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

11 PRECILA BALABBO,

12 Plaintiff,

13 v.

14 SUNNY MARKETING SYSTEMS, INC.,

15 Defendant.

Case No.: RG18932092

CONSENT JUDGMENT

Judge: Robert McGuiness

Dept.: 22

Hearing Date: April 11, 2019

Hearing Time: 3:00 PM

Reservation #: R-2049773

1 **1. INTRODUCTION**

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

10 **1.2 Allegations and Representations.** Balabbo alleges that Defendant has exposed
11 individuals to di(2-ethylhexyl) phthalate (DEHP) from its sales of Earth Therapeutics Quick-Dry
12 Hair Turban carry/storage cases without providing a clear and reasonable exposure warning
13 pursuant to Proposition 65. DEHP is listed under Proposition 65 as a chemical known to the State
14 of California to cause cancer and reproductive toxicity.

15 **1.3 Notice of Violation/Complaint.** On or about June 6, 2018, Balabbo served Sunny
16 Marketing Systems and various public enforcement agencies with documents entitled “60-Day
17 Notice of Violation” pursuant to Health & Safety Code § 25249.7(d) (the “Notice”), alleging that
18 Defendant violated Proposition 65 for failing to warn consumers and customers that use of Earth
19 Therapeutics Quick-Dry Hair Turban carry/storage cases expose users in California to DEHP. No
20 public enforcer has brought and is diligently prosecuting the claims alleged in the Notice. On
21 December 13, 2018, Balabbo filed a complaint (the “Complaint”) in the matter.

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.
28

1 1.5 Defendant denies the material, factual and legal allegations contained in Balabbo's
2 Notice and Complaint and maintains that all of the products that it has sold or distributed for sale
3 in California, including the Covered Products, as hereinafter defined, have been, and are, in
4 compliance with all laws including Proposition 65. Nothing in this Consent Judgment shall be
5 construed as an admission by Defendant of any fact, finding, conclusion of law, issue of law, or
6 violation of law; nor shall compliance with this Consent Judgment constitute or be construed as an
7 admission by Defendant of any fact, finding, conclusion, issue of law, or violation of law, such
8 being specifically denied by Defendant. However, this section shall not diminish or otherwise
9 affect the obligations, responsibilities, and duties of Defendant under this Consent Judgment.

10 **2. DEFINITIONS**

11 2.1 **Covered Products.** The term "Covered Products" means Earth Therapeutics
12 Quick-Dry Hair Turban carry/storage cases that are manufactured, distributed and/or offered for
13 sale in California by Sunny Marketing Systems and/or its customers.

14 2.2 **Effective Date.** The term "Effective Date" means the date this Consent Judgment is
15 entered as a Judgment of the Court.

16 **3. INJUNCTIVE RELIEF: WARNINGS**

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

24 3.2 **Reformulation Standard.** "Reformulated Products" shall mean Covered Products
25 that contain concentrations less than or equal to 0.1% (1,000 parts per million (ppm)) of DEHP
26 when analyzed pursuant to U.S. Environmental Protection Agency testing methodologies 3580A
27
28

1 and 8270C or other methodology utilized by federal or state government agencies for the purpose
2 of determining the phthalate content in a solid substance.

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

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

11 ⚠ **WARNING:** This product can expose you to chemicals including di(2-
12 ethylhexyl) phthalate (DEHP), which is known to the State of California to cause
13 cancer and birth defects or other reproductive harm. For more information go to
www.P65Warnings.ca.gov.

14 (b) **Alternative Warning:** Sunny Marketing Systems may, but is not required to, use
15 the alternative short-form warning as set forth in this § 3.3(b) (“**Alternative Warning**”) as follows:

16 ⚠ **WARNING:** Cancer and Reproductive Harm - www.P65Warnings.ca.gov.

17 **3.4 A Warning or Alternative Warning** provided pursuant to § 3.3 must print the word
18 “**WARNING:**” in all capital letters and in bold font, followed by a colon. The warning symbol to
19 the left of the word “**WARNING:**” must be a black exclamation point in a yellow equilateral
20 triangle with a black outline, except that if the sign or label for the Covered Product does not use
21 the color yellow, the symbol may be in black and white. The symbol must be in a size no smaller
22 than the height of the word “**WARNING:**”. The warning shall be affixed to or printed on the
23 Covered Product’s packaging or labeling, or on a placard, shelf tag, sign or electronic device or
24 automatic process, providing that the warning is displayed with such conspicuousness, as compared
25 with other words, statements, or designs as to render it likely to be read and understood by an
26 ordinary individual under customary conditions of purchase or use. A warning may be contained
27 in the same section of the packaging, labeling, or instruction booklet that states other safety
28

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

3 If Sunny Marketing Systems sells Covered Products via an internet website to customers
4 located in California, the warning requirements of this section shall be satisfied if the foregoing
5 warning appears either: (a) on the same web page on which a Covered Product is displayed and/or
6 described; (b) on the same page as the price for the Covered Product; or (c) on one or more web
7 pages displayed to a purchaser prior to purchase during the checkout process. Alternatively, a
8 symbol consisting of a black exclamation point in a yellow or white equilateral triangle may appear
9 adjacent to or immediately following the display, description, price, or checkout listing of the
10 Covered Product, if the warning statement appears elsewhere on the same web page in a manner
11 that clearly associates it with the product(s) to which the warning applies.

12 3.5 **Compliance with Warning Regulations.** Defendant shall be deemed to be in
13 compliance with this Consent Judgment by either adhering to §§ 3.3 and 3.4 of this Consent
14 Judgment or by complying with warning requirements adopted by the State of California's Office
15 of Environmental Health Hazard Assessment ("OEHHA") after the Effective Date..

16 **4. MONETARY TERMS**

17 4.1 **Civil Penalty.** Sunny Marketing Systems shall pay \$3,000.00 as a Civil Penalty
18 pursuant to Health and Safety Code § 25249.7(b), to be apportioned in accordance with California
19 Health & Safety Code § 25192, with 75% of these funds remitted to OEHHA and the remaining
20 25% of the Civil Penalty remitted to Balabbo, as provided by California Health & Safety Code
21 § 25249.12(d).

22 4.1.1 Within ten (10) days of the Effective Date, Sunny Marketing Systems shall
23 issue two separate checks for the Civil Penalty payment to (a) "OEHHA" in the amount of
24 \$2,250.00; and to (b) "Brodsky & Smith, LLC in Trust for Balabbo" in the amount of \$750.00.
25 Payment owed to Balabbo pursuant to this Section shall be delivered to the following payment
26 address:

27 Evan J. Smith, Esquire
28 Brodsky & Smith, LLC

Two Bala Plaza, Suite 510
Bala Cynwyd, PA 19004

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

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

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

4.2 **Attorneys' Fees.** Within ten (10) days of the Effective Date, Sunny Marketing Systems shall pay \$25,000.00 by check made payable to Brodsky & Smith, LLC ("Brodsky Smith") as complete reimbursement for Balabbo's attorneys' fees and costs incurred as a result of investigating, bringing this matter to Sunny Marketing Systems' attention, litigating and negotiating and obtaining judicial approval of a settlement in the public interest, pursuant to Code of Civil Procedure § 1021.5. This payment shall be delivered to the following address:

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

5. RELEASE OF ALL CLAIMS

5.1 This Consent Judgment is a full, final, and binding resolution between Balabbo acting on her own behalf, and on behalf of the public interest, and Sunny Marketing Systems, and its parents, shareholders, owners, members, directors, officers, managers, employees, representatives, agents, attorneys, divisions, subdivisions, subsidiaries, partners, sister companies,

1 and affiliates, and their predecessors, successors and assigns ("Defendant Releasees"), and all
2 entities from whom they obtain and to whom they directly or indirectly distribute or sell Covered
3 Products, including but not limited to manufacturers, suppliers, distributors, wholesalers,
4 customers, licensors, licensees retailers, franchisees, and cooperative members ("Downstream
5 Releasees"), of all claims for violations of Proposition 65 based on exposure to DEHP from
6 Covered Products as set forth in the Notice, with respect to any Covered Products manufactured,
7 distributed, or sold by Sunny Marketing Systems prior to the Effective Date. This Consent
8 Judgment shall have preclusive effect such that no other person or entity, whether purporting to act
9 in his, her, or its interests or the public interest shall be permitted to pursue and/or take any action
10 with respect to any violation of Proposition 65 that was alleged in the Complaint, or that could have
11 been brought pursuant to the Notice against Sunny Marketing Systems or its Downstream Releasees
12 of the Covered Product ("Proposition 65 Claims"). Compliance with the terms of this Consent
13 Judgment constitutes compliance with Proposition 65 with regard to the Covered Products.

14 5.2 In addition to the foregoing, Balabbo, on behalf of herself, her past and current
15 agents, representatives, attorneys, and successors and/or assignees, and not in her representative
16 capacity, hereby waives all rights to institute or participate in, directly or indirectly, any form of
17 legal action and releases Sunny Marketing Systems, Defendant Releasees, and Downstream
18 Releasees from any and all manner of actions, causes of action, claims, demands, rights, suits,
19 obligations, debts, contracts, agreements, promises, liabilities, damages, charges, losses, costs,
20 expenses, and attorneys' fees, of any nature whatsoever, known or unknown, suspected or
21 unsuspected, in law or equity, fixed or contingent, now or in the future, with respect to any alleged
22 or actual violations of Proposition 65 related to or arising from Covered Products manufactured,
23 imported, distributed, or sold by Sunny Marketing Systems, Defendant Releasees or Downstream
24 Releasees. With respect to the foregoing waivers and releases in this paragraph, Balabbo hereby
25 specifically waives any and all rights and benefits which she now has, or in the future may have,
26 conferred by virtue of the provisions of § 1542 of the California Civil Code, which provides as
27 follows:
28

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

4 5.3 Sunny Marketing Systems waives any and all claims against Balabbo, her attorneys
5 and other representatives, for any and all actions taken or statements made (or those that could have
6 been taken or made) by Balabbo and her attorneys and other representatives, whether in the course
7 of investigating claims or otherwise seeking enforcement of Proposition 65 against it in this matter,
8 and/or with respect to Covered Products.

9 **6. INTEGRATION**

10 6.1 This Consent Judgment contains the sole and entire agreement of the Parties and
11 any and all prior discussions, negotiations, commitments, and understandings related hereto shall
12 be deemed to have been merged within it. There are no warranties, representations, or terms of
13 agreement other than those contained herein exist or have been made by any Party with respect to
14 the other Party or the subject matter hereof.

15 **7. GOVERNING LAW**

16 7.1 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 or
18 is otherwise rendered inapplicable by reason of law generally, or as to Covered Products, then
19 Defendant shall have no further obligations pursuant to this Consent Judgment with respect to, and
20 to the extent that, Covered Products are so affected.

21 **8. NOTICES**

22 8.1 Unless specified herein, all correspondence and notices required to be provided
23 pursuant to this Consent Judgment shall be in writing and personally delivered or sent by: (i) first-
24 class, (registered or certified mail) return receipt requested; or (ii) overnight courier on any party
25 by the other party at the following addresses:

26 For Defendant:

27 Christine Wallace
28

1 The Law Offices of Anthony Cannatella
2 53 Orchard Street
3 Manhasset, NY 11030

4 And

5 For Balabbo:

6 Evan Smith
7 Brodsky & Smith, LLC
8 9595 Wilshire Blvd. Ste. 900
9 Beverly Hills, CA 90212

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

12 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

13 9.1 This Consent Judgment may be executed in counterparts and by facsimile, each of
14 which shall be deemed an original, and all of which, when taken together, shall constitute one and
15 the same document.

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

18 10.1 Balabbo agrees to comply with the requirements set forth in California Health &
19 Safety Code § 25249.7(f) and to promptly bring a Motion for Approval of this Consent Judgment.
20 Defendant agrees it shall support approval of such Motion.

21 10.2 This Consent Judgment shall not be effective until it is approved and entered by the
22 Court and shall be null and void if, for any reason, it is not approved by the Court. In such case,
23 the Parties agree to meet and confer on how to proceed and if such agreement is not reached within
24 30 days, the case shall proceed on its normal course.

25 10.3 If the Court approves this Consent Judgment and is reversed or vacated by an
26 appellate court, the Parties shall meet and confer as to whether to modify the terms of this Consent
27 Judgment. If the Parties do not jointly agree on a course of action to take, the case shall proceed on
28 its normal course on the trial court's calendar.

1 **11. MODIFICATION**

2 11.1 This Consent Judgment may be modified only by further stipulation of the Parties
3 and the approval of the Court or upon the granting of a motion brought to the Court by either Party
4 and the entry of a modified Consent Judgment by the Court thereon.

5 **12. RETENTION OF JURISDICTION**

6 12.1 This Court shall retain jurisdiction of this matter to implement or modify the
7 Consent Judgment.

8 **13. AUTHORIZATION**

9 13.1 The undersigned are authorized to execute this Consent Judgment on behalf of their
10 respective Parties and have read, understood and agree to all of the terms and conditions of this
11 document and certify that he or she is fully authorized by the Party he or she represents to execute
12 the Consent Judgment on behalf of the Party represented and legally bind that Party. Except as
13 explicitly provided herein each Party is to bear its own fees and costs.

14 **AGREED TO:**

AGREED TO:

15 Date: 6-21-19

Date: _____

16 By: 
17 PRECILA BALABBO

18 By: _____
19 SUNNY MARKETING SYSTEMS,
20 INC.

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

22 Dated: _____

Judge of Superior Court

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12 the Consent Judgment on behalf of the Party represented and legally bind that Party. Except as
13 explicitly provided herein each Party is to bear its own fees and costs.

14
15 **AGREED TO:**

16 Date: _____

17 By: _____
18 PRECILA BALABBO

AGREED TO:

16 Date: 2/1/19

17 By: [Signature]
18 SUNNY MARKETING SYSTEMS,
19 INC.

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

22
23 Dated: _____

24 Judge of Superior Court