

FILED
Superior Court of California
County of Los Angeles

FEB 17 2023

David W. Slayton
Sherri R. Carter, Executive Officer/Clerk

By Jontae Marquez, Deputy
Jontae M. Marquez

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Attorney for Plaintiff, APS&EE, LLC

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

APS&EE, LLC, a limited liability company,)

Plaintiff,)

v.)

TMD HOLDINGS, LLC, a limited liability)
company, BED BATH & BEYOND, INC., a)
corporation, and DOES 1 through 100,)
inclusive,)

Defendants.)

CASE NO. 21STCV18431

[PROPOSED] CONSENT JUDGMENT

Judge: Hon. Robert S. Draper

Dept.: 78

Compl. Filed: May 17, 2021

Unlimited Jurisdiction

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1 **1. RECITALS**

2 **1.1 The Parties**

3 **1.1.1** This Consent Judgment is entered into by and between APS&EE, LLC
4 (“Plaintiff”) and Bed Bath & Beyond Inc. (“Defendant”). Plaintiff and Defendant shall
5 hereinafter collectively be referred to as the “Parties”. This Consent Judgment does not apply to
6 the named defendant TMD Holdings, LLC (“TMD”).

7 **1.1.2** Plaintiff is an organization based in California with an interest in
8 protecting the environment, improving human health and the health of ecosystems, and
9 supporting environmentally sound practices, which includes promoting awareness of exposure to
10 toxic chemicals and reducing exposure to hazardous substances found in consumer products.

11 **1.1.3** Plaintiff alleges that Defendant is a person in the course of doing business
12 as the term is defined in California *Health & Safety Code* section 25249.6 et seq (“Proposition
13 65”).

14 **1.2 Allegations**

15 **1.2.1** Plaintiff alleges that ceramic mugs with exterior decorations manufactured
16 by TMD, including but not limited to TMD Retail 23oz latte mug, 13546BBB, 8-43944-15249-3,
17 and “Nap Queen” mug, 17137BBB, 8-43944-15662-0 (hereinafter collectively, the “Products”)
18 were sold by Defendant in the State of California, causing users in California to be exposed to
19 Lead without providing “clear and reasonable warnings”, in violation of Proposition 65. Lead is
20 potentially subject to Proposition 65 warning requirements because it is listed by the State of
21 California as known to cause cancer and birth defects or other reproductive harm.

22 **1.2.2** On March 1, 2021, Plaintiff provided a Sixty-Day Notice of Violation (the
23 “Notice”) to Defendant, as well as TMD, and the various public enforcement agencies regarding
24 the alleged violation of Proposition 65 with respect to the TMD Retail 23oz latte mug. On
25 December 8, 2021, Plaintiff provided a Supplemental Sixty-Day Notice of Violation (the
26 “Supplemental Notice”) to the aforementioned entities with respect to the Products. The Notice
27 and Supplemental Notice shall hereinafter collectively be referred to as the “Notices”. On May
28 17, 2021, Plaintiff filed the instant action in the Superior Court for the County of Los Angeles,

alleging violations of Proposition 65, and on March 14, 2022, Plaintiff filed a First Amended Complaint (the "Complaint").

1.3 No Admissions

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

1.4 Compromise

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

1.5 Jurisdiction And Venue

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

1.6 Effective Date

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

2. INJUNCTIVE RELIEF

2.1 Reformulation Standard

As of the Effective Date, and other than as set forth below, Defendant shall not manufacture, distribute, sell, offer for sale, or cause to have the Products sold in California unless: (a) the Product contains no more than 1.0 microgram of lead based on a wipe sample

collected using National Institute for Occupational Safety and Health Test Method 9100 from the part of the Product that contains the Exterior Decorations; or (b) the Product is accompanied by a clear and reasonable warning as described below in Section 2.2. "Exterior Decorations" is defined as all colored artwork, designs and/or markings on the exterior surface of the Products. Notwithstanding the above, Defendant shall not be required to place written warnings on the packaging of what remaining Products its California stores have in stock as of the Effective Date, as long as it provides an internet warning for such non-reformulated Product, as further described in Section 2.2.1 below.

2.2 Proposition 65 Warnings

2.2.1 For any Products that are not Reformulated Products, such Products made available in California stores or for shipment to California residents shall be accompanied by a clear and reasonable warning. The warning statement shall be substantially similar to the following:

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

"WARNING: Cancer and Reproductive Harm – www.P65Warnings.ca.gov

If Defendant has reason to believe the Products may expose consumers to additional chemicals listed under Proposition 65, then it may replace "Lead which is" with "chemicals, including Lead, which are" in the warning statement. The warning shall be accompanied by a symbol consisting of a black exclamation point in a yellow equilateral triangle with a bold black outline. Where the label for the 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".

The Products shall carry said warning directly on each unit, label, or package, with such conspicuousness as compared with other words, statements or designs as to render it likely to be read and understood by an ordinary consumer prior to sale. A Product that is sold by Defendant on the internet to persons located in California shall also provide the warning message by a

clearly marked hyperlink on the product display page, or otherwise prominently displayed to the purchaser before the purchaser completes his or her purchase of the Product.

3. PAYMENTS

3.1 Civil Penalty Pursuant To Proposition 65

In settlement of all claims referred to in this Agreement, Defendant shall pay a total civil penalty of one thousand dollars (\$1,000.00) to be apportioned in accordance with *Health and Safety Code* section 25249.12(c)(1) and (d), with 75% (\$750.00) for State of California Office of Environmental Health Hazard Assessment ("OEHHA"), and the remaining 25% (\$250.00) for APS&EE.

Defendant shall issue two (2) checks for the civil penalty: (1) a check or money order made payable to "OEHHA" in the amount of seven hundred and fifty dollars (\$750.00); and (2) a check or money order made payable to "Law Offices of Lucas T. Novak" in the amount of two hundred and fifty dollars (\$250.00). Defendant shall remit the payments within thirty (30) calendar days after the Effective Date and upon receipt of the W-9 for the "Law Offices of Lucas T. Novak", to:

Lucas T. Novak, Esq.
LAW OFFICES OF LUCAS T. NOVAK
8335 W Sunset Blvd., Suite 217
Los Angeles, CA 90069

3.2 Reimbursement Of APS&EE's Fees And Costs

Defendant shall reimburse APS&EE's reasonable experts' and attorney's fees and costs incurred in prosecuting the instant action, for all work performed through execution of this Agreement. Accordingly, Defendant shall issue a check or money order made payable to "Law Offices of Lucas T. Novak" in the amount of eighteen thousand dollars (\$18,000.00). Defendant shall remit the payments within thirty (30) calendar days after the Effective Date and upon receipt of the W-9 for the "Law Offices of Lucas T. Novak" to:

Lucas T. Novak, Esq.
LAW OFFICES OF LUCAS T. NOVAK
8335 W Sunset Blvd., Suite 217

Los Angeles, CA 90069

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, affiliates under common ownership or control, 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 TMD Holdings, LLC or 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

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

7 **5. ENFORCEMENT OF JUDGMENT**

8 A Party may enforce any of the terms and conditions of this Consent Judgment only after
9 that Party first provides thirty (30) days' notice to the Party allegedly failing to comply with the
10 terms and conditions of this Consent Judgment and attempts to resolve such Party's failure to
11 comply in an open and good faith manner.

12 **6. COURT APPROVAL**

13 Upon execution of this Consent Judgment by the Parties, Plaintiff shall promptly file a
14 noticed Motion for Approval and Entry of Consent Judgment in the above-entitled Court. This
15 Consent Judgment is not effective until it is approved and entered by the Court. It is the intention
16 of the Parties that the Court approve this Consent Judgment, and in furtherance of obtaining such
17 approval, the Parties and their respective counsel agree to mutually employ their best efforts to
18 support the entry of this agreement in a timely manner, including cooperating on drafting and
19 filing any papers in support of the required motion for judicial approval.

20 **7. SEVERABILITY**

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

24 **8. GOVERNING LAW**

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

27 **9. NOTICE**

28 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

10. 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.

11. 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.

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12. AUTHORIZATION

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

AGREED TO:

Date:

October 6, 2022

By:

[Signature]

Authorized Representative of Plaintiff APS&EE, LLC

AGREED TO:

Date:

DocuSigned by:
Ken Bradley
F8652ABE86FB404...
10/6/2022

By:

Authorized Representative of Bed Bath & Beyond Inc.

DS
[Signature]

IT IS SO ORDERED.

Dated:

2/17/23[Signature]

JUDGE OF THE SUPERIOR COURT

ROBERT S. DRAPER