



ENDORSED
FILED
ALAMEDA COUNTY

SEP 07 2017

CLERK OF THE SUPERIOR COURT

By: [Signature] DEPUTY

1 Evan Smith (Bar No. SBN 242352)
2 BRODSKY & SMITH, LLC.
3 9595 Wilshire Blvd., Ste. 900
4 Beverly Hills, CA 90212
5 Tel: (877) 534-2590
6 Fax: (310) 247-0160

Attorneys for Plaintiff

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 COUNTY OF ALAMEDA

11 EMA BELL,
12 Plaintiff,
13 v.
14 RITE AID CORP.,
15 Defendant.

Case No.: RG17846621
CONSENT JUDGMENT
Judge: 25
Dept.: Hon. Ronni MacLaren
Hearing Date: September 7, 2017
Hearing Time: 9:00 AM
Reservation #: R-1871483

20
21
22
23
24
25
26
27
28

1 **1. INTRODUCTION**

2 1.1 **The Parties.** This Consent Judgment is entered into by and between Ema Bell
3 acting on behalf of the public interest (hereinafter "Bell") and Rite Aid Corp. ("Rite Aid" or
4 "Defendant") on behalf of itself and the Defendant Releasees (defined in Paragraph 5.1 of this
5 Consent Judgment). Bell and Defendant are collectively referred to as the "Parties" and each of
6 them as a "Party." Bell is an individual residing in California who seeks to promote awareness of
7 exposures to toxic chemicals and improve human health by reducing or eliminating hazardous
8 substances contained in consumer products. Rite Aid is a person in the course of doing business
9 for purposes of Proposition 65, Cal. Health & Safety Code §§ 25249.6 et seq.

10 1.2 **Allegations and Representations.** Bell alleges that Defendant has exposed
11 individuals to Diisononyl phthalate (DINP) from Rite Aid Earwax Removal Kits without providing
12 clear and reasonable warnings under Proposition 65. DINP is listed under Proposition 65 as a
13 chemical known to the State of California to cause cancer.

14 1.3 **Notices of Violation/Complaint.** On or about October 19, 2016, Bell served Rite
15 Aid, and various public enforcement agencies with a document entitled "60-Day Notice of
16 Violation" pursuant to Health & Safety Code §25249.7(d) (the "Notice"), alleging that Defendant
17 was in violation of Proposition 65 for failing to warn consumers and customers that Rite Aid
18 Earwax Removal Kits exposed users in California to DINP. No public enforcer has brought and is
19 diligently prosecuting the claims alleged in the Notice. On January 23, 2017, Bell filed a complaint
20 (the "Complaint") in the matter.

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 Complaint filed in this matter, that
23 venue is proper in the County of Alameda, and that this Court has jurisdiction to approve, enter,
24 and oversee the enforcement of this Consent Judgment as a full and final binding resolution of all
25 claims which were or could have been raised in the Complaint based on the facts alleged therein
26 and/or in the Notice.

1 1.5 Defendant denies the material allegations contained in Bell's Notice and Complaint
2 and maintains that it has not violated Proposition 65. Nothing in this Consent Judgment shall be
3 construed as an admission by Defendant of any fact, finding, issue of law, or violation of law; nor
4 shall compliance with this Consent Judgment constitute or be construed as an admission by
5 Defendant of any fact, finding, conclusion, issue of law, or violation of law, such being specifically
6 denied by Defendant. However, this section shall not diminish or otherwise affect the obligations,
7 responsibilities, and duties of Defendant under this Consent Judgment.

8 **2. DEFINITIONS**

9 2.1 **Covered Products.** The term "Covered Products" means Rite Aid earwax removal
10 kits, including but not limited to, UPC No. 0 11822 33711 3, that are manufactured, distributed
11 and/or offered for sale in California.

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: WARNINGS**

15 3.1 Commencing ninety (90) days after the Effective Date, Rite Aid shall not
16 manufacture, import, or purchase for sale in California any Covered Product that contains more
17 than 1,000 parts per million DINP, Di(2-ethylhexyl) phthalate, Dibutyl phthalate, Benzyl butyl
18 phthalate, Diisodecyl phthalate, Di-n-octyl phthalate, and/or Di-n-hexyl phthalate that Rite Aid
19 knows will be or intends to be sold or offered for sale in California, unless the Covered Product is
20 accompanied by either of the following warning(s):

21 **WARNING:** This product contains a chemical known to the State of California to cause cancer.

22 Or

23 **WARNING:** This product can expose you to chemicals including Diisononyl phthalate, which is
24 known to the State of California to cause cancer. For more information go to
25 www.P65Warnings.ca.gov.

26 3.2 The warning provided pursuant to Section 3.1 shall be affixed to or printed on the
27 Covered Product's packaging or labeling. The warning shall be prominently affixed to or printed
28 on the packaging or labeling and displayed with such conspicuousness, as compared with other

1 words, statements, or designs as to render it likely to be read and understood by an ordinary
2 individual under customary conditions of purchase or use. A warning may be contained in the same
3 section of the packaging, labeling, or instruction booklet that states other safety warnings, if any,
4 concerning the use of the product and shall be at least the same size as those other safety warnings.

5 **4. MONETARY TERMS**

6 4.1 **Civil Penalty.** Rite Aid shall pay a Civil Penalty of \$3,000.00 pursuant to Health
7 and Safety Code section 25249.7(b), to be apportioned in accordance with California Health &
8 Safety Code § 25192, with 75% of these funds remitted to the State of California's Office of
9 Environmental Health Hazard Assessment and the remaining 25% of the penalty remitted to Bell,
10 as provided by California Health & Safety Code § 25249.12(d).

11 4.1.1 Within fourteen (14) business days of the Effective Date, Rite Aid shall
12 issue two separate checks for the Civil Penalty payment to (a) "OEHHA" in the amount of
13 \$2,250.00; and (b) "Brodsky & Smith, LLC in Trust for Bell" in the amount of \$750.00. Payment
14 owed to Bell pursuant to this Section shall be delivered to the following payment address:

15 Evan J. Smith, Esquire
16 Brodsky & Smith, LLC
17 Two Bala Plaza, Suite 510
Bala Cynwyd, PA 19004

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

20 For United States Postal Service Delivery:

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

24 For Non-United States Postal Service Delivery:

25 Mike Gyurics
26 Fiscal Operations Branch Chief
Office of Environmental Health Hazard Assessment
27 1001 I Street
Sacramento, CA 95814

1 A copy of the check payable to OEHHA shall be mailed to Brodsky & Smith, LLC at the
2 address set forth above as proof of payment to OEHHA.

3 4.2 **Attorney Fees.** Rite Aid shall pay \$29,000.00 to Brodsky & Smith, LLC (“Brodsky
4 Smith”) as complete reimbursement for Plaintiff Bell’s attorneys’ fees and costs incurred as a result
5 of investigating, bringing this matter to Rite Aid’s attention, litigating and negotiating and obtaining
6 judicial approval of a settlement in the public interest, pursuant to Code of Civil Procedure section
7 1021.5. Payment shall be made within fourteen (14) business days of the Effective Date and sent
8 to the address for Brodsky & Smith set forth in section 4.1.1, above.

9 4.3 Rite Aid shall pay the Civil Penalty and attorney fees identified in Sections 4.1 and
10 4.2 within fourteen (14) days of the Effective Date.

11 **5. RELEASE OF ALL CLAIMS**

12 5.1 This Consent Judgment is a full, final, and binding resolution between Bell acting
13 on her own behalf, and on behalf of the public and in the public interest, and Rite Aid, and its
14 parents, shareholders, directors, officers, employees, representatives, agents, attorneys, divisions,
15 subdivisions, subsidiaries, partners, sister companies, and affiliates, and their predecessors,
16 successors and assigns (“Defendant Releasees”), and all entities from whom they obtain and to
17 whom they directly or indirectly distribute or sell Covered Products, including but not limited to
18 manufacturers, suppliers, distributors, wholesalers, customers, licensors, licensees retailers,
19 franchisees, and cooperative members (“Downstream Releasees”), of all claims for violations of
20 Proposition 65, Business & Professions Code sections 17200 *et seq.*, or any other statutory or
21 common law claims that have been or could have been asserted in the Complaint against Rite Aid
22 based on exposure to DINP, Diisodecyl phthalate, Di(2-ethylhexyl) phthalate, Dibutyl phthalate,
23 Benzyl butyl phthalate, Di-n-octyl phthalate, and/or Di-n-hexyl phthalate from Covered Products
24 as set forth in the Notice, with respect to any Covered Products manufactured, distributed, or sold
25 by Rite Aid, Defendant Releasees or Downstream Releasees prior to the Effective Date, or any
26 other claim based on the facts or conduct alleged in the Complaint, whether based on actions
27 committed by Rite Aid, Defendant Releasees or Downstream Releasees. This Consent Judgment
28

1 shall have preclusive effect such that no other person or entity, whether purporting to act in his,
2 her, or its interests or the public interest shall be permitted to pursue and/or take any action with
3 respect to any violation of Proposition 65 that was alleged in the Complaint, or that could have
4 been brought pursuant to the Notice against Rite Aid, Defendant Releasees or Downstream
5 Releasees.

6 5.2 Compliance with the terms of this Consent Judgment resolves any issue now, in the
7 past, and in the future concerning compliance by Rite Aid, Defendant Releasees and Downstream
8 Releasees, with the requirements of Proposition 65, Business & Professions Code sections 17200
9 *et seq.*, or any other statutory or common law claims with regard to the Covered Products.

10 5.3 In any action brought by the Attorney General or another enforcer alleging
11 subsequent violations of Proposition 65, Business & Professions Code sections 17200 *et seq.*, or
12 any other statutory or common law claims, Rite Aid, Defendant Releasees and/or Downstream
13 Releasees may assert any and all defenses that are available, including the *res judicata* or collateral
14 estoppel effect of this Consent Judgment.

15 5.4 In addition to the foregoing, Bell, on behalf of herself, her past and current agents,
16 representatives, attorneys, and successors and/or assignees, and *not* in her representative capacity,
17 hereby waives all rights to institute or participate in, directly or indirectly, any form of legal action
18 and releases any Rite Aid, Defendant Releasees, and Downstream Releasees from any and all
19 manner of actions, causes of action, claims, demands, rights, suits, obligations, debts, contracts,
20 agreements, promises, liabilities, damages, charges, losses, costs, expenses, and attorneys' fees, of
21 any nature whatsoever, known or unknown, in law or equity, fixed or contingent, now or in the
22 future, with respect to any alleged violations of Proposition 65, Business & Professions Code
23 sections 17200 *et seq.*, or any other statutory or common law claims related to or arising from
24 Covered Products manufactured distributed or sold by Rite Aid, Defendant Releasees or
25 Downstream Releasees. With respect to the foregoing waivers and releases in this paragraph, Bell
26 hereby specifically waives any and all rights and benefits which she now has, or in the future may
27
28

1 have, conferred by virtue of the provisions of Section 1542 of the California Civil Code, which
2 provides as follows:

3 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE
4 CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER
5 FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF
6 KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS
7 SETTLEMENT WITH THE DEBTOR.

8 5.5 Rite Aid waives any and all claims against Bell, her attorneys and other
9 representatives, for any and all actions taken or statements made (or those that could have been
10 taken or made) by Bell and her attorneys and other representatives, whether in the course of
11 investigating claims or otherwise seeking enforcement of Proposition 65 against it in this matter,
12 and/or with respect to Covered Products.

13 **6. INTEGRATION**

14 6.1 This Consent Judgment contains the sole and entire agreement of the Parties and
15 any and all prior negotiations and understandings related hereto shall be deemed to have been
16 merged within it. No representations or terms of agreement other than those contained herein exist
17 or have been made by any Party with respect to the other Party or the subject matter hereof.

18 **7. GOVERNING LAW**

19 7.1 The terms of this Consent Judgment shall be governed by the laws of the State of
20 California and apply within the State of California. In the event that Proposition 65 is repealed or
21 is otherwise rendered inapplicable by reason of law generally, or as to Covered Products, then
22 Defendant shall have no further obligations pursuant to this Consent Judgment with respect to, and
23 to the extent that, Covered Products are so affected.

24 **8. NOTICES**

25 8.1 Unless specified herein, all correspondence and notices required to be provided
26 pursuant to this Consent Judgment shall be in writing and personally delivered or sent by: (i) first-
27 class, (registered or certified mail) return receipt requested; or (ii) overnight courier on any party
28 by the other party at the following addresses:

For Defendant:

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Sean Meenan
Winston & Strawn LLP
101 California St., 35th Fl.
San Francisco, CA 94111-5802

And

For Bell:

Evan Smith
Brodsky & Smith, LLC
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 Bell 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 and 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.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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 unless the unsuccessful party has acted with substantial justification. For purposes of this Consent Judgment, the term substantial justification shall carry the same meaning as used in the Civil Discovery Act of 1986, Code of Civil Procedure Section 2016, *et seq.*

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.

//
//
//
//
//
//
//
//
//
//
//
//
//
//
//

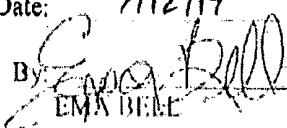
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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 certifies 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: 7/12/17
By: 
EMMA BELLE

Date: 7/17/17
By: 
RITE AID CORP.

IT IS SO ORDERED, ADJUDGED AND DECREED:

Dated: Sept. 7, 2017


Judge of Superior Court