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Attorneys for Plaintiffs,
Consumer Advocacy Group, Inc.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

LOS ANGELES – CENTRAL DISTRICT

CONSUMER ADVOCACY GROUP, INC., in the public interest, Plaintiff, v. FOCUS PRODUCTS GROUP, LLC, an Illinois Limited Liability Company, SWING-A-WAY PRODUCTS, LLC, an Illinois Limited Liability Company, ROSS STORES, INC., a Delaware Corporation, ROSS DRESS FOR LESS, INC., a Virginia Corporation, BED BATH & BEYOND INC., a New York Corporation, and DOES 1-20; Defendants.	CASE NO. BC496009 **CONSENT JUDGMENT [redacted]** Health & Safety Code § 25249.5 *et seq.* Dept. 72 Judge: Hon. Ruth Ann Kwan Complaint filed: November 20, 2012

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 interest of the public, and defendants, Focus Products Group, LLC (referred to as "Focus") and Swing-A-Way Products, LLC (referred to as "Swing"), (Focus and Swing, collectively referred to as "Settling Parties") with each referred to as a "Party" and collectively referred to as "Parties."

1.2 **Defendants and Products**

1.2.1 Focus is an Illinois limited liability company which employs ten or more persons. Focussells or distributes Swing A-Way ® Compact Can Opener #107BK, "Swing-A-Way® Surgical Stainless Steel Peeler, Model #327", "Swing-A-Way® Jar Opener with Spring-Loaded Power 711BK, SKU#7158400711", and "Swing-A-Way® Compact Opener, 107W, SKU #7148420002" (collectively the "Covered Products").

1.2.2 Swing is an Illinois limited liability company which employs ten or more persons.

1.2.3 For purposes of this Consent Judgment, the Settling Parties are each deemed a person in the course of doing business in California and is subject to the provisions of the Safe Drinking Water and Toxic Enforcement Act of 1986, California Health & Safety Code §§ 25249.6 et seq. ("Proposition 65").

1.3 **Chemical Of Concern**

1.3.1 Diethyl hexyl phthalate ("DEHP") is known to the State of California to cause cancer and/or birth defects or other reproductive harm.

1.4 **Notices of Violation.**

1.4.1 On or about July 14, 2011, CAG served Focus, Smart & Final, Inc. and various public enforcement agencies with a document entitled "60-Day Notice of Violation" (the "July 14, 2011 Notice") that provided the recipients with notice of alleged violations of Health & Safety Code § 25249.6 for failing to warn individuals in California of exposures to DEHP in Swing A-Way ® Compact Can Opener #107BK. No public enforcer has commenced or diligently prosecuted the allegations set forth in the July 14, 2011 Notice.

1.4.2 On or about March 21, 2012, CAG served Focus, Ross Dress For Less, Inc., Ross Stores, Inc., Swing-A-Way Products, LLC and various public enforcement agencies

with a document entitled "60-Day Notice of Violation" (the "March 21, 2012 Notice") that provided the recipients with notice of alleged violations of Health & Safety Code § 25249.6 for failing to warn individuals in California of exposures to DEHP contained in Kitchen Tools, including but not limited to the Swing-A-Way® Surgical Stainless Steel Peeler, Model #327. No public enforcer has commenced or diligently prosecuted the allegations set forth in the March 21, 2012 Notice.

1.4.3 On or about June 6, 2012, CAG served Focus, Bed Bath & Beyond Inc., Swing-A-Way Products, LLC, and various public enforcement agencies with a document entitled "60-Day Notice of Violation" (the "June 6, 2012 Notice") that provided the recipients with notice of alleged violations of Health & Safety Code § 25249.6 for failing to warn individuals in California of exposures to DEHP contained in Kitchen Tools, including but not limited to, Swing-A-Way® Surgical Stainless Steel Peeler, Model #327. No public enforcer has commenced or diligently prosecuted the allegations set forth in the June 6, 2012 Notice.

1.4.4 On or about November 30, 2012, CAG served Focus, Swing-A-Way Products, LLC and various public enforcement agencies with a document entitled "60-Day Notice of Violation" (the "November 30, 2012 Notice") that provided the recipients with notice of alleged violations of Health & Safety Code § 25249.6 for failing to warn individuals in California of exposures to DEHP contained in Kitchen Tools, including but not limited to Swing-A-Way® Jar Opener with Spring-Loaded Power 711BK, SKU#7158400711, and Swing-A-Way® Compact Opener, 107W, SKU #7148420002. No public enforcer has commenced or diligently prosecuted the allegations set forth in the November 30, 2012 Notice.

1.4.5 On or about December 14, 2012, CAG served Focus, Swing-A-Way Products, LLC, and various public entities with a document entitled "60 Day Notice of Violation" (the "December 14, 2012 Notice") that provided the recipients with notice of alleged violations of Health & Safety Code § 25249.6 for failing to warn individuals in California of exposures to DEHP contained in Kitchen Tools, including but not limited to, to Swing-A-Way®

Jar Opener with Spring-Loaded Power 711BK, SKU#7158400711, and Swing-A-Way® Compact Opener, 107W, SKU #7148420002. No public enforcer has commenced or diligently prosecuted the allegations set forth in the December 21, 2012 Notice.

1.5 **Complaint.**

On November 20, 2012, CAG filed a Complaint for civil penalties and injunctive relief ("Complaint") in Los Angeles Superior Court, Case No. BC496009. CAG later amended the Complaint filing a First Amended Complaint ("FAC") against Focus, Swing-A-Way Products, LLC, Ross Stores, Inc., Ross Dress For Less, Inc., and Bed Bath & Beyond Inc. (collectively "Defendants") on or about November 14, 2013. The Complaint and FAC allege, among other things, that Defendants violated Proposition 65 by failing to give clear and reasonable warnings of exposure to DEHP from the Covered Products.

1.6 **Consent to Jurisdiction**

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

1.7 **No Admission**

This Consent Judgment resolves claims that are denied and disputed. The Parties enter into this Consent Judgment pursuant to a full and final settlement of any and all claims between the Parties for the purpose of avoiding prolonged litigation. Nothing in this Consent Judgment shall be construed as an admission by the Parties of any material allegation of the Complaint (each and every allegation of which Defendants deny), any fact, conclusion of law, issue of law

or violation of law, including without limitation, any admission concerning any violation of Proposition 65 or any other statutory, regulatory, common law, or equitable doctrine, or the meaning of the terms "knowingly and intentionally expose" or "clear and reasonable warning" as used in Health and Safety Code section 25249.6. Nothing in this Consent Judgment, nor compliance with its terms, shall constitute or be construed as an admission by the Parties of any fact, conclusion of law, issue of law, or violation of law, or of fault, wrongdoing, or liability by any Defendant, their officers, directors, employees, or parent, subsidiary or affiliated corporations, or be offered or admitted as evidence in any administrative or judicial proceeding or litigation in any court, agency, or forum. Furthermore, nothing in this Consent Judgment shall prejudice, waive or impair any right, remedy, argument, or defense the Parties may have in any other or future legal proceeding, except as expressly provided in this Consent Judgment.

2. DEFINITIONS

2.1 "Effective Date" means the date that this Consent Judgment is signed by all Parties.

2.2 "Notices" means the July 14, 2011, March 21, 2012, June 6, 2012, November 30, 2012, and December 14, 2012 60 Day Notices of Violation sent by CAG as specified in Section 1.4 above.

3. INJUNCTIVE RELIEF / REFORMULATION / CLEAR AND REASONABLE WARNINGS.

3.1 As of the Effective Date, the Settling Parties will not distribute or sell the Covered Products in California unless the Covered Products have been reformulated to contain less than 0.1% by weight of DEHP. Any existing products remaining in Settling Parties' inventory should have compliant Proposition 65 warnings.

4. SETTLEMENT PAYMENT

4.1 **Payment and Due Date:** Within twenty(20) days of the approval of the Consent Judgment, Settling Parties shall pay a total of seventy-five thousand dollars and zero cents

($75,000) in full and complete settlement of all monetary claims by CAG related to the Notices, as follows:

4.1.1 **Civil Penalty**: Settling Parties shall issue separate checks totaling three thousand dollars ($3,000.00) as penalties pursuant to Health & Safety Code § 25249.12:

(a) Settling Parties will issue a check made payable to the State of California's Office of Environmental Health Hazard Assessment ("OEHHA") in the amount of two thousand two hundred fifty dollars ($2,250.00) representing 75% of the total penalty and Settling Parties will issue a check to "Consumer Advocacy Group, Inc." in the amount of seven hundred fifty dollars ($750.00) representing 25% of the total penalty; and

(b) Separate 1099s shall be issued for each of the above payments: Settling Parties will issue a 1099 to OEHHA, P.O. Box 4010, Sacramento, CA 95184 (EIN: 68-0284486) in the amount of $2,250.00. Settling Parties will also issue a 1099 to CAG c/o Yeroushalmi & Associates, 9100 Wilshire Boulevard, Suite 240W, Beverly Hills, California 90212.

4.1.2 **Payment In Lieu of Civil Penalties:** Settling Parties shall pay two thousand dollars ($2,000.00) in lieu of civil penalties to "Consumer Advocacy Group, Inc." CAG will use this payment for investigation of the public's exposure to Proposition 65 listed chemicals through various means, including laboratory fees for testing for Proposition 65 listed chemicals, administrative costs and fees related to such activities, expert fees for evaluating exposures through various mediums, including but not limited to consumer product, occupational, and environmental exposures to Proposition 65 listed chemicals, and the cost of hiring consulting and retained experts who assist with the extensive scientific analysis necessary for those files in litigation, as well as administrative costs and fees related to such activities in order to reduce the public's exposure to Proposition 65 listed chemicals by notifying those persons and/or entities believed to be responsible for such exposures and attempting to persuade those persons and/or entities to reformulate their products or the source of exposure to completely eliminate or lower the level of Proposition 65 listed chemicals, thereby addressing

the same public harm as allegedly in the instant Action. Further, should the court require it, CAG will submit under seal, an accounting of these funds as described above as to how the funds were used. The check shall be made payable to "Consumer Advocacy Group, Inc." and delivered to Reuben Yeroushalmi, Yeroushalmi & Associates, 9100 Wilshire Boulevard, Suite 240W, Beverly Hills, California 90212.

4.1.3 **Reimbursement of Attorneys Fees and Costs:** Settling Parties shall pay seventy thousand dollars ($70,000.00) to "Yeroushalmi & Associates" as reimbursement for reasonable investigation fees and costs, attorneys' fees, and any other costs incurred as a result of investigating, bringing this matter to Defendant's attention, litigating, and negotiating a settlement in the public interest. The check shall be made payable to "Yeroushalmi & Associates" and delivered to Reuben Yeroushalmi, Yeroushalmi & Associates, 9100 Wilshire Boulevard, Suite 240W, Beverly Hills, California 90212.

4.2 All payments shall be delivered to: Reuben Yeroushalmi, Yeroushalmi & Associates, 9100 Wilshire Blvd., Suite 240W, Beverly Hills, CA 90212.

5. MATTERS COVERED BY THIS CONSENT JUDGMENT

5.1 This Consent Judgment is a full, final, and binding resolution between CAG on behalf of itself and in the public interest and Defendants, of any alleged violation of Proposition 65 that was or could have been asserted by CAG against Defendants for failure to provide Proposition 65 warnings of exposure to DEHP from the Covered Products and fully resolves all claims that have been or could have been asserted in this action up to and including the date of entry of Judgment for failure to provide Proposition 65 warnings for the Covered Products regarding DEHP. CAG, on behalf of itself and in the public interest, hereby discharges Defendants and their parent companies, subsidiaries, divisions, affiliates, suppliers, franchisees, licensors, licensees, customers, distributors, wholesalers, retailers and all other upstream and downstream entities in the distribution chain of any of the Covered Products, and the predecessors, successors and assigns of any of them, and all of their respective officers, directors,

shareholders, members, managers, employees, agents (collectively, "Released Parties"), from all claims up through the Effective Date for violations of Proposition 65 based on exposure to DEHP from the Covered Products. Compliance with the terms of this Consent Judgment shall be deemed to constitute compliance by the Released Parties with Proposition 65 regarding alleged exposures to DEHP from the Covered Products. Nothing in this Section affects CAG's right to commence or prosecute an action under Proposition 65 against any person other than Defendants or Released Parties.

5.2 CAG on behalf of itself, its past and current agents, representatives, attorneys, successors, and/or assignees, hereby waives all rights to institute or participate in, directly or indirectly, any form of legal action and releases all claims, including, without limitation, all actions, and causes of action, in law or in equity, suits, liabilities, demands, obligations, damages, costs, fines, penalties, losses, or expenses (including, but not limited to, investigation fees, expert fees, and attorneys' fees) of any nature whatsoever, whether known or unknown, fixed or contingent (collectively "Claims"), against the Released Parties arising from any violation of Proposition 65 or any other statutory or common law regarding the failure to warn about exposure to DEHP from the Covered Products. In furtherance of the foregoing, as to alleged exposures to DEHP from the Covered Products, CAG on behalf of itself only, hereby waives any and all rights and benefits which it now has, or in the future may have, conferred upon it with respect to Claims arising from any violation of Proposition 65 or any other statutory or common law regarding the failure to warn about exposure to DEHP from the Covered Products by virtue of the provisions of section 1542 of the California Civil Code, which provides as follows:

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

CAG understands and acknowledges that the significance and consequence of this waiver of

California Civil Code section 1542 is that even if CAG suffers future damages arising out of or resulting from, or related directly or indirectly to, in whole or in part, Claims arising from any violation of Proposition 65 or any other statutory or common law regarding the failure to warn about exposure to DEHP from the Covered Products, including but not limited to any exposure to, or failure to warn with respect to exposure to DEHP from the Covered Products, CAG will not be able to make any claim for those damages against Released Parties. Furthermore, CAG acknowledges that it intends these consequences for any such Claims arising from any violation of Proposition 65 or any other statutory or common law regarding the failure to warn about exposure to DEHP from Covered Products as may exist as of the date of this release but which CAG does not know exist, and which, if known, would materially affect their decision to enter into this Consent Judgment, regardless of whether their lack of knowledge is the result of ignorance, oversight, error, negligence, or any other cause.

6. ENFORCEMENT OF JUDGMENT

6.1 The terms of this Consent Judgment shall be enforced exclusively by the Parties hereto. The Parties may, by noticed motion or order to show cause before the Superior Court of California, Los Angeles County, giving the notice required by law, enforce the terms and conditions contained herein. A Party may enforce any of the terms and conditions of this Consent Judgment only after that Party first provides 90 day's notice to the Party allegedly failing to comply with the terms and conditions of this Consent Judgment and attempts to resolve such Party's failure to comply in an open and good faith manner.

6.2 **Notice of Violation.** Prior to bringing any motion, order to show cause, or other proceeding to enforce the terms of this Consent Judgment, CAG shall provide a Notice of Violation ("NOV") to Defendants. The NOV shall include for each of the Covered Products: the date(s) the alleged violation(s) was observed and the location at which the Covered Products were offered for sale, and shall be accompanied by all test data obtained by CAG regarding the

Covered Products, including an identification of the component(s) of the Covered Products that were tested.

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

(a) The Covered Products were shipped by Defendants for sale in California before the Effective Date, or

(b) Since receiving the NOV Defendants have taken corrective action by either (i) requesting that its customers or stores in California, as applicable, remove the Covered Products identified in the NOV from sale in California and destroy or return the Covered Products to Defendants or vendor, as applicable, or (ii) providing a clear and reasonable warning for the Covered Products identified in the NOV pursuant to 27 Cal. Code Regs. § 25603.

6.2.2 **Contested NOV.** Defendants may serve an NOE informing CAG of its election to contest the NOV within 30 days of receiving the NOV.

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

(b) If the confirmatory testing establishes that the Covered Products do not contain DEHP in excess of the levels allowed in Section 3.1, above, CAG shall take no further action regarding the alleged violation. If the testing does not establish compliance with Section 3.1, above, Defendants may withdraw its NOE to contest the violation and may serve a new NOE pursuant to Section 6.2.1.

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

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

7. ENTRY OF CONSENT JUDGMENT

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

7.2 If this Consent Judgment is not approved in its entirety by the Court, (a) this Consent Judgment and any and all prior agreements between the parties merged herein shall terminate and become null and void, and the actions shall revert to the status that existed prior to the execution date of this Consent Judgment; (b) no term of this Consent Judgment or any draft thereof, or of the negotiation, documentation, or other part or aspect of the Parties' settlement discussions, shall have any effect, nor shall any such matter be admissible in evidence for any purpose in this Action, or in any other proceeding; and (c) the Parties agree to meet and confer to determine whether to modify the terms of the Consent Judgment and to resubmit it for approval.

8. MODIFICATION OF JUDGMENT

8.1 This Consent Judgment may be modified only upon written agreement of the Parties and upon entry of a modified Consent Judgment by the Court thereon, or upon motion of any party as provided by law and upon entry of a modified Consent Judgment by the Court.

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

9. RETENTION OF JURISDICTION

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

inapplicable by reason of law generally, or if any of the provisions of this Consent Judgment are rendered inapplicable or are no longer required as a result of any such repeal or preemption, or rendered inapplicable by reason of law generally as to the Covered Products, then any Defendant subject to this Consent Judgment may provide written notice to CAG of any asserted change in the law, and shall have no further obligations pursuant to this Consent Judgment with respect to, and to the extent that, the Covered Products are so affected. Nothing in this Consent Judgment shall be interpreted to relieve a Defendant from any obligation to comply with any pertinent state or federal law or regulation.

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

15. EXECUTION AND COUNTERPARTS

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

16. NOTICES

16.1 Any notices under this Consent Judgment shall be by personal delivery of First Class Mail.

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If to CAG:

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

If to Focus Products Group, LLC:

Jeff Ackerberg, Current President or CEO
Focus Products Group, LLC
120 Lakeview Pkwy
Vernon Hills, IL 60061

With a copy to:

J.T. Wells Blaxter, Esq.
BLAXTER LAW, a professional corporation
One Bush Street, Suite 650
San Francisco, California 94104

17. AUTHORITY TO STIPULATE

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

AGREED TO:	AGREED TO:
Date: 4-8, 2014	Date: _____, 2013
_____	_____
Name: Michel Sassoon	Name: _____
Title: Executive director	Title: _____
CONSUMER ADVOCACY GROUP, INC.	FOCUS PRODUCTS GROUP, LLC

If to CAG:

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

If to Focus Products Group, LLC:

Jim Murauskis
Focus Products Group International, LLC
300 Knightsbridge Parkway
Suite 500
Lincolnshire, IL 60069

With a copy to:

J.T. Wells Blaxter, Esq.
BLAXTER LAW, a professional corporation
One Bush Street, Suite 650
San Francisco, California 94104

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AGREED TO:	AGREED TO:
Date: _____, 2013	Date: 4/8/14, ~~2013~~
_____	_____
Name: _____	Name: Alex Moglia
Title: _____	Title: VP winding down
CONSUMER ADVOCACY GROUP, INC.	FOCUS PRODUCTS GROUP, LLC

AGREED TO:

Date: 4/8/14

Name: ALEX MOGLIA

Title: VP WINDING DOWN

SWING-A-WAY PRODUCTS, LLC

IT IS SO ORDERED.

Date: 5/27/14

RUTH A. KWAN

JUDGE OF THE SUPERIOR COURT