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7 CENTER FOR ENVIRONMENTAL HEALTH

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9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 COUNTY OF SAN FRANCISCO

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12 CENTER FOR ENVIRONMENTAL HEALTH,
13 a non-profit corporation,
14
15 Plaintiff,
16
17 v.
18 DOLLS KILL, INC., *et al.*,
19
20 Defendants.

Case No. CGC-22-602383

Assigned For All Purposes To The
Honorable Ethan P. Schulman, Dept. 304

**[PROPOSED] AMENDED CONSENT
JUDGMENT AS TO DEFENDANT
DSW SHOE WAREHOUSE, INC.
AND MAC DESIGN GROUP, LLC**

1 **1. INTRODUCTION**

2 1.1 The parties to this Consent Judgment are: the Center for Environmental Health
3 (“CEH”); Defendant DSW Shoe Warehouse, Inc. (“Settling Retailer”); and MAC Design Group,
4 LLC (“Settling Manufacturer”). Settling Retailer and Settling Manufacturer are referred to
5 collectively as the “Settling Parties.” CEH, Settling Retailer and Settling Manufacturer are
6 referred to collectively as the “Parties” to this Consent Judgment.

7 1.2 CEH alleges that Settling Retailer sells socks made primarily of polyester with
8 spandex that contain Bisphenol A (“BPA”) in the State of California (“Covered Products”) or has
9 done so in the past.

10 1.3 Settling Manufacturer manufacturers socks, some of which are sold to Settling
11 Retailer.

12 1.4 On June 23, 2022, CEH served a 60-Day Notice of Violation under
13 Proposition 65 (The Safe Drinking Water and Toxic Enforcement Act of 1986, California Health
14 & Safety Code §§ 25249.5, *et seq.*) (“Notice”) to Settling Retailer, the California Attorney
15 General, the District Attorneys of every County in the State of California, and the City Attorneys
16 for every City in the State of California with a population greater than 750,000. The Notice
17 alleges violations of Proposition 65 with respect to the presence of BPA in the Covered Products.
18 Settling Retailer denies ever receiving such notice.

19 1.5 On October 13, 2022, CEH filed the operative complaint naming Settling
20 Retailer as a defendant in this action. Settling Retailer alleges that receipt of the complaint was
21 its first notice of CEH’s allegations.

22 1.6 For purposes of this Consent Judgment only, the Parties stipulate that: (i) this
23 Court has jurisdiction over the allegations of violations contained in the operative Complaints
24 applicable to Settling Retailer and personal jurisdiction over the Settling Parties as to the acts
25 alleged in the Complaint; (ii) venue is proper in the County of San Francisco; and (iii) this Court
26 has jurisdiction to enter this Consent Judgment.

27 1.7 Nothing in this Consent Judgment is or shall be construed as an admission by
28 the Parties of any fact, conclusion of law, issue of law, or violation of law, nor shall compliance

1 with the Consent Judgment constitute or be construed as an admission by the Parties of any fact,
2 conclusion of law, issue of law, or violation of law. Nothing in this Consent Judgment shall
3 prejudice, waive, or impair any right, remedy, argument, or defense the Parties may have in any
4 other legal proceeding. This Consent Judgment is the product of negotiation and compromise and
5 is accepted by the Parties for purposes of settling, compromising, and resolving issues disputed in
6 this action.

7 **2. DEFINITIONS**

8 2.1 “Covered Products” means socks made primarily of polyester with spandex
9 that are manufactured, distributed, licensed or sold by Settling Manufacturer to Settling Retailer.

10 2.2 “Effective Date” means the date on which this Consent Judgment is entered by
11 the Court.

12 2.3 “Test Protocol” means a method for measuring total BPA content as set forth
13 in Exhibit A.

14 **3. INJUNCTIVE RELIEF**

15 3.1 **Reformulation of Covered Products.** Within six months following the
16 Effective Date (the “Reformulation Date”), Settling Manufacturer shall not manufacture,
17 distribute, license, sell, or offer for sale any Covered Product in California that contains BPA
18 except as provided in Section 3.3 below. Within six months following the Effective Date (the
19 “Reformulation Date”), Settling Retailer shall not sell, or offer for sale any Covered Product in
20 California that contains BPA except as provided in Section 3.3 or except where Settling
21 Manufacturer elects to provide the warning consistent with Section 3.4 below. For purposes of
22 this Consent Judgment, a product “contains BPA” if BPA is an intentionally added ingredient in
23 either the Covered Product or a component of the Covered Product, or contains in excess of one
24 (1.0) part per million BPA as measured by the Test Protocol. Settling Manufacturer shall not
25 replace the BPA with any other bisphenol (such as Bisphenol S or BPS). In the event that
26 Settling Retailer learns either through Plaintiff or another means that the Covered Products
27 contain BPA or another bisphenol in excess of the requirements set forth herein and Settling
28 Manufacturer has not provided the warning consistent with Section 3.4 below, Settling Retailer

1 shall notify its supplier that it has breached its specification and cease selling the subject Covered
2 Products in California until its supplier either sends a new shipment of Covered Products that are
3 in compliance with Proposition 65 or provides Settling Retailer with the required warnings
4 consistent with Section 3.4 below that Settling Retailer will affix to such Covered Products prior
5 to selling them.

6 3.2 **Specification to Suppliers.** No more than thirty (30) days after the Effective
7 Date, Settling Retailer shall issue specifications to their suppliers of Covered Products requiring
8 that Covered Products not contain BPA or any other phenol (such as Bisphenol S or BPS).

9 3.3 **Sell-Through for Existing Inventory.** The reformulation requirements of
10 Section 3.1 shall not apply to Covered Products that: a) Settling Retailer had entered into a
11 binding agreement to purchase prior to the Effective Date, including but not limited to Covered
12 Products in distribution centers, in inventory, or at retail locations; and b) to Covered Product that
13 Settling Manufacturer had labelled with a State-approved Proposition 65 “safe harbor warning”
14 (as described in § 3.4.1, below) prior to the Effective Date.

15 3.4 **Clear and Reasonable Warnings.**

16 3.4.1 **Election to Warn.** If Settling Manufacturer is unable to comply with the
17 Reformulation provision set forth in Section 3.1 or otherwise elects to permanently avail itself of
18 the warning option provided by this Section 3.4, Settling Manufacturer shall provide written
19 notice to CEH prior to the Reformulation Date, and Settling Manufacturer concurrently shall
20 make the additional payment specified in Section 5.2.5 below. Settling Manufacturer shall then
21 provide Clear and Reasonable Warnings for each Covered Product sold in California that contains
22 BPA. A Clear and Reasonable Warning under this Agreement shall state:



23 **WARNING:** This product can expose you to chemicals including Bisphenol
24 A (BPA) which is known to the State of California to cause birth defects or
25 other reproductive harm. For more information go to
26 www.P65Warnings.ca.gov.

27 The word “**WARNING**” shall be displayed in all capital letters and bold print and shall be
28 preceded by the yellow warning triangle symbol depicted above, provided however, the

1 symbol may be printed in black and white if the Covered Product label is produced without
2 using the color yellow. This warning statement shall be prominently displayed on the outer
3 packaging of the Covered Product and shall be displayed with such conspicuousness, as
4 compared with other words, statements or designs as to render it likely to be seen, read and
5 understood by an ordinary individual prior to sale. For internet, catalog or any other sale
6 where the consumer is not physically present, the warning statement shall be displayed in
7 such a manner that it is likely to be read and understood by an ordinary individual prior to the
8 authorization of or actual payment.

9 **4. ENFORCEMENT**

10 4.1 Plaintiff may, by motion or application for an order to show cause before the
11 Superior Court of San Francisco County, enforce the terms and conditions contained in this
12 Consent Judgment. Prior to bringing any motion or application to enforce the requirements of
13 Section 3 above, Plaintiff shall provide the appropriate Settling Party with a Notice of Violation
14 and a copy of any test results which purportedly support the Notice of Violation. CEH and the
15 affected Settling Party(ies) shall then meet and confer regarding the basis for the anticipated
16 motion or application in an attempt to resolve it informally, including providing Settling
17 Party(ies) with a reasonable opportunity of at least thirty (30) days to cure any alleged violation.
18 Should such attempts at informal resolution fail, Plaintiff may file an enforcement motion or
19 application. This Consent Judgment may only be enforced by the Parties.

20 4.2 The first time Plaintiff's Notice of Violation involves BPS or any phenol other
21 than BPA, affected Settling Party(ies) must provide notice to its supplier as set forth in Section
22 3.2, but shall have no further liability for violating the terms of this Consent Judgment. However,
23 any subsequent Notice of Violation involving BPS or any phenol other than BPA shall be
24 governed by Section 4.1

25 **5. PAYMENTS**

26 5.1 **Tax Information.** CEH has provided Settling Parties with appropriate tax
27 identification information (*e.g.*, Internal Revenue Service "W-9" forms) for all Payees identified
28 in Section 5.3.4 below.

1 5.2 **Payments by Settling Parties.** Within thirty (30) days of the Effective Date,
2 Settling Parties shall pay the total sum of sixty four thousand dollars (\$64,000.00) as a settlement
3 payment covering Settling Parties as further set forth in this Section. Any payment by Settling
4 Parties shall be deemed to be timely and not subject to a late charge and/or other penalty if: (1)
5 postmarked (if sent by the United States Postal Service) or (2) delivered to an overnight carrier
6 (*e.g.*, Fed Ex), on or before the deadline set forth in this paragraph.

7 5.3 **Allocation of Payments.** The total settlement amount for Settling Parties shall
8 be paid in five separate checks in the amounts specified below and delivered as set forth below.
9 Any failure by Settling Parties to comply with the payment terms herein shall be subject to a joint
10 and several stipulated late fee to be paid by Settling Parties in the amount of one hundred dollars
11 (\$100) for each day the full payment is not received after the applicable payment due date set forth
12 in Section 5.1. The late fees required under this Section shall be recoverable, together with
13 reasonable attorneys' fees, in an enforcement proceeding brought pursuant to Section 4 of this
14 Consent Judgment. The funds paid by Settling Parties shall be allocated as set forth below between
15 the following categories and made payable as follows:

16 5.3.1 \$8,900 as a civil penalty pursuant to Health & Safety Code §
17 25249.7(b). The civil penalty payment shall be apportioned in accordance with Health & Safety
18 Code § 25249.12 (25% to CEH and 75% to the State of California's Office of Environmental
19 Health Hazard Assessment). Accordingly, the OEHHA portion of the civil penalty payment for
20 \$6,675 shall be made payable to OEHAA and associated with taxpayer identification number 68-
21 0284486/ This payment shall be delivered as follows:

22 For United States Postal Service Delivery:

23 Attn: Mike Gyurics
24 Fiscal Operations Branch Chief
25 Office of Environmental Health Hazard Assessment
26 P.O. Box 4010, MS #19B
27 Sacramento, CA 95812-4010

28 For Non-United States Postal Service Delivery:

 Attn: Mike Gyurics

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Fiscal Operations Branch Chief
Office of Environmental Health Hazard Assessment
1001 I Street, MS #19B
Sacramento, CA 95814

The CEH portion of the civil penalty payment for \$2,225 shall be made payable to the Center for Environmental Health and associated with taxpayer identification number 94-3251981. This payment shall be delivered to Lexington Law Group, 503 Divisadero Street, San Francisco, CA 94117.

5.3.2 \$6,600 as an Additional Settlement Payment (“ASP”) to CEH pursuant to Health & Safety Code § 25249.7(b), and California Code of Regulations, Title 11, § 3204 and California Code of Regulations, Title 11, § 3204. CEH will use such funds to continue its work educating and protecting people from exposures to toxic chemicals, including BPA, in textiles and other products. CEH may also use a portion of such funds to monitor compliance with this Consent Judgment and to purchase and test Settling Parties’ products to confirm compliance.

5.3.3 \$48,500 as a reimbursement of a portion of CEH’s reasonable attorneys’ fees and costs. The attorneys’ fees and cost reimbursement shall be made in two separate checks as follows: (a) \$41,000 payable to the Lexington Law Group and associated with taxpayer identification number 94-3317175; and (b) \$7,500 payable to the Center for Environmental Health and associated with taxpayer identification number 94-3251981. Both of these payments shall be delivered to Lexington Law Group, 503 Divisadero Street, San Francisco, CA 94117.

5.3.4 To summarize, Settling Parties shall deliver checks made out to the payees and in the amounts set forth below:

Payee	Type	Amount	Deliver To
OEHHA	Penalty	\$6,675	OEHHA per Section 5.2.1
Center For Environmental Health	Penalty	\$2,225	LLG
Center For Environmental Health	ASP	\$6,600	LLG

Lexington Law Group	Fee and Cost	\$41,000	LLG
Center For Environmental Health	Fee and Cost	\$7,500	LLG

5.4 If Settling Manufacturer avails itself of the permanent warning option provided for by Section 3.4, Settling Manufacturer shall make an additional payment of \$16,000 and no cents to be split between a civil penalty and ASP as set forth herein, concurrently with its written notice as provided in Section 3.4.1. Of the additional payment, \$10,000 shall be a civil penalty, apportioned in accordance with Health & Safety Code § 25249.12 (25% to CEH and 75% to the State of California’s Office of Environmental Health Hazard Assessment (“OEHHA”). Accordingly, the OEHHA portion of the civil penalty payment of \$7,500 shall be made payable to OEHHA, associated with taxpayer identification number 68-0284486, and sent to the OEHHA address set forth in section 5.3.1 above. The CEH portion of the additional civil penalty payment of \$2,500 shall be made payable to the Center for Environmental Health and associated with taxpayer identification number 94-3251981. \$2,000 of the additional payment shall be made payable to Lexington Law Group, 503 Divisadero Street, San Francisco, CA 94117 for fees and costs associated with the additional payment. The remaining \$4,000 of the additional payment shall be made payable to the Center for Environmental Health and associated with taxpayer identification number 94-3251981 and shall be used as set forth in Section 5.3.2 above. Both payments to CEH shall be delivered to Lexington Law Group, 503 Divisadero Street, San Francisco, CA 94117.

5.5 **Failure to Comply With Payment Obligations.** Notwithstanding the provisions of the Enforcement of Judgments Law and Code of Civil Procedure §708.160, in the event that Settling Parties do not comply fully with their respective payment obligations under Section 5, in addition to any other enforcement mechanism available to CEH, CEH may obtain an order requiring the applicable Settling Party to submit to a Debtors Exam. In the event that an affected Settling Party fails to submit to any such Debtors Exam ordered by the Court, CEH may seek an order holding that Settling Party in contempt of Court.

6. MODIFICATION

6.1 **Written Consent.** This Consent Judgment may be modified from time to

1 time by express written agreement of the Parties with the approval of the Court, or by an order of
2 this Court upon motion and in accordance with law.

3 6.2 **Meet and Confer.** Any Party seeking to modify this Consent Judgment shall
4 attempt in good faith to meet and confer with all affected Parties prior to filing a motion to
5 modify the Consent Judgment.

6 **7. CLAIMS COVERED AND RELEASED**

7 7.1 Provided that Settling Parties comply in full with their individual obligations
8 under Section 5, this Consent Judgment is a full, final and binding resolution between CEH on
9 behalf of itself and the public interest and Settling Parties and their respective parents,
10 subsidiaries, affiliated entities that are under common ownership, directors, officers, employees,
11 agents, shareholders, successors, assigns, and attorneys (“Defendant Releasees”), and all entities
12 to which Settling Parties distribute or sell Covered Products, such as distributors, wholesalers,
13 customers, retailers, franchisees, licensors and licensees (“Downstream Defendant Releasees”), of
14 any violation of Proposition 65 based on failure to warn about alleged exposure to BPA contained
15 in Covered Products that were sold by Settling Parties prior to the Effective Date.

16 7.2 Provided that Settling Parties comply in full with their respective obligations
17 under Section 5, CEH, for itself, its agents, successors and assigns, releases, waives and forever
18 discharges any and all claims against that Settling Party, Defendant Releasees, and Downstream
19 Defendant Releasees arising from any violation of Proposition 65 or any other statutory or
20 common law claims that have been or could have been asserted by CEH individually regarding
21 the failure to warn about exposure to BPA contained in Covered Products sold by each Settling
22 Party prior to the Effective Date.

23 7.3 Compliance with the terms of this Consent Judgment by Settling Parties and
24 Defendant Releasees shall constitute compliance with Proposition 65 by Settling Parties,
25 Defendant Releasees, and Downstream Defendant Releasees with respect to any alleged failure to
26 warn about BPA in Covered Products manufactured by Settling Manufacturer and distributed or
27 sold by Settling Retailer after the Effective Date.

28 7.4 Nothing in this Section 7 affects Plaintiff’s right to commence or prosecute an

1 action under Proposition 65 against any person other than Settling Parties, Defendant Releasees,
2 or Downstream Defendant Releasees.

3 **8. NOTICE**

4 8.1 When CEH is entitled to receive any notice under this Consent Judgment, the
5 notice shall be sent by first class and electronic mail to:

6 Mark N. Todzo
7 Lexington Law Group
8 503 Divisadero Street
9 San Francisco, CA 94117
10 mtodzo@lexlawgroup.com

11 8.2 When Settling Parties are entitled to receive any notice under this Consent
12 Judgment, the notice shall be sent by first class and electronic mail to:

13 Todd O. Maiden
14 Reed Smith LLP
15 101 Second Street, Suite 1800
16 San Francisco, California 94105
17 tmaiden@reedsmith.com

18 8.3 Any Party may modify the person and address to whom the notice is to be sent
19 by sending the other Party notice by first class and electronic mail.

20 **9. COURT APPROVAL**

21 9.1 This Consent Judgment shall become effective upon entry by the Court.
22 Plaintiff shall prepare and file a Motion for Approval of this Consent Judgment and the Parties
23 shall support entry of this Consent Judgment.

24 9.2 If this Consent Judgment is not entered by the Court, it shall be of no force or
25 effect and shall never be introduced into evidence or otherwise used in any proceeding for any
26 purpose other than to allow the Court to determine if there was a material breach of Section 9.1.

27 **10. GOVERNING LAW AND CONSTRUCTION**

28 10.1 The terms of this Consent Judgment shall be governed by the laws of the State
of California.

11. ATTORNEYS' FEES

11.1 Should Plaintiff prevail on any motion, application for an order to show cause,

1 or other proceeding to enforce a violation of this Consent Judgment, Plaintiff shall be entitled to
2 its reasonable attorneys' fees and costs incurred as a result of such motion or application. Should
3 a Settling Party prevail on any motion application for an order to show cause or other proceeding,
4 that Settling Party may be awarded its reasonable attorneys' fees and costs against Plaintiff as a
5 result of such motion or application upon a finding by the Court that Plaintiff's prosecution of the
6 motion or application lacked substantial justification. For purposes of this Consent Judgment, the
7 term substantial justification shall carry the same meaning as used in the Civil Discovery Act of
8 1986, Code of Civil Procedure §§ 2016, *et seq.*

9 11.2 Except as otherwise provided in this Consent Judgment, each Party shall bear
10 its own attorneys' fees and costs.

11 11.3 Nothing in this Section 11 shall preclude a Party from seeking an award of
12 sanctions pursuant to law.

13 **12. ENTIRE AGREEMENT**

14 12.1 This Consent Judgment contains the sole and entire agreement and
15 understanding of the Parties with respect to the entire subject matter hereof, and any and all prior
16 discussions, negotiations, commitments or understandings related thereto, if any, are hereby
17 merged herein and therein. There are no warranties, representations or other agreements between
18 the Parties except as expressly set forth herein. No representations, oral or otherwise, express or
19 implied, other than those specifically referred to in this Consent Judgment have been made by any
20 Party hereto. No other agreements not specifically contained or referenced herein, oral or
21 otherwise, shall be deemed to exist or to bind any of the Parties hereto. Any agreements
22 specifically contained or referenced herein, oral or otherwise, shall be deemed to exist or to bind
23 any of the Parties hereto only to the extent that they are expressly incorporated herein. No
24 supplementation, modification, waiver or termination of this Consent Judgment shall be binding
25 unless executed in writing by the Party to be bound thereby. No waiver of any of the provisions
26 of this Consent Judgment shall be deemed or shall constitute a waiver of any of the other
27 provisions hereof whether or not similar, nor shall such waiver constitute a continuing waiver.
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1 **13. SUCCESSORS AND ASSIGNS**

2 13.1 This Consent Judgment shall apply to and be binding upon CEH and Settling Parties,
3 and their respective divisions, subdivisions and subsidiaries, and the successors or assigns of any
4 of them.

5 **14. RETENTION OF JURISDICTION**

6 14.1 This Court shall retain jurisdiction of this matter to implement or modify the
7 Consent Judgment.

8 **15. AUTHORITY TO STIPULATE TO CONSENT JUDGMENT**

9 15.1 Each signatory to this Consent Judgment certifies that he or she is fully
10 authorized by the Party he or she represents to stipulate to this Consent Judgment and to enter into
11 and execute the Consent Judgment on behalf of the Party represented and legally to bind that Party.

12 **16. NO EFFECT ON OTHER SETTLEMENTS**

13 16.1 Nothing in this Consent Judgment shall preclude CEH from resolving any claim
14 against an entity other than Settling Parties on terms that are different than those contained in this
15 Consent Judgment.

16 16.2 If CEH enters into any consent judgment (“Settlement Document”) with any
17 other entity with respect to an alleged failure to warn of alleged exposures to BPA in socks made
18 primarily of polyester with spandex in which it agrees to different injunctive terms (including
19 without limitation a different Test Protocol), it shall provide Settling Parties with notice thereof by
20 serving the Settlement Document on the Attorney General for posting on its public website, and
21 one or both Settling Parties may thereafter seek to modify this Consent Judgment to adopt those
22 injunctive terms and comply with them instead of those presently set forth in Section 3. If a Settling
23 Party seeks to adopt different injunctive terms, it shall provide notice to CEH consistent with
24 Section 6 of this Consent Judgment and CEH agrees to meet and confer in accordance with that
25 provision and not to oppose that Settling Party’s request for modification provided that the products
26 at issue in the Settlement Document are substantially similar to the Covered Products.

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IT IS SO ORDERED:

Dated: _____, 2023

Judge of the Superior Court

IT IS SO STIPULATED:

Dated: August 25, 2023

CENTER FOR ENVIRONMENTAL HEALTH



Charlie Pizarro
Interim Chief Executive Officer

Dated: August __, 2023

DSW SHOE WAREHOUSE, INC.

Signature

Printed Name

Title

Dated: August __, 2023

MAC DESIGN GROUP

Signature

Printed Name

Title

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IT IS SO ORDERED:

Dated: _____, 2023

Judge of the Superior Court

IT IS SO STIPULATED:

Dated: August __, 2023

CENTER FOR ENVIRONMENTAL HEALTH

Charlie Pizarro
Interim Chief Executive Officer

Dated: August 23, 2023

DSW SHOE WAREHOUSE, INC.



Signature

Miriam Shoap
Printed Name

Senior Manager, Legal Services
Title

Dated: August 23, 2023

MAC DESIGN GROUP



Signature

Mark McWhorter
Printed Name

President
Title

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EXHIBIT A

“Test Protocol” as defined in Section 2.3 of the Consent Judgment means the following test method:

- a. Obtain homogenized 1 gram sample of the sock by shredding the entire sock and taking a representative 1-gram sample of the shreds.
- b. Add the 1-gram sock sample to 10 ml of acetonitrile
- c. Heat the solution using a hot plate for 3 hours at 40 degrees Celsius
- d. Analytical method - Isotope dilution LC-Tandem MS (LC-MS)
- e. Limit of detection 1 ppm
- f. Reporting -- BPA concentration in mg of BPA per kg of sample