

SETTLEMENT AGREEMENT

1. INTRODUCTION

1.1 The Parties. This Settlement Agreement is entered into by and between Precila Balabbo (“Balabbo”) and Jacky and Lauren, Inc. (“Jacky & Lauren”). Together, Balabbo and Jacky & Lauren are collectively referred to as the “Parties.” Balabbo is an individual that resides in the State of California, and seeks to promote awareness of exposures to toxic chemicals and to improve human health by reducing or eliminating hazardous substances contained in consumer products. Balabbo alleges that Jacky & Lauren is a person in the course of doing business for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, Health & Safety Code § 25249.6, et seq. (“Proposition 65”).

1.2 General Allegations. Balabbo alleges that Jacky & Lauren has exposed individuals to the chemical di(2-ethylhexyl) phthalate (DEHP) from its sales of Jacky & Lauren Eye Brush Sets without first providing users and consumers of the products with a clear and reasonable health hazard exposure warnings as required by Proposition 65. DEHP is listed under Proposition 65 as a chemical known to the State of California to cause cancer and reproductive toxicity.

1.3 Product Description. The products covered by this Settlement Agreement are Jacky & Lauren Eye Brush Sets (the “Products”) that have been imported, distributed, offered for sale and/or sold in California by Jacky & Lauren.

1.4 Notice of Violation. On April 18, 2018, Balabbo served Jacky & Lauren and various public enforcement agencies with a document entitled “Notice of Violation of California Health & Safety Code § 25249.6, et seq.” (the “Notice”). The Notice provided Jacky & Lauren and such others, including public enforcers, with notice that alleged that Jacky & Lauren was in violation of California Health & Safety Code § 25249.6, for failing to warn California consumers and customers that use of the Products will expose them to DEHP. No public enforcer has diligently prosecuted the allegations set forth in the Notice.

1.5 No Admission. Jacky & Lauren denies the material factual and legal allegations contained in the Notice and maintains that, to the best of its knowledge, all products that are or have

been sold and distributed in California, including the Products, have been and are in compliance with all laws. Nothing in this Settlement Agreement shall be construed as an admission by Jacky & Lauren of any fact, finding, issue of law, or violation of law; nor shall compliance with this Settlement Agreement constitute or be construed as an admission by Jacky & Lauren of any fact, finding, conclusion, issue of law or violation of law, such being specifically denied by Jacky & Lauren. However, § 1.5 shall not diminish or otherwise affect the obligations, responsibilities and duties under this Settlement Agreement. Notwithstanding the allegations in the Notice, Jacky & Lauren maintains that it has not knowingly manufactured, or caused to be manufactured, the Products for sale in California in violation of Proposition 65.

1.6 Effective Date. For purposes of this Settlement Agreement, the term “Effective Date” shall mean the date this Agreement is last executed by the Parties.

2. INJUNCTIVE RELIEF: WARNINGS

2.1 Commencing ninety (90) days after the Effective Date, and continuing thereafter, Jacky & Lauren shall not manufacture or order from any supplier any Products intended for retail sale in California that contains DEHP on any component to which consumers are exposed in excess of 0.1% (1,000 ppm) (hereinafter “Reformulated Products”) unless the Product is accompanied by a warning that complies with Article 6 of Title 27 of the California Code of Regulations. Products sold by Jacky & Lauren before the date this Settlement Agreement is signed by both Parties may sell through by downstream distributors, dealers, and retailers, including Burlington and TJ MAXX, without a warning even if not Reformulated Products. After August 30, 2018, the warning shall consist of either:

(a) The statement: “WARNING: This product contains a chemical known to the State of California to cause cancer and birth defects or other reproductive harm.”; or (b) (1) A symbol consisting of a black exclamation point in a yellow equilateral triangle with a bold black outline to the left of the word “warning” in bold all capital letters, followed by the statement “This product can expose you to chemicals including di(2-ethylhexyl) phthalate (DEHP), 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 (2) a warning

consisting of a symbol that is a black exclamation point in a yellow equilateral triangle with a bold black outline to the left of the word “warning” in bold all capital letters, followed by the statement “Cancer and Reproductive Harm - www.P65Warnings.ca.gov.”¹

For Products manufactured on and after August 30, 2018, the warning set forth in Section 2.1(b) shall be used.

2.2 The warning provided pursuant to § 2.1 shall be affixed to or printed on the Products’ packaging or labeling, or on a placard, shelf tag, sign or electronic device or automatic process, providing that the warning is displayed with such conspicuousness, as compared with other words, statements, or designs as to render it likely to be read and understood by an ordinary individual under customary conditions of purchase or use. A warning may be contained in the same section of the packaging, labeling, or instruction booklet that states other safety warnings, if any, concerning the use of the product and shall be at least the same size as those other safety warnings.

3. PENALTIES PURSUANT TO HEALTH & SAFETY CODE § 25249.7(b)

In settlement of all the claims referred to in this Settlement Agreement, Jacky & Lauren shall pay \$1,000.00 as a Civil Penalty in accordance with this Section. The Civil Penalty payment shall be allocated in accordance with California Health & Safety Code § 25249.12(c)(1) and (d), with 75% of the funds remitted to the California Office of Environmental Health Hazard Assessment (“OEHHA”) and the remaining 25% of the penalty remitted to Balabbo. The Civil Penalty payment(s) shall be delivered to the addresses identified in § 3.2, below. For all amounts due and owing that are not received within the payment times set forth below, and Jacky & Lauren’s failure to pay within ten (10) days following written notification from Balabbo that payment was not received within the payment times, Jacky & Lauren shall pay a late civil penalty payment fee equal to \$100/day to be allocated in accordance with California Health & Safety Code § 25249.12(c)(1) and (d).

3.1 Civil Penalty. Within ten (10) days of the Effective Date, Jacky & Lauren shall issue two separate checks for the Civil Penalty payment to (a) “OEHHA” in the amount of \$750.00; and to

¹ The triangular symbol need only be in yellow where the sign, label, shelf tag or other transmission format is being printed in color for purposes of other language, symbols or designs.

(b) "Brodsky & Smith, LLC in Trust for Balabbo" in the amount of \$250.00. The Civil Penalty payment(s) shall be delivered to the addresses identified in § 3.2, below.

3.2 Payment Procedures.

(a) Issuance of Payments. Payments shall be delivered as follows:

(i) All payments owed to Balabbo, pursuant to § 3.1 shall be delivered to the following payment address:

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

(ii) All payments owed to OEHHA (EIN: 68-0284486), pursuant to Section 3.1 shall be delivered directly to OEHHA (Memo Line "Prop 65 Penalties") at the following addresses:

For United States Postal Service Delivery:

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

For Non-United States Postal Service Delivery:

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

(b) Copy of Payments to OEHHA. Jacky & Lauren agrees to provide Balabbo's counsel with a copy of the checks payable to OEHHA, simultaneous with its penalty payments to Balabbo, to be delivered to the address provided in Section 3.2(a)(i), as proof of payment to OEHHA.

(C) Tax Documentation. Jacky & Lauren agrees to provide a completed IRS 1099 for its payments to, and Balabbo agrees to provide IRS W-9 forms for, each of the following payees under this Settlement Agreement:

(i) “Precila Balabbo” whose address and tax identification number shall be provided within five (5) days after this Settlement Agreement is fully executed by the Parties;

(ii) “Brodsky & Smith, LLC” (EIN: 23-2971061) at the address provided in Section 3.2(a)(i); and

(iii) “Office of Environmental Health Hazard Assessment” 1001 I Street, Sacramento, CA 95814.

4. REIMBURSEMENT OF FEES AND COSTS

The Parties acknowledge that Balabbo and her counsel offered to reach preliminary agreement on the material terms of this dispute before reaching terms on the amount of fees and costs to be reimbursed to them. The Parties thereafter reached an accord on the compensation due to Balabbo and her counsel under general contract principles and the private attorney general doctrine and principles codified at California Code of Civil Procedure § 1021.5, for all work performed through the mutual execution of this agreement. Under these legal principles, Jacky & Lauren shall reimburse Balabbo’s counsel for fees and costs incurred as a result of investigating and bringing this matter to Jacky & Lauren’s attention, and negotiating a settlement in the public interest. Within ten (10) days of the Effective Date, Jacky & Lauren shall issue a check payable to “Brodsky & Smith, LLC” in the amount of \$3,666.67 for delivery to the address identified in § 3.2(a)(i), above. Within forty (40) days of the Effective Date, Jacky & Lauren shall issue a check payable to “Brodsky & Smith, LLC” in the amount of \$4,666.67 for delivery to the address identified in Section 3.2(a)(i), above. Within seventy (70) days of the Effective Date, Jacky & Lauren shall issue a check payable to “Brodsky & Smith, LLC” in the amount of \$3,666.67 for delivery to the address identified in § 3.2(a)(i), above. Jacky & Lauren shall pay a late payment of \$500.00 to Brodsky & Smith, LLC for each payment that is late (following Jackie & Lauren’s failure to pay within ten (10) days following written notification from Balabbo that payment was not received within the payment times), and shall continue to incur late payments of \$500 for each 30 day period that a payment is not received that was due under this agreement.

5. RELEASE OF ALL CLAIMS

5.1 Release of Jacky & Lauren and Downstream Customers and Entities.

This Settlement Agreement is a full, final and binding resolution between Balabbo, acting on her own behalf, and Jacky & Lauren, of any violation of Proposition 65 that was or could have been asserted by Balabbo or on behalf of her past and current agents, representatives, attorneys, successors, and/or assigns (“Releasers”) for failure to provide warnings for alleged exposures to DEHP contained in the Products, and Releasers hereby release any such claims against Jacky & Lauren and its parents, subsidiaries, affiliated entities, shareholders, marketplaces, directors, officers, agents, employees, attorneys, successors and assignees, and each entity to whom Jacky & Lauren directly or indirectly distributes or sells the Products, including but not limited to, downstream distributors, wholesalers, customers, marketplace hosts, retailers, including but not limited to Burlington, TJ MAXX and their respective parents, affiliates and subsidiaries, franchisees, cooperative members, and licensees (collectively, the “Releasees”), from all claims for violations of Proposition 65 through the Effective Date, or within 90 days after the Effective Date, based on their failure to warn about alleged exposure to the chemical DEHP that is contained in the Products, and that were manufactured, distributed, sold and/or offered for sale by Jacky & Lauren to customers and consumers in the State of California.

In further consideration of the promises and agreements herein contained, and for the payments to be made pursuant to Sections 3 and 4 above, Balabbo, on behalf of herself, her past and current agents, representatives, attorneys, successors and/or assignees, hereby covenants not to sue and waives any right to institute, participate in, directly or indirectly, any form of legal action and releases all claims that she may have, including without limitation, all actions and causes of action in law and in equity, all obligations, expenses (including without limitation all attorneys’ fees, expert fees, and investigation fees, and costs), damages, losses, liabilities and demands against any of the Releasees of any nature, character, or kind, whether known or unknown, suspected or unsuspected, limited to and arising out of the alleged or actual exposure to the chemical DEHP in the Products.

5.2 Jacky & Lauren’s Release of Balabbo. Jacky & Lauren, on behalf of itself, its past and current agents, representatives, attorneys, successors and/or assignees, hereby waives any and all

claims against Balabbo, her attorneys and other representatives, for any and all actions taken or statements made (or those that could have been taken or made) by Balabbo and/or her attorneys and other representatives, whether in the course of investigating claims or otherwise seeking to enforce Proposition 65 against it in this matter or with respect to the Products.

5.3 California Civil Code § 1542. It is possible that other claims not known to the Parties arising out of the facts alleged in the Notice and relating to the Products will develop or be discovered. Balabbo on behalf of herself only, on one hand, and Jacky & Lauren, on the other hand, acknowledge that this Agreement is expressly intended to cover and include all such claims up through the Effective Date, including all rights of action therefor. The Parties acknowledge that the claims released in Sections 5.1 and 5.2, above, may include unknown claims, and nevertheless waive California Civil Code § 1542 as to any such unknown claims. California Civil Code § 1542 reads as follows:

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

Balabbo and Jacky & Lauren each acknowledge and understand the significance and consequences of this specific waiver of California Civil Code § 1542.

5.4 Deemed Compliance with Proposition 65. Compliance by Jacky & Lauren with this Settlement Agreement constitutes compliance with Proposition 65 with respect to exposure to DEHP in the Products.

5.5. Public Benefit. It is Jacky & Lauren's understanding that the commitments it has agreed to herein, and actions to be taken by Jacky & Lauren under this Settlement Agreement, would confer a significant benefit to the general public, as set forth in Code of Civil Procedure § 1021.5 and Cal. Admin. Code tit. 11, § 3201. As such, it is the intent of Jacky & Lauren that to the extent any other private party initiates an action alleging a violation of Proposition 65 with respect to Jacky & Lauren failure to provide a warning concerning exposure to DEHP prior to use of the Products it has manufactured, distributed, sold, or offered for sale in California, or will manufacture, distribute, sell, or offer for sale in California, such private party action would not confer a significant benefit on the

general public as to those Products addressed in this Settlement Agreement, provided that Jacky & Lauren is in material compliance with this Settlement Agreement.

6. ENFORCEMENT

6.1 The terms of this Agreement shall be enforced exclusively by the Parties hereto. A Party may enforce any of the terms and conditions of this Agreement only after that Party first provides 60 days' notice to the Party allegedly failing to comply with the terms and conditions of this Agreement and attempts to resolve such Party's failure to comply in an open and good faith manner.

6.2 Notice of Violation. Prior to bringing any proceeding to enforce the terms of this Agreement, Balabbo shall provide written notice ("NOV") to Jacky & Lauren that includes information sufficient for Jacky & Lauren to be able to understand and correct the violation, including but not limited to: (a) the name of the product, (b) specific dates when the product was sold in California, (c) the store or other place at which the product was available for sale to consumers, and (d) any other evidence or other support for the allegations in the notice, including all test data obtained by Balabbo regarding the Covered Product.

6.3 Notice of Election Response. Within 30 days of receiving an NOV, Jacky & Lauren shall serve a Notice of Election ("NOE") either contesting or not contesting the NOV.

6.3.1 Non-Contested NOV. Balabbo shall take no further action regarding the alleged violation if Jacky & Lauren serves a NOE that elects not to contest the NOV and meets one of the following conditions:

(a) The Product was shipped by Jacky & Lauren for sale in California before the Effective Date, or

(b) Since receiving the NOV Jacky & Lauren has taken corrective action by either (i) taking all steps necessary to bring the sale of the product into compliance under the terms of this Agreement, or (ii) requesting that its customers in California remove the Covered Products identified in the NOV from sale in California and destroy or return the Covered Products to Jacky & Lauren, or (iii) refute the information provided in Section 6.2.

6.3.2 Contested NOV. If Jacky & Lauren serves a NOE electing to contest the NOV, the provisions of this § 6.2.2 shall apply.

(a) Jacky & Lauren may request that the sample(s) of Products tested by Balabbo be subject to confirmatory testing at an EPA-accredited laboratory.

(b) If the confirmatory testing establishes that the Products do not contain DEHP in excess of the levels allowed in Section 2.1, above, Balabbo shall take no further action regarding the alleged violation. If the testing does not establish compliance with Section 2.1, above, Jacky & Lauren may withdraw its NOE to contest the violation and may serve a new NOE pursuant to § 6.2.1.

(c) If Jacky & Lauren does not withdraw an NOE to contest the NOV or take action under § 6.2.1, above, the Parties shall meet and confer for a period of no less than 30 days before Balabbo may take action seeking to enforce the terms of this Agreement.

6.4 In any proceeding brought by either Party to enforce this Agreement, the prevailing party shall be entitled to recover its reasonable attorney's fees and costs.

7. SEVERABILITY

If, subsequent to the execution of this Settlement Agreement, any of the provisions of this Settlement Agreement are deemed by a court to be unenforceable, the validity of the enforceable provisions remaining shall not be adversely affected but only to the extent the deletion of the provision deemed unenforceable does not materially affect, or otherwise result in the effect of the Settlement Agreement being contrary to the intent of the Parties in entering into this Settlement Agreement.

8. GOVERNING LAW

The terms of this Settlement Agreement shall be governed by the law of the State of California and apply within the State of California. In the event that Proposition 65 is repealed or is otherwise rendered inapplicable or limited by reason of law generally, or as to the Products, Jacky & Lauren shall provide written notice to Balabbo of any asserted change in the law, and shall have no further

obligations pursuant to this Settlement Agreement with respect to, and to the extent that, a Product is so affected.

9. NOTICES

Unless specified herein, all correspondence and notices required to be provided pursuant to this Settlement Agreement shall be in writing and personally delivered or sent by: (i) first-class (registered or certified mail) return receipt requested; or (ii) overnight or two-day courier on any party by the other party to the following addresses:

For Jacky & Lauren:

Steve Gerber
Law Offices of Steven M. Gerber
666 Fifth Avenue, 26th Flr.
New York, NY 10103

For Balabbo:

Evan J. Smith
Brodsky & Smith, LLC
Two 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.

10. COUNTERPARTS: SIGNATURES

This Settlement Agreement may be executed in counterparts and by facsimile or .pdf signature, each of which shall be deemed an original, and all of which, when taken together, shall constitute one and the same document.

11. COMPLIANCE WITH HEALTH & SAFETY CODE § 25249.7(f)

Balabbo agrees to comply with the reporting requirements referenced in Health & Safety Code § 25249.7(f).

12. MODIFICATION

This Settlement Agreement may be modified only by a written agreement of the Parties.

13. ENTIRE AGREEMENT

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

14. AUTHORIZATION

The undersigned are authorized to execute this Settlement Agreement and have read, understood and agree to all of the terms and conditions contained of this Settlement Agreement.

AGREED TO:

AGREED TO:

Date: _____

Date: 8/9/2018

By: _____

Precila Balabbo

By:  _____

Jacky and Lauren, Inc.

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

14. AUTHORIZATION

The undersigned are authorized to execute this Settlement Agreement and have read, understood and agree to all of the terms and conditions contained of this Settlement Agreement.

AGREED TO:

AGREED TO:

Date: 

Date: _____

By: 8/9/18
Precila Balabbo

By: _____
Jacky and Lauren, Inc.