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FILED
Superior Court of California
County of Los Angeles

09/17/2019

Sherril R. Carter, Executive Officer / Clerk of Court

By: A. Williams Deputy

Attorneys for Plaintiff Ecological Alliance, LLC

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

(Unlimited Jurisdiction)

8 ECOLOGICAL ALLIANCE, LLC, a California
9 limited liability company,

Case No.: 19STCV24869

11 Plaintiff,

**[PROPOSED] STIPULATED
CONSENT JUDGMENT**

13 v.

14 DUNCAN ENTERPRISES, a California
15 corporation,

16 Defendant.

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2 Plaintiff Ecological Alliance, LLC ("Plaintiff"), and Defendant Duncan Enterprises
3 ("Defendant") hereby enter into this Stipulated Consent Judgment ("Consent Judgment") as
4 follows:

5 WHEREAS: On or about December 13, 2018, Plaintiff, through Plaintiff's counsel, served
6 a 60 Day Notice to Defendant, the California Attorney General, the District Attorneys of every
7 County in the State of California, and the City Attorneys for every City in the State of California
8 with a population greater than 750,000 (collectively, "Public Prosecutor(s)") alleging that
9 Defendant violated California's Safe Drinking Water and Toxic Enforcement Act of 1986,
10 California Health and Safety Code § 25249.6. et seq., and its implementing regulations
11 (collectively, "Proposition 65") and that Plaintiff intended to file an enforcement action in the
12 public interest; and

13 WHEREAS: Plaintiff alleges that Defendant manufactured and/or distributed paintbrush
14 sets that were sold or distributed for sale in California and further alleges that those paintbrush
15 sets expose consumers in the State of California to chemicals including Di(2-ethylhexy)phthalate
16 [DEHP], which are listed by the State of California pursuant to California Health and Safety Code
17 § 25249.8; and

18 WHEREAS: Plaintiff further alleges that persons in the State of California were exposed
19 to DEHP in paintbrush sets without being provided the Proposition 65 warning set out at
20 California Health and Safety Code § 25249.6 and its implementing regulations ("Proposition 65
21 Warning");

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

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

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

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

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3 INTRODUCTION

4 1.1. On December 13, 2018, Plaintiff served the 60-Day Notice upon Defendant and on
5 Public Prosecutors. No Public Prosecutors commenced an enforcement action. No
6 Public Prosecutor having commenced an enforcement action, Plaintiff proceeded to file
7 its Complaint against Defendant in the present action.

8 1.2. For purposes of this Consent Judgment only, Defendant is deemed a person in the
9 course of doing business in California as defined in Health & Safety Code section
10 25249.11.

11 1.3. For purposes of this Consent Judgment only, Plaintiff and Defendant (the
12 "Parties") stipulate that: 1) this Court has jurisdiction over the allegations contained in
13 the Complaint, and personal jurisdiction over Defendant as to the acts alleged in the
14 Complaint; 2) venue is proper in the County of Los Angeles; and 3) this Court has
15 jurisdiction to enter this Consent Judgment as a full and final resolution of all claims
16 which were or could have been raised in the Complaint based on the facts alleged therein
17 with respect to the Covered Products, and of all claims which were or could have been
18 raised by any person or entity based in whole or in part, directly or indirectly, on the facts
19 alleged in the 60-Day Notice, in the present action, or arising therefrom or related thereto,
20 with respect to Covered Products, including any Proposition 65 claim arising out of an
21 exposure to DEHP from the Covered Products (collectively, "Proposition 65 Claims").

22 1.4. The Parties enter into this Consent Judgment as a full and final settlement of the
23 Proposition 65 Claims, for the purpose of avoiding prolonged and costly litigation and of
24 resolving the issues raised therein both as to past and future conduct. By execution of
25 this Consent Judgment and agreeing to comply with its terms, the Parties do not admit
26 any fact, conclusion of law, or violation of law, nor shall Defendant's compliance with
27 the Consent Judgment constitute or be construed as an admission by Defendant of any
28 fact, conclusion of law, or violation of law. Defendant denies the material, factual, and

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2 legal allegations in the 60-Day Notice and the Complaint and expressly denies any
3 wrongdoing whatsoever.

4 2. DEFINITIONS

- 5 2.1. "Effective Date" shall mean the date the Consent Judgment has been approved and
6 entered by the Court.
- 7 2.2. "Covered Products" shall mean paintbrush sets including, but not limited to, Style
8 Numbers 27823 and 27828.
- 9 2.3. "Accessible Component Part" shall mean components of the Covered Products to which a
10 person would be exposed to DEHP by direct contact during normal use of the Covered
11 Product.

12 3. INJUNCTIVE RELIEF

- 13 3.1 As of the Effective Date, any Covered Product that Defendant sells or offers for
14 sale in California shall either (a) be reformulated such that no "Accessible Component
15 Part" of the Covered Product contains more than 0.1 percent (1,000 parts per million)
16 DEHP, or (b) contain a warning as stated in Sections 3.2-3.3 below. Compliance with
17 this Section 3.1 constitutes compliance by Defendant and Released Parties with all
18 requirements of Proposition 65 relating to DEHP exposure in the Covered Products.
- 19 3.2. Warning Option
- 20 Covered Products that are not reformulated as set forth in Section 3.1 above, shall be
21 accompanied by a warning as described in Section 3.3 below. No Proposition 65 warning
22 shall be required as to any Covered Products that are already in the stream of commerce as
23 of 90 days after the Effective Date, and all such Covered Products are hereby deemed to
24 be exempt from Proposition 65 with respect to DEHP.
- 25 3.3. Warning Language
- 26 Where required to provide a warning as set forth in Section 3.1, Defendant shall provide
27 one of the following warning statements on or within the unit packaging of the Covered
28

1
2 Products, or affixed to the Covered Products, displayed in a reasonably conspicuous
3 manner;

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

8 (2) **⚠ WARNING:** Cancer and Reproductive Harm –
9 www.P65Warnings.ca.gov.

10 Where the sign, label, or shelf tag for the product is not printed using the color
11 yellow, the warning symbol may be printed in black and white. The warning
12 symbol shall be placed to the left of the text of the warning, in a size no smaller
13 than the height of the word "WARNING".

14 4. MONETARY RELIEF

15 4.1 Within ten (10) business days of Effective Date, Defendant shall pay the total sum
16 of \$27,000 which includes \$7,000 in civil penalties and \$20,000 in payment of Plaintiff's
17 costs and reasonable attorney's fees. The \$7,000 civil penalty shall be apportioned
18 pursuant to Health and Safety Code section 25249.12 (d), with 75%, or \$5,250, paid to
19 the State of California's Office of Environmental Health Hazard Assessment and 25%, or
20 \$1,750, payable to Plaintiff.

21 4.2. The payments specified in Section 4.1. shall be made by wire transfer to Plaintiff's
22 counsel Custodio & Dubey LLP as set forth below. Plaintiffs' counsel will remit the
23 portions due to the State of California Office of Environmental Health Hazard
24 Assessment and to Plaintiff.

25 Bank: Bank of America, N.A.

26 Routing Transit No.: 026009593

27 Account No.: 325054144600

28 Beneficiary: Custodio & Dubey LLP

5. CLAIMS COVERED AND RELEASE

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2 5.1 This Consent Judgment is a full, final, and binding resolution between Plaintiff, on
3 behalf of itself, and acting in the public interest, and Defendant and its officers, directors,
4 members, shareholders, employees, attorneys, agents, parent companies, subsidiaries,
5 divisions, affiliates, their parents and all subsidiaries, and affiliates, thereof, their
6 respective employees, agents and assigns, as well as all other upstream and downstream
7 entities in the distribution chain for any of the Covered Products including, but not
8 limited to, suppliers, franchisees, licensees, and retailers, and the predecessors,
9 successors, and assigns of any of them (collectively, the "Released Parties"), for any
10 alleged violation of Proposition 65, and its implementing regulations, for failure to
11 provide Proposition 65 warnings for the Covered Products with respect to DEHP, and
12 fully resolves all claims that have been brought, or which could have been brought in this
13 action up to and including the Effective Date. Plaintiff on behalf of itself, and in the
14 public interest, hereby discharges the Released Parties from any and all claims, actions,
15 causes of action, suits, demands, liabilities, damages, penalties, fees, costs and expenses
16 asserted, or that could have been asserted, with respect to any alleged violation of
17 Proposition 65 arising from the failure to provide Proposition 65 warnings about
18 exposures to DEHP for any or all of the Covered Products, through and including the
19 Effective Date.

20 5.2. It is possible that other claims not known to the Parties arising out of the facts
21 contained in the 60-Day Notice, alleged in the Complaint, or relating to the Covered
22 Products, will hereafter be discovered or developed. Plaintiff, on behalf of itself only
23 acknowledges that this Consent Judgment is expressly intended to cover and include all
24 such claims through and including the Effective Date, including all rights of action
25 thereon. Plaintiff acknowledges that the claims released in Sections 5.1 and 5.2 may
26 include unknown claims, and nevertheless intend to release such claims, and in doing so
27 waive California Civil Code § 1542 which reads as follows:

28 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS THAT THE
CREDITOR OR RELEASING PARTY DOES NOT KNOW OR SUSPECT TO

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2 EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE
3 RELEASE AND THAT, IF KNOWN BY HIM OR HER WOULD HAVE
4 MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE
5 DEBTOR OR RELEASED PARTY.

6 5.3. Plaintiff understands and acknowledges that the significance and consequence of
7 this waiver of California Civil Code § 1542 is that even if Plaintiff suffers future damages
8 arising out of or resulting from, or related directly or indirectly to, in whole or in part, the
9 Covered Products, including but not limited to any exposure to, or failure to warn with
10 respect to exposure to, the Covered Products, Plaintiff will not be able to make any claim
11 for those damages against any of the Released Parties.

12 5.4. Compliance by Defendant with the terms of this Consent Judgment shall constitute
13 compliance with Proposition 65 by Defendant and Released Parties with respect to
14 exposure to DEHP in the Covered Products as set forth in the 60 Day Notice and/or the
15 Complaint.

16 6. Enforcement

17 6.1. The terms of this Consent Judgment shall be enforced exclusively by the Parties hereto.
18 The Parties may, by noticed motion or order to show cause before the Superior Court of
19 California, County of Los Angeles, giving the notice required by law, enforce the terms
20 and conditions contained herein. A Party may enforce any of the terms and conditions of
21 this Consent Judgment only after that Party first provides 30 days' notice to the Party
22 allegedly failing to comply with the terms and conditions of this Consent Judgment and
23 attempts to resolve such Party's failure to comply in an open and good faith manner.

24 6.2. **Notice of Violation.** Prior to bringing any motion, order to show cause, or other
25 proceeding to enforce Section 3 of this Consent Judgment, Plaintiff shall provide a
26 written notice of violation ("NOV") to Defendant. The NOV shall include information
27 sufficient for Defendant to be able to understand and correct the violation, and at a
28 minimum for each Covered Product must contain: (a) the name of the Covered Product,
(b) a valid store receipt or other proof of purchase that includes specific dates when the

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2 Covered Product was sold in California, (c) the store(s) at which the Covered Product
3 was available for sale to consumers, and (d) any other evidence or other support for the
4 allegations in the NOV, including all test data obtained by Plaintiff regarding the Covered
5 Products. Plaintiff shall retain any untested samples of the Covered Product and make
6 available to Defendant for confirmatory testing upon Defendant's request.

7 6.3. Notice of Election. Within 30 days of receiving an NOV, Defendant shall serve a notice
8 of election (NOE) either contesting or not contesting the NOV.

9 6.3.1. Non-Contested NOV. Plaintiff shall take no further action regarding the alleged
10 violation if, within 30 days of receiving such NOV, Defendant serves a Notice of
11 Election ("NOE") that meets one of the following conditions:

12 6.3.1.1. The Covered Products were in manufactured or distributed in California
13 before 90 days after the Effective Date, or

14 6.3.1.2. Since receiving the NOV, Defendant has taken corrective action by either
15 (i) directing its customer(s) to remove the Covered Product identified in the
16 NOV from sale in California, or (ii) taking all steps necessary to bring the sale
17 of the Covered Product into compliance under Section 3 of this Consent
18 Judgment.

19 6.3.2. Contested NOV. Defendant may serve a Notice of Election ("NOE") informing
20 Plaintiff of its election to contest the NOV within 30 days of receiving the NOV.

21 6.3.2.1. In its election, Defendant may request that the sample(s) of Covered
22 Product(s) tested by Plaintiff be subject to confirmatory testing at an accredited
23 laboratory.

24 6.3.2.2. If the confirmatory testing establishes that the Covered Products do not
25 contain DEHP in excess of the levels allowed in Section 3.1, Plaintiff shall take
26 no further action regarding the alleged violation. If the testing does not
27 establish compliance with Section 3.1, Defendant may withdraw its NOE to
28 contest the violation and may serve a new NOE pursuant to Section 6.3.1.

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2 6.3.2.3. If Defendant does not withdraw an NOE to contest the NOV or take action
3 under Section 6.3.1, the Parties shall meet and confer for a period of no less
4 than 30 days before Plaintiff may seek an order enforcing the terms of this
5 Consent Judgment.

6 6.3.2.4. In any proceeding brought by either Party to enforce this Consent
7 Judgment, the prevailing party shall be entitled to recover its reasonable
8 attorney's fees and costs.

9 **7. COMPLIANCE WITH HEALTH AND SAFETY CODE SECTION 25249.7(F)**

10 7.1 Plaintiff and its attorneys agree to comply with the reporting requirements
11 referenced in California Health and Safety Code § 25249.7(f).

12 **8. PROVISION OF NOTICE**

13 8.1. When any Party is entitled to receive any notice or writing under this Consent
14 Judgment, the notice or writing shall be sent by first class certified mail with return
15 receipt requested, or by electronic mail, as follows:

16 To Defendant:
17 Mark Brage
18 Duncan Enterprises
19 5673 E. Shields Avenue
20 Fresno, CA 93727
21 Mark.Brage@duncan.com

22 With copy to:
23 Mark Greenfield, Esq.
24 Norton Rose Fulbright US LLP
25 555 South Flower Street, Forty-First Floor
26 Los Angeles, CA 90071
27 mark.greenfield@nortonrosefulbright.com

28 To Plaintiff:
Vineet Dubey, Esq.
Custodio & Dubey LLP
448 S. Hill St., Ste 615
Los Angeles, CA 90013
dubey@cd-lawyers.com

8.2. Any party may modify the person and address to whom the notice is to be sent by

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2 sending the other Party notice that is transmitted in the manner set forth in section 8.1.

3 **9. COURT APPROVAL**

4 9.1. Upon execution of his Consent Judgment by all Parties, Plaintiff shall prepare and
5 file, at its sole cost and expense, a Motion for Approval of this Consent Judgment. This
6 Consent Judgment shall not become effective until approved and entered by the Court. If
7 this Consent Judgment is not entered by the Court, it shall be of no force or effect, and
8 shall not be introduced into evidence or otherwise used in any proceeding for any
9 purpose.

10 **10. GOVERNING LAW AND CONSTRUCTION**

11 10.1. The terms of this Consent Judgment shall be governed by the laws of the
12 State of California.

13 **11. ENTIRE AGREEMENT**

14 11.1. This Consent Judgment contains the sole and entire agreement of the Parties and
15 any and all prior negotiations and understandings related hereto shall be deemed to have
16 been merged within it. No representations or terms of agreement other than those
17 contained herein exist or have been made by any Party with respect to the other Party or
18 the subject matter hereof.

19 11.2. This Consent Judgment may be modified only by further stipulation of the Parties
20 and the approval of the Court or upon the granting of a motion brought to the Court by
21 either Party.

22 11.3. No waiver of any of the provisions of this Consent Judgment shall be deemed or
23 shall constitute a waiver of any of the other provisions hereof whether or not similar, nor
24 shall such waiver constitute a continuing waiver.

25 **12. RETENTION OF JURISDICTION**

26 12.1. This Court shall retain jurisdiction of this matter to implement or modify the
27 Consent Judgment.

28 **13. NO EFFECT ON OTHER SETTLEMENTS**

13.1. Nothing in this Consent Judgment shall preclude Plaintiff from resolving any

claim against another entity on terms that are different from those contained in this Consent Judgment.

14. EXECUTION IN COUNTERPARTS

14.1. This Consent Judgment may be executed in counterparts, each of which shall be deemed to be an original, and all of which, taken together, shall constitute the same document. Execution of the Consent Judgment by e-mail, facsimile, or other electronic means, shall constitute legal and binding execution and delivery. Any photocopy of the executed Consent Judgment shall have the same force and effect as the original.

15. AUTHORIZATION

15.1. The undersigned are authorized to stipulate to, enter into, and 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 Consent Judgment.

AGREED TO:

Ecological Alliance LLC

Date: [Signature]

By: 7/2/19

AGREED TO:

Duncan Enterprises

Date: 6/29/19

By: [Signature]

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

Dated: 09/17/2019



Mark V. Mooney

JUDGE OF THE SUPERIOR COURT
Mark V. Mooney / Judge