

SETTLEMENT AGREEMENT

1. INTRODUCTION

1.1 The Parties. This Settlement Agreement is entered into by and between Precila Balabbo (“Balabbo”) and Apollo Health & Beauty Care, Inc. (“Apollo”). Together, Balabbo and Apollo 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 Apollo 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 Apollo has exposed individuals to the chemical diethanolamine (“DEA”) from its sales of Beauty 360 Strong Hold Hair Gel 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 Beauty 360 Strong Hold Hair Gel (the “Products”) that Apollo 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 January 24, 2021, Balabbo served CVS Pharmacy, Inc., CVS.com OTC, LLC (collectively “CVS”), 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 CVS and such others, including public enforcers, with notice that alleged that Apollo 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. Apollo was subsequently identified as the manufacturer and supplier of the products in the Notice and entered into negotiations with Balabbo as indemnitor to CVS to resolve Balabbo’s claims concerning exposure to DEA in the Products. No public enforcer has diligently prosecuted the allegations set forth in the Notice.

1.5 No Admission. Apollo denies the material factual and legal allegations 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 Apollo 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 Apollo of any fact, finding, conclusion, issue of law or violation of law, such being specifically denied by Apollo. 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, Apollo 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 have notice that this Agreement is fully executed.

2. INJUNCTIVE RELIEF: REFORMULATION AND/OR WARNINGS


2.1 Reformulation of Products. As of the Effective Date, and continuing thereafter, Products that Apollo 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) at the Reporting Limit 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. As 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 Apollo 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:** Apollo 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.

In addition to affixing the **Warning** or **Alternative Warning** to the Product's packaging or labeling, the **Warning** or **Alternative Warning** shall be posted on websites where Apollo sells Products to consumers in California and the consumer is able to complete the purchase on the website. 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, Apollo shall (a) post the **Warning** or **Alternative Warning** on its own website, if the website allows for the California consumer to complete the purchase on the website, and (b) if it has the ability to do so, on the websites of its third-party internet sellers where Apollo controls the content of the product display page; 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.

2.5 Compliance with Warning Regulations. The Parties agree that Apollo 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") applicable to the Product and the exposures at issue 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, Apollo shall pay \$2,000.00 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, below.

3.1 Civil Penalty. Within ten (10) business days of the Effective Date, Apollo shall issue two (2) separate checks for the Civil Penalty payment: (a) one to “OEHHA” in the amount of \$1,500.00; and one to (b) “Brotsky Smith in Trust for Balabbo” in the amount of \$500.00. The Civil Penalty payment(s) shall be delivered to the addresses identified in § 3.2, below.

3.2 Payment Procedures.

(a) Issuance of Payments. Payments shall be delivered as follows:

(i) All payments owed to Balabbo, pursuant to § 3.1 shall be delivered to the following payment address:

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

(ii) All payments owed to OEHHA (EIN: 68-0284486), pursuant to § 3.1 shall be delivered directly to OEHHA (Memo Line “Prop 65 Penalties”) at the following addresses:

For United States Postal Service Delivery:

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

For Non-United States Postal Service Delivery:

Mike Gyurics
Fiscal Operations Branch Chief
Office of Environmental Health Hazard Assessment
1001 “I” Street
Sacramento, CA 95814.

(b) Copy of Payments to OEHHA. Apollo agrees to provide Balabbo’s counsel with a copy of the check payable to OEHHA, simultaneously with its penalty payment to Balabbo, to be delivered to the address provided in § 3.2(a)(i), as proof of payment to OEHHA.

(c) **Tax Documentation.** Apollo 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, Apollo shall reimburse Balabbo’s counsel for fees and costs incurred as a result of investigating and bringing this matter to Apollo’s attention, and negotiating a settlement in the public interest. Within ten (10) business days of the Effective Date, Apollo shall send a check payable to “Brodsky Smith” in the amount of \$25,500.00 for delivery to the address identified in § 3.2(a)(i), above.

5. RELEASE OF ALL CLAIMS

5.1 Release of Apollo 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 Apollo, 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 (“Releasers”) for failure to provide warnings for alleged exposures to DEA contained in the Products, and Releasers hereby release any such claims against Apollo 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 Apollo obtained any Products and each entity to whom Apollo directly or indirectly distributed or sold the Products, including but not limited to, downstream distributors, wholesalers, customers, retailers, including but not limited to CVS and its respective subsidiaries, affiliates and parents, franchisees, cooperative members and licensees (collectively, the “Releasees”), of all claims for violations of Proposition 65 based on exposure to DEA from use of the Products as set forth in the Notice, with respect to any Products manufactured, distributed, or sold by Apollo and/or Releasees prior to the Effective Date. Compliance with the terms of this Agreement constitutes compliance with Proposition 65 with regard to exposure to DEA from use of 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 Apollo’s Release of Balabbo. Apollo, 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 Apollo, 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 Apollo 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 Apollo with this Settlement Agreement constitutes compliance with Proposition 65 with respect to exposure to DEA from use of the Products.

5.5. Public Benefit. It is the Parties' understanding that the commitments Apollo has agreed to herein, and the actions to be taken by Apollo 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 Apollo'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 Apollo 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, Apollo 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:

For Apollo:

Carol R. Brophy, Esq.
Steptoe & Johnson LLP
One Market Plaza
Spear Tower, Suite 3900
San Francisco, CA 94105

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:

Date: 01/17/2023

By: 
Precila Balabbo

AGREED TO:

Date:  Jan 14 23

By: 
Apollo Health & Beauty Care, Inc.