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6 Attorneys for Plaintiffs,
Consumer Advocacy Group, Inc.
7
8

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 COUNTY OF LOS ANGELES
11

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

14 Plaintiff,

15 v.
16

17 SPLASH HOME, a business entity form
unknown, and ROSS STORES, INC., a
18 Delaware Corporation, ROSS DRESS FOR
LESS, INC., a California Corporation, dba
19 DD's DISCOUNTS, THE TJX
20 COMPANIES, INC., a Delaware
corporation, dba T.J. MAXX, and
21 BURLINGTON COAT FACTORY
WAREHOUSE CORPORATION, a
22 Delaware corporation, and DOES 1-20

23 Defendants.
24

CASE NO. BC480977

CONSENT JUDGMENT [PROPOSED]

Dept: 24

Judge: Robert L. Hess

Complaint filed: March 20, 2012

25 **1. INTRODUCTION**

26 1.1 This Consent Judgment is entered into by and between plaintiff Consumer
27 Advocacy Group, Inc. ("CAG") acting on behalf of itself and in the interest of the public and
28

1 defendant SPLASH HOME (“hereinafter Defendant”), with each a Party and collectively
2 referred to as “Parties.”

3 1.2 Defendant employs ten or more persons, is a person in the course of doing
4 business for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986,
5 California Health & Safety Code §§ 25249.6 et seq. (“Proposition 65”), and manufacture,
6 distribute, and sell Bath Mats, Bath Accessories, Vinyl Shower Curtain Liners, Shower Curtain
7 Liners, and Bathtub Mats (“Covered Products”).

8 **1.3 Notice of Violation.**

9 1.3.1 On or about December 31, 2010, CAG served Defendant and various
10 public enforcement agencies with a document entitled “60-Day Notice of Violation” (the
11 “December 31, 2010 Notice”) that provided the recipients with notice of alleged
12 violations of Health & Safety Code § 25249.6 for failing to warn individuals in California
13 of exposures to di(2-ethylhexyl)phthalate (DEHP) contained in Bath Mats.

14 1.3.2 On or about April 3, 2012, CAG served Defendant and various public
15 enforcement agencies with a document entitled “60-Day Notice of Violation” (the “April
16 3, 2012 Notice”) that provided the recipients with notice of alleged violations of Health
17 & Safety Code § 25249.6 for failing to warn individuals in California of exposures to
18 di(2-ethylhexyl)phthalate (DEHP) contained in Bath Accessories.

19 1.3.3 On or about February 11, 2013, CAG served Defendant and various public
20 enforcement agencies with a document entitled “60-Day Notice of Violation” (the
21 “February 11, 2013 Notice”) that provided the recipients with notice of alleged violations
22 of Health & Safety Code § 25249.6 for failing to warn individuals in California of
23 exposures to di(2-ethylhexyl)phthalate (DEHP) contained in Vinyl Shower Curtain
24 Liners.

25 1.3.4 On or about May 10, 2013, CAG served Defendant and various public
26 enforcement agencies with a document entitled “60-Day Notice of Violation” (the “May
27 10, 2013 Notice”) that provided the recipients with notice of alleged violations of Health
28

1 & Safety Code § 25249.6 for failing to warn individuals in California of exposures to
2 di(2-ethylhexyl)phthalate (DEHP) contained in Shower Curtain Liners.

3 1.3.5 On or about August 16, 2013, CAG served Defendant and various public
4 enforcement agencies with a document entitled “60-Day Notice of Violation” (the
5 “August 16, 2013 Notice”) that provided the recipients with notice of alleged violations
6 of Health & Safety Code § 25249.6 for failing to warn individuals in California of
7 exposures to di(2-ethylhexyl)phthalate (DEHP) contained in Bathtub Mats.

8 1.3.6 No public enforcer has commenced or diligently prosecuted the
9 allegations set forth in the December 31, 2010, April 3, 2012, February 11, 2013, May
10 10, 2013, and August 16, 2013 Notices.

11 **1.4 Complaint.**

12 On March 20, 2012, CAG filed a Complaint for civil penalties and injunctive relief
13 (“Complaint”) in Los Angeles Superior Court, Case No. BC480977. A first amended complaint
14 was filed on June 26, 2012. On October 16, 2013, CAG filed a Complaint for civil penalties and
15 injunctive relief in San Francisco Superior Court, Case No. CGC-13-534909 against Bed Bath &
16 Beyond. The Complaints allege, among other things, that Defendant and Bed Bath & Beyond
17 violated Proposition 65 by failing to give clear and reasonable warnings of exposure to DEHP
18 from the Covered Products.

19 **1.5 Consent to Jurisdiction**

20 For purposes of this Consent Judgment, the parties stipulate that this Court has
21 jurisdiction over the allegations of violations contained in the Complaint and personal
22 jurisdiction over Defendant as to the acts alleged in the Complaint, that venue is proper in the
23 City and County of Los Angeles and that this Court has jurisdiction to enter this Consent
24 Judgment as a full settlement and resolution of the allegations contained in the Complaint and of
25 all claims which were or could have been raised by any person or entity based in whole or in
26 part, directly or indirectly, on the facts alleged therein or arising therefrom or related to.
27
28

1 **1.6 No Admission**

2 This Consent Judgment resolves claims that are denied and disputed. The parties enter
3 into this Consent Judgment pursuant to a full and final settlement of any and all claims between
4 the parties for the purpose of avoiding prolonged litigation. This Consent Judgment shall not
5 constitute an admission with respect to any material allegation of the Complaint, each and every
6 allegation of which Defendant denies, nor may this Consent Judgment or compliance with it be
7 used as evidence of any wrongdoing, misconduct, culpability or liability on the part of
8 Defendant.

9 **2. DEFINITIONS**

10 2.1 “Covered Products” means Bath Mats, Bath Accessories, Vinyl Shower Curtain
11 Liners, Shower Curtain Liners, and Bathtub Mats sold, distributed, or manufactured only by
12 Defendant, Splash Home.

13 2.2 “Effective Date” means the date that this Consent Judgment is entered by the
14 Court.

15 2.3 “DEHP” means Di (2-ethylhexyl) Phthalate

16 2.4 “Notices” means the December 31, 2010, April 3, 2012, February 11, 2013, May
17 10, 2013, and August 16, 2013 Notices.

18 **3. INJUNCTIVE RELIEF/REFORMULATION**

19 3.1 Within 30 days of the Effective Date Defendant shall not sell or offer for sale in
20 California Covered Products that contain DEHP with more than 0.1% DEHP by weight. For any
21 Covered Products still existing in Defendant’s inventory, Defendant shall place Proposition 65
22 compliant warnings.
23

24 **4. SETTLEMENT PAYMENT**

25 4.1 Within fourteen (14) business days of the Effective Date or receipt of W-9 forms
26 from CAG, whichever is later, Defendant shall pay a total of \$113,000 in full and complete
27 settlement of all monetary claims by CAG related to the Notice, as follows.
28

1 4.2 **Reimbursement of Attorneys' Fees and Costs:** Defendant shall pay \$95,000 to
2 "Yeroushalmi & Associates" as reimbursement for the investigation fees and costs, testing costs,
3 expert fees, attorney fees, and other litigation costs and expenses for all work performed through
4 the approval of this Consent Judgment.

5 4.3 **Civil Penalties.** Defendant shall issue two separate checks for a total amount of
6 thirteen thousand dollars (\$13,000) as penalties pursuant to Health & Safety Code § 25249.12:
7 (a) one check made payable to the State of California's Office of Environmental Health Hazard
8 Assessment (OEHHA) in the amount of \$9,750.00, representing 75% of the total penalty; and (b)
9 one check to Consumer Advocacy Group, Inc. in the amount of \$3,250.00, representing 25% of
10 the total penalty. Two separate 1099s shall be issued for the above payments: The first 1099
11 shall be issued to OEHHA, P.O. Box 4010, Sacramento, CA 95184 (EIN: 68-0284486) in the
12 amount of \$9,750.00. The second 1099 shall be issued in the amount of \$3,250.00 to CAG and
13 delivered to: Yeroushalmi & Associates, 9100 Wilshire Boulevard, Suite 610E, Beverly Hills,
14 California 90212.

15 4.4 **Payment In Lieu of Civil Penalties:** Defendant shall pay \$5,000.00 in lieu of
16 civil penalties to "Consumer Advocacy Group, Inc." CAG will use this payment for
17 investigation of the public's exposure to Proposition 65 listed chemicals through various means,
18 laboratory fees for testing for Proposition 65 listed chemicals, expert fees for evaluating
19 exposures through various mediums, including but not limited to consumer product,
20 occupational, and environmental exposures to Proposition 65 listed chemicals, and the cost of
21 hiring consulting and retained experts who assist with the extensive scientific analysis necessary
22 for those files in litigation, in order to reduce the public's exposure to Proposition 65 listed
23 chemicals by notifying those persons and/or entities believed to be responsible for such
24 exposures and attempting to persuade those persons and/or entities to reformulate their products
25 or the source of exposure to completely eliminate or lower the level of Proposition 65 listed
26 chemicals, thereby addressing the same public harm as allegedly in the instant Action. Further,
27 should the court require it, CAG will submit under seal, an accounting of these funds as
28

1 described above as to how the funds were used. The check shall be made payable to "Consumer
2 Advocacy Group, Inc." and delivered to Reuben Yeroushalmi, Yeroushalmi & Associates, 9100
3 Wilshire Boulevard, Suite 610E, Beverly Hills, California 90212.

4 4.5 Payments shall be delivered to: Reuben Yeroushalmi, Yeroushalmi & Associates,
5 9100 Wilshire Blvd., Suite 610E, Beverly Hills, CA 90212.

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

7 5.1 This Consent Judgment is a full, final, and binding resolution between CAG on
8 behalf of itself and in the public interest and Defendant and its officers, directors, insurers,
9 employees, parents, shareholders, divisions, subdivisions, subsidiaries, partners, affiliates, sister
10 companies and their successors and assigns ("Defendant Releasees"), including but not limited to
11 each of its suppliers, customers, distributors, wholesalers, retailers, including Ross Stores, Inc.,
12 Ross Dress for Less, Inc., The TJX Companies, Inc., and Burlington Coat Factory Warehouse
13 Corporation, or any other person in the course of doing business, and the successors and assigns
14 of any of them, who may use, maintain, distribute or sell Covered Products ("Downstream
15 Defendant Releasees"), for all claims for violations of Proposition 65 up through the Effective
16 Date based on exposure to DEHP from Covered Products as set forth in the Notice. Defendant
17 and Defendant Releasees' compliance with this Consent Judgment shall constitute compliance
18 with Proposition 65 with respect to DEHP from Covered Products as set forth in the Notice.

19 5.2 CAG on behalf of itself, its past and current agents, representatives, attorneys,
20 successors, and/or assignees, hereby waives all rights to institute or participate in, directly or
21 indirectly, any form of legal action and releases all claims, including, without limitation, all
22 actions, and causes of action, in law or in equity, suits, liabilities, demands, obligations,
23 damages, costs, fines, penalties, losses, or expenses (including, but not limited to, investigation
24 fees, expert fees, and attorneys' fees) of any nature whatsoever, whether known or unknown,
25 fixed or contingent (collectively "Claims"), against Defendant, Defendant Releasees, and
26 Downstream Defendant Releasees arising from any violation of Proposition 65 or any other
27 statutory or common law regarding the failure to warn about exposure to DEHP from Covered
28

1 Products manufactured, distributed, or sold by Defendant and Defendant Releasees. In
2 furtherance of the foregoing, as to alleged exposures to DEHP from Covered Products, CAG
3 hereby waives any and all rights and benefits which it now has, or in the future may have,
4 conferred upon it with respect to the Claims arising from any violation of Proposition 65 or any
5 other statutory or common law regarding the failure to warn about exposure to DEHP from
6 Covered Products by virtue of the provisions of section 1542 of the California Civil Code, which
7 provides as follows:

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

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

26 **6. ENFORCEMENT OF JUDGMENT**

27 6.1 The terms of this Consent Judgment shall be enforced exclusively by the parties
28 hereto. The parties may, by noticed motion or order to show cause before the Superior Court of

1 California, City and County of Los Angeles, giving the notice required by law, enforce the terms
2 and conditions contained herein. A Party may enforce any of the terms and conditions of this
3 Consent Judgment only after that Party first provides 30 days' notice to the Party allegedly
4 failing to comply with the terms and conditions of this Consent Judgment and attempts to resolve
5 such Party's failure to comply in an open and good faith manner.

6 **6.2 Notice of Violation.** Prior to bringing any motion, order to show cause, or other
7 proceeding to enforce Section 3.1 of this Consent Judgment, CAG shall provide a Notice of
8 Violation ("NOV") to Defendant. The NOV shall include for each of the Covered Products: the
9 date(s) the alleged violation(s) was observed and the location at which the Covered Products
10 were offered for sale, and shall be accompanied by all test data obtained by CAG regarding the
11 Covered Products, including an identification of the component(s) of the Covered Products that
12 were tested.

13 **6.2.1 Non-Contested NOV.** CAG shall take no further action regarding the
14 alleged violation if, within 30 days of receiving such NOV, Defendant serves a Notice of
15 Election ("NOE") that meets one of the following conditions:

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

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

23 **6.2.2 Contested NOV.** Defendant may serve an NOE informing CAG of its
24 election to contest the NOV within 30 days of receiving the NOV.

25 (a) In its election, Defendant may request that the sample(s) Covered
26 Products tested by CAG be subject to confirmatory testing at an EPA-accredited
27 laboratory.
28

1 (b) If the confirmatory testing establishes that the Covered Products do
2 not contain DEHP in excess of the level allowed in Section 3.1 CAG shall take no further
3 action regarding the alleged violation. If the testing does not establish compliance with
4 Section 3.1, Defendant may withdraw its NOE to contest the violation and may serve a
5 new NOE pursuant to Section 6.2.

6 (c) If Defendant does 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
8 an order enforcing the terms of this Consent Judgment.

9 6.3. In any proceeding brought by either Party to enforce this Consent Judgment,
10 the prevailing party shall be entitled to recover its reasonable attorney's fees and costs at
11 the Court's discretion.

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 Defendant waive their respective rights to a hearing or trial on the allegations of the Complaint.

16 7.2 Upon approval of the Consent Judgment, the CGC-13-534909 action shall be
17 dismissed.

18 7.2 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
24 Action, or in any other proceeding; and (c) the Parties agree to meet and confer to determine
25 whether to modify the terms of the Consent Judgment and to resubmit it for approval. Upon
26 approval of the Consent Judgment, all Defendants in the present action, other than Splash, shall
27 be dismissed, and the CGC-13-534909 action shall be dismissed in its entirety.
28

1 **8. MODIFICATION OF JUDGMENT**

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.

5 8.2 Any Party seeking to modify this Consent Judgment shall attempt in good faith to
6 meet and confer with the other Party prior to filing a motion to modify the Consent Judgment.

7 **9. RETENTION OF JURISDICTION**

8 9.1 This Court shall retain jurisdiction of this matter to implement and enforce the
9 terms of this Consent Judgment.

10 **10. DUTIES LIMITED TO CALIFORNIA**

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

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

14 11.1 CAG shall serve a copy of this Consent Judgment, signed by both parties, on the
15 California Attorney General so that the Attorney General may review this Consent Judgment
16 prior to its submittal to the Court for approval. No sooner than forty five (45) days after the
17 Attorney General has received the aforementioned copy of this Consent Judgment, and in the
18 absence of any written objection by the Attorney General to the terms of this Consent Judgment,
19 the parties may then submit it to the Court for approval.

20 **12. ATTORNEY FEES**

21 12.1 Except as specifically provided in Section 6.3, each Party shall bear its own costs
22 and attorney fees in connection with this action.

23 **13. ENTIRE AGREEMENT**

24 13.1 This Consent Judgment contains the sole and entire agreement and understanding
25 of the parties with respect to the entire subject matter hereof and any and all prior discussions,
26 negotiations, commitments and understandings related hereto. No representations, oral or
27 otherwise, express or implied, other than those contained herein have been made by any party
28

1 hereto. No other agreements not specifically referred to herein, oral or otherwise, shall be
2 deemed to exist or to bind any of the parties.

3 **14. GOVERNING LAW**

4 14.1 The validity, construction and performance of this Consent Judgment shall be
5 governed by the laws of the State of California, without reference to any conflicts of law
6 provisions of California law.

7 14.2 The Parties, including their counsel, have participated in the preparation of this
8 Consent Judgment and this Consent Judgment is the result of the joint efforts of the Parties. This
9 Consent Judgment was subject to revision and modification by the Parties and has been accepted
10 and approved as to its final form by all Parties and their counsel. Accordingly, any uncertainty
11 or ambiguity existing in this Consent Judgment shall not be interpreted against any Party as a
12 result of the manner of the preparation of this Consent Judgment. Each Party to this Consent
13 Judgment agrees that any statute or rule of construction providing that ambiguities are to be
14 resolved against the drafting Party should not be employed in the interpretation of this Consent
15 Judgment and, in this regard, the Parties hereby waive California Civil Code § 1654.

16 **15. EXECUTION AND COUNTERPARTS**

17 15.1 This Consent Judgment may be executed in counterparts and by means of
18 facsimile or portable document format (pdf), which taken together shall be deemed to constitute
19 one document.

20 **16. NOTICES**

21 16.1 Any notices under this Consent Judgment shall be by personal delivery or First
22 Class Mail.

23 If to CAG:

24
25 Reuben Yeroushalmi, Esq.
26 9100 Wilshire Boulevard, Suite 610E
27 Beverly Hills, CA 90212
28 (310) 623-1926

If to Splash Home:

1 Splash Home
2 295 5th Avenue, Ste. 1514
3 New York, NY 10016

4 With a copy to:

5 Norman Wisnicki
6 Wolf Rifkin Shapiro Schulman Rabkin LLP
7 11400 West Olympic Blvd, Ninth Floor
8 Los Angeles, CA 90064

9 **17. AUTHORITY TO STIPULATE**

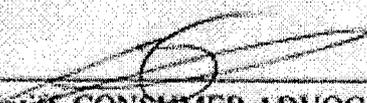
10 17.1 Each signatory to this Consent Judgment certifies that he or she is fully authorized
11 by the party he or she represents to enter into this Consent Judgment and to execute it on behalf
12 of the party represented and legally to bind that party.

13 AGREED TO:

14 Date: 2-13, 2014

15 AGREED TO:

16 Date: _____, 2014

17 By: 
18 Plaintiff, CONSUMER ADVOCACY
19 GROUP, INC.

20 By: _____
21 Defendant, SPLASH HOME

22 **IT IS SO ORDERED.**

23 Date: _____

24 _____
25 JUDGE OF THE SUPERIOR COURT

1 Splash Home
2 295 5th Avenue, Ste. 1514
3 New York, NY 10016

4 With a copy to:

5 Norman Wisnicki
6 Wolf Rifkin Shapiro Schulman Rabkin LLP
7 11400 West Olympic Blvd, Ninth Floor
8 Los Angeles, CA 90064

9 **17. AUTHORITY TO STIPULATE**

10 17.1 Each signatory to this Consent Judgment certifies that he or she is fully authorized
11 by the party he or she represents to enter into this Consent Judgment and to execute it on behalf
12 of the party represented and legally to bind that party.

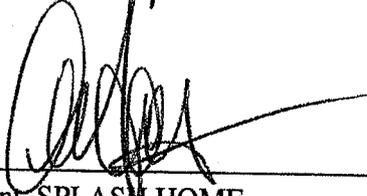
13 AGREED TO:

14 Date: _____, 2014

15 By: _____
16 Plaintiff, CONSUMER ADVOCACY
17 GROUP, INC.

18 AGREED TO:

19 Date: February 14, 2014

20 By: 
21 Defendant, SPLASH HOME

22 **IT IS SO ORDERED.**

23 Date: _____

24 _____
25 JUDGE OF THE SUPERIOR COURT