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

12 PRECILA BALABBO,  
13 Plaintiff,

14 v.

15 BETTY DAIN CREATIONS, LLC,  
16 Defendant.

Case No.: RG16842621

**CONSENT JUDGMENT**

Judge: Jo-Lynne Q. Lee

Dept.: 18

Hearing Date: March 7, 2017

Hearing Time: 3:00 PM

Reservation #: R-1813243

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CONSENT JUDGMENT

1           **1.     Introduction**

2           1.1     On July 18, 2016, Precila Balabbo (“Balabbo”) served Betty Dain Creations, LLC  
3 (“Betty Dain”), Sally Beauty Supply, LLC, Sally Beauty Distributions, LLC (collectively, “Sally  
4 Beauty”) and various public enforcement agencies with a document entitled “Notice of Violation  
5 of California Health & Safety Code § 25249.6, *et seq.*” (the “Notice”). The Notice provided  
6 Betty Dain and such others, including public enforcers, with notice that alleged that Betty Dain  
7 was in violation of California Health & Safety Code § 25249.6 (“Proposition 65”), for failing to  
8 warn consumers and customers that shampoo hoses and vinyl hair caps manufactured, sold and/or  
9 distributed by Betty Dain in California, exposed users in California to the chemicals Di(2-  
10 ethylhexyl) phthalate (DEHP) and Diisononyl phthalate (DINP). No public enforcer has  
11 diligently prosecuted the allegations set forth in the Notice.

12           1.2     On December 15, 2016, Balabbo filed a Complaint for Civil Penalties and  
13 Injunctive Relief (“Complaint”) in Alameda County Superior Court, Case No. RG16842621,  
14 against Betty Dain alleging violations of Proposition 65.

15           1.3     Betty Dain is a corporation that employs more than ten persons under California  
16 Health and Safety Code §25249.6 and, through its distributors and retailers, offered the Products  
17 for sale within the State of California.

18           1.4     Betty Dain and Balabbo are collectively referred to herein as, the “Parties”.

19           1.5     The term “Products” means shampoo hoses and vinyl hair caps that contain DEHP  
20 and/or DINP, including, but not limited to, (a) Shampoo Hose style 580, UPC No.  
21 013534600899, (b) the Bull’s Eye Tipping Cap, Style No. 2077, UPC No. 013534600097, (c)  
22 Highlighting Cap, UPC No. 5033102917247, and (d) Neutralizing Cap Style 189, SKU 260085  
23 that have been manufactured, imported, sold, or distributed for sale in California by Betty Dain.

24           1.6     Balabbo’s Complaint alleges, among other things, that Betty Dain sold the  
25 Products in California and/or to California citizens, that the Products contain DEHP and DINP,  
26 and that the resulting exposure violated provisions of Proposition 65, by exposing persons to a  
27 chemical known to the State of California to cause both cancer and reproductive toxicity without  
28 first providing a clear and reasonable warning to such individuals.

1           1.7     For purposes of this Consent Judgment only, the Parties stipulate that this Court  
2 has jurisdiction over the allegations of violations contained in the Complaint and personal  
3 jurisdiction over Betty Dain as to the acts alleged in the Complaint, that venue is proper in the  
4 County of Alameda, and that this Court has jurisdiction to enter this Consent Judgment as a  
5 resolution of the allegations contained in the Complaint.

6           1.8     The Parties enter into this Consent Judgment pursuant to a full settlement of  
7 disputed claims between the Parties as alleged in the Complaint for the purpose of avoiding  
8 prolonged litigation. By execution of this Consent Judgment, Betty Dain does not admit any  
9 violation of Proposition 65 and specifically denies that it has committed any such violation.  
10 Nothing in this Consent Judgment shall be construed as an admission by Betty Dain of any fact,  
11 issue of law or violation of law, nor shall compliance with the Consent Judgment constitute or be  
12 construed as an admission by Betty Dain of any fact, issue of law, or violation of law. Nothing in  
13 this Consent Judgment shall prejudice, waive, or impair any right, remedy or defense that Betty  
14 Dain may have in any other future legal proceeding. However, this paragraph shall not diminish  
15 or otherwise affect the obligations, responsibilities and duties of Betty Dain under this Consent  
16 Judgment.

17           1.9     For purposes of this Consent Judgment, the term "Effective Date" shall mean the  
18 date that the Consent Judgment is entered by the Court.

19           **2. Injunctive Relief**

20           2.1     Commencing ninety (90) days after the Effective Date, and continuing thereafter,  
21 Betty Dain shall only ship, sell, or offer for sale in California, Reformulated Product pursuant to  
22 Section 2.2 or Product that is labeled with a clear and reasonable warning pursuant to Section 2.3.  
23 Betty Dain and its downstream retailers shall have no obligation to label Products that entered the  
24 stream of commerce prior to the Effective Date or within ninety (90) days after the Effective  
25 Date. For purposes of this Settlement Agreement, a "Reformulated Product" is Product that is in  
26 compliance with the standard set forth below in section 2.2.

27           2.2     "Reformulated Product" shall mean Product that contains less than or equal to  
28 1,000 parts per million ("ppm") of each of DEHP and DINP when analyzed pursuant to CPSC-

1 CH-C1001-09.3 Standard Operating Procedure for Determination of Phthalates method.

2 2.3 Commencing ninety (90) days after the Effective Date, Betty Dain shall, for all  
3 Products it sells or distributes and that is intended for sale in California and that is not a  
4 Reformulated Product, provide clear and reasonable warnings as set forth in subsections 2.3(a)  
5 and (b) below. The warning shall be prominently placed with such conspicuousness as compared  
6 with other words, statements, designs, or devices as to render it likely to be read and understood  
7 by an ordinary individual under customary conditions before purchase or use. Each warning shall  
8 be provided in a manner such that the consumer or user understands to which specific Product the  
9 warning applies, so as to minimize the risk of consumer confusion.

10 (a) **Retail Store Sales**

11 (i) **Product Labeling.** Betty Dain shall affix a warning to the  
12 packaging, labeling or directly on each Product they sell or distribute and that are  
13 intended for sale in California and that is not a Reformulated Product that states:

14 **[PROPOSITION 65] WARNING:**

15 This product contains chemicals known to the State of California to cause cancer,  
16 birth defects or other reproductive harm.

17 The bracketed text may, but is not required to, be used.

18 (ii) **Point of Sale Warnings.** Alternatively to the Product Labeling  
19 set forth in Section 2.3(a)(i) above, Betty Dain may and where permitted by its  
20 retailers, provide warning signs in the form below to its customers in California  
21 with instructions to post the warning signs in close proximity to the point of  
22 display of the Product. Such instruction sent to Betty Dain customers shall be sent  
23 by certified mail, return receipt requested.

24 **[PROPOSITION 65] WARNING:**

25 This product contains chemicals known to the State of California to cause cancer,  
26 birth defects or other reproductive harm.

27 The bracketed text may, but is not required to, be used.

28 (b) **Mail Order Catalog Warning.** In the event that Betty Dain directly  
sells Products via a printed mail order catalog directly to consumers located in California after the

1 Effective Date that is not a Reformulated Product, Betty Dain shall provide a warning for such  
2 Product sold via printed mail order catalog to such California residents. A warning that is given  
3 in a printed mail order catalog shall be in the same type size or larger than the Product description  
4 text within the catalog. The following warning shall be provided on the same page and in the  
5 same location as the display and/or description of the Products:

6 **[PROPOSITION 65] WARNING:**

7 This product contains chemicals known to the State of California to cause cancer,  
8 birth defects or other reproductive harm.

9 The bracketed text may, but is not required to, be used. Where it is impracticable to provide the  
10 warning on the same page and in the same location as the display and/or description of the  
11 Products, Betty Dain may utilize a designated symbol to cross reference the applicable warning  
12 and shall define the term “designated symbol” with the following language on the inside of the  
13 front cover of the printed catalog or on the same page as any order form for the Product:

14 **[PROPOSITION 65] WARNING:** Certain products identified with this symbol  
15 ▼ and offered for sale in this catalog contains chemicals known to the State of  
16 California to cause cancer, birth defects or other reproductive harm.

17 The bracketed text may, but is not required to, be used. The designated symbol must appear on  
18 the same page and in close proximity to the display and/or description of the Products. On each  
19 page where the designated symbol appears, Betty Dain must provide a header or footer directing  
20 the consumer to the warning language and definition of the designated symbol.

21 **(c) Internet Sales Warning.** In the event that Betty Dain sells Products  
22 via the internet directly to consumers located in California ninety (90) days after the Effective  
23 Date that is not a Reformulated Product, Betty Dain shall provide a warning for such Product sold  
24 via the internet to such California residents. A warning that is given on the internet shall be in  
25 substantially the same type size as the Products' description text and shall be given in conjunction  
26 with the direct sale of the Products. The warning shall appear either: (a) on the same web page  
27 on which the Product is displayed; (b) on the same web page as the order form for the Products;  
28 (c) on the same page as the price for the Product; (d) on the same webpage where the Products are  
displayed via web link or (e) on one or more web pages displayed to a purchaser during the

1 checkout process. However, it shall not be a violation of this provision of the Consent Judgment  
2 if an internet retailer, such as Amazon.com, unilaterally modifies the Products' display,  
3 description, order form, or checkout process such that the warning provided by Betty Dain no  
4 longer appears as required by this provision. The following warning shall be provided:

5 **[PROPOSITION 65] WARNING:**

6 This product contains chemicals known to the State of California to cause cancer, birth  
7 defects or other reproductive harm.

8 The bracketed text may, but is not required to, be used.

9 **3. Entry of Consent Judgment**

10 3.1 The Parties hereby request that the Court promptly enter this Consent Judgment.

11 Upon entry of this Consent Judgment, Balabbo and Betty Dain waive their respective rights to a  
12 hearing or trial on the allegations of the Complaint and 60-Day Notice.

13 3.2 In the event that the Attorney General objects or otherwise comments on one or  
14 more provisions of this Consent Judgment, Betty Dain agrees not to oppose, object to, or  
15 otherwise impede any reasonable steps taken by Balabbo to satisfy such concerns or objections.

16 **4. Matters Covered By This Consent Judgment**

17 4.1 **Plaintiff's Public Release of Proposition 65 Claims.** This Consent

18 Judgment is a final and binding resolution between Plaintiff Balabbo, acting on her own behalf,  
19 and on behalf of the public and in the public interest, and Defendant Betty Dain, and shall have  
20 preclusive effect such that no other person or entity, whether purporting to act in his, her, or its  
21 interests or the public interest shall be permitted to pursue and/or take any action with respect to  
22 any violation of Proposition 65 that was alleged in the Complaint, or that could have been brought  
23 pursuant to the Notice against Betty Dain, Sally Beauty or their downstream retailers of the  
24 Products ("Proposition 65 Claims"). As to alleged exposures to DEHP and DINP in the Products,  
25 compliance with the terms of this Consent Judgment by Betty Dain is deemed sufficient to satisfy  
26 all obligations concerning compliance by Betty Dain and Sally Beauty, and each of their  
27 downstream retailers, with the requirements of Proposition 65 with respect to the Products.  
28

1           4.2     **Plaintiff's Release of Additional Claims.**   As to Balabbo for and in her  
2 individual capacity only, this Consent Judgment shall have preclusive effect such that she shall  
3 not be permitted to pursue and/or take any action with respect to any other statutory or common  
4 law claim, to the fullest extent that any such claim was or could have been asserted by her against  
5 Betty Dain, Sally Beauty or any and all downstream retailers of the Products based on their  
6 exposure of Balabbo to DEHP and DINP in the Products, or their failure to provide a clear and  
7 reasonable warning of exposure to Balabbo as well as any other claim based in whole or in part  
8 on the facts alleged in the Complaint and the Notice, whether based on actions committed by  
9 Betty Dain, Sally Beauty, or any of their downstream retailers of the Products (“Phthalate  
10 Exposure Claims”).

11           4.3     **Waiver of Rights Under Section 1542 of the California Civil Code.**   As to  
12 Balabbo’s public release of Proposition 65 Claims set forth in Section 4.1 (“Public Release”) and  
13 her individual release of Phthalate Exposure Claims set forth in Section 4.2 (“Individual  
14 Release”), Balabbo, acting on her own behalf and on behalf of the public with respect to the  
15 Public Release and acting in her individual capacity with respect to the Individual Release,  
16 waives all rights to institute any form of legal action, and releases all claims against Betty Dain,  
17 Sally Beauty, and their downstream retailers, including their parents, subsidiaries, affiliates,  
18 assigns, and acquiring entities of any of them, who may use, maintain, distribute or sell the  
19 Products, for the Proposition 65 Claims and the Phthalate Exposure Claims (referred to  
20 collectively in this Section as “Claims”). In furtherance of the foregoing, Balabbo, acting on her  
21 own behalf and on behalf of the public with respect to the Public Release and acting in her  
22 individual capacity with respect to the Individual Release, waives any and all rights and benefits  
23 which she now has, or in the future may have, conferred upon her with respect to the Claims by  
24 virtue of the provisions of § 1542 of the California Civil Code, which provides as follows:

25           **A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE**  
26           **CREDITOR DOES NOT KNOW OR SUSPECT EXIST IN HIS OR HER**  
27           **FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF**  
28           **KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED**  
              **HIS SETTLEMENT WITH THE DEBTOR.**

1           4.4     **Betty Dain’ Release of Plaintiff Balabbo.** Betty Dain, on behalf of itself, its past  
2 and current agents, representatives, attorneys, successors and/or assignees, hereby waives any and  
3 all claims against Balabbo, her attorneys, and other representatives for any and all actions taken or  
4 statements made (or those that could have been taken or made) by Balabbo and her attorneys and  
5 other representatives, whether in the course of investigating claims or otherwise seeking  
6 enforcement of Proposition 65 against Betty Dain in this matter.

7           **5.     Enforcement of Judgment**

8           5.1     The terms of this Consent Judgment shall be enforced exclusively by the Parties  
9 hereto. The Parties may, by noticed motion or order to show cause before the Superior Court of  
10 Alameda County, giving the notice required by law, enforce the terms and conditions contained  
11 herein. In any proceeding brought by either party to enforce this Consent Judgment, such party  
12 may seek whatever fines, costs, penalties or remedies as may be provided by law for any violation  
13 of Proposition 65 or this Consent Judgment.

14          **6.     Modification of Judgment**

15          6.1     This Consent Judgment may be modified only by written agreement of the Parties  
16 upon entry of a modified Consent Judgment by the Court thereon, or upon motion of any party as  
17 provided by law and upon an entry of a modified Consent Judgment by the Court.

18          6.2     Should any court enter final judgment in a case brought by Balabbo or the People  
19 involving the Products that sets forth standards defining when Proposition 65 warnings will or  
20 will not be required (“Alternative Standards”), or if the California Attorney General’s office  
21 otherwise provides written endorsement (i.e., a writing that is circulated by the Attorney General  
22 that is not intended for the purpose of soliciting further input or comments) of Alternative  
23 Standards applicable to products that are of the same general type and function as the Products  
24 and constructed from the same materials, Betty Dain shall be entitled to seek a modification of  
25 this Consent Judgment on sixty (60) days’ notice to Balabbo so as to be able to utilize and rely on  
26 such Alternative Standards in lieu of those set forth in Section 2 of this Consent Judgment.  
27 Balabbo shall not unreasonably contest any proposed application to effectuate such a modification  
28 provided that the Products for which such a modification is sought are of the same general type



1 and function as those to which the Alternative Standards apply.

2 **7. Settlement Payment**

3 7.1 In settlement of all the claims referred to in this Consent Judgment, and without  
4 any admission of liability therefore, Betty Dain shall make the following monetary payments:

5 7.1.1 **Initial Civil Penalty.** Within ten (10) business days of the entry of this  
6 Consent Judgment by the Court, Betty Dain shall pay a total of \$3,000.00 in Initial Civil Penalties  
7 in accordance with this Section. The Initial Civil Penalty payment will be allocated in accordance  
8 with California Health & Safety Code §§ 25249.12(c)(1) and (d), with 75% of the funds remitted  
9 to the California Office of Environmental Health Hazard Assessment ("OEHHA") and the  
10 remaining 25% of the civil penalty remitted to Balabbo. Within ten (10) business days of the  
11 entry of this Consent Judgment by the Court, Betty Dain shall issue two separate checks for the  
12 civil penalty payment to (a) "OEHHA" in the amount of \$2,250.00; and (b) "Brodsky & Smith,  
13 LLC in Trust for Balabbo" in the amount of \$750.00. Payment owed to Balabbo pursuant to this  
14 Section shall be delivered to the following payment address:

15 Evan J. Smith, Esquire  
16 Brodsky & Smith, LLC  
17 Two Bala Plaza, Suite 510  
18 Bala Cynwyd, PA 19004

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

21 For United States Postal Service Delivery:

22 Mike Gyurics  
23 Fiscal Operations Branch Chief  
24 Office of Environmental Health Hazard Assessment  
25 P.O. Box 4010  
26 Sacramento, CA 95812-4010

27 For Non-United States Postal Service Delivery:

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

A copy of the check payable to OEHHA shall be mailed to Brodsky & Smith, LLC at the

1 address set forth above as proof of payment to OEHHA.

2           **7.1.2 Final Civil Penalty.** On June 1, 2017, Betty Dain shall make a Final Civil  
3 Penalty payment of \$3,000.00. Pursuant to Title 11 California Code of Regulations, Section  
4 3203(c), Balabbo agrees that the Final Civil Penalty payment shall be waived in its entirety if, no  
5 later than May 1, 2017, an officer of Betty Dain provides Balabbo with a signed declaration  
6 certifying that all Products it ships for sale or distributes for sale in California as of the date of its  
7 certification are Reformulated Products or are marked with the warnings required by this Consent  
8 Decree (hereinafter “Labeled Product”) and that Betty Dain will continue to offer only  
9 Reformulated Products or Labeled Products in California in the future. The option to provide a  
10 declaration certifying its complete early reformulation or labeling of the Products in lieu of  
11 making the Final Civil Penalty payment otherwise required by this Section is a material term, and  
12 time is of the essence.

13           **7.1.3 Attorney Fees and Costs.** In addition to the payment above, Betty Dain  
14 shall pay \$32,000.00 to Brodsky & Smith, LLC (“Brodsky & Smith”) as complete reimbursement  
15 for Balabbo’s attorneys’ fees and costs, including any investigation and laboratory costs or expert  
16 fees, incurred in the course of bringing the Complaint and in enforcing Proposition 65, including  
17 without limitation, preparation of the 60-Day Notice letter and discussions with the office of the  
18 Attorney General. Payment shall be made within ten (10) business days of the entry of this  
19 Consent Judgment by the Court and sent to the address for Brodsky & Smith set forth in Section  
20 7.1.1, above.

21           **8. Notices**

22           8.1 Any and all notices between the Parties provided for or permitted under this  
23 Agreement, or by law, shall be in writing and personally delivered or sent by: (i) first-class  
24 (registered or certified mail) return receipt requested; or (ii) overnight or two-day courier on any  
25 party by the other party to the following addresses:

26           For Betty Dain:

27                                   Felicia Leborgne Nowels  
28                                   Akerman LLP, Suite 1200  
                                      106 East College Avenue

1 Tallahassee, FL 32301

2 For Balabbo:

3 Evan J. Smith  
4 BRODSKY & SMITH, LLC  
5 9595 Wilshire Blvd., Suite 900  
6 Beverly Hills, CA 90212

7 Any party, from time to time, may specify in writing to the other party a change of address to  
8 which all notices and other communications shall be sent.

9 **9. Authority to Stipulate**

10 9.1 Each signatory to this Consent Judgment certifies that he or she is fully authorized  
11 by the party he or she represents to enter into this Consent Judgment and to execute it on behalf of  
12 the party represented and legally to bind that party.

13 **10. Counterparts**

14 10.1 This Stipulation may be signed in counterparts and shall be binding upon the  
15 Parties hereto as if all said Parties executed the original hereof.

16 **11. Retention of Jurisdiction**

17 11.1 This Court shall retain jurisdiction of this matter to implement the Consent  
18 Judgment.

19 **12. Service on the Attorney General**

20 12.1 Balabbo shall serve a copy of this Consent Judgment, signed by all Parties, on the  
21 California Attorney General on behalf of the Parties so that the Attorney general may review this  
22 Consent Judgment prior to its submittal to the Court for Approval. No sooner than forty-five (45)  
23 days after the Attorney General has received the aforementioned copy of this Consent Judgment,  
24 and in the absence of any written objection by the Attorney General to the terms of this Consent  
25 Judgment, the Parties may then submit it to the Court for Approval.

26 **13. Entire Agreement**

27 13.1 This Consent Judgment contains the sole and entire agreement and understanding  
28 of the Parties with respect to the entire subject matter hereof, and any and all discussions,  
negotiations, commitment and understandings related thereto. No representations, oral or

1 otherwise, express or implied, other than those contained herein have been made by any party  
2 hereto. No other agreements not specifically referred to herein, oral or otherwise, shall be deemed  
3 to exist or to bind any of the Parties.

4 **14. Governing Law and Construction**

5 14.1 The validity, construction and performance of this Consent Judgment shall be  
6 governed by the laws of the State of California, without reference to any conflicts of law  
7 provisions of California law.

8 **15. Court Approval**

9 15.1 If this Consent Judgment is not approved by the Court, it shall be of no force or  
10 effect, and cannot be used in any proceeding for any purpose.

11 **IT IS SO STIPULATED:**

12  
13 Dated: \_\_\_\_\_ Dated: 1/17/17

14  
15 By: \_\_\_\_\_ By: *Betty Dain*  
16 Precila Balabbo Betty Dain Creations, LLC

17 **IT IS SO ORDERED, ADJUDGED AND DECREED:**

18  
19 Dated: \_\_\_\_\_ Judge of Superior Court

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1 otherwise, express or implied, other than those contained herein have been made by any party  
2 hereto. No other agreements not specifically referred to herein, oral or otherwise, shall be deemed  
3 to exist or to bind any of the Parties.

4 **14. Governing Law and Construction**

5 14.1 The validity, construction and performance of this Consent Judgment shall be  
6 governed by the laws of the State of California, without reference to any conflicts of law  
7 provisions of California law.

8 **15. Court Approval**

9 15.1 If this Consent Judgment is not approved by the Court, it shall be of no force or  
10 effect, and cannot be used in any proceeding for any purpose.

11 **IT IS SO STIPULATED:**

12  
13 Dated: 1/18/17 Dated: \_\_\_\_\_

14  
15 By:  By: \_\_\_\_\_  
16 Precila Balabbo Betty Dain Creations, LLC

17 **IT IS SO ORDERED, ADJUDGED AND DECREED:**

18  
19 Dated: \_\_\_\_\_ Judge of Superior Court