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Safe Products for Californians, LLC

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SANTA CLARA

| | | |
|--------------------------------------|---|---|
| SAFE PRODUCTS FOR CALIFORNIANS, LLC, |) | No. _18CV328424 |
| |) | |
| Plaintiff, |) | [PROPOSED] CONSENT JUDGMENT |
| |) | |
| vs. |) | (Health & Safety Code § 25249.5, <i>et seq.</i>) |
| |) | |
| ROYAL BRUSH MANUFACTURING, INC., |) | |
| et al.; |) | |
| |) | |
| Defendants. |) | |

1. INTRODUCTION

1.1 Parties

This Consent Judgment is entered into by and between plaintiff Safe Products for Californians, LLC (“SPFC”) and defendant Royal Brush Manufacturing, Inc. (“Royal Brush”) with SPFC and Royal Brush each referred to individually as a “Party” and collectively as the “Parties.”

1.2 Plaintiff

SPFC is a limited liability California company with its principal place of business within the State of California, County of Santa Clara, who seeks to promote awareness of exposures to toxic chemicals, and to improve human health by reducing or eliminating harmful substances contained in consumer and commercial products.

1 **1.3 Defendant**

2 Royal Brush employs ten or more persons and is a person in the course of doing
3 business for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986,
4 California Health and Safety Code section 25249.5 *et seq.* (“Proposition 65”).

5 **1.4 General Allegations**

6 SPFC alleges that the products Royal Brush manufactures, imports, sells and/or
7 distributes for sale in California cause exposure to di(2-ethylhexyl) phthalate (“DEHP”), and
8 that it does so without providing the health hazard warning that SPFC alleges is required by
9 Proposition 65.

10 **1.5 Product Description**

11 The products that are covered by this Settlement Agreement are reusable clear bags,
12 identified in the 60-Day Notice of Violation as “Brush Value Pack – Acrylic,” UPC
13 #090672225962, with clear plastic packaging containing DEHP, which are manufactured,
14 imported, distributed, sold and/or offered for sale by Royal Brush and/or its customers in the
15 state of California, hereinafter the “Covered Products.”

16 **1.6 Notice of Violation**

17 On January 4, 2018, SPFC served Royal Brush and the requisite public enforcement
18 agencies with a 60-Day Notice of Violation (“Notice”), alleging that Royal Brush violated
19 Proposition 65 when it failed to warn its customers and consumers in California that the
20 Covered Products expose users to DEHP. To the best of the Parties’ knowledge, no public
21 enforcer has commenced and is diligently prosecuting an action to enforce the allegations set
22 forth in the Notice.

23 **1.7 Complaint**

24 On May 16, 2018, SPFC commenced the instant action naming Royal Brush as a
25 defendant for the alleged violations of Proposition 65 that are the subject of the Notice.

26 **1.8 No Admission**

27 Royal Brush denies the material, factual, and legal allegations contained in the Notice
28 and Complaint, and maintains that all of the products that it has sold or distributed for sale in

California, including the Covered Products, have been, and are, in compliance with all laws. Nothing in this Consent Judgment shall be construed as an admission by Royal Brush of any fact, finding, conclusion of law, issue of law, or violation of law, nor shall compliance with this Consent Judgment constitute or be construed as an admission by Royal Brush of any fact, finding, conclusion of law, issue of law, or violation of law. This Section shall not, however, diminish or otherwise affect Royal Brush's obligations, responsibilities, and duties under this Consent Judgment.

1.9 Jurisdiction

For purposes of this Consent Judgment only, the Parties stipulate that this Court has jurisdiction over Royal Brush as to the allegations contained in the Complaint, that venue is proper in the County of Santa Clara, and that the Court has jurisdiction to enter and enforce the provisions of this Consent Judgment pursuant to Proposition 65 and Code of Civil Procedure section 664.6.

1.10 Effective Date

For purposes of this Consent Judgment, the term "Effective Date" shall mean the date that the Court enters an order approving the terms of this Consent Judgment.

2. INJUNCTIVE RELIEF

2.1 Product Removal

As of the Effective Date, Royal Brush shall not directly sell, or ship for sale in California any Covered Products.


2.2 Customer Notification for Covered Products No Longer in Royal Brush's Control

No later than 30 days after the Effective Date, Royal Brush shall send a letter, electronic or otherwise ("Notification Letter"), to each California retailer to which it supplied the Covered Products for resale in California, if any. The Notification Letter shall advise the recipient that portions of the Products "contain DEHP, a chemicals known to the State of California to cause cancer, birth defects and other reproductive harm," and request that the recipient either: (a) label the Covered Products remaining in inventory for sale in California, or


1 to California Customers, pursuant to Section 2.3; or (b) return, at Royal Brush's sole expense,
2 all units of the Covered Products held by a California customer or for sale in California or to
3 California customers to Royal Brush or a party Royal Brush has otherwise designated. The
4 Notification Letter shall require a response from the recipient within 15 days confirming
5 whether the Covered Products will be labeled or returned. Royal Brush shall maintain records
6 of all correspondence or other communications generated pursuant to this Section for one year
7 after the Effective Date and shall promptly produce copies of such records upon SPFC's
8 reasonable written request.

9 **2.3 Clear and Reasonable Warnings for Products No Longer in Royal Brush's** 10 **Control**

11 The Notification Letter shall instruct any recipient that intends to provide a clear and
12 reasonable warning pursuant to Section 2.2 that all Covered Products remaining in inventory
13 for sale after the Effective Date, must include the following warning:

14  **WARNING** This product can expose you to chemicals,
15 including DEHP, that are known to the State
16 of California to cause cancer and birth defects
17 or other reproductive harm. For more
information go to www.P65Warnings.ca.gov;

18 or

19  **WARNING** Cancer and Reproductive Harm -
20 www.P65Warnings.ca.gov

21
22 The warning provided pursuant to Section 2.3 shall be prominently affixed to or printed
23 on the Covered Products' packaging or labeling and displayed with such conspicuousness, as
24 compared with other words, statements, or designs as to render it likely to be read and
25 understood by an ordinary individual under customary conditions of purchase or use. A
26 warning may be contained in the same section of the packaging or labeling that states other
27 safety warnings, if any, concerning the use of the product and shall be at least the same size as
28 those other safety warnings.

1 **3. MONETARY SETTLEMENT TERMS**

2 **3.1 Payments Pursuant to Health and Safety Code § 25249.7(b)(2)**

3 Pursuant to Health and Safety Code section 25249.7(b), Royal Brush shall pay civil
4 penalties in the amount of \$10,000.00. The penalty payment shall be allocated according to
5 Health and Safety Code section 25249.12(c)(1) and (d), with 75% of the penalty amount paid
6 to the California Office of Environmental Health Hazard Assessment (“OEHHA”) and the
7 remaining 25% of the penalty paid to SPFC. SPFC’s counsel shall be responsible for remitting
8 Royal Brush’s penalty payment under this Settlement Agreement to OEHHA. Within five (5)
9 business days of the Effective Date, Royal Brush shall issue a check payable to “Mission Law
10 Firm, A.P.C., Trust Account” in the amount of \$2,500.00, and a check payable to OEHHA in
11 the amount of \$7,500.00. These penalty payments shall be delivered to the address listed in
12 Section 3.3 below.

13 **3.2 Reimbursement of Attorneys’ Fees and Costs**

14 The Parties acknowledge that SPFC and its counsel offered to resolve this dispute
15 without reaching terms on the amount of fees and costs to be reimbursed to them, thereby
16 leaving the issue to be resolved after the material terms of the agreement had been settled.
17 Shortly after the other settlement terms had been finalized, Royal Brush expressed a desire to
18 resolve SPFC’s fees and costs. The Parties then negotiated a resolution of the compensation
19 due to SPFC and its counsel under general contract principles and the private attorney general
20 doctrine codified at California Code of Civil Procedure § 1021.5. For all work performed
21 through the mutual execution of this agreement and the Court’s approval of the same, but
22 exclusive of fees and costs on appeal, if any, Royal Brush shall reimburse SPFC and its
23 counsel \$26,963.48. The reimbursement shall cover all fees and costs incurred by SPFC
24 investigating, bringing this matter to Royal Brush’s attention, litigating, and negotiating a
25 settlement of the matter in the public interest.

26 **3.3 Payment Procedures**

27 All payments required by this Consent Judgment shall be delivered to the following
28 address:

Mission Law Firm, A.P.C.
Attn: Proposition 65 (SPFC)
332 North Second Street
San Jose, California 95112

If for any reason this Consent Judgment is not entered by the Court within nine (9) months of the date the Consent Judgment is executed by all parties, SPFC shall meet and confer with Royal Brush about mutually agreeable steps the parties can take to ensure entry of the Consent Judgment. If such steps cannot be agreed between the Parties, SPFC shall promptly return to Royal Brush any and all monies paid by Royal Brush herein under Section 3 upon Royal Brush's written request.

4. CLAIMS COVERED AND RELEASED

4.1 SPFC's Release of Proposition 65 Claims

SPFC, acting on its own behalf and in the public interest, releases Royal Brush and its parents, subsidiaries, affiliated entities under common ownership, directors, officers, employees, and attorneys, and each entity to whom Royal Brush directly or indirectly distributes or sells the Covered Products including, but not limited to, Walmart (along with its parents, subsidiaries, affiliated entities under common ownership, directors, officers, agents employees, attorneys), downstream distributors, wholesalers, customers, retailers, franchisers, cooperative members, licensors and licensees (collectively, "Releasees") from all claims for violations of Proposition 65 through the Effective Date that were or could have been asserted by SPFC relating to the Covered Products. Compliance with the terms of this Settlement Agreement constitutes compliance with Proposition 65 with respect to exposures to DEHP from the Covered Products, as set forth in the Notice. The Parties further understand and agree that this Section 4.1 release shall not extend upstream to any entities that manufactured the Covered Products or any component parts thereof, or any distributors or suppliers who sold the Covered Products or any component parts thereof to Royal Brush.

4.2 SPFC's Individual Release of Claims

SPFC, on behalf of itself, its past and current agents, representatives, attorneys, successors, and assignees, provides a release herein which shall be effective as a full and final

1 accord and satisfaction, as a bar to all actions, causes of action, obligations, costs, expenses,
2 attorneys' fees, damages, losses, claims, liabilities, and demands of SPFC of any nature,
3 character, or kind, whether known or unknown, suspected or unsuspected, limited to and
4 arising out of alleged or actual exposures to DEHP in the Covered Products manufactured,
5 imported, distributed, or sold by Royal Brush prior to the Effective Date. The Parties further
6 understand and agree that this Section 4.2 release shall not extend upstream to any entities that
7 manufactured the Covered Products, or any component parts thereof, or upstream to any
8 distributors or suppliers who sold the Covered Products, or any component parts thereof to
9 Royal Brush. Nothing in this section affects SPFC's right to commence or prosecute an action
10 under Proposition 65 against a Releasee that does not involve Royal Brush's Covered Products.

11 In further consideration of the promises and agreements herein contained, and for the
12 payments to be made pursuant to Section 3, SPFC, on behalf of itself, its past and current
13 agents, representatives, attorneys, successors and/or assignees, hereby covenants not to sue and
14 waives any right to institute, participate in, directly or indirectly, any form of legal action and
15 releases all claims that it may have, including without limitation, all actions and causes of
16 action in law and in equity, all obligations, expenses (including without limitation all
17 attorneys' fees, expert fees, and investigation fees, and costs), damages, losses, liabilities and
18 demands against any of the Releasees of any nature, character, or kind, whether known or
19 unknown, suspected or unsuspected, limited to and arising out of the allegations made in the
20 Notice.

21 **4.3 Royal Brush's Release of SPFC**

22 Royal Brush, on its own behalf and on behalf of its past and current agents,
23 representatives, attorneys, successors and/or assignees, hereby waives any and all claims
24 against SPFC and its attorneys and other representatives, for any and all actions taken or
25 statements made (or those that could have been taken or made) by SPFC and its attorneys and
26 other representatives in the course of investigating claims, seeking to enforce Proposition 65
27 against it in this matter, or with respect to the Covered Products.

28 //

1 **5. COURT APPROVAL**

2 This Consent Judgment is not effective until it is approved and entered by the Court
3 and shall be null and void if, for any reason, it is not approved and entered by the Court within
4 one year after it has been fully executed by all Parties. SPFC and Royal Brush agree to support
5 the entry of this agreement as a judgment, and to obtain the Court's approval of their
6 settlement in a timely manner. The Parties acknowledge that, pursuant to California Health and
7 Safety Code section 25249.7(f), a noticed motion is required for judicial approval of this
8 Consent Judgment, which motion SPFC shall draft and file and Royal Brush shall support,
9 appearing at the hearing if so requested. SPFC agrees to file a notice of motion within fifteen
10 (15) calendar days after the Effective Date.

11 **6. SEVERABILITY**

12 If, subsequent to the Court's approval and entry of this Consent Judgment as a
13 judgment, any provision of this Consent Judgment is held by a court to be unenforceable, the
14 validity of the remaining provisions shall not be adversely affected.

15 **7. GOVERNING LAW**

16 The terms of this Consent Judgment shall be governed by the laws of the State of
17 California and apply within the State of California. In the event that Proposition 65 is repealed,
18 preempted, or is otherwise rendered inapplicable by reason of law generally, or as to the
19 Covered Products, then Royal Brush may provide SPFC with written notice of any asserted
20 change in the law, and shall have no further obligations pursuant to this Consent Judgment,
21 with respect to, and to the extent that, the Covered Products are so affected. Nothing in this
22 Consent Judgment shall be interpreted to relieve Royal Brush from its obligation to comply
23 with any pertinent state or federal law or regulation.

24 **8. NOTICE**

25 Unless specified herein, all correspondence and notice required by this Consent
26 Judgment shall be in writing and sent by: (i) personal delivery, (ii) first-class registered or
27 certified mail, return receipt requested; or (iii) a recognized overnight courier to any Party by
28 the other at the following addresses:

To Royal Brush:

To SPFC:

Sandra A. Edwards
Farella Braun + Martell LLP
235 Montgomery Street
17th Floor
San Francisco, CA 94104

Mission Law Firm, A.P.C.
Attn: Proposition 65 (SPFC)
332 North Second Street
San Jose, California 95112

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

9. COUNTERPARTS, FACSIMILE AND PDF SIGNATURES

This Consent Judgment may be executed in counterparts and by facsimile or portable document format (pdf) signature, 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 REPORTING REQUIREMENTS

SPFC and its counsel agree to comply with the reporting form requirements referenced in California Health and Safety Code section 25249.7(f).

11. MODIFICATION

This Consent Judgment may be modified only by: (i) a written agreement of the Parties and the entry of a modified Consent Judgment by the Court thereon; or (ii) upon a successful motion of any Party and the entry of a modified Consent Judgment by the Court thereon.

12. OTHER TERMS

12.1 No Other Agreements

This Consent Judgment contains the sole and entire agreement and understanding of the Parties with respect to the entire subject matter set forth in this Consent Judgment, and any and all prior discussions, negotiations, commitments, or understandings related thereto, if any, are deemed merged. There are no warranties, representations, or other agreements between the Parties except as expressly set forth in this Consent Judgment. No representations, oral or otherwise, express or implied, other than those specifically referred to in this Consent Judgment have been made by any Party. No other agreements not specifically contained or referenced in this Consent Judgment, oral or otherwise, shall be deemed to exist or to bind any of the Parties. No supplementation, modification, waiver, or termination of this Consent

Judgment shall be binding unless executed in writing by the Party to be bound. No waiver of any of the provisions of this Consent Judgment shall be deemed or shall constitute a waiver of any of the other provisions whether or not similar, nor shall such waiver constitute a continuing waiver. Nothing in this Consent Judgment shall release, or in any way affect any rights that Royal Brush might have against any other party.

12.2 Construction

The Parties, including their counsel, have participated in the preparation of this Consent Judgment and this Consent Judgment is the result of the joint efforts of the Parties. This Consent Judgment was subject to revision and modification by the Parties and has been accepted and approved as to its final form by all Parties and their Counsel. Accordingly, any uncertainty or ambiguity existing in this Consent Judgment shall not be interpreted against any Party as a result of the manner of the preparation of this Consent Judgment. Each Party to this Consent Judgment agrees that any statute or rule of construction providing that ambiguities are to be resolved against the drafting Party should not be employed in the interpretation of this Consent Judgment and, in this regard the Parties hereby waive California Civil Code section 1654.

13. AUTHORIZATION

The undersigned are authorized to execute this Consent Judgment on behalf of their respective Parties and have read, understood, and agree to all of the terms and conditions of this Consent Judgment.

Dated: Aug 3, 2018


Kenneth Moore (Aug 3, 2018)

Safe Products for Californians, LLC
By: Randy Moore, Operating Manager

Dated: _____

Royal Brush Manufacturing, Inc.

Print Name: _____

Print Title: _____

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2 any of the provisions of this Consent Judgment shall be deemed or shall constitute a waiver of
3 any of the other provisions whether or not similar, nor shall such waiver constitute a continuing
4 waiver. Nothing in this Consent Judgment shall release, or in any way affect any rights that
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20 this Consent Judgment.

21 Dated: _____

Safe Products for Californians, LLC
By: Randy Moore, Operating Manager

24 Dated: AUGUST 8, 2018



Royal Brush Manufacturing, Inc.

Print Name: MICHAEL C. DOVELLOS

Print Title: DIRECTOR, BUS. DEVELOPMENT

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