

FILED
Superior Court of California
County of Los Angeles

12/14/2021

Sherri R. Carter, Executive Officer / Clerk of Court

By: A. Barton Deputy

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8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 FOR THE COUNTY OF LOS ANGELES

10 APS&EE, LLC, a limited liability company,)
11 Plaintiff,)
12 v.)
13 HOME ESSENTIALS & BEYOND, INC., a)
14 corporation, HOME ESSENTIALS, INC., a)
15 corporation, and DOES 1 through 100,)
16 inclusive,)
17 Defendants.)

CASE NO. 19STCV40762

~~[PROPOSED]~~ CONSENT JUDGMENT

Judge: Hon. Monica Bachner

Dept.: 71

Compl. Filed: November 12, 2019

Unlimited Jurisdiction

18 **1. RECITALS**

19 **1.1 The Parties**

20 **1.1.1** This Consent Judgment is entered into by and between APS&EE, LLC
21 (“Plaintiff”) and Bed Bath & Beyond, Inc. (“Defendant”). Plaintiff and Defendant shall
22 hereinafter collectively be referred to as the “Parties”. This Consent Judgment does not apply to
23 the named defendants Home Essentials & Beyond, Inc. and Home Essentials, Inc.

24 **1.1.2** Plaintiff is an organization based in California with an interest in
25 protecting the environment, improving human health and the health of ecosystems, and
26 supporting environmentally sound practices, which includes promoting awareness of exposure to
27 toxic chemicals and reducing exposure to hazardous substances found in consumer products.

28 **1.1.3** Plaintiff alleges that Defendant is a person in the course of doing business

1 as the term is defined in California *Health & Safety Code* section 25249.6 et seq. (“Proposition
2 65”).

3 **1.2 Allegations**

4 **1.2.1** Plaintiff alleges that Defendant sold “Home Essentials” brand of ceramic
5 mugs with exterior decorations, including “Stars and Stripes” #61249, 7-86460-61249-5
6 (hereinafter the “Products”) in the State of California causing users in California to be exposed to
7 unsafe levels of Lead without providing “clear and reasonable warnings”, in violation of
8 Proposition 65. Lead is potentially subject to Proposition 65 warning requirements because it is
9 listed by the State of California as known to cause cancer and birth defects or other reproductive
10 harm.

11 **1.2.2** On August 28, 2019, Plaintiff provided a Sixty-Day Notice of Violation
12 (the “August 28, 2019 Notice”) to Home Essentials & Beyond, Inc., Home Essentials, Inc.,
13 Home Essentials Sales & Marketing, Inc., and the various public enforcement agencies regarding
14 the alleged violation of Proposition 65 with respect to the Products. On June 3, 2020, Plaintiff
15 provided a Supplemental Sixty-Day Notice of Violation (the “June 3, 2020 Notice”) to Home
16 Essentials & Beyond, Inc., Home Essentials, Inc., Home Essentials Sales & Marketing, Inc.,
17 Tuesday Morning, Inc., and the various public enforcement agencies regarding the alleged
18 violation of Proposition 65 with respect to the Products. On September 11, 2020, Plaintiff
19 provided a Second Supplemental Sixty-Day Notice of Violation (the “September 11, 2020
20 Notice”) to Defendant, as well as Home Essentials & Beyond, Inc., Home Essentials, Inc., Home
21 Essentials Sales & Marketing, Inc., Tuesday Morning, Inc., and the various public enforcement
22 agencies regarding the alleged violation of Proposition 65 with respect to the Products. The
23 August 28, 2019 Notice, June 3, 2020 Notice, and September 11, 2020 Notice shall hereinafter
24 collectively be referred to as the “Notices”. On November 12, 2019, Plaintiff filed the instant
25 action (“Complaint”) in the Superior Court for the County of Los Angeles, alleging violations of
26 Proposition 65. On or about November 23, 2020, the Complaint was amended to replace Doe 1
27 with Defendant.

28 **1.3 No Admissions**

1 Defendant denies all allegations in Plaintiff's Notices and Complaint and maintains that
2 the Products have been, and are, in compliance with all laws, and that Defendant has not violated
3 Proposition 65. This Consent Judgment shall not be construed as an admission of liability by
4 Defendant but to the contrary as a compromise of claims that are expressly contested and denied.
5 However, nothing in this section shall affect the Parties' obligations, duties, and responsibilities
6 under this Consent Judgment.

7 **1.4 Compromise**

8 The Parties enter into this Consent Judgment in order to resolve the controversy
9 described above in a manner consistent with prior Proposition 65 settlements and consent
10 judgments that were entered in the public interest and to avoid prolonged and costly litigation
11 between them.

12 **1.5 Jurisdiction And Venue**

13 For purposes of this Consent Judgment only, the Parties stipulate that the above-entitled
14 Court has jurisdiction over Defendant as to the allegations in the Complaint, that venue is proper
15 in Los Angeles County, and that this Court has jurisdiction to enter and enforce the provisions of
16 this Consent Judgment pursuant to California Code of Civil Procedure ("CCP") § 664.6 and
17 Proposition 65.

18 **1.6 Effective Date**

19 The "Effective Date" shall be the date this Consent Judgment is approved and entered by
20 the Court.

21 **2. INJUNCTIVE RELIEF**

22 **2.1 Reformulation Standard**

23 As of the Effective Date, and other than as set forth below, Defendant shall not
24 manufacture, distribute, sell, offer for sale, or cause to have the Products sold in California
25 unless: (a) the Product contains no more than 1.0 microgram of lead based on a wipe sample
26 collected using NIOSH Method 9100 from the part of the Product that contains the Exterior
27 Decorations; or (b) the Product is accompanied by a clear and reasonable warning as described
28 below in Section 2.2. "Exterior Decorations" is defined as all colored artwork, designs and/or

1 markings on the exterior surface of the Products. Notwithstanding the above, Defendant shall
2 not be required to place written warnings on the packaging of what remaining Product it has in
3 stock as of the Effective Date, as long as it provides an internet warning for such non-
4 reformulated Product, as further described in Section 2.2.1 below.

5 **2.2 Proposition 65 Warnings**

6 **2.2.1** For any Products that are not Reformulated Products, such Products shall
7 be accompanied by a clear and reasonable warning. Defendant shall provide a warning statement
8 substantially similar to the following:

9 “**WARNING:** This product can expose you to Lead which is known to the State
10 of California to cause cancer and birth defects or other reproductive harm. For
more information go to www.P65Warnings.ca.gov; or

11 “**WARNING:** Cancer and Reproductive Harm – www.P65Warnings.ca.gov
12

13 If Defendant has reason to believe the Products may expose consumers to additional
14 chemicals listed under Proposition 65, then it may replace “Lead which is” with “chemicals,
15 including Lead, which are” in the warning statement. The warning shall be accompanied by a
16 symbol consisting of a black exclamation point in a yellow equilateral triangle with a bold black
17 outline. Where the label for the product is not printed using the color yellow, the symbol may be
18 printed in black and white. The symbol shall be placed to the left of the text of the warning, in a
19 size no smaller than the height of the word “WARNING”.

20 The Products shall carry said warning directly on each unit, label, or package, with such
21 conspicuousness as compared with other words, statements or designs as to render it likely to be
22 read and understood by an ordinary consumer prior to sale. A Product that is sold by Defendant
23 on the internet to persons located in California shall also provide the warning message by a
24 clearly marked hyperlink on the product display page, or otherwise prominently displayed to the
25 purchaser before the purchaser completes his or her purchase of the Product. For Products that
26 Defendant provides for a downstream entity to sell on the internet, Defendant shall include an
27 instruction that the entity comply with the warnings requirements of this section.

28 **3. PAYMENTS**

3.1 Civil Penalty Pursuant To Proposition 65

In settlement of all claims referred to in this Consent Judgment, Defendant shall pay a total civil penalty of two thousand dollars (\$2,000.00) to be apportioned in accordance with *Health and Safety Code* section 25249.12(c)(1) and (d), with 75% (\$1,500.00) for State of California Office of Environmental Health Hazard Assessment (“OEHHA”), and the remaining 25% (\$500.00) for Plaintiff.

Defendant shall issue these payments collectively as part of the total payment described below in Section 3.2 via wire transfer to Law Offices of Lucas T. Novak. After receipt of the wire transfer, Law Offices of Lucas T. Novak shall be responsible for forwarding the respective payments to OEHHA and APS&EE.

3.2 Reimbursement Of Plaintiff’s Fees And Costs

Defendant shall reimburse Plaintiff’s experts’ and attorney’s fees and costs incurred in prosecuting the instant action, for all work performed through entry of this Consent Judgment, in the amount of seventeen thousand dollars (\$17,000.00).

Accordingly, Defendant shall remit total payment via wire transfer to Law Offices of Lucas T. Novak in the amount of nineteen thousand dollars (\$19,000.00), which includes the civil penalty described in Section 3.1, within five (5) business days of the Effective Date. Wire instructions have been exchanged between the Parties’ counsel.

4. RELEASES

4.1 Plaintiff’s Release Of Defendant

Plaintiff, acting in its individual capacity and in the public interest, in consideration of the promises and monetary payments contained herein, hereby releases Defendant, its parents, subsidiaries, shareholders, directors, members, officers, employees, attorneys, successors and assignees, as well as its downstream distributors, retailers, and customers (collectively “Releasees”), from any alleged Proposition 65 violation claims asserted in Plaintiff’s Notices and/or Complaint regarding failure to warn about exposure to lead from the Exterior Decorations of the Products sold by Defendant before and up to the Effective Date. This Consent Judgment does not act as a release of Home Essentials & Beyond, Inc., Home Essentials, Inc., Home

Essentials Sales & Marketing, Inc., Tuesday Morning, Inc., and entities in the upstream chain of distribution from Defendant.

4.2 Defendant's Release Of Plaintiff

Defendant, by this Consent Judgment, waives all rights to institute any form of legal action against Plaintiff, its shareholders, directors, members, officers, employees, attorneys, experts, successors and assignees for actions or statements made or undertaken, whether in the course of investigating claims or seeking enforcement of Proposition 65 against Defendant in this matter. If any Releasee should institute any such action, then Plaintiff's release of said Releasee in this Consent Judgment shall be rendered void and unenforceable.

4.3 Waiver Of Unknown Claims

Each of the Parties acknowledges that it is familiar with Section 1542 of California Civil Code which provides as follows:

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

Each of the Parties waives and relinquishes any right or benefit it has or may have under Section 1542 of California Civil Code or any similar provision under the statutory or non-statutory law of any other jurisdiction to the full extent that it may lawfully waive all such rights and benefits. The Parties acknowledge that each may subsequently discover facts in addition to, or different from, those that it believes to be true with respect to the claims released herein. The Parties agree that this Consent Judgment and the releases contained herein shall be and remain effective in all respects notwithstanding the discovery of such additional or different facts.

5. COURT APPROVAL

Upon execution of this Consent Judgment by the Parties, Plaintiff shall promptly file a noticed Motion for Approval and Entry of Consent Judgment in the above-entitled Court. This Consent Judgment is not effective until it is approved and entered by the Court. It is the intention of the Parties that the Court approve this Consent Judgment, and in furtherance of obtaining such

approval, the Parties and their respective counsel agree to mutually employ their best efforts to support the entry of this agreement in a timely manner, including cooperating on drafting and filing any papers in support of the required motion for judicial approval.

6. SEVERABILITY

Should any part or provision of this Consent Judgment for any reason be declared by a Court to be invalid, void or unenforceable, the remaining portions and provisions shall continue in full force and effect.

7. GOVERNING LAW

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

8. NOTICE

All correspondence and notice required to be provided under this Consent Judgment shall be in writing and delivered personally or sent by first class or certified mail addressed as follows:

TO DEFENDANT:

Todd O. Maiden, Esq.
Reed Smith LLP
101 Second Street, Suite 1800
San Francisco, CA 94105-3659

TO PLAINTIFF:

Lucas T. Novak, Esq.
Law Offices of Lucas T. Novak
8335 W Sunset Blvd., Suite 217
Los Angeles, CA 90069

9. INTEGRATION

This Consent Judgment constitutes the entire agreement between the parties with respect to the subject matter hereof and may not be amended or modified except in writing.

10. COUNTERPARTS

This Consent Judgment may be executed in counterparts, each of which shall be deemed an original, and all of which, when taken together, shall constitute the same document. Execution and delivery of this 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 originals.

1 **11. AUTHORIZATION**

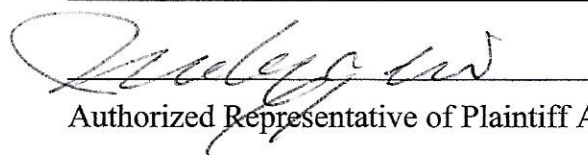
2 The undersigned are authorized to execute this Consent Judgment on behalf of their
3 respective Parties. Each Party has read, understood, and agrees to all of the terms and conditions
4 of this Consent Judgment. Each Party warrants to the other that it is free to enter into this
5 Consent Judgment and is not subject to any conflicting obligation that will or might prevent or
6 interfere with the execution or performance of this Consent Judgment by said Party.

7
8 **AGREED TO:**

9 Date:

7/15/2021

10 By:

11 

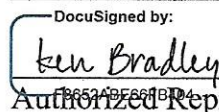
12 Authorized Representative of Plaintiff APS&EE, LLC

13
14 **AGREED TO:**

15 Date:

7/15/2021

16 By:

17 

18 Authorized Representative of Bed Bath & Beyond, Inc.

19 **IT IS SO ORDERED.**

20
21 Dated: 12/14/2021

22 
23 JUDGE OF THE SUPERIOR COURT
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