

NOV 20 2012

John A. Clarke, Executive Officer/Clerk
By SHAUNYA WESLEY, Deputy

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10 Consumer Advocacy Group, Inc.

11 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
12 **LOS ANGELES – CENTRAL DISTRICT**

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

15 Plaintiff,

16 v.

17 FOCUS PRODUCTS GROUP, LLC, an
18 Illinois Limited Liability Company, SWING-
19 A-WAY PRODUCTS, LLC, an Illinois
20 Limited Liability Company, ROSS STORES,
21 INC., a Delaware Corporation, ROSS
22 DRESS FOR LESS, INC., a Virginia
23 Corporation, BED BATH & BEYOND INC.,
24 a New York Corporation, and DOES 1-20;

25 Defendants.

26 CASE NO. **BC 496009**

27 COMPLAINT FOR PENALTY,
28 INJUNCTION, AND RESTITUTION

Violation of Proposition 65, the Safe
Drinking Water and Toxic Enforcement
Act of 1986 (*Health & Safety Code*, §
25249.5, *et seq.*)

ACTION IS AN UNLIMITED CIVIL
CASE (exceeds \$25,000)

Plaintiff CONSUMER ADVOCACY GROUP, INC. alleges a cause of action against
defendants FOCUS PRODUCTS GROUP, LLC, SWING-A-WAY PRODUCTS, LLC, ROSS
STORES, INC., ROSS DRESS FOR LESS, INC., BED BATH & BEYOND INC., and DOES 1-
20 as follows:

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THE PARTIES

- 1
2 1. Plaintiff CONSUMER ADVOCACY GROUP, INC. ("Plaintiff" or "CAG") is an
3 organization qualified to do business in the State of California. CAG is a person within
4 the meaning of Health and Safety Code section 25249.11, subdivision (a). CAG, acting
5 as a private attorney general, brings this action in the public interest as defined under
6 Health and Safety Code section 25249.7, subdivision (d).
- 7 2. Defendant FOCUS PRODUCTS GROUP, LLC ("FOCUS") is an Illinois limited liability
8 company, doing business in the State of California at all relevant times herein.
- 9 3. Defendant SWING-A-WAY PRODUCTS, LLC ("SWING-A-WAY") is an Illinois
10 limited liability company, doing business in the State of California at all relevant times
11 herein.
- 12 4. Defendant ROSS STORES, INC. ("ROSS"), is a Delaware Corporation, qualified to do
13 business and doing business in the State of California at all relevant times herein.
- 14 5. Defendant ROSS DRESS FOR LESS, INC. ("ROSS DRESS"), is a Virginia Corporation,
15 qualified to do business and doing business in the State of California at all relevant times
16 herein.
- 17 6. Defendant BED BATH & BEYOND INC. ("BED BATH"), is a New York Corporation,
18 qualified to do business and doing business in the State of California at all relevant times
19 herein.
- 20 7. Plaintiff is presently unaware of the true names and capacities of defendants DOES 1-20,
21 and therefore sues these defendants by such fictitious names. Plaintiff will amend this
22 complaint to allege their true names and capacities when ascertained. Plaintiff is
23 informed, believes, and thereon alleges that each fictitiously named defendant is
24 responsible in some manner for the occurrences herein alleged and the damages caused
25 thereby.
- 26 8. At all times mentioned herein, the term "Defendants" includes FOCUS, SWING-A-
27 WAY, ROSS, ROSS DRESS, BED BATH, and DOES 1-20.
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1 9. Plaintiff is informed and believes, and thereon alleges that each of the Defendants at all
2 times mentioned herein have conducted business within the State of California.

3 10. Upon information and belief, at all times relevant to this action, each of the Defendants,
4 including DOES 1-20, was an agent, servant, or employee of each of the other
5 Defendants. In conducting the activities alleged in this Complaint, each of the
6 Defendants was acting within the course and scope of this agency, service, or
7 employment, and was acting with the consent, permission, and authorization of each of
8 the other Defendants. Defendant FOCUS is the parent company of Defendant SWING-
9 A-WAY. All actions of each of the Defendants alleged in this Complaint were ratified
10 and approved by every other Defendant or their officers or managing agents.

11 Alternatively, each of the Defendants aided, conspired with and/or facilitated the alleged
12 wrongful conduct of each of the other Defendants.

13 11. Plaintiff is informed, believes, and thereon alleges that at all relevant times, each of the
14 Defendants was a person doing business within the meaning of Health and Safety Code
15 section 25249.11, subdivision (b), and that each of the Defendants had ten (10) or more
16 employees at all relevant times.

17 JURISDICTION

18 12. The Court has jurisdiction over this lawsuit pursuant to California Constitution Article
19 VI, Section 10, which grants the Superior Court original jurisdiction in all causes except
20 those given by statute to other trial courts. This Court has jurisdiction over this action
21 pursuant to Health and Safety Code section 25249.7, which allows enforcement of
22 violations of Proposition 65 in any Court of competent jurisdiction.

23 13. This Court has jurisdiction over Defendants named herein because Defendants either
24 reside or are located in this State or are foreign corporations authorized to do business in
25 California, are registered with the California Secretary of State, or who do sufficient
26 business in California, have sufficient minimum contacts with California, or otherwise
27 intentionally avail themselves of the markets within California through their manufacture,
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1 distribution, promotion, marketing, or sale of their products within California to render
2 the exercise of jurisdiction by the California courts permissible under traditional notions
3 of fair play and substantial justice.

4 14. Venue is proper in the County of Los Angeles because one or more of the instances of
5 wrongful conduct occurred, and continues to occur, in the County of Los Angeles and/or
6 because Defendants conducted, and continue to conduct, business in the County of Los
7 Angeles with respect to the consumer product that is the subject of this action.

8 **BACKGROUND AND PRELIMINARY FACTS**

9 15. In 1986, California voters approved an initiative to address growing concerns about
10 exposure to toxic chemicals and declared their right “[t]o be informed about exposures to
11 chemicals that cause cancer, birth defects, or other reproductive harm.” Ballot Pamp.,
12 Proposed Law, Gen. Elec. (Nov. 4, 1986) at p. 3. The initiative, The Safe Drinking
13 Water and Toxic Enforcement Act of 1986, codified at Health and Safety Code sections
14 25249.5, *et seq.* (“Proposition 65”), helps to protect California’s drinking water sources
15 from contamination, to allow consumers to make informed choices about the products
16 they buy, and to enable persons to protect themselves from toxic chemicals as they see
17 fit.

18 16. Proposition 65 requires the Governor of California to publish a list of chemicals known to
19 the state to cause cancer, birth defects, or other reproductive harm. *Health & Safety Code*
20 § 25249.8. The list, which the Governor updates at least once a year, contains over 700
21 chemicals and chemical families. Proposition 65 imposes warning requirements and
22 other controls that apply to Proposition 65-listed chemicals.

23 17. All businesses with ten (10) or more employees that operate or sell products in California
24 must comply with Proposition 65. Under Proposition 65, businesses are: (1) prohibited
25 from knowingly discharging Proposition 65-listed chemicals into sources of drinking
26 water (*Health & Safety Code* § 25249.5), and (2) required to provide “clear and
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1 reasonable" warnings before exposing a person, knowingly and intentionally, to a
2 Proposition 65-listed chemical (*Health & Safety Code* § 25249.6).

3 18. Proposition 65 provides that any person "violating or threatening to violate" the statute
4 may be enjoined in any court of competent jurisdiction. *Health & Safety Code* § 25249.7.

5 "Threaten to violate" means "to create a condition in which there is a substantial
6 probability that a violation will occur." *Health & Safety Code* § 25249.11(e).

7 Defendants are also liable for civil penalties of up to \$2,500.00 per day per violation,
8 recoverable in a civil action. *Health & Safety Code* § 25249.7(b).

9 19. On January 1, 1988, the Governor of California added DEHP to the list of chemicals
10 known to the State to cause cancer, and on October 24, 2003, the Governor added DEHP
11 to the list of chemicals known to the State to cause developmental male reproductive
12 toxicity. Pursuant to Health and Safety Code sections 25249.9 and 25249.10, twenty (20)
13 months after addition of DEHP to the list of chemicals known to the State to cause
14 reproductive toxicity, DEHP became fully subject to Proposition 65 warning
15 requirements and discharge prohibitions.

16 20. Plaintiff identified certain practices of manufacturers and distributors of DEHP-bearing
17 products of exposing, knowingly and intentionally, persons in California to the
18 Proposition 65-listed chemicals of such products without first providing clear and
19 reasonable warnings of such to the exposed persons prior to the time of exposure.
20 Plaintiff later discerned that Defendants engaged in such practice.

21 **SATISFACTION OF PRIOR NOTICE**

22 21. On or about July 14, 2011, Plaintiff gave notice of alleged violations of Health and Safety
23 Code section 25249.6, concerning consumer products exposures and occupational
24 exposures, subject to a private action to FOCUS and to the California Attorney General,
25 County District Attorneys, and City Attorneys for each city containing a population of at
26 least 750,000 people in whose jurisdictions the violations allegedly occurred, concerning
27 the product Can Openers.
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- 1 22. On or about March 21, 2012, Plaintiff gave notice of alleged violations of Health and
2 Safety Code section 25249.6, concerning consumer products exposures and occupational
3 exposures, subject to a private action to FOCUS, SWING-A-WAY, ROSS, ROSS
4 DRESS, and to the California Attorney General, County District Attorneys, and City
5 Attorneys for each city containing a population of at least 750,000 people in whose
6 jurisdictions the violations allegedly occurred, concerning the product Kitchen Tools.
- 7 23. On or about June 6, 2012, Plaintiff gave notice of alleged violations of Health and Safety
8 Code section 25249.6, concerning consumer products exposures and occupational
9 exposures, subject to a private action to FOCUS, SWING-A-WAY, BED BATH, and to
10 the California Attorney General, County District Attorneys, and City Attorneys for each
11 city containing a population of at least 750,000 people in whose jurisdictions the
12 violations allegedly occurred, concerning the product Kitchen Tools.
- 13 24. Before sending the notices of alleged violation, Plaintiff investigated the consumer
14 products involved, the likelihood that such products would cause users to suffer
15 significant exposures to DEHP, and the corporate structure of each of the Defendants.
- 16 25. Plaintiff's notices of alleged violation included Certificates of Merit executed by the
17 attorney for the noticing party, CAG. The Certificates of Merit stated that the attorney
18 for Plaintiff who executed the certificates had consulted with at least one person with
19 relevant and appropriate expertise who reviewed data regarding the exposures to DEHP,
20 the subject Proposition 65-listed chemicals of this action. Based on that information, the
21 attorney for Plaintiff who executed the Certificates of Merit believed there was a
22 reasonable and meritorious case for this private action. The attorney for Plaintiff attached
23 to the Certificates of Merit served on the Attorney General the confidential factual
24 information sufficient to establish the basis of the Certificates of Merit.
- 25 26. Plaintiff's notices of alleged violations also included Certificates of Service and a
26 document entitled "The Safe Drinking Water & Toxic Enforcement Act of 1986
27 (Proposition 65) A Summary." *Health & Safety Code* § 25249.7(d).
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1 27. Plaintiff is commencing this action more than sixty (60) days from the dates that Plaintiff
2 gave notices of the alleged violations to FOCUS, SWING-A-WAY, ROSS, ROSS
3 DRESS, BED BATH, and the public prosecutors referenced in Paragraphs 21, 22, and 23.

4 28. Plaintiff is informed, believes, and thereon alleges that neither the Attorney General, nor
5 any applicable district attorney or city attorney has commenced and is diligently
6 prosecuting an action against the Defendants.

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8 **FIRST CAUSE OF ACTION**

9 **(By CONSUMER ADVOCACY GROUP, INC. and against FOCUS and DOES 1-
10 20 for Violations of Proposition 65, The Safe Drinking Water and Toxic
11 Enforcement Act of 1986 (Health & Safety Code, §§ 25249.5, et seq.))**

12 **Can Openers**

13 29. Plaintiff CONSUMER ADVOCACY GROUP repeats and incorporates by reference
14 paragraphs 1 through 28 of this complaint as though fully set forth herein.

15 30. Each of the Defendants is, and at all times mentioned herein was, a manufacturer,
16 distributor, promoter, or retailer of Can Openers ("Can Openers"), including Swing-A-
17 Way® Compact Can Opener #107BK.

18 31. Can Openers contain DEHP.

19 32. Defendants knew or should have known that DEHP has been identified by the State of
20 California as a chemical known to cause cancer and reproductive toxicity and therefore
21 was subject to Proposition 65 warning requirements. Defendants were also informed of
22 the presence of DEHP in Can Openers within Plaintiff's notice of alleged violations
23 further discussed above at Paragraph 21.

24 33. Plaintiff's allegations regarding Can Openers concern "[c]onsumer products
25 exposure[s]," which "is an exposure that results from a person's acquisition, purchase,
26 storage, consumption, or other reasonably foreseeable use of a consumer good, or any
27 exposure that results from receiving a consumer service." *Cal. Code Regs.* tit. 27, §
28 25602(b). Can Openers are consumer products, and, as mentioned herein, exposures to
DEHP took place as a result of such normal and foreseeable consumption and use.

1 34. Plaintiff is informed, believes, and thereon alleges that between July 14, 2008 and the
2 present, each of the Defendants knowingly and intentionally exposed their employees and
3 California consumers and users of Can Openers, which Defendants manufactured,
4 distributed, or sold as mentioned above, to DEHP, without first providing any type of
5 clear and reasonable warning of such to the exposed persons before the time of exposure.
6 Defendants have distributed and sold Can Openers in California. Defendants know and
7 intend that California consumers will use and consume Can Openers, thereby exposing
8 them to DEHP. Defendants thereby violated Proposition 65.

9 35. The principal routes of exposure are through dermal contact, ingestion and inhalation.
10 Persons sustain exposures by handling Can Openers without wearing gloves or any other
11 personal protective equipment, or by touching bare skin or mucous membranes with
12 gloves after handling Can Openers, as well as through direct and indirect hand to mouth
13 contact, hand to mucous membrane, or breathing in particulate matter dispersed from Can
14 Openers. And as to the employees of Defendants, employees may be exposed to DEHP
15 in the course of their employment by handling, distributing, and selling Can Openers.

16 36. Plaintiff is informed, believes, and thereon alleges that each of the violations by
17 Defendants of Proposition 65 as to Can Openers has been ongoing and continuous to the
18 date of the signing of this complaint, as Defendants engaged and continue to engage in
19 conduct which violates Health and Safety Code section 25249.6, including the
20 manufacture, distribution, promotion, and sale of Can Openers, so that a separate and
21 distinct violation of Proposition 65 occurred each and every time a person was exposed to
22 DEHP by Can Openers as mentioned herein.

23 37. Plaintiff is informed, believes, and thereon alleges that each violation of Proposition 65
24 mentioned herein is ever continuing. Plaintiff further alleges and believes that the
25 violations alleged herein will continue to occur into the future.
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1 38. Based on the allegations herein, Defendants are liable for civil penalties of up to
2 \$2,500.00 per day per individual exposure to DEHP from Can Openers, pursuant to
3 Health and Safety Code section 25249.7(b).

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5 **SECOND CAUSE OF ACTION**

6 **(By CONSUMER ADVOCACY GROUP, INC. and against FOCUS, SWING-A-
7 WAY, ROSS, ROSS DRESS, and DOES 1-20 for Violations of Proposition 65, The
8 Safe Drinking Water and Toxic Enforcement Act of 1986 (Health & Safety Code, §§
9 25249.5, et seq.))**

10 **Kitchen Tools**

11 39. Plaintiff CONSUMER ADVOCACY GROUP repeats and incorporates by reference
12 paragraphs 1 through 38 of this complaint as though fully set forth herein.

13 40. Each of the Defendants is, and at all times mentioned herein was, a manufacturer,
14 distributor, promoter, or retailer of Kitchen Tools (“Kitchen Tools”), including Swing-A-
15 Way® Surgical Stainless Steel Peeler, Model #327.

16 41. Kitchen Tools contain DEHP.

17 42. Defendants knew or should have known that DEHP has been identified by the State of
18 California as a chemical known to cause cancer and reproductive toxicity and therefore
19 was subject to Proposition 65 warning requirements. Defendants were also informed of
20 the presence of DEHP in Kitchen Tools within Plaintiff’s notice of alleged violations
21 further discussed above at Paragraph 22.

22 43. Plaintiff’s allegations regarding Kitchen Tools concern “[c]onsumer products
23 exposure[s],” which “is an exposure that results from a person’s acquisition, purchase,
24 storage, consumption, or other reasonably foreseeable use of a consumer good, or any
25 exposure that results from receiving a consumer service.” *Cal. Code Regs. tit. 27, §*
26 *25602(b)*. Kitchen Tools are consumer products, and, as mentioned herein, exposures to
27 DEHP took place as a result of such normal and foreseeable consumption and use.

28 44. Plaintiff is informed, believes, and thereon alleges that between March 21, 2009 and the
present, each of the Defendants knowingly and intentionally exposed their employees and

1 California consumers and users of Kitchen Tools, which Defendants manufactured,
2 distributed, or sold as mentioned above, to DEHP, without first providing any type of
3 clear and reasonable warning of such to the exposed persons before the time of exposure.
4 Defendants have distributed and sold Kitchen Tools in California. Defendants know and
5 intend that California consumers will use and consume Kitchen Tools, thereby exposing
6 them to DEHP. Defendants thereby violated Proposition 65.

7 45. The principal routes of exposure are through dermal contact, ingestion and inhalation.
8 Persons sustain exposures by handling Kitchen Tools without wearing gloves or any
9 other personal protective equipment, or by touching bare skin or mucous membranes with
10 gloves after handling Kitchen Tools, as well as through direct and indirect hand to mouth
11 contact, hand to mucous membrane, or breathing in particulate matter dispersed from
12 Kitchen Tools. And as to the employees of Defendants, employees may be exposed to
13 DEHP in the course of their employment by handling, distributing, and selling Kitchen
14 Tools.

15 46. Plaintiff is informed, believes, and thereon alleges that each of the violations by
16 Defendants of Proposition 65 as to Kitchen Tools has been ongoing and continuous to the
17 date of the signing of this complaint, as Defendants engaged and continue to engage in
18 conduct which violates Health and Safety Code section 25249.6, including the
19 manufacture, distribution, promotion, and sale of Kitchen Tools, so that a separate and
20 distinct violation of Proposition 65 occurred each and every time a person was exposed to
21 DEHP by Kitchen Tools as mentioned herein.

22 47. Plaintiff is informed, believes, and thereon alleges that each violation of Proposition 65
23 mentioned herein is ever continuing. Plaintiff further alleges and believes that the
24 violations alleged herein will continue to occur into the future.

25 48. Based on the allegations herein, Defendants are liable for civil penalties of up to
26 \$2,500.00 per day per individual exposure to DEHP from Kitchen Tools, pursuant to
27 Health and Safety Code section 25249.7(b).

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1 **THIRD CAUSE OF ACTION**

2 **(By CONSUMER ADVOCACY GROUP, INC. and against FOCUS, SWING-A-**
3 **WAY, BED BATH, and DOES 1-20 for Violations of Proposition 65, The Safe**
4 **Drinking Water and Toxic Enforcement Act of 1986 (Health & Safety Code, §§**
5 **25249.5, et seq.))**

6 **Kitchen Tools**

7 49. Plaintiff CONSUMER ADVOCACY GROUP repeats and incorporates by reference
8 paragraphs 1 through 48 of this complaint as though fully set forth herein.

9 50. Each of the Defendants is, and at all times mentioned herein was, a manufacturer,
10 distributor, promoter, or retailer of Kitchen Tools (“Kitchen Tools”), including Swing-A-
11 Way® Surgical Stainless Steel Peeler, Model #327.

12 51. Kitchen Tools contain DEHP.

13 52. Defendants knew or should have known that DEHP has been identified by the State of
14 California as a chemical known to cause cancer and reproductive toxicity and therefore
15 was subject to Proposition 65 warning requirements. Defendants were also informed of
16 the presence of DEHP in Kitchen Tools within Plaintiff's notice of alleged violations
17 further discussed above at Paragraph 23.

18 53. Plaintiff's allegations regarding Kitchen Tools concern “[c]onsumer products
19 exposure[s],” which “is an exposure that results from a person’s acquisition, purchase,
20 storage, consumption, or other reasonably foreseeable use of a consumer good, or any
21 exposure that results from receiving a consumer service.” *Cal. Code Regs. tit. 27, §*
22 *25602(b)*. Kitchen Tools are consumer products, and, as mentioned herein, exposures to
23 DEHP took place as a result of such normal and foreseeable consumption and use.

24 54. Plaintiff is informed, believes, and thereon alleges that between June 6, 2009 and the
25 present, each of the Defendants knowingly and intentionally exposed their employees and
26 California consumers and users of Kitchen Tools, which Defendants manufactured,
27 distributed, or sold as mentioned above, to DEHP, without first providing any type of
28 clear and reasonable warning of such to the exposed persons before the time of exposure.
Defendants have distributed and sold Kitchen Tools in California. Defendants know and

1 intend that California consumers will use and consume Kitchen Tools, thereby exposing
2 them to DEHP. Defendants thereby violated Proposition 65.

3 55. The principal routes of exposure are through dermal contact, ingestion and inhalation.

4 Persons sustain exposures by handling Kitchen Tools without wearing gloves or any
5 other personal protective equipment, or by touching bare skin or mucous membranes with
6 gloves after handling Kitchen Tools, as well as through direct and indirect hand to mouth
7 contact, hand to mucous membrane, or breathing in particulate matter dispersed from
8 Kitchen Tools. And as to the employees of Defendants, employees may be exposed to
9 DEHP in the course of their employment by handling, distributing, and selling Kitchen
10 Tools.

11 56. Plaintiff is informed, believes, and thereon alleges that each of the violations by
12 Defendants of Proposition 65 as to Kitchen Tools has been ongoing and continuous to the
13 date of the signing of this complaint, as Defendants engaged and continue to engage in
14 conduct which violates Health and Safety Code section 25249.6, including the
15 manufacture, distribution, promotion, and sale of Kitchen Tools, so that a separate and
16 distinct violation of Proposition 65 occurred each and every time a person was exposed to
17 DEHP by Kitchen Tools as mentioned herein.

18 57. Plaintiff is informed, believes, and thereon alleges that each violation of Proposition 65
19 mentioned herein is ever continuing. Plaintiff further alleges and believes that the
20 violations alleged herein will continue to occur into the future.

21 58. Based on the allegations herein, Defendants are liable for civil penalties of up to
22 \$2,500.00 per day per individual exposure to DEHP from Kitchen Tools, pursuant to
23 Health and Safety Code section 25249.7(b).

24 59. Plaintiff has engaged in good faith efforts to resolve the claims alleged herein prior to
25 filing this Complaint.

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PRAYER FOR RELIEF

Plaintiff demands against each of the Defendants as follows:

1. A permanent injunction mandating Proposition 65-compliant warnings;
2. Penalties pursuant to Health and Safety Code section 25249.7, subdivision (b);
3. Costs of suit;
4. Reasonable attorney fees and costs; and
5. Any further relief that the court may deem just and equitable.

Dated: 11/16, 2012

YEROUSHALMI & ASSOCIATES

BY: _____
Reuben Yeroushalmi
Attorneys for Plaintiff,
Consumer Advocacy Group, Inc.