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7

8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

9 **COUNTY OF LOS ANGELES**

10 CONSUMER ADVOCACY GROUP, INC.,
11 in the public interest,

12 Plaintiff,

13 v.

14 NATIONAL STORES, INC. DBA FALLAS
15 PAREDES AND DBA FALLAS
16 DISCOUNT STORES, a California
17 Corporation; MET-RX SUBSTRATE
18 TECHNOLOGY, INC., a California
19 Corporation; and DOES 1-20;

Defendants.

CASE NO. BC658596

CONSENT JUDGMENT [PROPOSED]

Health & Safety Code § 25249.5 *et seq.*

Dept.: 54

Judge: Hon. Ernest Hiroshige

Complaint filed: April 19, 2016

20 **1. INTRODUCTION**

21 1.1 **Parties.** This Consent Judgment is entered into by and between plaintiff, Consumer
22 Advocacy Group, Inc., (referred to as “CAG”) acting on behalf of itself and in the interest of the
23 public, and Defendant MET-RX SUBSTRATE TECHNOLOGY, INC. (“MET-RX”) (referred to
24 as “Met-Rx” or “Defendant”), each a Party to the action and collectively referred to as “Parties.”
25 This Consent Judgment is intended to fully resolve all claims, demands, and allegations related to
26 this action and the Notices of Violation referred to herein.
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1 1.2 **Defendant and Products**

2 1.2.1 CAG alleges that, for purposes of this Consent Judgment only, MET-RX is
3 “a person in the course of doing business” in California within the meaning of the Safe Drinking
4 Water and Toxic Enforcement Act of 1986, California Health & Safety Code §§ 25249.6 et seq.
5 (“Proposition 65”).

6 1.2.2 CAG alleges that Defendant either manufactures, caused to be
7 manufactured, sells or sold, and/or distributes or distributed “Covered Products” as defined below
8 in California or to California consumers.

9 1.3 **Chemical of Concern.** Di-n-butyl Phthalate (“DBP”) is listed under Proposition
10 65 as a chemical known to the State of California to cause male reproductive toxicity and female
11 reproductive toxicity.

12 1.4 **Notices of Violation.** By letters dated August 8, 2016 and August 29, 2016, CAG
13 served National Stores, Inc., Met-Rx, Marketing Results, Ltd. and certain public enforcement
14 agencies with “60-Day Notice of Intent to Sue for Violation of the Safe Drinking Water and Toxic
15 Enforcement Act of 1986” (“the Notices”) that provided the recipients with notice of alleged
16 violations of Health & Safety Code § 25249.6 for failing to warn individuals in California of
17 alleged exposures to DBP alleged to be contained in certain “Polymer Exercise Balls.” No public
18 enforcer has commenced or diligently prosecuted the allegations set forth in the Notices.

19 1.5 **Complaint and Answer.** On April 19, 2017, CAG filed a Complaint for civil
20 penalties and injunctive relief (“Complaint”) in Superior Court of California County of Los
21 Angeles Case No. BC658596, against Defendant. The Complaint alleges, among other things, that
22 Defendant and other addressees of the Notices violated Proposition 65 by failing to give clear and
23 reasonable warnings of alleged exposure to DBP from the Covered Products.

24 1.6 **Consent to Jurisdiction.** For purposes of this Consent Judgment, the Parties
25 stipulate that this Court has jurisdiction over the allegations of violations contained in the
26 Complaint and personal jurisdiction over Defendant as to the acts alleged in the Complaint, that

1 venue is proper in the County of Los Angeles, and that this Court has jurisdiction to enter this
2 Consent Judgment as a full settlement and resolution of the allegations contained in the Complaint
3 and of all claims which were, or could have been raised by, any person or entity based in whole or
4 in part, directly or indirectly, on the facts alleged therein or arising therefrom or related thereto.

5 1.7 **No Admission.** This Consent Judgment resolves claims that are denied and
6 disputed. The Parties enter into this Consent Judgment pursuant to a full and final settlement of
7 any and all claims between the Parties for the purpose of avoiding prolonged litigation. Nothing
8 in this Consent Judgment shall be construed as an admission against interest by any Party,
9 including any material allegation of the Complaint (each and every allegation of which Defendant
10 denies), any fact, conclusion of law, issue of law or violation of law, including without limitation,
11 any admission concerning any violation of Proposition 65 or any other statutory, regulatory,
12 common law, or equitable doctrine, or any admission as to the meaning of the terms “knowingly
13 and intentionally expose” or “clear and reasonable warning” as used in Health and Safety Code
14 section 25249.6. Nothing in this Consent Judgment, nor compliance with its terms, shall constitute
15 or be construed as an admission against interest by any Party of any fact, conclusion of law, issue
16 of law, or violation of law, or of fault, wrongdoing, or liability by Defendant, its officers, directors,
17 employees, or parent, subsidiary or affiliated corporations, or be offered or admitted as evidence
18 in any administrative or judicial proceeding or litigation in any court, agency or forum.
19 Furthermore, nothing in this Consent Judgment shall prejudice, waive or impair any right, remedy,
20 argument, or defense any Party may have in any other or future legal proceeding, except as
21 expressly provided in this Consent Judgment.

22 **2. DEFINITIONS**

23 2.1 “Polymer Exercise Balls” means flexible, partly compressible, polymer, gym
24 fitness balls, including but not limited to: the balls contained in “Gym in a Box,; Includes: Exercise
25 Ball & Resistance Band [With Pump]”; “Starter Kit”; 21” Exercise Ball with Pump; Item# 12569
26 MRL Columbus Ohio; UPC: 847561025697; “Made in China”; 082-910-140125 37/5 BAS G
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1 867269” but does not include balls used in sports (such as basketballs, tennis balls, jai alai balls,
2 hand balls, squash or racket balls, footballs, soccer balls, polo balls, whiffle balls, t-balls, baseballs
3 or softballs), or balls used for recreation (such as kick balls, beach balls, dodge balls, tether balls,
4 four square balls, punch or balloon balls), or liquid filled balls, or balls used for stress relief (such
5 as hand-sized squeeze balls), or balls used in furniture (such as “chair balls”) or balls used for
6 weight lifting (such as weighted hand balls) or “slam balls,” or balls for pets.

7 2.2 “Covered Products” means Polymer Exercise Balls as defined in Section 2.1.

8 2.3 “Effective Date” means the date that CAG serves notice on Defendant that the
9 Court has approved this Consent Judgment.

10 **3. INJUNCTIVE RELIEF/REFORMULATION/ WARNINGS**

11 3.1 After the Effective Date, Defendant shall not sell, offer for sale, or distribute for
12 sale in California any Covered Products manufactured after the Effective Date by or for Defendant,
13 unless such Covered Products are reformulated to contain less than 0.1% by weight (1,000 parts
14 per million) of DBP.

15 3.2 For any Covered Products still existing in Defendant’s inventory as of the Effective
16 Date that have not been reformulated to contain less than 0.1% (1,000 parts per million) DBP,
17 which Defendant intends to be distributed, sold or offered for sale in California, Defendant shall
18 place a Proposition 65 warning which complies with the then-existing warning requirements of
19 Proposition 65. Any warning provided pursuant to this section shall be affixed to the label, or
20 packaging of, or directly on, the Covered Products, and be prominently placed with such
21 conspicuousness as compared with other words, statements, designs, or devices as to render it
22 likely to be read and understood by an ordinary individual under customary conditions before
23 purchase or use. In addition to any other “safe harbor” Proposition 65 warning, Defendant may
24 use the following: **“WARNING:** This product contains DBP, a chemical known to the State of
25 California to cause birth defects or other reproductive harm.”

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1 entities believed to be responsible for such exposures and attempting to persuade those persons
2 and/or entities to reformulate their products or the source of exposure to completely eliminate or
3 lower the level of Proposition 65 Listed Chemicals including but not limited to costs of
4 documentation and tracking of products investigated, storage of products, website enhancement
5 and maintenance, computer and software maintenance, investigative equipment, CAG's member's
6 time for work done on investigations, office supplies, mailing supplies and postage. Within 30
7 days of a request from the Attorney General, CAG shall provide to the Attorney General copies of
8 documentation demonstrating how the above funds have been spent. CAG shall be solely
9 responsible for ensuring the proper expenditure of such additional settlement payment.

10 4.1.3 **Reimbursement of Attorney's Fees and Costs:** Defendant shall pay a
11 total amount of \$40,000.00 to "Yeroushalmi & Yeroushalmi" (EIN _____) as reimbursement
12 for reasonable investigation fees and costs, attorneys' fees, and any other costs incurred as a result
13 of investigating, bringing this matter to Defendant' attention, litigating, and negotiating a
14 settlement in the public interest.

15 4.2 **Delivery of Payments:**

16 4.2.1 All payments to OEHHA shall be delivered to: Office of Environmental
17 Health Hazard Assessment, Attn: Mike Gyurics, 1001 I Street, Mail Stop 12-B, Sacramento,
18 California 95812. Defendant shall provide a copy of the payment to OEHHA.

19 4.2.2 All payments to CAG and Yeroushalmi & Yeroushalmi shall be delivered
20 to: Reuben Yeroushalmi, Yeroushalmi & Yeroushalmi, 9100 Wilshire Blvd., Suite 240W, Beverly
21 Hills, CA 90212.

22 **5. MATTERS COVERED BY THIS CONSENT JUDGMENT/RELEASES OF**
23 **CLAIMS**

24 5.1 This Consent Judgment is a full, final, and binding resolution between CAG, on
25 behalf of itself and in the public interest, and Defendant and its officers, directors, insurers,
26 employees, parents, shareholders, divisions, subdivisions, subsidiaries, partners, affiliates, sister
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1 companies, and their predecessors, successors and assigns (collectively, the “Defendant
2 Releasees”), or any other person in the course of doing business, and the predecessors, successors
3 and assigns of any of them (collectively, the “Stream of Commerce Releasees”), for all claims by
4 CAG and in the public interest for violations of Proposition 65 up to and including the Effective
5 Date based on alleged exposure to DBP, from Covered Products, as set forth in the Notices and/or
6 Complaint. CAG hereby waives and releases all of the foregoing claims against Defendant,
7 Defendant Releasees, and Stream of Commerce Releasees up to and including the Effective Date.
8 Collectively, Defendant, Defendant Releasees and Stream of Commerce Releasees shall be
9 referred to as the “Released Parties.” After the Effective Date, Defendant’s compliance with this
10 Consent Judgment shall constitute compliance with Proposition 65 by all Released Parties.
11 Nothing in this Section affects CAG’s right to commence or prosecute an action under Proposition
12 65 against any person who is not a Released Party.

13 5.2 In addition, CAG on behalf of itself, its past and current agents, representatives,
14 attorneys, successors, and/or assignees, hereby waives all rights to institute or participate in,
15 directly or indirectly, any form of legal action and releases all claims, including, without limitation,
16 all actions, and causes of action, in law or in equity, suits, liabilities, demands, obligations,
17 damages, costs, fines, penalties, losses, or expenses (including, but not limited to, investigation
18 fees, expert fees, and attorneys’ fees) of any nature whatsoever, whether known or unknown, fixed
19 or contingent (collectively “Claims”), against any Released Party arising from any violation of
20 Proposition 65 or any other statutory or common law regarding the failure to warn about exposure
21 to DBP from the Covered Products. In furtherance of the foregoing, as to alleged exposures to
22 DBP from the Covered Products, CAG on behalf of itself only, hereby waives any and all rights
23 and benefits which it now has, or in the future may have, conferred upon it with respect to Claims
24 arising from any violation of Proposition 65 or any other statutory or common law regarding the
25 failure to warn about alleged exposure to DBP from the Covered Products by virtue of the
26 provisions of section 1542 of the California Civil Code, which provides as follows:

1 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE
2 CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER
3 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.

4 CAG understands and acknowledges that the significance and consequence of this waiver of
5 California Civil Code section 1542 is that even if CAG suffers future damages arising out of or
6 resulting from, or related directly or indirectly to, in whole or in part, Claims arising from any
7 violation of Proposition 65 or any other statutory or common law regarding the failure to warn
8 about alleged exposure to DBP from the Covered Products, including but not limited to any
9 exposure to, or failure to warn with respect to exposure to DBP from the Covered Products, CAG
10 will not be able to make any claim for those damages or injunctive relief against any Released
11 Party. Furthermore, CAG acknowledges that it intends these consequences for any such Claims
12 arising from any violation of Proposition 65 or any other statutory or common law regarding the
13 failure to warn about alleged exposure to DBP from Covered Products as may exist as of the
14 Effective Date but which CAG does not know exist, and which, if known, would materially affect
15 its decision to enter into this Consent Judgment, regardless of whether the lack of knowledge is
16 the result of ignorance, oversight, error, negligence, or any other cause.

17 5.3 Notwithstanding anything to the contrary in this Consent Judgment, neither
18 Marketing Results Ltd. nor National Stores, Inc. shall be deemed a Released Party under this
19 Consent Judgment.

20 **6. ENFORCEMENT OF JUDGMENT**

21 6.1 The terms of this Consent Judgment shall be enforced exclusively by the Parties
22 hereto. Any Party may, by noticed motion or order to show cause before the Superior Court of
23 California, County of Los Angeles, giving the notice required by law, enforce the terms and
24 conditions contained herein. A Party may enforce any of the terms and conditions of this Consent
25 Judgment only after that Party first provides at least 30 days' notice to the Party allegedly failing
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1 to comply with the terms and conditions of this Consent Judgment and attempts to resolve such
2 Party's failure to comply in an open and good faith manner.

3 **6.2 Notice of Violation.** Prior to bringing any motion, order to show cause, or other
4 proceeding to enforce the terms of this Consent Judgment, the Party alleging a violation shall
5 provide written notice ("NOV") to the other Party. The NOV shall include information sufficient
6 for the Party alleged to be in violation to be able to understand and correct the violation. With
7 respect to NOVs from CAG relating to the Covered Products, for each of the Covered Products at
8 issue, notice to Defendant must contain (a) the name of the product, (b) specific dates when the
9 product was sold in California, (c) the store or other place at which the product was available for
10 sale to consumers, and (d) any other evidence or other support for the allegations in the notice.

11 **6.2.1 Non-Contested NOV.** For NOVs from CAG relating to the Covered
12 Products, CAG shall take no further action regarding the alleged violation if, within 60
13 days of receiving such NOV, Defendant serves a Notice of Election ("NOE") that meets at
14 least one of the following conditions:

15 (a) Defendant concludes the Covered Products at issue are subject to
16 the releases of claims in Section 5; and/or

17 (b) Defendant concludes Defendant is not obligated under this Consent
18 Judgment to take any action with regard to the Covered Products at issue; and/or

19 (c) Since receiving the NOV Defendant has taken corrective action by
20 either (i) taking steps necessary to bring sale of the product into compliance under the terms
21 of this Consent Judgment, or (ii) requesting that its direct customers or stores in California,
22 as applicable, remove the Covered Products identified in the NOV from sale in California,
23 or destroy or return the Covered Products to Defendant or vendor, as applicable, or (iii)
24 otherwise refutes the information provided in paragraph 6.2.

1 6.2.2 **Contested NOV.** For NOVs from CAG relating to the Covered Products,
2 Defendant may serve a “Notice of Contest” informing CAG of its election to contest the
3 NOV within 30 days of receiving the NOV.

4 (a) As part of its Notice of Contest, Defendant may request that the
5 sample(s) of Covered Products tested by CAG be subject to confirmatory testing at an EPA
6 or State of California accredited laboratory.

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

12 (c) If Defendant does not withdraw a Notice of Contest or take action
13 under Section 6.2.1, above, the Parties shall meet and confer for a period of no less than 30
14 days before CAG may seek an order enforcing the terms of this Consent Judgment. If CAG
15 seeks such an order, Defendant may assert any and all available rights and defenses.

16 6.3 In any proceeding brought by either Party to enforce this Consent Judgment, the
17 prevailing party shall be entitled to seek recovery of its reasonable attorney’s fees and costs.

18 **7. ENTRY OF CONSENT JUDGMENT**

19 7.1 CAG shall file a motion seeking approval of this Consent Judgment pursuant to
20 California Health & Safety Code § 25249.7(f). Upon entry of the Consent Judgment, CAG and
21 Defendant waive their respective rights to a hearing or trial on the allegations of the Complaint.

22 7.2 If this Consent Judgment is not approved in full by the Court, (a) this Consent
23 Judgment and any and all prior agreements between the parties merged herein shall terminate and
24 become null and void, and the actions shall revert to the status that existed prior to the execution
25 date of this Consent Judgment; (b) no term of this Consent Judgment or any draft thereof, or of the
26 negotiation, documentation, or other part or aspect of the Parties’ settlement discussions, shall

1 have any effect, nor shall any such matter be admissible in evidence for any purpose in this Action,
2 or in any other proceeding; and (c) the Parties agree to meet and confer to determine whether to
3 modify the terms of the Consent Judgment and to resubmit it for approval.

4 **8. MODIFICATION OF JUDGMENT**

5 8.1 This Consent Judgment may be modified only upon written agreement of the
6 Parties and, if the modification affects a substantive provision of this Consent Judgment, upon
7 entry of a modified Consent Judgment by the Court thereon, or otherwise upon motion of any Party
8 as provided by law and upon entry of a modified Consent Judgment by the Court.

9 8.2 Any Party seeking to modify this Consent Judgment shall attempt in good faith to
10 meet and confer with the other Party prior to filing a motion to modify the Consent Judgment.

11 **9. RETENTION OF JURISDICTION**

12 9.1 This Court shall retain jurisdiction of this matter to implement and enforce the terms
13 of this Consent Judgment under Code of Civil Procedure § 664.6.

14 **10. DUTIES LIMITED TO CALIFORNIA**

15 10.1 Defendant's obligations under this Consent Judgment shall not apply to Covered
16 Products which are not sold or distributed by Defendant or to Covered Products sold or distributed
17 outside the State of California.

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

19 11.1 CAG shall serve a copy of this Consent Judgment, signed by all Parties, on the
20 California Attorney General so that the Attorney General may review this Consent Judgment for
21 at least forty-five (45) days prior to its submittal to the Court for approval.

22 **12. ATTORNEY FEES**

23 12.1 Except as specifically provided in Sections 4.1.3 and 6.3, each Party shall bear its
24 own attorneys' fees and costs in connection with this action.

1 **13. ENTIRE AGREEMENT**

2 13.1 This Consent Judgment contains the sole and entire agreement and understanding
3 of the Parties with respect to the entire subject matter hereof and any and all prior discussions,
4 negotiations, commitments and understandings related hereto. No representations, oral or
5 otherwise, express or implied, other than those contained herein have been made by any party
6 hereto. No other agreements not specifically referred to herein, oral or otherwise, shall be deemed
7 to exist or to bind any of the Parties.

8 **14. GOVERNING LAW**

9 14.1 The validity, construction and performance of this Consent Judgment shall be
10 governed by the laws of the State of California, without reference to any conflicts of law provisions
11 of California law.

12 14.2 The terms of this Consent Judgment shall be governed by the laws of the State of
13 California. In the event that Proposition 65 is repealed, preempted, or is otherwise rendered
14 inapplicable by reason of law generally, or if any of the provisions of this Consent Judgment are
15 rendered inapplicable or are no longer required as a result of any such repeal or preemption, or
16 rendered inapplicable by reason of law generally as to the Covered Products, then any Defendant
17 subject to this Consent Judgment may provide written notice to CAG of any asserted change in the
18 law, and shall have no further obligations pursuant to this Consent Judgment with respect to, and
19 to the extent that, the Covered Products are so affected. Nothing in this Consent Judgment shall
20 be interpreted to relieve a Defendant from any obligation to comply with any pertinent state or
21 federal law or regulation.

22 14.3 The Parties, including their counsel, have participated in the preparation of this
23 Consent Judgment and this Consent Judgment is the result of the efforts of the Parties. This
24 Consent Judgment was subject to revision and modification by the Parties and has been accepted
25 and approved as to its final form by all Parties and their counsel. Accordingly, any uncertainty or
26 ambiguity existing in this Consent Judgment shall not be interpreted against any Party as a result

1 of the manner of the preparation of this Consent Judgment. Each Party to this Consent Judgment
2 agrees that any statute or rule of construction providing that ambiguities are to be resolved against
3 the drafting Party should not be employed in the interpretation of this Consent Judgment and, in
4 this regard, each Party hereby waives California Civil Code § 1654.

5 **15. EXECUTION AND COUNTERPARTS**

6 15.1 This Consent Judgment may be executed in counterparts and by means of facsimile
7 or portable document format (pdf), which taken together shall be deemed to constitute one
8 document and have the same force and effect as original signatures.

9 **16. NOTICES**

10 16.1 Any notices under this Consent Judgment shall be by First Class Mail (with a
11 courtesy copy by email).

12 If to CAG: Yeroushalmi & Yeroushalmi, 9100 Wilshire Boulevard, Suite 240W,
13 Beverly Hills, CA 90212; (310) 623-1926; Email: lawfirm@yeroushalmi.com.

14 If to Met-Rx:

15 (1) Sidley Austin, LLP, Judith Praitis and Amy Lally, Suite 4000, 555 West 5th
16 Street, Los Angeles, California, 90013; (213) 896-6000; Email:
17 jpraitis@sidley.com and alally@sidley.com.

18 (2) Met-Rx Substrate Technology, Inc., attention Christine McInerney and Debra
19 Dyckman, 2100 Smithtown Avenue, Ronkonkoma, NY 11770; (631) 200-
20 1278.

21 **17. AUTHORITY TO STIPULATE**

22 17.1 Each signatory to this Consent Judgment certifies that he or she is fully authorized
23 by the party he or she represents to enter into this Consent Judgment and to execute it on behalf of
24 the party represented and legally to bind that party.

25
26 [Signatures on Next Page]

1 AGREED TO:

AGREED TO:

2 Date: August 31, 2018

Date: August 30, 2018

3
4 Michael Marcus Stephen J. Conboy

5 Name: Michael Marcus Name: Stephen J. Conboy

6 Title: Director Title: President & CFO
7 CONSUMER ADVOCACY MET-RX SUBSTRATE TECHNOLOGY, INC.
8 GROUP, INC.

9
10
11 IT IS SO ORDERED:

12
13 _____ Date: _____

14 Hon. Ernest Hiroshige
15 Judge of the Superior Court