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12 Environmental Health Advocates, Inc.

13 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

14 **IN AND FOR THE COUNTY OF ALAMEDA**

15 ENVIRONMENTAL HEALTH
16 ADVOCATES, INC.,

17 Plaintiff,

18 v.

19 EDGEWELL PERSONAL CARE BRANDS,
20 LLC, a Delaware limited liability company,
21 BED BATH & BEYOND INC., a New York
22 corporation, and DOES 1 through 100,
23 inclusive,
24 Defendants.

Case No.: 22CV006660

[PROPOSED] CONSENT JUDGMENT

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

1 **1. INTRODUCTION**

2 **1.1 Parties**

3 This Consent Judgment is entered into by and between Environmental Health Advocates, Inc.
4 (“EHA” or “Plaintiff”) and Edgewell Personal Care Brands, LLC (“Defendant” or “EPCB”), with
5 EHA and EPCB each individually referred to as a “Party” and collectively referred to as the
6 “Parties.”

7 **1.2 Plaintiff**

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

11 **1.3 Defendant**

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

15 **1.4 General Allegations**

16 EHA alleges that EPCB manufactures, imports, sells, and distributes for sale Covered
17 Products that contain benzene. EHA further alleges that EPCB does so without providing a sufficient
18 health hazard warning as required by Proposition 65 and related regulations. Pursuant to Proposition
19 65, benzene is listed as a chemical known to cause cancer and birth defects or other reproductive
20 harm.

21 **1.5 Notices of Violation**

22 On or around November 5, 2021, EHA issued a 60-Day Notice of Violation of Proposition 65
23 (“Notice”) to EPCB, Bed Bath & Beyond Inc., the California Attorney General, and all other required
24 public enforcement agencies. The Notice alleged that EPCB violated Proposition 65 by failing to
25 provide Proposition 65 warnings to consumers in California associated with exposures to benzene
26 contained in the Covered Products.

27 No public enforcer has commenced or is otherwise prosecuting an action to enforce the
28 violations alleged in the Notice.

1 **1.6 Product Description**

2 The products covered by this Consent Judgment are Banana Boat® and Hawaiian Tropic®
3 aerosol sunscreens manufactured, imported, sold, or distributed by EPCB that allegedly contain
4 benzene and are imported, sold, shipped, delivered, or distributed for sale to consumers in California
5 (“Covered Products”).

6 **1.7 State of the Pleadings**

7 On or around February 7, 2022, EHA filed a Complaint against EPCB for the alleged
8 violations of Proposition 65 that are the subject of the Notice (“Complaint”).

9 **1.8 No Admission**

10 EPCB denies the material factual and legal allegations of the Notice and Complaint and
11 maintains that all of the Covered Products it has manufactured, imported, sold, and/or distributed for
12 sale in California, including Covered Products, have been, and are, in compliance with all laws,
13 including Proposition 65. Nothing in this Consent Judgment shall be construed as an admission of
14 any fact, finding, conclusion of law, issue of law, or violation of law, nor shall compliance with this
15 Consent Judgment be construed as an admission of any fact, finding, conclusion of law, issue of law,
16 or violation of law. This Section shall not, however, diminish or otherwise affect EPCB’s obligations,
17 responsibilities, and duties under this Consent Judgment.

18 **1.9 Jurisdiction**

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

23 **1.10 Effective Date**

24 For purposes of this Consent Judgment, the term “Effective Date” means the date on which
25 the Court signs this Consent Judgment and all Parties have been provided with a copy.

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1 **2. INJUNCTIVE RELIEF**

2 **2.1 Reformulation of the Covered Products**

3 Any Covered Products that are manufactured by or for EPCB after the Effective Date that are
4 thereafter sold or distributed for sale in California by EPCB without a warning shall not contain more
5 than 2 parts per million (“ppm”) of benzene on average (the Average Level), as set forth in this Section

6 2.2. As used in this Section 2, “distributed for sale in California” means to directly ship Covered
7 Products into California or to sell Covered Products to a distributor EPCB knows will sell Covered
8 Products in California.

9 **2.2 Testing**

10 (a) Compliance with the Average Level shall be determined by GC-MS on
11 Covered Product after it has been dispensed from the bottle. Any testing for purposes of Section 2.1
12 shall be performed by a laboratory accredited by the State of California, a federal agency, or a
13 recognized accrediting organization. If a new test method is developed to test for benzene in aerosol
14 sunscreen products that more accurately measures consumer exposure, EPCB may request a
15 modification to this Section of the Consent Judgment pursuant to Section 12, which EHA will not
16 unreasonably oppose.

17 (b) The Average Level is determined by randomly selecting and testing, over no
18 less than a ten-day period, one sample from at least three lots (or from as many lots as are available,
19 if fewer than three) and a maximum of seven lots of Covered Products produced at locations that
20 supply such Covered Products to California (“Sampling Data”). The mean and standard deviation
21 shall be calculated using the Sampling Data. Any data points that are more than three standard
22 deviations outside the mean shall be discarded, and the mean and standard deviation recalculated
23 using the remaining data points. The mean determined in accordance with this procedure shall be
24 deemed the “Average Level”.

25 (c) For three consecutive years after the Effective Date, starting in the calendar
26 year after the Effective Date, EPCB shall arrange for testing under this section 2.2. The testing shall
27 be at least once per year. No further testing shall be required in those three years, and no further
28 testing thereafter is required unless EPCB materially modifies the ingredients of the Covered Product

1 in a manner that might materially affect benzene content, at which point up to seven lots of the
2 Covered Product that has been modified shall be tested, as provided for in section 2.2(b) above, to
3 confirm its compliance.

4 **2.3 Sell-Through Period**

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

10 **3. MONETARY SETTLEMENT TERMS**

11 **3.1 Settlement Amount**

12 EPCB shall pay fifty thousand dollars (\$50,000.00) in settlement and total satisfaction of all
13 the claims referred to in the Notice, the Complaint, and this Consent Judgment. This includes civil
14 penalties in the amount of five thousand dollars (\$5,000) pursuant to Health and Safety Code section
15 25249.7(b) and attorneys' fees and costs in the amount forty-five thousand dollars (\$45,000) pursuant
16 to Code of Civil Procedure section 1021.5.

17 **3.2 Civil Penalty**

18 The portion of the settlement attributable to civil penalties shall be allocated according to
19 Health and Safety Code section 25249.12(c)(1) and (d), with seventy-five percent (75%) of the
20 penalty paid to the California Office of Environmental Health Hazard Assessment ("OEHHA"), and
21 the remaining twenty-five percent (25%) of the penalty paid to EHA individually.

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

23 Environmental Health Advocates
24 225 Broadway, Suite 2100
25 San Diego, CA 92101

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

27 For United States Postal Service Delivery:

28 Mike Gyurics

1 Fiscal Operations Branch Chief
2 Office of Environmental Health Hazard Assessment
3 P.O. Box 4010
4 Sacramento, CA 95812-4010

5 For Federal Express 2-Day Delivery:

6 Mike Gyurics
7 Fiscal Operations Branch Chief
8 Office of Environmental Health Hazard Assessment
9 1001 I Street
10 Sacramento, CA 95814

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

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

- 15 • "Environmental Health Advocates, Inc." (EIN: 84-2322975) at the address provided in
16 Section 3.2(a)(i);
- 17 • "Office of Environmental Health Hazard Assessment" 1001 I Street, Sacramento, CA 95814.

18 **3.3 Attorney's Fees and Costs**

19 The portion of the settlement attributable to attorneys' fees and costs, forty-five thousand
20 dollars (\$45,000), shall be paid to Entorno Law, LLP ("EHA's Counsel"), who are entitled to
21 attorneys' fees and costs incurred by it in this action, including but not limited to investigating
22 potential violations, bringing this matter to EPCB's attention, as well as litigating and negotiating a
23 settlement in the public interest.

24 EPCB shall provide their payment to EHA's counsel in one check for forty-five thousand
25 dollars (\$45,000) payable to Entorno Law, LLP. The payment shall be delivered to the following
26 address:

27 Noam Glick
28 Entorno Law LLP
225 Broadway, Suite 2100
San Diego, CA 92101

29 **3.4 Timing**

30 The above-mentioned checks will be issued within fourteen (14) days of the Effective Date.

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1 **4. CLAIMS COVERED AND RELEASED**

2 **4.1 EHA's Public Release of Proposition 65 Claims**

3 Plaintiff acting on its own behalf and in the public interest releases EPCB and its parents,
4 subsidiaries, affiliated entities, its directors, officers, principals, agents, employees, attorneys,
5 insurers, accountants, predecessors, successors, and assigns ("Defendant Entities"), each entity to
6 whom Defendant directly or indirectly distributes, ships, or sells the Covered Products including but
7 not limited to downstream distributors, wholesalers, customers, and retailers (including but not
8 limited to Bed Bath & Beyond Inc.), franchisees, franchisors, cooperative members, suppliers,
9 licensees, and licensors, and all of the foregoing entities' owners, directors, officers, agents,
10 principals, employees, attorneys, insurers, accountants, representatives, predecessors, successors, and
11 assigns (collectively, including Defendant Entities, referred to as the "Releasees") from all claims of
12 v Proposition 65 violations for Covered Products manufactured prior to the Effective Date.

13 Compliance with the terms of this Consent Judgment constitutes compliance with Proposition 65 with
14 respect to exposures to benzene from Covered Products as set forth in the Notice. This Consent
15 Judgment is a full, final, and binding resolution of all claims under Proposition 65 that were or could
16 have been asserted against EPCB and/or Releasees for failure to provide warnings required under
17 Proposition 65 for alleged exposure to benzene through reasonably foreseeable use of the Covered
18 Products. This release does not extend to any third-party retailers selling the product on a website
19 who, after receiving instruction from EPCB to include a warning as set forth above in section 2.3, do
20 not include such a warning.

21 **4.2 EHA's Individual Release of Claims**

22 EHA, in its individual capacity, also hereby provides a release to Releasees, which shall be a
23 full and final accord and satisfaction of, as well as a bar to, all actions, causes of action, obligations,
24 costs, expenses, attorneys' fees, damages, losses, claims, liabilities, and demands of every nature,
25 character, and kind, whether known or unknown, suspected or unsuspected, arising out of alleged or
26 actual exposures to benzene in Covered Products manufactured by EPCB or Releasees before the
27 Effective Date. The release in this Section 4.2 is effective as a full and final accord and satisfaction
28 of, as well as a bar to, all actions, causes of action, obligations, costs, expenses, attorneys' fees,

1 damages, losses, claims, liabilities and demands of every nature, character, and kind, whether known
2 or unknown, suspected or unsuspected as to Defendant Entities. EHA acknowledges that it is familiar
3 with Section 1542 of the California Civil Code, which provides as follows:

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

9 EHA understands and acknowledges the significance and consequences of California Civil Code
10 section 1542 and nevertheless specifically waives its rights thereunder.

11 **4.3 EPCB's Release of EHA**

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

18 **5. COURT APPROVAL**

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

22 **6. SEVERABILITY**

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

26 **7. GOVERNING LAW**

27 The terms of this Consent Judgment shall be governed by the laws of the state of California as
28 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 EPCB may
provide written notice to EHA of any asserted change, and shall have no further injunctive

1 obligations pursuant to this Consent Judgment with respect to, and to the extent that, the Covered
2 Products are so affected. In the event the California Office of Health Hazard Assessment adopts a
3 regulation or safe use determination, or issues an interpretive guideline that exempts Covered
4 Products from meeting the requirements of Proposition 65; or if benzene cases are permanently
5 enjoined by a court of competent jurisdiction; or if Proposition 65 is determined to be preempted by
6 federal law or a burden on First Amendment rights with respect to benzene in Covered Products or
7 Covered Products substantially similar to Covered Products, then EPCB shall be relieved of its
8 obligation to comply with Section 2 herein.

9 **8. ENFORCEMENT**

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

12 **9. NOTICE**

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

16 If to EPCB:

17 Trenton H. Norris
18 Arnold & Porter
19 Three Embarcadero Center | 10th Floor
San Francisco, CA 94111-4024

If to EHA:

Noam Glick
Entorno Law LLP
225 Broadway, Suite 2100
San Diego, CA 92101

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

22 **10. COUNTERPARTS; DIGITAL SIGNATURES**

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

26 **11. POST EXECUTION ACTIVITIES**

27 EHA agrees to comply with the reporting form requirements referenced in Health and Safety

28 Code section 25249.7(f). The Parties further acknowledge that, pursuant to Health and Safety Code

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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
4 agreement as judgment, and to obtain judicial approval of their settlement in a timely manner. For
5 purposes of this Section, “best efforts” shall include, at a minimum, supporting the motion for
6 approval, responding to any objection that any third-party may make, and appearing at the hearing
7 before the Court if so requested.

8 **12. MODIFICATION**

9 12.1 This Consent Judgment may be modified by: (i) a written agreement of the Parties and
10 entry of a modified consent judgment thereon by the Court; or (ii) a successful motion or application
11 of any Party, and the entry of a modified consent judgment thereon by the Court.

12 12.2 **Other EHA Settlements.** EPCB may move to modify this Consent Judgment to
13 substitute a higher benzene reformulation level that EHA agrees to in a future consent judgment
14 applicable to products substantially similar to the Covered Products, and EHA agrees not to oppose
15 any such motion except for good cause shown.

16 12.3 **Court Decision Regarding Similar Products.** If a court of competent jurisdiction
17 renders a final judgment that one or more products that are substantially similar to the Covered
18 Products do not require a warning for benzene under Proposition 65, then Defendant may move to
19 modify this Consent Judgment to conform to such ruling, and EHA agrees not to oppose any such
20 motion except for good cause shown.

21 12.4 **Federal Agency Action.** If the U.S. Food and Drug Administration states through any
22 guidance, regulation, or legally binding act that the permissible benzene level associated with
23 products that are substantially similar to the Covered Products are above 2 ppm, then EPCB may
24 move to have this Consent Judgment modified in accordance with the procedure for noticed motions
25 set forth herein to bring it into compliance with federal law.

26 12.5 **Federal Agency Action and Preemption.** If a court of competent jurisdiction or an
27 agency of the federal government, including, but not limited to the U.S. Food and Drug
28 Administration, states through any guidance, regulation, or legally binding act that federal law has

1 preemptive effect on any of the requirements of this Consent Judgment, then this Consent Judgment
2 may be modified in accordance with the procedure for noticed motions set forth herein to bring it into
3 compliance with or avoid conflict with federal law, and EHA agrees not to oppose any such motion
4 except for good cause shown.

5 **13. AUTHORIZATION**

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

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

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

13 **15. ENTIRE AGREEMENT**

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

19 **AGREED TO:**

AGREED TO:

20
21 Date: 08/01/2022

Date: 8/15/22

22
23 By: 
24 ENVIRONMENTAL HEALTH
ADVOCATES, INC.

By: 
EDGEWELL PERSONAL CARE
BRANDS, LLC

25 **IT IS SO ORDERED.**

26
27 Date: _____

28
JUDGE OF THE SUPERIOR COURT