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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 NUTRITION & FITNESS, INC. dba NFI
15 CONSUMER PRODUCTS, CVS PHARMACY,
16 INC.,
17 Defendants.

Case No.: CGC-22-600852

CONSENT JUDGMENT

Judge: Richard B. Ulmer
Dept.: 302
Hearing Date: August 15, 2024
Hearing Time: 9:30 AM
Complaint Filed: July 21, 2022

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1. INTRODUCTION

1.1 **The Parties.** This Consent Judgment is entered into by and between Precila Balabbo acting on behalf of the public interest (hereinafter “Balabbo”) and Nutrition & Fitness, Inc. dba NFI Consumer Products (“NFI” or “Defendant”) with Balabbo and Defendant collectively referred to as the “Parties” and each of them as a “Party.” Balabbo is an individual residing in California that seeks to promote awareness of exposures to toxic chemicals and improve human health by reducing or eliminating hazardous substances contained in consumer products. NFI is alleged to be a person in the course of doing business for purposes of Proposition 65, Cal. Health & Safety Code §§ 25249.6 et seq.

1.2 **Allegations and Representations.** Balabbo alleges that Defendant has exposed individuals to diethanolamine (DEA) from its sales of are Blue Emu Pain Relief Cream without providing a clear and reasonable exposure warning pursuant to Proposition 65. DEA is listed under Proposition 65 as a chemical known to the State of California to cause reproductive toxicity.

1.3 **Notice of Violation/Complaint.** On or about August 18, 2021, Balabbo served NFI, CVS Pharmacy, Inc., and various public enforcement agencies with documents entitled “60-Day Notice of Violation” pursuant to Health & Safety Code §25249.7(d) (the “Notice”), alleging that Defendant violated Proposition 65 for failing to warn consumers and customers that use of Blue Emu Pain Relief Cream expose users in California to DEA. No public enforcer has brought and is diligently prosecuting the claims alleged in the Notice. On July 21, 2022, Balabbo filed a complaint (the “Complaint”) in the matter.

1.4 For purposes of this Consent Judgment only, the Parties stipulate that this Court has jurisdiction over Defendant as to the allegations contained in the Complaint filed in this matter, that venue is proper in the County of San Francisco, and that this Court has jurisdiction to approve, enter, and oversee the enforcement of this Consent Judgment as a full and final binding resolution of all claims which were or could have been raised in the Complaint based on the facts alleged therein and/or in the Notice.

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 Blue Emu Pain Relief
10 Creams that are manufactured, distributed and/or offered for sale in California by NFI.

11 2.2 **Effective Date.** The term "Effective Date" means the date this Consent Judgment is
12 entered as a Judgment of the Court.

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

14 3.1 **Reformulation of Covered Products.** As of the date this Consent Judgment is
15 signed by both Parties, and continuing thereafter, Covered Products that Defendant directly
16 manufactures, imports, distributes, sells, or offers for sale to wholesale or retail businesses, or
17 individuals in California shall either be: (a) DEA Free Reformulated Products pursuant to § 3.2,
18 below; or (b) be labeled with a clear and reasonable exposure warning pursuant to §§ 3.3 and 3.4,
19 below. For purposes of this Consent Judgment, a "DEA Free Reformulated Product" is a Covered
20 Product that complies with the standard set forth in § 3.2 below. The warning requirement set forth
21 in §§ 3.3 and 3.4 shall not apply to any Reformulated Product.

22 3.2 **DEA Free Reformulation Standard.** To qualify as a "DEA Free Reformulated
23 Product" the Product must meet the following standard: DEA content that is not detectable (i.e.,
24 zero) or DEA that is below the Reporting Limit (defined herein) when analyzed pursuant to liquid
25 chromatography/tandem mass spectrometry (LC/MS/MS), inductively coupled mass-spectroscopy
26 (ICP-MS) or other method of analysis utilized by the International Organization for Standardization
27 (ISO) for qualitative and quantitative screening of cosmetics and cosmetic raw materials.
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3.2.1 **Reporting Limit**¹. The Covered Product “Reporting Limit” is 10 mg/kg.

3.3 **Clear and Reasonable Warning.** As of the date this Consent Judgment is signed by both Parties, and continuing thereafter, a clear and reasonable exposure warning as set forth in this §§ 3.3 and 3.4 must be provided for all Covered Products that Defendant manufacturers, imports, distributes, sells, or offers for sale in California that is not a DEA Free Reformulated Product. There shall be no obligation for Defendant to provide a warning for Covered Products that enter the stream of commerce prior to the date this Consent Judgment is signed by both Parties. The warning shall consist of either the **Warning** or **Alternative Warning** described in §§ 3.3(a) or (b), respectively:

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

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

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

⚠ WARNING: Cancer - www.P65Warnings.ca.gov.

3.4 A **Warning** or **Alternative Warning** provided pursuant to § 3.3 must print the word “**WARNING:**” in all capital letters and in bold font, followed by a colon. The warning symbol to the left of the word “**WARNING:**” must be a black exclamation point in a yellow equilateral triangle with a black outline, except that if the sign or label for the Covered Product does not use the color yellow, the symbol may be in black and white. The symbol must be in a size no smaller than the height of the word “**WARNING:**”. The **Warning** or **Alternative Warning** shall be affixed to or printed on the Covered Product’s packaging or labeling, or on a placard, shelf tag, sign or electronic device or automatic process, provided that the **Warning** or **Alternative Warning** is displayed with such conspicuousness, as compared with other words, statements, or designs as to

¹ The Reporting Limit is the lowest concentration at which DEA can be detected in a sample of a Product by an accredited testing laboratory 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

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render it likely to be read and understood by an ordinary individual under customary conditions of purchase or use. The **Warning** or **Alternative Warning** may be contained in the same section of the packaging, labeling, or instruction booklet that states other safety warnings, if any, concerning the use of the Covered Product and shall be at least the same size as those other safety warnings.

In addition to affixing the **Warning** or **Alternative Warning** to the Covered Product’s packaging or labeling, the **Warning** or **Alternative Warning** shall be posted on websites where NFI 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 using the word “**WARNING,**” appears on the product display page, or by otherwise prominently displaying the warning to the purchaser prior to completing the purchase. To comply with this Section, NFI shall (a) post the **Warning** or **Alternative Warning** on its own website and, if it has the ability to do so, on the websites of its third-party internet sellers; and (b) if it does not have the ability to post the **Warning** or **Alternative Warning** on the websites of its third-party internet sellers, provide such sellers with written notice in accordance with Title 27, California Code of Regulations, Section 25600.2. Third-party internet sellers of the Product that have been provided with written notice in accordance with Title 27, California Code of Regulations, Section 25600.2 are not released in Section 5 of this Agreement if they fail to meet the warning requirements of this Section.

3.5 **Compliance with Warning Regulations.** Defendant shall be deemed to be in compliance with this Consent Judgment by either adhering to §§ 3.3 and 3.4 of this Consent Judgment or by complying with warning requirements adopted by the State of California’s Office of Environmental Health Hazard Assessment (“OEHHA”) applicable to the Covered Product and the exposure at issue after the Effective Date. If consumer information is provided in a foreign language, NFI shall provide the **Warning** in the foreign language.

4. MONETARY TERMS

4.1 **Civil Penalty.** NFI shall pay \$5,000.00 as a Civil Penalty pursuant to Health and Safety Code section 25249.7(b), to be apportioned in accordance with California Health & Safety Code § 25249.12(c)(1) and (d), with 75% of these funds remitted to OEHHA and the remaining

1 25% of the Civil Penalty remitted to Balabbo, as provided by California Health & Safety Code
2 § 25249.12(d).

3 4.1.1 Within ten (10) days of the Effective Date, NFI shall issue two separate
4 checks for the Civil Penalty payment to (a) "OEHHA" in the amount of \$3,750.00; and to (b)
5 "Brodsky Smith in Trust for Balabbo" in the amount of \$1,250.00. Payment owed to Balabbo
6 pursuant to this Section shall be delivered to the following payment address:

7 Evan J. Smith, Esquire
8 Brodsky Smith
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
Office of Environmental Health Hazard Assessment
15 P.O. Box 4010
Sacramento, CA 95812-4010

16 For Non-United States Postal Service Delivery:

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

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

22 4.2 **Attorneys' Fees.** Within ten (10) days of the Effective Date, NFI shall pay
23 \$50,000.00 to Brodsky Smith as complete reimbursement for Balabbo's attorneys' fees and costs
24 incurred as a result of investigating, bringing this matter to NFI attention, litigating and negotiating
25 and obtaining judicial approval of a settlement in the public interest, pursuant to Code of Civil
26 Procedure § 1021.5.

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5. RELEASE OF ALL CLAIMS

5.1 This Consent Judgment is a full, final, and binding resolution between Balabbo acting on her own behalf, and on behalf of the public interest, and NFI, and its parents, shareholders, members, directors, officers, managers, employees, representatives, agents, attorneys, divisions, subdivisions, subsidiaries, partners, sister companies, and affiliates, 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, franchisees, and cooperative members (“Downstream Releasees”), of all claims for violations of Proposition 65 based on exposure to DEA from use of the Covered Products as set forth in the Notice, with respect to any Covered Products manufactured, distributed, or sold by NFI prior to the Effective Date. It is the Parties’ intention that this Consent Judgment shall have preclusive effect such that no other actions by private enforcers, whether purporting to act in his, her, or its interests or the public interest shall be permitted to pursue and/or take any action with respect to any violation of Proposition 65 based on exposure to DEA that was alleged in the Complaint, or that could have been brought pursuant to the Notice against NFI and/or the Downstream Releasees of the Covered Products (“Proposition 65 Claims”).

5.2 In addition to the foregoing, Balabbo, on behalf of herself, her past and current agents, representatives, attorneys, and successors and/or assignees, and *not* in her representative capacity, hereby waives all rights to institute or participate in, directly or indirectly, any form of legal action and releases NFI, Defendant Releasees, and Downstream Releasees from any and all manner of actions, causes of action, claims, demands, rights, suits, obligations, debts, contracts, agreements, promises, liabilities, damages, charges, losses, costs, expenses, and attorneys’ fees, of any nature whatsoever, known or unknown, in law or equity, fixed or contingent, now or in the future, with respect to any alleged violations of Proposition 65 related to or arising from exposure to DEA from Covered Products manufactured, distributed, or sold by NFI, Defendant Releasees or Downstream Releasees. With respect to the foregoing waivers and releases in this paragraph,

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Balabbo hereby specifically waives any and all rights and benefits which she now has, or in the future may have, conferred by virtue of the provisions of § 1542 of the California Civil Code, which provides as follows:

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

5.3 NFI waives any and all claims against Balabbo, her attorneys and other representatives, for any and all actions taken, or statements made (or those that could have been taken or made) by Balabbo and her attorneys and other representatives, whether in the course of investigating claims or otherwise seeking enforcement of Proposition 65 against it in this matter, and/or with respect to DEA exposure from Covered Products.

6. INTEGRATION

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

7. GOVERNING LAW

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

8. NOTICES

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

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For Defendant:

William F. Tarantino
Morrison Foerster LLP
425 Market Street
San Francisco, CA 94105-2482

And

For Balabbo:

Evan Smith
Brodsky Smith
9595 Wilshire Blvd., Ste. 900
Beverly Hills, CA 90212

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

9. COUNTERPARTS; FACSIMILE SIGNATURES

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

10. COMPLIANCE WITH HEALTH & SAFETY CODE § 25249.7(f)/COURT

APPROVAL

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

10.2 This Consent Judgment shall not be effective until it is approved and entered by the Court and shall be null and void if, for any reason, it is not approved by the Court. In such case, the 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.

10.3 If the Court approves this Consent Judgment and is reversed or vacated by an appellate court, the Parties shall meet and confer as to whether to modify the terms of this Consent Judgment. If the Parties do not jointly agree on a course of action to take, the case shall proceed on 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: 6 / 27 / 24

Date: 2 / 28 / 2024

By: *Precila Balabbo*
PRECILA BALABBO

By: *[Signature]*
NUTRITION & FITNESS, INC.
VP / GENERAL COUNSEL

IT IS SO ORDERED, ADJUDGED AND DECREED:

Dated: _____

Judge of Superior Court