

SETTLEMENT AGREEMENT

1. INTRODUCTION

1.1 The Parties. This Settlement Agreement is entered into by and between Precila Balabbo (“Balabbo”) and B.F. Ascher & Company, Inc. (“B.F. Ascher”). Together, Balabbo and B.F. Ascher are collectively referred to as the “Parties.” Balabbo is an individual who resides in the State of California and seeks to promote awareness of exposures to toxic chemicals and to improve human health by reducing or eliminating hazardous substances contained in consumer products. Balabbo alleges that B.F. Ascher is a person in the course of doing business for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, Health & Safety Code § 25249.6, et seq. (“Proposition 65”).

1.2 General Allegations. Balabbo alleges that B.F. Ascher has exposed individuals to the chemical diethanolamine (“DEA”) from its sales of Pretty Feet & Hands cream without first providing users and consumers of the product with a clear and reasonable health hazard exposure warning as required pursuant to Proposition 65. DEA is listed under Proposition 65 as a chemical known to the State of California to cause cancer.

1.3 Product Description. The products covered by this Settlement Agreement are Pretty Feet & Hands cream (the “Products”) that B.F. Ascher has either imported, and/or distributed, and/or offered for sale and/or directly or indirectly sold in California.

1.4 Notice of Violation. On December 27, 2021, Balabbo served B.F. Ascher, Bed Bath & Beyond, Inc., and various public enforcement agencies with documents entitled “Notice of Violation of California Health & Safety Code § 25249.6, et seq.” (collectively, the “Notice”). The Notice provided B.F. Ascher and such others, including public enforcers, with notice that alleged that B.F. Ascher was in violation of California Health & Safety Code § 25249.6, for failing to warn California consumers and customers that use of the Products will expose them to DEA. No public enforcer has diligently prosecuted the allegations set forth in the Notice.

1.5 No Admission. B.F. Ascher denies each and every material factual and legal allegation contained in the Notice and maintains that, to the best of its knowledge, all products that are or have

been sold and distributed in California, including the Products, have been and are in compliance with all laws. Nothing in this Settlement Agreement shall be construed as an admission against interest by B.F. Ascher of any fact, finding, issue of law, or violation of law; nor shall compliance with this Settlement Agreement constitute or be construed as an admission against interest by B.F. Ascher of any fact, finding, conclusion, issue of law or violation of law, such being specifically denied by B.F. Ascher. However, this § 1.5 shall not diminish or otherwise affect the obligations, responsibilities and duties under this Settlement Agreement. Notwithstanding the allegations in the Notice, B.F. Ascher maintains that it has not knowingly manufactured, or caused to be manufactured, the Products for sale in California in violation of Proposition 65.

1.6 Effective Date. For purposes of this Settlement Agreement, the term “Effective Date” shall mean the date that both Parties are have notice that this Agreement is fully executed.

2. INJUNCTIVE RELIEF: REFORMULATION AND/OR WARNINGS

2.1 Reformulation of Products. Within 30 days of the Effective Date, and continuing thereafter, Products that B.F. Ascher directly manufactures, imports, distributes, sells, or offers for sale in California shall either: (a) be Reformulated Products pursuant to § 2.2, below; or (b) be labeled with a clear and reasonable exposure warning pursuant to §§ 2.3 and 2.4, below. For purposes of this Settlement Agreement, a “DEA Free Reformulated Product” is a Product that is in compliance with the standard set forth in § 2.2, below. The warning requirements set forth in §§ 2.3 and 2.4 shall not apply to any Reformulated Product or to any Product manufactured prior to the Effective Date.


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

2.2.1 Reporting Limit. 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.

2.3 Clear and Reasonable Warning. Within 30 days of the Effective Date, and continuing thereafter, except as set forth in § 2.1 a clear and reasonable exposure warning as set forth in this §§ 2.3 and 2.4 must be provided for all Products that B.F. Ascher manufacturers, imports, distributes, sells, or offers for sale in California that is not a DEA Free Reformulated Product. The warning shall consist of either the **Warning** or **Alternative Warning** described in §§ 2.3(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 are known to the State of California to cause cancer. For more information go to www.P65Warnings.ca.gov.

(b) **Alternative Warning:** B.F. Ascher may, but is not required to, use the alternative short-form warning as set forth in this § 2.3(b) (“**Alternative Warning**”) as follows:

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

2.4 A **Warning** or **Alternative Warning** provided pursuant to § 2.3 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 Products 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 shall be affixed to or printed on the Products’ packaging or labeling, or on a placard, shelf tag, sign or electronic device or automatic process, providing that the warning is displayed with such conspicuousness, as compared with other words, statements, or designs as to render it likely to be read and understood by an ordinary individual under customary conditions of purchase or use. The 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 Product and shall be at least the same size as those other safety warnings.

If B.F. Ascher sells Products via its proprietary internet website to customers located in California, the warning requirements of this section shall be satisfied if the foregoing warning appears either: (a) on the same web page on which a Product is displayed and/or described; (b) on the same page as the price for the Product; or (c) on one or more web pages displayed to a purchaser prior to completion of purchase during the checkout process. Alternatively, a symbol consisting of a black exclamation point in a yellow or white equilateral triangle may appear adjacent to or immediately following the display, description, price, or checkout listing of the Product, if the warning statement appears elsewhere on the same web page in a manner that clearly associates it with the product(s) to which the warning applies.

2.5 Compliance with Warning Regulations. The Parties agree that B.F. Ascher shall be deemed to be in compliance with Proposition 65 and this Settlement Agreement by either adhering to §§ 2.1, or 2.3 and 2.4 of this Settlement Agreement or by complying with warning requirements adopted by the State of California's Office of Environmental Health Hazard Assessment ("OEHHA") that are in effect after the Effective Date.

3. PENALTIES PURSUANT TO HEALTH & SAFETY CODE § 25249.7(b)

In settlement of all the claims referred to in this Settlement Agreement, B.F. Ascher shall pay \$1,000.00 as a Civil Penalty in accordance with this Section. The Civil Penalty payment shall be allocated in accordance with California Health & Safety Code §§ 25249.12(c)(1) and (d), with 75% of the Penalty remitted to OEHHA and the remaining 25% of the Penalty remitted to Balabbo. The Civil Penalty payment(s) shall be delivered to the addresses identified in § 3.2.

3.1 Civil Penalty. Within ten (10) business days of the Effective Date, B.F. Ascher shall issue two (2) separate checks for the Civil Penalty payment: (a) one to "OEHHA" in the amount of \$750.00; and one to (b) "Brodsky Smith in Trust for Balabbo" in the amount of \$250.00. The Civil Penalty payment(s) shall be delivered to the addresses identified in § 3.2, below. Balabbo's counsel shall deliver to OEHHA and Balabbo their respective portion of the penalty payment.

3.2 Payment Procedures.

(a) **Issuance of Payments.** Payments payable and due under this Agreement shall be delivered to Balaboo's counsel at the following address:

Evan J. Smith, Esquire
Brodsky Smith
Two Bala Plaza, Suite 805
Bala Cynwyd, PA 19004.

(b) **Tax Documentation.** B.F. Ascher agrees to provide a completed IRS 1099 for its payments to, and Balabbo agrees to provide IRS W-9 forms for, each of the following payees under this Settlement Agreement:

- (i) "Precila Balabbo" whose address and tax identification number shall be provided within five (5) calendar days of the Effective Date;
- (ii) "Brodsky Smith" (EIN: 23-2971061) at the address provided in Section 3.2(a)(i); and
- (iii) "Office of Environmental Health Hazard Assessment" 1001 "I" Street, Sacramento, CA 95814.

4. **REIMBURSEMENT OF FEES AND COSTS**

The Parties acknowledge that Balabbo and her counsel offered to reach preliminary agreement on the material terms of this dispute before reaching terms on the amount of fees and costs to be reimbursed to her. The Parties thereafter reached an accord on the compensation due to Balabbo and her counsel under general contract principles and the private attorney general doctrine and principles codified at California Code of Civil Procedure § 1021.5, for all work performed through the Effective Date. Under these legal principles, B.F. Ascher shall reimburse Balabbo's counsel for fees and costs incurred as a result of investigating and bringing this matter to B.F. Ascher's attention, and negotiating a settlement in the public interest. Within ten (10) business days of the Effective Date, B.F. Ascher shall send a check payable to "Brodsky Smith" in the amount of \$18,000.00 for delivery to the address identified in § 3.2(a)(i), above.

5. **RELEASE OF ALL CLAIMS**

5.1 **Release of B.F. Ascher and Upstream and Downstream Customers and Entities.**

This Settlement Agreement is a full, final and binding resolution between Balabbo, acting on her own behalf, and B.F. Ascher, of any violation of Proposition 65 that was or could have been asserted by Balabbo or on behalf of her past and current agents, representatives, attorneys, successors, and/or assigns (“Releasors”) for failure to provide warnings for alleged exposures to DEA contained in the Products, and Releasors hereby release any such claims against B.F. Ascher and its parents, subsidiaries, affiliated entities, shareholders, marketplaces, directors, officers, agents, employees, attorneys, and their respective predecessors, successors and assignees, and each entity from whom B.F. Ascher obtained any Products and each entity to whom B.F. Ascher directly or indirectly distributed or sold the Products, including but not limited to, downstream distributors, wholesalers, customers, retailers, including but not limited to Bed Bath & Beyond, Inc., and their respective subsidiaries, affiliates and parents, franchisees, cooperative members and licensees (collectively, the “Releasees”), from all claims for violations of Proposition 65 through the Effective Date for the Products.

In further consideration of the promises and agreements herein contained, and for the payments to be made pursuant to §§ 3 and 4 above, Balabbo, on behalf of herself, her past and current agents, representatives, attorneys, successors and/or assignees, hereby covenants not to sue and waives any right to institute, participate in, directly or indirectly, any form of legal action and releases all claims that she may have, including without limitation, all actions and causes of action in law and in equity, all obligations, expenses (including without limitation all attorneys’ fees, expert fees, and investigation fees, and costs), damages, losses, liabilities and demands against any of the Releasees of any nature, character, or kind, whether known or unknown, suspected or unsuspected, limited to and arising out of the alleged or actual exposure to DEA in the Products.

5.2 B.F. Ascher’s Release of Balabbo. B.F. Ascher, on behalf of itself, its past and current agents, representatives, attorneys, successors and/or assignees, hereby waives any and all claims against Balabbo, her attorneys and other representatives, for any and all actions taken or statements made by Balabbo and/or her attorneys and other representatives, whether in the course of investigating

claims or otherwise seeking to enforce Proposition 65 against it in this matter or with respect to the Products up through the Effective Date.

5.3 California Civil Code § 1542. It is possible that other claims not known to the Parties arising out of the facts alleged in the Notice and relating to the Products will develop or be discovered. Balabbo, on behalf of herself only, on the one hand, and B.F. Ascher, on the other hand, acknowledge that this Agreement is expressly intended to cover and include all such claims up through the Effective Date, including all rights of action therefor. The Parties acknowledge that the claims released in §§ 5.1 and 5.2, above, may include unknown claims, and nevertheless waive California Civil Code § 1542 as to any such unknown claims. California Civil Code § 1542 reads 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.

Balabbo and B.F. Ascher each respectively acknowledge and understand the significance and consequences of this specific waiver of California Civil Code § 1542.

5.4 Deemed Compliance with Proposition 65. The Parties agree that compliance by B.F. Ascher with this Settlement Agreement constitutes compliance with Proposition 65 with respect to alleged exposure to DEA from use of the Products.

5.5. Public Benefit. It is the Parties' understanding that the commitments B.F. Ascher has agreed to herein, and the actions to be taken by B.F. Ascher under this Settlement Agreement, including payment of a civil penalty, would confer a significant benefit to the general public, as set forth in Code of Civil Procedure § 1021.5 and Cal. Admin. Code tit. 11, § 3201. As such, it is the intent of the Parties that, to the extent any other private party initiates an action alleging a violation of Proposition 65 with respect to B.F. Ascher's failure to provide a warning concerning exposure to DEA prior to use of the Products it has manufactured, distributed, sold, or offered for sale in California, or will manufacture, distribute, sell, or offer for sale in California, such private party action would not

confer a significant benefit on the general public as to those Products addressed in this Settlement Agreement, provided that B.F. Ascher is in material compliance with this Settlement Agreement.

6. SEVERABILITY

If, subsequent to the execution of this Settlement Agreement, any of the provisions of this Settlement Agreement are deemed by a court to be unenforceable, the validity of the enforceable provisions remaining shall not be adversely affected but only to the extent the deletion of the provision deemed unenforceable does not materially affect, or otherwise result in the effect of the Settlement Agreement being contrary to the intent of the Parties in entering into this Settlement Agreement.

7. GOVERNING LAW

The terms of this Settlement Agreement shall be governed by the law of the State of California and apply within the State of California. In the event that Proposition 65 is repealed or is otherwise rendered inapplicable or limited by reason of law generally, or as to the Products, or if DEA is delisted, B.F. Ascher shall provide written notice to Balabbo of any asserted change in the law, and shall have no further obligations pursuant to this Settlement Agreement with respect to, and to the extent that, a Product is so affected. This Settlement Agreement is enforceable solely by the Parties hereto.

8. NOTICES

Unless specified herein, all correspondence and notices required to be provided pursuant to this Settlement Agreement shall be in writing and personally delivered or sent by: (i) first-class (registered or certified mail) return receipt requested; or (ii) overnight or two-day courier on any Party by the other Party to the following addresses or (iii) e-mail:

For B.F. Ascher:

Lynn R. Fiorentino
Arentfox Schiff LLP
44 Montgomery Street, 38th Floor
San Francisco, CA 94104
Lynn.florentino@afslaw.com

For Balabbo:

Evan J. Smith
Brodsky Smith
Two Bala Plaza, Suite 805

Bala Cynwyd, PA 19004

Either 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: SIGNATURES

This Settlement Agreement may be executed in counterparts and by facsimile or .pdf signature, 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)

Balabbo agrees to comply with the reporting requirements referenced in Health & Safety Code § 25249.7(f).

11. MODIFICATION

This Settlement Agreement may be modified only by a written agreement of the Parties.

12. ENTIRE AGREEMENT

This Settlement Agreement contains the sole and entire agreement of the Parties and any 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.

13. AUTHORIZATION

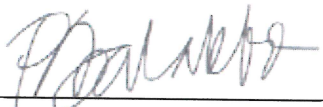
The undersigned are authorized to execute this Settlement Agreement and have read, understood and agree to all of the terms and conditions contained of this Settlement Agreement.

AGREED TO:

AGREED TO:

Date: 06/16/2022

Date: 6/28/22

By: 
Precila Balabbo

By: 
B.F. Ascher & Company, Inc.