute or sell Covered Products (“Downstream Defendant Releasees”), of all claims
4 for alleged or actual violations of Proposition 65 for alleged exposures to the Listed Chemical
5 from the Covered Products manufactured, distributed or sold by Defendant up through the
6 Effective Date as set forth in the Notices and Complaint. Defendant and Defendant Releasees’
7 compliance with this Consent Judgment shall constitute compliance with Proposition 65 with
8 respect to alleged exposures to the Listed Chemical from the Covered Products sold by
9 Defendant Releasees or Downstream Defendant Releasees after the Effective Date. Nothing in
10 this Section affects CAG’s right to commence or prosecute an action under Proposition 65
11 against any person other than Defendant, Defendant Releasees, or Downstream Defendant
12 Releasees.

13 5.2 CAG on behalf of itself, its past and current agents, representatives, attorneys,
14 successors, and/or assignees, hereby waives all rights to institute or participate in, directly or
15 indirectly, any form of legal action and releases all claims, including, without limitation, all
16 actions, and causes of action, in law or in equity, suits, liabilities, demands, obligations,
17 damages, costs, fines, penalties, losses, or expenses (including, but not limited to, investigation
18 fees, expert fees, and attorneys’ fees) of any nature whatsoever, whether known or unknown,
19 fixed or contingent (collectively “Claims”), against the Released Parties arising from any actual
20 or alleged violation of Proposition 65 or any other statutory or common law claim regarding the
21 Covered Products manufactured, distributed or sold by the Released Parties through the Effective
22 Date regarding any actual or alleged failure to warn about exposure to the Listed Chemical from
23 the Covered Products. In furtherance of the foregoing, CAG on behalf of itself only, hereby
24 waives any and all rights and benefits which it now has, or in the future may have, conferred
25 upon it with respect to Claims regarding the Covered Products manufactured, distributed or sold
26 by the Released Parties through the Effective Date arising from any violation of Proposition 65
27 or any other statutory or common law regarding the failure to warn about exposure to the Listed
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1 Chemical from the Covered Products by virtue of the provisions of section 1542 of the California
2 Civil Code, which provides as follows:

3 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS THAT THE
4 CREDITOR OR RELEASING PARTY DOES NOT KNOW OR SUSPECT TO
5 EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE
6 RELEASE, AND THAT, IF KNOWN BY HIM OR HER, WOULD HAVE
7 MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE
8 DEBTOR OR RELEASED PARTY.

9 CAG understands and acknowledges that the significance and consequence of this waiver of
10 California Civil Code section 1542 is that even if CAG suffers future damages arising out of or
11 resulting from, or related directly or indirectly to, in whole or in part, Claims arising from any
12 violation of Proposition 65 or any other statutory or common law regarding the Covered
13 Products manufactured, distributed or sold by the Released Parties through the Effective Date
14 regarding the failure to warn about actual or alleged exposure to the Listed Chemical from the
15 Covered Products, CAG will not be able to make any claim for those damages, penalties or other
16 relief against the Released Parties. Furthermore, CAG acknowledges that it intends these
17 consequences for any such Claims arising from any violation of Proposition 65 or any other
18 statutory or common law regarding the failure to warn about exposure to the Listed Chemical
19 from the Covered Products as may exist as of the date of this release but which CAG does not
20 know exist, and which, if known, would materially affect their decision to enter into this Consent
21 Judgment, regardless of whether their lack of knowledge is the result of ignorance, oversight,
22 error, negligence, or any other cause.

21 **6. ENTRY OF CONSENT JUDGMENT**

22 6.1 CAG shall file a motion seeking approval of this Consent Judgment pursuant to
23 California Health & Safety Code § 25249.7(f). The Parties agree to act in good faith to obtain
24 Court approval of the Consent Judgment. Upon entry of the Consent Judgment, CAG and
25 Defendant waive their respective rights to a hearing and trial on the allegations in the Notices
26 and Complaint. Upon receipt of all payments outlined in Section 4, CAG agrees to file a
27 dismissal, without prejudice, of Saks & Company LLC.
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1 6.2 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
3 and become null and void, and the actions shall revert to the status that existed prior to the
4 execution date of this Consent Judgment; (b) no term of this Consent Judgment or any draft
5 thereof, or of the negotiation, documentation, or other part or aspect of the Parties' settlement
6 discussions, shall have any effect, nor shall any such matter be admissible in evidence for any
7 purpose in this Action, or in any other proceeding; and (c) the Parties agree to meet and confer to
8 determine whether to modify the terms of the Consent Judgment and to resubmit it for approval.

9 **7. MODIFICATION OF JUDGMENT**

10 7.1 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.

13 7.2 Any Party seeking to modify this Consent Judgment shall attempt in good faith to
14 meet and confer with the other Party prior to filing a motion to modify the Consent Judgment.

15 **8. RETENTION OF JURISDICTION**

16 8.1 This Court shall retain jurisdiction of this matter to implement and enforce the
17 terms of this Consent Judgment under Code of Civil Procedure section 664.6.

18 8.2 In any proceeding brought by either Party to enforce this Consent Judgment, the
19 prevailing party shall be entitled to recover its reasonable attorney's fees and costs.

20 **9. SERVICE ON THE ATTORNEY GENERAL**

21 9.1 CAG shall serve a copy of this Consent Judgment, signed by both parties, on the
22 California Attorney General so that the Attorney General may review this Consent Judgment
23 prior to its submittal to the Court for approval. No sooner than forty-five (45) days after the
24 Attorney General has received the aforementioned copy of this Consent Judgment, CAG may
25 then submit it to the Court for approval.

26 **10. ENTIRE AGREEMENT**

27 10.1 This Consent Judgment contains the sole and entire agreement and understanding
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1 of the Parties with respect to the entire subject matter hereof and any and all prior discussions,
2 negotiations, commitments and understandings related hereto. No representations, oral or
3 otherwise, express or implied, other than those contained herein have been made by any party
4 hereto. No other agreements not specifically referred to herein, oral or otherwise, shall be
5 deemed to exist or to bind any of the Parties.

6 **11. ATTORNEY FEES**

7 11.1 Except as specifically provided in Sections 4.1.3 and 8.2, each Party shall bear its
8 own attorneys' fees and costs in connection with the claims resolved in this Consent Judgment.

9 **12. GOVERNING LAW**

10 12.1 The validity, construction, terms, and performance of this Consent Judgment shall
11 be governed by the laws of the State of California, without reference to any conflicts of law
12 provisions of California law.

13 12.2 In the event that Proposition 65 is repealed, preempted, or is otherwise rendered
14 inapplicable by reason of law generally, or if any of the provisions of this Consent Judgment are
15 rendered inapplicable or are no longer required as a result of any such repeal or preemption, or
16 rendered inapplicable by reason of law generally as to the Covered Products, then Defendant
17 may provide written notice to CAG of any asserted change in the law, and shall have no further
18 obligations pursuant to this Consent Judgment with respect to, and to the extent that, the Covered
19 Products are so affected. Nothing in this Consent Judgment shall be interpreted to relieve
20 Defendant from any obligation to comply with any other pertinent state or federal law or
21 regulation.

22 12.3 The Parties, including their counsel, have participated in the preparation of this
23 Consent Judgment and this Consent Judgment is the result of the joint efforts of the Parties. This
24 Consent Judgment was subject to revision and modification by the Parties and has been accepted
25 and approved as to its final form by all Parties and their counsel. Accordingly, any uncertainty
26 or ambiguity existing in this Consent Judgment shall not be interpreted against any Party as a
27 result of the manner of the preparation of this Consent Judgment. Each Party to this Consent
28

1 Judgment agrees that any statute or rule of construction providing that ambiguities are to be
2 resolved against the drafting Party should not be employed in the interpretation of this Consent
3 Judgment and, in this regard, the Parties hereby waive California Civil Code section 1654.

4 **13. EXECUTION AND COUNTERPARTS**

5 13.1 This Consent Judgment may be executed in counterparts and by means of
6 facsimile or portable document format (pdf), which taken together shall be deemed to constitute
7 one document and have the same force and effect as original signatures.

8 **14. NOTICES**

9 14.1 Any notices under this Consent Judgment shall be by delivery of First-Class Mail.
10 If to CAG:

11 Reuben Yeroushalmi, Esq.
12 Yeroushalmi & Yeroushalmi
13 9100 Wilshire Boulevard, Suite 240W
14 Beverly Hills, CA 90212

15 If to Defendant E.S. Originals, Inc.

16 Matthew Kenefick
17 Jeffer Mangels Butler & Mitchell LLP
18 2 Embarcadero Center, 5th Floor
19 San Francisco, California 94111

20 **15. AUTHORITY TO STIPULATE**

21 15.1 Each signatory to this Consent Judgment certifies that he or she is fully authorized
22 by the Party he or she represents to enter into this Consent Judgment and to execute it on behalf
23 of the Party represented and legally to bind that party.
24
25
26
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1 AGREE TO:

AGREE TO:

2
3 Date: 4/29, 2021

Date: 4/22/2021, 2021

4
5 Michael Marcus

DocuSigned by:
Richard Bacall
AFF41A98D77A4BD...

6
7 Name: Michael Marcus

Richard Bacall

8
9 Title: Director

cfo

10 CONSUMER ADVOCACY GROUP, INC.

E.S. ORIGINALS, INC.

11
12 IT IS SO ORDERED.



Michael P. Linfield

13
14 Date: 4/29/21

Michael P. Linfield / Judge

JUDGE OF THE SUPERIOR COURT