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FILED
ALAMEDA COUNTY

AUG 02 2019

CLERK OF THE SUPERIOR COURT
 By *Paul Smith* Deputy

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

10 EMA BELL,

11 Plaintiff,

12 v.

13 COMPASS HEALTH BRANDS CORP.,
 14 ACORN DEVELOPMENT COMPANIES, INC.,
 15 APEX MEDICAL CORP., RITE AID CORP.,

Defendants.

Case No.: RG17880997

CONSENT JUDGMENT

Judge: C. Don Clay

Dept.: 6

Hearing Date: June 7, 2019

Hearing Time: 10:00 AM

Reservation #: R-2061546

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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 Apex Medical Corp. (“Carex”) with
4 Bell and Defendant collectively referred to as the “Parties” and each of them as a “Party.” Bell is
5 an individual residing in California that seeks to promote awareness of exposures to toxic chemicals
6 and improve human health by reducing or eliminating hazardous substances contained in consumer
7 products. Carex is alleged to be a person in the course of doing business for purposes of Proposition
8 65, Cal. Health & Safety Code §§ 25249.6 et seq.

9 **1.2 Allegations and Representations.** Bell alleges that Defendant has exposed
10 individuals to diisononyl phthalate (DINP) from Carex Cast Protectors without providing clear and
11 reasonable warnings under Proposition 65. DINP is listed under Proposition 65 as a chemical
12 known to the State of California to cause cancer.

13 **1.3 Notice of Violation/Complaint.** On or about June 28, 2017, Bell served Carex,
14 Compass Health Brands Corp. (“Compass Health”), Acorn Development Companies, Inc.
15 (“Acorn”), Rite Aid Corp. (“Rite Aid”) (collectively, “Defendants”) and various public
16 enforcement agencies with documents entitled “60-Day Notice of Violation” pursuant to Health &
17 Safety Code § 25249.7(d) (the “Notice”), alleging that Defendants were in violation of Proposition
18 65 for failing to warn consumers and customers that Carex Cast Protectors exposed users in
19 California to DINP. No public enforcer has brought and is diligently prosecuting the claims alleged
20 in the Notice. On November 2, 2017, Bell filed a complaint (the “Complaint” or the “Action”) in
21 the matter against Carex, Compass Health, Acorn and Rite Aid¹.

22 **1.4** For purposes of this Consent Judgment only, the Parties stipulate that this Court has
23 jurisdiction over Carex as to the allegations contained in the Complaint filed in this matter, that
24 venue is proper in the County of Alameda, and that this Court has jurisdiction to approve, enter,
25 and oversee the enforcement of this Consent Judgment as a full and final binding resolution of all
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27 ¹ On April 18, 2019, defendants Compass Health, Acorn and Rite Aid were dismissed
28 from the Action.

1 claims which were or could have been raised in the Complaint based on the facts alleged therein
2 and/or in the Notice.

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

10 **2. DEFINITIONS**

11 2.1 **Covered Products.** The term “Covered Products” means Carex Cast Protectors that
12 are manufactured, distributed, offered for sale and/or sold in California by Carex.

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 **Reformulation of Covered Products.** Commencing ninety (90) days after the
17 Effective Date, and continuing thereafter, Covered Products that Carex directly manufactures,
18 imports, distributes, sells, or offers for sale in California shall either: (a) be Reformulated Products
19 pursuant to § 3.2, below; or (b) be labeled with a clear and reasonable exposure warning pursuant
20 to §§ 3.3 and 3.4, below. For purposes of this Consent Judgment, a “Reformulated Product” is a
21 Covered Product that is in compliance with the standard set forth in § 3.2 below. The warning
22 requirement set forth in §§ 3.3 and 3.4 shall not apply to any Reformulated Product.

23 3.2 **Reformulation Standard.** “Reformulated Products” shall mean Covered Products
24 that contain concentrations less than or equal to 0.1% (1,000 parts per million (ppm) of DINP when
25 analyzed pursuant to U.S. Environmental Protection Agency testing methodologies 3580A and
26 8270C or other methodology utilized by federal or state government agencies for the purpose of
27 determining the phthalate content in a solid substance.
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1 3.3 **Clear and Reasonable Warning.** Commencing ninety (90) days after the Effective
2 Date, and continuing thereafter, a clear and reasonable exposure warning as set forth in this §§ 3.3
3 and 3.4 must be provided for any Covered Product that Carex manufacturers, imports, distributes,
4 sells, or offers for sale in California that is not a Reformulated Product. There shall be no obligation
5 for Carex to provide a warning for Covered Products that enter the stream of commerce prior to the
6 date that is ninety 90) days after the Effective Date of this Consent Judgment. 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 diisononyl
10 phthalate (DINP), which is known to the State of California to cause cancer. For
11 more information go to www.P65Warnings.ca.gov.

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

14 △ **WARNING:** Cancer - www.P65Warnings.ca.gov.

15 3.4 A **Warning** or **Alternative Warning** provided pursuant to § 3.3 must print the word
16 “**WARNING:**” in all capital letters and in bold font, followed by a colon. The warning symbol to
17 the left of the word “**WARNING:**” must be a black exclamation point in a yellow equilateral
18 triangle with a black outline, except that if the sign or label for the Covered Product does not use
19 the color yellow, the symbol may be in black and white. The symbol must be in a size no smaller
20 than the height of the word “**WARNING:**”. The warning shall be affixed to or printed on the
21 Covered Product’s packaging or labeling, or on a placard, shelf tag, sign or electronic device or
22 automatic process, providing that the warning is displayed with such conspicuousness, as compared
23 with other words, statements, or designs as to render it likely to be read and understood by an
24 ordinary individual under customary conditions of purchase or use. A warning may be contained
25 in the same section of the packaging, labeling, or instruction booklet that states other safety
26 warnings, if any, concerning the use of the Covered Product and shall be at least the same size as
27 those other safety warnings.
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1 **3.5 Compliance with Warning Regulations.** Carex shall be deemed to be in
2 compliance with this Consent Judgment by either adhering to §§ 3.3 and 3.4 of this Consent
3 Judgment or by complying with warning requirements adopted by the State of California's Office
4 of Environmental Health Hazard Assessment ("OEHHA") after the Effective Date.

5 **4. MONETARY TERMS**

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

10 4.1.1 Within ten (10) days of the Effective Date, Carex shall issue two separate
11 checks for the Civil Penalty payment to (a) "OEHHA" in the amount of \$2,250.00; and (b)
12 "Brodsky & Smith, LLC in Trust for Bell" in the amount of \$750.00. Payment owed to Bell
13 pursuant to this Section shall be delivered to the following payment address:

14 Evan J. Smith, Esquire
15 Brodsky & Smith, LLC
16 Two Bala Plaza, Suite 510
17 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
23 Office of Environmental Health Hazard Assessment
24 P.O. Box 4010
25 Sacramento, CA 95812-4010

26 For Non-United States Postal Service Delivery:

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

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

3 4.2 **Attorneys' Fees.** Within ten (10) days of the Effective Date, Carex shall pay
4 \$29,500.00 to Brodsky & Smith, LLC ("Brodsky Smith") as complete reimbursement for Bell's
5 attorneys' fees and costs incurred as a result of investigating, bringing this matter to the attention
6 of Carex, litigating and negotiating and obtaining judicial approval of a settlement in the public
7 interest, pursuant to Code of Civil Procedure § 1021.5.

8 **5. RELEASE OF ALL CLAIMS**

9 5.1 This Consent Judgment is a full, final, and binding resolution between Bell acting
10 on her own behalf, and on behalf of the public interest, and Carex, and its parents, shareholders,
11 members, directors, officers, managers, employees, representatives, agents, attorneys, divisions,
12 subdivisions, subsidiaries, partners, sister companies, and affiliates, and their predecessors,
13 successors and assigns ("Defendant Releasees"), and all entities from whom they obtain and to
14 whom they directly or indirectly distribute or sell Covered Products, including but not limited to
15 manufacturers, suppliers, distributors, wholesalers, customers, licensors, licensees retailers,
16 franchisees, and cooperative members, including but not limited to Compass Health, Acorn, and
17 Rite Aid ("Downstream Releasees"), of all claims for violations of Proposition 65 based on
18 exposure to DINP from Covered Products as set forth in the Notice, with respect to any Covered
19 Products manufactured, distributed, or sold by Carex prior to the Effective Date. This Consent
20 Judgment shall have preclusive effect such that no other person or entity, whether purporting to act
21 in his, her, or its interests or the public interest shall be permitted to pursue and/or take any action
22 with respect to any violation of Proposition 65 that was alleged in the Complaint, or that could have
23 been brought pursuant to the Notice against Carex or its Downstream Releasees of the Product
24 ("Proposition 65 Claims"). Compliance with the terms of this Consent Judgment constitutes
25 compliance with Proposition 65 with regard to the Covered Products.

26 5.2 In addition to the foregoing, Bell, on behalf of herself, her past and current agents,
27 representatives, attorneys, and successors and/or assignees, and not in her representative capacity,
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1 hereby waives all rights to institute or participate in, directly or indirectly, any form of legal action
2 and releases Carex, Defendant Releasees, and Downstream Releasees from any and all manner of
3 actions, causes of action, claims, demands, rights, suits, obligations, debts, contracts, agreements,
4 promises, liabilities, damages, charges, losses, costs, expenses, and attorneys' fees, of any nature
5 whatsoever, known or unknown, in law or equity, fixed or contingent, now or in the future, with
6 respect to any alleged violations of Proposition 65 related to or arising from Covered Products
7 manufactured, distributed, or sold by Carex, Defendant Releasees or Downstream Releasees. With
8 respect to the foregoing waivers and releases in this Section, Bell hereby specifically waives any
9 and all rights and benefits which she now has, or in the future may have, conferred by virtue of the
10 provisions of § 1542 of the California Civil Code, which provides as follows:

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

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

20 6. INTEGRATION

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

25 7. GOVERNING LAW

26 7.1 The terms of this Consent Judgment shall be governed by the laws of the State of
27 California and apply within the State of California. In the event that Proposition 65 is repealed or
28 is otherwise rendered inapplicable by reason of law generally, or as to Covered Products, then

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Carex shall have no further obligations pursuant to this Consent Judgment with respect to, and to the extent that, Covered Products are so affected.

8. NOTICES

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

For Defendant:

Christopher Amantea
Steptoe & Johnson LLP
633 West 5th Street, 7th Floor
Los Angeles, CA 90071

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. Defendant agrees it shall support approval of such Motion.

1 10.2 This Consent Judgment shall not be effective until it is approved and entered by the
2 Court and shall be null and void if, for any reason, it is not approved by the Court. In such case,
3 the Parties agree to meet and confer on how to proceed and if such agreement is not reached within
4 thirty (30) days, the case shall proceed on its normal course.

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

9 **11. MODIFICATION**

10 11.1 This Consent Judgment may be modified only by further stipulation of the Parties
11 and the approval of the Court or upon the granting of a motion brought to the Court by either Party.

12 **12. ATTORNEY'S FEES**

13 12.1 A party who unsuccessfully brings or contests an action arising out of this Consent
14 Judgment shall be required to pay the prevailing party's reasonable attorney's fees and costs.

15 12.2 Nothing in this Section shall preclude a Party from seeking an award of sanctions
16 pursuant to law.

17 **13. RETENTION OF JURISDICTION**

18 13.1 This Court shall retain jurisdiction of this matter to implement or modify the
19 Consent Judgment.

20 **14. AUTHORIZATION**

21 14.1 The undersigned are authorized to execute this Consent Judgment on behalf of their
22 respective Parties and have read, understood and agree to all of the terms and conditions of this
23 document and certify that he or she is fully authorized by the Party he or she represents to execute
24 the Consent Judgment on behalf of the Party represented and legally bind that Party. Except as
25 explicitly provided herein each Party is to bear its own fees and costs.
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AGREED TO:

AGREED TO:

Date: _____

Date: 2/28/19

By: _____
EMA BELL

By: [Signature]
APEX MEDICAL CORP.

IT IS SO ORDERED, ADJUDGED AND DECREED:

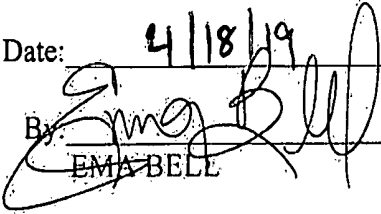
Dated: _____

Judge of Superior Court

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AGREED TO:

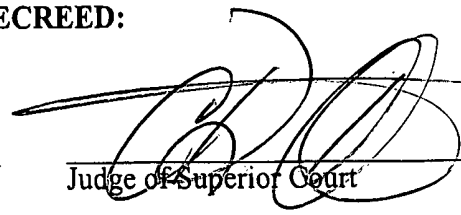
AGREED TO:

Date: 4/18/19
By: 
EMMA BELLE

Date: _____
By: _____
APEX MEDICAL CORP.

IT IS SO ORDERED, ADJUDGED AND DECREED:

Dated: Aug 2, 2019


Judge of Superior Court
C. Don Clay