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FILED
ALAMEDA COUNTY

MAY 24 2019

CLERK OF THE SUPERIOR COURT
By *[Signature]* Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ALAMEDA

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PRECILA BALABBO & EMA BELL,

Plaintiffs,

v.

MAKEUP ERASER GROUP, LLC,

Defendant.

Case No.: RG19002933
CONSENT JUDGMENT

Judge: Noel Wise
Dept.: 24
Hearing Date: May 16, 2019
Hearing Time: 9:00 AM
Reservation #: R-2062380

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1. INTRODUCTION

1.1 **The Parties.** This Consent Judgment is entered into by and between Precila Balabbo ("Balabbo") and Ema Bell ("Bell") (collectively, "Plaintiffs"), each acting on behalf of the public interest, and MakeUp Eraser Group, LLC ("MakeUp Eraser Group" or "Defendant") with Plaintiffs and Defendant collectively referred to as the "Parties" and each of them as a "Party." Balabbo and Bell are individuals residing in California that seek to promote awareness of exposures to toxic chemicals and improve human health by reducing or eliminating hazardous substances contained in consumer products. Plaintiffs allege, and for purposes of this settlement only MakeUp Eraser Group does not dispute, that MakeUp Eraser Group is a person in the course of doing business for purposes of Proposition 65, Cal. Health & Safety Code §§ 25249.6 et seq.

1.2 **Allegations and Representations.** Plaintiffs allege that Defendant has exposed individuals to di(2-ethylhexyl) phthalate (DEHP) from its sales of MakeUp Eraser Group manufactured carry/travel cases/bags/totes ("Covered Products") without providing a clear and reasonable exposure warning pursuant to Proposition 65. DEHP is listed under Proposition 65 as a chemical known to the State of California to cause cancer and reproductive toxicity.

1.3 **Notice of Violation/Complaint.** On or about October 25, 2018, Bell served MakeUp Eraser Group, The TJX Companies, Inc. ("TJX"), and various public enforcement agencies with a document entitled "Notice of Violation of California Health & Safety Code § 25249.6, et seq." (the "October Notice"). On or about November 5, 2018, Balabbo served MakeUp Eraser Group, CVS Pharmacy, Inc. ("CVS"), and various public enforcement agencies with a document entitled "Notice of Violation of California Health & Safety Code § 25249.6, et seq." (the "November Notice")¹. The Notices provided MakeUp Eraser Group and such others, including public enforcers, with notice that alleged that MakeUp Eraser Group was in violation of California Health & Safety Code § 25249.6, for failing to warn California consumers and customers that use of the Covered Products will expose them to DEHP. To the best of the

¹ The October Notice and the November Notice are collectively referred to herein as, the "Notices."

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Parties' knowledge, no public enforcer has brought and is diligently prosecuting the claims alleged in the Notices. On January 16, 2019, Plaintiffs filed a complaint (the "Complaint") in the matter.

1.4 For purposes of this Consent Judgment only, the Parties stipulate that this Court has jurisdiction over Defendant as to the allegations contained in the Complaint filed in this matter, that venue is proper in the County of Alameda, and that this Court has jurisdiction to approve, enter, and oversee the enforcement of this Consent Judgment as a full and final binding resolution of all claims which were or could have been raised in the Complaint based on the facts alleged therein and/or in the Notices.

1.5 Defendant denies the material factual and legal allegations contained in the Notices and Complaint. Defendant maintains that it has not violated Proposition 65 and that, to the best of its knowledge, all products that are or have been sold and distributed in California, including the Covered Products, have been and are in compliance with all laws. Nothing in this Consent Judgment shall be construed as an admission by Defendant of any fact, finding, conclusion, issue of law, or violation of law; nor shall compliance with this Consent Judgment constitute or be construed as an admission by Defendant of any fact, finding, conclusion, issue of law, or violation of law, such being specifically denied by Defendant. However, this section shall not diminish or otherwise affect the obligations, responsibilities, and duties of Defendant under this Consent Judgment.

2. **DEFINITIONS**

2.1 **Covered Products.** The term "Covered Products" means MakeUp Eraser Group carry/travel cases/bags/totes, including but not limited to Flamingo and Watermelon styled cases, that are manufactured, imported, distributed, sold, and/or offered for sale in California by MakeUp Eraser Group.

2.2 **Effective Date.** The term "Effective Date" means the date this Consent Judgment is entered as a Judgment of the Court.

1 **3. INJUNCTIVE RELIEF: WARNINGS**

2 3.1 **Reformulation of Covered Products.** Commencing ninety (90) days after the
3 Effective Date, and continuing thereafter, Covered Products that MakeUp Eraser Group directly
4 manufactures, imports, distributes, sells, or offers for sale in California shall either: (a) be
5 Reformulated Products pursuant to § 3.2, below; or (b) be labeled with a clear and reasonable
6 warning pursuant to §§ 3.3 and 3.4, below. For purposes of this Consent Judgment, a
7 "Reformulated Product" is a Covered Product that is in compliance with the standard set forth in
8 § 3.2 below. The warning requirement set forth in §§ 3.3 and 3.4 shall not apply to any
9 Reformulated Product.

10 3.2 **Reformulation Standard.** "Reformulated Products" shall mean Covered
11 Products that contain concentrations less than or equal to 0.1% (1,000 parts per million (ppm)) of
12 DEHP when analyzed pursuant to U.S. Environmental Protection Agency testing methodologies
13 3580A and 8270C or other methodology utilized by federal or state government agencies for the
14 purpose of determining the phthalate content in a solid substance.

15 3.3 **Clear and Reasonable Warning.** Commencing ninety (90) days after the
16 Effective Date, and continuing thereafter, a clear and reasonable exposure warning as set forth in
17 §§ 3.3 and 3.4 must be provided for all Covered Products that Defendant manufactures, imports,
18 distributes, sells, or offers for sale in California that is not a Reformulated Product. There shall
19 be no obligation for Defendant to provide a warning for Covered Products that enter the stream of
20 commerce up to and through ninety (90) days after the Effective Date. The warning shall consist
21 of either the **Warning** or **Alternative Warning** described in §§ 3.3(a) or (b), respectively:

22 (a) **Warning.** The "Warning" shall consist of the statement:

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

27 ² If, from its own testing or otherwise, MakeUp Eraser knows the Product will expose
28 persons to diisononyl phthalate (DINP) *and not* DEHP, MakeUp Eraser shall provide the
following **Warning** in lieu of the above: "**⚠ WARNING:** This product can expose you to
(Footnote continues on next page.)

1 (b) **Alternative Warning:** MakeUp Eraser Group may, but is not required to, use the
2 alternative short-form warning as set forth in this § 3.3(b) ("**Alternative Warning**") as follows:

3 **⚠ WARNING: Cancer and Reproductive Harm - www.P65Warnings.ca.gov.**³

4 3.4. A **Warning** or **Alternative Warning** provided pursuant to § 3.3 must print the
5 word "**WARNING:**" in all capital letters and in bold font, followed by a colon. The warning
6 symbol to the left of the word "**WARNING:**" must be a black exclamation point in a yellow
7 equilateral triangle with a black outline, except that if the sign or label for the Covered Product
8 does not use the color yellow, the symbol may be in black and white. The symbol must be in a
9 size no smaller than the height of the word "**WARNING:**". The warning shall be affixed to or
10 printed on the Covered Product's packaging or labeling, or on a placard, shelf tag, sign or
11 electronic device or automatic process, providing that the warning is displayed with such
12 conspicuousness, as compared with other words, statements, or designs as to render it likely to be
13 read and understood by an ordinary individual under customary conditions of purchase or use. A
14 warning may be contained in the same section of the packaging, labeling, or instruction booklet
15 that states other safety warnings, if any, concerning the use of the Covered Product and, for the
16 **Alternative Warning**, shall be at least the same size as those other safety warnings.

17 If MakeUp Eraser Group sells Covered Products via its internet website to customers
18 located in California, the **Warning** or **Alternative Warning** may be provided by including it or a
19 clearly marked hyperlink using the word "**WARNING**" on the product display page, or by
20

21 (Footnote continued from previous page.)

22 chemicals including diisononyl phthalate (DINP), which is known to the State of California to
23 cause cancer. For more information go to www.P65Warnings.ca.gov.

24 If, from its own testing or otherwise, MakeUp Eraser knows the Product will expose
25 persons to diisononyl phthalate (DINP) *and not* DEHP, MakeUp Eraser shall provide the
26 following **Alternative Warning** in lieu of the above: **⚠ WARNING: Cancer -**
27 www.P65Warnings.ca.gov.

1 otherwise prominently displaying the Warning or Alternative Warning to the purchaser prior to
2 completing the purchase.

3 **3.5 Compliance with Warning Regulations.** Defendant shall be deemed to be in
4 compliance with the warning requirements of this Consent Judgment by either adhering to §§ 3.3
5 and 3.4 of this Consent Judgment or by complying with Proposition 65 warning regulations
6 adopted by the State of California's Office of Environmental Health Hazard Assessment
7 ("OEHHA") after the Effective Date.

8 **4. MONETARY TERMS**

9 **4.1 Civil Penalty.** MakeUp Eraser Group shall pay \$3,000.00 as a Civil Penalty
10 pursuant to Health and Safety Code section 25249.7(b), to be apportioned in accordance with
11 California Health & Safety Code § 25192, with 75% of these funds remitted to OEHHA and the
12 remaining 25% of the Civil Penalty remitted to Plaintiffs, as provided by California Health &
13 Safety Code § 25249.12(d).

14 **4.1.1** Within ten (10) days of the Effective Date, MakeUp Eraser Group shall
15 issue three (3) separate checks for the Civil Penalty payment to (a) "OEHHA" in the amount of
16 \$2,250.00; to (b) "Brodsky & Smith, LLC in Trust for Balabbo" in the amount of \$375.00; and to
17 (c) "Brodsky & Smith, LLC in Trust for Bell" in the amount of \$375.00. Payment owed to
18 Plaintiffs pursuant to this Section shall be delivered to the following payment address:

19 Evan J. Smith, Esquire
20 Brodsky & Smith, LLC
21 Two Bala Plaza, Suite 510
22 Bala Cynwyd, PA 19004

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

25 For United States Postal Service Delivery:

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

 For Non-United States Postal Service Delivery:

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

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

8 4.2 **Attorneys' Fees.** Within ten (10) days of the Effective Date, MakeUp Eraser
9 Group shall pay \$24,000.00 to Brodsky & Smith, LLC ("Brodsky Smith") as complete
10 reimbursement for Plaintiffs' attorneys' fees and costs incurred as a result of investigating,
11 bringing this matter to MakeUp Eraser Group's attention, litigating and negotiating and obtaining
12 judicial approval of a settlement in the public interest, pursuant to Code of Civil Procedure §
13 1021.5.

14 **5. RELEASE OF ALL CLAIMS**

15 5.1 This Consent Judgment is a full, final, and binding resolution between Balabbo
16 and Bell, each acting on her own behalf, and on behalf of the public interest, and MakeUp Eraser
17 Group, and its parents, shareholders, members, directors, officers, managers, employees,
18 representatives, agents, attorneys, divisions, subdivisions, subsidiaries, partners, sister companies,
19 and affiliates, and their predecessors, successors and assigns (all collectively "Defendant
20 Releasees"), and all entities from whom Makeup Eraser Group and Defendant Releasees obtain
21 and to whom they directly or indirectly distribute or sell Covered Products, including but not
22 limited to manufacturers, suppliers, distributors, wholesalers, customers, licensors, licensees
23 retailers, franchisees, marketplace hosts, and cooperative members, including but not limited to
24 TJX, CVS, and each of their respective subsidiaries, affiliates and parents, franchisees,
25 cooperative members and licensees (all collectively "Downstream Releasees"), of all claims for
26 alleged violations of Proposition 65 based on exposure to DEHP from Covered Products as set
27 forth in the Notices, with respect to any Covered Products manufactured, imported, distributed,
28 offered for sale, or sold by MakeUp Eraser Group through ninety (90) days after the Effective
Date. This Consent Judgment shall have preclusive effect such that no other person or entity,

1 whether purporting to act in his, her, or its interests or the public interest shall be permitted to
2 pursue and/or take any action with respect to any violation of Proposition 65 that was alleged in
3 the Complaint, or that could have been brought pursuant to the Notices against MakeUp Eraser
4 Group, Defendant Releasees, and/or the Downstream Releasees of the Covered Products
5 ("Proposition 65 Claims"). Compliance with the terms of this Consent Judgment constitutes
6 compliance with Proposition 65 with regard to the Covered Products.

7 5.2 In addition to the foregoing, Balabbo and Bell, each on behalf of herself and
8 Releasees hereby waives all rights to institute or participate in, directly or indirectly, any form of
9 legal action and releases MakeUp Eraser Group, Defendant Releasees, and Downstream
10 Releasees from any and all manner of actions, causes of action, claims, demands, rights, suits,
11 obligations, debts, contracts, agreements, promises, liabilities, damages, charges, losses, costs,
12 expenses, and attorneys' fees, of any nature whatsoever, known or unknown, in law or equity,
13 fixed or contingent, now or in the future, with respect to any alleged violations of Proposition 65
14 related to or arising from Covered Products manufactured, imported, distributed, offered for sale,
15 or sold by MakeUp Eraser Group, Defendant Releasees or Downstream Releasees. With respect
16 to the foregoing waivers and releases in this paragraph, Plaintiffs hereby specifically waive any
17 and all rights and benefits which they now have, or in the future may have, conferred by virtue of
18 the provisions of § 1542 of the California Civil Code, which provides as follows:

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

25 5.3 MakeUp Eraser Group waives any and all claims against Plaintiffs, their attorneys
26 and other representatives, for any and all actions taken or statements made (or those that could
27 have been taken or made) by Plaintiffs and their attorneys and other representatives, whether in
28 the course of investigating claims or otherwise seeking enforcement of Proposition 65 against it
in this matter, and/or with respect to Covered Products.

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6. INTEGRATION

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

7. GOVERNING LAW

7.1 The terms of this Consent Judgment 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 as to Covered Products, then Defendant shall have no further obligations pursuant to this Consent Judgment with respect to, and to the extent that, Covered Products are so affected.

8. NOTICES

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

For Defendant:

Daniel McCarthy, CEO
MakeUp Eraser
17224 N. 43rd Ave Suite 106
Glendale, AZ 85308

With copy to:

Ann G. Grimaldi
Grimaldi Law Offices
535 Mission Street, 14th Floor
San Francisco, CA 94105

And

For Plaintiffs:

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

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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.

9. COUNTERPARTS; FACSIMILE SIGNATURES

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

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

10.1 Plaintiffs agree to comply with the requirements set forth in California Health & Safety Code § 25249.7(f) and to promptly bring a Motion for Approval of this Consent Judgment. Defendant agrees it shall reasonably support approval of such Motion.

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

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

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.

1 12.2 Nothing in this Section shall preclude a Party from seeking an award of sanctions
2 pursuant to law.

3 **13. RETENTION OF JURISDICTION**

4 13.1 This Court shall retain jurisdiction of this matter to implement or modify the
5 Consent Judgment.

6 **14. AUTHORIZATION**

7 14.1 The undersigned are authorized to execute this Consent Judgment on behalf of
8 their respective Parties and have read, understood and agree to all of the terms and conditions of
9 this
10 document and certify that he or she is fully authorized by the Party he or she represents to execute
11 the Consent Judgment on behalf of the Party represented and legally bind that Party. Except as
12 explicitly provided herein each Party is to bear its own fees and costs.

13
14 **AGREED TO:**

AGREED TO:

15 Date: 3/14/2019
16 By: 
17 PRECIA BALABBO

Date: _____
By: _____
EMA BELL

18 **AGREED TO:**

19
20 Date: 03/06/2019
21 By: 
22 MAKEUP ERASER GROUP, LLC

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

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25 Dated: _____
26 _____ Judge of Superior Court

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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: _____
By: _____
PRECILA BALABBO

Date: 3/19/2019
By: _____
EMA BELL

AGREED TO:

Date: 03/06/2019
By: _____
Daniel McCarthy
MAKEUP ERASER GROUP, LLC

IT IS SO ORDERED, ADJUDGED AND DECREED:

Dated: 5/16/19 _____
Judge of Superior Court