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8 Ema Bell

FILED  
ALAMEDA COUNTY

JAN 31 2018

CLERK OF THE SUPERIOR COURT  
By *Daneta Wilson* Deputy

DEC 07 2017

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

11 EMA BELL,

12 Plaintiff,

13 v.

14 D.M. MERCHANDISING, INC.,

15 Defendant.

Case No.: RG17880125

CONSENT JUDGMENT

Judge: ~~Ioana Petrou~~

Dept.: 15

Hearing Date: January 31, 2018

Hearing Time: 9:00 AM

Reservation #: R-1910857

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BY FAX

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 DM Merchandising, Inc., (hereinafter  
4 “DM Merchandising”), with Bell and DM Merchandising collectively referred to as the “Parties”  
5 and each of them as a “Party.” Bell is an individual residing in California who seeks to promote  
6 awareness of exposures to toxic chemicals and improve human health by reducing or eliminating  
7 hazardous substances contained in consumer products. DM Merchandising employs ten or more  
8 persons and is a person in the course of doing business for purposes of Proposition 65, Cal. Health  
9 & Safety Code §§ 25249.6 et seq.

10           1.2   **Allegations and Representations.** Bell alleges that DM Merchandising has  
11 exposed individuals to Di(2-ethylhexyl)phthalate (“DEHP”) from Soothie ice packs without  
12 providing clear and reasonable warnings under Proposition 65. DEHP is listed under Proposition  
13 65 as a chemical known to the State of California to cause reproductive toxicity.

14           1.3   **Notices of Violation/Complaint.** On or about April 27, 2017, Bell served DM  
15 Merchandising 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 DM  
17 Merchandising was in violation of Proposition 65 for failing to warn consumers and customers that  
18 the Soothie ice packs exposed users in California to DEHP. No public enforcer has brought and is  
19 diligently prosecuting the claims alleged in the Notice. On or about October 25, 2017, Bell filed a  
20 complaint in the matter as captioned above (“Complaint”). The Complaint was amended on  
21 November 1, 2017.

22           1.4   For purposes of this Consent Judgment only, the Parties stipulate that this Court has  
23 jurisdiction over DM Merchandising as to the allegations contained in the complaint filed in this  
24 matter, that venue is proper in the County of Alameda, and that this Court has jurisdiction to  
25 approve, enter, and oversee the enforcement of this Consent Judgment as a full and final binding  
26 resolution of all claims which were or could have been raised in the Complaint based on the facts  
27 alleged therein and/or in the Notice.  
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1           1.5     DM Merchandising denies the material allegations contained in Bell'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 DM Merchandising of any fact, finding, issue of law, or  
4 violation of law; nor shall compliance with this Consent Judgment constitute or be construed as an  
5 admission by DM Merchandising of any fact, finding, conclusion, issue of law, or violation of law,  
6 such being specifically denied by DM Merchandising. However, this section shall not diminish or  
7 otherwise affect the obligations, responsibilities, and duties of DM Merchandising under this  
8 Consent Judgment.

9           **2.     DEFINITIONS**

10           2.1     **Covered Products.** The term "Covered Products" means Soothie Ice Packs  
11 including, but not limited to, UPC No. 7 22950 25718 0 that have been distributed, sold and/or  
12 offered for sale in California, and that contain DEHP.

13           2.2     **Effective Date.** The term "Effective Date" means the date this Consent Judgment is  
14 entered as a Judgment of the Court.

15           **3.     INJUNCTIVE RELIEF; WARNINGS**

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

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

3 **4. MONETARY TERMS**

4 4.1 **Civil Penalty.** DM Merchandising shall pay a Civil Penalty of \$3,000.00 pursuant  
5 to Health and Safety Code section 25249.7(b), to be apportioned in accordance with California  
6 Health & Safety Code § 25192, with 75% of these funds remitted to the State of California's Office  
7 of Environmental Health Hazard Assessment and the remaining 25% of the penalty remitted to  
8 Bell, as provided by California Health & Safety Code § 25249.12(d).

9 4.1.1 Within ten (10) business days of the Effective Date, DM Merchandising  
10 shall issue two separate checks for the Civil Penalty payment to (a) "OEHHA" in the amount of  
11 \$2,250.00; and (b) "Brodsky & Smith, LLC in Trust for Bell" in the amount of \$750.00. 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  
Bala Cynwyd, PA 19004

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

18 For United States Postal Service Delivery:

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

22 For Non-United States Postal Service Delivery:

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

26 A copy of the check payable to OEHHA shall be mailed to Brodsky & Smith, LLC at the  
27 address set forth above as proof of payment to OEHHA.  
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1           4.2     **Attorney Fees.** DM Merchandising shall pay \$32,000.00 to Brodsky & Smith, LLC  
2 (“Brodsky Smith”) as complete reimbursement for Plaintiff Bell’s attorneys’ fees and costs incurred  
3 as a result of investigating, bringing this matter to DM Merchandising’s attention, litigating and  
4 negotiating and obtaining judicial approval of a settlement in the public interest, pursuant to Code  
5 of Civil Procedure section 1021.5. Payment shall be made within ten (10) business days of the  
6 Effective Date and sent to the address for Brodsky & Smith set forth in section 4.1.1, above.

7           4.3     DM Merchandising shall pay the civil penalty and attorney fees in Sections 4.1 and  
8 4.2 within ten (10) days of the Effective Date.

9           **5.     RELEASE OF ALL CLAIMS**

10           5.1     This consent judgment is a full, final, and binding resolution between Bell acting in  
11 the public interest, and DM Merchandising and its parents, shareholders, divisions, subdivisions,  
12 subsidiaries, partners, sister companies, and affiliates, and their successors and assigns (“Defendant  
13 Releasees”), and all entities from whom they obtain and to whom they directly or indirectly  
14 distribute or sell Covered Products, including but not limited to manufacturers, suppliers,  
15 distributors, wholesalers, customers, licensors, licensees retailers, franchisees, and cooperative  
16 members, including but not limited to Big 5 Corp., and its subsidiaries and affiliates (“Downstream  
17 Defendant Releasees”), of all claims for violations of Proposition 65 based on exposure to DEHP  
18 from Covered Products as set forth in the Notice, with respect to any Covered Products  
19 manufactured, distributed, or sold by DM Merchandising prior to the Effective Date. Compliance  
20 with the terms of this consent judgment constitutes compliance with Proposition 65 with regard to  
21 the Covered Products.

22           5.2     In addition to the foregoing, Bell, on behalf of herself, her past and current agents,  
23 representatives, attorneys, and successors and/or assignees, and *not* in her representative capacity,  
24 hereby waives all rights to institute or participate in, directly or indirectly, any form of legal action  
25 and releases any DM Merchandising, Defendant Releasees, and Downstream Defendant Releasees  
26 from any and all manner of actions, causes of action, claims, demands, rights, suits, obligations,  
27 debts, contracts, agreements, promises, liabilities, damages, charges, losses, costs, expenses, and  
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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 DM Merchandising or Defendant  
4 Releasees. With respect to the foregoing waivers and releases in this paragraph, Bell hereby  
5 specifically waives any and all rights and benefits which she now has, or in the future may have,  
6 conferred by virtue of the provisions of Section 1542 of the California Civil Code, which provides  
7 as follows:

8  
9 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE  
10 CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS FAVOR  
11 AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY  
12 HIM MUST HAVE MATERIALLY AFFECTED HIS SETTLEMENT WITH  
13 THE DEBTOR.

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

19 **6. INTEGRATION**

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

24 **7. GOVERNING LAW**

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

1       **8.     NOTICES**

2             8.1     Unless specified herein, all correspondence and notices required to be provided  
3 pursuant to this Consent Judgment shall be in writing and personally delivered or sent by: (i) first-  
4 class, (registered or certified mail) return receipt requested; or (ii) overnight courier on any party  
5 by the other party at the following addresses:

6     For DM Merchandising:

7             Myles Marks  
8             Director of Purchasing  
9             D.M. Merchandising, Inc.  
10            835 N. Church Ct.  
11            Elmhurst, IL 60126

12     With a copy to:

13             Jeffrey Margulies  
14             Norton Rose Fulbright US LLP  
15             555 South Flower St.  
16             Forty First Floor  
17             Los Angeles, CA 90071

18     And

19     For Bell:

20             Evan Smith  
21             Brodsky & Smith, LLC  
22             2 Bala Plaza, Suite 510  
23             Bala Cynwyd, PA 19004

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

26       **9.     COUNTERPARTS; FACSIMILE SIGNATURES**

27             9.1     This Consent Judgment may be executed in counterparts and by facsimile, each of  
28 which shall be deemed an original, and all of which, when taken together, shall constitute one and  
the same document.

1 **10. COMPLIANCE WITH HEALTH & SAFETY CODE § 25249.7(D)/COURT**

2 **APPROVAL**

3 10.1 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 DM  
5 Merchandising agrees it shall support approval of such Motion.

6 10.2 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 10.3 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 **11. MODIFICATION**

15 11.1 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 **12. ATTORNEY'S FEES**

18 12.1 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 12.2 Nothing in this Section shall preclude a Party from seeking an award of sanctions  
24 pursuant to law.

25 **13. RETENTION OF JURISDICTION**

26 13.1 This Court shall retain jurisdiction of this matter to implement or modify the  
27 Consent Judgment.  
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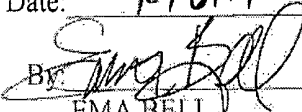
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**14. AUTHORIZATION**

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: 12/6/17  
By:   
EMA BELL

Date: \_\_\_\_\_  
By: \_\_\_\_\_  
D.M. MERCHANDISING, INC.

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

Dated: \_\_\_\_\_

\_\_\_\_\_  
Judge of Superior Court

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**AGREED TO:**

**AGREED TO:**

Date: _____	Date: <u>11.15.17</u>
By: _____ EMA BELL	By: <u>[Signature]</u> D.M. MERCHANDISING, INC.

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

Dated: January 31, 2018

[Signature]  
Judge of Superior Court

**EVELIO M. GRILLO  
JUDGE**