

1 Reuben Yeroushalmi (SBN 19381)
Daniel D. Cho (SBN 105409)
2 Ben Yeroushalmi (SBN 232540)
YEROUSHALMI & ASSOCIATES
3 9100 Wilshire Blvd., Suite 240 W
Beverly Hills, CA 90212
4 Telephone: 310 623 1926
Fax: 310 623 1930
5 EMAIL: lawfirm@yeroushalmi.com

6 Attorneys for Plaintiff
CONSUMER ADVOCACY GROUP, INC.
7 Paul S. Rosenlund (SBN 87660)
Michael L. Reitzell (SBN 215272)
8 **DUANE MORRIS LLP**
Spear Tower
9 One Market Plaza, Suite 2200
San Francisco, CA 94105-1127
10 Telephone: 415 957 3000
Fax: 415 957 3001
11 E-mail: psrosenlund@duanemorris.com
mlreitzell@duanemorris.com

12 Attorneys for Defendant
13 BETTER SLEEP, INC.

14 SUPERIOR COURT OF THE STATE OF CALIFORNIA
15 FOR THE COUNTY OF LOS ANGELES – CENTRAL DISTRICT

16 CONSUMER ADVOCACY GROUP, INC., in the
17 public interest,

18 Plaintiff,

19 v.

20 BETTER SLEEP, INC., a New Jersey Corporation,
BURLINGTON COAT FACTORY WAREHOUSE
21 CORPORATION, a Delaware Corporation, and
DOES 1-20,

22 Defendants.
23
24

Case No. BC497063

[PROPOSED] CONSENT JUDGMENT

(Health & Safety Code § 25249.6 *et seq.*)

Complaint Filed: December 7, 2012

25 **1. INTRODUCTION**

26 **1.1 Parties**

27 This Consent Judgment is entered into by and between plaintiff Consumer Advocacy Group,
28 Inc. (“CAG”), Better Sleep, Inc., aka Better Bath (“Better Sleep”), and Burlington Coat Factory

1 Warehouse Corporation (“Burlington”), with Better Sleep and Burlington collectively referred to as
2 the “Defendants,” and CAG and Defendants collectively referred to as the “Parties.”

3 **1.2 CAG**

4 CAG is a California corporation that serves as a private enforcer of Proposition 65, as
5 described in Proposition 65 and the regulations of the Attorney General of California at 11 Cal. Code
6 Regs. § 3000 *et seq.*

7 **1.3 Better Sleep, Inc. and Burlington Coat Factory Warehouse Corporation**

8 Defendants each employ ten or more persons and are each a person in the course of doing
9 business for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, California
10 Health & Safety Code § 25249.6, *et seq.* (“Proposition 65”).

11 **1.4 General Allegations**

12 CAG alleges that Defendants have manufactured, imported, distributed and/or sold vinyl or
13 PVC bath mats that contain di(2-ethylhexyl)phthalate (“DEHP”) without the requisite Proposition 65
14 warnings. Defendants deny CAG’s allegations.

15 **1.5 Notice of Violation**

16 On July 12, 2012, CAG served Defendants, and various public enforcement agencies, with a
17 document entitled “60-Day Notice of Violation” (the “Notice”) that provided the recipients with
18 notice of alleged violations of California Health & Safety Code § 25249.6 based on Defendants’
19 alleged failure to warn consumers and employees in the workplace that certain Covered Products
20 exposed users in California to DEHP. To the best of the Parties’ knowledge, no public enforcer has
21 prosecuted the allegations set forth in the Notice.

22 **1.6 Complaint**

23 On December 7, 2012, CAG filed a complaint in the Superior Court in and for the County of
24 Los Angeles against Defendants and Does 1 through 20, entitled *CAG v. Better Sleep, Inc., et al.*,
25 Case No. BC497063, alleging violations of California Health & Safety Code § 25249.6, based on the
26 alleged exposures to DEHP contained in certain vinyl or PVC bath mats sold by Defendants in
27 California (the “Complaint”).

28 ///

1 **1.7 No Admission**

2 Defendants deny the material, factual and legal allegations contained in the Notice and
3 Complaint and maintain that all Covered Products sold in California have been and are in
4 compliance with all applicable California laws and regulations. Nothing in this Consent Judgment
5 shall be construed as an admission by Defendants of any fact, finding, issue of law, or violation of
6 law, nor shall compliance with this Consent Judgment constitute or be construed as an admission by
7 Defendants of any fact, finding, conclusion, issue of law, or violation of law. However, this section
8 shall not diminish or otherwise affect Defendants’ obligations, responsibilities, and duties under this
9 Consent Judgment.

10 **1.8 Consent to Jurisdiction**

11 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
12 jurisdiction over Defendants as to the allegations contained in the Complaint, that venue is proper in
13 the County of Los Angeles and that this Court has jurisdiction to enter and enforce the provisions of
14 this Consent Judgment.

15 **2. DEFINITIONS**

16 **2.1 Covered Products**

17 For purposes of this Consent Judgment, the term “Covered Products” shall mean vinyl or
18 PVC bath mats manufactured, imported, distributed and/or sold by Better Sleep that are sold or
19 offered for sale in the State of California, including, but not limited to “Better Bath Non-Slip
20 Bathmat, #48CLR” and “Better Bath Non-Slip Bathmat, BCF#48”.

21 **2.2 Effective Date**

22 For purposes of this Consent Judgment, the term “Effective Date” shall mean the date that
23 this Consent Judgment is approved by the Court.

24 **2.3 Reformulated Products**

25 Reformulated Products are defined as Covered Products containing DEHP in concentrations
26 not to exceed 0.1 percent (1,000 parts per million) when analyzed pursuant to U.S. Environmental
27 Protection Agency testing methodologies 3550 and 8270.

28 ///

1 **3. INJUNCTIVE RELIEF: REFORMULATION**

2 **3.1 Reformulation Commitment**

3 3.1.1 Better Sleep has implemented processes to comply with the reformulation
4 standards recited in this Consent Judgment. As of sixty (60) days following the Effective
5 Date (the “Reformulation Date”), all Covered Products manufactured, imported, distributed
6 or acquired for sale in the State of California by Better Sleep shall be Reformulated Products.

7 3.1.2 Burlington agrees that it shall remove from stock all existing Better Sleep
8 Style BCF48 bathmats presently in its California stores until it receives Reformulated
9 Products from Better Sleep.

10 **4. PENALTIES PURSUANT TO HEALTH & SAFETY CODE § 25249.7(b)**

11 **4.1 Civil Penalty**

12 In settlement of all the claims referred to in this Consent Judgment, Better Sleep shall pay a
13 civil penalty in the amount of \$1,000 within five days of the Effective Date, to be allocated in
14 accordance with California Health & Safety Code § 25249.12(c)(1) & (d), with 75% of the funds
15 remitted to the California Office of Environmental Health Hazard Assessment (“OEHHA”) and the
16 remaining 25% of the penalty remitted to CAG as follows: Better Sleep shall issue two separate
17 checks to: (a) “OEHHA” in the amount of \$750.00; and (b) “Yeroushalmi & Associates in Trust for
18 Consumer Advocacy Group, Inc.” in the amount of \$250.00. All penalty payments shall be
19 delivered to the addresses listed in Section 4.3 below.

20 **4.2 Payment in Lieu of Civil Penalty**

21 Better Sleep also shall separately pay \$1,000 to CAG as a payment in lieu of civil penalty
22 pursuant to Health & Safety Code §25249.7(b) and California Code of Regulations, Title 11 §
23 3203(b). CAG will use this payment for investigation of the public’s exposure to Proposition 65
24 listed chemicals through various means, laboratory fees for testing for Proposition 65 listed
25 chemicals, expert fees for evaluating exposures through various mediums, including but not limited
26 to consumer product, occupational, and environmental exposures to Proposition 65 listed chemicals,
27 and the cost of hiring consulting and retained experts who assist with the extensive scientific
28 analysis necessary for those files in litigation, as well as administrative costs incurred during the

1 litigation, in order to reduce the public's exposure to Proposition 65 listed chemicals by notifying
2 those persons and/or entities believed to be responsible for such exposures and attempting to
3 persuade those persons and/or entities to reformulate their products or the source of exposure to
4 completely eliminate or lower the level of Proposition 65 listed chemicals, thereby addressing the
5 same public harm as allegedly in the instant Action.

6 **4.3 Payment Procedures**

7 **4.3.1 Issuance of Payments.** Payments shall be delivered as follows:

8 (a) All payments owed to CAG pursuant to this Consent Judgment shall
9 be delivered to the following payment address:

10 Reuben Yeroushalmi
11 Yeroushalmi & Associates
12 9100 Wilshire Blvd., Suite 240 W
13 Beverly Hills, CA 90212

14 (b) All payments owed to OEHHA (EIN: 68-0284486), pursuant to this
15 Consent Judgment shall be delivered directly to OEHHA (Memo line "Prop 65 Penalties") at
16 the following addresses:

17 For United States Postal Service Delivery:

18 Mike Gyurics
19 Fiscal Operations Branch Chief
20 Office of Environmental Health Hazard Assessment
21 P.O. Box 4010
22 Sacramento, CA 95812-4010

23 For Non-United States Postal Service Delivery:

24 Mike Gyurics
25 Fiscal Operations Branch Chief
26 Office of Environmental Health Hazard Assessment
27 1001 I Street
28 Sacramento, CA 95814

With a copy of the checks payable to OEHHA mailed to Yeroushalmi & Associates, at the
address set forth above in 4.3.1(a), as proof of payment to OEHHA.

4.3.2 Issuance of 1099 Forms. After each penalty payment, Better Sleep shall
issue separate 1099 forms for each payment to (a) CAG, to be mailed to CAG at 9000

1 Wilshire Blvd. Los Angeles, CA 90211, and (b) OEHHA, which shall be identified as
2 “California Office of Environmental Health Hazard Assessment” (EIN: 68-0284486) in the
3 1099 form, to be mailed to OEHHA, P.O. Box 4010, Sacramento, CA 95814.

4 **5. REIMBURSEMENT OF FEES AND COSTS**

5 Better Sleep shall pay \$113,000 to Yeroushalmi & Associates for fees and costs incurred as a
6 result of investigating, bringing this matter to Defendants’ attention, and enforcing this matter,
7 including the fees and costs incurred (and yet to be incurred) negotiating, drafting, and obtaining the
8 Court’s approval of this Consent Judgment in the public interest. Defendant shall issue a separate
9 1099 for fees and costs, shall make the check payable to “Yeroushalmi & Associates”, and shall
10 deliver payment within fifteen days of the Effective Date, to the address listed in Section 4.3.1(a)
11 above.

12 **6. RELEASE OF ALL CLAIMS**

13 **6.1 CAG’s Public Release of Proposition 65 Claims**

14 CAG acting on its own behalf and in the public interest releases Defendants, all companies
15 and persons named in the Notice, their parents, subsidiaries, affiliated entities under common
16 ownership, directors, officers, employees, licensors, licensees, attorneys, and each entity to whom
17 Defendants directly or indirectly distribute or sell Covered Products, including, but not limited, to
18 downstream distributors, wholesalers, customers, retailers, franchisees, cooperative members, and
19 licensees, and all of their parents, subsidiaries, affiliated entities under common ownership,
20 directors, officers, employees, attorneys (“Releasees”) from all claims for violations of Proposition
21 65 based on exposure to DEHP from Covered Products as set forth in the Notice, manufactured,
22 imported, acquired for distribution, distributed or sold by Defendants prior to the Effective Date.
23 Compliance with the terms of this Consent Judgment constitutes compliance with Proposition 65
24 with respect to DEHP in Covered Products, as set forth in the Notice, manufactured, imported,
25 distributed or sold by Defendants.

26 **6.2 CAG’s Individual Release of Claims**

27 CAG, in its corporate capacity only and *not* in its representative capacity, provides a release
28 herein which shall be effective as a full and final accord and satisfaction, as a bar to all actions,

1 causes of action, obligations, costs, expenses, attorneys' fees, damages, losses, claims, liabilities and
2 demands of plaintiff of any nature, character or kind, whether known or unknown, suspected or
3 unsuspected, limited to and arising out of alleged or actual exposures to DEHP from Covered
4 Products manufactured, distributed or sold by Defendants before the Effective Date.

5 **6.3 Defendants' Release of CAG**

6 Defendants on behalf of themselves, their past and current agents, representatives, attorneys,
7 successors, and/or assignees, hereby waive any and all claims against CAG, its attorneys and other
8 representatives, for any and all actions taken or statements made by CAG and its attorneys and other
9 representatives, whether in the course of investigating claims or otherwise seeking to enforce
10 Proposition 65 against them in this matter with respect to Covered Products.

11 **6.4 CAG's Dismissal of Burlington**

12 Promptly after this Consent Judgment is approved by the Court, CAG shall cause a Request
13 for Dismissal With Prejudice to be entered by the Court as to defendant Burlington Coat Factory
14 Warehouse Corporation. By way of this Consent Judgment, the Parties stipulate that the Complaint
15 relates only to bathmats manufactured, imported, distributed and/or sold by Better Sleep.

16 **6.5 No Other Known Claims or Violations**

17 CAG and CAG's counsel affirm that they are not presently aware of any actual or alleged
18 violations of Proposition 65 by Better Sleep or for which Better Sleep bears legal responsibility other
19 than those that are fully resolved by this Consent Judgment, and as to Burlington that they are not
20 presently aware of any actual or alleged violations of Proposition 65 relative to Covered Products by
21 Burlington or for which Burlington bears legal responsibility other than those that are fully resolved
22 by this Consent Judgment.

23 **7. COURT APPROVAL**

24 7.1 By this Consent Judgment and upon its approval by the Court, the Parties waive their
25 right to trial on the merits, and waive rights to seek appellate review of any and all interim rulings,
26 including all pleading, procedural, and discovery orders.

27 7.2 The Parties acknowledge that, pursuant to California Health & Safety Code §25249.7,
28 a noticed motion is required to obtain judicial approval of this Consent Judgment, which CAG shall

1 file. Defendants shall support the entry of this Consent Judgment. If this Consent Judgment is not
2 approved by the Court, (a) this Consent Judgment and any and all prior agreements between the
3 Parties merged herein shall terminate and become null and void, and the action shall revert to the
4 status that existed prior to the execution date of this Consent Judgment; (b) no term of this Consent
5 Judgment or any draft thereof, or of the negotiation, documentation, or other part or aspect of the
6 Parties' settlement discussions, shall have any effect, nor shall any such matter be admissible in
7 evidence for any purpose in this action, or in any other proceeding; and (c) the Parties agree to meet
8 and confer to determine whether to modify the terms of the Consent Judgment and to resubmit it for
9 approval.

10 **8. ENFORCEMENT OF CONSENT JUDGMENT**

11 Any Party may, by motion, application for an order to show cause before the Los Angeles
12 Superior Court, or any other appropriate action, enforce the terms and conditions contained in this
13 Consent Judgment. A Party may file such a motion, action or application only after that Party first
14 provides 30 days' notice to the Party allegedly failing to comply with the terms and conditions of
15 this Consent Judgment and attempts to resolve such Party's failure to comply in an open and good
16 faith manner for a period of no less than 30 days.

17 **9. GOVERNING LAW**

18 9.1 The terms of this Consent Judgment shall be governed by the laws of the State of
19 California and apply within the State of California. In the event that Proposition 65 is repealed,
20 preempted or is otherwise rendered inapplicable by reason of law generally, or if any of the
21 provisions of this Consent Judgment are rendered inapplicable or no longer required as a result of
22 any such repeal or preemption or rendered inapplicable by reason of law generally as to the
23 Products, then Defendants shall provide written notice to CAG of any asserted change in the law,
24 and shall have no further obligations pursuant to this Consent Judgment with respect to, and to the
25 extent that, the Covered Products are so affected. Nothing in this Consent Judgment shall be
26 interpreted to relieve Defendants from any obligation to comply with any pertinent state or federal
27 toxics control law.

28 ///

1 9.2 This Consent Judgment contains the sole and entire agreement and understanding of
2 the Parties with respect to the entire subject matter set forth in this Consent Judgment, and any and
3 all prior discussions, negotiations, commitments, or understandings related thereto, if any, are
4 deemed merged. There are no warranties, representations, or other agreements between the Parties
5 except as expressly set forth in this Consent Judgment. No representations, oral or otherwise,
6 express or implied, other than those specifically referred to in this Consent Judgment have been
7 made by any party. No other agreements not specifically contained or referenced in this Consent
8 Judgment, oral or otherwise, shall be deemed to exist or to bind any of the Parties. No
9 supplementation, modification, waiver or termination of this Consent Judgment shall be binding
10 unless executed in writing by the party to be bound. No waiver of any of the provisions of this
11 Consent Judgment shall be deemed or shall constitute a waiver of any of the other provisions
12 whether or not similar, nor shall such waiver constitute a continuing waiver.

13 9.3 The Parties, including their counsel, have participated in the preparation of this
14 Consent Judgment and this Consent Judgment is the result of the joint efforts of the Parties. This
15 Consent Judgment was subject to revision and modification by the Parties and has been accepted and
16 approved as to its final form by all Parties and their counsel. Accordingly, any uncertainty or
17 ambiguity existing in this Consent Judgment shall not be interpreted against any Party as a result of
18 the manner of the preparation of this Consent Judgment. Each Party to this Consent Judgment
19 agrees that any statute or rule of construction providing that ambiguities are to be resolved against
20 the drafting Party should not be employed in the interpretation of this Consent Judgment and, in this
21 regard, the Parties hereby waive California Civil Code § 1654.

22 **10. NOTICES**

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

27 ///

28 ///

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

To Better Sleep:

William H. Emery
President
Better Sleep, Inc.
100 Readington Road
Branchburg, NJ 08876

To CAG:

Michael Marcus
Director
Consumer Advocacy Group, Inc.
9000 Wilshire Blvd.
Los Angeles, CA 90211

With a copy on behalf of Better Sleep to:

Paul S. Rosenlund, Esq.
Duane Morris LLP
One Market Plaza
Spear Tower, Suite 2200
San Francisco, CA 94105-1127

With a copy on behalf of CAG to

Reuben Yeroushalmi
Yeroushalmi & Associates
9100 Wilshire Blvd., Suite 240W
Beverly Hills, CA 90212

To Burlington:

Stacy Haigney
Vice President, Assistant General
Counsel
Burlington Coat Factory Warehouse
Corporation
1400 Broadway, 11th Floor
New York, NY 10018

With a copy on behalf of Burlington to:

Jeffrey B. Margulies, Esq.
Norton Rose Fulbright
555 South Flower Street, 41st Floor
Los Angeles, CA 90071

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

11. COUNTERPARTS; FACSIMILE/PDF SIGNATURES

This Consent Judgment may be executed in counterparts and by facsimile or pdf signature, each of which shall be deemed an original, and all of which, when taken together, shall constitute one and the same document. A facsimile or pdf signature shall be as valid as the original.

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

CAG and its attorneys shall comply with the reporting form requirements referenced in California Health & Safety Code § 25249.7(f).

///
///

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

13. MODIFICATION

This Consent Judgment may be modified only: (1) by written agreement of the Parties and upon entry of a modified Consent Judgment by the Court thereon; or (2) upon a successful motion of any party and entry of a modified Consent Judgment by the Court.

14. AUTHORIZATION

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

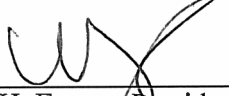
AGREED TO:

Date: _____

By: _____
Michael Marcus, Director
Plaintiff, Consumer Advocacy Group,
Inc.

AGREED TO:

Date: JANUARY 28, 2014

By: 
William H. Emery, ~~President~~
Defendant, Better Sleep, Inc.

AGREED TO:

Date: _____

By: _____
Stacy Haigney
Vice President, Assistant General
Counsel
Defendant, Burlington Coat Factory
Warehouse Corporation

1 **13. MODIFICATION**

2 This Consent Judgment may be modified only: (1) by written agreement of the Parties and
3 upon entry of a modified Consent Judgment by the Court thereon; or (2) upon a successful motion
4 of any party and entry of a modified Consent Judgment by the Court.

5 **14. AUTHORIZATION**

6 The undersigned are authorized to execute this Consent Judgment on behalf of their
7 respective parties and have read, understood, and agree to all of the terms and conditions of this
8 Consent Judgment.

9 AGREED TO:

AGREED TO:

10 Date: _____

Date: _____

11
12 By: _____

By: _____

13 Michael Marcus, Director
14 Plaintiff, Consumer Advocacy Group,
Inc.

William H. Emery, President
Defendant, Better Sleep, Inc.

15 AGREED TO:

16 Date: _____

17
18 By: _____

19 Stacy Haigney
20 Vice President, Assistant General
21 Counsel
22 Defendant, Burlington Coat Factory
23 Warehouse Corporation
24
25
26
27
28