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

11 PRECILA BALABBO,

12 Plaintiff,

13 vs.

14 TABATA U.S.A., INC., OUTDOOR
15 ADVENTURES UNLIMITED, INC.
16 DBA DIVERS SUPPLY,

17 Defendants.

Case No.: CGC-23-604298

CONSENT JUDGMENT

Judge: Richard B. Ulmer

Dept.: 302

Hearing Date: December 27, 2023

Hearing Time: 9:30 AM

Complaint Filed: January 27, 2023

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 Tabata U.S.A., Inc. (“Tabata” or
4 “Defendant”) with Balabbo and Defendant collectively referred to as the “Parties” and each of them
5 as a “Party.” Balabbo is an individual residing in California that seeks to promote awareness of
6 exposures to toxic chemicals and improve human health by reducing or eliminating hazardous
7 substances contained in consumer products. Tabata 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 *Tusa*® dry bags, UPC #
11 685193463698 without providing a clear and reasonable exposure warning pursuant to Proposition
12 65. DEHP is listed pursuant to Proposition 65 as a chemical known to the State of California to
13 cause cancer and birth defects or other reproductive harm.

14 1.3 **Notice of Violation/Action.** On or about February 7, 2022, Balabbo served Tabata,
15 Outdoor Adventures Unlimited, Inc., and various public enforcement agencies with documents
16 entitled “60-Day Notice of Violation” pursuant to Health & Safety Code §25249.7(d) (the
17 “Notice”), alleging that Defendant violated Proposition 65 for failing to warn consumers and
18 customers that use of *Tusa*® dry bags, UPC # 685193463698 expose users in California to DEHP.
19 No public enforcer has brought and is diligently prosecuting the claims alleged in the Notice. On
20 January 27, 2023, Balabbo filed a complaint (the “Complaint”).

21 1.4 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
22 jurisdiction over Defendant as to the allegations contained in the Action filed in this matter, that
23 venue is proper in the County of San Francisco, and that this Court has jurisdiction to approve,
24 enter, and oversee the enforcement of this Consent Judgment as a full and final binding resolution
25 of all claims which were or could have been raised in the Action based on the facts alleged therein
26 and 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 *Tusa*® dry bags, UPC #
10 685193463698 that are manufactured, distributed, shipped into California and offered for sale in
11 California by Tabata.

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 date this Consent Judgment is
16 signed by both Parties, and continuing thereafter, Covered Products that Tabata directly
17 manufactures, imports, distributes, sells, or offers for sale in California shall either be: (a)
18 reformulated Products pursuant to § 3.2, below; or (b) labeled with a clear and reasonable exposure
19 warning pursuant to §§ 3.3 and 3.4, below. For purposes of this Consent Judgment, a “Reformulated
20 Product” is a Covered Product that is in compliance with the standard set forth in § 3.2 below. The
21 warning requirement set forth in §§ 3.3 and 3.4 shall not apply to any Reformulated Product.

22 3.2 **Reformulation Standard.** “Reformulated Products” shall mean Covered Products
23 that contain concentrations less than or equal to 0.1% (1,000 parts per million (ppm)) of DEHP
24 when analyzed pursuant to U.S. Environmental Protection Agency testing methodologies 3580A
25 and 8270C or other methodology utilized by federal or state government agencies for the purpose
26 of determining the phthalate content in a solid substance.

1 3.3 **Clear and Reasonable Warning.** As of the date this Consent Judgment is signed
2 by both Parties, and continuing thereafter, a clear and reasonable exposure warning as set forth in
3 this §§ 3.3 and 3.4 must be provided for all Covered Products that Defendant manufacturers,
4 imports, distributes, sells, or offers for sale in California that is not a Reformulated Product. There
5 shall be no obligation for Defendant to provide a warning for Covered Products that enter the stream
6 of commerce prior to the date this Consent Judgment is signed by both Parties. The warning shall
7 consist of either the **Warning** or **Alternative Warning** described in §§ 3.3(a) or (b), respectively:

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

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

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

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

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

1 In addition to affixing the **Warning** or **Alternative Warning** to the Covered Product's
2 packaging or labeling, the **Warning** or **Alternative Warning** shall be posted on websites where
3 Tabata offers Products for sale to consumers in California. The requirements of this Section shall
4 be satisfied if the **Warning** or **Alternative Warning**, or a clearly marked hyperlink using the word
5 "**WARNING**," appears on the product display page, or by otherwise prominently displaying the
6 warning to the purchaser prior to completing the purchase. To comply with this Section, Tabata
7 shall (a) post the **Warning** or **Alternative Warning** on its own website and, if it has the ability to
8 do so, on the websites of its third-party internet sellers; and (b) if it does not have the ability to post
9 the **Warning** or **Alternative Warning** on the websites of its third-party internet sellers, provide
10 such sellers with written notice in accordance with Title 27, California Code of Regulations, §
11 25600.2. Third-party internet sellers of the Covered Product that have been provided with written
12 notice in accordance with Title 27, California Code of Regulations, § 25600.2 are not released in
13 Section 5 of this Agreement if they fail to meet the warning requirements herein.

14 3.5 **Compliance with Warning Regulations.** Defendant shall be deemed to be in
15 compliance with this Consent Judgment by either adhering to §§ 3.3 and 3.4 of this Consent
16 Judgment or by complying with warning requirements adopted by OEHHA applicable to the
17 Covered Product and exposures at issue after the Effective Date. If consumer information is
18 provided in a foreign language, Tabata shall provide the **Warning** in the foreign language.

19 **4. MONETARY TERMS**

20 4.1 **Civil Penalty.** Tabata shall pay \$1,000.00 as a Civil Penalty pursuant to Health and
21 Safety Code section 25249.7(b), to be apportioned in accordance with California Health & Safety
22 Code § 25192, with 75% of these funds remitted to OEHHA and the remaining 25% of the Civil
23 Penalty remitted to Balabbo, as provided by California Health & Safety Code § 25249.12(d).

24 4.1.1 Within ten (10) days of the Effective Date, Tabata shall issue two separate
25 checks for the Civil Penalty payment to (a) "OEHHA" in the amount of \$750.00; and to (b)
26 "Brodsky Smith in Trust for Balabbo" in the amount of \$250.00. Payment owed to Balabbo
27 pursuant to this Section shall be delivered to the following payment address:

28 Evan J. Smith, Esquire

1 Brodsky Smith
2 Two Bala Plaza, Suite 805
3 Bala Cynwyd, PA 19004

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

6 For United States Postal Service Delivery:

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

12 For Non-United States Postal Service Delivery:

13 Mike Gyurics
14 Fiscal Operations Branch Chief
15 Office of Environmental Health Hazard Assessment
16 1001 I Street
17 Sacramento, CA 95814

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

20 4.2 **Attorneys' Fees.** Within ten (10) days of the Effective Date, Tabata shall pay
21 \$16,500.00 to Brodsky Smith as complete reimbursement for Balabbo's attorneys' fees and costs
22 incurred as a result of investigating, bringing this matter to the attention of Tabata, litigating and
23 negotiating and obtaining judicial approval of a settlement in the public interest, pursuant to Code
24 of Civil Procedure § 1021.5.

25 **5. RELEASE OF ALL CLAIMS**

26 5.1 This Consent Judgment is a full, final, and binding resolution between Balabbo
27 acting on her own behalf, and on behalf of the public interest, and Tabata, and its parents,
28 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, including but not limited to, its parents, subsidiaries, and affiliates, franchisees,

1 cooperative members, and Outdoor Adventures Unlimited, Inc., dba Divers Supply (“Downstream
2 Releasees”), of all claims for violations of Proposition 65 based on exposure to DEHP from use of
3 the Covered Products manufactured, distributed, or sold by Tabata prior to the Effective Date as
4 set forth in the Notice. It is the Parties’ intention that this Consent Judgment shall have preclusive
5 effect such that no other actions by private enforcers, whether purporting to act in his, her, or its
6 interests or the public interest shall be permitted to pursue and take any action with respect to any
7 violation of Proposition 65 based on exposure to DEHP from use of the Covered Products that was
8 alleged in the Complaint, or that could have been brought pursuant to the Notice against Tabata
9 and the Downstream Releasees (“Proposition 65 Claims”). Tabata’s compliance with the terms of
10 this Consent Judgment constitutes compliance by Tabata with Proposition 65 with regard to
11 exposure to DEHP from use of the Covered Products.

12 5.2 In addition to the foregoing, Balabbo, on behalf of herself, her past and current
13 agents, representatives, attorneys, and successors and assignees, and *not* in her representative
14 capacity, hereby waives all rights to institute or participate in, directly or indirectly, any form of
15 legal action and releases Tabata, Defendant Releasees, and Downstream Releasees from any and
16 all manner of actions, causes of action, claims, demands, rights, suits, obligations, debts, contracts,
17 agreements, promises, liabilities, damages, charges, losses, costs, expenses, and attorneys’ fees, of
18 any nature whatsoever, known or unknown, in law or equity, fixed or contingent, now or in the
19 future, with respect to any alleged violations of Proposition 65 related to or arising from Covered
20 Products manufactured, distributed, or sold by Tabata, Defendant Releasees or Downstream
21 Releasees. With respect to the foregoing waivers and releases in this paragraph, Balabbo hereby
22 specifically waives any and all rights and benefits which she now has, or in the future may have,
23 conferred by virtue of the provisions of § 1542 of the California Civil Code, which provides as
24 follows:

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

1 5.3 Tabata waives any and all claims against Balabbo, her attorneys and other
2 representatives, for any and all actions taken, or statements made (or those that could have been
3 taken or made) by Balabbo and her attorneys and other representatives, whether in the course of
4 investigating claims or otherwise seeking enforcement of Proposition 65 against it in this matter,
5 and with respect to Covered Products.

6 **6. INTEGRATION**

7 6.1 This Consent Judgment contains the sole and entire agreement of the Parties and
8 any and all prior negotiations and understandings related hereto shall be deemed to have been
9 merged within it. No representations or terms of agreement other than those contained herein exist
10 or have been made by any Party with respect to the other Party or the subject matter hereof.

11 **7. GOVERNING LAW**

12 7.1 The terms of this Consent Judgment shall be governed by the laws of the State of
13 California and apply within the State of California. In the event that Proposition 65 is repealed or
14 is otherwise rendered inapplicable by reason of law generally, or as to Covered Products, then
15 Defendant shall have no further obligations pursuant to this Consent Judgment with respect to, and
16 to the extent that, Covered Products are so affected.

17 **8. NOTICES**

18 8.1 Unless specified herein, all correspondence and notices required to be provided
19 pursuant to this Consent Judgment shall be in writing and personally delivered or sent by: (i) first-
20 class, (registered or certified mail) return receipt requested; or (ii) overnight courier on any party
21 by the other party at the following addresses:

22 For Defendant:

23 Grant A. Nigolian
24 GNPC
25 650 Town Center Dr., Ste. 1880
26 Costa Mesa, CA 92626

27 And

28 For Balabbo:

 Evan Smith

1 Brodsky Smith
2 9595 Wilshire Blvd., Ste. 900
3 Beverly Hills, CA 90212

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

6 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

7 9.1 This Consent Judgment may be executed in counterparts and by facsimile, each of
8 which shall be deemed an original, and all of which, when taken together, shall constitute one and
9 the same document.

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

12 10.1 Balabbo agrees to comply with the requirements set forth in California Health &
13 Safety Code § 25249.7(f) and to promptly bring a Motion for Approval of this Consent Judgment.
14 Defendant agrees it shall support approval of such Motion.

15 10.2 This Consent Judgment shall not be effective until it is approved and entered by the
16 Court and shall be null and void if, for any reason, it is not approved by the Court. In such case, the
17 Parties agree to meet and confer on how to proceed and if such agreement is not reached within 30
18 days, the case shall proceed on its normal course.

19 10.3 If the Court approves this Consent Judgment and is reversed or vacated by an
20 appellate court, the Parties shall meet and confer as to whether to modify the terms of this Consent
21 Judgment. If the Parties do not jointly agree on a course of action to take, the case shall proceed on
22 its normal course on the trial court's calendar.

23 **11. MODIFICATION**

24 11.1 This Consent Judgment may be modified only by further stipulation of the Parties
25 and the approval of the Court or upon the granting of a motion brought to the Court by either Party.
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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: 11/8/2023

Date: 06/07/2023

By: *Precila Balabbo*
PRECILA BALABBO

By: *Anna Backe*
TABATA U.S.A., INC.

IT IS SO ORDERED, ADJUDGED AND DECREED:

Dated: _____

Judge of Superior Court