

1 Evan Smith (Bar No. SBN 242352)
2 BRODSKY & SMITH, LLC.
3 9595 Wilshire Blvd., Ste. 900
4 Beverly Hills, CA 90212
5 Tel: (877) 534-2590
6 Fax: (310) 247-0160

7 *Attorneys for Plaintiff*

8
9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 COUNTY OF ALAMEDA

11 PRECILA BALABBO,
12 Plaintiff,

13 v.

14 UPPER CANADA SOAP AMERICA, INC.,
15 Defendant.

Case No.: RG18927944

CONSENT JUDGMENT

Judge: Dennis Hayashi
Dept.: 518
Hearing Date: April 10, 2019
Hearing Time: 2:30 PM
Reservation #: R-2049277

1 **1. INTRODUCTION**

2 1.1 **The Parties.** This Consent Judgment is entered into by and between Precila
3 Balabbo acting on behalf of the public interest (hereinafter “Balabbo”) and Upper Canada Soap &
4 Candle Makers Corporation (“Upper Canada”) with Balabbo and Upper Canada collectively
5 referred to as the “Parties” and each of them as a “Party.” Balabbo is an individual residing in
6 California that seeks to promote awareness of exposures to toxic chemicals and improve human
7 health by reducing or eliminating hazardous substances contained in consumer products. Upper
8 Canada is alleged to be a person in the course of doing business for purposes of Proposition 65,
9 Cal. Health & Safety Code §§ 25249.6 et seq.

10 1.2 **Allegations and Representations.** Balabbo alleges that Upper Canada has exposed
11 individuals to di(2-ethylhexyl) phthalate (DEHP) from its sales of Beauty To Go and TheraWell
12 travel bags/cases without providing a clear and reasonable exposure warning pursuant to
13 Proposition 65. DEHP is listed under Proposition 65 as a chemical known to the State of California
14 to cause cancer and reproductive toxicity.

15 1.3 **Notice of Violation/Complaint.** On or about March 6, 2018, Balabbo served Upper
16 Canada, and various public enforcement agencies with documents entitled “60-Day Notice of
17 Violation” pursuant to Health & Safety Code §25249.7(d) (the “Notice”), alleging that Upper
18 Canada violated Proposition 65 for failing to warn consumers and customers that use of Beauty To
19 Go and TheraWell travel bags/cases expose users in California to DEHP. No public enforcer has
20 brought and is diligently prosecuting the claims alleged in the Notice. On November 7, 2018,
21 Balabbo filed a complaint (the “Complaint”) in the matter.

22 1.4 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
23 jurisdiction over Upper Canada as to the allegations contained in the Complaint filed in this matter,
24 that venue is proper in the County of Alameda, and that this Court has jurisdiction to approve, enter,
25 and oversee the enforcement of this Consent Judgment as a full and final binding resolution of all
26 claims which were or could have been raised in the Complaint based on the facts alleged therein
27 and/or in the Notice.
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1 1.5 Upper Canada denies the material allegations contained in Balabbo’s Notice and
2 Complaint and maintains that it has not violated Proposition 65. Nothing in this Consent Judgment
3 shall be construed as an admission by Upper Canada of any fact, finding, issue of law, or violation
4 of law; nor shall compliance with this Consent Judgment constitute or be construed as an admission
5 by Upper Canada of any fact, finding, conclusion, issue of law, or violation of law, such being
6 specifically denied by Upper Canada. However, this section shall not diminish or otherwise affect
7 the obligations, responsibilities, and duties of Upper Canada under this Consent Judgment.

8 **2. DEFINITIONS**

9 2.1 **Covered Products.** The term “Covered Products” means Beauty To Go Travel
10 Bags with Item Numbers D5425, D5426, and D5427 and TheraWell Wellness Warming Product
11 bags/cases with Item Numbers W7611PKS, W7611MTS, W7612PKS, W7612MTS, W7613PKS,
12 W7613MTS that are manufactured, distributed and/or offered for sale in California by Upper
13 Canada

14 2.2 **Effective Date.** The term “Effective Date” means the date this Consent Judgment is
15 entered as a Judgment of the Court.

16 **3. INJUNCTIVE RELIEF: WARNINGS**

17 3.1 **Reformulation of Covered Products.** As of 180 days after the Effective Date, and
18 continuing thereafter, Covered Products that Upper Canada directly manufactures, imports,
19 distributes, sells, or offers for sale in California shall either: (a) be Reformulated Products pursuant
20 to § 3.2, below; or (b) be labeled with a clear and reasonable exposure warning pursuant to §§ 3.3
21 and 3.4, below. For purposes of this Consent Judgment, a “Reformulated Product” is a Covered
22 Product that is in compliance with the standard set forth in § 3.2 below. The warning requirement
23 set forth in §§ 3.3 and 3.4 shall not apply to any Reformulated Product.

24 3.2 **Reformulation Standard.** “Reformulated Products” shall mean Covered Products
25 that contain concentrations less than or equal to 0.1% (1,000 parts per million (ppm)) of DEHP
26 when analyzed pursuant to U.S. Environmental Protection Agency testing methodologies 3580A
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1 and 8270C or other methodology utilized by federal or state government agencies for the purpose
2 of determining the phthalate content in a solid substance.

3 **3.3 Clear and Reasonable Warning.** As of 180 days after the Effective Date, and
4 continuing thereafter, a clear and reasonable exposure warning as set forth in this §§ 3.3 and 3.4
5 must be provided for all Covered Products that Upper Canada manufacturers, imports, distributes,
6 sells, or offers for sale in California that is not a Reformulated Product. There shall be no obligation
7 for Upper Canada to provide a warning for Covered Products that enter the stream of commerce
8 prior to 180 days after the Effective Date. The warning shall consist of either the **Warning** or
9 **Alternative Warning** described in §§ 3.3(a) or (b), respectively:

10 (a) **Warning.** The “Warning” shall consist of the statement:

11 ⚠ **WARNING:** This product can expose you to chemicals including di(2-
12 ethylhexyl) phthalate (DEHP), which is known to the State of California to cause
13 cancer and birth defects or other reproductive harm. For more information go to
www.P65Warnings.ca.gov.

14 (b) **Alternative Warning:** Upper Canada may, but is not required to, use the alternative
15 short-form warning as set forth in this § 3.3(b) (“**Alternative Warning**”) as follows:

16 ⚠ **WARNING:** Cancer and Reproductive Harm - www.P65Warnings.ca.gov.

17 **3.4 A Warning or Alternative Warning** provided pursuant to § 3.3 must contain the
18 word “**WARNING:**” in all capital letters and in bold font, followed by a colon. The warning
19 symbol to the left of the word “**WARNING:**” must be a black exclamation point in a yellow
20 equilateral triangle with a black outline, except that if the sign or label for the Covered Product
21 does not use the color yellow, the symbol may be in black and white. The symbol must be in a size
22 no smaller than the height of the word “**WARNING:**”. The warning shall be affixed to or printed
23 on the Covered Product’s packaging or labeling, or on a placard, shelf tag, sign or electronic device
24 or automatic process, providing that the warning is displayed with such conspicuousness, as
25 compared with other words, statements, or designs as to render it likely to be read and understood
26 by an ordinary individual under customary conditions of purchase or use. A warning may be
27 contained in the same section of the packaging, labeling, or instruction booklet that states other
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1 safety warnings, if any, concerning the use of the Covered Product and shall be at least the same
2 size as those other safety warnings.

3 If Upper Canada sells Covered Products via an internet website to customers located in
4 California, the warning requirements of this section shall be satisfied if the foregoing warning
5 appears either: (a) on the same web page on which a Covered Product is displayed and/or described;
6 (b) on the same page as the price for the Covered Product; or (c) on one or more web pages
7 displayed to a purchaser prior to purchase during the checkout process. Alternatively, a symbol
8 consisting of a black exclamation point in a yellow or white equilateral triangle may appear adjacent
9 to or immediately following the display, description, price, or checkout listing of the Covered
10 Product, if the warning statement appears elsewhere on the same web page in a manner that clearly
11 associates it with the product(s) to which the warning applies.

12 3.5 **Compliance with Warning Regulations.** Upper Canada shall be deemed to be in
13 compliance with this Consent Judgment by either adhering to §§ 3.3 and 3.4 of this Consent
14 Judgment or by complying with warning requirements adopted by the State of California’s Office
15 of Environmental Health Hazard Assessment (“OEHHA”) after the Effective Date.

16 4. **MONETARY TERMS**

17 4.1 **Civil Penalty.** Upper Canada shall pay \$2,000.00 as a Civil Penalty pursuant to
18 Health and Safety Code section 25249.7(b), to be apportioned in accordance with California Health
19 & Safety Code § 25192, with 75% of these funds remitted to OEHHA and the remaining 25% of
20 the Civil Penalty remitted to Balabbo, as provided by California Health & Safety Code
21 § 25249.12(d).

22 4.1.1 Within ten (10) business days of the Effective Date, Upper Canada shall
23 issue two separate checks for the Civil Penalty payment to (a) “OEHHA” in the amount of
24 \$1,500.00; and to (b) “Brodsky & Smith, LLC in Trust for Balabbo” in the amount of \$500.00.
25 Payment owed to Balabbo pursuant to this Section shall be delivered to the following payment
26 address:

27 Evan J. Smith, Esquire
28 Brodsky & Smith, LLC

1 Two Bala Plaza, Suite 510
2 Bala Cynwyd, PA 19004

3 Payment owed to OEHHA (EIN: 68-0284486) pursuant to this Section shall be delivered directly
4 to OEHHA (Memo Line "Prop 65 Penalties") at one of the following address(es):

5 For United States Postal Service Delivery:

6 Mike Gyurics
7 Fiscal Operations Branch Chief
8 Office of Environmental Health Hazard Assessment
9 P.O. Box 4010
10 Sacramento, CA 95812-4010

11 For Non-United States Postal Service Delivery:

12 Mike Gyurics
13 Fiscal Operations Branch Chief
14 Office of Environmental Health Hazard Assessment
15 1001 I Street
16 Sacramento, CA 95814

17 A copy of the check payable to OEHHA shall be mailed to Brodsky & Smith, LLC at the address
18 set forth above as proof of payment to OEHHA.

19 4.2 **Attorneys' Fees.** Within ten (10) business days of the Effective Date, Upper Canada
20 shall pay \$22,000.00 to Brodsky & Smith, LLC ("Brodsky Smith") as complete reimbursement for
21 Balabbo's attorneys' fees and costs incurred as a result of investigating, bringing this matter to
22 Upper Canada's attention, litigating and negotiating and obtaining judicial approval of a settlement
23 in the public interest, pursuant to Code of Civil Procedure § 1021.5.

24 **5. RELEASE OF ALL CLAIMS**

25 5.1 This Consent Judgment is a full, final, and binding resolution between Balabbo
26 acting on her own behalf, and on behalf of the public interest, and Upper Canada, and its parents,
27 shareholders, members, directors, officers, managers, employees, representatives, agents,
28 attorneys, divisions, subdivisions, subsidiaries, partners, sister companies, and affiliates, and their
predecessors, successors and assigns ("Defendant Releasees"), and all entities from whom they
obtain and to whom they directly or indirectly distribute or sell Covered Products, including but
not limited to manufacturers, suppliers, distributors, wholesalers, customers, licensors, licensees
retailers, franchisees, and cooperative members, including but not limited to, Tuesday Morning,

1 Inc., Stein Mart, Inc., Stein Mart Holding Corp. (“Downstream Releasees”), of all claims for
2 violations of Proposition 65 based on exposure to DEHP from Covered Products as set forth in the
3 Notice, with respect to any Covered Products manufactured, distributed, or sold by Upper Canada
4 prior to the Effective Date. This Consent Judgment shall have preclusive effect such that no other
5 person or entity, whether purporting to act in his, her, or its interests or the public interest shall be
6 permitted to pursue and/or take any action with respect to any violation of Proposition 65 that was
7 alleged in the Complaint, or that could have been brought pursuant to the Notice against Upper
8 Canada and/or the Downstream Releasees of the Covered Products (“Proposition 65 Claims”).
9 Compliance with the terms of this Consent Judgment constitutes compliance with Proposition 65
10 with regard to the Covered Products.

11 5.2 In addition to the foregoing, Balabbo, on behalf of herself, her past and current
12 agents, representatives, attorneys, and successors and/or assignees, and *not* in her representative
13 capacity, hereby waives all rights to institute or participate in, directly or indirectly, any form of
14 legal action and releases Upper Canada, Defendant Releasees, and Downstream Releasees from
15 any and all manner of actions, causes of action, claims, demands, rights, suits, obligations, debts,
16 contracts, agreements, promises, liabilities, damages, charges, losses, costs, expenses, and
17 attorneys’ fees, of any nature whatsoever, known or unknown, in law or equity, fixed or contingent,
18 now or in the future, with respect to any alleged violations of Proposition 65 related to or arising
19 from Covered Products manufactured, distributed, or sold by Upper Canada, Defendant Releasees
20 or Downstream Releasees. With respect to the foregoing waivers and releases in this paragraph,
21 Balabbo hereby specifically waives any and all rights and benefits which she now has, or in the
22 future may have, conferred by virtue of the provisions of § 1542 of the California Civil Code, which
23 provides as follows:

24 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS THAT THE
25 CREDITOR OR RELEASING PARTY DOES NOT KNOW OR SUSPECT TO
26 EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE
27 RELEASE AND THAT, IF KNOWN BY HIM OR HER, WOULD HAVE
28 MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE
 DEBTOR OR RELEASED PARTY.

1 5.3 Upper Canada waives any and all claims against Balabbo, her attorneys and other
2 representatives, for any and all actions taken or statements made (or those that could have been
3 taken or made) by Balabbo and her attorneys and other representatives, whether in the course of
4 investigating claims or otherwise seeking enforcement of Proposition 65 against it in this matter,
5 and/or with respect to Covered Products.

6 **6. INTEGRATION**

7 6.1 This Consent Judgment contains the sole and entire agreement of the Parties and
8 any and all prior negotiations and understandings related hereto shall be deemed to have been
9 merged within it. No representations or terms of agreement other than those contained herein exist
10 or have been made by any Party with respect to the other Party or the subject matter hereof.

11 **7. GOVERNING LAW**

12 7.1 The terms of this Consent Judgment shall be governed by the laws of the State of
13 California and apply within the State of California. In the event that Proposition 65 is repealed or
14 is otherwise rendered inapplicable by reason of law generally, or as to Covered Products, then
15 Upper Canada shall have no further obligations pursuant to this Consent Judgment with respect to,
16 and to the extent that, Covered Products are so affected.

17 **8. NOTICES**

18 8.1 Unless specified herein, all correspondence and notices required to be provided
19 pursuant to this Consent Judgment shall be in writing and personally delivered or sent by: (i) first-
20 class, (registered or certified mail) return receipt requested; or (ii) overnight courier on any party
21 by the other party at the following addresses:

22 For Upper Canada:

23 Stephen Flatt
24 Upper Canada Soap & Candle Makers Corporation
25 1510A Caterpillar Rd.
26 Mississauga, ON LAX 2W9
27 Canada

27 With copy to:

28 Jeffrey Margulies

1 Norton Rose Fulbright US LLP
2 555 South Flower Street
3 Forty-First Floor
4 Los Angeles, CA 90071

5 And

6 For Balabbo:

7 Evan Smith
8 Brodsky & Smith, LLC
9 9595 Wilshire Blvd., Ste. 900
10 Beverly Hills, CA 90212

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

13 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

14 9.1 This Consent Judgment may be executed in counterparts and by facsimile, each of
15 which shall be deemed an original, and all of which, when taken together, shall constitute one and
16 the same document.

17 **10. COMPLIANCE WITH HEALTH & SAFETY CODE § 25249.7(f)/COURT**
18 **APPROVAL**

19 10.1 Balabbo agrees to comply with the requirements set forth in California Health &
20 Safety Code § 25249.7(f) and to promptly bring a Motion for Approval of this Consent Judgment.

21 10.2 This Consent Judgment shall not be effective until it is approved and entered by the
22 Court and shall be null and void if, for any reason, it is not approved by the Court. In such case,
23 the Parties agree to meet and confer on how to proceed and if such agreement is not reached within
24 30 days, the case shall proceed on its normal course.

25 10.3 If the Court approves this Consent Judgment and is reversed or vacated by an
26 appellate court, the Parties shall meet and confer as to whether to modify the terms of this Consent
27 Judgment. If the Parties do not jointly agree on a course of action to take, the case shall proceed on
28 its normal course on the trial court's calendar.

11. MODIFICATION

11.1 This Consent Judgment may be modified only by further stipulation of the Parties
and the approval of the Court or upon the granting of a motion brought to the Court by either Party.

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12. ATTORNEY'S FEES

12.1 A Party who unsuccessfully brings or contests an action arising out of this Consent Judgment shall be required to pay the prevailing party's reasonable attorney's fees and costs.

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

13. RETENTION OF JURISDICTION

13.1 This Court shall retain jurisdiction of this matter to implement or modify the Consent Judgment.

14. AUTHORIZATION

14.1 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 document and certify that he or she is fully authorized by the Party he or she represents to execute the Consent Judgment on behalf of the Party represented and legally bind that Party. Except as explicitly provided herein each Party is to bear its own fees and costs.

AGREED TO:

AGREED TO:

Date: 2-12-19

Date: _____

By: 
PRECILA BALABBO

By: _____
UPPER CANADA SOAP & CANDLE
MAKERS CORPORATION

IT IS SO ORDERED, ADJUDGED AND DECREED:

Dated: _____

Judge of Superior Court

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AGREED TO:

AGREED TO:

Date: _____

Date: Feb 14/2019

By: _____
PRECILA BALABBO

By: [Signature]
UPPER CANADA SOAP & CANDLE
MAKERS CORPORATION

IT IS SO ORDERED, ADJUDGED AND DECREED:

Dated: _____

Judge of Superior Court