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

Attorneys for Plaintiff

FILED
ALAMEDA COUNTY

AUG 10 2017

CLERK OF THE SUPERIOR COURT

By  Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ALAMEDA

EMA BELL,

Plaintiff,

v.

BED BATH & BEYOND, INC.,

Defendant.

Case No.: RG17847010
CONSENT JUDGMENT
Judge: Paul D. Herbert
Dept.: 20
Hearing Date: July 21, 2017
Hearing Time: 11:00 AM
Reservation #: R-1853253

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1. INTRODUCTION

1.1 **The Parties.** This Consent Judgment is entered into by and between Ema Bell acting on behalf of the public interest (hereinafter “Bell”) and Bed Bath & Beyond, Inc. (“BB&B” or “Defendant”) with Bell and Defendant collectively referred to as the “Parties” and each of them as a “Party.” Bell is an individual residing in California who seeks to promote awareness of exposures to toxic chemicals and improve human health by reducing or eliminating hazardous substances contained in consumer products. BB&B is a person in the course of doing business for purposes of Proposition 65, Cal. Health & Safety Code §§ 25249.6 et seq.

1.2 **Allegations and Representations.** Bell alleges that Defendant has exposed individuals to Diisononyl phthalate (DINP) from table pads without providing clear and reasonable warnings under Proposition 65. DINP is listed under Proposition 65 as a chemical known to the State of California to cause cancer.

1.3 **Notices of Violation/Complaint.** On or about November 10, 2016, Bell served BB&B, and various public enforcement agencies with a document entitled “60-Day Notice of Violation” pursuant to Health & Safety Code §25249.7(d) (the “Notice”), alleging that Defendant was in violation of Proposition 65 for failing to warn consumers and customers that Ultimate Luxury Deluxe Table Pads exposed users in California to DINP. No public enforcer has brought and is diligently prosecuting the claims alleged in the Notice. On January 25, 2017, Bell filed a complaint (the “Complaint”) in the matter.

1.4 For purposes of this Consent Judgment only, the Parties stipulate that this Court has jurisdiction over Defendant as to the allegations contained in the Complaint filed in this matter, that venue is proper in the County of Alameda, and that this Court has jurisdiction to approve, enter, and oversee the enforcement of this Consent Judgment as a full and final binding resolution of all claims which were or could have been raised in the Complaint based on the facts alleged therein and/or in the Notice.

1.5 Defendant denies the material allegations contained in Bell’s Notice and Complaint and maintains that it has not violated Proposition 65. Nothing in this Consent Judgment shall be

1 construed as an admission by Defendant of any fact, finding, issue of law, or violation of law; nor
2 shall compliance with this Consent Judgment constitute or be construed as an admission by
3 Defendant of any fact, finding, conclusion, issue of law, or violation of law, such being specifically
4 denied by Defendant. However, this section shall not diminish or otherwise affect the obligations,
5 responsibilities, and duties of Defendant under this Consent Judgment.

6 **2. DEFINITIONS**

7 2.1 **Covered Products.** The term "Covered Products" means Ultimate Luxury Deluxe
8 Table Pads, UPC No. 0 75139 06524 4 that are manufactured, distributed and/or offered for sale in
9 California by BB&B and that contain DINP.

10 2.2 **Effective Date.** The term "Effective Date" means the date this Consent Judgment is
11 entered as a Judgment of the Court.

12 **3. INJUNCTIVE RELIEF: WARNINGS**

13 3.1 Commencing ninety (90) days after the Effective Date, BB&B will not sell in
14 California, or distribute for sale in California any Covered Product that contains more than 1,000
15 parts per million DINP unless the Covered Product is accompanied by a clear and reasonable
16 warning in any manner specified in Title 27, California Code of Regulations, Article 6, §§ 25600,
17 *et seq.*

18 3.2 The warning provided pursuant to Section 3.1 shall be affixed to or printed on the
19 Covered Product's packaging or labeling. The warning shall be prominently affixed to or printed
20 on the packaging or labeling and displayed with such conspicuousness, as compared with other
21 words, statements, or designs as to render it likely to be read and understood by an ordinary
22 individual under customary conditions of purchase or use. A warning may be contained in the same
23 section of the packaging, labeling, or instruction booklet that states other safety warnings, if any,
24 concerning the use of the product and shall be at least the same size as those other safety warnings.

25 3.3 **Point of Sale Warnings.** Alternatively, BB&B may provide warning signs
26 substantially similar to the warning provided pursuant to Section 3.3, below, to its customers and
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1 in California, and its stores in California, with instructions to post the warnings in close proximity
2 to the point of display of the Covered Product:

3 **WARNING PROP 65 AFFECTED MERCHANDISE:** This product will expose you to
4 chemicals known to the State of California to cause cancer, birth defects or other
5 reproductive harm.

6 **4. MONETARY TERMS**

7 **4.1 Initial Civil Penalty.** BB&B shall pay an Initial Civil Penalty of \$2,000.00 pursuant
8 to Health and Safety Code section 25249.7(b), to be apportioned in accordance with California
9 Health & Safety Code § 25192, with 75% of these funds remitted to the State of California's Office
10 of Environmental Health Hazard Assessment and the remaining 25% of the penalty remitted to
11 Bell, as provided by California Health & Safety Code § 25249.12(d).

12 4.1.1 Within fourteen (14) business days of the Effective Date, BB&B shall issue
13 two separate checks for the Initial Civil Penalty payment to (a) "OEHHA" in the amount of
14 \$1,500.00; and (b) "Brodsky & Smith, LLC in Trust for Bell" in the amount of \$500.00. Payment
15 owed to Bell pursuant to this Section shall be delivered to the following payment address:

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

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

22 For United States Postal Service Delivery:

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

28 For Non-United States Postal Service Delivery:

 Mike Gyurics
 Fiscal Operations Branch Chief
 Office of Environmental Health Hazard Assessment
 1001 I Street

1 Sacramento, CA 95814

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

4 4.2 **Final Civil Penalty.** Sixty (60) days after the Effective Date, BB&B shall make a
5 Final Civil Penalty payment of \$2,000.00 on the same terms as set forth in Section 4.1.1 pertaining
6 to the Initial Civil Penalty. Pursuant to Title 11 California Code of Regulations, Section 3203(c),
7 Bell agrees that the Final Civil Penalty payment shall be waived in its entirety if, on or before the
8 Final Civil Penalty payment is due, an officer of BB&B provides Bell with a signed declaration
9 certifying that all Products it ships for sale or distributes for sale in California as of the date of its
10 certification are Reformulated Products or are marked with, or are accompanied by the warnings
11 required by this Consent Decree (hereinafter "Labeled Product") and that BB&B will continue to
12 offer only Reformulated Products or Labeled Products in California in the future. The option to
13 provide a declaration certifying its complete early reformulation or labeling of the Products in lieu
14 of making the Final Civil Penalty payment otherwise required by this Section is a material term,
15 and time is of the essence.

16 4.3 **Attorney Fees.** BB&B shall pay \$18,000.00 to Brodsky & Smith, LLC ("Brodsky
17 Smith") as complete reimbursement for Plaintiff Bell's attorneys' fees and costs incurred as a result
18 of investigating, bringing this matter to BB&B's attention, litigating and negotiating and obtaining
19 judicial approval of a settlement in the public interest, pursuant to Code of Civil Procedure section
20 1021.5. Payment shall be made within fourteen (14) business days of the Effective Date and sent
21 to the address for Brodsky & Smith set forth in section 4.1.1, above.

22 4.4 BB&B shall pay the Initial Civil Penalty and attorney fees identified in Sections 4.1
23 and 4.3 within fourteen (14) days of the Effective Date.

24 **5. RELEASE OF ALL CLAIMS**

25 5.1 This consent judgment is a full, final, and binding resolution between Bell acting on
26 her own behalf, and on behalf of the public interest, and BB&B, and its parents, shareholders,
27 directors, officers, employees, representatives, agents, attorneys, divisions, subdivisions,
28 subsidiaries, partners, sister companies, and affiliates, and their predecessors, successors and

1 assigns ("Defendant Releasees"), and all entities from whom they obtain and to whom they directly
2 or indirectly distribute or sell Covered Products, including but not limited to Laminet Cover
3 Company, Lamco Advertising Specialties, Inc., manufacturers, suppliers, distributors, wholesalers,
4 customers, licensors, licensees retailers, franchisees, and cooperative members ("Additional
5 Releasees"), of all claims for violations of Proposition 65 based on exposure to DINP from Covered
6 Products as set forth in the Notice, with respect to any Covered Products manufactured, distributed,
7 or sold by BB&B prior to the Effective Date. This consent judgment shall have preclusive effect
8 such that no other person or entity, whether purporting to act in his, her, or its interests or the public
9 interest shall be permitted to pursue and/or take any action with respect to any violation of
10 Proposition 65 that was alleged in the Complaint, or that could have been brought pursuant to the
11 Notice against BB&B or its Additional Releasees of the Product including but not limited to
12 ("Proposition 65 Claims"). Compliance with the terms of this consent judgment constitutes
13 compliance with Proposition 65 with regard to the Covered Products.

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

26
27 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE
28 CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR
 AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY

1 HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS SETTLEMENT WITH
2 THE DEBTOR.

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

8 **6. ENFORCEMENT OF JUDGMENT**

9 6.1 The terms of this Consent Judgment shall be enforced exclusively by the Parties
10 hereto. The Parties may, by noticed motion or order to show cause before the Court, giving the
11 notice required by law, enforce the terms and conditions contained herein. In any proceeding
12 brought by either party to enforce this Consent Judgment, such Party may seek whatever fines,
13 costs, penalties or remedies as may be provided by law for any violation of Proposition 65 or this
14 Consent Judgment.

15 6.2 In the event that, at any time following 180 days after notice of entry of this Consent
16 Judgment by the Court is filed and served on BB&B, Bell and/or her agents, attorneys, assigns, or
17 any other person acting in the public interest under Health & Safety Code § 25249.7(d) and/or
18 Business & Professions Code § 17200 identifies one or more retail stores owned or principally
19 operated by BB&B in the State of California (hereinafter, "retail outlet") at which required
20 warnings for Covered Products are not being or were not given, or at which Covered Products that
21 does not meet the reformulation requirements of Section 3.1 of this Consent Judgment, are or were
22 sold, Bell or such person shall notify BB&B in writing of such alleged failure(s) to warn or
23 reformulate (the "Probationary Notice of Default"). The Probationary Notice of Default shall be
24 sent by certified mail to the person identified in Section 9.1 of this Consent Judgment to receive
25 notices for BB&B. The Probationary Notice shall set forth the alleged violation(s) and the date the
26 alleged violation(s) was or were observed, the retail outlet(s) in question, a description of the
27 product giving rise to the alleged violation(s) with sufficient detail to allow BB&B to determine
28 the basis for the claim being asserted, and some other form of documentary evidence specifically

1 in support of the allegation that warnings are required and have not been posted or given or that the
2 reformulation requirements have not been complied with.

3 6.3 In the event BB&B corrects the alleged default(s) within sixty (60) days of receiving
4 the Probationary Notice of Default, Bell or the notifying person shall take no further enforcement
5 action with respect to such violation(s). In the event BB&B fails to correct such alleged default(s)
6 within sixty (60) days following the Probationary Notice of Default from Bell or other notifying
7 person, subject to the provisions of Section 6.4 of this Consent Judgment, BB&B shall pay Bell or
8 the notifying person, as a stipulated penalty for failure to remedy the alleged default(s), the amount
9 of Five Thousand Dollars (\$5,000.00).

10 6.4 In the event that BB&B wishes to contest the allegations contained in the
11 Probationary Notice of Default served pursuant to Section 6.2, it shall notify Bell or notifying
12 person of such in writing within thirty (30) days of its receipt of the Probationary Notice of Default.
13 BB&B may provide any documentary evidence to Bell or notifying person in support of its position.
14 In the event that, upon a good faith review of the evidence, Bell or the notifying person agrees with
15 BB&B's position, he, she or it shall take no further action hereunder. In the event that BB&B
16 provides documentary evidence, and Bell or notifying person disagrees with BB&B's position, he,
17 she or it shall, within thirty (30) days notify BB&B of such and provide BB&B, in writing, with
18 the reasons for its disagreement, including supporting test results. Thereafter, the parties shall meet
19 and confer to attempt to resolve their dispute on mutually acceptable terms; if no such resolution
20 results, (a) Bell or the notifying person may by motion or order to show cause before the Superior
21 Court of Alameda County, seek to enforce the terms and conditions contained in this Consent
22 Judgment, or (b) Bell or the notifying person may initiate an enforcement action for new violations
23 pursuant to Health & Safety Code § 252497(d) and/or Business & Professions Code § 17204.

24 **7. INTEGRATION**

25 7.1 This Consent Judgment contains the sole and entire agreement of the Parties and
26 any and all prior negotiations and understandings related hereto shall be deemed to have been
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1 merged within it. No representations or terms of agreement other than those contained herein exist
2 or have been made by any Party with respect to the other Party or the subject matter hereof.

3 **8. GOVERNING LAW**

4 8.1 The terms of this Consent Judgment shall be governed by the laws of the State of
5 California and apply within the State of California. In the event that Proposition 65 is repealed or
6 is otherwise rendered inapplicable by reason of law generally, or as to Covered Products, then
7 Defendant shall have no further obligations pursuant to this Consent Judgment with respect to, and
8 to the extent that, Covered Products are so affected.

9 **9. NOTICES**

10 9.1 Unless specified herein, all correspondence and notices required to be provided
11 pursuant to this Consent Judgment shall be in writing and personally delivered or sent by: (i) first-
12 class, (registered or certified mail) return receipt requested; or (ii) overnight courier on any party
13 by the other party at the following addresses:

14 For Defendant:

15 Kenneth O. Bradley, Esq.
16 Vice President - Litigation
17 Bed Bath & Beyond Inc.
18 650 Liberty Ave.
19 Union NJ 07083

20 And

21 For Bell:

22 Evan Smith
23 Brodsky & Smith, LLC
24 9595 Wilshire Blvd., Ste. 900
25 Beverly Hills, CA 90212

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

28 **10. COUNTERPARTS; FACSIMILE SIGNATURES**

10.1 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.

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

2 **APPROVAL**

3 11.1 Bell agrees to comply with the requirements set forth in California Health & Safety
4 Code §25249.7(f) and to promptly bring a Motion for Approval of this Consent Judgment and
5 Defendant agrees it shall support approval of such Motion.

6 11.2 This Consent Judgment shall not be effective until it is approved and entered by the
7 Court and shall be null and void if, for any reason, it is not approved by the Court. In such case,
8 the Parties agree to meet and confer on how to proceed and if such agreement is not reached within
9 30 days, the case shall proceed on its normal course.

10 11.3 If the Court approves this Consent Judgment and is reversed or vacated by an
11 appellate court, the Parties shall meet and confer as to whether to modify the terms of this Consent
12 Judgment. If the Parties do not jointly agree on a course of action to take, the case shall proceed on
13 its normal course on the trial court's calendar.

14 **12. MODIFICATION**

15 12.1 This Consent Judgment may be modified only by further stipulation of the Parties
16 and the approval of the Court or upon the granting of a motion brought to the Court by either Party.

17 **13. ATTORNEY'S FEES**

18 13.1 A party who unsuccessfully brings or contests an action arising out of this Consent
19 Judgment shall be required to pay the prevailing party's reasonable attorney's fees and costs unless
20 the unsuccessful party has acted with substantial justification. For purposes of this Consent
21 Judgment, the term substantial justification shall carry the same meaning as used in the Civil
22 Discovery Act of 1986, Code of Civil Procedure Section 2016, *et seq.*

23 13.2 Nothing in this Section shall preclude a Party from seeking an award of sanctions
24 pursuant to law.

25 **14. RETENTION OF JURISDICTION**

26 14.1 This Court shall retain jurisdiction of this matter to implement or modify the
27 Consent Judgment.
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15. AUTHORIZATION

15.1 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: *ll*

Date: _____

Date: 5/15/17

By: _____

By: *Debra Paul*

EMA BELL

BED BATH & BEYOND, INC.

IT IS SO ORDERED, ADJUDGED AND DECREED:

Dated:

5/10/2017

Paul D. Herbert
Judge of Superior Court

1 **15. AUTHORIZATION**

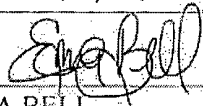
2 15.1 The undersigned are authorized to execute this Consent Judgment on behalf of their
3 respective Parties and have read, understood and agree to all of the terms and conditions of this
4 document and certifies that he or she is fully authorized by the Party he or she represents to execute
5 the Consent Judgment on behalf of the Party represented and legally bind that Party. Except as
6 explicitly provided herein each Party is to bear its own fees and costs.
7

8 **AGREED TO:**

AGREED TO:

9
10 Date: 6/1/17

Date: _____

11 By: 
12 EMA BELL

By: _____
BED BATH & BEYOND, INC.

13
14 **IT IS SO ORDERED, ADJUDGED AND DECREED:**

15
16 Dated: _____

Judge of Superior Court