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8
9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 COUNTY OF SANTA CLARA
11 UNLIMITED CIVIL JURISDICTION

13 DENNIS JOHNSON,

14 Plaintiff,

15 v.

16 APPLE BEAUTY, INC.; BURLINGTON
17 STORES, INC.; and DOES 1-150,
18 inclusive,

18 Defendants.

Case No. 20CV368203

**[PROPOSED] STIPULATED CONSENT
JUDGMENT**

(Health & Safety Code § 25249.6 *et seq.* and
Code of Civil Procedure § 664.6)

1 **1. INTRODUCTION**

2 **1.1 Parties**

3 This Stipulated Consent Judgment is entered into by and between plaintiff Dennis Johnson
4 (“Johnson”) and defendants Apple Beauty, Inc. (“Apple Beauty”) and Burlington Stores, Inc
5 (“Burlington”). Apple Beauty and Burlington shall be collectively referred to herein as
6 “Defendants”, with Johnson and Defendants each referred to individually as a “Party” and
7 collectively as the “Parties.”

8 **1.2 Plaintiff**

9 Johnson is a resident of the State of California who seeks to promote awareness of
10 exposures to toxic chemicals, and to improve human health by reducing or eliminating harmful
11 substances contained in consumer and commercial products.

12 **1.3 Defendant**

13 Both Apple Beauty and Burlington each employ ten or more persons and is a person in the
14 course of doing business for purposes of the Safe Drinking Water and Toxic Enforcement Act of
15 1986, California Health and Safety Code section 25249.6 *et seq.* (“Proposition 65”).

16 **1.4 General Allegations**

17 Johnson alleges that Defendants manufacture, import, sell, and/or distribute for sale in
18 California, PVC toiletry bags containing the phthalate chemical Di(2-ethylhexyl) Phthalate
19 (“DEHP”). DEHP is listed pursuant to Proposition 65 as a chemical known to cause birth defects
20 and other reproductive harm. Johnson alleges that Defendants failed to provide the health hazard
21 warning required by Proposition 65 for exposures to DEHP.

22 **1.5 Product Description**

23 The products covered by this Stipulated Consent Judgment are the PVC toiletry bags
24 containing DEHP commonly referred to as the “*Marvel Spider Man Toiletry Bag*” UPC: 8 15940
25 02336 7, that are manufactured, sold, or distributed for sale in California by Defendants (hereinafter
26 referred to as the “Product”).
27
28

1 **1.6 Notice of Violation**

2 On April 14, 2020, Johnson served Defendants and the requisite public enforcement
3 agencies with a 60-Day Notice of Violation (“Notice”), alleging that Defendants violated
4 Proposition 65 when they failed to warn their customers and consumers in California of the health
5 hazards associated with exposures to DEHP from the Product. No public enforcer has commenced
6 and is diligently prosecuting the allegations set forth in the Notice.

7 **1.7 Complaint**

8 On July 9, 2020, Johnson commenced the instant action, naming Defendants for alleged
9 violations of Proposition 65 that are the subject of the Notice.

10 **1.8 No Admission**

11 Defendants deny the material, factual, and legal allegations contained in the Notice and
12 maintain that the Products sold and distributed in California have been, and are, in compliance with
13 all laws. Nothing in this Stipulated Consent Judgment shall be construed as an admission by
14 Defendants of any fact, finding, conclusion, issue of law, or violation of law, nor shall compliance
15 with this Stipulated Consent Judgment constitute or be construed as an admission by Defendants
16 of any fact, finding, conclusion, issue of law, or violation of law, such being specifically denied by
17 Defendants. This Section shall not, however, diminish or otherwise affect Defendants’ obligations,
18 responsibilities, and duties under this Stipulated Consent Judgment.

19 **1.9 Jurisdiction**

20 For purposes of this Stipulated Consent Judgment only, the Parties stipulate that this Court
21 has jurisdiction over Defendants as to the allegations contained in the Complaint, that venue is
22 proper in the County of Santa Clara, and that the Court has jurisdiction to enter and enforce the
23 provisions of this Stipulated Consent Judgment pursuant to Proposition 65 and Code of Civil
24 Procedure section 664.6.

25 **1.10 Effective Date**

26 For purposes of this Stipulated Consent Judgment, the term “Effective Date” shall mean the
27 date Plaintiff provides notice to Defendants that the Court approved this Stipulated Consent
28

1 Judgment. Plaintiff may provide notice that the Court approved this Stipulated Consent Judgement
2 via electronic mail to counsel for Defendants.

3 **2. INJUNCTIVE RELIEF: REFORMULATION/WARNINGS**

4 **2.1 Reformulation Standard**

5 “Reformulated Products” are defined as those products containing DEHP in concentrations
6 less than 0.1 percent (1,000 parts per million) when analyzed pursuant to U.S. Environmental
7 Protection Agency testing methodologies 3580A and 8270C, or any other methodologies utilized by
8 federal or state agencies for the purpose of determining the DEHP content in a solid substance.

9 **2.2 Reformulation/Warning Commitment**

10 Defendants represent that the Product was a promotional item, and will not be sold again in
11 California. However, in the event that Defendants do manufacture, import, distribute, sell or offer
12 the Product for sale in California after the Effective Date, Defendants shall not do so unless the
13 Product qualifies as a Reformulated Product pursuant to Section 2.1 or contain appropriate health
14 hazard warnings pursuant to Section 2.3 below. Compliance with the terms of this Stipulated
15 Consent Judgment shall constitute compliance with Proposition 65 with respect to exposures to
16 DEHP from the Product, as set forth in the Notice.

17 **2.3 Product Warnings**

18 As of the Effective Date, any Product Defendants sell and/or distribute for sale in California
19 that do not qualify as Reformulated Product, shall bear a clear and reasonable warning pursuant to
20 this Section. Defendants further agrees that the warning will be prominently placed with such
21 conspicuousness when compared with other words, statements, designs or devices as to render it
22 likely to be read and understood by an ordinary individual under customary conditions of use. For
23 purposes of this Stipulated Consent Judgment, a clear and reasonable warning for the Product shall
24 consist of a warning affixed directly to the Product or Product packaging, label, or tag, for any
25 Product sold in California and contain one of the following statements:

26 **⚠ WARNING: Reproductive Harm- www.P65Warnings.ca.gov**

27 **OR**

1 **⚠ WARNING:** This product can expose you to chemicals including DEHP, which
2 is known to the State of California to cause birth defects or other reproductive harm.
3 For more information go to www.P65Warnings.ca.gov

4 In the event that the Office of Environmental Health Hazard Assessment promulgates one or
5 more regulations requiring or permitting specific safe harbor warning text and/or methods of
6 transmission different than those set forth above, Defendants shall be entitled to use, at their
7 discretion, such other specific safe harbor warning text and/or methods of transmission without
8 being deemed in breach of this Agreement.

9 **3. MONETARY SETTLEMENT TERMS**

10 **3.1 Civil Penalty Payment**

11 Pursuant to Health and Safety Code section 25249.7(b)(2), and in settlement of all claims
12 alleged in the Notice or referred to in this Stipulated Consent Judgment, Defendants agree to pay
13 \$2,000 in civil penalties within seven (7) business days of the Effective Date. The penalty payment
14 will be allocated in accordance with California Health and Safety Code section 25249.12(c)(1) &
15 (d), with 75% of the penalty amount remitted to the California Office of Environmental Health
16 Hazard Assessment (“OEHHA”) and the remaining 25% of the penalty amount paid to Johnson and
17 delivered to the address in Section 3.3 herein. On behalf of Defendants, and under the terms of an
18 indemnity agreement with Burlington, Great American Beauty, Inc. (GAB) will provide payment in
19 two checks as follows: (1) “OEHHA” in the amount of \$1,500; and (2) “Dennis Johnson” in the
20 amount of \$500.

21 **3.2 Attorneys’ Fees and Costs**

22 The Parties acknowledge that Johnson and his counsel offered to resolve this dispute
23 without reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving
24 the issue to be resolved after the material terms of the agreement had been settled. Shortly after the
25 other settlement terms had been reached, Defendants expressed desire to resolve Johnson’s fees and
26 costs. The Parties reached an accord on the compensation due to Johnson and his counsel under
27 general contract principles and the private attorney general doctrine codified at Code of Civil
28 Procedure section 1021.5 for all work performed in this matter. Under these legal principles, within
 seven (7) business days of the Effective Date, on behalf of Defendants GAB agrees to pay \$10,500,

1 in the form of a check made payable to “Voorhees & Bailey, LLP,” for all fees and costs incurred
2 investigating, bringing this matter to the attention of Defendants’ management, filing this action,
3 and negotiating a settlement in the public interest, but exclusive of fees and costs on appeal, if any.

4 **3.3 Payment Address**

5 All payments under this Stipulated Consent Judgment shall be delivered to the following
6 address:

7 Voorhees & Bailey, LLP
8 990 Amarillo Avenue
9 Palo Alto, CA 94303

10 **4. CLAIMS COVERED AND RELEASED**

11 **4.1 Johnson’s Release of Proposition 65 Claims**

12 Johnson, acting on his own behalf and in the public interest, releases Defendants and their
13 parents, subsidiaries, affiliated entities under common ownership, directors, officers, employees,
14 and attorneys (“Releasees”) and each entity to whom Defendants directly or indirectly distribute or
15 sell the Product including, but not limited to, their downstream distributors (including, GAB and
16 Palm Beach Beaute’ (and their parents, subsidiaries, affiliated entities under common ownership,
17 directors, officers, employees, and attorneys), whether either company is characterized as a
18 downstream distributor or an upstream distributor; collectively referred to as “Other Releasees”),
19 wholesalers, customers, retailers (including, specifically, Burlington Stores, Inc.), franchisers,
20 cooperative members, licensors and licensees, (“Downstream Releasees”) from all claims for any
21 violations arising under Proposition 65 for unwarned exposures to DEHP from the Product
22 manufactured, imported, distributed or sold by Defendants prior to the Effective Date, as set forth in
23 the Notice, regardless of the date any Releasee or Downstream Releasee distributes or sells the
24 Product. The Parties further understand and agree that except for the Other Releasees, this Section
25 4.1 release shall not extend upstream to any entities that manufactured the Product or any
26 component parts thereof, or any distributors or suppliers who sold the Product or any component
27 parts thereof to Defendants.
28

1 **4.2 Johnson’s Individual Release of Claims**

2 The Parties further understand and agree that except for the Other Releasees, this Section
3 4.2 release shall not extend upstream to any entities that manufactured the Product, or any
4 component parts thereof, or any distributors or suppliers who sold the Product, or any component
5 parts thereof to Defendants. Nothing in this Section affects Johnson’s right to commence or
6 prosecute an action under Proposition 65 against a Releasee that does not involve the Product.

7 **4.3 Defendants’ Release of Johnson**

8 Defendants and the Other Releasees, on their own behalf and on behalf of their past and
9 current agents, representatives, attorneys, successors and/or assignees, hereby waive any and all
10 claims against Johnson and his attorneys and other representatives, for any and all actions taken or
11 statements made by Johnson and his attorneys and other representatives, whether in the course of
12 investigating claims, seeking to enforce Proposition 65 against it in this matter, or with respect to
13 the Product.

14 **5. COURT APPROVAL**

15 This Stipulated Consent Judgment shall be null and void if, for any reason, it is not
16 approved and entered by the Court within one year after it has been fully executed by all Parties.
17 Johnson and Defendants agree to support the entry of this agreement as a judgment, and to obtain
18 the Court’s approval of their settlement within thirty (30) days of its full execution by the Parties.
19 The Parties acknowledge that, pursuant to California Health and Safety Code section 25249.7,
20 subdivision (f)(4), a noticed motion is required for judicial approval of this Stipulated Consent
21 Judgment, which motion Johnson shall draft and file and Defendants shall support, appearing at the
22 hearing if so requested. If any third-party objection to the motion is filed, Johnson and Defendants
23 agree to work together to file a reply and appear at any hearing. This provision is a material
24 component of the Stipulated Consent Judgment and shall be treated as such in the event of a breach.

25 **6. SEVERABILITY**

26 If, subsequent to the execution of this Stipulated Consent Judgment, any provision of this
27 Stipulated Consent Judgment is deemed by a court to be unenforceable, the validity of the
28 remaining provisions shall not be adversely affected.

1 **7. GOVERNING LAW**

2 This Stipulated Consent Judgment shall be governed by the laws of the State of California
3 and apply within the State of California. In the event that Proposition 65 is repealed or is otherwise
4 rendered inapplicable by reason of law generally, or as to the Product, then Defendants may provide
5 written notice to Johnson of any asserted change in the law and shall have no further injunctive
6 obligations pursuant to this Stipulated Consent Judgment with respect to, and to the extent that, the
7 Product is so affected.

8 **8. NOTICE**

9 Unless specified herein, all correspondence and notice required to be provided under this
10 Stipulated Consent Judgment shall be in writing and sent by: (a) personal delivery; (b) first-class,
11 registered or certified mail, return receipt requested; or (c) a recognized overnight courier on any
12 Party by the other at the following addresses:

13 For Apple Beauty:

14 Michael E. Vergara
15 Somach Simmons & Dunn
16 500 Capitol Mall, Suit 1000
17 Sacramento, CA 95814
18 (916) 446-7979
19 mvergara@somachlaw.com

For Johnson:

Voorhees & Bailey, LLP
Proposition 65 Coordinator
990 Amarillo Avenue
Palo Alto, CA 94303
(617) 669-6960
troy@voorheesbailey.com

18 For Burlington Stores, Inc.:

19 Lindsay R. Goldstein
20 Director, Managing Counsel - Litigation
21 Burlington Stores, Inc.
22 1830 Route 130 North
23 Burlington, NJ 08016
24 Direct: 609-387-7800 Ext. 53675
25 lindsay.goldstein@burlington.com

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

28

1 **9. COUNTERPARTS; FACSIMILE AND PDF SIGNATURES**

2 This Stipulated Consent Judgment may be executed in counterparts and by facsimile or
3 portable document format (PDF) signature, each of which shall be deemed an original, and all of
4 which, when taken together, shall constitute one and the same document.

5 **10. COMPLIANCE WITH HEALTH & SAFETY CODE § 25249.7, SUBD. (f)(1)**

6 Johnson and his attorneys agree to comply with the reporting form requirements referenced
7 in California Health and Safety Code section 25249.7(f).

8 **11. MODIFICATION**

9 This Stipulated Consent Judgment may be modified only by: (i) a written agreement of the
10 Parties and the entry of a modified Stipulated Consent Judgment by the Court thereon; or (ii) upon a
11 successful motion of any party and the entry of a modified Stipulated Consent Judgment by the
12 Court thereon.

13 **12. AUTHORIZATION**

14 The undersigned are authorized to execute this Stipulated Consent Judgment on behalf of
15 their respective Parties and have read, understand, and agreed to all of the terms and conditions of
16 this Stipulated Consent Judgment.

17 **AGREED TO:**

18
19 Date: 10/1/2020

20
21 By: 
22 DENNIS JOHNSON

AGREED TO:

20 Date: 10/6/2020

21 By: 
22 APPLE BEAUTY, INC., AND BURLINGTON
23 STORES, INC.

24 Michael E. Vergara