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

11 PRECILA BALABBO,
12 Plaintiff,
13 v.
14 NOVEL BRANDS, LLC, et al.,
15 Defendants.

Case No.: RG19019394
CONSENT JUDGMENT
Judge: Patrick R. McKinney
Dept.: 514
Hearing Date: October 29, 2019
Hearing Time: 1:30 PM
Reservation #: R-2113172

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1 **1. INTRODUCTION**

2 1.1 **The Parties.** This Consent Judgment is entered into by and between Precila Balabbo
3 acting on behalf of the public interest (hereinafter “Balabbo”) and Novel Brands, LLC (“Novel
4 Brands” or “Defendant”) with Balabbo and Defendant collectively referred to as the “Parties” and
5 each of them as a “Party.” Balabbo is an individual residing in California that seeks to promote
6 awareness of exposures to toxic chemicals and improve human health by reducing or eliminating
7 hazardous substances contained in consumer products. Novel Brands is alleged to be a person in
8 the course of doing business for purposes of Proposition 65, Cal. Health & Safety Code §§ 25249.6
9 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 Sink Angel sink mats without
12 providing a clear and reasonable exposure warning pursuant to Proposition 65. DEHP is listed
13 under Proposition 65 as a chemical known to the State of California to cause cancer and
14 reproductive toxicity.

15 1.3 **Notice of Violation/Complaint.** On or about August 23, 2018, Balabbo served
16 Novel Brands, and various public enforcement agencies with documents entitled “60-Day Notice
17 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 Sink
19 Angel sink mats expose users in California to DEHP. No public enforcer has brought and is
20 diligently prosecuting the claims alleged in the Notice. On May 17, 2019, Balabbo filed a complaint
21 (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.
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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 Sink Angel sink mats that
10 are manufactured, distributed and/or offered for sale in California by Novel Brands.

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

22 3.2 **Reformulation Standard.** “Reformulated Products” shall mean Covered Products
23 that contain concentrations less than or equal to 0.1% (1,000 parts per million (ppm)) of DEHP
24 when analyzed pursuant to U.S. Environmental Protection Agency testing methodologies 3580A
25 and 8270C or other methodology utilized by federal or state government agencies for the purpose
26 of determining the phthalate content in a solid substance.
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1 3.3 **Clear and Reasonable Warning.** As of the date this Consent Judgment is signed
2 by both Parties, and continuing thereafter, a clear and reasonable exposure warning as set forth in
3 this §§ 3.3 and 3.4 must be provided for all Covered Products that Defendant manufacturers,
4 imports, distributes, sells, or offers for sale in California that is not a Reformulated Product. There
5 shall be no obligation for Defendant to provide a warning for Covered Products that enter the stream
6 of commerce prior to the date this Consent Judgment is signed by both Parties. The warning shall
7 consist of either the **Warning** or **Alternative Warning** described in §§ 3.3(a) or (b), respectively:

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

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

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

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

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

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

10 3.5 **Compliance with Warning Regulations.** Defendant shall be deemed to be in
11 compliance with this Consent Judgment by either adhering to §§ 3.3 and 3.4 of this Consent
12 Judgment or by complying with warning requirements adopted by the State of California’s Office
13 of Environmental Health Hazard Assessment (“OEHHA”) after the Effective Date.

14 **4. MONETARY TERMS**

15 4.1 **Civil Penalty.** Novel Brands shall pay \$3,000.00 as a Civil Penalty pursuant to
16 Health and Safety Code section 25249.7(b), to be apportioned in accordance with California Health
17 & Safety Code § 25192, with 75% of these funds remitted to OEHHA and the remaining 25% of
18 the Civil Penalty remitted to Balabbo, as provided by California Health & Safety Code
19 § 25249.12(d).

20 4.1.1 Within ten (10) days of the Effective Date, Novel Brands shall issue two
21 separate checks for the Civil Penalty payment to (a) “OEHHA” in the amount of \$2,250.00; and
22 to (b) “Brodsky & Smith, LLC in Trust for Balabbo” in the amount of \$750.00. Payment owed to
23 Balabbo pursuant to this Section shall be delivered to the following payment address:

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

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

1 For United States Postal Service Delivery:

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

7 For Non-United States Postal Service Delivery:

8 Mike Gyurics
9 Fiscal Operations Branch Chief
10 Office of Environmental Health Hazard Assessment
11 1001 I Street
12 Sacramento, CA 95814

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

15 4.2 **Attorneys' Fees.** As complete reimbursement for Balabbo's attorneys' fees and
16 costs incurred as a result of investigating, bringing this matter to Novel Brands' attention, litigating
17 and negotiating and obtaining judicial approval of a settlement in the public interest, pursuant to
18 Code of Civil Procedure § 1021.5, Novel Brands shall pay \$26,000.00 to Brodsky & Smith, LLC
19 ("Brodsky Smith"). The timing for payments pursuant to this Section shall be as follows: (a) Within
20 ten (10) days of the Effective Date, Novel Brands shall issue a check payable to "Brodsky & Smith,
21 LLC" in the amount of \$10,000.00; (b) Within ninety (90) days of the Effective Date, Novel Brands
22 shall issue a check payable to "Brodsky & Smith, LLC" in the amount of \$16,000.00. For all
23 amounts due and owing that are not received within the payment times set forth herein, Novel
24 Brands shall pay a late payment fee equal to \$100/day. Payment owed to pursuant to this Section
25 shall be delivered to the payment address identified in § 4.1.1, above.

26 **5. RELEASE OF ALL CLAIMS**

27 5.1 This Consent Judgment is a full, final, and binding resolution between Balabbo
28 acting on her own behalf, and on behalf of the public interest, and Novel Brands, and its parents,
shareholders, members, directors, officers, managers, employees, representatives, agents,
attorneys, divisions, subdivisions, subsidiaries, partners, sister companies, and affiliates, and their
predecessors, successors and assigns ("Defendant Releasees"), and all entities from whom they

1 obtain and to whom they directly or indirectly distribute or sell Covered Products, including but
2 not limited to manufacturers, suppliers, distributors, wholesalers, customers, licensors, licensees
3 retailers, franchisees, and cooperative members, including but not limited to Burlington Stores,
4 Inc., Burlington Coat Factory Warehouse Corporation, Burlington Coat Factory Holdings, LLC
5 (“Downstream Releasees”), of all claims for violations of Proposition 65 based on exposure to
6 DEHP from Covered Products as set forth in the Notice, with respect to any Covered Products
7 manufactured, distributed, or sold by Novel Brands 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 Novel Brands and/or the Downstream Releasees of the
12 Covered Products (“Proposition 65 Claims”). Compliance with the terms of this Consent Judgment
13 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 Novel Brands, Defendant Releasees, and Downstream Releasees from any
18 and all manner of actions, causes of action, claims, demands, rights, suits, obligations, debts,
19 contracts, agreements, promises, liabilities, damages, charges, losses, costs, expenses, and
20 attorneys’ fees, of any nature whatsoever, known or unknown, in law or equity, fixed or contingent,
21 now or in the future, with respect to any alleged violations of Proposition 65 related to or arising
22 from Covered Products manufactured, distributed, or sold by Novel Brands, Defendant Releasees
23 or Downstream Releasees. With respect to the foregoing waivers and releases in this paragraph,
24 Balabbo hereby specifically waives any and all rights and benefits which she now has, or in the
25 future may have, conferred by virtue of the provisions of § 1542 of the California Civil Code, which
26 provides as follows:

27 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS THAT THE
28 CREDITOR OR RELEASING PARTY DOES NOT KNOW OR SUSPECT TO

1 EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE
2 RELEASE AND THAT, IF KNOWN BY HIM OR HER, WOULD HAVE
3 MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE
4 DEBTOR OR RELEASED PARTY.

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

10 **6. INTEGRATION**

11 6.1 This Consent Judgment contains the sole and entire agreement of the Parties and
12 any and all prior negotiations and understandings related hereto shall be deemed to have been
13 merged within it. No representations or terms of agreement other than those contained herein exist
14 or have been made by any Party with respect to 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 Leila C. Bruderer
28 Downey Brand LLP
621 Capitol Mall, 18th Floor
Sacramento, CA 95814

And

1 For Balabbo:

2 Evan Smith
3 Brodsky & Smith, LLC
4 9595 Wilshire Blvd., Ste. 900
5 Beverly Hills, CA 90212

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

8 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

9 9.1 This Consent Judgment may be executed in counterparts and by facsimile, each of
10 which shall be deemed an original, and all of which, when taken together, shall constitute one and
11 the same document.

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

13 10.1 Balabbo agrees to comply with the requirements set forth in California Health &
14 Safety Code § 25249.7(f) and to promptly bring a Motion for Approval of this Consent Judgment.
15 Defendant agrees it shall support approval of such Motion.

16 10.2 This Consent Judgment shall not be effective until it is approved and entered by the
17 Court and shall be null and void if, for any reason, it is not approved by the Court. In such case, the
18 Parties agree to meet and confer on how to proceed and if such agreement is not reached within 30
19 days, the case shall proceed on its normal course.

20 10.3 If the Court approves this Consent Judgment and is reversed or vacated by an
21 appellate court, the Parties shall meet and confer as to whether to modify the terms of this Consent
22 Judgment. If the Parties do not jointly agree on a course of action to take, the case shall proceed on
23 its normal course on the trial court's calendar.

24 **11. MODIFICATION**

25 11.1 This Consent Judgment may be modified only by further stipulation of the Parties
26 and the approval of the Court or upon the granting of a motion brought to the Court by either Party.

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2 **12. ATTORNEY'S FEES**

3 12.1 A Party who unsuccessfully brings or contests an action arising out of this Consent
4 Judgment shall be required to pay the prevailing party's reasonable attorney's fees and costs.

5 12.2 Nothing in this Section shall preclude a Party from seeking an award of sanctions
6 pursuant to law.

7 **13. RETENTION OF JURISDICTION**

8 13.1 This Court shall retain jurisdiction of this matter to implement or modify the
9 Consent Judgment.

10 **14. AUTHORIZATION**

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

16 **AGREED TO:**

AGREED TO:

17
18 Date:

9/10/19

Date:

8/28/19

19 By:


PRECILA BALABBO

By:


NOVEL BRANDS, LLC

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

23
24 Dated: _____

Judge of Superior Court