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Environmental Health Advocates, Inc.

**SUPERIOR COURT OF THE STATE OF CALIFORNIA**

**IN AND FOR THE COUNTY OF ALAMEDA**

ENVIRONMENTAL HEALTH  
ADVOCATES, INC.,

Plaintiff,

v.

BLUE WAVE PRODUCTS, INC., a Georgia  
corporation, AMAZON.COM, INC., a  
Delaware corporation, and DOES 1 through  
100, inclusive,

Defendants.

Case No. RG20081969

**[PROPOSED] CONSENT JUDGMENT**

(Health & Safety Code § 25249.6 *et seq.* and  
Code Civ. Proc. § 664.6)

# **1. INTRODUCTION**

## **1.1 Parties**

This Consent Judgment is entered into by and between Environmental Health Advocates, Inc., (“EHA” or “Plaintiff”), on the one hand, and Blue Wave Products, Inc. (“Defendant” or “Blue Wave”), on the other hand, with EHA and Blue Wave each individually referred to as a “Party” and collectively referred to as the “Parties.”

## **1.2 Plaintiff**

EHA is a corporation organized in the state of California, acting in the interest of the general public. It seeks to promote awareness of exposures to toxic chemicals and to improve human health by reducing or eliminating hazardous substances contained in consumer products.

## **1.3 Defendant**

Blue Wave employs ten or more individuals and is a “person in the course of doing business” for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, Health and Safety Code section 25249.6 *et seq.* (“Proposition 65”).

## **1.4 General Allegations**

EHA alleges that Blue Wave manufactures, imports, sells, and distributes for sale Blue Wave 8-ft Single Water Tube for Winter Pool Cover (Ea) that contains Di (2-ethylhexyl) phthalate (DEHP). EHA further alleges that Blue Wave does so without providing a sufficient health hazard warning as required by Proposition 65 and related regulations pursuant to Proposition 65 and alleges that DEHP is listed as a chemical known to cause cancer, birth defects and other reproductive harm.

## **1.5 Notice of Violation**

On or around August 28, 2020, EHA served Blue Wave, Amazon.com, Inc., the California Attorney General, and all other required public enforcement agencies with a 60-Day Notice of Violation of Proposition 65 (“Notice”). The Notice alleged that Blue Wave had violated Proposition 65 by failing to sufficiently warn consumers in California of the health hazards associated with exposures to DEHP contained in wristbands, including but not limited to Blue Wave 8-ft Single Water Tube for Winter Pool Cover (Ea).

No public enforcer has commenced or is otherwise prosecuting an action to enforce the

violations alleged in the Notice.

#### **1.6 Covered Product Description**

The products covered by this Consent Judgment (i.e., the “Covered Products”) are the “Blue Wave Single Water Tube for Winter Pool Cover,” manufactured, processed, distributed, shipped, or sold by Blue Wave that allegedly contain DEHP and are imported, sold, shipped, delivered, or distributed for sale to consumers in California by Releasees (as defined in section 4.1).

#### **1.7 State of the Pleadings**

On or around December 1, 2020, EHA filed a Complaint against Blue Wave for the alleged violations of Proposition 65 that are the subject of the Notice (“Complaint”).

#### **1.8 No Admission**

Blue Wave denies the material factual and legal allegations of the Notice and Complaint and maintains that all of the Covered Products it has manufactured, produced, packaged, imported, supplied, sold, and/or distributed for sale in California, including Covered Products, have been, and are, in compliance with all laws. Nothing in this Consent Judgment shall be construed as an admission of any fact, finding, conclusion of law, issue of law, or violation of law, nor shall compliance with this Consent Judgment be construed as an admission of any fact, finding, conclusion of law, issue of law, or violation of law. This Section shall not, however, diminish or otherwise affect Blue Wave’s obligations, responsibilities, and duties under this Consent Judgment.

#### **1.9 Jurisdiction**

For purposes of this Consent Judgment and the Complaint only, the Parties stipulate that this Court has jurisdiction over Blue Wave as to the allegations in the Complaint, that venue is proper in the County of Alameda, and that the Court has jurisdiction to enter and enforce the provisions of this Consent Judgment pursuant to Proposition 65 and Code of Civil Procedure section 664.6.

#### **1.10 Effective Date**

For purposes of this Consent Judgment, the term “Effective Date” means the date on which the Court grants the motion for approval of this Consent Judgment, as discussed in Section 5.

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1     **2.     INJUNCTIVE RELIEF**

2             **2.1 Clear and Reasonable Warnings**

3             As of the Effective Date, and continuing thereafter, a clear and reasonable Proposition 65  
4     warning as set forth in this §§ 2.1 and 2.2 must be provided for all Covered Products that Blue Wave  
5     manufactures, supplies and distributes for sale in California.

6             On or after the Effective Date, for Covered Products, Blue Wave shall provide one of the  
7     following warning statements:

8             **Option 1:**

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

12            **Option 2:**

13                    **WARNING:** Cancer and Reproductive Harm –  
                      [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov)

14            This warning statement shall be prominently displayed on the Covered Products, on the  
15     packaging of the Covered Products, or on a placard, shelf tag, or sign provided that the statement is  
16     displayed with such conspicuousness, as compared with other words, statements, or designs as to  
17     render it likely to be read and understood by an ordinary individual under customary conditions prior  
18     to sale. If the warning statement is displayed on the Covered Products' packaging, it must be in a type  
19     size no smaller than the largest type size used for other consumer information on the product. In no  
20     case shall a warning statement displayed on the Covered Products' packaging appear in a type size  
21     smaller than 6-point type. The same warning shall be posted on any websites under the exclusive  
22     control of Blue Wave where Covered Products are sold into California. Blue Wave shall instruct any  
23     third-party website to which it sells its Covered Products to include the same warning as a condition  
24     of selling the Covered Products.

25            The warning shall be provided to California consumers in a manner that complies with 27  
26     C.C.R. § 25602(b). Specifically, for internet purchases, a warning must also be provided by including  
27     either the warning or a clearly marked hyperlink using the word "**WARNING**" on the product display  
28     page, or by otherwise prominently displaying the warning to the purchaser prior to completing the

1 purchase.

## 2 **2.2 Sell-Through Period**

3 Notwithstanding anything else in this Consent Judgment, the Covered Products that are  
4 manufactured on or prior to the Effective Date shall be subject to release of liability pursuant to  
5 this Consent Judgment, without regard to when such Covered Products were, or are in the future,  
6 distributed or sold to customers. As a result, the obligation of Blue Wave, or any Releasees (if  
7 applicable), do not apply to these Covered Products manufactured on or prior to the Effective Date.

## 8 **3. MONETARY SETTLEMENT TERMS**

### 9 **3.1 Settlement Amount**

10 Blue Wave shall pay fifty thousand dollars (\$50,000.00) in settlement and total satisfaction of  
11 all the claims referred to in the Notice, the Complaint, and this Consent Judgment. This includes civil  
12 penalties in the amount of five thousand dollars (\$5,000.00) pursuant to Health and Safety Code  
13 section 25249.7(b) and attorneys' fees and costs in the amount of forty-five thousand dollars  
14 (\$45,000.00) pursuant to Code of Civil Procedure section 1021.5.

### 15 **3.2 Civil Penalty**

16 The portion of the settlement attributable to civil penalties shall be allocated according to  
17 Health and Safety Code section 25249.12(c)(1) and (d), with seventy-five percent (75%) of the  
18 penalty, three thousand seven hundred and fifty dollars (\$3,750.00), paid to the California Office of  
19 Environmental Health Hazard Assessment ("OEHHA"), and the remaining twenty-five percent (25%)  
20 of the penalty, one thousand two hundred and fifty dollars (\$1,250.00), paid to EHA individually.  
21 These payments will be sent to the below addresses within fourteen (14) days of the Effective Date.

22 All payments owed to EHA shall be delivered to the following address:

23 Environmental Health Advocates  
24 225 Broadway, Suite 1900  
25 San Diego, CA 92101

26 All payments owed to OEHHA (EIN: 68-0284486) shall be delivered directly to OEHHA  
27 (Memo Line "Prop 65 Penalties") at the following addresses:

28 ///

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 Federal Express 2-Day Delivery:

Mike Gyurics  
Fiscal Operations Branch Chief  
Office of Environmental Health Hazard Assessment  
1001 I Street  
Sacramento, CA 95814

Blue Wave agrees to provide EHA's counsel with a copy of the check payable to OEHHA, simultaneous with its penalty payments to EHA.

Plaintiff and its counsel will provide completed IRS 1099, W-9, or other tax forms as required. Relevant information is set out below:

- "Glick Law Group" (EIN: 47-1838518) at the address provided in Section 3.2(a)(i);
- "Nicholas & Tomasevic" (EIN: 46-3474065) at the address provided in Section 3.2(a)(i); and
- "Office of Environmental Health Hazard Assessment" 1001 I Street, Sacramento, CA 95814.

### **3.3 Attorneys' Fees and Costs**

The portion of the settlement attributable to attorneys' fees and costs, forty five dollars (\$45,000.00), shall be paid to Glick Law Group, P.C. and Nicholas & Tomasevic, LLP (collectively, "EHA's Counsel"), who are entitled to attorneys' fees and costs incurred by it in this action, including but not limited to investigating potential violations, bringing this matter to Blue Wave's attention, as well as litigating and negotiating a settlement in the public interest.

Blue Wave shall provide their payment to EHA's Counsel in two installments as follows. Payment may be by physical check or by electronic means, including wire transfers, at Blue Wave's discretion.

Blue Wave shall provide their payment in two installments as follows:

- The first installment in the amount of forty thousand dollars (\$40,000.00), divided equally, payable to Glick Law Group, PC (\$20,000.00) and Nicholas & Tomasevic, LLP (\$20,000.00), within fourteen (14) days of the Effective Date (“First Payment”).
- The second installment in the amount of five thousand dollars (\$5,000), payable to Glick Law Group, PC (\$2,500.00) and Nicholas & Tomasevic, LLP (\$2,500.00), within thirty (30) days of the Effective Date (the “Second Payment”). If the First Payment is timely made, the Second Payment shall be waived in its entirety by EHA and both Glick Law Group, PC and Nicholas & Tomasevic, LLP, and no further payments shall be due.

All installments will be sent to the following addresses:

Noam Glick  
Glick Law Group  
225 Broadway, 19<sup>th</sup> Floor  
San Diego, CA 92101

Craig Nicholas  
Nicholas & Tomasevic, LLP  
225 Broadway, 19th Floor  
San Diego, CA 92101

#### **4. CLAIMS COVERED AND RELEASED**

##### **4.1 EHA’s Public Release of Proposition 65 Claims**

Plaintiff acting on its own behalf and in the public interest releases Blue Wave and its parents, subsidiaries, affiliated entities under common ownership, its directors, officers, principals, agents, employees, attorneys, insurers, accountants, predecessors, successors, and assigns (“Defendant Entities”), each entity to whom Blue Wave directly or indirectly distributes, ships, or sells the Covered Products including but not limited to downstream distributors, wholesalers, customers, and retailers (including but not limited to Amazon.com, Inc.), franchisees, franchisors, cooperative members, suppliers, licensees, and licensors, and all of the foregoing entities’ owners, directors, officers, agents, principals, employees, attorneys, insurers, accountants, representatives, predecessors, successors, and assigns (collectively referred to as the “Releasees”) from all claims for violations of Proposition 65 up through the Effective Date based on exposure to DEHP from Covered Products as set forth in the Notice. Compliance with the terms of this Consent Judgment constitutes compliance with Proposition

65 with respect to exposures to DEHP from Covered Products as set forth in the Notice.

#### **4.2 EHA's Individual Release of Claims**

EHA, in its individual capacity, also provides a release to Blue Wave and/or Releasees, which shall be a full and final accord and satisfaction of, as well as a bar to, all actions, causes of action, obligations, costs, expenses, attorneys' fees, damages, losses, claims, liabilities, and demands of every nature, character, and kind, whether known or unknown, suspected or unsuspected, arising out of alleged or actual exposures to DEHP in Covered Products manufactured, imported, sold, or distributed by Blue Wave before the Effective Date.

#### **4.3 Blue Wave's Release of EHA**

Blue Wave on its own behalf, and on behalf of Releasees as well as its past and current agents, representatives, attorneys, successors, and assignees, hereby waives any and all claims against EHA and its attorneys and other representatives, for any and all actions taken or statements made by EHA and its attorneys and other representatives, whether in the course of investigating claims, otherwise seeking to enforce Proposition 65 against them, in this matter or with respect to the Covered Products.

### **5. COURT APPROVAL**

This Consent Judgment is not effective until it is approved by the Court and shall be null and void if it is not approved by the Court within one year after it has been fully executed by the Parties, or by such additional time as the Parties may agree to in writing.

### **6. SEVERABILITY**

Subsequent to the Court's approval and entry of this Consent Judgment, if any provision is held by a court to be unenforceable, the validity of the remaining provisions shall not be adversely affected.

### **7. GOVERNING LAW**

The terms of this Consent Judgment shall be governed by the laws of the state of California as applied within the state of California. In the event that Proposition 65 is repealed, or is otherwise rendered inapplicable for reasons, including but not limited to changes in the law, then Blue Wave may provide written notice to EHA of any asserted change, and shall have no further injunctive obligations pursuant to this Consent Judgment with respect to, and to the extent that, the Covered



Products are so affected.

In the event the California Office of Health Hazard Assessment adopts a regulation or safe use determination, or issues an interpretive guideline that exempts Covered Products from meeting the requirements of Proposition 65; or if DEHP cases are permanently enjoined by a court of competent jurisdiction; or if Proposition 65 is determined to be preempted by federal law or a burden on First Amendment rights with respect to DEHP in Covered Products or Covered Products substantially similar to Covered Products, then Blue Wave shall be relieved of its obligation to comply with Section 2 herein.

**8. ENFORCEMENT**

In any action to enforce the terms of this Consent Judgment, the prevailing party shall be entitled to its reasonable attorneys' fees and costs.

**9. NOTICE**

Unless otherwise specified herein, all correspondence and notice required by this Consent Judgment shall be in writing and sent by: (i) personal delivery; (ii) first-class, registered, or certified mail, return receipt requested; or (iii) a recognized overnight courier to the following addresses:

If to Blue Wave:

Garth Ward  
Lewis Brisbois Bisgaard & Smith LLP  
550 West C Street, Suite 1700  
San Diego, CA 92101

If to EHA:

Noam Glick  
Glick Law Group, PC  
225 Broadway, 19th Floor  
San Diego, CA 92101

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

**10. COUNTERPARTS; DIGITAL SIGNATURES**

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

**11. POST EXECUTION ACTIVITIES**

EHA agrees to comply with the reporting form requirements referenced in Health and Safety Code section 25249.7(f). The Parties further acknowledge that, pursuant to Health and Safety Code

1 section 25249.7(f), a noticed motion is required to obtain judicial approval of the settlement, which  
2 motion EHA shall draft and file. In furtherance of obtaining such approval, the Parties agree to  
3 mutually employ their best efforts, including those of their counsel, to support the entry of this agreement  
4 as judgment, and to obtain judicial approval of their settlement in a timely manner. For purposes of this  
5 Section, "best efforts" shall include, at a minimum, supporting the motion for approval, responding to  
6 any objection that any third-party may make, and appearing at the hearing before the Court if so  
7 requested.

8 **12. MODIFICATION**

9 This Consent Judgment may be modified by: (i) a written agreement of the Parties and entry  
10 of a modified consent judgment thereon by the Court; or (ii) a successful motion or application of any  
11 Party, and the entry of a modified consent judgment thereon by the Court.

12 **13. AUTHORIZATION**

13 The undersigned are authorized to execute this Consent Judgment and acknowledge that they  
14 have read, understand, and agree to all of the terms and conditions contained herein.

15 **14. GOOD FAITH ATTEMPT TO RESOLVE DISPUTES**

16 If a dispute arises with respect to either Party's compliance with the terms of this Consent  
17 Judgment entered by the Court, the Parties shall meet and confer in person, or by telephone, and/or  
18 in writing and endeavor to resolve the dispute in an amicable manner. No action or motion may be  
19 filed in the absence of such a good faith attempt to resolve the dispute beforehand.

20 **15. ENTIRE AGREEMENT**

21 This Consent Judgment contains the sole and entire agreement and understanding of the  
22 Parties with respect to the entire subject matter herein, and any and all prior discussions, negotiations,  
23 commitments, and understandings related hereto. No representations, oral or otherwise, express or  
24 implied, other than those contained herein have been made by any Party. No other agreements, oral  
25 or otherwise, unless specifically referred to herein, shall be deemed to exist or to bind any Party.

26 **AGREED TO:**

**AGREED TO:**

27 Date: 9/13/2022

Date: 9/13/2022

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By:   
ENVIRONMENTAL HEALTH  
ADVOCATES, INC.

By:   
BLUE WAVE PRODUCTS, INC.

**IT IS SO ORDERED.**

Date: \_\_\_\_\_

\_\_\_\_\_

JUDGE OF THE SUPERIOR COURT