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8
9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 COUNTY OF ALAMEDA

11 EMA BELL,

12 Plaintiff,

13 v.

14 ARCHES & HALOS, LLC, BEAUTY
15 PARTNERS, LLC, TARGET CORPORATION,

16 Defendants.

Case No.: 21CV002133

**[PROPOSED] CONSENT
JUDGMENT**

Judge: Jeffrey Brand

Dept.: 22

Hearing Date: December 7, 2023

Hearing Time: 2:00 PM

Reservation #: 903665042784

1 1.5 Defendant denies the material allegations contained in the Notice and Action and
2 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 Arches & Halos brow
10 mousses that are manufactured, imported, distributed, sold and/or offered for sale in California by
11 Defendant.

12 2.2 **Effective Date.** The term “Effective Date” means the date this Consent Judgment is
13 entered as a Judgment of the Court.

14 **3. INJUNCTIVE RELIEF: REFORMULATION AND/OR WARNINGS**

15 3.1 **Reformulation of Covered Products.** Commencing by or before one hundred
16 eighty (180) days after the Effective Date, and continuing thereafter, Covered Products that
17 Defendant manufactures or imports for sale to wholesale or retail businesses, or individuals in
18 California shall either: (a) be a Reformulated Product pursuant to § 3.2, below; or (b) be labeled
19 with a clear and reasonable exposure warning pursuant to §§ 3.3 and 3.4, below. The warning
20 requirement set forth in §§ 3.3 and 3.4 shall not apply to any Reformulated Product. There shall be
21 no obligation for Arches & Halos to provide a warning for Covered Products that entered the stream
22 of commerce prior to 180 days after the Effective Date whether or not it is a Reformulated Product,
23 and the Section 5 release applies to all such Covered Products.


24 3.2 **DEA Free Reformulation Standard.** “Reformulated Product” shall mean Covered
25 Product with DEA content that is below the Reporting Limit (defined herein) when analyzed
26 pursuant to liquid chromatography/tandem mass spectrometry (LC/MS/MS), inductively coupled
27 mass-spectroscopy (ICP-MS) or other method of analysis utilized by the International Organization

1 for Standardization (ISO) for qualitative and quantitative screening of cosmetics and cosmetic raw
2 materials.


3 3.2.1 **Reporting Limit.** The Covered Product “Reporting Limit¹” is 20 mg/kg.

4 3.3 **Clear and Reasonable Warning.** Except for Covered Products already in the
5 stream of commerce, as of 180 days after the Effective Date, and continuing thereafter, Arches &
6 Halos must provide a clear and reasonable exposure warning as set forth in this §§ 3.3 and 3.4 for
7 all Covered Products that Defendant manufacturers or imports for sale to wholesale or retail
8 businesses in California that is not a Reformulated Product. The warning shall consist of either the
9 **Warning** or **Alternative Warning** described in §§ 3.3(a) or (b), respectively:

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

11  **WARNING:** This product can expose you to chemicals including
12 diethanolamine (DEA), which is known to the State of California to cause cancer.
13 For more information go to www.P65Warnings.ca.gov.

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

16  **WARNING:** Cancer - www.P65Warnings.ca.gov.

17 3.4 A **Warning** or **Alternative Warning** provided pursuant to § 3.3 must print the word
18 “**WARNING:**” in all capital letters and in bold font, followed by a colon. The warning symbol to
19 the left of the word “**WARNING:**” must be a black exclamation point in a yellow equilateral
20 triangle with a black outline, except that if the sign or label for the Covered Product does not use
21 the color yellow, the symbol may be in black and white. The symbol must be in a size no smaller
22 than the height of the word “**WARNING:**”. The **Warning** or **Alternative Warning** shall be affixed
23 to or printed on the Covered Product’s packaging or labeling, provided that the **Warning** or
24 **Alternative Warning** is displayed with such conspicuousness, as compared with other words,
25 statements, or designs as to render it likely to be read and understood by an ordinary individual

26 ¹ The Reporting Limit is the lowest concentration at which DEA can be reported in a
27 sample of a Covered Product by a commercially reasonable accredited testing laboratory
28 employing LC/MS/MS analysis or other method of analysis utilized by the ISO for qualitative
and quantitative screening of cosmetics and cosmetic raw materials.

1 under customary conditions of purchase or use. The **Warning** or **Alternative Warning** may be
2 contained in the same section of the packaging, labeling, or instruction booklet that states other
3 safety warnings, if any, concerning the use of the Covered Product and shall be at least the same
4 size as those other safety warnings. If consumer information is provided in a foreign language,
5 Defendant shall provide the **Warning** in the foreign language.

6 In addition to affixing the **Warning** or **Alternative Warning** to the Covered Product's
7 packaging or labeling, the **Warning** or **Alternative Warning** shall be posted on websites where
8 Arches & Halos offers Covered Products for sale to consumers in California. The requirements of
9 this Section shall be satisfied if the **Warning** or **Alternative Warning**, or a clearly marked
10 hyperlink using the word "**WARNING**," appears on the product display page, or by otherwise
11 prominently displaying the warning to the purchaser prior to completing the purchase. To comply
12 with this Section, Arches & Halos shall (a) post the **Warning** or **Alternative Warning** on its own
13 website and, if it has the ability to do so, on the websites of its third-party internet sellers; and (b)
14 if it does not have the ability to post the **Warning** or **Alternative Warning** on the websites of its
15 third-party internet sellers, provide such sellers with written notice in accordance with Title 27,
16 California Code of Regulations, Section 25600.2. Third-party internet sellers of the Product that
17 have been provided with written notice in accordance with Title 27, California Code of Regulations,
18 Section 25600.2 are not released in Section 5 of this Agreement if they fail to meet the warning
19 requirements of this Section.

20 3.5 **Compliance with Warning Regulations.** The Parties agree that Defendant shall be
21 deemed in compliance with the warning requirements in this Consent Judgment by either adhering
22 to §§ 3.3 and 3.4 of this Consent Judgment or by complying with warning requirements adopted by
23 the State of California's Office of Environmental Health Hazard Assessment ("OEHHA")
24 applicable to the Covered Product and the exposures at issue after the Effective Date.

25 **4. MONETARY TERMS**

26 4.1 **Civil Penalty.** Defendant shall pay \$3,000.00 as a Civil Penalty pursuant to Health
27 and Safety Code section 25249.7(b), to be apportioned in accordance with California Health &
28

1 Safety Code § 25192, with 75% of these funds remitted to OEHHA and the remaining 25% of the
2 Civil Penalty remitted to Plaintiff, as provided by California Health & Safety Code § 25249.12(d).

3 4.1.1 Within ten (10) business days of the Effective Date, Defendant shall issue
4 two separate checks for the Civil Penalty payment to (a) "OEHHA" in the amount of \$2,250.00;
5 and to (b) "Ema Bell" in the amount of \$750.00. Payment owed to Bell pursuant to this Section
6 shall be delivered to the following payment address:

7 Evan J. Smith, Esquire
8 Brodsky Smith, LLC
9 Two Bala Plaza, Suite 805
Bala Cynwyd, PA 19004

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

12 For United States Postal Service Delivery:

13 Mike Gyurics
14 Fiscal Operations Branch Chief
15 Office of Environmental Health Hazard Assessment
P.O. Box 4010
16 Sacramento, CA 95812-4010

17 For Non-United States Postal Service Delivery:

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

21 A copy of the check payable to OEHHA shall be mailed to Brodsky & Smith at the address set
22 forth above as proof of payment to OEHHA.

23 4.2 **Attorneys' Fees.** Within ten (10) business days of the Effective Date, Defendant
24 shall pay \$27,000.00 to Brodsky Smith as complete reimbursement for Plaintiff's attorneys' fees
25 and costs incurred as a result of investigating, bringing this matter to Defendant's attention,
26 litigating and negotiating and obtaining judicial approval of a settlement in the public interest,
27 pursuant to Code of Civil Procedure § 1021.5.

1 from Covered Products manufactured, distributed, or sold by Defendant, Defendant Releasees or
2 Downstream Releasees. With respect to the foregoing waivers and releases in this paragraph,
3 Plaintiff specifically waives any and all rights and benefits she now has, or in the future may have,
4 conferred by virtue of the provisions of § 1542 of the California Civil Code, which provides as
5 follows:

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

10 5.3 Defendant waives any and all claims against Plaintiff, his attorneys and other
11 representatives, for any and all actions taken, or statements made (or those that could have been
12 taken or made) by Plaintiff and his attorneys and other representatives, whether in the course of
13 investigating claims or otherwise seeking enforcement of Proposition 65 against it in this Action,
14 and/or with respect to Covered Products.

15 **6. INTEGRATION**

16 6.1 This Consent Judgment contains the sole and entire agreement of the Parties and all
17 prior negotiations and understandings related hereto shall be deemed to have been merged within
18 it. No representations or terms of agreement other than those contained herein exist or have been
19 made by any Party with respect to the other Party or the subject matter hereof.

20 **7. GOVERNING LAW**

21 7.1 The terms of this Consent Judgment shall be governed by the laws of the State of
22 California and apply within the State of California. If Proposition 65 is repealed or is otherwise
23 rendered inapplicable by reason of law generally, or as to Covered Products, then Defendant shall
24 have no further obligations pursuant to this Consent Judgment with respect to, and to the extent
25 that, Covered Products are so affected.

26 **8. NOTICES**

27 8.1 Unless specified herein, all correspondence and notices required to be provided
28 pursuant to this Consent Judgment shall be in writing and personally delivered or sent by: (i) first-

1 class, (registered or certified mail) return receipt requested; or (ii) overnight courier on any party
2 by the other party at the following addresses:

3 For Defendant:

4 Will Wagner
5 Arnold & Porter
6 Three Embarcadero Center | 10th Floor
7 San Francisco, CA 94111-4024
8 Will.Wagner@arnoldporter.com

9 For Plaintiff:

10 Evan Smith
11 Brodsky Smith
12 9595 Wilshire Blvd., Ste. 900
13 Beverly Hills, CA 90212

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

16 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

17 9.1 This Consent Judgment may be executed in counterparts and by facsimile or
18 electronically (such as by PDF), each of which shall be deemed an original, and all of which, when
19 taken together, shall constitute one and the same document.

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

22 10.1 Plaintiff agrees to comply with the requirements set forth in California Health &
23 Safety Code § 25249.7(f) and to promptly bring a Motion for Approval of this Consent Judgment.
24 Defendant agrees it shall not oppose such Motion unless such Motion is materially inconsistent
25 with the terms of this Consent Judgment.

26 10.2 This Consent Judgment shall not be effective until it is approved and entered by the
27 Court and shall be null and void if, for any reason, it is not approved by the Court. In such case, the
28 Parties agree to meet and confer on how to proceed and if such agreement is not reached within 30
days, the case shall proceed on its normal course.

1 10.3 If the Court approves this Consent Judgment and is reversed or vacated by an
2 appellate court, the Parties shall meet and confer as to whether to modify the terms of this Consent
3 Judgment. If the Parties do not jointly agree on a course of action to take, the case shall proceed on
4 its normal course on the trial court’s calendar.

5 **11. MODIFICATION AND ENFORCEMENT**

6 11.1 This Consent Judgment may be modified only by further stipulation of the Parties
7 and the approval of the Court or upon the granting of a motion brought to the Court by either Party.
8 Notwithstanding the foregoing, if Plaintiff, the Attorney General, or any public enforcer
9 represented by Brodsky Smith agrees to terms in a judicially entered consent judgment with any
10 manufacturer of cosmetics as defined by California Health and Safety Code 109900 which permits
11 a higher level of DEA in cosmetics without requiring an exposure warning, the Parties agree that
12 Defendant shall be deemed in compliance with the terms of this Consent Judgment if it elects to
13 adhere to such reformulation terms as provided in such other DEA judicially entered consent
14 judgment.

15 11.2 If a dispute arises with respect to either Party’s compliance with the terms of this
16 Consent Judgment, the Parties shall meet and confer in writing and endeavor to resolve the dispute
17 in an amicable manner. No action or motion may be filed in the absence of such a good faith attempt
18 to resolve the dispute beforehand, which shall not be less than thirty (30) days. No private enforcer
19 other than Plaintiff may enforce the terms of this Consent Judgment.

20 **12. ATTORNEY’S FEES**

21 12.1 A Party who unsuccessfully brings or contests an action arising out of this Consent
22 Judgment shall be required to pay the prevailing party’s reasonable attorney’s fees and costs.

23 12.2 Nothing in this Section shall preclude a Party from seeking an award of sanctions
24 pursuant to law.

25 **13. RETENTION OF JURISDICTION**

26 13.1 This Court shall retain jurisdiction of this matter to implement or modify the
27 Consent Judgment.

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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: 6/26/23
By: [Signature]
EMA BELL

Date: 6/26/23
By: [Signature]
ARCHES & HALOS, LLC

IT IS SO ORDERED, ADJUDGED AND DECREED:

Dated: _____

Judge of Superior Court