

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

X
UNITED STATES OF AMERICA *ex rel.*
MICHAEL KRIGSTEIN,

Plaintiff,

v.

BYER TWO;
BYER CALIFORNIA; and
ALLAN BYER,

Defendants.

X

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UNITED STATES OF AMERICA,

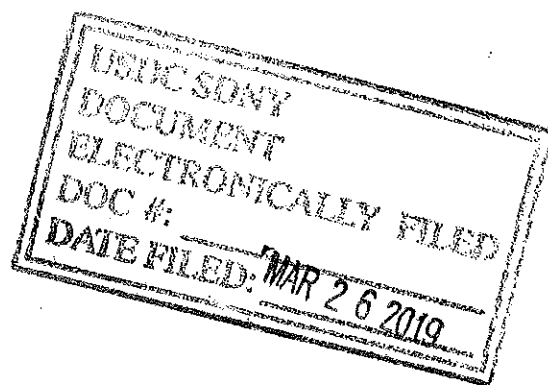
Plaintiff-Intervenor,

v.

BYER CALIFORNIA, INC.,

Defendant.

X



STIPULATION AND ORDER
OF SETTLEMENT AND DISMISSAL

13 Civ. 9030 (GBD)

WHEREAS, this Stipulation and Order of Settlement and Dismissal (the "Stipulation") is entered into by and among the United States of America, including on behalf of its agency, United States Customs and Border Protection ("CBP") (collectively, the "United States" or "Government"), by its attorney, Geoffrey S. Berman, United States Attorney for the Southern District of New York; the relator Michael Krigstein, by his representatives (the "Relator"); and defendant Byer California, Inc. ("Defendant" or "Byer," and together with the Government and Relator, "the Parties"), by its authorized representatives;

WHEREAS, Byer is a California Corporation with its principal place of business in San Francisco, California;

WHEREAS, Defendant is a designer, manufacturer and importer of women's apparel;

WHEREAS, Defendant's business involves regularly purchasing women's and girl's garments that are made overseas and imported into the United States, and selling those garments to department stores and national retail chains in the United States, under proprietary, branded and private label distribution;

WHEREAS, Defendant regularly conducts business with entities that purchase garments overseas and import them into the United States on behalf of Byer;

WHEREAS, on or about December 20, 2013, Relator filed a *qui tam* action (the "Civil Action") in the United States District Court for the Southern District of New York (the "Court") pursuant to the *qui tam* provisions of the False Claims Act, 31 U.S.C. § 3730(b) (the "Act"). In the Civil Action, Relator alleged that Defendant violated the Act through a scheme by which Queen Apparel NY, Inc. ("Queen") could evade or underpay U.S. customs duties (the "Relator Complaint");

WHEREAS, the United States has intervened in the Civil Action as against Defendant and filed a Complaint-in-Intervention of the United States of America (the "Federal Complaint");

WHEREAS, Queen, an importer that engaged in business with Defendant, was also named by the Relator as a defendant in the Civil Action, and the United States intervened in the Civil Action as against defendant Queen and filed a separate Complaint-in-Intervention of the United States of America as against Queen;

WHEREAS, the Federal Complaint alleges that Defendant caused Queen and/or conspired with Queen, to repeatedly submit false invoices to U.S. Customs and Border

Protection (“CBP”) by underreporting the value of garments that it manufactured overseas and imported into the United States for Defendant. The conduct described in this Paragraph is the “Covered Conduct” for purposes of this Stipulation;

WHEREAS, the Parties have reached a full and final mutually agreeable resolution addressing the claims asserted against the Defendant in the Federal Complaint and the Relator Complaint, for the Covered Conduct;

NOW, THEREFORE, upon the Parties’ agreement, IT IS HEREBY ORDERED that:

TERMS AND CONDITIONS

1. The Parties consent to this Court’s exercise of subject matter jurisdiction over this action and personal jurisdiction over each of them.
2. Defendant hereby admits, acknowledges as true, and accepts responsibility for the following conduct (“Admitted Conduct”):
 - a. From 2009 to 2013 (“relevant time period”), Byer purchased garments that were manufactured and imported by Queen in accordance with Byer’s guidelines. Queen was owned and managed by Hank Choi.
 - b. All of the garments purchased by Byer from Queen were bought on a “Landed Duty Paid” (“LDP”) or “Delivered Duty Paid” (“DDP”) basis, meaning that (i) Queen, as importer of record, would submit documents to CBP containing, *inter alia*, the value of the garments and the corresponding amount of import duties owed on those garments, and (ii) the import duties owed to the United States and levied by CBP for those garments manufactured abroad and imported to the United States by Queen were to be paid by Queen, who would charge an all-in purchase price paid by Byer.

- c. During the relevant time period, Byer would, pursuant to its internal review process for LDP/DDP transactions, review copies of CBP entry summary forms (CBP Form 7501) and the LDP/DDP commercial invoices from Queen to determine whether the tariff classification and values declared by Queen in these transactions were accurate, based on the information available to Byer.
- d. During the relevant time period, Byer also regularly compared the estimated or known value of a garment's fabric and/or trim to Queen's valuation of the same garment, after manufacture and importation.
- e. Based on the aforementioned reviews, Byer understood that Queen had falsely represented the value of garments in copies of documents that it had presented to CBP, and that as a result of that undervaluation, Queen paid less than the required amount of import duties.
- f. Although Byer was substantially certain that during the relevant time period Queen presented entry forms to CBP that contained false valuations of the garments Byer was purchasing, and even asked Queen to stop this practice and review its values, Byer made no attempt to alert CBP and continued to supply Queen with additional work orders.
- g. In September 2012, Queen's owner, Hank Choi, tried to bribe Byer's compliance manager with an envelope full of cash to look the other way. Byer rejected this attempted bribe, but continued to provide Queen with more work orders until April 2013, when Byer finally stopped doing business with Queen. During this seven-month period, Byer continued to conduct business with Queen despite multiple warning signs that Queen was submitting documents to CBP containing false valuations.

3. Defendant shall pay to the Government three hundred and twenty-five thousand dollars (\$325,000) within thirty (30) business days after the Effective Date (defined below in paragraph 26) (the "Settlement Amount"). The payment shall be made by electronic funds transfer in accordance with instructions to be provided by the Financial Litigation Unit of the United States Attorney's Office for the Southern District of New York. Of the Settlement Amount, \$162,500 constitutes restitution to the United States.

4. Defendant agrees to cooperate fully and truthfully with the United States' investigation of individuals and entities not released in this Stipulation. Upon reasonable notice, Defendant shall encourage, and agrees not to impair, the cooperation of its directors, officers, and employees, and shall use its best efforts to make available, and encourage, the cooperation of former directors, officers, and employees for interviews and testimony, consistent with the rights and privileges of such individuals. Defendant further agrees to furnish to the United States, upon request, complete and unredacted copies of all non-privileged documents, reports, memoranda of interviews, and records in its possession, custody, or control concerning any investigation of the Covered Conduct.

5. Defendant, having truthfully admitted to the conduct set forth in paragraph 2 hereof (the "Admitted Conduct"), agrees that it shall not, through its attorneys, agents, or employees, make any public statement, including but not limited to, any statement in a press release, social media forum, or website, that contradicts or is inconsistent with the Admitted Conduct or suggests that the Admitted Conduct is not wrongful (a "Contradictory Statement"). Any Contradictory Statement by Defendant, its attorneys, agents, or employees, shall constitute a violation of this Stipulation, thereby authorizing the Government to pursue any of the remedies set forth in paragraph 11 hereof, or seek other appropriate relief from the Court. Before pursuing

any remedy, the Government shall notify Defendant that it has determined that Defendant has made a Contradictory Statement. Upon receiving notice from the Government, Defendant may cure its violation by repudiating the Contradictory Statement in a press release or other public statement within four business days. If Defendant learns of a potential Contradictory Statement by its attorneys, agents, or employees, Defendant must notify the Government of the statement within 24 hours. The decision as to whether any statement constitutes a Contradictory Statement or will be imputed to Defendant for the purpose of this Stipulation, or whether Defendant has adequately repudiated a Contradictory Statement to cure a violation of this Stipulation, shall be within the sole discretion of the Government.

6. Subject to the exceptions in Paragraphs 10 and 15 below (concerning excluded claims and bankruptcy proceedings), and conditioned upon Defendant's full compliance with the terms of this Stipulation, including full payment of the Settlement Amount to the United States pursuant to Paragraph 3 above, the United States releases Defendant, including its parent, subsidiaries and corporate predecessors, successors and assigns, from any civil or administrative monetary claim that the United States has for the Covered Conduct under the Act; the Civil Monetary Penalties Law, 42 U.S.C. § 1320a-7a; the Program Fraud Civil Remedies Act, 31 U.S.C. § 3801-3812; and the common law theories of fraud, payment by mistake, and unjust enrichment. For avoidance of doubt, this Stipulation does not release any current or former officer, director, employee, or agent of Defendant from liability of any kind.

7. Defendant fully and finally releases the United States, and its current and former agencies, officers, employees, servants, and agents from any claims (including attorneys' fees, costs, and expenses of every kind and however denominated) that Defendant has asserted, could have asserted, or may assert in the future against the United States, its agencies, officers,

employees, servants, or agents related to the Covered Conduct and the United States' investigation, prosecution and settlement thereof.

8. Conditioned on Defendant's timely payment of the full Settlement Amount pursuant to Paragraph 3 above, the Relator, for himself and his heirs, successors, attorneys, agents, and assigns, releases Defendant, including its parent, subsidiaries and corporate predecessors, successors and assigns, as well as all of its current and former officers, directors, employees, attorneys, and other agents, from any and all manner of claims, proceedings, liens, and causes of action of any kind or description that the Relator has against Defendant related to or arising from the Relator Complaint; provided, however, that nothing in this Stipulation shall preclude Relator from seeking to recover his reasonable expenses and attorneys' fees and costs pursuant to 31 U.S.C. § 3730(d).

9. In consideration of the execution of this Stipulation by the Relator and the Relator's release as set forth in Paragraph 8 above, Defendant, including its parent, subsidiaries, predecessors, and corporate successors and assigns, as well as all of its current and former officers, directors, employees, attorneys, and other agents, release the Relator and his successors, heirs, assigns, attorneys, and other agents, from any and all manner of claims, proceedings, liens, and causes of action of any kind or description that Defendant has against Relator related to or arising from the Relator Complaint.

10. Notwithstanding the releases given in Paragraph 6 above, or any other term of this Stipulation, the following claims of the Government are specifically reserved and are not released by this Stipulation:

a. any liability arising under Title 26, United States Code (Internal Revenue Code);

- b. any criminal liability;
- c. except as explicitly stated in this Stipulation, any administrative liability;
- d. any liability to the United States (or its agencies) for any conduct other than

the Covered Conduct;

- e. any liability based upon obligations created by this Stipulation; and
- f. any liability of individuals.

11. Defendant shall be in default of this Stipulation if Defendant fails to make the required payment set forth in Paragraph 3 above on or before the due date for such payment, or if it fails to comply materially with any other term of this Stipulation that applies to it ("Default"). The Government shall provide written notice to Defendant of any Default in the manner set forth in Paragraph 26 below. Defendant shall then have an opportunity to cure the Default within ten (10) calendar days from the date of delivery of the notice of Default. In the event that a Default is not fully cured within ten (10) calendar days of the delivery of the notice of Default ("Uncured Default"), interest shall accrue at the rate of 12% per annum compounded daily on the remaining unpaid principal balance of the Settlement Amount, beginning ten (10) calendar days after mailing of the notice of Default. In the event of an Uncured Default, Defendant shall agree to the entry of a consent judgment in favor of the United States against Defendant in the amount of the Settlement Amount as attached hereto as Exhibit A. The United States may also, at its option, (a) rescind this Stipulation and reinstate the claims asserted against Defendant in the Government Complaint; (b) seek specific performance of this Stipulation; (c) offset the remaining unpaid balance of the Settlement Amount from any amounts due and owing Defendant by any department, agency, or agent of the United States; or (d) exercise any other rights granted by law, or under the terms of this Stipulation, or recognizable at common law or in

equity. Defendant shall not contest any offset imposed or any collection undertaken by the Government pursuant to this Paragraph, either administratively or in any Federal or State court. In addition, Defendant shall pay the Government all reasonable costs of collection and enforcement under this Paragraph, including attorneys' fees and expenses. In the event that the United States opts to rescind this Stipulation pursuant to this Paragraph, Defendant shall not plead, argue, or otherwise raise any defenses under the theories of statute of limitations, laches, estoppel, or similar theories, to any civil or administrative claims that relate to the Covered Conduct.

12. The Relator and his heirs, successors, attorneys, agents, and assigns shall not object to this Stipulation; Relator agrees and confirms that the terms of this Stipulation are fair, adequate, and reasonable under all the circumstances, pursuant to 31 U.S.C. § 3730(c)(2)(B).

13. Defendant waives and shall not assert any defenses Defendant may have to any criminal prosecution or administrative action relating to the Covered Conduct that may be based in whole or in part on a contention that, under the Double Jeopardy Clause in the Fifth Amendment of the Constitution, or under the Excessive Fines Clause in the Eighth Amendment of the Constitution, this Stipulation bars a remedy sought in such criminal prosecution or administrative action.

14. Defendant represents and warrants that it has reviewed its financial situation, that it is currently not insolvent as such term is defined in 11 U.S.C. § 101(32) and that it reasonably believes that it shall remain solvent following payment to the Government of the Settlement Amount. Further, the Parties warrant that, in evaluating whether to execute this Stipulation, they (a) have intended that the mutual promises, covenants, and obligations set forth constitute a contemporaneous exchange for new value given to Defendant, within the meaning of 11 U.S.C.

§ 547(c)(1); and (b) have concluded that these mutual promises, covenants, and obligations do, in fact, constitute such a contemporaneous exchange. Further, the Parties warrant that the mutual promises, covenants, and obligations set forth herein are intended to and do, in fact, represent a reasonably equivalent exchange of value that is not intended to hinder, delay, or defraud any entity to which Defendant was or became indebted to on or after the date of this Stipulation, within the meaning of 11 U.S.C. § 548(a)(1).

15. If within 91 days of the Effective Date of this Stipulation or any payment made under this Stipulation, Defendant commences any case, action, or other proceeding under any law relating to bankruptcy, insolvency, reorganization, or relief of debtors or a third party commences any case, action, or other proceeding under any law related to bankruptcy, insolvency, reorganization, or relief of debtors (a) seeking an order for relief of Defendant's debts, or seeking to adjudicate Defendant as bankrupt or insolvent; or (b) seeking appointment of a receiver, trustee, custodian, or other similar official for Defendant or for all or part of Defendant's assets, Defendant agrees as follows:

a. Defendant's obligations under this Stipulation may not be avoided pursuant to 11 U.S.C. § 547, and Defendant shall not argue or otherwise take the position in any such case, action, or proceeding that (i) Defendant's obligations under this Stipulation may be avoided under 11 U.S.C. § 547; (ii) Defendant was insolvent at the time this Stipulation was entered into; or (iii) the mutual promises, covenants, and obligations set forth in this Stipulation do not constitute a contemporaneous exchange for new value given to Defendant.

b. If any of Defendant's obligations under this Stipulation are avoided for any reason, including, but not limited to, through the exercise of a trustee's avoidance powers under the Bankruptcy Code, the Government, at its option, may rescind the release in this

Stipulation and bring any civil and/or administrative claim, action, or proceeding against Defendants for the claims that would otherwise be covered by the release in Paragraph 6 above. Defendant agrees that (i) any such claim, action, or proceeding brought by the Government would not be subject to an “automatic stay” pursuant to 11 U.S.C. § 362(a) as a result of the case, action, or proceeding described in the first sentence of this Paragraph, and Defendant shall not argue or otherwise contend that the Government’s claim, action, or proceeding is subject to an automatic stay; (ii) Defendant shall not plead, argue, or otherwise raise any defenses under the theories of statute of limitations, laches, estoppel, or similar theories, to any claim, action, or proceeding that is brought by the Government within 60 calendar days of written notification to Defendant that the release has been rescinded pursuant to this Paragraph; and (iii) the Government has a valid claim against Defendant in the amount of the Settlement Amount and the Government may pursue its claim in the case, action, or proceeding described in the first sentence of this Paragraph, as well as in any other case, action, or proceeding.

c. Defendant acknowledges that the agreements in this Paragraph are provided in exchange for valuable consideration provided in this Stipulation.

16. Defendant agrees to the following:

a. Unallowable Costs Defined: All costs (as defined in the Federal Acquisition Regulation, 48 C.F.R. § 31.205-47; and the regulations and official program directives promulgated thereunder) incurred by or on behalf of Defendant, including its present or former officers, directors, employees, and agents in connection with:

- (1) the matters covered by this Stipulation;
- (2) the United States’ audit(s) and civil investigation(s) of matters covered by this Stipulation;

(3) Defendant's investigation, defense, and corrective actions undertaken in response to the United States' audit(s) and civil investigation(s) in connection with matters covered by this Stipulation (including attorneys' fees);

(4) the negotiation and performance of this Stipulation; and

(5) any payment Defendant makes to the United States pursuant to this Stipulation and any payment Defendant may make to the Relator, including expenses, costs and attorneys' fees;

are unallowable costs for government contracting purposes ("Unallowable Costs").

b. Future Treatment of Unallowable Costs: Unallowable Costs shall be separately determined and accounted for by Defendant, and Defendant shall not charge such Unallowable Costs directly or indirectly to any contracts with the United States.

c. Treatment of Unallowable Costs Previously Submitted for Payment: Within 90 days of the Effective Date of this Stipulation, Defendant shall identify and repay by adjustment to future claims for payment or otherwise any Unallowable Costs included in payments previously sought by Defendant from the United States. Defendant agrees that the United States, at a minimum, shall be entitled to recoup from Defendant any overpayment plus applicable interest and penalties as a result of the inclusion of such Unallowable Costs on previously-submitted requests for payment. The United States, including the Department of Justice and/or the affected agencies, reserves its right to audit, examine, or re-examine Defendant's books and records and to disagree with any calculation submitted by Defendant or any of its subsidiaries or affiliates regarding any Unallowable Costs included in payments

previously sought by Defendant, or the effect of any such Unallowable Costs on the amounts of such payments.

17. This Stipulation is intended to be for the benefit of the Parties only. The Parties do not release any claims against any other person or entity except as otherwise provided herein.

18. Each Party shall bear its own legal and other costs incurred in connection with this matter, including the preparation and performance of this Stipulation; provided, however, nothing in this Stipulation shall preclude the Relator from seeking to recover his expenses or attorneys' fees and costs from Defendant, pursuant to 31 U.S.C. § 3730(d).

19. Any failure by the Government to insist upon the full or material performance of any of the provisions of this Stipulation shall not be deemed a waiver of any of the provisions hereof, and the Government, notwithstanding that failure, shall have the right thereafter to insist upon the full or material performance of any and all of the provisions of this Stipulation.

20. This Stipulation is governed by the laws of the United States. The exclusive jurisdiction and venue for any dispute relating to this Stipulation is the United States District Court for the Southern District of New York. For purposes of construing this Stipulation, this Stipulation shall be deemed to have been drafted by all Parties to this Stipulation and shall not, therefore, be construed against any Party for that reason in any subsequent dispute.

21. This Stipulation constitutes the complete agreement between the Parties with respect to the subject matter hereof. This Stipulation may not be amended except by written consent of the Parties.

22. The undersigned counsel and other signatories represent and warrant that they are fully authorized to execute this Stipulation on behalf of the persons and the entities indicated below.

23. This Stipulation is binding on Defendant's successor entities.

24. This Stipulation is binding on the Relator's successors, transferees, heirs, and assigns.

25. This Stipulation may be executed in counterparts, each of which constitutes an original and all of which constitute one and the same Stipulation. E-mails that attach signatures in PDF form or facsimiles of signatures shall constitute acceptable, binding signatures for purposes of this Stipulation.

26. Any notice pursuant to this Stipulation shall be in writing and shall, unless expressly provided otherwise herein, be delivered by hand, express courier, or e-mail transmission followed by postage-prepaid mail, and shall be addressed as follows:

TO THE UNITED STATES:

Kirti Vaidya Reddy
Assistant United States Attorney
United States Attorney's Office
Southern District of New York
86 Chambers Street, Third Floor
New York, New York 10007
Kirti.reddy@usdoj.gov

TO DEFENDANT:

ARTHUR PURCELL, ESQ.
Sandler, Travis & Rosenberg, P.A.
551 Fifth Avenue, Suite 1100
New York, New York 10176
APurcell@strtrade.com

TO RELATOR:

MICHAEL D. FITZGERALD, ESQ.
800 Old Bridge Road
Brielle, New Jersey 08730
Mdfitz@briellelaw.com

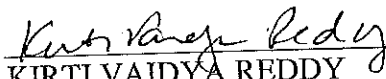
26. The effective date of this Stipulation is the date upon which the Stipulation is approved by the Court (the "Effective Date").

Agreed to by:

THE UNITED STATES OF AMERICA

Dated: New York, New York
March 22, 2019

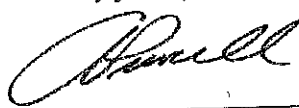
*Attorneys for Plaintiff-Intervenor
United States of America*

By: 
KIRTI VAIDYA REDDY
Assistant United States Attorney
86 Chambers Street, 3rd Floor
New York, New York 10007
Telephone No. (212) 637-12751
Facsimile No. (212) 637-2786
Kirti.Reddy@usdoj.gov

DEFENDANT

Dated: New York, New York
March 22, 2019

Attorney for Byer California

By: 
ARTHUR PURCELL
Sandler, Travis & Rosenberg, P.A.
551 Fifth Avenue, Suite 1100
New York, New York 10176
Telephone No. (212) 549-0131
APurcell@strtrade.com

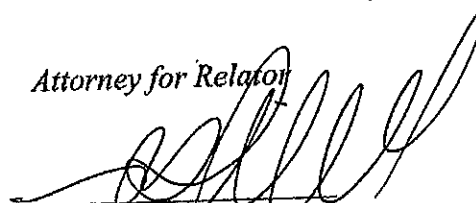
RELATOR

Dated: New York, New York
March 22, 2019

By: *Relator*

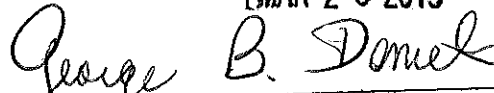
MICHAEL KRIGSTEIN

Dated: Brielle, New Jersey
March 22, 2019

By: *Attorney for Relator*

MICHAEL D. FITZGERALD
800 Old Bridge Road
Brielle, New Jersey 08730
Telephone No. (732) 223-2200
Facsimile No. (732) 223-7299
Mdfitz@briellelaw.com

SO ORDERED:

[MAR 26 2019


THE HONORABLE GEORGE B. DANIELS
United States District Judge