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Attorneys for Plaintiff Ecological Alliance, LLC

FILED
Superior Court of California
County of Los Angeles

01/10/2020

Sherri R. Carter, Executive Officer / Clerk of Court

By: C. Guerrero Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

(Unlimited Jurisdiction)

ECOLOGICAL ALLIANCE, LLC, a California
limited liability company,

Plaintiff,

v.

KIDS PREFERRED, LLC, a New Jersey
limited liability company,

Defendant.

Case No.: 19STCV36768

~~PROPOSED~~ STIPULATED
CONSENT JUDGMENT

1 Plaintiff Ecological Alliance, LLC (“Plaintiff”), and Defendant Kids Preferred, LLC
2 (“Defendant”) hereby enter into this Stipulated Consent Judgment (“Consent Judgment”) as
3 follows:

4 WHEREAS: On or about November 30, 2018, Plaintiff, through Plaintiff’s counsel,
5 served a 60-Day Notice to Defendant and Burlington Coat Factory Direct Corporation, and also to
6 the California Attorney General, the District Attorneys of every County in the State of California,
7 and the City Attorneys for every City in the State of California with a population greater than
8 750,000 (collectively, “Public Prosecutor(s)”) alleging that Defendant violated California’s Safe
9 Drinking Water and Toxic Enforcement Act of 1986, California Health and Safety Code §
10 25249.6, et seq., and its implementing regulations (collectively, “Proposition 65”) and that
11 Plaintiff intended to file an enforcement action in the public interest; and

12 WHEREAS: Plaintiff alleges that Defendant manufactured and/or distributed activity
13 gyms containing Diisononyl phthalate (“DINP”), (the “Covered Products”) that were sold or
14 distributed for sale in California and further alleges that those Covered Products expose
15 consumers in the State of California to DINP, which is listed by the State of California pursuant
16 to California Health and Safety Code § 25249.8; and

17 WHEREAS: Plaintiff further alleges that persons in the State of California were exposed
18 to DINP in Covered Products without being provided the Proposition 65 warning set out at
19 California Health and Safety Code § 25249.6 and its implementing regulations (“Proposition 65
20 Warning”);

21 WHEREAS: Defendant denies the allegations of the 60-Day Notice, and denies that it has
22 violated Proposition 65 and expressly denies that it has engaged in any wrongdoing whatsoever,

23 WHEREAS: Plaintiff seeks to provide the public with Proposition 65 warnings and
24 believes that this objective is achieved by the actions described in this Consent Judgment; and

25 WHEREAS: Plaintiff and Defendant wish to resolve their differences without the delay
26 and expense of litigation.

27 NOW THEREFORE BE IT RESOLVED AND AGREED UPON AS BETWEEN
28 PLAINTIFF ACTING IN THE PUBLIC INTEREST AND DEFENDANT AS FOLLOWS:

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1. INTRODUCTION

1.1 On November 30, 2018, Plaintiff served the 60-Day Notice upon Defendant, Burlington Coat Factory Direct Corporation and on Public Prosecutors. No Public Prosecutors commenced an enforcement action. No Public Prosecutor having commenced an enforcement action, Plaintiff proceeded to file its Complaint against Defendant in the present action.

1.2 Defendant employs ten (10) or more persons.

1.3 For purposes of this Consent Judgment only, Plaintiff and Defendant (the “Parties”) stipulate that: 1) this Court has jurisdiction over the allegations of violation contained in the Complaint, and jurisdiction over Defendant as to the acts alleged in the Complaint; 2) venue is proper in the County of Los Angeles; and 3) this Court has jurisdiction to enter this Consent Judgment as a full and final resolution of all claims which were or could have been raised in the Complaint based on the facts alleged therein with respect to the Covered Products, and of all claims which were or could have been raised by any person or entity based in whole or in part, directly or indirectly, on the facts alleged in the 60-Day Notice, in the present action, or arising therefrom or related thereto, with respect to Covered Products, including any Proposition 65 claim arising out of an exposure to Covered Products (collectively, “Proposition 65 Claims”).

1.4 As set forth more fully in Section 5, the Parties enter into this Consent Judgment as a full and final settlement of the Proposition 65 Claims, for the purpose of avoiding prolonged and costly litigation and of resolving the issues raised therein both as to past and future conduct. By execution of this Consent Judgment and agreeing to comply with its terms, the Parties do not admit any fact, conclusion of law, or violation of law, nor shall Defendant’s compliance with the Consent Judgment constitute or be construed as an admission by Defendant of any fact, conclusion of law, or violation of law. Defendant denies the material, factual, and legal allegations in the 60-Day Notice and the Complaint and expressly denies any wrongdoing whatsoever.

2. DEFINITIONS

“Effective Date” shall mean, with respect to this Consent Judgment, the date the Consent

1 Judgment has been approved and entered by the Court.

2 **3. INJUNCTIVE RELIEF**

3 3.1 For each Covered Product, Defendant agrees to undertake, or cause to be
4 undertaken on its behalf, either: (a) reformulation of the Covered Products as set forth in Section
5 3.2 below; or (b) provide a warning as prescribed in Sections 3.3-3.4below. Compliance with this
6 Section 3.1 will constitute compliance by Defendant with all requirements of Proposition 65
7 relating to the Covered Products:

8 3.2 Reformulation Standards

9 Subject to Section 3.5, any Covered Product that is sold, or offered for sale, to consumers
10 in the State of California after the Effective Date shall be deemed to comply with Proposition 65,
11 and be exempt from any Proposition 65 warning requirements with respect to DINP, if no
12 “Accessible Component Part” of such Covered Product contains more than 0.1 percent (1,000
13 parts per million) of DINP (the “Reformulation Standard”). For purposes of this Consent
14 Judgment, “Accessible Component Part” shall mean components of the Covered Products to
15 which a person would be exposed to DINP by direct contact during normal use of the Covered
16 Product.

17 3.3 Warning Option

18 Subject to Section 3.5, Covered Products that do not meet the Reformulation Standard set
19 forth in Section 3.2above, shall be accompanied by a warning as described in Section 3.4 below.
20 This warning requirement shall only be required as to Covered Products that are distributed, sold
21 or shipped for sale to consumers in the State of California by Defendant beginning ninety (90)
22 days after the Effective Date. No Proposition 65 warning shall be required as to any Covered
23 Products that are already in the stream of commerce as of the Effective Date and ninety (90) days
24 thereafter, and all such Covered Products are hereby deemed to be exempt from any Proposition
25 65 warning requirements with respect to DINP.

26 3.4 Warning Language

27 Where required to meet the criteria set forth in Section 3.3, Defendant shall provide one of
28 the following warning statements, displayed in a reasonably conspicuous manner:

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(1) **WARNING:** This product can expose you to DINP, which is known to the State of California to cause cancer, birth defects or other reproductive harm. For more info go to www.P65Warnings.ca.gov.

(2) **WARNING:** Cancer and Reproductive Harm – www.P65Warnings.ca.gov. Any warning required to be provided shall also include a symbol consisting of a black exclamation point in a yellow equilateral triangle with a bold black outline. Where a sign, label or shelf tag for a Covered Product is not printed using the color yellow, the symbol may be printed in black and white. The symbol shall be placed to the left of the text of the warning, in a size no smaller than the height of the word “WARNING”.

3.5 90-Day Grace Period

Although Defendant shall be deemed in compliance on the Effective Date, Defendant shall have a ninety (90)-day grace period after the Effective Date to complete the reformulation or warning steps provided in Sections 3.1 – 3.4 such that any Covered Products that have been distributed, shipped, or sold by Defendant prior to ninety (90) days after the Effective Date shall not be subject to the requirements of Sections 3.1-3.4.

4. MONETARY RELIEF

4.1 Within fifteen (15) business days of the Effective Date, Defendant shall make the Total Settlement Payment of \$25,000.

4.1.1. Allocation of Payments

The Total Settlement Payment shall be paid in three (3) separate checks made payable and allocated as follows:

4.1.2. Civil Penalty

Defendant shall pay \$5,000.00 as a civil penalty pursuant to Health & Safety Code § 25249.7(b). The civil penalty shall be apportioned in accordance with Health & Safety Code § 25249.12 (25% to Plaintiff and 75% to the State of California’s Office of Environmental Health Hazard Assessment (“OEHHA”). Accordingly, the OEHHA portion of the civil penalty payment in the amount of \$3,750.00 shall be made payable to OEHHA and associated with taxpayer

1 identification number 68-0284486. This payment shall be delivered as follows:

2 For United States Postal Service Delivery:

3 Attn: Mike Gyurics
4 Fiscal Operations Branch Chief
5 Office of Environmental Health Hazard Assessment
6 P.O. Box 4010, MS #19B
7 Sacramento, CA 95812-4010

8 For Non-United States Postal Service Delivery:

9 Attn: Mike Gyurics
10 Fiscal Operations Branch Chief
11 Office of Environmental Health Hazard Assessment
12 1001 I Street, MS #19B
13 Sacramento, CA 95814

14 The Plaintiff portion of the civil penalty payment in the amount of \$1,250.00 shall be made
15 payable to Ecological Alliance, LLC and associated with taxpayer identification number 47-
16 4662528. This payment shall be delivered to Custodio & Dubey LLP, 448 S. Hill St., Suite 615,
17 Los Angeles, California 90013. Separate 1099s shall be issued for each of these payments and
18 delivered to the same addresses as each respective payment.

19 4.1.3. Attorney's Fees and Costs

20 A reimbursement of Plaintiff's attorney's fees and costs in the amount of \$20,000 and
21 associated with taxpayer identification number 46-1919008. This payment shall be delivered to
22 Custodio & Dubey LLP, 448 S. Hill St., Suite 615, Los Angeles, California 90013. This payment
23 shall be complete reimbursement for any and all attorney's fees, expert and investigative fees and
24 related costs, and any and all other costs and expenses associated with this matter, the Notice or
25 this Consent Judgment. Other than the payment required under this Section 4, each Party bears
26 its own attorney's fees and costs.

27 **5. CLAIMS COVERED AND RELEASE**

28 5.1 Public Release

This Consent Judgment is a full, final, and binding resolution between Plaintiff, on behalf
of itself, and acting in the public interest, and Defendant, its parent companies, officers, directors,
members, shareholders, employees, attorneys, agents, subsidiaries, divisions, affiliates,

1 manufacturers, suppliers, licensees, and each of their predecessors, successors, assigns, parents,
2 subsidiaries, and affiliates (collectively "Releasees"), and each entity to whom any Releasee
3 directly or indirectly exports, distributes or sells the Covered Products, including, without
4 limitation, distributors, wholesalers, customers, retailers, franchisees, cooperative members,
5 licensors, dealers, remainder stores and licensees, and each of their owners, purchasers, officers,
6 directors, attorneys, representatives, shareholders, agents, employees, and sister and parent
7 entities, including, but not limited to, Burlington Coat Factory Direct Corporation (collectively
8 "Downstream Releasees") for all claims that have been asserted for, could have been asserted for,
9 or that arise out of alleged or actual violations of Proposition 65 or its implementing regulations
10 for alleged exposures to DINP in Covered Products prior to and including the Effective Date.
11 Defendant, Releasees and Downstream Releasees are hereby collectively referred to as the
12 "Released Parties." Plaintiff, on behalf of itself and in the public interest, hereby discharges and
13 releases Released Parties from any and all claims, including, without limitation, all actions, and
14 causes of action, in law or in equity, suits, liabilities, demands, obligations, damages, costs, fines,
15 penalties, losses, or expenses (including, but not limited to, fees of attorneys, experts, and others)
16 of any nature whatsoever, whether known or unknown, fixed or contingent, asserted for, that
17 could have been asserted for, or that arise out of alleged exposures to DINP from Covered
18 Products sold, manufactured or distributed by any Released Party in California, or the failure of
19 any Released Party to provide clear, accurate and reasonable warnings under Proposition 65,
20 Business and Professions Code §17200, et seq., or any other applicable law about exposure to
21 DINP, predicated or based on a violation of Proposition 65, arising from the sale, distribution, or
22 use of any Covered Products sold, manufactured or distributed by any Released Party in
23 California (collectively "Claims"). Compliance with the Consent Judgment by any Released
24 Party shall constitute compliance with Proposition 65 by all Released Parties with respect to the
25 presence of DINP in the Covered Products on and after the Effective Date. Plaintiff agrees that
26 any and all Claims are resolved with prejudice by this Consent Judgment. The release in this
27 Section 5.1 applies to all Covered Products that Defendant manufactured, distributed, or sold
28 prior to ninety (90) days after the Effective Date, regardless of the date any other Released Party

1 may distribute or sell the Covered Products.

2 5.2 Plaintiff's Individual Release of Claims

3 In further consideration of the promises and agreements herein contained, Plaintiff, on its
4 own behalf and on behalf of its past and current agents, parent companies, subsidiaries, officers,
5 directors, employees, representatives, attorneys, successors, and/or assignees, hereby generally
6 releases and waives all rights to institute or participate in, directly or indirectly, any form of legal
7 action, and discharges and releases the Released Parties from any and all claims or causes of
8 action. The general releases in Section 5.2 are provided in Plaintiff's individual capacity and are
9 not releases on behalf of the public.

10 5.3 Release of Unknown Claims

11 It is possible that other claims not known to the Parties will hereafter be discovered or
12 developed. Plaintiff, on its own behalf and on behalf of its past and current agents, parent
13 companies, subsidiaries, officers, directors, employees, representatives, attorneys, successors,
14 and/or assignees, on the one hand, and the Released Parties, on the other hand, acknowledge that
15 this Consent Judgment is expressly intended to cover and include all such claims through and
16 including the Effective Date, including all rights of action thereon. Plaintiff, on its own behalf
17 and on behalf of its past and current agents, parent companies, subsidiaries, officers, directors,
18 employees, representatives, attorneys, successors, and/or assignees, on the one hand, and the
19 Released Parties, on the other hand, acknowledge that the claims released in Sections 5.1 and 5.3
20 may include unknown claims, and nevertheless intend to release such claims, and in doing so
21 waive California Civil Code § 1542 (and any other state, federal, or international law of similar
22 import) which reads as follows:

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

1 5.4 Plaintiff, on its own behalf and on behalf of its past and current agents, parent
2 companies, subsidiaries, officers, directors, employees, representatives, attorneys, successors,
3 and/or assignees, understands and acknowledges that the significance and consequence of this
4 waiver of California Civil Code § 1542 is that even if Plaintiff suffers future damages arising out
5 of or resulting from, or related directly or indirectly to, in whole or in part, any claims arising
6 from any violation of Proposition 65 or any other statutory or common law regarding the Covered
7 Products, including but not limited to any actual or alleged exposure to, or failure to warn with
8 respect to exposure to, the Covered Products, Plaintiff will not be able to make any claim for
9 those damages, penalties or other relief against any of the Released Parties.

10 5.5 Compliance by Defendant with the terms of this Consent Judgment shall constitute
11 compliance with Proposition 65 with respect to exposure to DINP in the Covered Products as set
12 forth in the 60 Day-Notice and/or the Complaint.

13 **6. COMPLIANCE WITH HEALTH AND SAFETY CODE SECTION 25249.7(f)**

14 Plaintiff and its attorneys agree to comply with the reporting form requirements
15 referenced in California Health and Safety Code § 25249.7(f).

16 **7. PROVISION OF NOTICE**

17 7.1 When any Party is entitled to receive any notice or writing under this Consent
18 Judgment, the notice or writing shall be sent by: (i) first class certified mail with return receipt
19 requested; (ii) a recognized overnight courier; or (iii) by electronic mail, as follows:

20 To Defendant:

21 Jeffrey M. Goldman, Esq.
22 Pepper Hamilton LLP
23 4 Park Plaza Suite 1200
24 Irvine, California 92614
25 goldmanj@pepperlw.com

26 With a copy to:

27 AnnMarie Sanford, Esq.
28 Pepper Hamilton LLP
29 4000 Town Center, Suite 1800
30 Southfield, Michigan 48075-1505
31 sanforda@pepperlaw.com

 To Plaintiff:

1 Vineet Dubey, Esq.
2 Custodio & Dubey LLP
3 448 S. Hill St., Ste 615
4 Los Angeles, CA 90013
5 dubey@cd-lawyers.com

6 7.2 Any party may modify the person and address to whom the notice is to be sent by
7 sending the other Party notice that is transmitted in the manner set forth in Section 7.1.

8 **8. COURT APPROVAL**

9 Upon execution of his Consent Judgment by all Parties, Plaintiff shall prepare and file, at
10 its sole cost and expense, a Motion for Approval of this Consent Judgment that Defendant shall
11 support. This Consent Judgment shall not become effective until approved and entered by the
12 Court. If this Consent Judgment is not entered by the Court, it shall be of no force or effect, and
13 shall not be introduced into evidence or otherwise used in any proceeding for any purpose.

14 **9. GOVERNING LAW AND CONSTRUCTION**

15 The terms of this Consent Judgment shall be governed by the laws of the State of
16 California and apply within the State of California. In the event that Proposition 65 is repealed or
17 is otherwise rendered inapplicable by reason of law generally, or as to the Covered Products, then
18 Defendant may provide written notice to Plaintiff of any asserted change in the law, and, with the
19 exception of Section 4.1 above, shall have no further obligations pursuant to this Consent
20 Judgment, with respect to, and to the extent that, the Covered Products are so affected. None of
21 the terms of this Consent Judgment shall have any application to Covered Products sold outside
22 of the State of California.

23 **10. MODIFICATION**

24 This Consent Judgment may only be modified by a written instrument executed by the
25 Party or Parties to be bound thereby, and after approval by the Court upon a noticed motion. Any
26 motion to modify shall be served on all Parties and the Office of the Attorney General.

27 **11. RETENTION OF JURISDICTION**

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

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

2 Nothing in this Consent Judgment shall preclude Plaintiff from resolving any claim
3 against another entity on terms that are different from those contained in this Consent Judgment.

4 **13. EXECUTION IN COUNTERPARTS**

5 This Consent Judgment may be executed in counterparts, each of which shall be deemed
6 to be an original, and all of which, taken together, shall constitute the same document. Execution
7 of the Consent Judgment by e-mail, facsimile, or other electronic means such as portable
8 document format ("PDF"), shall constitute legal and binding execution and delivery. Any
9 photocopy of the executed Consent Judgment shall have the same force and effect as the original.

10 **14. AUTHORIZATION**

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

14 **AGREED TO:**

15 **Ecological Alliance LLC**

16 Date: 10/8/19

17 By: [Signature]

18 Harmony Welsh, Managing Member

19 **AGREED TO:**

20 **Kids Preferred, LLC**

21 Date: 10/8/19

22 By: [Signature]

23 Lotis Prenselaar, CEO

24 IT IS HEREBY ORDERED, ADJUDGED AND DECREED that, pursuant to Health &
25 Safety Code § 25249.7(f)(4) and Code of Civil Procedure § 664.6, judgment is hereby entered.

26 Dated: 01/10/2020

27 [Signature]
28 P. J. [Signature] JUDGE OF THE SUPERIOR COURT