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

11 ESTATE OF KAREN CHARLENE CALACIN,

12 Plaintiff,

13 v.

14 THE ALLEN COMPANY, INC.,

15 Defendant.

Case No.: RG18894989

CONSENT JUDGMENT

Judge: Robert McGuiness

Dept.: 22

Hearing Date: October 30, 2018

Hearing Time: 3:00 PM

Reservation #: R-1996845

1 **1. INTRODUCTION**

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

10 1.2 **Allegations and Representations.** Plaintiff alleges that Defendant has exposed
11 individuals to diisononyl phthalate (DINP) from its sales of Allen earmuffs without providing a
12 clear and reasonable exposure warning pursuant to Proposition 65. DINP is listed under
13 Proposition 65 as a chemical known to the State of California to cause cancer.

14 1.3 **Notice of Violation/Complaint.** On or about September 9, 2017, Karen Calacin
15 served Allen, and various public enforcement agencies with documents entitled “60-Day Notice of
16 Violation” pursuant to Health & Safety Code §25249.7(d) (the “Notice”), alleging that Defendant
17 violated Proposition 65 for failing to warn consumers and customers that use of Allen earmuffs
18 expose users in California to DINP. No public enforcer has brought and is diligently prosecuting
19 the claims alleged in the Notice. On March 1, 2018, Karen Calacin filed a complaint (the
20 “Complaint” or the “Action”) in the matter. On June 27, 2018, the Complaint was amended in
21 order to substitute the Estate as the plaintiff in the Action.

22 1.4 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
23 jurisdiction over Defendant as to the allegations contained in the Complaint filed in this matter, that
24 venue is proper in the County of Alameda, and that this Court has jurisdiction to approve, enter,
25 and oversee the enforcement of this Consent Judgment as a full and final binding resolution of all
26 claims which were or could have been raised in the Complaint based on the facts alleged therein
27 and/or in the Notice.
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1 1.5 Defendant denies the material allegations contained in the Notice and Complaint
2 and maintains that it has not violated Proposition 65. Nothing in this Consent Judgment shall be
3 construed as an admission by Defendant of any fact, finding, issue of law, or violation of law; nor
4 shall compliance with this Consent Judgment constitute or be construed as an admission by
5 Defendant of any fact, finding, conclusion, issue of law, or violation of law, such being specifically
6 denied by Defendant. However, this section shall not diminish or otherwise affect the obligations,
7 responsibilities, and duties of Defendant under this Consent Judgment.

8 **2. DEFINITIONS**

9 2.1 **Covered Products.** The term “Covered Products” means Allen earmuffs that are
10 manufactured, distributed and/or offered for sale in California by Allen

11 2.2 **Effective Date.** The term “Effective Date” means the date this Consent Judgment is
12 entered as a Judgment of the Court.

13 **3. INJUNCTIVE RELIEF: WARNINGS**

14 3.1 **Reformulation of Covered Products.** Commencing on the Effective Date and
15 continuing thereafter, Covered Products that Allen directly manufactures, imports, distributes, sells,
16 or offers for sale in California shall either: (a) be Reformulated Products pursuant to § 3.2, below;
17 or (b) be labeled with a clear and reasonable exposure warning pursuant to §§ 3.3 and 3.4, below.
18 For purposes of this Consent Judgment, a “Reformulated Product” is a Covered Product that is in
19 compliance with the standard set forth in § 3.2, below. The warning requirement set forth in §§ 3.3
20 and 3.4 shall not apply to any Reformulated Product.

21 3.2 **Reformulation Standard.** “Reformulated Products” shall mean Covered Products
22 that contain concentrations less than or equal to 0.1% (1,000 parts per million (ppm) of DINP when
23 analyzed pursuant to U.S. Environmental Protection Agency testing methodologies 3580A and
24 8270C or other methodology utilized by federal or state government agencies for the purpose of
25 determining the phthalate content in a solid substance.

26 3.3 **Clear and Reasonable Warning.** Commencing with the Effective Date and
27 continuing thereafter, a clear and reasonable exposure warning as set forth in this §§ 3.3 and 3.4
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1 must be provided for all Covered Products that Defendant manufacturers, imports, distributes, sells,
2 or offers for sale in California that is not a Reformulated Product. There shall be no obligation for
3 Defendant to provide a warning for Covered Products that enter the stream of commerce prior to
4 the Effective Date. The warning shall consist of either the **Warning** or **Alternative Warning**
5 described in §§ 3.3(a) or (b), respectively:

6 (a) **Warning.** The “Warning” shall consist of the statement:

7 **⚠ WARNING:** This product can expose you to chemicals including diisononyl
8 phthalate (DINP), which is known to the State of California to cause cancer. For
9 more information go to www.P65Warnings.ca.gov.

10 (b) **Alternative Warning:** Allen may, but is not required to, use the alternative short-
11 form warning as set forth in this § 3.3(b) (“**Alternative Warning**”) as follows:

12 **⚠ WARNING:** Cancer - www.P65Warnings.ca.gov.

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

26 3.5 **Compliance with Warning Regulations.** Defendant shall be deemed to be in
27 compliance with this Consent Judgment by either adhering to §§ 3.3 and 3.4 of this Consent
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1 Judgment or by complying with warning requirements in place as adopted by OEHHA after the
2 Effective Date.

3 **4. MONETARY TERMS**

4 4.1 **Civil Penalty.** Allen shall pay \$3,000.00 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 the State of California’s Office of
7 Environmental Health Hazard Assessment (“OEHHA”) and the remaining 25% of the Civil Penalty
8 remitted to Plaintiff, as provided by California Health & Safety Code § 25249.12(d).

9 4.1.1 Within ten (10) days of the Effective Date, Allen shall issue two separate
10 checks for the Civil Penalty payment to (a) “OEHHA” in the amount of \$2,250.00; and to (b)
11 “Brodsky & Smith, LLC in Trust for Estate of Karen Charlene Calacin” in the amount of
12 \$750.00. Payment owed to Plaintiff pursuant to this Section shall be delivered to the following
13 payment address:

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

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

20 For United States Postal Service Delivery:

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

26 For Non-United States Postal Service Delivery:

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

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

3 4.2 **Attorneys' Fees.** Within ten (10) days of the Effective Date, Allen shall pay
4 \$18,000.00 to Brodsky & Smith, LLC ("Brodsky Smith") as complete reimbursement for Plaintiff's
5 attorneys' fees and costs incurred as a result of investigating, bringing this matter to Allen's
6 attention, litigating and negotiating and obtaining judicial approval of a settlement in the public
7 interest, pursuant to Code of Civil Procedure § 1021.5.

8 **5. RELEASE OF ALL CLAIMS**

9 5.1 This Consent Judgment is a full, final, and binding resolution between Plaintiff
10 acting on its own behalf, and on behalf of the public interest, and Allen, and its parents,
11 shareholders, members, directors, officers, managers, employees, representatives, agents,
12 attorneys, divisions, subdivisions, subsidiaries, partners, sister companies, and affiliates, and their
13 predecessors, successors and assigns ("Defendant Releasees"), and all entities from whom they
14 obtain and to whom they directly or indirectly distribute or sell Covered Products, including but
15 not limited to manufacturers, suppliers, distributors, wholesalers, customers, licensors, licensees
16 retailers, franchisees, and cooperative members, including but not limited to Kmart Corp.
17 ("Downstream Releasees"), of all claims for violations of Proposition 65 based on exposure to
18 DINP from Covered Products as set forth in the Notice, with respect to any Covered Products
19 manufactured, distributed, or sold by Allen prior to the Effective Date. This Consent Judgment
20 shall have preclusive effect such that no other person or entity, whether purporting to act in his,
21 her, or its interests or the public interest shall be permitted to pursue and/or take any action with
22 respect to any violation of Proposition 65 that was alleged in the Complaint, or that could have
23 been brought pursuant to the Notice against Allen or its Downstream Releasees of the Product
24 including but not limited to ("Proposition 65 Claims"). Compliance with the terms of this Consent
25 Judgment constitutes compliance with Proposition 65 with regard to the Covered Products.

26 5.2 In addition to the foregoing, Plaintiff, on behalf of itself, its past and current agents,
27 representatives, attorneys, and successors and/or assignees, and not in its representative capacity,
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1 hereby waives all rights to institute or participate in, directly or indirectly, any form of legal action
2 and releases Allen, Defendant Releasees, and Downstream Releasees from any and all manner of
3 actions, causes of action, claims, demands, rights, suits, obligations, debts, contracts, agreements,
4 promises, liabilities, damages, charges, losses, costs, expenses, and attorneys' fees, of any nature
5 whatsoever, known or unknown, in law or equity, fixed or contingent, now or in the future, with
6 respect to any alleged violations of Proposition 65 related to or arising from Covered Products
7 manufactured, distributed, or sold by Allen, Defendant Releasees or Downstream Releasees. With
8 respect to the foregoing waivers and releases in this paragraph, Plaintiff hereby specifically waives
9 any and all rights and benefits which it now has, or in the future may have, conferred by virtue of
10 the provisions of § 1542 of the California Civil Code, which provides as follows:

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

15 5.3 Allen waives any and all claims against Plaintiff, its attorneys and other
16 representatives, for any and all actions taken or statements made (or those that could have been
17 taken or made) by Plaintiff and its attorneys and other representatives, whether in the course of
18 investigating claims or otherwise seeking enforcement of Proposition 65 against it in this matter,
and/or with respect to Covered Products.

19 **6. INTEGRATION**

20 6.1 This Consent Judgment contains the sole and entire agreement of the Parties and
21 any and all prior negotiations and understandings related hereto shall be deemed to have been
22 merged within it. No representations or terms of agreement other than those contained herein exist
23 or have been made by any Party with respect to the other Party or the subject matter hereof.

24 **7. GOVERNING LAW**

25 7.1 The terms of this Consent Judgment shall be governed by the laws of the State of
26 California and apply within the State of California. In the event that Proposition 65 is repealed or
27 is otherwise rendered inapplicable by reason of law generally, or as to Covered Products, then
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1 Defendant shall have no further obligations pursuant to this Consent Judgment with respect to, and
2 to the extent that, Covered Products are so affected.

3 **8. NOTICES**

4 8.1 Unless specified herein, all correspondence and notices required to be provided
5 pursuant to this Consent Judgment shall be in writing and personally delivered or sent by: (i) first-
6 class, (registered or certified mail) return receipt requested; or (ii) overnight courier on any party
7 by the other party at the following addresses:

8 For Defendant:

9 Caitlin C. Blanche
10 K&L Gates LLP
11 1 Park Plaza
12 Twelfth Floor
Irvine, CA 92614

13 And

14 For Plaintiff:

15 Evan Smith
16 Brodsky & Smith, LLC
9595 Wilshire Blvd., Ste. 900
Beverly Hills, CA 90212

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

19 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

20 9.1 This Consent Judgment may be executed in counterparts and by facsimile, each of
21 which shall be deemed an original, and all of which, when taken together, shall constitute one and
22 the same document.

23 **10. COMPLIANCE WITH HEALTH & SAFETY CODE § 25249.7(f)/COURT**
24 **APPROVAL**

25 10.1 Plaintiff agrees to comply with the requirements set forth in California Health &
26 Safety Code § 25249.7(f) and to promptly bring a Motion for Approval of this Consent Judgment.
27 Defendant agrees it shall support approval of such Motion.

1 10.2 This Consent Judgment shall not be effective until it is approved and entered by the
2 Court and shall be null and void if, for any reason, it is not approved by the Court. In such case,
3 the Parties agree to meet and confer on how to proceed and if such agreement is not reached within
4 30 days, the case shall proceed on its normal course.

5 10.3 If the Court approves this Consent Judgment and is reversed or vacated by an
6 appellate court, the Parties shall meet and confer as to whether to modify the terms of this Consent
7 Judgment. If the Parties do not jointly agree on a course of action to take, the case shall proceed on
8 its normal course on the trial court's calendar.

9 **11. MODIFICATION**

10 11.1 This Consent Judgment may be modified only by further stipulation of the Parties
11 and the approval of the Court or upon the granting of a motion brought to the Court by either Party.

12 **12. ATTORNEY'S FEES**

13 12.1 A Party who unsuccessfully brings or contests an action arising out of this Consent
14 Judgment shall be required to pay the prevailing party's reasonable attorney's fees and costs.

15 12.2 Nothing in this Section shall preclude a Party from seeking an award of sanctions
16 pursuant to law.

17 **13. RETENTION OF JURISDICTION**

18 13.1 This Court shall retain jurisdiction of this matter to implement or modify the
19 Consent Judgment.

20 **14. AUTHORIZATION**

21 14.1 The undersigned are authorized to execute this Consent Judgment on behalf of their
22 respective Parties and have read, understood and agree to all of the terms and conditions of this
23 document and certify that he or she is fully authorized by the Party he or she represents to execute
24 the Consent Judgment on behalf of the Party represented and legally bind that Party. Except as
25 explicitly provided herein each Party is to bear its own fees and costs.
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AGREED TO:

AGREED TO:

Date: _____

Date: 8/21/18

By: _____

By: [Signature]

Hector Velarde, Administrator of the
ESTATE OF KAREN CHARLENE
CALACIN

THE ALLEN COMPANY, INC.

IT IS SO ORDERED, ADJUDGED AND DECREED:

Dated: _____

Judge of Superior Court

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AGREED TO:

AGREED TO:

Date: 8/17/18

Date: _____

By: Hector Velarde

By: _____

Hector Velarde, Administrator of the
ESTATE OF KAREN CHARLENE
CALACIN

THE ALLEN COMPANY, INC.

IT IS SO ORDERED, ADJUDGED AND DECREED:

Dated: _____

Judge of Superior Court