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Attorneys for Plaintiff

FILED
ALAMEDA COUNTY

SEP - 5 2017

CLERK OF THE SUPERIOR COURT

By _____ Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ALAMEDA

PRECILA BALABBO,

Plaintiff,

vs.

SALLY BEAUTY SUPPLY, LLC,

Defendant.

Case No. RG17860443
~~PROPOSED~~ CONSENT JUDGMENT
Judge: Robert McGuiness
Dept.: 22
Hearing Date: ~~August 22, 2017~~ September 5, 2017
Hearing Time: 3:00 PM
Reservation #: R-1865181

1 **1. INTRODUCTION**

2 **1.1 Parties**

3 This Consent Judgment is entered into by and between plaintiff Precila Balabbo,
4 ("Balabbo") on the one hand, and Sally Beauty Supply, LLC ("Defendant") on the other hand,
5 with Balabbo and Defendant individually referred to as a "Party" and collectively as the "Parties."

6 **1.2 Plaintiff**

7 Balabbo is an individual residing in California who seeks to promote awareness of
8 exposures to chemicals.

9 **1.3 Defendant**

10 Defendant employs ten or more persons and is a person in the course of doing business for
11 purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, Health and Safety
12 Code Section 25249.6 *et seq.* ("Proposition 65").

13 **1.4 General Allegations**

14 Balabbo alleges that Defendant manufactures, imports, sells, or distributes for sale to
15 consumers in the State of California Salon Care Foam Hair Roller Cases containing Di(2-
16 ethylhexyl)phthalate ("DEHP") without first providing the clear and reasonable exposure warning
17 required by Proposition 65. DEHP is listed pursuant to Proposition 65 as a chemical that is
18 known to the State of California to cause cancer and birth defects and other reproductive harm.

19 **1.5 Product Description**

20 The products covered by this Consent Judgment are Salon Care Foam Hair Roller Cases,
21 UPC No. 5 033102 833615 that contain DEHP, and that are manufactured, sold, and/or
22 distributed for authorized sale to consumers in California by Defendant ("Products").

23 **1.6 Notice of Violation**

24 On or about January 4, 2017, Balabbo served Defendant and certain requisite public
25 enforcement agencies with a "60-Day Notice of Violation" ("Notice"), a document that informed
26 the recipients of Balabbo's allegation that Defendant violated Proposition 65 by failing to warn its
27 customers and consumers in California that the Products expose users to DEHP.

28

1 1.7 **Complaint**

2 After the 60-day notice period was exhausted without an authorized public prosecutor of
3 Proposition 65 having asserted such claims, Balabbo filed the instant action against Defendant
4 ("Complaint") for the alleged violations of Health & Safety Code § 25249.6 that are the subjects
5 of the Notice.

6 1.8 **No Admission**

7 Defendant denies the material factual, and legal allegations contained in the Notice and
8 maintains that all of the products it has manufactured, sold, or distributed for authorized sale in
9 California, including the Products, have been, and are, in compliance with all laws, including
10 Proposition 65. Nothing in this Consent Judgment shall be construed as an admission by
11 Defendant of any fact, finding, conclusion of law, issue of law, or violation of law; nor shall
12 compliance with this Consent Judgment constitute or be construed as an admission by Defendant
13 of any fact, finding, conclusion of law, issue of law, or violation of law; the same being
14 specifically denied by Defendant. This section shall not, however, diminish or otherwise affect
15 Defendant's obligations, responsibilities, and duties under this Consent Judgment.

16 1.9 **Consent to Jurisdiction**

17 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
18 jurisdiction over Defendant as to the allegations in the Complaint, that venue is proper in
19 Alameda County, and that this Court has jurisdiction to enter, enforce, and modify the provisions
20 of this Consent Judgment.

21 1.10 **Effective Date**

22 For purposes of this Consent Judgment, the term "Effective Date" shall mean the date on
23 which Balabbo serves notice on the Defendant and the Office of the California Attorney General
24 that the Court has approved and entered this Consent Judgment.

25 2. **INJUNCTIVE RELIEF: REFORMULATION AND WARNINGS**

26 By no later than the Compliance Date, and continuing thereafter, Defendant shall only
27 manufacture or import for potential sale in California, Products that meet the Reformulation
28

1 Standard set forth in Section 2.1 below ("Reformulated Products") or which meet the warning
2 requirements set forth in Section 2.2 below.

3 **2.1 Reformulation Standard**

4 For purposes of this Consent Judgment, Reformulated Products are defined as Products
5 that contain no more than 1,000 parts per million (0.1%) each of any of the following chemicals:
6 DEHP, Di-isodecyl phthalate (DIDP), Diisononyl Phthalate (DINP); Butyl benzyl phthalate
7 (BBP), Di-n-hexyl Phthalate (DnHP) and Di-n-butyl Phthalate (DBP) ("Listed Phthalates"). For
8 purposes of determining compliance with this Consent Judgment, the content of Listed Phthalates
9 shall be analyzed pursuant to EPA testing methodologies 3580A and 8270C or equivalent
10 methodologies utilized by state or federal agencies for the purpose of determining Listed
11 Phthalate content in a solid substance.

12 **2.2 Product Warnings**

13 For all Products that contain a Listed Phthalate in an amount exceeding the Reformulation
14 Standard set forth in Section 2.1 above, and which are manufactured, sold or packaged for
15 shipment to California following the Compliance Date, Defendant shall provide the following
16 Proposition 65 warning:

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

19 or

20 **WARNING:** This product can expose you to chemicals including [name of
21 chemical], which are known to the State of California to cause
22 cancer. For more information go to www.P65Warnings.ca.gov.

23 where the brackets may be filled with one or more chemicals listed pursuant to Proposition 65
24 and which Defendant has a reasonable basis to know may be in the Products.¹ The above warning
25 statement shall be placed or affixed on the Product or its package so as to be able to be read and

26 ¹ The "Compliance Date" shall mean October 31, 2017 or six months following the Effective Date, whichever arises
27 earlier. Products manufactured for and imported by the Defendant prior to the Compliance Date are exempted from
28 the requirements set forth in Sections 2.1 and 2.2 above and may be offered for sale in California and sold through as
is.

² Where only one Listed Phthalate exceeds the Reformulation Standard, Defendant may elect to have the warning
statement refer to the word "chemical" in the singular.

1 understood by an ordinary individual prior to purchase or use or it may be displayed at the point
2 of purchase prior to final consummation of the sales transaction by which the product is acquired
3 by someone in California.

4 **3. STATUTORY PENALTY PAYMENTS**

5 **3.1 Civil Penalty**

6 Defendant shall pay \$2,000.00 in civil penalties pursuant to California Health & Safety
7 Code § 25249.7(b) in accordance with this Section. This penalty payment shall be allocated in
8 accordance with California Health & Safety Code § 25249.12(c)(1) and (d), with 75% of the
9 funds remitted to the California Office of Environmental Health Hazard Assessment
10 ("OEHHA") and the remaining 25% of the penalty remitted to Balabbo. More specifically,
11 within fifteen (15) business days of the Effective Date, Defendant shall issue two separate
12 checks for the civil penalty payment to (a) "OEHHA" in the amount of \$1,500.00 and with the
13 memo line on the check indicating "Prop 65 Penalties—Balabbo v. Sally Beauty Supply, LLC"
14 (Defendant may reference OEHHA's Tax Identification Number of 68-0284486 for this check);
15 and (b) "Brodsky and Smith, LLC Trust Account" in the amount of \$500.00 (for which Balabbo
16 shall provide Defendant a completed IRS Form W-9 with a tax identification number within two
17 days following the Effective Date, if not beforehand). These checks shall be delivered to the
18 addresses listed in Section 3.4 below.

19 **3.2 Payment Delivery**

20 (a) Payment to Balabbo shall be delivered to the following address:

21 Jordan Schatz, Esq.
22 Brodsky & Smith, LLC
23 2 Bala Plaza, Suite 510
Bala Cynwyd, PA 19004

24 (b) Payment to OEHHA shall be delivered to one of the following addresses:

25 For United States Postal Service Delivery:

26 Mike Gyurics
27 Fiscal Operations Branch Chief
Office of Environmental Health Hazard Assessment
28 P.O. Box 4010
Sacramento, CA 95812-4010

1 Or

2 For Non-United States Postal Service Delivery:

3 Mike Gyurics
4 Fiscal Operations Branch Chief
5 Office of Environmental Health Hazard Assessment
6 1001 I Street
7 Sacramento, CA 95814

8 **4. REIMBURSEMENT OF FEES AND COSTS**

9 Defendant shall pay Balabbo \$22,500.00 for fees and costs incurred as a result of
10 investigating, bringing this matter to Defendant's attention, and negotiating a settlement in the
11 public interest. Defendant shall make its checks payable to Brodsky & Smith, LLC and shall
12 deliver payment to the address listed in Section 3(a) above within fifteen (15) business days of the
13 Effective Date. To facilitate timely payment, Balabbo shall provide Defendant with a completed
14 IRS Form W-9 with Brodsky & Smith, LLC's tax identification number within two days
15 following the Effective Date if not beforehand.

16 **5. CLAIMS COVERED AND RELEASED**

17 **5.1 Balabbo's Public Release of Proposition 65 Claims**

18 Balabbo, acting on her own behalf and in the public interest, releases Defendant, and its
19 affiliated entities, directors, officers, employees, and attorneys, as well as each entity from whom
20 they acquire the Products or the Products' components, including but not limited to, Win-Way
21 International Ltd., and each entity to whom they directly or indirectly distribute or sell Products,
22 including, but not limited to, distributors, wholesalers, dealers, customers, retailers, franchisees,
23 cooperative members, licensors, and licensees ("Defendant Releasees"); from all claims for
24 violations of Proposition 65 based on exposures to DEHP from Products manufactured, sold, or
25 packaged by Defendant prior to the Effective Date.³

26 **5.2 Balabbo's Private Releases of Claims**

27 Balabbo, in her individual capacity only, also provides a release herein to Defendant
28 Releasees, which shall be effective as a full and final accord and satisfaction, as a bar to all

³ Following the Effective Date, compliance with the terms of this Consent Judgment shall be deemed compliance with Proposition 65 with respect to exposures to DEHP from the Products.

1 actions, causes of action, obligations, costs, expenses, attorneys' fees, damages, losses, claims,
2 liabilities and demands of any nature, character, or kind, whether known or unknown, suspected
3 or unsuspected, arising out of alleged or actual exposures to any of the chemicals listed under
4 Proposition 65 (including but not limited to the Listed Phthalates) in the Products. In this regard,
5 Balabbo hereby acknowledges that she is familiar with Section 1542 of the California Civil Code,
6 which provides as follows:

7 **A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE**
8 **CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE**
9 **TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM OR HER MUST**
10 **HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR.**

11 **5.3 Defendant's Release of Balabbo**

12 Defendant, on its own behalf and on behalf of its past and current agents, representatives,
13 attorneys, successors, and assignees, hereby waives any and all claims that it may have against
14 Balabbo and her attorneys and other representatives for any and all actions taken or statements
15 made (or those that could have been taken or made) by Balabbo and her attorneys and other
16 representatives, whether in the course of investigating claims, otherwise seeking to enforce
17 Proposition 65 against Defendant in this matter, or with respect to the Products.

18 **6. COURT APPROVAL**

19 This Consent Judgment is not effective until it is approved and entered by the Court and
20 shall be null and void if, for any reason, it is not approved and entered by the Court within one
21 year after it has been fully executed by all Parties unless the Parties mutually agree to extend that
22 time period due to what they mutually agree are reasonably unforeseeable circumstances.

23 **7. SEVERABILITY**

24 If, subsequent to the execution of this Consent Judgment, any provision of this Consent
25 Judgment is held by a court to be unenforceable, the validity of the remaining provisions shall not
26 be adversely affected.

1 **8. GOVERNING LAW**

2 The terms of this Consent Judgment shall be governed by the laws of the State of
3 California and apply within the State of California. In the event that Proposition 65 is repealed or
4 is otherwise rendered inapplicable by reason of law generally, or as to the Products, then
5 Defendant may provide written notice to Balabbo of any asserted change in the law and have no
6 further obligations pursuant to this Consent Judgment, with respect to, and to the extent that, the
7 Products are so affected.

8 **9. NOTICES**

9 Unless specified herein, all correspondence and notices required to be provided pursuant
10 to this Settlement Agreement shall be in writing and personally delivered or sent by: (i) first-class
11 (registered or certified mail) return receipt requested; or (ii) overnight or two-day courier on any
12 Party by the other Party to the following addresses:

13 For Defendant:

14 Michael Steel
15 MSteel@mofo.com
16 Morrison & Foerster LLP
17 425 Market Street, 31st Floor
18 San Francisco, CA 94105

19 For Balabbo:

20 Jordan Schatz, Esq.
21 jschatz@brodskysmith.com
22 Brodsky & Smith, LLC
23 2 Bala Plaza, Suite 510
24 Bala Cynwyd, PA 19004

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

27 **10. COUNTERPARTS; FACSIMILE SIGNATURES**

28 This Consent Judgment may be executed in counterparts and by facsimile or portable
document format (PDF) signature, each of which shall be deemed an original, and all of which,
when taken together, shall constitute one and the same document.

1. **11. POST EXECUTION ACTIVITIES**

2. Balabbo agrees to comply with the reporting form requirements referenced in Health &
3. Safety Code § 25249.7(f). The Parties further acknowledge that, pursuant to Health & Safety
4. Code § 25249.7(f), a noticed motion is required to obtain judicial approval of the settlement
5. manifested in this Consent Judgment. In furtherance of obtaining such approval, Balabbo shall
6. file and serve a noticed motion for approval of this Consent Judgment within sixty (60) days of its
7. execution by all Parties and assure that the Office of the California Attorney General is served
8. with said motion and all supporting papers at least forty-five (45) days prior to the scheduled
9. hearing thereon. Defendant agrees to support the entry of this Consent Judgment once such
10. motion has been filed.

11. **12. ENFORCEMENT**

12. The Court shall retain jurisdiction to oversee, enforce and/or modify the terms of this
13. Consent Judgment. Any Party may, after meeting and conferring, by motion or application for an
14. order to show cause before this Court, enforce the terms and conditions contained in this Consent
15. Judgment. However, before filing such a motion or an application for an order to show cause,
16. Balabbo shall provide Defendant with 30 (thirty) days written notice of any alleged violations of
17. the terms of Injunctive Relief contained in Section 2 herein. As long as Defendant cures any such
18. alleged violations within 30 (thirty) days of receipt of the written notice by ceasing the sale of the
19. Covered Product in California until such time as warnings are provided for it pursuant to Section
20. 2.2 above or testing reveals that the reformulation standard has been met for it pursuant to Section
21. 2.1 above; then there shall be deemed no good cause for enforcement or actionable violation.

22. **13. INTEGRATION**

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

1 14. **MODIFICATION**

2 This Consent Judgment may be modified only by: (i) a written agreement of the Parties
3 and upon entry, following at least twenty-one (21) days' notice to the Office of the Attorney
4 General, of a modified consent judgment by the Court thereon; or (ii) upon a successful motion or
5 application of any Party, which shall also be served on the Office of the California Attorney
6 General with at least twenty-one (21) days' notice, and the entry of a modified consent judgment
7 by the Court. Any Party seeking to modify this Consent Judgment shall attempt in good faith to
8 meet and confer with all affected Parties prior to filing a motion to modify the Consent Judgment.

9 15. **AUTHORIZATION**

10 The undersigned are authorized to execute this Consent Judgment on behalf of their
11 respective Parties and have read, understood and agreed to all of the terms and conditions of this
12 Consent Judgment.

13 **AGREED TO:**

14 Date: 5/17/2017

15 By: 
16 Precila Balabbo

AGREED TO:

Date: _____

By: _____
Sally Beauty Supply, LLC

17 **IT IS SO ORDERED, ADJUDGED AND DECREED:**

18
19
20 Dated: _____

Judge of Superior Court

1 14. MODIFICATION

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14 Date: _____

15 By: _____
16 Precila Balabbo

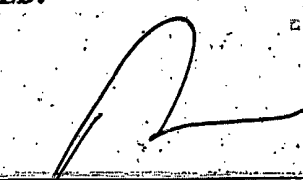
AGREED TO:

14 Date: JUN 6, 2017

15 By: 
16 Sally Beauty Supply LLC

17 **IT IS SO ORDERED, ADJUDGED AND DECREED:**

18
19
20 Dated: 9/5/17


21 _____
22 Judge of Superior Court

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