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ALAMEDA COUNTY

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CLERK OF THE SUPERIOR COURT

By: *Manafra*

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9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 COUNTY OF ALAMEDA

11 PRECILA BALABBO,

12 Plaintiff,

13 v.

14 B. R. E. INDUSTRIES, INC.,

15 Defendant.

Case No.: HG20049352

CONSENT JUDGMENT

Judge: Jeffrey Brand

Dept.: 22

Hearing Date: April 2, 2020

Hearing Time: 3:00 PM

Reservation #: R-2160791

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1 **1. INTRODUCTION**

2 **1.1 The Parties.** This Consent Judgment is entered into by and between Precila Balabbo
3 acting on behalf of the public interest (hereinafter "Balabbo") and B. R. E. Industries, Inc. ("BRE"
4 or "Defendant"), a.k.a. IVL Holdings, with Balabbo and Defendant collectively referred to as the
5 "Parties" and each of them as a "Party." Balabbo is an individual residing in California that seeks
6 to promote awareness of exposures to toxic chemicals and improve human health by reducing or
7 eliminating hazardous substances contained in consumer products. BRE is alleged to be a person
8 in the course of doing business for purposes of Proposition 65, Cal. Health & Safety Code §§
9 25249.6 et seq.

10 **1.2 Allegations and Representations.** Balabbo alleges that Defendant has exposed
11 individuals to di(2-ethylhexyl) phthalate (DEHP) and/or diisononyl phthalate (DINP) from its sales
12 of fanny packs/waist bags and cosmetic bags/cases/kits/pouches without providing a clear and
13 reasonable exposure warning pursuant to Proposition 65. DEHP is listed under Proposition 65 as a
14 chemical known to the State of California to cause cancer and reproductive toxicity. DINP is listed
15 under Proposition 65 as a chemical known to the State of California to cause cancer.

16 **1.3 Notice of Violation/Complaint.** On or about September 18, 2019, Balabbo served
17 BRE, and various public enforcement agencies with documents entitled "60-Day Notice of
18 Violation" pursuant to Health & Safety Code § 25249.7(d) (the "Notice"), alleging that Defendant
19 violated Proposition 65 for failing to warn consumers and customers that use of fanny packs/waist
20 bags and cosmetic bags/cases/kits/pouches expose users in California to DEHP and/or DINP. No
21 public enforcer has brought and is diligently prosecuting the claims alleged in the Notice. On
22 January 6, 2020, Balabbo filed a complaint (the "Complaint") in the matter.

23 **1.4 Jurisdiction.** For purposes of this Consent Judgment only, the Parties stipulate that
24 this Court has jurisdiction over Defendant as to the allegations contained in the Complaint filed in
25 this matter, that venue is proper in the County of Alameda, and that this Court has jurisdiction to
26 approve, enter, and oversee the enforcement of this Consent Judgment pursuant to Proposition 65
27 and Code of Civil Procedure §664.6 as a full and final binding resolution of all claims which were
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1 or could have been raised in the Complaint based on the facts alleged therein and/or in the Notice.

2 1.5 **No Admission.** Defendant denies the material allegations contained in Balabbo's
3 Notice and Complaint and maintains that it has not violated Proposition 65, and that all of the
4 products that it has sold or distributed for sale in California, including the Covered Products, have
5 been, and are, in compliance with all laws. Nothing in this Consent Judgment shall be construed as
6 an admission by Defendant of any fact, finding, issue of law, conclusion of law, or violation of law;
7 nor shall compliance with this Consent Judgment constitute or be construed as an admission by
8 Defendant of any fact, finding, conclusion of law, issue of law, or violation of law, such being
9 specifically denied by Defendant. However, this section shall not diminish or otherwise affect the
10 obligations, responsibilities, and duties of Defendant under this Consent Judgment.

11 **2. DEFINITIONS**

12 2.1 **Covered Products.** The term "Covered Products" means (a) fanny packs/waist bags
13 and (b) cosmetic bags/cases/kits/pouches that are manufactured, imported, distributed and/or
14 offered for sale in California by BRE, Defendant Releasees, and/or Downstream Releasees
15 including, under the various trade names, including IMoshion, Blush Crush, Ivy London, and
16 Revive Vintage.

17 2.2 **Effective Date.** The term "Effective Date" means the date this Consent Judgment is
18 entered as a Judgment of the Court.

19 **3. INJUNCTIVE RELIEF: WARNINGS**

20 3.1 **Reformulation of Covered Products.** As of the date this Consent Judgment is
21 signed by both Parties, and continuing thereafter, Covered Products that BRE directly
22 manufactures, imports, distributes, sells, or offers for sale in California shall either: (a) be
23 Reformulated Products pursuant to § 3.2, below; or (b) be labeled with a clear and reasonable
24 exposure warning pursuant to §§ 3.3 and 3.4, below. For purposes of this Consent Judgment, a
25 "Reformulated Product" is a Covered Product that is in compliance with the standard set forth in §
26 3.2 below. The warning requirement set forth in §§ 3.3 and 3.4 shall not apply to any Reformulated
27 Product.
28

1 With respect to existing Covered Products, meaning those that are currently in the channels
2 of distribution, with distributors and retailers, BRE, Defendant Releasees, and Downstream
3 Releasees (defined below in §5.1) to sell-through those items. However, as of the Effective Date,
4 no new Covered Products may be distributed or sold in California that are not Reformulated
5 Products as defined in §3.2 below, or do not contain the appropriate warnings pursuant to §§3.3
6 through 3.5 below.

7
8 **3.2 Reformulation Standard.** "Reformulated Products" shall mean Covered Products
9 that contain concentrations less than or equal to 0.1% (1,000 parts per million (ppm)) of DEHP
10 and/or DINP when analyzed pursuant to U.S. Environmental Protection Agency testing
11 methodologies 3580A and 8270C or other methodology utilized by federal or state government
12 agencies for the purpose of determining the phthalate content in a solid substance.

13 **3.3 Clear and Reasonable Warning.** As of the date this Consent Judgment is signed
14 by both Parties, and continuing thereafter, a clear and reasonable exposure warning as set forth in
15 this §§ 3.3 and 3.4 must be provided for all Covered Products that Defendant manufacturers,
16 imports, distributes, sells, or offers for sale in California that is not a Reformulated Product. There
17 shall be no obligation for Defendant to provide a warning for Covered Products that enter the stream
18 of commerce prior to the date this Consent Judgment is signed by both Parties. The warning shall
19 consist of either the **Warning** or **Alternative Warning** described in §§ 3.3(a) or (b), respectively:

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

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

25 (b) **Alternative Warning:** BRE may, but is not required to, use the alternative short-
26 form warning as set forth in this § 3.3(b) ("**Alternative Warning**") as follows:

27 **⚠ WARNING:** Cancer and Reproductive Harm - www.P65Warnings.ca.gov.¹

28 ¹ To the extent BRE determines that Covered Products for which a warning statement is
required under § 3.3 above contain only DINP in concentrations in excess of 1,000 ppm, if it
chooses not to use an **Alternative Warning**, it shall substitute the chemical DINP for DEHP in
the **Warning** shown in § 3.3(a) above, and it shall delete the term "and birth defects or other

(Footnote continues on next page.)

1 3.4 A **Warning or Alternative Warning** provided pursuant to § 3.3 must print the word
2 “**WARNING:**” in all capital letters and in bold font, followed by a colon. The warning symbol to
3 the left of the word “**WARNING:**” must be a black exclamation point in a yellow equilateral
4 triangle with a black outline, except that if the sign or label for the Covered Product does not use
5 the color yellow, the symbol may be in black and white. The symbol must be in a size no smaller
6 than the height of the word “**WARNING:**”. The warning shall be affixed to or printed on the
7 Covered Product’s packaging or labeling, or on a placard, shelf tag, sign or electronic device or
8 automatic process, providing that the warning is displayed with such conspicuousness, as compared
9 with other words, statements, or designs as to render it likely to be read and understood by an
10 ordinary individual under customary conditions of purchase or use. A warning may be contained
11 in the same section of the packaging, labeling, or instruction booklet that states other safety
12 warnings, if any, concerning the use of the Covered Product and shall be at least the same size as
13 those other safety warnings.

14 If BRE sells Covered Products via an internet website to customers located in California,
15 the warning requirements of this section shall be satisfied if the foregoing warning appears either:
16 (a) on the same web page on which a Covered Product is displayed and/or described; (b) on the
17 same page as the price for the Covered Product; or (c) on one or more web pages displayed to a
18 purchaser prior to purchase during the checkout process. Alternatively, a symbol consisting of a
19 black exclamation point in a yellow or white equilateral triangle may appear adjacent to or
20 immediately following the display, description, price, or checkout listing of the Covered Product,
21 if the warning statement appears elsewhere on the same web page in a manner that clearly associates
22 it with the product(s) to which the warning applies.

23 3.5 **Compliance with Warning Regulations.** Defendant shall be deemed to be in
24 compliance with this Consent Judgment by either adhering to §§ 3.3 and 3.4 of this Consent
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28 reproductive harm” from the warning statement shown in § 3.3(a), and it shall delete the term
“Reproductive Harm” from the alternative warning statement in 3.3(b) above.

1 Judgment or by complying with warning requirements adopted by the State of California's Office
2 of Environmental Health Hazard Assessment ("OEHHA") after the Effective Date.

3 **4. MONETARY TERMS**

4 4.1 **Civil Penalty.** BRE shall pay \$3,500.00 as a Civil Penalty pursuant to Health and
5 Safety Code section 25249.7(b), to be apportioned in accordance with California Health & Safety
6 Code § 25192, with 75% of these funds remitted to OEHHA and the remaining 25% of the Civil
7 Penalty remitted to Balabbo, as provided by California Health & Safety Code § 25249.12(d).

8 4.1.1 Within ten (10) days of the Effective Date, BRE shall issue two separate
9 checks for the Civil Penalty payment to (a) "OEHHA" in the amount of \$2,625.00; and to (b)
10 "Brodsky & Smith, LLC in Trust for Balabbo" in the amount of \$875.00. Payment owed to
11 Balabbo pursuant to this Section shall be delivered to the following payment address:

12 Evan J. Smith, Esquire
13 Brodsky & Smith, LLC
14 Two Bala Plaza, Suite 510
Bala Cynwyd, PA 19004

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

17 For United States Postal Service Delivery:

18 Mike Gyurics
19 Fiscal Operations Branch Chief
20 Office of Environmental Health Hazard Assessment
P.O. Box 4010
Sacramento, CA 95812-4010

21 For Non-United States Postal Service Delivery:

22 Mike Gyurics
23 Fiscal Operations Branch Chief
24 Office of Environmental Health Hazard Assessment
1001 I Street
Sacramento, CA 95814

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

1 4.2 **Attorneys' Fees.** As complete reimbursement for Balabbo's attorneys' fees and
2 costs incurred as a result of investigating, bringing this matter to BRE attention, litigating and
3 negotiating and obtaining judicial approval of a settlement in the public interest, pursuant to Code
4 of Civil Procedure § 1021.5 BRE shall pay \$29,000.00 to Brodsky & Smith, LLC ("Brodsky
5 Smith"). Payment pursuant to this Section shall be as follows: (a) Within ten (10) days of the
6 Effective Date BRE shall issue a check to "Brodsky & Smith, LLC" in the amount of \$9,000.00;
7 (b) Within thirty (30) days of the Effective Date BRE shall issue a check to "Brodsky & Smith,
8 LLC" in the amount of \$10,000.00; and (c) Within sixty (60) days of the Effective Date BRE shall
9 issue a check to "Brodsky & Smith, LLC" in the amount of \$10,000.00. All payments pursuant to
10 this Section shall be delivered to the Brodsky Smith address identified in Section 4.1.1, above. For
11 all payments pursuant to this Section that are not received by or before the day it is due, BRE shall
12 be liable for a late payment fee equal to \$100/day for each day the payment is late.

13 **5. RELEASE OF ALL CLAIMS**

14 5.1 **Balabbo's Release of Proposition 65 Claims.** This Consent Judgment is a full,
15 final, and binding resolution between Balabbo acting on her own behalf, and on behalf of the public
16 interest, and BRE, and its parents, shareholders, members, directors, officers, managers,
17 employees, representatives, agents, attorneys, divisions, subdivisions, subsidiaries, partners, sister
18 companies, and affiliates, and their predecessors, successors and assigns ("Defendant Releasees"),
19 and all entities from whom they obtain and to whom they directly or indirectly distribute or sell
20 Covered Products, including but not limited to manufacturers, suppliers, distributors, wholesalers,
21 customers, licensors, licensees retailers, franchisees, and cooperative members, including but not
22 limited to The TJX Companies Inc., The TJX Operating Companies, Inc., T J Max, Marshalls, Ross
23 Stores, Inc., Ross Dress for Less, Inc., Ross Procurement, Inc., DD's Discounts, Burlington Coat
24 Factory Direct Corporation, and each of their parents, shareholders, members, directors, officers,
25 managers, employees, representatives, agents, attorneys, divisions, subdivisions, subsidiaries,
26 partners, sister companies, and affiliates, and their predecessors, successors and assigns
27 ("Downstream Releasees"), of all claims for violations of Proposition 65 based on exposure to
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1 above, in sections 5.1 through 5.3 may include unknown claims, and hereby specifically waive any
2 and all rights and benefits which they now have, or in the future may have, conferred by virtue of
3 the provisions of § 1542 of the California Civil Code, which provides as follows:
4

5 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS THAT THE
6 CREDITOR OR RELEASING PARTY DOES NOT KNOW OR SUSPECT TO
7 EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE
8 RELEASE AND THAT, IF KNOWN BY HIM OR HER, WOULD HAVE
9 MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE
10 DEBTOR OR RELEASED PARTY.

11 **6. INTEGRATION**

12 6.1 This Consent Judgment contains the sole and entire agreement of the Parties and
13 any and all prior negotiations and understandings related hereto shall be deemed to have been
14 merged within it. No representations or terms of agreement other than those contained herein exist
15 or have been made by any Party with respect to the other Party or the subject matter hereof.

16 **7. GOVERNING LAW**

17 7.1 The terms of this Consent Judgment shall be governed by the laws of the State of
18 California and apply within the State of California. In the event that Proposition 65 is repealed or
19 is otherwise rendered inapplicable by reason of law generally, or as to Covered Products, then
20 Defendant shall have no further obligations pursuant to this Consent Judgment with respect to, and
21 to the extent that, Covered Products are so affected.

22 **8. NOTICES**

23 8.1 Unless specified herein, all correspondence and notices required to be provided
24 pursuant to this Consent Judgment shall be in writing and personally delivered or sent both by e-
25 mail and by either: (i) first-class, (registered or certified mail) return receipt requested; or (ii)
26 overnight courier on any party by the other party at the following addresses:

27 For Defendant:

28 Kendra Lounsberry
Barnes & Thornburg LLP
2029 Century Park E., Suite 300
Los Angeles, CA, 90067-2904
kendra.lounsberry@btlaw.com

And

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For Balabbo:

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

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 Balabbo agrees 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 support approval of such Motion. If any third-party objection to the motion is filed, Balabbo and BRE agree to work together to file a reply and appear at any hearing.

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.

1 **11. MODIFICATION**

2 11.1 This Consent Judgment may be modified only by further stipulation of the Parties
3 and the approval of the Court or upon the granting of a motion brought to the Court by either Party.

4 **12. ATTORNEY'S FEES**

5 12.1 A Party who unsuccessfully brings or contests an action arising out of this Consent
6 Judgment shall be required to pay the prevailing party's reasonable attorney's fees and costs.

7 12.2 Nothing in this Section shall preclude a Party from seeking an award of sanctions
8 pursuant to law.

9 **13. RETENTION OF JURISDICTION**

10 13.1 This Court shall retain jurisdiction of this matter to implement or modify the
11 Consent Judgment.

12 **14. AUTHORIZATION**

13 14.1 The undersigned are authorized to execute this Consent Judgment on behalf of their
14 respective Parties and have read, understood and agree to all of the terms and conditions of this
15 document and certify that he or she is fully authorized by the Party he or she represents to execute
16 the Consent Judgment on behalf of the Party represented and legally bind that Party. Except as
17 explicitly provided herein each Party is to bear its own fees and costs.

18 **AGREED TO:**

AGREED TO:

19
20 Date: 02/08/2020

Date: 1-21-2020

21
22 By: 
23 PRECILA BALABBO

By: 
B. R. E. INDUSTRIES, INC.

24
25 **IT IS SO ORDERED, ADJUDGED AND DECREED:**

26
27 Dated: 0/2/2020


Judge of Superior Court

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11
CONSENT JUDGMENT