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5 CENTER FOR ADVANCED PUBLIC AWARENESS

6
7 SUPERIOR COURT OF THE STATE OF CALIFORNIA
8 COUNTY OF SAN FRANCISCO
9 UNLIMITED CIVIL JURISDICTION

10
11 CENTER FOR ADVANCED PUBLIC
AWARENESS, INC.,

12 Plaintiff,

13 v.

14 MARC DANIEL ENTERPRISES, INC.; BUY
15 RITE BEAUTY SUPPLY, INC.; and DOES 1-
30, inclusive,

16 Defendants.

Case No.

[PROPOSED] CONSENT JUDGMENT

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

1 **1. INTRODUCTION**

2 This Consent Judgment is entered into by and between plaintiff Center for Advanced Public
3 Awareness (“CAPA”) and defendant Marc Daniel Enterprise, Inc., formerly known as Buy Rite
4 Beauty Supply, Inc. (collectively, “**Marc Daniel**”), with CAPA and Marc Daniel each individually
5 referred to as a “Party” and collectively, as the “Parties,” to resolve the allegations in the July 6,
6 2020 60-Day Notice of Violation and the September 23, 2020 Supplemental 60-Day Notice of
7 Violation in compliance with the Safe Drinking Water and Toxic Enforcement Act of 1986, Health
8 & Safety Code § 25249.6 *et seq.* (“Proposition 65”).

9 **1.1 The Parties**

10 CAPA states that it is a California-based non-profit organization seeking to protect the
11 environment through elimination or reduction of toxic chemicals utilized in the manufacture of
12 consumer products and to increase public awareness of those chemicals through promotion of
13 environmentally sound practices and corporate responsibility. Marc Daniel employs ten or more
14 persons and is a person in the course of doing business for purposes of Proposition 65, pursuant to
15 Health & Safety Code § 25249.11(b).

16 **1.2 Allegations**

17 CAPA alleges Marc Daniel manufactures, imports, or distributes seats with vinyl upholstery
18 containing di(2-ethylhexyl)phthalate (“**DEHP**”) including, but not limited to, the *Child Booster Seat*
19 *Model # OD-0107; C/No. OD-121519/267*, sold to persons in California without providing the
20 warning CAPA alleges is required by California Health & Safety Code § 25249.6 *et seq.*
21 (“**Proposition 65**”). All such seats with vinyl upholstery are collectively referred to herein as the
22 “**Products**,” On October 24, 2003, DEHP was listed as a chemical known to the State of California
23 to cause cancer, birth defects and reproductive toxicity.

24 **1.3 Notices of Violation**

25 On July 6, 2020, CAPA attempted to serve Buy Rite Beauty Supply, Inc., the California
26 Attorney General and the requisite public enforcement agencies with a 60-Day Notice of Violation
27 (“**Notice**”), alleging Buy Rite Beauty Supply, Inc. violated Proposition 65 when it failed to warn its
28 customers and consumers in California its Products can expose users to DEHP, as required by

1 Proposition 65. Thereafter, on September 23, 2020, CAPA served a Supplemental 60-Day Notice of
2 Violation (“**Supplemental Notice**” and, collectively, with Notice, the “**Notices**”) alleging Marc
3 Daniel as the entity in violation of Proposition 65 for failure to warn California consumers its
4 Products can expose users to DEHP. CAPA served the Supplemental Notice on the California
5 Attorney General, the requisite public enforcement agencies, and Marc Daniel Enterprises, Inc. To
6 the best of the Parties’ knowledge, no public enforcer has commenced and is diligently prosecuting
7 an action to enforce the allegations set forth in the Notice.

8 **1.4 Complaint**

9 On January 14, 2021, CAPA commenced the instant action (“**Complaint**”), naming Marc
10 Daniel as defendant for the alleged violations of Proposition 65 that are the subject of the Notices.

11 **1.5 No Admission**

12 Marc Daniel denies the material, factual, and legal allegations contained in the Notices and
13 Complaint, and maintains all of the products it has sold or distributed for sale in California,
14 including the Products, have been, and are, in compliance with all laws. Nothing in this Consent
15 Judgment shall be construed as, nor shall compliance with this Consent Judgment constitute, an
16 admission by Marc Daniel of any fact, finding, conclusion of law, issue of law, or violation of law.
17 This section shall not, however, diminish or otherwise affect Marc Daniel’s obligations,
18 responsibilities, and duties under this Consent Judgment.

19 **1.6 Jurisdiction**

20 For purposes of this Consent Judgment only, the Parties stipulate: this Court has jurisdiction
21 over Marc Daniel as to the allegations contained in the Complaint; venue is proper in San Francisco
22 County; and the Court has jurisdiction to enter and enforce the provisions of this Consent Judgment,
23 pursuant to Proposition 65 and Code of Civil Procedure § 664.6.

24 **1.7 Effective Date**

25 The term “**Effective Date**” shall mean the date upon which Marc Daniel receives “**notice**” the
26 Court has granted the Motion to Approve this Consent Judgment. For purposes of this Section, the
27 Parties agree notice will be effectuated upon email transmission of a copy of the Court’s signed
28 Order and Judgment and shall not depend upon acknowledgment of receipt.

1 **2. INJUNCTIVE RELIEF: REFORMULATION OR WARNINGS**

2 **2.1 Commitment to Reformulate**

3 Commencing on the Effective Date and continuing thereafter, Marc Daniel shall only
4 manufacture or import, for sale to consumers in California or to customers with either retail outlets
5 in California or e-commerce websites shipping to consumers in California, Products that are either:
6 (1) Reformulated Products, as defined by Section 2.2, below; or (2) Products bearing a clear and
7 reasonable warning in compliance with Sections 2.3 through 2.6. Commencing 90 days after the
8 Effective Date and continuing thereafter, Marc Daniel shall only sell, ship or distribute for sale to
9 consumers in California or to customers with either retail outlets in California or e-commerce
10 websites shipping to consumers in California, Products that are either: (1) Reformulated Products, as
11 defined by Section 2.2, below; or (2) Products bearing a clear and reasonable warning in compliance
12 with Sections 2.3 through 2.6.

13 **2.2 Reformulation Standard Defined**

14 For purposes of this Consent Judgment, “Reformulated Products” are defined as Products
15 containing DEHP in a maximum concentration of 0.1 percent (1,000 parts per million) in any
16 accessible component (i.e. a component that may be touched during a reasonably foreseeable use of
17 the Product) when analyzed by a laboratory accredited by the State of California, a federal agency,
18 or a nationally recognized accrediting organization. For purposes of compliance with this
19 reformulation standard, testing samples shall be prepared and extracted using Consumer Product
20 Safety Commission (“CPSC”) methodology CPSC-CH-C1001.09.4 and analyzed using U.S.
21 Environmental Protection Agency (“EPA”) methodologies 8270D, or other scientifically valid
22 methodologies utilized by federal or state government agencies to determine phthalate content in a
23 solid substance.

24 **2.3 Clear and Reasonable Warnings**

25 Commencing on the Effective Date or ninety days thereafter, pursuant to Section 2.1, for
26 Products that are not Reformulated Products as defined by Section 2.2, Marc Daniel shall provide
27 clear and reasonable warnings in accordance with this Section. Each warning shall be prominently
28 placed with such conspicuousness, as compared with other words, statements, designs, or devices, as

1 to render it likely to be read and understood by an ordinary individual under customary conditions
2 before purchase or use and shall be provided in a manner such that it is clearly associated with the
3 specific Product to which the warning applies.

4 (a) **Warning.** The Warning shall consist of one of the following statements:

5 (i)

6 **⚠ WARNING:** This product can expose you to DEHP, which is known to the State
7 of California to cause cancer and birth defects or other reproductive
8 harm. For more information go to www.P65Warnings.ca.gov.

8 or,

9 (i) **Short-Form Warning.** Marc Daniel may, but is not required to, use the
10 following short-form warning (“**Short-Form Warning**”):

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

12 (b) **Foreign Language Requirement.** Where a consumer product sign, label or shelf tag
13 used to provide a warning includes consumer information in language(s) other than English, the
14 warning must also be provided in the other language(s) in addition to English.

15 **2.4 On-Product Warnings**

16 Marc Daniel shall affix a warning to the Product label or otherwise directly on each Product
17 provided for sale to customers with retail outlets in California. For the purpose of this agreement,
18 “**Product label**” means a display of written, printed or graphic material that is printed on or affixed to
19 a Product or its immediate container or wrapper. A warning provided pursuant to section 2.3(a) or (b)
20 must print the word “**WARNING:**” in all capital letters and in bold font. The warning symbol to the
21 left of the word “**WARNING:**” must be a black exclamation point in a yellow equilateral triangle
22 with a black outline, except that if the labeling does not use the color yellow, then the symbol may be
23 in black and white. The entire warning shall appear in a type size of at least 6-point type and no
24 smaller than the largest type size used for other consumer information on the product. The warning
25 shall consist of either the Warning, or the Short-Form Warning described in subsection 2.3(a) or (b),
26 respectively.

27 **2.5 Mail Order Catalog Warnings**

28 If, after the Effective Date, Marc Daniel prints new catalogs and sells Products through such

1 catalogs to customers located in, or with retail outlets located, in California, Marc Daniel shall
2 provide a warning for each Product both on the Product label in accordance with Section 2.4, and in
3 the catalog in a manner that clearly associates the warning with the *specific* Product being purchased.
4 Any warning provided in a mail order catalog shall be in the same type size or larger than other
5 consumer information provided for the Product within the catalog and shall be provided on the same
6 page and in the same location as the display and/or description of the Product. The catalog warning
7 may use the Short-Form Warning content described in Section 2.3(b), if the warning provided on the
8 Product label also uses the Short-Form Warning content.

9 **2.6 Internet Warnings**

10 If, after the Effective Date, Marc Daniel sells Products via the internet to customers located in
11 California, Marc Daniel shall provide warnings for each Product by displaying the warning to the
12 customer prior to completing the purchase or during the purchase of Products without requiring
13 customers to seek out the warning. The warning or a clearly marked hyperlink to the warning using
14 the word “**WARNING**” given in conjunction with the sale of the Products via the internet shall
15 appear: (a) on the same web page on which the Product is displayed; (b) on the same web page as the
16 order form for the Product; (c) on the same page as the price for any Product; or (d) on one or more
17 web pages displayed to a purchaser during the checkout process. In its internet warning, Marc Daniel
18 may use the Short-Form Warning content described in Section 2.3, if a warning provided on the
19 Product label also uses the Short-Form Warning content.

20 **2.7 Compliance with Warning Regulations**

21 Marc Daniel may comply with the warning requirements of this Section by any other means
22 authorized pursuant to Health and Safety Code 25249.5 *et seq.* or by adhering to the safe harbor
23 guidelines published by the Office of Environmental Health Hazard Assessment as set forth in Title
24 27, Div. 4, Chap. 1, Ar. 6 of the California Code of Regulations, commencing at § 25600 *et seq.*, as
25 may be amended from time to time.

26 **3. MONETARY SETTLEMENT TERMS**

27 **3.1 Civil Penalty**

28 Pursuant to Health and Safety Code § 25249.7(b), within five (5) days of the Effective Date,

1 Marc Daniel agrees to pay \$10,000 in civil penalties. Marc Daniel shall allocate this civil penalty
2 payment according to Health and Safety Code § 25249.12(c)(1) and (d), with seventy-five percent
3 (75%) paid to the California Office of Environmental Health Hazard Assessment (OEHHA), and the
4 remaining twenty-five percent (25%) retained by CAPA, by issuing two checks made payable as
5 follows: (1) “OEHHA” in the amount of \$7,500; and (2) “Center for Advanced Public Awareness”
6 in the amount of \$2,500. CAPA’s counsel shall deliver OEHHA’s and CAPA’s portion of the
7 penalty payment. Marc Daniel’s civil penalty payments shall be delivered to the address in Section
8 3.3, below.

9 **3.2 Reimbursement of Attorneys’ Fees and Costs**

10 CAPA and its counsel offered to resolve the allegations in the Notices and Complaint without
11 reaching terms on the amount of reimbursement of their attorneys’ fees and costs. Shortly after the
12 Parties finalized the other material settlement terms, they negotiated and reached an accord on the
13 compensation to be paid to CAPA’s counsel, under general contract principles and the private
14 attorney general doctrine, codified at California Code of Civil Procedure § 1021.5, for all work
15 performed through the initial entry of this Consent Judgment pursuant to its terms. Within five (5)
16 business days of the Effective Date, Marc Daniel agrees to issue a check in the amount of \$29,200
17 made payable to “Seven Hills LLP” for all fees and costs incurred investigating, bringing this matter
18 to Marc Daniel’s attention, litigating, negotiating a settlement in the public interest, and obtaining
19 the Court’s approval of its terms pursuant to Section 5.

20 **3.3 Payment Address**

21 All payments required by this Consent Judgment shall be delivered to the following address:

22 Seven Hills LLP
23 Attn: Kimberly Gates Johnson
24 4 Embarcadero Center, Suite 1400
San Francisco, CA 94111

25 **4. CLAIMS COVERED AND RELEASED**

26 **4.1 CAPA’s Release of Proposition 65 Claims**

27 CAPA, acting on its own behalf and in the public interest, and on behalf of its past and
28 current agents, representatives, attorneys, successors and assignees (“**Releasers**”) releases Marc

1 Daniel and its past and present parents, subsidiaries, affiliated entities under common ownership,
2 directors, officers, employees, and attorneys and each entity to whom Marc Daniel directly or
3 indirectly distributes or sells the Products including, but not limited to, its downstream distributors,
4 wholesalers, customers, retailers, franchisers, cooperative members, licensors and licensees
5 (“**Releasees**”) for any violations arising under Proposition 65 for unwarned exposures to DEHP from
6 Products manufactured or distributed into the State of California by Marc Daniel prior to the
7 Effective Date, as set forth in the Notice. Compliance with the terms of this Consent Judgment
8 constitutes compliance with Proposition 65 by Marc Daniel with respect to the alleged or actual
9 failure to warn about exposures to DEHP from Products manufactured or distributed by Marc Daniel
10 and offered for sale in California after the Effective Date.

11 **4.2 CAPA’s Individual Release of Claims**

12 CAPA, in its individual capacity only and *not* in his representative capacity, also provides a
13 release to Marc Daniel and Releasees which shall be effective as a full and final accord and
14 satisfaction, as a bar to all actions, causes of action, obligations, costs, expenses, attorneys’ fees,
15 damages, losses, claims, liabilities and demands of CAPA of any nature, character or kind, whether
16 known or unknown, suspected or unsuspected, arising out of alleged or actual exposures to DEHP, in
17 Products manufactured or distributed into the State of California by Marc Daniel prior to the
18 Effective Date.

19 **4.3 Marc Daniel’s Release of CAPA**

20 Marc Daniel, on its own behalf and on behalf of its past and current agents, representatives,
21 attorneys, successors and/or assignees, hereby waives any and all claims against CAPA, its attorneys
22 and other representatives, and Releasors, for any and all actions taken or statements made (or those
23 that could have been taken or made) by CAPA and its attorneys and other representatives in the
24 course of investigating the claims alleged in the Notices, seeking to enforce Proposition 65 against it
25 in this matter, or with respect to the Products.

26 **4.4 Mutual Waiver of California Civil Code Section 1542**

27 The Parties each acknowledge familiarity with Section 1542 of the Civil Code, which
28 provides as follows:

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

6 The Parties, each on its own behalf, and each on behalf of its past and current agents,
7 attorneys, successors, and assignees, expressly waive and relinquish any and all rights and benefits
8 which it/they may have under, or which may be conferred upon it/them by the provisions of Civil
9 Code Section 1542 as well as under any other state or federal statute or common law principle of
10 similar effect, to the fullest extent it may lawfully waive such rights or benefits pertaining to the
11 released matters, as specifically defined by Sections 4.2 and 4.3, above.

12 **5. COURT APPROVAL**

13 Pursuant to California Health and Safety Code § 25249.7(f)(4), CAPA shall file a noticed
14 motion for judicial approval of this Consent Judgment. The Parties agree to mutually employ
15 reasonable efforts, and those of their counsel, to support the entry of this agreement as a judgment
16 and to obtain judicial approval of their settlement in a timely manner. For purposes of this section,
17 “reasonable efforts” shall include, at a minimum, supporting the motion for approval, responding to
18 any third-party objection, and appearing at the hearing before the Court if so requested.

19 **6. SEVERABILITY**

20 If, subsequent to the Court’s approval and entry of this Consent Judgment as a judgment, any
21 provision of this Consent Judgment is deemed by a court to be unenforceable, the validity of the
22 remaining provisions shall not be adversely affected.

23 **7. GOVERNING LAW**

24 The terms of this Consent Judgment shall be governed by the laws of the State of California
25 and apply within the State of California. In the event Proposition 65 is repealed, preempted, or is
26 otherwise rendered inapplicable by reason of law generally, or as to the Products, then Marc Daniel
27 may provide CAPA with written notice of any asserted change in the law and shall have no further
28 injunctive obligations pursuant to this Consent Judgment with respect to, and to the extent, the

1 Products are so affected. Nothing in this Consent Judgment shall be interpreted to relieve Marc
2 Daniel from its obligation to comply with any pertinent state or federal law or regulation, as it relates
3 to the subject matter herein.

4 **8. NOTICE**

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

9 For Marc Daniel:

For CAPA:

10 Gary Roberts, Esq.
11 Dentons US LLP
12 601 South Figueroa St., Ste. 2500
Los Angeles, CA 90017-5704

Kimberly Gates Johnson, Esq.
Seven Hills LLP
4 Embarcadero Center, Suite 1400
San Francisco, CA 94111

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

15 **9. COUNTERPARTS, FACSIMILE AND PDF SIGNATURES**

16 This Consent Judgment may be executed in counterparts and by portable document format
17 (pdf) signature, each of which shall be deemed an original and all of which, when taken together,
18 shall constitute one and the same document.

19 **10. COMPLIANCE WITH REPORTING REQUIREMENTS**

20 CAPA and its counsel agree to comply with the reporting form requirements referenced in
21 California Health and Safety Code § 25249.7(f).

22 **11. ENTIRE AGREEMENT**

23 This Consent Judgment contains the sole and entire agreement and understanding of the
24 Parties with respect to the entire subject matter hereof, and any and all prior discussions,
25 negotiations, commitments, or understandings related thereto, if any, are hereby merged herein and
26 therein. There are no warranties, representations, or other agreements between the Parties, except as
27 expressly set forth herein. No representations, oral or otherwise, express or implied, other than those
28 specifically referred to in this Consent Judgment have been made by any Party hereto. No other

1 agreements not specifically contained or referenced herein, oral or otherwise, shall be deemed to
2 exist or to bind any of the Parties hereto.

3 **12. MODIFICATION**

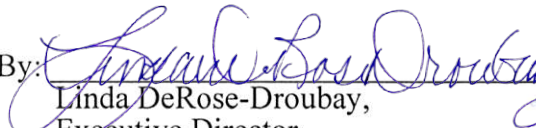
4 This Consent Judgment may be modified only by: (i) a written agreement of the Parties and
5 the entry of a modified Consent Judgment by the Court thereon; or (ii) upon a successful motion of
6 any party and the entry of a modified Consent Judgment by the Court thereon.

7 **13. AUTHORIZATION**

8 The undersigned are authorized to execute this Consent Judgment on behalf of their
9 respective Parties and have read, understood, and agreed to all of the terms and conditions of this
10 Consent Judgment.

11 **AGREED TO:**

12 Date: March 5, 2021

13 By: 
14 Linda DeRose-Droubay,
15 Executive Director
16 CENTER FOR ADVANCED
PUBLIC AWARENESS, INC.

AGREED TO:

Date: March 2, 2021

By: 
Richard Eichholz
President
MARC DANIEL ENTERPRISES, INC.

17 116421212