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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 OLYMPIA TOOLS INTERNATIONAL, INC.,
15 Defendant.

Case No.: HG19040034

CONSENT JUDGMENT

Judge: Patrick R. McKinney
Dept.: 514
Hearing Date: March 17, 2020
Hearing Time: 2:30 PM
Reservation #: R-2154499

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 Olympia Tools International,
4 Inc. (“Olympia Tools” or “Defendant”) with Balabbo and Defendant collectively referred to as the
5 “Parties” and each of them as a “Party.” Balabbo is an individual residing in California that seeks
6 to promote awareness of exposures to toxic chemicals and improve human health by reducing or
7 eliminating hazardous substances contained in consumer products. Olympia Tools is alleged to be
8 a person in the course of doing business for purposes of Proposition 65, Cal. Health & Safety Code
9 §§ 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 iWork nasal pliers - grips/handles
12 without providing a clear and reasonable exposure warning pursuant to Proposition 65. DEHP is
13 listed 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 April 10, 2019, Balabbo served
16 Olympia Tools, 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 iWork
19 nasal pliers - grips/handles expose users in California to DEHP. No public enforcer has brought
20 and is diligently prosecuting the claims alleged in the Notice. On October 22, 2019, Balabbo filed
21 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.

1 1.5 Defendant denies the material allegations contained in Balabbo’s Notice and
2 Complaint and maintains that it has not violated Proposition 65. Nothing in this Consent Judgment
3 shall be construed as an admission by Defendant of any fact, finding, issue of law, or violation of
4 law; nor shall compliance with this Consent Judgment constitute or be construed as an admission
5 by Defendant of any fact, finding, conclusion, issue of law, or violation of law, such being
6 specifically denied by Defendant. However, this section shall not diminish or otherwise affect the
7 obligations, responsibilities, and duties of Defendant under this Consent Judgment.

8 **2. DEFINITIONS**

9 2.1 **Covered Products.** The term “Covered Products” means iWork Round Nose pliers
10 - grips/handles that are distributed and/or offered for sale in California by Olympia Tools.

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 Effective Date (as defined herein)
15 and continuing thereafter, Covered Products that Olympia Tools manufactures and directly imports,
16 distributes, sells, or offers for sale into California shall either: (a) be Reformulated Products
17 pursuant to § 3.2, below; or (b) be labeled with a clear and reasonable exposure warning pursuant
18 to §§ 3.3 and 3.4, below. For purposes of this Consent Judgment, a “Reformulated Product” is a
19 Covered Product that is in compliance with the standard set forth in § 3.2 below. The warning
20 requirement set forth in §§ 3.3 and 3.4 shall not apply to any Reformulated Product.

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

26 3.3 **Clear and Reasonable Warning.** As of the Effective Date and continuing
27 thereafter, a clear and reasonable exposure warning as set forth in this §§ 3.3 and 3.4 or otherwise
28

1 compliant with Prop 65, must be provided for all Covered Products that Defendant imports,
2 distributes, sells, or offers for sale in California that is not a Reformulated Product. There shall be
3 no obligation for Defendant to provide a warning for Covered Products that enter the stream of
4 commerce prior to the Effective Date. The warning shall consist of either the **Warning** or
5 **Alternative Warning** described in §§ 3.3(a) or (b), respectively:

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

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

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

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

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

27 If Olympia Tools sells Covered Products directly via an internet website to customers
28 located in California, the warning requirements of this section shall be satisfied if the foregoing
warning appears either: (a) on the same web page on which a Covered Product is displayed and/or

1 described; (b) on the same page as the price for the Covered Product; (c) on one or more web pages
2 displayed to a purchaser prior to purchase during the checkout process, or (d) are otherwise
3 compliant with Prop 65. Alternatively, a symbol consisting of a black exclamation point in a yellow
4 or white equilateral triangle may appear adjacent to or immediately following the display,
5 description, price, or checkout listing of the Covered Product, if the warning statement appears
6 elsewhere on the same web page in a manner that clearly associates it with the product(s) to which
7 the warning applies.

8 **3.5 Compliance with Warning Regulations.** Defendant shall be deemed to be in
9 compliance with this Consent Judgment by either adhering to §§ 3.3 and 3.4 of this Consent
10 Judgment or by complying with warning requirements adopted by the State of California’s Office
11 of Environmental Health Hazard Assessment (“OEHHA”) after the Effective Date.

12 **4. MONETARY TERMS**

13 **4.1 Civil Penalty.** Olympia Tools shall pay \$2,000.00 as a Civil Penalty pursuant to
14 Health and Safety Code section 25249.7(b), to be apportioned in accordance with California Health
15 & Safety Code § 25192, with 75% of these funds remitted to OEHHA and the remaining 25% of
16 the Civil Penalty remitted to Balabbo, as provided by California Health & Safety Code
17 § 25249.12(d).

18 **4.1.1** Within ten (10) days of the Effective Date, Olympia Tools shall issue two
19 separate checks for the Civil Penalty payment to (a) “OEHHA” in the amount of \$1,500.00; and
20 to (b) “Brodsky & Smith, LLC in Trust for Balabbo” in the amount of \$500.00. Payment owed to
21 Balabbo pursuant to this Section shall be delivered to the following payment address:

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

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

28 For United States Postal Service Delivery:

 Mike Gyurics

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

5 For Non-United States Postal Service Delivery:

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

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

13 4.2 **Attorneys' Fees.** Within ten (10) days of the Effective Date, Olympia Tools shall
14 pay \$20,500.00 to Brodsky & Smith, LLC ("Brodsky Smith") as complete reimbursement for
15 Balabbo's attorneys' fees and costs incurred as a result of investigating, bringing this matter to
16 Olympia Tools attention, litigating and negotiating and obtaining judicial approval of a settlement
17 in the public interest, pursuant to Code of Civil Procedure § 1021.5.

18 **5. RELEASE OF ALL CLAIMS**

19 5.1 This Consent Judgment is a full, final, and binding resolution between Balabbo
20 acting on her own behalf, and on behalf of the public interest, and Olympia Tools, and its parents,
21 shareholders, members, directors, officers, managers, employees, representatives, agents,
22 attorneys, divisions, subdivisions, subsidiaries, partners, sister companies, and affiliates, and their
23 predecessors, successors and assigns ("Defendant Releasees"), and all entities from whom they
24 obtain and to whom they directly or indirectly distribute or sell Covered Products, including but
25 not limited to manufacturers, suppliers, distributors, wholesalers, customers, licensors, licensees
26 retailers, franchisees, and cooperative members, including but not limited to Walmart, Inc.,
27 Walmart.com USA, LLC, and their respective parents, shareholders, members, directors, officers,
28 managers, employees, representatives, principals, agents, attorneys, franchisees, cooperative
members, marketplaces, insurers, divisions, subdivisions, subsidiaries, partners, sister companies,
affiliates, each entity to whom they directly or indirectly distribute or sell the Covered Products,
and their respective predecessors, successors, and assigns ("Downstream Releasees"), of all claims

1 for violations of Proposition 65 based on exposure to DEHP from Covered Products as set forth in
2 the Notice, with respect to any Covered Products distributed, or sold by Olympia Tools prior to the
3 Effective Date. This Consent Judgment shall have preclusive effect such that no other person or
4 entity, whether purporting to act in his, her, or its interests or the public interest shall be permitted
5 to pursue and/or take any action with respect to any violation of Proposition 65 that was alleged in
6 the Complaint, or that could have been brought pursuant to the Notice against Olympia Tools and/or
7 the Downstream Releasees of the Covered Products (“Proposition 65 Claims”). Compliance with
8 the terms of this Consent Judgment constitutes compliance with Proposition 65 with regard to the
9 Covered Products.

10 5.2 In addition to the foregoing, Balabbo, on behalf of herself, her past and current
11 agents, representatives, attorneys, and successors and/or assignees, and *not* in her representative
12 capacity, hereby waives all rights to institute or participate in, directly or indirectly, any form of
13 legal action and releases Olympia Tools, Defendant Releasees, and Downstream Releasees from
14 any and all manner of actions, causes of action, claims, demands, rights, suits, obligations, debts,
15 contracts, agreements, promises, liabilities, damages, charges, losses, costs, expenses, and
16 attorneys’ fees, of any nature whatsoever, known or unknown, in law or equity, fixed or contingent,
17 now or in the future, with respect to any alleged violations of Proposition 65 related to or arising
18 from Covered Products distributed, or sold by Olympia Tools, Defendant Releasees or Downstream
19 Releasees. With respect to the foregoing waivers and releases in this paragraph, Balabbo hereby
20 specifically after conferring with Counsel waives any and all rights and benefits which she now
21 has, or in the future may have, conferred by virtue of the provisions of § 1542 of the California
22 Civil Code, which provides as follows:

23 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS THAT THE
24 CREDITOR OR RELEASING PARTY DOES NOT KNOW OR SUSPECT TO
25 EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE
26 RELEASE AND THAT, IF KNOWN BY HIM OR HER, WOULD HAVE
MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE
DEBTOR OR RELEASED PARTY.

27 5.3 Olympia Tools waives any and all claims against Balabbo, her attorneys and other
28 representatives, for any and all actions taken or statements made (or those that could have been

1 taken or made) by Balabbo and her attorneys and other representatives, whether in the course of
2 investigating claims or otherwise seeking enforcement of Proposition 65 against it in this matter,
3 and/or with respect to Covered Products.

4 **6. INTEGRATION**

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

9 **7. GOVERNING LAW**

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

15 **8. NOTICES**

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

20 For Defendant:

21 Lee N. Smith
22 Coleman & Horowitz, LLP
23 499 W. Shaw Ave., Ste. 116
Fresno, CA 93704

24 And

25 For Balabbo:

26 Evan Smith
27 Brodsky & Smith, LLC
28 9595 Wilshire Blvd., Ste. 900
Beverly Hills, CA 90212

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

3 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

4 9.1 This Consent Judgment may be executed in counterparts and by facsimile, each of
5 which shall be deemed an original, and all of which, when taken together, shall constitute one and
6 the same document.

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

9 10.1 Balabbo agrees to comply with the requirements set forth in California Health &
10 Safety Code § 25249.7(f) and to promptly bring a Motion for Approval of this Consent Judgment.
11 Defendant agrees it shall support approval of such Motion.

12 10.2 This Consent Judgment shall not be effective until it is approved and entered by the
13 Court and shall be null and void if, for any reason, it is not approved by the Court. In such case, the
14 Parties agree to meet and confer on how to proceed and if such agreement is not reached within 30
15 days, the case shall proceed on its normal course.

16 10.3 If the Court approves this Consent Judgment and is reversed or vacated by an
17 appellate court, the Parties shall meet and confer as to whether to modify the terms of this Consent
18 Judgment. If the Parties do not jointly agree on a course of action to take, the case shall proceed on
19 its normal course on the trial court's calendar.

20 **11. MODIFICATION**

21 11.1 This Consent Judgment may be modified only by further stipulation of the Parties
22 and the approval of the Court or upon the granting of a motion brought to the Court by either Party.

23 **12. ATTORNEY'S FEES**

24 12.1 A Party who unsuccessfully brings or contests an action arising out of this Consent
25 Judgment shall be required to pay the prevailing party's reasonable attorney's fees and costs.

26 12.2 Nothing in this Section shall preclude a Party from seeking an award of sanctions
27 pursuant to law.

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13. RETENTION OF JURISDICTION

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

14. AUTHORIZATION

14.1 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 document and certify that he or she is fully authorized by the Party he or she represents to execute the Consent Judgment on behalf of the Party represented and legally bind that Party. Except as explicitly provided herein each Party is to bear its own fees and costs.

AGREED TO:

AGREED TO:

Date: 12/11/2019

Date: _____

By: 
PRECILA BALABBO

By: _____
OLYMPIA TOOLS INTERNATIONAL,
INC.

IT IS SO ORDERED, ADJUDGED AND DECREED:

Dated: _____

Judge of Superior Court

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AGREED TO:

AGREED TO:

Date: _____

Date: 1.20.20

By: _____
PRECILA BALABBO

By: _____
OLYMPIA TOOLS INTERNATIONAL,
INC.

IT IS SO ORDERED, ADJUDGED AND DECREED:

Dated: _____

Judge of Superior Court