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8
9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 COUNTY OF SAN FRANCISCO

11 PRECILA BALABBO,

12 Plaintiff,

13 v.

14 BESTWAY (USA), INC.,

15 Defendants.

Case No.: CGC-22-602446

CONSENT JUDGMENT

Judge: Richard B. Ulmer

Dept.: 302

Hearing Date: June 9, 2023

Hearing Time: 9:30 AM

Complaint Filed: October 18, 2022

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 Bestway (USA), Inc. (“Bestway”
4 or “Defendant”) with Balabbo and Defendant collectively referred to as the “Parties” and each of
5 them as a “Party.” Balabbo is an individual residing in California that seeks to promote awareness
6 of exposures to toxic chemicals and improve human health by reducing or eliminating hazardous
7 substances contained in consumer products. Bestway is alleged to be a person in the course of doing
8 business for purposes of Proposition 65, Cal. Health & Safety Code §§ 25249.6 et seq.

9 1.2 **Allegations and Representations.** Balabbo alleges that Defendant has exposed
10 individuals to di(2-ethylhexyl) phthalate (DEHP) from its sales of are PlayDay children’s ball sets
11 in clear plastic bags without providing a clear and reasonable exposure warning pursuant to
12 Proposition 65. DEHP is listed under Proposition 65 as a chemical known to the State of California
13 to cause cancer and birth defects or other reproductive harm.

14 1.3 **Notice of Violation/Complaint.** On or about June 30, 2021, Balabbo served
15 Bestway, Walmart Apollo, LLC, Walmart, Inc. (collectively, “Walmart”), Bestway Hong Kong
16 International Ltd., and various public enforcement agencies with documents entitled “60-Day
17 Notice of Violation” pursuant to Health & Safety Code §25249.7(d) (the “Notice”), alleging that
18 they violated Proposition 65 for failing to warn consumers and customers that use of PlayDay
19 children’s ball sets in clear plastic bags expose users in California to DEHP. No public enforcer has
20 brought and is diligently prosecuting the claims alleged in the Notice. On October 18, 2022,
21 Balabbo filed 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 San Francisco, and that this Court has jurisdiction to approve,
25 enter, and oversee the enforcement of this Consent Judgment as a full and final binding resolution
26 of all claims which were or could have been raised in the Complaint based on the facts alleged
27 therein and/or in the Notice.
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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 PlayDay children's ball
10 sets in clear plastic bags (UPC #821808524266) that are manufactured, distributed and/or offered
11 for sale in California by Bestway and that contain DEHP.

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.** As of the Effective Date, and continuing
16 thereafter, Bestway shall not directly manufacture or order or import from any supplier any Covered
17 Products intended for retail sale in California that are not either: (a) Reformulated Products
18 pursuant to § 3.2, below; or (b) labeled with a clear and reasonable exposure warning pursuant to
19 §§ 3.3 and 3.4, below. For purposes of this Consent Judgment, a "Reformulated Product" is a
20 Covered Product that is in compliance with the standard set forth in § 3.2 below. The warning
21 requirement set forth in §§ 3.3 and 3.4 shall not apply to any Reformulated Product. There shall be
22 no obligation for Defendant or Downstream Releasees (defined below) to provide a warning for
23 Covered Products sold or distributed by Bestway before the Effective Date.

24 3.2 **Reformulation Standard.** "Reformulated Products" shall mean Covered Products
25 that contain concentrations less than or equal to 0.1% (1,000 parts per million (ppm)) of DEHP
26 when analyzed pursuant to U.S. Environmental Protection Agency testing methodologies 3580A
27 and 8270C or other methodology utilized by federal or state government agencies for the purpose
28

1 of determining the phthalate content in a solid substance. Bestway is entitled to rely on test results
2 from accredited laboratories provided to Bestway.

3 3.3 **Clear and Reasonable Warning.** The warning required by § 3.1 shall consist of
4 either the **Warning** or **Alternative Warning** described in §§ 3.3(a) or (b), respectively:

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

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

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

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

13 3.4 A **Warning** or **Alternative Warning** provided pursuant to § 3.3 must print the word
14 “**WARNING:**” in all capital letters and in bold font, followed by a colon. The warning symbol to
15 the left of the word “**WARNING:**” must be a black exclamation point in a yellow equilateral
16 triangle with a black outline, except that if the sign or label for the Covered Product does not use
17 the color yellow, the symbol may be in black and white. The symbol must be in a size no smaller
18 than the height of the word “**WARNING:**”. The **Warning** or **Alternative Warning** shall be affixed
19 to or printed on the Covered Product’s packaging or labeling, or on a placard, shelf tag, sign or
20 electronic device or automatic process, provided that the **Warning** or **Alternative Warning** is
21 displayed with such conspicuousness, as compared with other words, statements, or designs as to
22 render it likely to be read and understood by an ordinary individual under customary conditions of
23 purchase or use. The **Warning** or **Alternative Warning** may be contained in the same section of
24 the packaging, labeling, or instruction booklet that states other safety warnings, if any, concerning
25 the use of the Covered Product and shall be at least the same size as those other safety warnings.

26 In addition to affixing the **Warning** or **Alternative Warning** to the Covered Product’s
27 packaging or labeling, the **Warning** or **Alternative Warning** shall be posted on websites where
28 Bestway offers Covered Products for sale to consumers in California. The requirements of this
Section shall be satisfied if the **Warning** or **Alternative Warning**, or a clearly marked hyperlink

1 using the word “**WARNING**” or similar language appears on the product display page, or by
2 otherwise prominently displaying the warning to the purchaser prior to completing the purchase.
3 To comply with this Section, Bestway shall (a) post the **Warning** or **Alternative Warning** on its
4 own website and, if it has the ability to do so, on the websites of its third-party internet sellers; and
5 (b) if it does not have the ability to post the **Warning** or **Alternative Warning** on the websites of
6 its third-party internet sellers, provide such sellers with written notice in accordance with Title 27,
7 California Code of Regulations, Section 25600.2. Third-party internet sellers of the Covered
8 Product that have been provided with written notice in accordance with Title 27, California Code
9 of Regulations, Section 25600.2 are not released in Section 5 of this Agreement if they fail to meet
10 the warning requirements of this Section.

11 3.5 **Compliance with Warning Regulations.** Defendant shall be deemed to be in
12 compliance with this Consent Judgment by either adhering to §§ 3.3 and 3.4 of this Consent
13 Judgment or by complying with warning requirements adopted by the State of California’s Office
14 of Environmental Health Hazard Assessment (“OEHHA”) applicable to the Covered Product and
15 the exposures at issue.

16 **4. MONETARY TERMS**

17 4.1 **Civil Penalty.** Bestway shall pay \$2,000.00 as a Civil Penalty pursuant to Health
18 and Safety Code section 25249.7(b), to be apportioned in accordance with California Health &
19 Safety Code § 25249.12(c)(1) and (d), with 75% of these funds remitted to OEHHA and the
20 remaining 25% of the Civil Penalty remitted to Balabbo, as provided by California Health & Safety
21 Code § 25249.12(d).

22 4.1.1 Within ten (10) days of the Effective Date, Bestway shall issue two
23 separate checks for the Civil Penalty payment to (a) “OEHHA” in the amount of \$1,500; and to
24 (b) “Precila Balabbo” in the amount of \$500.00. Payment owed to Balabbo pursuant to this
25 Section shall be delivered to the following payment address:

26 Evan J. Smith, Esquire
27 Brodsky & Smith
28 Two Bala Plaza, Suite 805
 Bala Cynwyd, PA 19004

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

3 For United States Postal Service Delivery:

4 Mike Gyurics
5 Fiscal Operations Branch Chief
6 Office of Environmental Health Hazard Assessment
7 P.O. Box 4010
8 Sacramento, CA 95812-4010

9 For Non-United States Postal Service Delivery:

10 Mike Gyurics
11 Fiscal Operations Branch Chief
12 Office of Environmental Health Hazard Assessment
13 1001 I Street
14 Sacramento, CA 95814

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

17 4.2 **Attorneys' Fees.** Within ten (10) days of the Effective Date, Bestway shall pay
18 \$18,000.00 to Brodsky & Smith ("Brodsky & Smith") as complete reimbursement for Balabbo's
19 attorneys' fees and costs incurred as a result of investigating, bringing this matter to Bestway
20 attention, litigating and negotiating and obtaining judicial approval of a settlement in the public
21 interest, pursuant to Code of Civil Procedure § 1021.5.

22 **5. RELEASE OF ALL CLAIMS**

23 5.1 This Consent Judgment is a full, final, and binding resolution between Balabbo
24 acting on her own behalf, and on behalf of the public interest, and Bestway, and its parents,
25 shareholders, members, directors, officers, managers, employees, representatives, agents,
26 attorneys, divisions, subdivisions, subsidiaries, partners, sister companies, and affiliates, including
27 without limitation Bestway Inflatables & Material Corporation and Bestway (Hong Kong)
28 International Ltd., and their predecessors, successors and assigns ("Defendant Releasees"), and all
entities from whom they obtain and to whom they directly or indirectly distribute or sell Covered
Products, including but not limited to manufacturers, suppliers, distributors, wholesalers,
customers, licensors, licensees retailers (including without limitation Walmart-related entities),

1 franchisees, and cooperative members (“Downstream Releasees”), of all claims for violations of
2 Proposition 65 that were or could have been or could later be asserted against Defendant Releasees
3 or Downstream Releasees based on exposure to DEHP from use of the Covered Products or failure
4 to warn as set forth in the Notice, with respect to any Covered Products (i) manufactured,
5 distributed, or sold by Bestway prior to the Effective Date or (ii) sold or distributed by Downstream
6 Releasees after the Effective Date (but which were acquired by any such parties prior to the
7 Effective Date). It is the Parties’ intention that this Consent Judgment shall have preclusive effect
8 such that no other actions by private enforcers, whether purporting to act in his, her, or its interests
9 or the public interest shall be permitted to pursue and/or take any action with respect to any violation
10 of Proposition 65 that was alleged in the Complaint, or that could have been brought pursuant to
11 the Notice against Bestway, Defendant Releasees, and/or the Downstream Releasees of the Covered
12 Products (“Proposition 65 Claims”). Compliance with the terms of this Consent Judgment
13 constitutes compliance with Proposition 65 with regard to exposure to DEHP from use of the
14 Covered Products.

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

27 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS THAT THE
28 CREDITOR OR RELEASING PARTY DOES NOT KNOW OR SUSPECT TO

1 EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE
2 RELEASE AND THAT, IF KNOWN BY HIM OR HER, WOULD HAVE
3 MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE
4 DEBTOR OR RELEASED PARTY.

5 5.3 Bestway waives any and all claims against Balabbo, her attorneys and other
6 representatives, for any and all actions taken, or statements made by Balabbo and her attorneys and
7 other representatives, whether in the course of investigating claims or otherwise seeking
8 enforcement of Proposition 65 against it in this matter, and/or with respect to DEHP exposure from
9 Covered Products.

10 **6. INTEGRATION**

11 6.1 This Consent Judgment contains the sole and entire agreement of the Parties and all
12 prior negotiations and understandings related hereto shall be deemed to have been merged within
13 it. No representations or terms of agreement other than those contained herein exist or have been
14 made by any Party with respect to the other Party or the subject matter hereof.

15 **7. GOVERNING LAW**

16 7.1 The terms of this Consent Judgment shall be governed by the laws of the State of
17 California and apply within the State of California. If Proposition 65 is repealed or is otherwise
18 rendered inapplicable by reason of law generally, or as to Covered Products, then Defendant shall
19 have no further obligations pursuant to this Consent Judgment with respect to, and to the extent
20 that, Covered Products are so affected.

21 **8. NOTICES**

22 8.1 Unless specified herein, all correspondence and notices required to be provided
23 pursuant to this Consent Judgment shall be in writing and personally delivered or sent by: (i) first-
24 class, (registered or certified mail) return receipt requested; or (ii) overnight courier on any party
25 by the other party at the following addresses:

26 For Defendant:

27 Bestway (USA), Inc.
28 Attn. Vice President—Legal & Risk Management
 3435 S. McQueen Road
 Chandler, AZ 85286

 and

1 Jeff Parker
2 Sheppard Mullin
3 333 South Hope Street, 43rd Floor
4 Los Angeles, CA 90071-1422

4 And

5 For Balabbo:

6 Evan Smith
7 Brodsky & Smith
8 9595 Wilshire Blvd., Ste. 900
9 Beverly Hills, CA 90212

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

12 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

13 9.1 This Consent Judgment may be executed in counterparts and by facsimile, each of
14 which shall be deemed an original, and all of which, when taken together, shall constitute one and
15 the same document.

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

18 10.1 Balabbo agrees to comply with the requirements set forth in California Health &
19 Safety Code § 25249.7(f) and to promptly bring a Motion for Approval of this Consent Judgment.
20 Defendant agrees it shall support approval of such Motion.

21 10.2 This Consent Judgment shall not be effective until it is approved and entered by the
22 Court and shall be null and void if, for any reason, it is not approved by the Court. In such case, the
23 Parties agree to meet and confer on how to proceed and if such agreement is not reached within 30
24 days, the case shall proceed on its normal course.

25 10.3 If the Court approves this Consent Judgment and is reversed or vacated by an
26 appellate court, the Parties shall meet and confer as to whether to modify the terms of this Consent
27 Judgment. If the Parties do not jointly agree on a course of action to take, the case shall proceed on
28 its normal course on the trial court's calendar.

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11. MODIFICATION

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

12. ATTORNEY'S FEES

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

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

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: 4/21/23
By: *Precila Balabbo*
PRECILA BALABBO

Date: 10/17/2022
DocuSigned by:
By: *Giacomo Mayer*
BESTWAY (USA), INC.
VP Legal & Risk Management

IT IS SO ORDERED, ADJUDGED AND DECREED:

Dated: _____
Judge of Superior Court