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8 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
9 COUNTY OF SAN DIEGO  
10

11 EVELYN WIMBERLEY,

12 Plaintiff,

13 v.

14 CVS/PHARMACY; BED BATH & BEYOND,  
INC.,

15 Defendants.  
16  
17

Case No. 37-2011-00093908-CU-NP-CTL

**CONSENT JUDGMENT AS TO  
DEFENDANTS ALLSTAR MARKETING  
GROUP, LLC AND MERCHANT MEDIA,  
LLC. [PROPOSED]**

1       **1.     INTRODUCTION**

2           1.1     The parties to this Consent Judgment (“Parties”) are Plaintiff Evelyn Wimberley  
3 (“Wimberley”) and Defendants Allstar Marketing Group, LLC (“Allstar”) and Merchant Media,  
4 LLC (“Merchant Media”) (collectively “Settling Defendants”). Wimberley is an individual  
5 residing in California who seeks to promote awareness of exposures to toxic chemicals and  
6 improve human health by reducing or eliminating hazardous substances contained in consumer  
7 products. Each Settling Defendant is a company that employs 10 or more persons.

8           1.2     **Notices of Violation.**

9           1.2.1         On or about January 4, 2011, Wimberley served Settling Defendants and  
10 all public enforcement agencies eligible to initiate Proposition 65 actions on behalf of the People  
11 of the State of California with a document entitled “60-Day Notice of Violation” that alleged that  
12 Settling Defendants were in violation of California Health & Safety Code § 25249.6 for failing to  
13 warn consumers and customers that dryer balls exposed users in California to lead.

14          1.2.2         On or about January 24, 2011, Wimberley served Settling Defendants and  
15 all public enforcement agencies eligible to initiate Proposition 65 actions on behalf of the People  
16 of the State of California with a second document entitled “60-Day Notice of Violation” that  
17 alleged that Settling Defendants were in violation of California Health & Safety Code § 25249.6  
18 for failing to warn consumers and customers that dryer balls exposed users in California to lead.

19          1.2.3         The January 4, 2011 and January 24, 2011 notices shall be referred to as  
20 the “Notices.” No public enforcer has diligently prosecuted the allegations set forth in the Notice.

21          1.3     **Complaint.** On July 6, 2011, Wimberley filed a complaint (“Complaint”) in San  
22 Diego County Superior Court, entitled *Evelyn Wimberley v. CVS/Pharmacy, et al.*, San Diego  
23 County Superior Court Case Number 37-2011-0009308-CU-NP-CTL, naming as defendants  
24 CVS/Pharmacy and Bed Bath & Beyond, Inc. for civil penalties and injunctive relief pursuant to  
25 the provisions of California Health & Safety Code §25249.5 *et seq.* (“Proposition 65”). On  
26 August 9, 2011, Wimberley filed an amendment to the Complaint naming Settling Defendants as  
27 defendants, and a dismissal of CVS/Pharmacy.  
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1           1.4     For purposes of this Consent Judgment only, the Parties stipulate that this Court  
2 has jurisdiction over the subject matter of the violations alleged in the Complaint and personal  
3 jurisdiction over Settling Defendants as to the acts alleged in the Complaint, that venue is proper  
4 in the County of San Diego, and that this Court has jurisdiction to enter this Consent Judgment as  
5 a full and final resolution of all claims which were or could have been raised in the Complaint  
6 based on the facts alleged therein.

7           1.5     This Consent Judgment resolves allegations and claims that are denied and  
8 disputed by Settling Defendants. The Parties enter into this Consent Judgment pursuant to a full  
9 and final settlement of any and all claims between the Parties, as they relate to lead in Covered  
10 Products, as defined in Section 2.2 below. Settling Defendants deny the material factual and legal  
11 allegations contained in the Notice and Complaint and maintains that all products that it has sold  
12 and distributed in California, including the Covered Products, have been and are in compliance  
13 with Proposition 65 and all other applicable laws. Nothing in this Consent Judgment shall be  
14 construed as an admission by Settling Defendants of any fact, finding, issue of law, or violation of  
15 law; nor shall compliance with this Consent Judgment constitute or be construed as an admission  
16 by Settling Defendants of any fact, finding, conclusion, issue of law, or violation of law, such  
17 being specifically denied by Settling Defendants. However, this section shall not diminish or  
18 otherwise affect the obligations, responsibilities, and duties of Settling Defendants under this  
19 Consent Judgment.

## 20     **2.     DEFINITIONS**

21           2.1     The term “Accessible Component” means any component of a Covered Product  
22 that could be touched by a person during reasonably foreseeable use.

23           2.2     The term “Covered Product” means dryer balls.

24           2.3     The term “Effective Date” means the date on which this Consent Judgment is  
25 entered by the Court.

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1     **3.     INJUNCTIVE RELIEF**

2             3.1     Commencing on the Effective Date, Settling Defendants shall not manufacture or  
3     cause to be manufactured any Covered Products that contain more than 300 parts per million  
4     (ppm) lead by weight in any Accessible Component.

5             3.2     Covered Products that are manufactured after the Effective Date shall bear a  
6     marking on the product or packaging to demonstrate that the date of manufacture is after the  
7     Effective Date.

8             3.3     The reformulation requirement of Section 3.1 shall not apply to any Covered  
9     Product manufactured before the Effective Date.

10    **4.     SETTLEMENT PAYMENTS**

11            4.1     Allstar shall pay a settlement amount of \$10,000 to Wimberley to be allocated by  
12    Wimberley as follows:

13            4.1.1         **Civil Penalty:** \$200 as a civil penalty pursuant to Health and Safety Code  
14    Section 25249.7(b). Wimberley shall remit 75% of the civil penalty to the California Office of  
15    Environmental Health hazard Assessment (“OEHHA”), pursuant to Health and Safety Code  
16    Section 25192.

17            4.1.2         **Attorney Fees and Costs:** \$9,800 to reimburse Wimberley and her  
18    attorneys for their reasonable investigation fees and costs, attorneys’ fees, and any other costs  
19    incurred as a result of investigating, bringing this matter to Settling Defendants’ attention,  
20    litigating and negotiating and obtaining judicial approval of a settlement in the public interest,  
21    pursuant to Code of Civil Procedure Section 1021.5.

22            4.1.3         **Timing of Payments:** Allstar shall make the payments required under this  
23    Consent Judgment no later than ten days after the Effective Date.

24    **5.     ENFORCEMENT**

25            5.1     Any Party may, by motion or application for an order to show cause before this  
26    Court, enforce the terms and conditions contained in this Consent Judgment. A Party may file  
27    such a motion or application only after that Party first provides notice to the Party allegedly  
28    failing to comply with the terms and conditions of this Consent Judgment and attempts to resolve

1 such Party's failure to comply in an open and good faith manner for a period of no less than 30  
2 days.

3 **6. RELEASE OF ALL CLAIMS**

4 6.1 This Consent Judgment is a full, final and binding resolution between Wimberley  
5 on behalf of herself and the public interest and Settling Defendants, and their parents,  
6 shareholders, divisions, subdivisions, subsidiaries, partners, sister companies, and affiliates, and  
7 their successors and assigns ("Defendant Releasees"), all entities from whom they obtain and to  
8 whom they directly or indirectly distribute or sell Covered Products, including but not limited to  
9 manufacturers, suppliers, distributors, wholesalers, customers, retailers, franchisees, cooperative  
10 members, including but not limited to Bed Bath & Beyond, Inc., and Defendant Releasees'  
11 licensors and licensees ("Downstream Defendant Releasees") of any violation of Proposition 65  
12 that was or could have been asserted in the Complaint against Settling Defendants, Defendant  
13 Releasees, and Downstream Defendant Releasees, based on failure to warn about alleged  
14 exposure to lead contained in Covered Products, with respect to any Covered Products  
15 manufactured by or for Settling Defendants prior to the Effective Date.

16 6.2 In further consideration of the promises and agreements herein contained, the  
17 injunctive relief commitments set forth in Section 3.1, and for the payments to be made pursuant  
18 to Section 4.1, Wimberley, on behalf of herself, her past and current agents, representatives,  
19 attorneys, successors, and/or assignees, and in the interest of the general public, hereby waives all  
20 rights to institute or participate in, directly or indirectly, any form of legal action and release all  
21 claims, including, without limitation, all actions, and causes of action, in law or in equity, suits,  
22 liabilities, demands, obligations, damages, costs, fines, penalties, losses, or expenses (including,  
23 but not limited to, investigation fees, expert fees, and attorneys' fees) of any nature whatsoever,  
24 whether known or unknown, fixed, or contingent (collectively "claims"), that were or could have  
25 been brought based on the facts in the Notice or Complaint against Settling Defendants,  
26 Defendant Releasees, and Downstream Defendant Releasees.

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1           6.3     Upon entry of this Consent Judgment, Wimberley shall file a dismissal with  
2 prejudice of the Complaint against Settling Defendants' Downstream Defendant Releasees,  
3 including but not limited to Bed Bath & Beyond, Inc.

4           6.4     Compliance with the terms of this Consent Judgment by Settling Defendants shall  
5 constitute compliance with Proposition 65 with respect to lead in any Covered Products that are  
6 manufactured by or for Settling Defendants following the Effective Date.

7           6.5     Settling Defendants waive any and all claims against Wimberley, her attorneys and  
8 other representatives, for any and all actions taken or statements made (or those that could have  
9 been taken or made) by Wimberley and her attorneys and other representatives, whether in the  
10 course of investigating claims or otherwise seeking enforcement of Proposition 65 against it in  
11 this matter, and/or with respect to the Covered Products that have accrued prior to the Effective  
12 Date.

13       **7.     COURT APPROVAL**

14           7.1     This Consent Judgment is not effective until it is approved and entered by the  
15 Court and shall be null and void if, for any reason, it is not approved and entered by the Court  
16 within one year after it has been fully executed by all Parties.

17           7.2     If the Court does not approve the Consent Judgment, the Parties shall meet and  
18 confer as to whether to modify the terms of this Consent Judgment or appeal the ruling. If the  
19 Parties do not jointly agree on a course of action to take, the case shall proceed on its normal  
20 course on the trial court's calendar.

21           7.3     If the Court approves this Consent Judgment and is reversed or vacated by an  
22 appellate court, the Parties shall meet and confer as to whether to modify the terms of this  
23 Consent Judgment. If the Parties do not jointly agree on a course of action to take, any monies  
24 that have been paid to Plaintiff pursuant to Section 4.1 shall be refunded within 15 days after  
25 remittitur to the trial court, and the case shall proceed on its normal course on the trial court's  
26 calendar.

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1       **8.     ATTORNEY’S FEES**

2           8.1     A party who unsuccessfully brings or contests an action arising out of this Consent  
3 Judgment shall be required to pay the prevailing party’s reasonable attorney’s fees and costs  
4 unless the unsuccessful party has acted with substantial justification. For purposes of this  
5 Consent Judgment, the term substantial justification shall carry the same meaning as used in the  
6 Civil Discovery Act of 1986, Code of Civil Procedure Section 2016, et seq.

7           8.2     Nothing in this Section 8 shall preclude a Party from seeking an award of  
8 sanctions pursuant to law.

9       **9.     ENTIRE AGREEMENT**

10          9.1     This Consent Judgment contains the sole and entire agreement and understanding  
11 of the Parties with respect to the entire subject matter hereof, and any and all prior discussions,  
12 negotiations, commitments, or understandings related thereto, if any, are hereby merged herein  
13 and therein. No representations, oral or otherwise, express or implied, other than those  
14 specifically referred to in this Consent Judgment have been made by any Party hereto. No  
15 supplementation, modification, waiver, or termination of this Consent Judgment shall be binding  
16 unless executed in writing by the Party to be bound thereby. No waiver of any of the provisions  
17 of this Consent Judgment shall be deemed or shall constitute a waiver of any of the other  
18 provisions hereof whether or not similar, nor shall such waiver constitute a continuing waiver.

19       **10.    GOVERNING LAW AND APPLICATION**

20          10.1    The terms of this Consent Judgment shall be governed by the laws of the State of  
21 California and shall apply only to Covered Products that are sold or offered for sale in the State of  
22 California.

23          10.2    This Consent Judgment shall apply to and be binding upon Wimberley and  
24 Settling Defendants and their divisions, subdivisions, and subsidiaries, and the Parties’ successors  
25 and assigns .

26          10.3    The Parties, including their counsel, have participated in the preparation of this  
27 Consent Judgment and this Consent Judgment is the result of the joint efforts of the Parties. This  
28 Consent Judgment was subject to revision and modification by the Parties and has been accepted

1 and approved as to its final form by all Parties and their counsel. Accordingly, any uncertainty or  
2 ambiguity existing in this Consent Judgment shall not be interpreted against any Party as a result  
3 of the manner of the preparation of this Consent Judgment.

4 **11. RETENTION OF JURISDICTION**

5 11.1 This Court shall retain jurisdiction of this matter to implement, modify, and  
6 enforce the terms this Consent Judgment.

7 **12. NOTICES**

8 12.1 Unless specified herein, all correspondence and notices required to be provided  
9 pursuant to this Consent Judgment shall be in writing and personally delivered or sent by: (i)  
10 first-class, (registered or certified mail) return receipt requested; or (ii) overnight courier on any  
11 party by the other party at the following addresses:

12 For Allstar:

13 Jennifer De Marco  
14 Allstar Marketing Group, LLC  
15 2 Skyline Drive  
16 Hawthorne, NY 10532

17 With a copy to:

18 Jeffrey Margulies  
19 Fulbright & Jaworski L.L.P.  
20 555 South Flower St.  
21 Forty First Floor  
22 Los Angeles, CA 90071

23 For Merchant Media:

24 Michael Antino  
25 Merchant Media LLC  
26 230 Maple St.  
27 Suite 6  
28 Marlborough, MA 01752

With a copy to:

Jeffrey Margulies  
Fulbright & Jaworski L.L.P.  
555 South Flower St.  
Forty First Floor  
Los Angeles, CA 90071



1 For Wimberley:

2 Mr. Stephen Ure  
3 Law Offices of Stephen Ure, PC.  
4 1518 Sixth Avenue  
5 San Diego, California 92101

6 Any party, from time to time, may specify in writing to the other party a change of address to  
7 which all notices and other communications shall be sent.

8 **13. COUNTERPARTS; FACSIMILE SIGNATURES**

9 13.1 This Consent Judgment may be executed in counterparts and by facsimile or  
10 portable document format (pdf), each of which shall be deemed an original, and all of which,  
11 when taken together, shall constitute one and the same document.

12 **14. COMPLIANCE WITH HEALTH & SAFETY CODE § 25249.7(f)**

13 14.1 Wimberley agrees to comply with the reporting form requirements referenced in  
14 California Health & Safety Code § 25249.7(f).

15 **15. AUTHORIZATION**

16 15.1 The undersigned are authorized to execute this Consent Judgment on behalf of  
17 their respective Parties and have read, understood and agree to all of the terms and conditions of  
18 this Consent Judgment.

<p>19 AGREED TO:</p> <p>20 Date : _____, 2012</p> <p>21 By: _____</p> <p>22 Evelyn Wimberley</p>	<p>20 AGREED TO:</p> <p>21 Date: _____, 2012</p> <p>22 By: _____</p> <p>23 On Behalf of Allstar Marketing, LLC</p>
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	AGREED TO: Date: _____, 2012  By: _____ On Behalf of Merchant Media, LLC
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1 For Wimberley:

2 Mr. Stephen Ure  
3 Law Offices of Stephen Ure, PC.  
4 1518 Sixth Avenue  
5 San Diego, California 92101

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18 this Consent Judgment.

<p>19 AGREED TO:</p> <p>20 Date: <u>4-12</u>, 2012</p>	<p>20 AGREED TO:</p> <p>21 Date: <u>4/5</u>, 2012</p>
<p>21 By: </p> <p>22 Evelyn Wimberley</p>	<p>21 By: </p> <p>22 On Behalf of Allstar Marketing, LLC</p>

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	AGREED TO: Date: <u>4-9</u> , 2012 By:  On Behalf of Merchant Media, LLC
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