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

12 KAREN CALACIN,

13 Plaintiff,

14 v.

15 NATIONAL CELLULAR USA, INC.,

16 Defendant.

Case No.: RG17865826

CONSENT JUDGMENT

Judge: Stephen Pulido

Dept.: 517

Hearing Date: October 24, 2017

Hearing Time: 3:00 PM

Reservation #: R-1873966

1 **1. INTRODUCTION**

2 **1.1 The Parties.** This Consent Judgment is entered into by and between Karen
3 Calacin acting on behalf of the public interest (hereinafter “Calacin”) and National Cellular USA,
4 Inc. (“National Cellular” or “Defendant”) with Calacin and Defendant collectively referred to as
5 the “Parties” and each of them as a “Party.” Calacin is an individual residing in California who
6 seeks to promote awareness of exposures to toxic chemicals and improve human health by
7 reducing or eliminating hazardous substances contained in consumer products. National Cellular
8 is a person in the course of doing business for purposes of Proposition 65, Cal. Health & Safety
9 Code §§ 25249.6 et seq.

10 **1.2 Allegations and Representations.** Calacin alleges that Defendant has exposed
11 individuals to Di(2-ethylhexyl) phthalate (DEHP) from Overtime Phantom earphones without
12 providing clear and reasonable warnings under Proposition 65. DEHP is listed under Proposition
13 65 as a chemical known to the State of California to cause reproductive toxicity.

14 **1.3 Notices of Violation/Complaint.** On or about April 10, 2017, Calacin served
15 National Cellular and various public enforcement agencies with a document entitled “60-Day
16 Notice of Violation” pursuant to Health & Safety Code §25249.7(d) (the “Notice”), alleging that
17 Defendant was in violation of Proposition 65 for failing to warn consumers and customers that
18 Overtime Phantom earphones exposed users in California to DEHP. No public enforcer has
19 brought and is diligently prosecuting the claims alleged in the Notice. On June 29, 2017, Calacin
20 filed a complaint in the matter (the “Complaint”).

21 **1.4** For purposes of this Consent Judgment only, the Parties stipulate that this Court
22 has jurisdiction over Defendant as to the allegations contained in the Complaint filed in this
23 matter, that venue is proper in the County of Alameda, and that this Court has jurisdiction to
24 approve, enter, and oversee the enforcement of this Consent Judgment as a full and final binding
25 resolution of all claims which were or could have been raised in the Complaint based on the facts
26 alleged therein and/or in the Notice.

1 1.5 Defendant denies the material allegations contained in Calacin's Notice and
2 Complaint and maintains that it has not violated Proposition 65. Nothing in this Consent
3 Judgment shall be construed as an admission by Defendant of any fact, finding, issue of law, or
4 violation of law; nor shall compliance with this Consent Judgment constitute or be construed as
5 an admission by Defendant of any fact, finding, conclusion, issue of law, or violation of law, such
6 being specifically denied by Defendant. However, this section shall not diminish or otherwise
7 affect the obligations, responsibilities, and duties of Defendant under this Consent Judgment.

8 **2. DEFINITIONS**

9 2.1 **Covered Products.** The term "Covered Products" means earphones, including but
10 not limited to Overtime Phantom Headphones, UPC No. 8 02029 06478 6, that are manufactured,
11 distributed and/or offered for sale in California by National Cellular, and that contain DEHP.

12 2.2 **Effective Date.** The term "Effective Date" means the date this Consent Judgment
13 is entered as a Judgment of the Court.

14 **3. INJUNCTIVE RELIEF: WARNINGS**

15 3.1 Commencing ninety (90) days after the Effective Date, National Cellular shall not
16 manufacture, import, or purchase for sale in California any Covered Product that contains more
17 than 1,000 parts per million DEHP, unless the Covered Product is accompanied by the following
18 warning: "WARNING: This product contains a chemical known to the State of California to
19 cause, birth defects and other reproductive harm."

20 3.2 The warning provided pursuant to Section 3.1 shall be affixed to or printed on the
21 Covered Product's packaging or labeling. The warning shall be prominently affixed to or printed
22 on the packaging or labeling and displayed with such conspicuousness, as compared with other
23 words, statements, or designs as to render it likely to be read and understood by an ordinary
24 individual under customary conditions of purchase or use. A warning may be contained in the
25 same section of the packaging, labeling, or instruction booklet that states other safety warnings, if
26 any, concerning the use of the product and shall be at least the same size as those other safety
27 warnings.
28

1 **4. MONETARY TERMS**

2 **4.1 Initial Civil Penalty.** National Cellular shall pay an Initial Civil Penalty of
3 \$1,000.00 pursuant to Health and Safety Code section 25249.7(b), to be apportioned in
4 accordance with California Health & Safety Code § 25192, with 75% of these funds remitted to
5 the State of California's Office of Environmental Health Hazard Assessment and the remaining
6 25% of the penalty remitted to Calacin, as provided by California Health & Safety Code
7 § 25249.12(d).

8 4.1.1 Within ten (10) business days of the Effective Date, National Cellular shall
9 issue two separate checks for the civil penalty payment to (a) "OEHHA" in the amount of
10 \$750.00; and (b) "Brodsky & Smith, LLC in Trust for Calacin" in the amount of \$250.00.

11 Payment owed to Calacin pursuant to this Section shall be delivered to the following payment
12 address:

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

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

18 For United States Postal Service Delivery:

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

22 For Non-United States Postal Service Delivery:

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

26 A copy of the check payable to OEHHA shall be mailed to Brodsky & Smith, LLC at the
27 address set forth above as proof of payment to OEHHA.
28

1 4.2 **Final Civil Penalty.** One Hundred Twenty (120) days after the Effective Date,
2 National Cellular shall make a Final Civil Penalty payment of \$1,000.00 on the same terms as set
3 forth in Section 4.1.1 pertaining to the Initial Civil Penalty. Pursuant to Title 11 California Code
4 of Regulations, Section 3203(c), Calacin agrees that the Final Civil Penalty payment shall be
5 waived in its entirety if, on or before the date the Final Civil Penalty payment is due, an officer of
6 National Cellular provides Plaintiff with a signed declaration certifying that all Covered Products
7 it ships for sale or distributes for sale in California as of the date of its certification are
8 Reformulated Products¹ or are marked with the warnings required by this Consent Decree
9 (hereinafter “Labeled Product”) and that National Cellular will, to the best of its knowledge,
10 continue to offer only Reformulated Products or Labeled Products in California in the future. The
11 option to provide a declaration certifying its complete early reformulation or labeling of the
12 Covered Products in lieu of making the Final Civil Penalty payment otherwise required by this
13 Section is a material term, and time is of the essence.

14 4.3 **Attorney Fees.** National Cellular shall pay \$11,500.00 to Brodsky & Smith, LLC
15 (“Brodsky Smith”) as complete reimbursement for Plaintiff Calacin’s attorneys’ fees and costs
16 incurred as a result of investigating, bringing this matter to National Cellular’s attention, litigating
17 and negotiating and obtaining judicial approval of a settlement in the public interest, pursuant to
18 Code of Civil Procedure section 1021.5. Payment shall be made within fourteen (14) business
19 days of the Effective Date and sent to the address for Brodsky & Smith set forth in section 4.1.1,
20 above.

21 **5. RELEASE OF ALL CLAIMS**

22 5.1 This Consent Judgment is a full, final, and binding resolution between Calacin
23 acting in the public interest, and National Cellular, and its parents, shareholders, divisions,
24 subdivisions, subsidiaries, partners, sister companies, and affiliates, and their successors and
25 assigns (“Defendant Releasees”), and all entities from whom they obtain and to whom they

26 ¹ A “Reformulated Product” is Product that contains no more than 1,000 parts per million
27 DEHP.
28

1 directly or indirectly distribute or sell Covered Products, including but not limited to,
2 manufacturers, suppliers, distributors, wholesalers, customers, retailers, licensors, licensees
3 retailers, franchisees, and cooperative members ("Downstream Defendant Releasees"), of all
4 claims for violations of Proposition 65 based on exposure to DEHP from Covered Products as set
5 forth in the Notice, with respect to any Covered Products manufactured, distributed, or sold by
6 National Cellular prior to one hundred twenty (120) days after the Effective Date. Compliance
7 with the terms of this Consent Judgment constitutes compliance with Proposition 65 with regard
8 to the Covered Products.

9 5.2 In addition to the foregoing, Calacin, on behalf of herself, her past and current
10 agents, representatives, attorneys, and successors and/or assignees, and not in her representative
11 capacity, hereby waives all rights to institute or participate in, directly or indirectly, any form of
12 legal action and releases any National Cellular, Defendant Releasees, and Downstream Defendant
13 Releasees from any and all manner of actions, causes of action, claims, demands, rights, suits,
14 obligations, debts, contracts, agreements, promises, liabilities, damages, charges, losses, costs,
15 expenses, and attorneys' fees, of any nature whatsoever, known or unknown, in law or equity,
16 fixed or contingent, now or in the future, with respect to any alleged violations of Proposition 65
17 related to or arising from Covered Products manufactured distributed or sold by National Cellular
18 or Defendant Releasees. With respect to the foregoing waivers and releases in this paragraph,
19 Calacin hereby specifically waives any and all rights and benefits which she now has, or in the
20 future may have, conferred by virtue of the provisions of Section 1542 of the California Civil
21 Code, which provides as follows:

22
23 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE
24 CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS FAVOR
25 AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY
26 HIM MUST HAVE MATERIALLY AFFECTED HIS SETTLEMENT WITH
27 THE DEBTOR.

28 5.3 National Cellular waives any and all claims against Calacin, her attorneys and
other representatives, for any and all actions taken or statements made (or those that could have

1 been taken or made) by Calacin and her attorneys and other representatives, whether in the course
2 of investigating claims or otherwise seeking enforcement of Proposition 65 against it in this
3 matter, and/or with respect to Covered Products.

4 **6. INTEGRATION**

5 6.1 This Consent Judgment contains the sole and entire agreement of the Parties and
6 any and all prior negotiations and understandings related hereto shall be deemed to have been
7 merged within it. No representations or terms of agreement other than those contained herein
8 exist or have been made by any Party with respect to the other Party or the subject matter hereof.

9 **7. GOVERNING LAW**

10 7.1 The terms of this Consent Judgment shall be governed by the laws of the State of
11 California and apply within the State of California. In the event that Proposition 65 is repealed or
12 is otherwise rendered inapplicable by reason of law generally, or as to Covered Products, then
13 Defendant shall have no further obligations pursuant to this Consent Judgment with respect to,
14 and to the extent that, Covered Products are so affected.

15 **8. NOTICES**

16 8.1 Unless specified herein, all correspondence and notices required to be provided
17 pursuant to this Consent Judgment shall be in writing and personally delivered or sent by: (i)
18 first-class, (registered or certified mail) return receipt requested; or (ii) overnight courier on any
19 party by the other party at the following addresses:

20 For Defendant:

21 Gerry Grunsfeld
22 Lazar Grunsfeld Elnadav
23 1795 Coney Island Avenue
Brooklyn NY 11230

24 And

25 For Calacin:

26 Evan Smith
27 Brodsky & Smith, LLC
28 2 Bala Plaza, Suite 510
Bala Cynwyd, PA 19004

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 Calacin 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 and Defendant agrees it shall support approval of such Motion.

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.

11. MODIFICATION

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

12. ATTORNEY'S FEES

12.1 A party who unsuccessfully brings or contests an action arising out of this Consent Judgment shall be required to pay the prevailing party's reasonable attorney's fees and costs unless the unsuccessful party has acted with substantial justification. For purposes of this

1 Consent Judgment, the term substantial justification shall carry the same meaning as used in the
2 Civil Discovery Act of 1986, Code of Civil Procedure Section 2016, et seq.

3 12.2 Nothing in this Section shall preclude a Party from seeking an award of sanctions
4 pursuant to law.

5 **13. RETENTION OF JURISDICTION**

6 13.1 This Court shall retain jurisdiction of this matter to implement or modify the
7 Consent Judgment.

8 **14. AUTHORIZATION**

9 14.1 The undersigned are authorized to execute this Consent Judgment on behalf of
10 their respective Parties and have read, understood and agree to all of the terms and conditions of
11 this document and certifies that he or she is fully authorized by the Party he or she represents to
12 execute the Consent Judgment on behalf of the Party represented and legally bind that Party.
13 Except as explicitly provided herein each Party is to bear its own fees and costs.

14
15 **AGREED TO:**

AGREED TO:

16
17 Date: _____

Date: 7/20/17

18 By: _____

By:  _____

19 KAREN CALACIN

NATIONAL CELLULAR USA, INC.

20
21 **IT IS SO ORDERED, ADJUDGED AND DECREED:**

22
23 Dated: _____

Judge of Superior Court

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14
15 **AGREED TO:**

AGREED TO:

16 Date: 7/20/17

Date: _____

17 By: Karen Calacin
18 KAREN CALACIN

By: _____
NATIONAL CELLULAR USA, INC.

19
20
21 **IT IS SO ORDERED, ADJUDGED AND DECREED:**

22
23 Dated: _____

Judge of Superior Court