

**SETTLEMENT AGREEMENT**  
**BETWEEN**  
**CENTER FOR ADVANCED PUBLIC AWARENESS**  
**And**  
**SWISSCO LLC**

This Settlement Agreement is entered by and between Center for Advanced Public Awareness (“CAPA”) and Swissco LLC (“Swissco”) each individually referred to as a “Party” and, collectively, as the “Parties”, in order to resolve the allegations contained in the August 29, 2018 60-Day Notice of Violation (“Notice”).

**1. INTRODUCTION**

**1.1 General Allegations**

CAPA is a California-based non-profit organization who seeks to protect the environment through the elimination or reduction of toxic chemicals utilized in manufacturing consumer products and to increase public awareness of those chemicals by promoting environmentally sound practices and corporate responsibility. CAPA alleges that Swissco employs ten or more persons and is a person in the course of doing business for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, California Health & Safety Code §§ 25249.5 *et seq.* (Proposition 65).

CAPA alleges that Swissco manufactures, imports, sells and/or distributes for sale in California vinyl/PVC toiletry bags that contain di(2-ethyhexyl)phthalate (“DEHP”) and that it does so without providing the health hazard warning CAPA alleges is required by Proposition 65. DEHP is listed pursuant to Proposition 65 as a chemical known to the State of California to cause cancer, birth defects or other reproductive harm.

**1.2 Product Description**

The products that are covered by this Settlement Agreement are vinyl/PVC toiletry bags containing DEHP that are manufactured, imported, sold or offered for sale in California by



Swissco, including, but not limited to, the *Elite 12 Pack Mascara Wands*, SKU #810360217, UPC #7 69898 73817 3, hereinafter, the “Covered Products.”

### **1.3 60-Day Notice of Violation**

On August 29, 2018, CAPA served Big Lots Stores, Inc., Swissco, the California Attorney General, and the requisite public enforcement agencies with a 60-Day Notice of Violation (“Notice”), alleging that Swissco violated Proposition 65 when it failed to warn its customers and consumers in California that the Covered Products expose users to DEHP. To the best of the Parties’ knowledge, no public enforcer has commenced and is diligently prosecuting the allegations set forth in the Notice.

### **1.4 No Admission**

Swissco denies the material, factual and legal allegations contained in the Notice and maintains that all products it has sold and distributed in California, including the Covered Products, have been and are in compliance with all laws. Nothing in this Settlement Agreement shall be construed as an admission by Swissco of any fact, finding, issue of law or violation of law; nor shall compliance with this Settlement Agreement constitute or be construed as an admission by Swissco of any fact, finding, conclusion, issue of law or violation of law. This section shall not, however, diminish or otherwise affect the obligations, responsibilities and duties under this Settlement Agreement.

### **1.5 Effective Date**

For purposes of this Settlement Agreement, the term “Effective Date” shall mean September 25, 2019.

## **2. INJUNCTIVE RELIEF: REFORMULATION OR WARNING**

### **2.1 Commitment to Reformulate or Warn**

Commencing on or before December 31, 2019 and continuing thereafter, all Covered Products that Swissco manufactures, imports, sells or distributes for sale in California shall be either: (a) Reformulated Products, as defined in Section 2.2, below; or (b) Covered Products



bearing a clear and reasonable health hazard warning, in accordance with Sections 2.3 through 2.6.

## **2.2 Reformulated Products Defined**

“Reformulated Products” are Products containing DEHP in concentrations of less than 0.1 percent (1,000 parts per million) in each accessible component (i.e. any component that may be touched during a reasonably foreseeable use) when analyzed by a laboratory accredited by the State of California, a federal agency, or a nationally recognized accrediting organization. For purposes of compliance with this reformulation standard, testing samples shall be prepared and extracted using Consumer Product Safety Commission (CPSC) methodology CPSC-CH-C1001.09.3 and analyzed using U.S. Environmental Protection Agency (EPA) methodologies 8270D, or any other scientifically reliable methodology for determining DEHP content in a solid substance. Covered Products that are reformulated to meet this standard shall be deemed to comply with Proposition 65 and will not require a warning with respect to DEHP.

## **2.3 Clear and Reasonable Warnings Defined**

For all Covered Products that are sold or shipped out to consumers, retailers and distributors, in or into California, after December 31, 2019 and that do not meet the definition of Reformulated Products, as detailed in Section 2.2, supra, Swissco agrees to provide clear and reasonable warnings, pursuant to this Section. Swissco shall affix a warning to the Covered Product label or otherwise directly on each Covered Product provided for sale to customers in California, except as provided for under the exceptions to the warning requirements discussed in this section. For the purpose of this Settlement Agreement, “Product label” means a display of written, printed or graphic material that is printed on or affixed to a Product or its immediate container or wrapper.


Each warning shall be prominently placed with such conspicuousness as compared with other words, statements, designs, or devices as to render it likely to be read and understood by an ordinary individual under customary conditions before purchase or use and shall be provided in a manner such that it is clearly associated with the specific Covered Product to which the warning




applies. Any warning provided shall appear in a type size of at least 6-point type and in no event smaller than the largest type size used for other consumer information on the product.

#### **2.4 Covered Product Warnings**

For all Covered Products that are distributed, shipped, sold or offered for sale, in or into California, after December 31, 2019, the parties agree that the following warning shall constitute a compliant warning for DEHP in the Covered Products:

 **WARNING:** This product can expose you to DEHP, which is known to the State of California to cause birth defects or other reproductive harm. For more information go to [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov).

Swissco may, but is not required to, utilize the following short-form warning, subject to the additional requirements in Section 2.5, below.

 **WARNING:** Cancer and Reproductive Harm – [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov)

In either of the above instances, the triangular warning symbol shall be in yellow with a black exclamation point, *provided however*, the symbol may be printed in black and white if the Covered Product label is printed against a yellow background.

#### **2.5 Internet Warnings**

If, after December 31, 2019, Swissco sells Covered Products via the internet to customers located in California, Swissco shall provide warnings for each Covered Product both on the Product label, in accordance with Sections 2.3 and 2.4, and by prominently displaying the warning to the customer prior to completing the purchase or during the purchase of the Covered Products without requiring customers to seek out the warning. Warnings given in conjunction with the sale of the Covered Products via the internet shall: (i) appear on the same web page on which the Covered Product is displayed; (ii) appear on the same web page as the order form for the Covered Product; or (iii) be otherwise prominently displayed to a purchaser prior to purchase. The warning shall be closely associated with the product for which it is given and appear in the same type size or larger than any Covered Product description text, such that the consumer or customer does not have to search for it in the general content. Swissco may utilize



the Short-Form Warning content described in Section 2.4, supra, if the warning provided on the Covered Product label also uses the Short-Form Warning content. Swissco may also comply with this section by providing the warning using a clearly marked hyperlink that includes the word “WARNING” on the same web page and in the same location as the display and/or description of the Covered Product.

## **2.6 Additional Information Regarding Compliance, Warnings and Transmission**

The Parties agree that warning requirements and specifications as they apply to the Covered Products, previously detailed in Sections 2.3 through 2.5, comply with Proposition 65 and its implementing regulations as of the date of the Settlement Agreement, pursuant to the regulations adopted on or about August 30, 2016, and which became effective, as amended, August 30, 2018. If modifications or amendments to Proposition 65 or its implementing regulations after the Effective Date change or modify the required warning language or methodology, the Parties specifically agree that Swissco may modify the content and delivery methods of its warnings to conform to the modified or amended regulations or alter the warning specifications or methods as authorized pursuant to title 27, California Code of Regulations (“C.C.R.”) title 27, Ar. 6, §§ 25601 *et seq.*, as may be amended from time to time, in order to maintain compliance with Proposition 65, with respect to DEHP in the Covered Products.

## **3. MONETARY SETTLEMENT TERMS**

### **3.1 Civil Penalty Payment**

Pursuant to Health and Safety Code § 25249.7(b), and in settlement of all claims alleged in the Notice or referred to in this Settlement Agreement, Swissco agrees to pay a total of \$2,000 in civil penalties. The penalty payment shall be allocated in accordance with California Health and Safety Code § 25249.12(c)(1) and (d), with 75% of the penalty amount paid to the California Office of Environmental Health Hazard Assessment (“OEHHA”) and the remaining 25% of the penalty amount retained by CAPA.

Swissco will deliver its payment within ten (10) business days of the Effective Date, in two checks made payable to: (a) “OEHHA” in the amount of \$1,500; and (b) “Gates Johnson



Law, in Trust for CAPA” in the amount of \$500. CAPA’s counsel shall be responsible for delivering OEHHHA’s portion of the penalties paid under this Settlement Agreement.

### **3.2 Reimbursement of Attorneys’ Fees and Costs**

The Parties acknowledge that CAPA and its counsel offered to resolve this dispute without reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving the issue to be resolved after the Parties settled the material terms of the agreement. Shortly after the Parties finalized the non-monetary and injunctive terms, Swissco expressed a desire to resolve CAPA’s attorneys’ fees and costs. The Parties then negotiated a resolution of the compensation due to CAPA and its counsel under general contract principles and the private attorney general doctrine, codified at California Code of Civil Procedure § 1021.5, for all work performed through the mutual execution of this Settlement Agreement. Under these legal principles, within ten (10) business days of the Effective Date, Swissco agrees to pay \$20,000 to CAPA and its counsel for all reasonable fees and costs incurred in investigating, bringing this matter to the attention of Swissco’s management, and negotiating a settlement in the public interest. Swissco’s payment shall be delivered to the address listed in Section 3.3, below, in the form of a check, made payable to “Gates Johnson Law.”

### **3.3 Payment Address**

All payments required by this Settlement Agreement shall be delivered to the following address:

Gates Johnson Law  
c/o Kimberly Gates  
2822 Moraga Street  
San Francisco, CA 94122

## **4. CLAIMS COVERED AND RELEASED**

### **4.1 CAPA’s Release of Swissco**

This Settlement Agreement is a full, final and binding resolution between CAPA, as an individual and *not* on behalf of the public, and Swissco, of any violation of Proposition 65 that was or could have been asserted by CAPA on behalf of itself, its past and current agents, representatives, attorneys, successors, and/or assignees, against Swissco, its parents, subsidiaries,



affiliated entities under common ownership, directors, officers, employees, attorneys, and each entity to whom Swissco directly or indirectly distributes or sells Covered Products, including, but not limited, to downstream distributors, wholesalers, customers, retailers (including without limitation Big Lots Stores, Inc.), franchisees, cooperative members, and licensees (collectively, Releasees), based on alleged exposures to DEHP and the failure to provide a warning about exposure to DEHP contained in Covered Products distributed, sold or offered for sale by Swissco, as alleged in the Notice, prior to the Effective Date.

In further consideration of the promises and agreements herein contained, CAPA as an individual and *not* on behalf of the public, on behalf of itself, its past and current agents, representatives, attorneys, successors, and/or assignees, hereby waives all of CAPA's rights to institute or participate in, directly or indirectly, any form of legal action and releases all claims that CAPA may have, including, without limitation, all actions, and causes of action, in law or in equity, suits, liabilities, demands, obligations, damages, costs, fines, penalties, losses, expenses, investigation fees, expert fees, and attorneys' fees arising under Proposition 65 with respect to DEHP in Covered Products distributed, sold and/or offered for sale by Swissco before the Effective Date, as alleged in the Notice, against Swissco and Releasees.

The Parties further understand and agree that this Section 4.1 release shall not extend upstream to any entities that manufactured the Covered Products or any component parts thereof, or any distributors or suppliers who sold the Covered Products or any component parts thereof to Swissco. Nothing in this Section affects CAPA's right to commence or prosecute an action under Proposition 65 against a Releasee that does not involve Swissco's Covered Products.

#### **4.2 Swissco's Release of CAPA**

Swissco, on behalf of itself, its past and current agents, representatives, attorneys, successors, and assignees, hereby waives any and all claims against CAPA and its attorneys and other representatives, for any and all actions taken or statements made (or those that could have been taken or made) by CAPA and its attorneys and other representatives, whether in the course



of investigating claims or otherwise seeking to enforce Proposition 65 against it in this matter with respect to the Covered Products.

**5. SEVERABILITY**

If, subsequent to the execution of this Settlement Agreement, any of the provision of this Settlement Agreement is deemed by a court to be unenforceable, the validity of the remaining enforceable provisions shall not be adversely affected.

**6. GOVERNING LAW**

The terms of this Settlement Agreement shall be governed by the laws of the State of California and apply within the State of California. In the event that Proposition 65 is repealed or is otherwise rendered inapplicable by reason of law generally, or if any of the provisions of this Settlement Agreement are rendered inapplicable or no longer required as to the Covered Products, then Swissco shall provide written notice to CAPA of any asserted change in the law and shall have no further injunctive obligations pursuant to this Settlement Agreement with respect to, and to the extent that, the Covered Products are so affected. Nothing in this Settlement Agreement shall be interpreted to relieve Swissco from any obligation to comply with any pertinent state or federal toxics control law.

**7. NOTICE**

Unless specified herein, all correspondence and notices required to be provided pursuant to this Settlement Agreement shall be in writing and: (i) personally delivered; (ii) sent by first-class (registered or certified mail) return receipt requested; or (iii) sent by overnight courier, to one party by the other party at the following addresses:

For Swissco:

Carol R. Brophy, Esq.  
Steptoe & Johnson LLP  
1 Market Street  
Spear Tower, Suite 3900  
San Francisco, CA 94105

For CAPA:



Kimberly Gates Johnson, Esq.  
Gates Johnson Law  
2822 Moraga Street  
San Francisco, CA 94122

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.

**8. COUNTERPARTS; FACSIMILE AND SIGNATURES**

This Settlement Agreement 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 be deemed to constitute one and the same document.

**9. REPORTING PURSUANT TO HEALTH & SAFETY CODE § 25249.7(f)**

CAPA agrees to comply with the reporting requirements referenced in Health & Safety Code § 25249.7(f), and shall report this Settlement Agreement to the Attorney General's Office within five (5) days of the date this agreement is fully executed by the Parties.

**10. MODIFICATION**

This Settlement Agreement may only be modified by the written agreement of the Parties.

**11. AUTHORIZATION**


The undersigned represent they have the full authority to enter into and legally bind the entities that are the subject of this Settlement Agreement. The undersigned further represent they are authorized to execute this Settlement Agreement and have read, understood and agree to all of the terms and conditions contained herein.


**AGREED TO:**

**AGREED TO:**

Date: 09/24/2019

Date: 9/24/2019/

By:   
Linda DeRose Droubay, Executive Director  
Center for Advanced Public Awareness

By:   
Joseph Ades, Principal  
Swissco LLC