

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

6 Attorneys for Plaintiffs,
7 Consumer Advocacy Group, Inc.

8
9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 COUNTY OF LOS ANGELES
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12 CONSUMER ADVOCACY GROUP, INC.,
13 in the public interest,

14 Plaintiff,

15 v.

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17 SMART & FINAL STORES, LLC, a
Delaware Limited Liability Company;
18 AMERIFOODS TRADING COMPANY,
LLC, a California Limited Liability
19 Company; SMART & FINAL HOLDINGS,
20 INC., a Delaware Corporation; and SMART
& FINAL LLC, a Delaware Limited Liability
21 Company; and DOES 1-20
22 Defendants.

CASE NO. BC528121; Related Case
BC500801

CONSENT JUDGMENT [PROPOSED]

Dept: 38
Judge: Honorable Maureen Duffy-Lewis
Complaint filed:

23 **1. INTRODUCTION**

24 1.1 This Consent Judgment is entered into by and between plaintiff Consumer
25 Advocacy Group, Inc. ("CAG") acting on behalf of itself and in the interest of the public and
26 defendants Farbe, Inc. ("Farbe"), Smart & Final Stores, LLC ("Smart & Final") (Smart & Final
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1 and Farbe are referred to hereinafter as "Defendants"), with each a "Party" and collectively
2 referred to as "Parties."

3 **1.2 Defendants and Products**

4 1.2.1 It is alleged that Defendants employ ten or more persons, are persons in the course
5 of doing business for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986,
6 California Health & Safety Code §§ 25249.6 et seq. ("Proposition 65"), and manufacture,
7 distribute, and/or sell "Aprons" (hereinafter "Subject Products") before the effective date of this
8 Consent Judgment ("Covered Products").

9 **1.3 Chemical of Concern**

10 Di(2-ethylhexyl)phthalate ("DEHP") is known to the State of California to cause cancer
11 and/or birth defects or other reproductive harm.

12 **1.4 Notices of Violation.**

13 1.4.1 On March 27, 2012, July 15, 2013, August 1, 2013, and April 17, 2014,
14 CAG served Smart & Final and various public enforcement agencies with a document entitled
15 "60-Day Notice of Violation" ("Notices") that provided the recipients with notice of alleged
16 violations of Health & Safety Code § 25249.6 for failing to warn individuals in California of
17 exposures to DEHP contained in certain vinyl bib aprons.

18 1.4.2 No public enforcer has commenced or diligently prosecuted the
19 allegations set forth in the Notices.

20 **1.5 Complaints.**

21 On February 13, 2013, CAG filed the initial complaint against Smart & Final for civil
22 penalties and injunctive relief, regarding Aprons in Los Angeles Superior Court Case No.
23 BC500801, ultimately resulting in summary judgment for Smart & Final on a procedural issue.
24 On November 20, 2013, CAG filed a second Complaint against Smart & Final for civil penalties
25 and injunctive relief, regarding Vinyl Aprons, in Los Angeles Superior Court, Case No.
26 BC528121. (The complaint in case number BC528121 is hereinafter referred to as the
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1 "Complaint.").In both cases CAG alleged that, among other things, Smart & Final violated
2 Proposition 65 by failing to give clear and reasonable warnings of exposure to DEHP from
3 Covered Products. The cases were ordered related on April 30, 2014 On July 31, 2014, CAG filed
4 a Doe amendment in case number BC528121 to add Farbe, Inc. as a defendant.

5 **1.6 Consent to Jurisdiction**

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

14 **1.7 No Admission**

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

6 **2. DEFINITIONS**

7 2.1 "Covered Products" means vinyl bib aprons identified as "First Street Clear Vinyl
8 Bib Aprons, 25 x 37 inches, barcode 0 41512 09741 6" aprons, manufactured, sold, and/or
9 distributed only by Defendants prior to Effective Date of this Consent Judgment.

10 2.2 "Effective Date" means the date that this Consent Judgment is approved by the
11 Court, except as to the "Injunctive Relief" addressed in paragraph 3.2.

12 2.3 "DEHP" means Di (2-ethylhexyl)phthalate.

13 2.4 "Notices" means the March 27, 2012, July 15, 2013, August 1, 2013, and April 17,
14 2014 60 Day Notices of Violation sent by CAG to Smart & Final.
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16 **3. INJUNCTIVE RELIEF/REFORMULATION**

17 3.1 Reformulation is required for all Covered Products manufactured by, delivered to,
18 or received by Defendants for sale in California after the Effective Date. Newly ordered
19 products must be reformulated to the extent that they would contain no more than 0.1% (1000
20 parts per million) of DEHP.
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22 3.2 For all Covered Products to be sold or distributed in California which exist in
23 Defendants' inventory as of the Effective Date, Defendants shall provide Proposition 65
24 compliant warnings on said products within 60 days of execution of this agreement. Thereafter,
25 Defendants shall not engage in any California sale of the Covered Products, remaining in
26 inventory and that contain DEHP, without providing the following or something substantially
27 similar to the following warning language, printed conspicuously on the labels of the Covered
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1 Products:

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

6 **4. SETTLEMENT PAYMENT**

7 **4.1 Payment and Due Date:** Within ten (10) days of the approval of the Consent
8 Judgment, Farbe, Inc. shall pay a total of one hundred fifty thousand dollars (\$150,000.00) as
9 follows:

10 **4.1.1 Civil Penalties.** Farbe, Inc. shall issue two separate checks for a total amount
11 of twenty thousand dollars (\$20,000.00) as penalties pursuant to Health & Safety Code § 25249.12:

12 (a) one check made payable to the State of California's Office of Environmental Health
13 Hazard Assessment (OEHHA) in the amount of \$15,000.00 representing 75% of the total penalty;
14 and

15 (b) one check to Consumer Advocacy Group, Inc. in the amount of \$5,000.00 representing
16 25% of the total penalty.

17 (c) Separate 1099s shall be issued for the above payments: Farbe, Inc. will issue a 1099 to
18 OEHHA, P.O. Box 4010, Sacramento, CA 95184 (EIN: 68-0284486) in the amount of \$15,000.00.
19 Farbe, Inc. will also issue a 1099 in the amount of \$5,000.00 to CAG and delivered to:
20 Yeroushalmi & Associates, 9100 Wilshire Boulevard, Suite 240W, Beverly Hills, California
21 90212.

22 **4.1.2 Payment In Lieu of Civil Penalties:** Farbe, Inc. shall pay \$5,000.00 in lieu of
23 civil penalties to "Consumer Advocacy Group, Inc." as follows: Farbe, Inc. will issue a check to
24 CAG in the amount of five thousand dollars (\$5,000.00). CAG will use this payment for
25 investigation of the public's exposure to Proposition 65 listed chemicals through various means,
26 laboratory fees for testing for Proposition 65 listed chemicals, expert fees for evaluating exposures
27 through various mediums, including but not limited to consumer product, occupational, and
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1 environmental exposures to Proposition 65 listed chemicals, and the cost of hiring consulting and
2 retained experts who assist with the extensive scientific analysis necessary for those files in
3 litigation, in order to reduce the public's exposure to Proposition 65 listed chemicals by notifying
4 those persons and/or entities believed to be responsible for such exposures and attempting to
5 persuade those persons and/or entities to reformulate their products or the source of exposure to
6 completely eliminate or lower the level of Proposition 65 listed chemicals, thereby addressing the
7 same public harm as allegedly in the instant Action. Further, should the court require it, CAG will
8 submit under seal, an accounting of these funds as described above as to how the funds were used.
9 The check shall be made payable to "Consumer Advocacy Group, Inc." and delivered to Reuben
10 Yeroushalmi, Yeroushalmi & Associates, 9100 Wilshire Boulevard, Suite 240W, Beverly Hills,
11 California 90212.

12 4.1.3 **Reimbursement of Attorneys Fees and Costs:** Farbe, Inc. shall pay one hundred
13 twenty five thousand dollars (\$125,000.00) to "Yeroushalmi & Associates" as reimbursement for
14 reasonable investigation fees and costs, attorneys' fees, and any other costs incurred as a result of
15 investigating, bringing this matter to Defendants' attention, litigating, and negotiating a settlement
16 in the public interest. The check shall be made payable to "Yeroushalmi & Associates" and
17 delivered to Reuben Yeroushalmi, Yeroushalmi & Associates, 9100 Wilshire Boulevard, Suite
18 240W, Beverly Hills, California 90212.

19 4.2 Payments pursuant to 4.1.1 through 4.1.3 in full and complete settlement of all
20 monetary claims by CAG related to the Notices shall be delivered to: Reuben Yeroushalmi,
21 Yeroushalmi & Associates, 9100 Wilshire Blvd., Suite 240W, Beverly Hills, CA 90212 within the
22 time agreed upon by the Parties.
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24 **5. MATTERS COVERED BY THIS CONSENT JUDGMENT**

25 5.1 This Consent Judgment is a full, final, and binding resolution between CAG on
26 behalf of itself and in the public interest and Defendants and their respective officers, directors,
27 insurers, employees, parents, shareholders, divisions, subdivisions, subsidiaries, partners,
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1 affiliates, sister companies, agents, contractors, vendors, their successors and assigns and or
2 anyone acting on Defendants' behalf or for their benefit (including but not limited to Amerifoods
3 Trading Company, LLC; Smart & Final Holdings, Inc.; and Smart & Final LLC) ("Defendant
4 Releasees"), including but not limited to each of their manufacturers, suppliers, customers,
5 distributors, wholesalers, retailers, or any other person in the course of doing business, and the
6 successors and assigns of any of them, who may use, maintain, distribute or sell Covered Products
7 ("Downstream Defendant Releasees"), for all conduct of Defendants prior to the Effective Date
8 based on alleged exposure to DEHP from Covered Products as set forth in the Notices.
9 Defendants' and Defendant Releasees' compliance with this Consent Judgment shall constitute
10 compliance with Proposition 65 with respect to DEHP from Covered Products.

11 5.2 CAG on behalf of itself, its past and current agents, representatives, attorneys,
12 successors, and/or assignees, hereby waives all rights to institute or participate in, directly or
13 indirectly, any form of legal action and releases all claims, including, without limitation, all
14 actions, and causes of action, in law or in equity, suits, liabilities, demands, obligations, damages,
15 costs, fines, penalties, losses, or expenses (including, but not limited to, investigation fees, expert
16 fees, and attorneys' fees) of any nature whatsoever, whether known or unknown, fixed or
17 contingent (collectively "Claims"), against Defendants, Defendant Releasees, and Downstream
18 Defendant Releasees arising from any allegations of violation of Proposition 65 or any other
19 statutory or common law regarding the failure to warn about exposure to DEHP and DBP from
20 Covered Products manufactured, distributed, or sold by Defendants and Defendant Releasees. In
21 furtherance of the foregoing, as to alleged exposures to DEHP and DBP from Covered Products,
22 CAG hereby waives any and all rights and benefits which it now has, or in the future may have,
23 conferred upon it with respect to the Claims arising from any violation of Proposition 65 or any
24 other statutory or common law regarding the failure to warn about exposure to DEHP and DBP
25 from Covered Products by virtue of the provisions of section 1542 of the California Civil Code,
26 which provides as follows:
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1 **A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE**
2 **CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS FAVOR**
3 **AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY**
4 **HIM, MUST HAVE MATERIALLY AFFECTED HIS SETTLEMENT**
5 **WITH THE DEBTOR.**

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

20 **6. ENFORCEMENT OF JUDGMENT**

21 6.1 The terms of this Consent Judgment shall be enforced exclusively by the Parties
22 hereto. Except as otherwise agreed by the Parties, the Parties may, by noticed motion or order to
23 show cause before the Superior Court of California, City and County of Los Angeles, giving the
24 notice required by law, enforce the terms and conditions contained herein. A Party may enforce
25 any of the terms and conditions of this Consent Judgment only after that Party first provides notice
26 to the Party allegedly failing to comply with the terms and conditions of this Consent Judgment
27 and provide 60 days in which the Parties shall attempt to resolve such Party's failure to comply in
28 an open and good faith manner.

1 6.2 **Notice of Violation.** Prior to bringing any motion, order to show cause, or other
2 proceeding to enforce any alleged violation of Section 3.1 of this Consent Judgment, CAG shall
3 provide a Notice of Violation (“NOV”) to Defendants. The NOV shall include for each of the
4 Newly Alleged Products: the date(s) the alleged violation(s) was observed and the location at
5 which the Newly Alleged Products were offered for sale, and shall be accompanied by all test data
6 obtained by CAG regarding the Newly Alleged Products, including an identification of the
7 component(s) of the Newly Alleged Products that were tested. Before any destructive testing of
8 any Newly Alleged Products is conducted by or on behalf of CAG, CAG shall give Defendant(s)
9 an opportunity to inspect and verify at reasonable times and places the authenticity of any Newly
10 Alleged Product in violation of this Consent Judgment.

11 6.2.1 **Non-Contested NOV.** CAG shall take no further action regarding the
12 alleged violation if, within 60 days of receiving such NOV, Defendants serves a Notice of
13 Election (“NOE”) that meets one of the following conditions:

14 (a) The Newly Alleged Products were shipped by Defendants for sale
15 in California before the Effective Date, or

16 (b) Since receiving the NOV Defendants have taken corrective action
17 by either (i) requesting that its customers in California remove the Newly Alleged Products
18 identified in the NOV from sale in California and destroy or return the Newly Alleged
19 Products to Defendants, or (ii) providing a clear and reasonable warning for the Newly
20 Alleged Products identified in the NOV pursuant to 27 Cal. Code Regs. § 25603.

21 6.2.2 **Contested NOV.** Defendants may serve an NOE informing CAG of its
22 election to contest the NOV within 60 days of receiving the NOV.

23 (a) In its election, Defendants may request that the sample(s) Covered
24 Products tested by CAG be subject to additional confirmatory testing at an EPA-accredited
25 laboratory.
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1 (b) If the confirmatory testing establishes that the Newly Alleged
2 Products do not contain DEHP and DBP in excess of the level allowed in Section 3.1, CAG
3 shall take no further action regarding the alleged violation. If the testing does not establish
4 compliance with Section 3.1, Defendants may withdraw its NOE to contest the violation
5 and may serve a new NOE pursuant to Section 6.2.1.

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

9 6.3 In any proceeding brought by either Party to enforce this Consent Judgment, such
10 party may seek whatever fines, costs, penalties or remedies as may be provided by law for any
11 violation of Proposition 65 or this Consent Judgment.

12 7. ENTRY OF CONSENT JUDGMENT

13 7.1 CAG shall file a motion seeking approval of this Consent Judgment pursuant to
14 California Health & Safety Code § 25249.7(f). Upon entry of the Consent Judgment, CAG and
15 Defendants waive their respective rights to a hearing or trial on the allegations of the Complaint.

16 7.2 Upon approval of this Consent Judgment by the Court, plaintiff shall file a Request
17 for Dismissal without prejudice as to the remaining Doe defendants.

18 7.3 If this Consent Judgment is not approved by the Court, (a) this Consent Judgment
19 and any and all prior agreements between the parties merged herein shall terminate and become
20 null and void, and the actions shall revert to the status that existed prior to the execution date of
21 this Consent Judgment; (b) no term of this Consent Judgment or any draft thereof, or of the
22 negotiation, documentation, or other part or aspect of the Parties' settlement discussions, shall
23 have any effect, nor shall any such matter be admissible in evidence for any purpose in this Action,
24 or in any other proceeding; and (c) the Parties agree to meet and confer to determine whether to
25 modify the terms of the Consent Judgment and to resubmit it for approval.
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1 **8. MODIFICATION OF JUDGMENT AND RIGHTS THEREUNDER**

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. Any
5 Party may waive in writing any right it may have under this Consent Judgment.

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

8 **9. RETENTION OF JURISDICTION**

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

11 **10. DUTIES LIMITED TO CALIFORNIA**

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

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

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

21 **12. ATTORNEY FEES**

22 12.1 Except as specifically provided in Section 4.1 and 6.3, each Party shall bear its own
23 costs and attorney fees in connection with this action.

24 **13. ENTIRE AGREEMENT**

25 13.1 This Consent Judgment contains the sole and entire agreement and understanding
26 of the Parties with respect to the entire subject matter hereof and any and all prior discussions.
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1 negotiations, commitments and understandings related hereto. No representations, oral or
2 otherwise, express or implied, other than those contained herein have been made by any party
3 hereto. No other agreements not specifically referred to herein, oral or otherwise, shall be deemed
4 to exist or to bind any of the Parties.
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7 **14. GOVERNING LAW**

8 14.1 The validity, construction and performance of this Consent Judgment shall be
9 governed by the laws of the State of California, without reference to any conflicts of law provisions
10 of California law.

11 14.2 The Parties, including their counsel, have participated in the preparation of this
12 Consent Judgment and this Consent Judgment is the result of the joint efforts of the Parties. This
13 Consent Judgment was subject to revision and modification by the Parties and has been accepted
14 and approved as to its final form by all Parties and their counsel. Accordingly, any uncertainty or
15 ambiguity existing in this Consent Judgment shall not be interpreted against any Party as a result
16 of the manner of the preparation of this Consent Judgment. Each Party to this Consent Judgment
17 agrees that any statute or rule of construction providing that ambiguities are to be resolved against
18 the drafting Party should not be employed in the interpretation of this Consent Judgment and, in
19 this regard, the Parties hereby waive California Civil Code § 1654.
20

21 **15. EXECUTION AND COUNTERPARTS**

22 15.1 This Consent Judgment may be executed in counterparts and by means of facsimile
23 or portable document format (PDF), which taken together shall be deemed to constitute one
24 document and have the same force and effect as original signatures.

25 **16. NOTICES**

26 15.1 Any notices under this Consent Judgment shall be by personal delivery or First
27 Class Mail.
28

1 If to CAG:

2 Reuben Yeroushalmi
3 9100 Wilshire Boulevard, Suite 240W
4 Beverly Hills, CA 90212

5 (310) 623-1926

6 If to Farbe, Inc.

7 Firoze Fakhri, President or Current President/CEO
8 Farbe, Inc.
9 18150 S. Figueroa Street
10 Gardena, CA 90248

11 With a copy to:

12 Randolph Visser
13 Sheppard Mullin Richter & Hampton, LLP
14 333 South Hope Street, 43rd Floor
15 Los Angeles, CA 90071

16 If to Smart & Final Stores, LLC,

17 Donald Alvarado, General Counsel
18 600 Citadel Drive
19 Commerce, CA 90040

20 With a copy to

21 David G. Freedman
22 Law Offices of David G. Freedman
23 1801 Century Park East, 16th Floor
24 Los Angeles, CA 90067

25 **17. AUTHORITY TO STIPULATE**

26 17.1 Each signatory to this Consent Judgment certifies that he or she is fully authorized
27 by the party he or she represents to enter into this Consent Judgment and to execute it on behalf of
28 the party represented and legally to bind that party.

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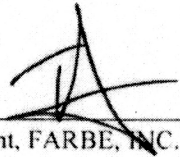
AGREED TO:

Date: _____, 2014

By: _____
Plaintiff, CONSUMER ADVOCACY
GROUP, INC.

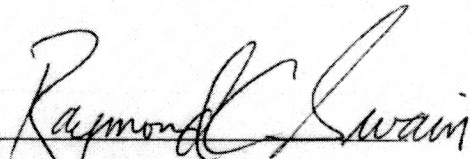
AGREED TO:

Date: October 21, 2014

By: 
Defendant, FARBE, INC.

AGREED TO:

Date: 10-21-14, 2014

By: 
Defendant, SMART & FINAL STORES, LLC

IT IS SO ORDERED.

Date: _____

JUDGE OF THE SUPERIOR COURT

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AGREED TO:

Date: 10-22-14, 2014

AGREED TO:

Date: _____, 2014

By: 
Plaintiff, CONSUMER ADVOCACY
GROUP, INC.

By: _____
Defendant, FARBE, INC.

AGREED TO:

Date: _____, 2014

By: _____
Defendant, SMART & FINAL STORES, LLC

IT IS SO ORDERED.

Date: _____

JUDGE OF THE SUPERIOR COURT