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8
9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 COUNTY OF ALAMEDA

11 HECTOR VELARDE,
12 Plaintiff,

13 v.

14 BEST ACCESSORY GROUP ACQUISITION,
15 LLC,
16 Defendant.

Case No.: RG18914273

**[PROPOSED] CONSENT
JUDGMENT**

Judge: Jo-Lynne Q. Lee
Dept.: 18
Hearing Date: October 16, 2018
Hearing Time: 3:00 PM
Reservation #: R-1989054

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1 **1. INTRODUCTION**

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

10 1.2 **Allegations and Representations.** Velarde alleges that use of Color Rush My
11 Beauty Spot Rubber Hair Rollers Set–Plastic Bag and Tuscan Hills Spa Bag Set–Clear Plastic Case,
12 have exposed individuals to diisononyl phthalate (DINP) and/or di(2-ethylhexyl) phthalate
13 (DEHP), without providing a clear and reasonable exposure warning pursuant to Proposition 65.
14 On January 1, 1988, the State of California’s Office of Environmental Health Hazard Assessment
15 (“OEHHA”) listed DEHP under Proposition 65 as a chemical known to the State of California to
16 cause cancer. On October 24, 2003, OEHHA listed DEHP under Proposition 65 as a chemical
17 known to the State of California to cause reproductive toxicity. On December 20, 2013, OEHHA
18 listed DINP under Proposition 65 as a chemical known to the State of California to cause cancer.

19 1.3 **Notices of Violation/Complaint.** On or about January 25, 2018, Karen Calacin
20 served Best Accessory Group, Best Accessory Group Acquisition, LLC t/a Tuscan Hills, Accessory
21 Zone, LLC, Accessory Zone, LLC t/a Tuscan Hills, Tuesday Morning, Inc. and various public
22 enforcement agencies with documents entitled “Notice of Violation of California Health & Safety
23 Code § 25249.5 et. seq.” (the “Calacin Notice”), alleging violations of Proposition 65 for failing to
24 warn consumers that use of the Tuscan Hills Spa Bag Set–Clear Plastic Case exposed users in
25 California to DEHP. On or about March 12, 2018, Velarde served the same entities as were served
26 the Calacin Notice with documents entitled “Notice of Violation of California Health & Safety
27 Code § 25249.5 et. seq.” (the “March Notice”), alleging the same violations alleged in the Calacin
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1 Notice. The Calacin Notice was subsequently withdrawn on March 27, 2018, and is no longer
2 viable or valid. On or about May 15, 2018, Velarde served Best Accessory Group, Best Accessory
3 Group Acquisition, LLC t/a Tuscan Hills, Accessory Zone, LLC, Accessory Zone, LLC t/a Tuscan
4 Hills, Tuesday Morning, Inc., Burlington Stores, Inc., Burlington Coat Factory Holdings, LLC,
5 Burlington Coat Factory Warehouse Corporation, and various public enforcement agencies with
6 documents entitled “Notice of Violation of California Health & Safety Code § 25249.5 et. seq.”
7 (the “Amended Notice”), alleging violations of Proposition 65 for failing to warn consumers that
8 the (i) Tuscan Hills Spa Bag Sets – clear plastic case exposed users in California to DEHP, and (ii)
9 Color Rush My Beauty Spot Rubber Hair Rollers Set– plastic bags exposed users in California to
10 DEHP and DINP. No public enforcer has brought and is diligently prosecuting the claims alleged
11 in any of the Calacin Notice, the March Notice or the Amended Notice (together, the “Notices”).
12 On July 25, 2018, Velarde filed a complaint (the “Complaint”) in the matter.

13 1.4 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
14 jurisdiction over Defendant as to the allegations contained in the Notices and Complaint filed in
15 this matter, that venue is proper in the County of Alameda, and that this Court has jurisdiction to
16 approve, enter, and oversee the enforcement of this Consent Judgment pursuant to Proposition 65
17 and California Code of Civil Procedure §664.6.

18 1.5 Defendant denies the material, factual, and legal allegations contained in the Notices
19 and Complaint and maintains that, to the best of its knowledge, based on testing in the normal
20 course of business, its products that are or have been manufactured, imported, sold, offered for sale
21 and distributed in California, including the Covered Products, have been and are in compliance
22 with all laws. Nothing in this Consent Judgment shall be construed as an admission by Defendant
23 of any fact, finding, conclusion of law, issue of law, or violation of law; nor shall compliance with
24 this Consent Judgment constitute or be construed as an admission by Defendant of any fact, finding,
25 conclusion of law, issue of law, or violation of law, such being specifically denied by Defendant.
26 However, this section shall not diminish or otherwise affect the obligations, responsibilities, and
27 duties under this Consent Judgment.
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1 **2. DEFINITIONS**

2 2.1 **Covered Products.** The term “Covered Products” means (i) Tuscan Hills Spa Bag
3 Sets and/or clear plastic bags and cases sold under the Tuscan Hills brand or trademark, and (ii)
4 Color Rush My Beauty Spot Rubber Hair Rollers Sets and/or clear plastic bags and cases sold under
5 the My Beauty Spot brand or trademark, that are manufactured, imported, distributed, sold or
6 offered for sale in California by Best Accessory Group.

7 2.2 **Effective Date.** For purposes of this Consent Judgment, the term “Effective Date”
8 shall be five (5) days after Velarde’s counsel provides written notice to Defendant’s counsel that
9 the Motion to Approve the Consent Judgment has been granted and entered by the Court.

10 **3. INJUNCTIVE RELIEF: WARNINGS**

11 3.1 **Reformulation of Covered Products.** Commencing one hundred eighty (180) days
12 after the Effective Date, and continuing thereafter, Covered Products that Best Accessory Group
13 directly manufactures, imports, distributes, sells, or offers for sale in California shall either: (a) be
14 Reformulated Products pursuant to Section 3.2 below; or (b) have a clear and reasonable warning
15 pursuant to Sections 3.3 and 3.4. For purposes of this Consent Judgment, a “Reformulated Product”
16 is a Covered Product that is in compliance with the standard set forth in section 3.2 below. The
17 warning requirement set forth in Sections 3.3 and 3.4 shall not apply to any Reformulated Product.

18 3.2 **Reformulation Standard.** “Reformulated Products” shall mean Covered Products
19 that contain concentrations less than or equal to 0.1% (1,000 parts per million (ppm) of DEHP and
20 less than or equal to 0.1% (1,000 ppm) of DINP when analyzed pursuant to U.S. Environmental
21 Protection Agency testing methodologies 3580A and 8270C or other methodology utilized by
22 federal or state government agencies for the purpose of determining DEHP and/or DINP content in
23 a solid substance.

24 3.3 **Clear and Reasonable Warning.** Commencing one hundred eighty (180) days
25 after the Effective Date, a clear and reasonable warning as set forth in this Section 3.3 and Section
26 3.4 must be provided for all Covered Products that Defendant manufacturers, imports, distributes,
27 sells, or offers for sale in California and that is not a Reformulated Product. There shall be no
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1 obligation for Defendant to provide a warning for Covered Products that enter the stream of
2 commerce prior to one hundred eighty (180) days after the Effective Date. The warning shall
3 consist of either the Warning or Alternative Warning described in Subsection 3.3(a) or (b),
4 respectively:

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

6 **⚠ WARNING:** This product can expose you to chemicals including [name of one
7 or more chemicals], which is [are] known to the State of California to cause [cancer
8 and birth defects or other reproductive harm]¹. For more information go to
9 www.P65Warnings.ca.gov.

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

13 **⚠ WARNING:** Cancer [and Reproductive Harm]² - www.P65Warnings.ca.gov.

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

25 ¹ If the Covered Product contains DEHP, or DEHP *and* DINP, the warning shall indicate
26 “... cancer and birth defects or other reproductive harm.” If the Covered Product contains DINP
only, the warning shall indicate “... cancer.”

27 ² If the Covered Product contains DEHP, or DEHP *and* DINP, the warning shall indicate
28 “Cancer and Reproductive Harm - www.P65Warnings.ca.gov.” If the Covered Product contains
DINP only, the warning shall indicate “Cancer - www.P65Warnings.ca.gov.”

1 safety warnings, if any, concerning the use of the product and shall be at least the same size as those
2 other safety warnings.

3 **3.5 Compliance with Warning Regulations.** Defendant shall be deemed to be in
4 compliance with this Consent Judgment by either adhering to Sections 3.3 and 3.4 of this Consent
5 Judgment or by complying with warning requirements adopted by OEHHA after the Effective Date.

6 **4. MONETARY TERMS**

7 **4.1 Civil Penalty.** Best Accessory Group shall pay \$3,000.00 as a Civil Penalty
8 pursuant to Health and Safety Code § 25249.7(b), to be apportioned in accordance with California
9 Health & Safety Code § 25192, with 75 percent of the total Civil Penalty remitted to OEHHA and
10 the remaining 25 percent of the Civil Penalty remitted to Velarde, as provided by California Health
11 & Safety Code § 25249.12(d).

12 **4.1.1** Within ten (10) business days of the Effective Date, Best Accessory Group
13 shall issue two separate checks for the Civil Penalty payment as follows: (a) "OEHHA" in the
14 amount of \$2,250.00; and (b) "Brodsky & Smith, LLC in Trust for Velarde" in the amount of
15 \$750.00. Payment owed to Velarde pursuant to this Section shall be delivered to the following
16 payment address:

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

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

23 For United States Postal Service Delivery:

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

29 For Non-United States Postal Service Delivery:

30 Mike Gyurics
31 Fiscal Operations Branch Chief
32 Office of Environmental Health Hazard Assessment

1 1001 I Street
2 Sacramento, CA 95814

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

5 4.2 **Attorneys' Fees.** Within ten (10) business days of the Effective Date, Best
6 Accessory Group shall pay \$24,500.00 to Brodsky & Smith, LLC ("Brodsky Smith") as complete
7 reimbursement for Velarde's reasonable attorneys' fees and costs incurred as a result of
8 investigating, bringing this matter to Best Accessory Group's attention, litigating and negotiating
9 and obtaining judicial approval of a settlement in the public interest, pursuant to Code of Civil
10 Procedure section 1021.5. Other than the payments required hereunder, each Party is to bear its
11 own attorney's fees and costs.

12 **5. RELEASE OF ALL CLAIMS**

13 5.1 This Consent Judgment is a full, final, and binding resolution between Velarde
14 acting on his own behalf, and on behalf of the public interest, and Best Accessory Group, and its
15 parents, shareholders, members, directors, officers, managers, employees, representatives, agents,
16 attorneys, divisions, subdivisions, subsidiaries, partners, sister companies and affiliates, and their
17 predecessors, successors and assigns, including without limitation Best Accessory Group
18 Acquisition, LLC t/a Tuscan Hills, Accessory Zone, LLC, Accessory Zone, LLC t/a Tuscan Hills
19 ("Defendant Releasees"), and all entities from whom they obtain and to whom they directly or
20 indirectly distribute or sell Covered Products, including but not limited to manufacturers, suppliers,
21 distributors, wholesalers, customers, licensors, licensees retailers, franchisees, and cooperative
22 members, including without limitation Tuesday Morning, Inc., Burlington Stores, Inc., Burlington
23 Coat Factory Holdings, LLC, Burlington Coat Factory Warehouse Corporation, and their respective
24 parents, affiliates and subsidiaries, shareholders, directors, officers, agents, employees, attorneys,
25 successors and assignees, franchisees, cooperative members and licensees ("Downstream
26 Releasees") (Downstream Releasees and Defendant Releasees collectively referred to as
27 "Releasees"), of all claims for violations of Proposition 65 based on exposure to DEHP or DINP
28 from Covered Products as set forth in the Notices and Complaint, with respect to any Covered

1 Products manufactured, distributed, or sold by Best Accessory Group prior to one hundred eighty
2 (180) days after the Effective Date. This Consent Judgment shall have preclusive effect such that
3 no other person or entity, whether purporting to act in his, her, or its interests or the public interest
4 shall be permitted to pursue and/or take any action with respect to any violation of Proposition 65
5 that was alleged in the Complaint, or that could have been brought pursuant to the Notices against
6 Best Accessory Group or any of the Releasees. Compliance with the terms of this Consent
7 Judgment constitutes compliance with Proposition 65 with regard to the Covered Products.

8 5.2 In addition to the foregoing, Velarde, on behalf of himself, his past and current
9 agents, representatives, attorneys, and successors and/or assignees, and not in his representative
10 capacity, hereby waives all rights to institute or participate in, directly or indirectly, any form of
11 legal action against and releases Best Accessory Group and all Releasees from any and all manner
12 of actions, causes of action, claims, demands, rights, suits, obligations, debts, contracts, agreements,
13 promises, liabilities, damages, charges, losses, costs, expenses, and attorneys' fees, of any nature
14 whatsoever, known or unknown, in law or equity, fixed or contingent, now or in the future, with
15 respect to any alleged violations of Proposition 65 related to or arising from Covered Products.
16 With respect to the foregoing waivers and releases in this paragraph, Velarde hereby specifically
17 waives any and all rights and benefits which he now has, or in the future may have, conferred by
18 virtue of the provisions of Section 1542 of the California Civil Code, which provides as follows:

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

23 5.3 Best Accessory Group waives any and all claims against Velarde, his attorneys and
24 other representatives, for any and all actions taken or statements made (or those that could have
25 been taken or made) by Velarde and his attorneys and other representatives, whether in the course
26 of investigating claims or otherwise seeking enforcement of Proposition 65 against it in this matter
27 or with respect to Covered Products.
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1 **6. INTEGRATION**

2 6.1 This Consent Judgment contains the sole and entire agreement of the Parties and
3 any and all prior negotiations and understandings related hereto shall be deemed to have been
4 merged within it. No representations or terms of agreement other than those contained herein exist
5 or have been made by any Party with respect to the other Party or the subject matter hereof.

6 **7. GOVERNING LAW**

7 7.1 The terms of this Consent Judgment shall be governed by the laws of the State of
8 California. In the event that Proposition 65 is repealed or is otherwise rendered inapplicable by
9 reason of law generally or as to Covered Products, then Defendant shall have no further obligations
10 pursuant to this Consent Judgment with respect to, and to the extent that, Covered Products are so
11 affected.

12 **8. NOTICES**

13 8.1 Unless specified herein, all correspondence and notices required to be provided
14 pursuant to this Consent Judgment shall be in writing and personally delivered or sent by: (i) first-
15 class, (registered or certified mail) return receipt requested; (ii) valid email; or (iii) overnight
16 courier on any Party by the other Party at the following addresses:

17 For Defendant:

18 Malcolm C. Weiss (mweiss@huntonak.com)
19 Shannon K. Oldenburg (soldenburg@huntonak.com)
20 Hunton Andrews Kurth LLP
21 550 South Hope Street
 Suite 2000
 Los Angeles, CA 90071

22 And

23 For Velarde:

24 Evan Smith (esmith@brodskysmith.com)
25 Brodsky & Smith, LLC
26 9595 Wilshire Blvd., Ste. 900
 Beverly Hills, CA 90212

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

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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. POST-EXECUTION ACTIVITIES

10.1 Velarde 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. Defendant agrees it shall not object to 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 and entered by the Court within one (1) year after it is fully executed by the Parties. In such case, the Parties agree to meet and confer on how to proceed.

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: (a) a written agreement between the Parties and entry of a modified consent judgment by the Court; or (b) modification of the Consent Judgment by the Court following either Party's successful motion or application.

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 Consent Judgment, the term substantial justification shall carry the same meaning as used in the California Code of Civil Procedure, § 2016 et. seq.

1 12.2 Nothing in this Section shall preclude a Party from seeking an award of sanctions
2 pursuant to law.

3 **13. RETENTION OF JURISDICTION**

4 13.1 This Court shall retain jurisdiction of this matter to implement or modify the
5 Consent Judgment.

6 **14. AUTHORIZATION**

7 14.1 The undersigned are authorized to execute this Consent Judgment on behalf of their
8 respective Parties and have read, understood and agree to all of the terms and conditions of this
9 document and certify that he or she is fully authorized by the Party he or she represents to execute
10 the Consent Judgment on behalf of the Party represented and legally bind that Party. Except as
11 explicitly provided herein each Party is to bear its own fees and costs.

12 **15. SEVERABILITY**

13 15.1 If, subsequent to the Court's approval and entry of this Consent Judgment as a
14 judgment, any provision of this Consent Judgment is held by a court to be unenforceable, the Parties
15 shall give full meaning to the intent of the Parties to resolve and settle this matter in its entirety,
16 and the validity of the remaining provisions shall not be adversely affected.

17 **AGREED TO:**

AGREED TO:

18
19 Date: 7/28/2018

Date: _____

20 By: Hector Velarde

By: _____

21 HECTOR VELARDE

BEST ACCESSORY GROUP
ACQUISITION, LLC.

22
23 **IT IS SO ORDERED, ADJUDGED AND DECREED:**

24
25 Dated: _____

Judge of Superior Court

1
2 12.2 Nothing in this Section shall preclude a Party from seeking an award of sanctions
3 pursuant to law.

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16 shall give full meaning to the intent of the Parties to resolve and settle this matter in its entirety,
17 and the validity of the remaining provisions shall not be adversely affected.

18 **AGREED TO:**

AGREED TO:

19 Date: _____

Date: 7/31/2018

20 By: _____

By: [Signature]

21 HECTOR VELARDE

22 BEST ACCESSORY GROUP
ACQUISITION, LLC.

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

24 Dated: _____

25 _____
26 Judge of Superior Court