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Attorneys for Plaintiff

FILED
ALAMEDA COUNTY

JUN 06 2017

CLERK OF THE SUPERIOR COURT
By Pam Williams
Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ALAMEDA

EMA BELL,

Plaintiff,

v.

MUSIC BY MAIL, INC.,

Defendant.

Case No.: RG17851900
CONSENT JUDGMENT

Judge: Ioana Petrou

Dept.: 15

Hearing Date: June 6, 2017

Hearing Time: 9:00 AM

Reservation #: R-1843126

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2 **1. INTRODUCTION**

3 1.1 **The Parties.** This Consent Judgment is entered into by and between Ema Bell
4 acting on behalf of the public interest (hereinafter “Bell”) and Music By Mail, Inc. (“Music By
5 Mail” or “Defendant”) with Bell and Defendant collectively referred to as the “Parties” and each
6 of them as a “Party.” Bell is an individual residing in California who seeks to promote awareness
7 of exposures to toxic chemicals and improve human health by reducing or eliminating hazardous
8 substances contained in consumer products. Music By Mail is a person in the course of doing
9 business 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 Di(2-ethylhexyl) phthalate (DEHP) from *Audiology* headphones without providing
12 clear and reasonable warnings under Proposition 65. DEHP is listed under Proposition 65 as a
13 chemical known to the State of California to cause reproductive toxicity.

14 1.3 **Notices of Violation/Complaint.** On or about December 5, 2016, Bell served
15 Music By Mail and various public enforcement agencies with a document entitled “60-Day Notice
16 of Violation” pursuant to Health & Safety Code §25249.7(d) (the “Notice”), alleging that
17 Defendant was in violation of Proposition 65 for failing to warn consumers and customers that
18 *Audiology* headphones exposed users in California to DEHP. No public enforcer has brought and
19 is diligently prosecuting the claims alleged in the Notice. On March 7, 2017, Bell filed a complaint
20 in the matter (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 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.

27 1.5 Defendant denies the material allegations contained in Bell’s Notice and Complaint
28 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 Headphones, Earphones,
8 and other audio listening devices, including but not limited to Stealth Bluetooth Headphones, SKU
9 No. 6 33711 34272 2, that are manufactured, distributed and/or offered for sale in California by
10 Music By Mail or Audio Technology of New York Inc. and that contains DEHP.

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

13 **3. INJUNCTIVE RELIEF: WARNINGS**

14 3.1 Commencing ninety (90) days after the Effective Date, Music By Mail shall not
15 manufacture, import, or purchase for sale in California any Covered Product that contains more
16 than 1,000 parts per million DEHP, unless the Covered Product is accompanied by the following
17 warning: "WARNING: This product contains a chemical known to the State of California to cause
18 cancer, birth defects and other reproductive harm."

19 3.2 The warning provided pursuant to Section 3.1 shall be affixed to or printed on the
20 Covered Product's packaging or labeling. The warning shall be prominently affixed to or printed
21 on the packaging or labeling and displayed with such conspicuousness, as compared with other
22 words, statements, or designs as to render it likely to be read and understood by an ordinary
23 individual under customary conditions of purchase or use. A warning may be contained in the same
24 section of the packaging, labeling, or instruction booklet that states other safety warnings, if any,
25 concerning the use of the product and shall be at least the same size as those other safety warnings.
26 Music by Mail and its downstream retailers shall have no obligation to label Covered Products that
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1 entered the stream of commerce prior to the Effective Date or within ninety (90) days after the
2 Effective Date.

3 **4. MONETARY TERMS**

4 4.1 **Civil Penalty.** Music By Mail shall pay a civil penalty of \$2,000.00 pursuant to
5 Health and Safety Code section 25249.7(b), to be apportioned in accordance with California Health
6 & Safety Code § 25192, with 75% of these funds remitted to the State of California's Office of
7 Environmental Health Hazard Assessment and the remaining 25% of the penalty remitted to Bell,
8 as provided by California Health & Safety Code § 25249.12(d).

9 4.1.1 Within ten (10) business days of the Effective Date, Music By Mail shall
10 issue two separate checks for the civil penalty payment to (a) "OEHHA" in the amount of
11 \$1,500.00; and (b) "Brodsky & Smith, LLC in Trust for Bell" in the amount of \$500.00. Payment
12 owed to Bell pursuant to this Section shall be delivered to the following payment address:

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

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

19 For United States Postal Service Delivery:

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

25 For Non-United States Postal Service Delivery:

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

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

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2 4.2 **Attorney Fees.** Music By Mail shall pay \$25,000.00 to Brodsky & Smith, LLC
3 (“Brodsky Smith”) as complete reimbursement for Plaintiff Bell’s attorneys’ fees and costs incurred
4 as a result of investigating, bringing this matter to Music By Mail’s attention, litigating and
5 negotiating and obtaining judicial approval of a settlement in the public interest, pursuant to Code
6 of Civil Procedure section 1021.5. Payment shall be made within ten (10) business days of the
7 Effective Date and sent to the address for Brodsky & Smith set forth in section 4.1.1, above.

8 4.3 Music By Mail shall pay the civil penalty and attorney fees in Sections 4.1 and 4.2
9 within ten (10) days of the Effective Date.

10 **5. RELEASE OF ALL CLAIMS**

11 5.1 This consent judgment is a full, final, and binding resolution between Bell acting in
12 the public interest, and Music By Mail, and its parents, shareholders, divisions, subdivisions,
13 subsidiaries, partners, sister companies, and affiliates, and their successors and assigns (“Defendant
14 Releasees”), and all entities from whom they obtain and to whom they directly or indirectly
15 distribute or sell Covered Products, including but not limited to Marshalls of MA, Inc.
16 (“Marshalls”), manufacturers, suppliers, distributors, wholesalers, customers, licensors, licensees
17 retailers, franchisees, and cooperative members (“Downstream Defendant Releasees”), of all
18 claims for violations of Proposition 65 based on exposure to DEHP from Covered Products as set
19 forth in the Notice, with respect to any Covered Products manufactured, distributed, or sold by
20 Music By Mail prior to ninety (90) days after the Effective Date. Compliance with the terms of
21 this Consent Judgment constitutes compliance with Proposition 65 with regard to the Covered
22 Products.

23 5.2 In addition to the foregoing, Bell, on behalf of herself, her past and current agents,
24 representatives, attorneys, and successors and/or assignees, and *not* in her representative capacity,
25 hereby waives all rights to institute or participate in, directly or indirectly, any form of legal action
26 and releases any Music By Mail, Defendant Releasees, and Downstream Defendant Releasees from
27 any and all manner of actions, causes of action, claims, demands, rights, suits, obligations, debts,
28 contracts, agreements, promises, liabilities, damages, charges, losses, costs, expenses, and

1 attorneys' fees, of any nature whatsoever, known or unknown, in law or equity, fixed or contingent,
2 now or in the future, with respect to any alleged violations of Proposition 65 related to or arising
3 from Covered Products manufactured distributed or sold by Music By Mail or Defendant Releasees.
4 With respect to the foregoing waivers and releases in this paragraph, Bell hereby specifically
5 waives any and all rights and benefits which she now has, or in the future may have, conferred by
6 virtue of the provisions of Section 1542 of the California Civil Code, which provides as follows:
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8 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE
9 CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS FAVOR
10 AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY
11 HIM MUST HAVE MATERIALLY AFFECTED HIS SETTLEMENT WITH
12 THE DEBTOR.

11 5.3 Music By Mail waives any and all claims against Bell, her attorneys and other
12 representatives, for any and all actions taken or statements made (or those that could have been
13 taken or made) by Bell and her attorneys and other representatives, whether in the course of
14 investigating claims or otherwise seeking enforcement of Proposition 65 against it in this matter,
15 and/or with respect to Covered Products.

16 **6. INTEGRATION**

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

21 **7. GOVERNING LAW**

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

3 8.1 Unless specified herein, all correspondence and notices required to be provided
4 pursuant to this Consent Judgment shall be in writing and personally delivered or sent by: (i) first-
5 class, (registered or certified mail) return receipt requested; or (ii) overnight courier on any party
6 by the other party at the following addresses:

7 For Defendant:

8 David Safdiah
9 Music By Mail, Inc. t/a Audiology
10 129 31st Street
11 Brooklyn, NY 11232

12 And

13 For Bell:

14 Evan Smith
15 Brodsky & Smith, LLC
16 2 Bala Plaza, Suite 510
17 Bala Cynwyd, PA 19004

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

20 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

21 9.1 This Consent Judgment may be executed in counterparts and by facsimile, each of
22 which shall be deemed an original, and all of which, when taken together, shall constitute one and
23 the same document.

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

26 10.1 Bell agrees to comply with the requirements set forth in California Health & Safety
27 Code §25249.7(f) and to promptly bring a Motion for Approval of this Consent Judgment and
28 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,

1 the Parties agree to meet and confer on how to proceed and if such agreement is not reached within
2 30 days, the case shall proceed on its normal course.

3 10.3 If the Court approves this Consent Judgment and is reversed or vacated by an
4 appellate court, the Parties shall meet and confer as to whether to modify the terms of this Consent
5 Judgment. If the Parties do not jointly agree on a course of action to take, the case shall proceed on
6 its normal course on the trial court's calendar.

7 **11. MODIFICATION**

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

10 **12. ATTORNEY'S FEES**

11 12.1 A party who unsuccessfully brings or contests an action arising out of this Consent
12 Judgment shall be required to pay the prevailing party's reasonable attorney's fees and costs unless
13 the unsuccessful party has acted with substantial justification. For purposes of this Consent
14 Judgment, the term substantial justification shall carry the same meaning as used in the Civil
15 Discovery Act of 1986, Code of Civil Procedure Section 2016, et seq.

16 12.2 Nothing in this Section shall preclude a Party from seeking an award of sanctions
17 pursuant to law.

18 **13. RETENTION OF JURISDICTION**

19 13.1 This Court shall retain jurisdiction of this matter to implement or modify the
20 Consent Judgment.

21 **14. AUTHORIZATION**

22 14.1 The undersigned are authorized to execute this Consent Judgment on behalf of their
23 respective Parties and have read, understood and agree to all of the terms and conditions of this
24 document and certifies that he or she is fully authorized by the Party he or she represents to execute
25 the Consent Judgment on behalf of the Party represented and legally bind that Party. Except as
26 explicitly provided herein each Party is to bear its own fees and costs.
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AGREED TO:

AGREED TO:

Date: 4/14/17
By: Anthony Ferreiro
ANTHONY FERREIRO

Date: 7/3/17
By: [Signature]
MUSIC BY MAIL, INC.

IT IS SO ORDERED, ADJUDGED AND DECREED:

Dated: 6/6/17

[Signature]
Judge of Superior Court