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

10 KINGPUN CHENG,

11 Plaintiff,

12 vs.

13 HOME FASHIONS DISTRIBUTOR, INC.,

14 Defendant.

Case No. 37-2018-00046010-CU-OE-CTL

UNLIMITED JURISDICTION

**STIPULATION AND [PROPOSED]
ORDER RE ENTRY OF CONSENT
JUDGMENT AS TO HOME
FASHIONS DISTRIBUTOR, INC.**

Complaint Filed: September 13, 2018

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18 **1. Introduction**

19 **1.1 Parties**

20 This Stipulation and [Proposed] Order re Consent Judgment (“Consent Judgment”) is
21 hereby entered into by and between Kingpun Cheng, as an individual and acting in the interest of
22 the public (hereinafter “Cheng”), and Home Fashions Distributor, Inc. (hereinafter “Home
23 Fashions”). The term “Home Fashions” shall also include Great Bay Home, LLC and Home
24 Fashion Design, LLC. Home Fashions and Cheng shall be collectively referred to as the “Parties”
25 and each of them as a “Party.” Cheng is an individual residing in California who seeks to
26 promote awareness of exposures to toxic chemicals and improve human health by reducing or
27 eliminating hazardous substances contained in consumer products. For purposes of this
28

1 Stipulation and proposed Order, Home Fashions acknowledges that it employs ten or more
2 persons as required for purposes of Cal. Health & Safety Code §§ 25249.5 *et seq.* (“Proposition
3 65”).

4 1.2 General Allegations

5 Cheng alleges that Home Fashions offered for sale and sold in the State of California
6 antimicrobial mattress pads and their zipper containers, including but not limited to “Alexa
7 Collection Embossed Antimicrobial Mattress Pad” UPC88583025814, containing DEHP (Di[2-
8 -Ethylhexyl] Phthalate), which is a chemical listed under Proposition 65 known to the State of
9 California to cause cancer, birth defects, and/or other reproductive harm, and that it did so
10 without providing the warning Cheng alleges is required by Proposition 65. The products that are
11 covered by this Consent Judgment are defined as antimicrobial mattress pads and their vinyl
12 zipper containers manufactured or distributed by or for Home Fashions that are or were sold by
13 The TJX Companies, Inc. and other retailers in or into California. All such antimicrobial mattress
14 pads and their zipper containers, including but not limited to “Alexa Collection Embossed
15 Antimicrobial Mattress Pads,” are referred to herein as “Covered Products”. The term “Covered
16 Products” shall also include all other products sold by Home Fashions that are sold in vinyl zipper
17 bags.
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19 1.3 Notice of Violation

20 On or about July 3, 2018, Cheng issued a 60 Day Notice of Violation to Home Fashions,
21 Amazon. and various public enforcement agencies pursuant to Health & Safety Code §25249.7(d)
22 alleging that Home Fashions was in violation of Proposition 65 for failing to warn California
23 consumers that the Covered Products exposed them to DEHP (Di[2--Ethylhexyl] Phthalate) (“60
24 Day Notice”) in excess of the safe harbor levels as established by the California Office of
25 Environmental Health Hazard Assessment. The 60 Day Notice is referred to herein as “Notice”.
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1 No public enforcer diligently prosecuted the claims threatened in the Notice within sixty days
2 plus service time after service of the Notice to them by Cheng.

3 **1.4 Complaint**

4 On or about September 13, 2018, Cheng filed a Complaint against Home Fashions for
5 civil penalties and injunctive relief (“Complaint”) in San Diego Superior Court, Case No. 37-
6 2018-00046010-CU-OE-CTL. The Complaint alleges, among other things, that Home Fashions
7 violated Proposition 65 by failing to give clear and reasonable warnings of exposure to DEHP
8 (Di[2--Ethylhexyl] Phthalate) from the Covered Products.
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10 **1.5 Consent to Jurisdiction/No Admission**

11 For purposes of this Consent Judgment only, the Parties consent that this Court has
12 jurisdiction over the allegations of violations contained in the Complaint and personal jurisdiction
13 over the named Defendant as to the acts alleged in the Complaint, that venue is proper in the
14 County of San Diego and that this Court has jurisdiction to enter this Consent Judgment as a full
15 settlement and resolution of the allegations contained in the Notices, Complaint, and of all claims
16 which were or could have been raised by any person or entity based in whole or in part, directly
17 or indirectly, on the prior conduct of the Parties or on the facts alleged in the Complaint or arising
18 therefrom or related to.
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20 **1.6 No Admission**

21 Home Fashions denies the material, factual, and legal allegations contained in Cheng’s
22 Notice and Complaint and maintains that it has not violated Proposition 65. Nothing in this
23 Consent Judgment shall be construed as an admission by Home Fashions of any fact, finding,
24 conclusion of law, issue of law, or violation of law; nor shall compliance with this Consent
25 Judgment constitute or be construed as an admission by Home Fashions of any fact, finding,
26 conclusion of law, issue of law, or violation of law, such being specifically denied by Home
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1 Fashions. However, this section shall not diminish or otherwise affect the obligations,
2 responsibilities and duties under this Consent Judgment.

3 **1.7 Effective Date**

4 For purposes of this Consent Judgment, the term “Effective Date” shall mean the date that
5 the Motion to Approve the Consent Judgment has been granted by the Court. For purposes of this
6 Consent Judgment, the term “Execution Date” shall mean the date this Consent Judgment is
7 signed by all parties.
8

9 **2. Injunctive Relief**

10 Any Covered Product manufactured after the Effective Date that is sold, offered for sale,
11 or distributed for sale in California shall either (a) be reformulated pursuant to Section 2.1 or
12 (b) include a warning as provided in Section 2.3. Compliance with the terms of this Consent
13 Judgment shall constitute compliance with Proposition 65 by Home Fashions and the Releasees
14 with respect to DEHP in Covered Products.
15

16 **2.1 Reformulation Option.**

17 The Covered Products shall be deemed to comply with Proposition 65 with regard to
18 DEHP (Di[2--Ethylhexyl] Phthalate), and be exempt from any Proposition 65 warning
19 requirements for DEHP (Di[2--Ethylhexyl] Phthalate), if the Covered Products meet the
20 following criteria: the materials from which the exposed components or surface materials are
21 made shall have a DEHP content by weight of no more than 0.10% (1,000 parts per million, or
22 “1,000 ppm”). Home Fashions may comply with the above requirements by relying on
23 information obtained from its suppliers or manufacturers regarding the content of the materials
24 from which the components are made, provided such reliance is in good faith. Obtaining test
25 results showing that the DEHP content is no more than 0.10%, using a method of sufficient
26 sensitivity to establish a limit of quantification (as distinguished from detection) of less than
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1 1,000 ppm shall be deemed to establish good faith reliance. For purposes of this Consent
2 Judgment, Covered Products in compliance with this standard are “Reformulated Products”.

3 **2.2 Warning Alternative.**

4 As an alternative to reformulating the Covered Products, Covered Products manufactured
5 after the Effective Date that Home Fashions ships for sale, sells, or offers for sale in or into
6 California that are not Reformulated Products as set forth in Section 2.1 above shall be
7 accompanied by a clear and reasonable warning as described in Section 2.3 below.

8 **2.3 Clear and Reasonable Warnings.**

9 Where required under Section 2.2 above, Home Fashions shall provide Proposition 65
10 warnings substantially as follows:

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

14 OR

15 **WARNING:** This product contains chemicals known to the State of California to cause
16 cancer and birth defects or other reproductive harm.

17 OR other warning content and methods allowed now or in the future pursuant to
18 Proposition 65 or its implementing regulations.

19 Where the unit packaging, label, package inserts, or product is not printed using the color
20 yellow, the symbol may be printed in black and white. The symbol shall be placed to the left of
21 the text of the warning, in a size no smaller than the height of the word “WARNING.”

22 **2.3.1** Where utilized as an alternative to meeting the criteria set forth in Section 2.1,
23 Home Fashions shall provide the warning language set forth in Section 2.3 either with the unit
24 package of the Covered Products or affixed to the Covered Products. Such warning shall be
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1 prominently affixed to or printed on each Product's label, package, package insert, or the Product
2 itself. If printed on the label, the warning shall be contained in the same section that states other
3 safety warnings, if any, concerning the use of the Product. Home Fashions may continue to
4 utilize, on an ongoing basis, unit packaging that is not identical but contains substantively the
5 same Proposition 65 warnings as those set forth in Section 2.3 above, but only to the extent such
6 packaging materials have already been printed no later than ninety days after the Effective Date.
7 Any such warnings comply with both Proposition 65 and the terms of this Consent Judgment.
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9 2.3.2 The requirements for warnings set forth in Section 2.3 above are imposed pursuant
10 to the terms of this Consent Judgment. The Parties recognize that these are not the exclusive
11 methods of providing a warning under Proposition 65 and its implementing regulations and that
12 they may or may not be appropriate in other circumstances. Moreover, the Parties acknowledge
13 that nothing in this Consent Judgment shall prohibit Home Fashions from providing additional
14 information in connection with the warnings required herein.
15

16 2.4 **Products Manufactured Prior to the Effective Date**

17 Notwithstanding anything else in this Consent Judgment, Covered Products that were
18 manufactured prior to the Effective Date shall be subject to the release of liability pursuant to
19 Section 5 of this Consent Judgment, without regard to when such Covered Products were or are in
20 the future distributed or sold to customers. As a result, the obligations of Home Fashions as set
21 forth in this Consent Judgment, including but not limited to reformulation or warning pursuant to
22 Section 2, do not apply to these products manufactured prior to the Effective Date.
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24 **3. Entry of Consent Judgment**

25 3.1 With regard to all claims that have been raised or which could be raised with
26 respect to failure to warn pursuant to Proposition 65 with regard to lead in the Covered Products,
27 Home Fashions shall pay a civil penalty of \$1,200.00 pursuant to Health and Safety Code section
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1 25249.7(b), to be apportioned in accordance with California Health & Safety Code § 25192, with
2 75% of these funds remitted to the State of California's Office of Environmental Health Hazard
3 Assessment ("OEHHA") and the remaining 25% of the penalty remitted to Cheng, as provided by
4 California Health & Safety Code § 25249.12(c)(1) and (d) and the instructions directly below.

5 3.2 **Payment Procedures**

6 Home Fashions shall issue two separate checks for the penalty payment: (a) one check
7 made payable to "OEHHA" (tax identification number: 68-0284486) in an amount representing
8 75% of the total penalty (i.e., \$900.00); and (b) one check in an amount representing 25% of the
9 total penalty (i.e., \$300.00) made payable directly to Cheng. Home Fashions shall mail these
10 payments within five (5) days after the Effective Date to the following addresses respectively:
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13 To Office of Environmental Health Hazard Assessment:

14 For United States Postal Service Delivery:

15 Attn: Mike Gyurics
16 Fiscal Operations Branch Chief
17 Office of Environmental Health Hazard Assessment
18 P.O. Box 4010, MS #19B
19 Sacramento, CA 95812-4010

20 For Non-United States Postal Service Delivery:

21 Attn: Mike Gyurics
22 Fiscal Operations Branch Chief
23 Office of Environmental Health Hazard Assessment
24 1001 I Street, MS #19B
25 Sacramento, CA 95814

26 To Mr. Kingpun Cheng:

27 Mr. Kingpun Cheng
28 C/O Sy and Smith, PC
11622 El Camino Real, Suite 100
San Diego, CA 92130

4. **Reimbursement of Fees and Costs**

The Parties reached an accord on the compensation due to Cheng and his counsel under
the private attorney general doctrine and principles of contract law. Under these legal principles,

1 Home Fashions shall reimburse Cheng's counsel for fees and costs incurred as a result of
2 investigating, bringing this matter to Home Fashions' attention, and negotiating a settlement.

3 Home Fashions shall pay Cheng's counsel \$14,000 for all attorneys' fees, expert and
4 investigation fees, and related costs associated with this matter and the Notices. Home Fashions
5 shall send a check payable to "Sy and Smith, PC" within five (5) days of the Effective Date. Sy
6 and Smith, PC will provide Home Fashions with their tax identification information on or before
7 the Effective Date if requested. Other than the payment required hereunder, each side is to bear
8 its own attorneys' fees and costs.
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10 5. **Release of all Claims**

11 5.1 **Release of Home Fashions and Downstream Customers, Retailers, and**
12 **Entities**

13 Cheng, acting on behalf of himself and in a representative capacity in the public interest,
14 releases Home Fashions and its respective officers, directors, attorneys, representatives,
15 shareholders, agents, and employees, sister and parent entities, successors, and assigns, and each
16 entity to whom it directly or indirectly distributed or distributes or sold or sells the Covered
17 Products including, but not limited to, their downstream distributors, wholesalers, licensors,
18 licensees, auctioneers, retailers (including, but not limited to Marshalls of MA, Inc., their parents
19 and all affiliates and subsidiaries thereof), their respective employees, agents and assigns,
20 franchisees, dealers, customers, owners, purchasers, users, parent companies, corporate affiliates,
21 subsidiaries, (collectively "Releasees") from all claims for violations of Proposition 65 up
22 through the Effective Date, and consistent with the provisions of Section 2.4, above, based on
23 exposure to lead from the Covered Products as set forth in the Notices. The release in this
24 Section applies to all Covered Products that were manufactured prior to the Effective Date,
25 regardless of the date any Releasee distributes or sells the Covered Products. Compliance with
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1 the terms of this Consent Judgment constitutes compliance with Proposition 65 with respect to
2 exposures to lead from the Covered Products.

3 In addition to the foregoing, Cheng, on behalf of himself, his past and current agents,
4 representatives, attorneys, and successors and/or assignees, and *not* in his representative capacity,
5 hereby waives all rights to institute or participate in, directly or indirectly, any form of legal
6 action and releases any other claims, cause of action, obligation, costs, expenses, attorneys' fees,
7 damages, losses, liabilities, and demands that he could make against Home Fashions or the
8 Releasees with respect to violations of Proposition 65 based upon the Covered Products. The
9 Parties acknowledge that the claims released above may include unknown claims, and with
10 respect to the foregoing waivers and releases in this paragraph, Cheng hereby specifically waives
11 any and all rights and benefits which he now has, or in the future may have, conferred by virtue of
12 the provisions of Section 1542 of the California Civil Code, which provides as follows:
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15 **A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS**
16 **WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT**
17 **TO EXIST IN HIS OR HER FAVOR AT THE TIME OF**
18 **EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM**
19 **OR HER MUST HAVE MATERIALLY AFFECTED HIS OR**
20 **HER SETTLEMENT WITH THE DEBTOR.**

21 Cheng acknowledges and understands the significance and consequences of this specific
22 waiver of California Civil Code section 1542.

23 5.2 Home Fashions Release of Cheng

24 Home Fashions waives any and all claims against Cheng, his attorneys and other
25 representatives, for any and all actions taken or statements made by Cheng and his attorneys and
26 other representatives whether in the course of investigating claims or otherwise seeking
27 enforcement of Proposition 65 against it in this matter, and/or with respect to the Covered
28 Products.

1 **6. Non-Disparagement**

2 The Parties agree to refrain from taking action or making statements, written, oral or
3 through any form of social media, which disparage or defame the goodwill or reputation of the
4 other Party.

5 **7. Severability and Merger**

6 If, subsequent to the execution of this Consent Judgment, any of the provisions of this
7 document are held by a court to be unenforceable, the validity of the enforceable provisions
8 remaining shall not be adversely affected.

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

13 **8. Governing Law**

14 The terms of this Consent Judgment shall be governed by the laws of the State of
15 California and apply within the State of California.

16 Compliance with the terms of this Consent Judgment resolves any issue, now or in the
17 future, regarding the requirements of Proposition 65 with respect to alleged exposures to DEHP
18 (Di[2--Ethylhexyl] Phthalate) arising from the Covered Products. In the event that Proposition 65
19 is repealed or is otherwise rendered inapplicable by reason of law generally, or as to the Covered
20 Products, then Home Fashions shall provide written notice to Cheng of any asserted change in the
21 law, and shall have no further obligations pursuant to this Consent Judgment with respect to, and
22 to the extent that, the Covered Products are so affected.
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1 **9. Notices**

2 9.1 Unless specified herein, all correspondence and notices required to be provided
3 pursuant to this Consent Judgment shall be in writing and personally delivered or sent by:
4 electronic mail and either (i) first-class, (registered or certified mail) return receipt requested; or
5 (ii) overnight courier on any Party by the other Party at the following addresses:
6

7 For Home Fashions:

8 Home Fashions Distributor, Inc.
9 Attn. Mike O'Neill
10 44 Industrial Park Drive
11 Dover, NH 03080

12 With a copy to:

13 Whitney Roy, Esq.
14 Sheppard Mullin Richter & Hampton LLP
15 333 South Hope Street, 43rd Floor
16 Los Angeles, CA 90071-1422
17 wroy@sheppardmullin.com

18 and

19 For Cheng:

20 Parker A. Smith
21 Sy and Smith, PC
22 11622 El Camino Real, Suite 100
23 San Diego, CA 92130
24 parker@sysmithlaw.com

25 Any Party, from time to time, may specify in writing by the means set forth above to the
26 other Party a change of address to which all notices and other communications shall be sent.

27 **10. Counterparts; Facsimile Signatures**

28 10.1 This Consent Judgment may be executed in counterparts and by facsimile or
exchange by electronic means, each of which shall be deemed an original, and all of which, when
taken together, shall constitute one and the same document.

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Dated: 9-14-18

Home Fashions Distributor, Inc., Great Bay
Home, LLC and Home Fashion Design, LLC

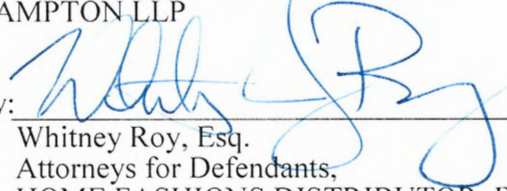
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By: 
MICHAEL O'NEIL President

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Dated: September 14, 2018

SHEPPARD MULLIN RICHTER &
HAMPTON LLP

By: 
Whitney Roy, Esq.
Attorneys for Defendants,
HOME FASHIONS DISTRIBUTOR, INC.,
GREAT BAY HOME, LLC AND HOME
FASHION DESIGN, LLC

Dated: Sept. 14, 2018

SY & SMITH

By: 
Parker A. Smith, Esq.
Attorneys for Plaintiff,
KINGPUN CHENG

IT IS SO ORDERED, ADJUDGED AND DECREED:

Dated: _____

Judge of the Superior Court