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FILED
ALAMEDA COUNTY

MAY 15 2018

CLERK OF THE SUPERIOR COURT
By *Punya DeBrey* Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ALAMEDA

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EMA BELL,
Plaintiff,
v.
FASHIONCRAFT-EXCELLO, LLC,
Defendant.

Case No.: RG18890604
~~PROPOSED~~ CONSENT
JUDGMENT
Judge: Stephen Kaus
Dept.: 19
Hearing Date: May 9, 2018
Reservation #: R-1930117

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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 FashionCraft-Excello, LLC (“FashionCraft-Excello” 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 that seeks to promote awareness of exposures to toxic chemicals and improve human health by reducing or eliminating hazardous substances contained in consumer products. FashionCraft-Excello is alleged to be a person in the course of doing business for purposes of Proposition 65, The Safe Drinking Water and Toxic Enforcement Act of 1986, Cal. Health & Safety Code §§ 25249.6 et seq.

1.2 **Allegations and Representations.** Bell alleges that Defendant has exposed individuals in California to Di(2-ethylhexyl) phthalate (DEHP) from the use of Fashioncraft Travel Pill Cases without providing clear and reasonable warnings under Proposition 65. DEHP is listed under Proposition 65 as a chemical known to the State of California to cause cancer and reproductive toxicity.

1.3 **Notices of Violation/Complaint.** On or about October 2, 2017, Bell served FashionCraft-Excello, Inc. and various public enforcement agencies with documents 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 Fashioncraft Travel Pill Cases exposed users in California to DEHP. Effective January 1, 2018 FashionCraft-Excello, Inc. was merged into FashionCraft-Excello, LLC. No public enforcer has brought and is diligently prosecuting the claims alleged in the Notices. On January 24, 2018, 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

1 and/or in the Notice.

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

10 **2. DEFINITIONS**

11 2.1 **Covered Products.** The term "Covered Products" means Fashioncraft Travel Pill
12 Cases in all colors and sizes that have been imported, manufactured, directly or indirectly
13 distributed and/or offered for sale in California by FashionCraft-Excello.

14 2.2 **Effective Date.** The term "Effective Date" means the date Plaintiff serves notice on
15 Defendant that this Consent Judgment has been entered as a Judgment of the Court.

16 **3. INJUNCTIVE RELIEF: WARNINGS**

17 3.1 Commencing ninety (90) days after the Effective Date, and continuing thereafter,
18 FashionCraft-Excello shall not manufacture or order from any supplier any Covered Products
19 intended for retail sale in California that contains DEHP on any component to which consumers
20 are exposed in excess of 0.1% (1,000 ppm) (hereinafter "Reformulated Products") unless the
21 Covered Product is accompanied by a warning as set forth herein. Covered Products distributed or
22 sold by FashionCraft-Excello before the Effective Date of this Consent Judgment may sell through
23 without a warning even if not Reformulated Products. Until August 30, 2018, the warning shall
24 consist of either:

25 (a) The statement: "WARNING: This product contains a chemical known to the State
26 of California to cause cancer and birth defects or other reproductive harm."; or
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1 (b) (1) A symbol consisting of a black exclamation point in a yellow equilateral triangle
2 with a bold black outline to the left of the word "warning" in bold all capital letters, followed
3 by the statement "This product can expose you to chemicals including Di(2-
4 ethylhexyl)phthalate (DEHP), which is known to the State of California to cause cancer and
5 birth defects or other reproductive harm. For more information, go to
6 www.P65Warnings.ca.gov."; or (2) a warning consisting of a symbol that is a black
7 exclamation point in a yellow equilateral triangle with a bold black outline to the left of the
8 word "warning" in bold all capital letters, followed by the statement "Cancer and
9 Reproductive Harm - www.P65Warnings.ca.gov."¹

10 For Covered Products manufactured on and after August 30, 2018, if a warning is required for a
11 Covered Product the warning set forth in Section 3.1(b) shall be used.

12 3.2 When required, the warning provided pursuant to Section 3.1 shall be affixed to or
13 printed on the Covered Product's packaging or labeling, or on a placard, shelf tag, sign or electronic
14 device or automatic process, provided that the warning is displayed with such conspicuousness, as
15 compared with other words, statements, or designs as to render it likely to be read and understood
16 by an ordinary individual under customary conditions of purchase or use. A warning may be
17 contained in the same section of the packaging, labeling, or instruction booklet that states other
18 safety warnings, if any, concerning the use of the product and shall be at least the same size as those
19 other safety warnings.

20 4. MONETARY TERMS

21 4.1 **Civil Penalty.** FashionCraft-Excello shall pay a Civil Penalty of \$1,000.00 pursuant
22 to Health and Safety Code section 25249.7(b), to be apportioned in accordance with California
23 Health & Safety Code § 25192, with 75% of these funds remitted to the State of California's Office
24 of Environmental Health Hazard Assessment and the remaining 25% of the Civil Penalty remitted
25 to Bell, as provided by California Health & Safety Code § 25249.12(d).

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27 ¹ The triangular symbol need only be in yellow where the sign, label, shelf tag or other
28 transmission format is being printed in color for purposes of other language, symbols or designs.

1 4.1.1 Within ten (10) business days of the Effective Date, FashionCraft-Excello
2 shall issue two separate checks for the Civil Penalty payment to: (a) "OEHHA" in the amount of
3 \$750.00; and (b) "Brodsky & Smith, LLC in Trust for Bell" in the amount of \$250.00. Payment
4 owed to Bell pursuant to this Section shall be delivered to the following payment address:

5 Evan J. Smith, Esquire
6 Brodsky & Smith, LLC
7 Two Bala Plaza, Suite 510
8 Bala Cynwyd, PA 19004

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

10 For United States Postal Service Delivery:

11 Mike Gyurics
12 Fiscal Operations Branch Chief
13 Office of Environmental Health Hazard Assessment
14 P.O. Box 4010
15 Sacramento, CA 95812-4010.

14 For Non-United States Postal Service Delivery:

15 Mike Gyurics
16 Fiscal Operations Branch Chief
17 Office of Environmental Health Hazard Assessment
18 1001 I Street
19 Sacramento, CA 95814.

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

20 4.2 **Conditional Civil Penalty.** One Hundred Eighty (180) days after the Effective
21 Date, FashionCraft-Excello shall make a Conditional Civil Penalty payment of \$1,000.00 on the
22 same terms as set forth in Section 4.1.1 pertaining to the Civil Penalty. Pursuant to Title 11
23 California Code of Regulations, Section 3203(c), Bell agrees that the Conditional Civil Penalty
24 payment shall be waived in its entirety if, on or before the date the Conditional Civil Penalty
25 payment is due, an officer of FashionCraft-Excello provides Bell with a signed declaration
26 certifying that all Covered Products it ships for sale or distributes for sale in California as of the
27 date of its certification are Reformulated Products or are marked with the warnings required by this
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1 Consent Decree (hereinafter "Labeled Product") and that FashionCraft-Excello will continue to
2 offer only Reformulated Products or Labeled Products in California in the future. The option to
3 provide a declaration certifying its complete early reformulation or labeling of the Covered
4 Products in lieu of making the Conditional Civil Penalty payment otherwise required by this Section
5 is a material term, and time is of the essence.

6 4.3 **Attorney Fees.** FashionCraft-Excello shall pay \$16,500.00 to Brodsky & Smith,
7 LLC ("Brodsky Smith") as complete reimbursement for Plaintiff Bell's attorneys' fees and costs
8 incurred as a result of investigating, bringing this matter to FashionCraft-Excello's attention,
9 litigating and negotiating and obtaining judicial approval of a settlement in the public interest,
10 pursuant to Code of Civil Procedure section 1021.5.

11 4.4 FashionCraft-Excello shall pay the Civil Penalty and Attorney Fees identified in
12 Sections 4.1 and 4.3 within ten (10) business days of the Effective Date.

13 **5. RELEASE OF ALL CLAIMS**

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

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

18 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE
19 CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR
20 AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY
21 HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS SETTLEMENT WITH
22 THE DEBTOR. EB [initials]

23 5.3 FashionCraft-Excello waives any and all claims against Bell, her attorneys and other
24 representatives, for any and all actions taken or statements made by Bell and her attorneys and other
25 representatives, whether in the course of investigating claims or otherwise seeking enforcement of
26 Proposition 65 against it in this matter, and/or with respect to Covered Products up through the
27 Effective Date.
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1 **6. INTEGRATION**

2 6.1 This Consent Judgment contains the sole and entire agreement of the Parties and
3 any and all prior negotiations and understandings related hereto shall be deemed to have been
4 merged within it. No representations or terms of agreement other than those contained herein exist
5 or have been made by any Party with respect to the other Party or the subject matter hereof.

6 **7. GOVERNING LAW**

7 7.1 The terms of this Consent Judgment shall be governed by the laws of the State of
8 California and apply within the State of California. In the event that Proposition 65 is repealed or
9 is otherwise rendered inapplicable by reason of law generally, or as to Covered Products, then
10 Defendant shall have no further obligations pursuant to this Consent Judgment with respect to, and
11 to the extent that, Covered Products are so affected.

12 **8. NOTICES**

13 8.1 Unless specified herein, all correspondence and notices required to be provided
14 pursuant to this Consent Judgment shall be in writing and personally delivered or sent by: (i) first-
15 class, (registered or certified mail) return receipt requested; or (ii) overnight courier on any party
16 by the other party at the following addresses:

17 For Defendant:

18 Judith M. Praitis
19 Sidley Austin LLP
20 555 West Fifth Street
 Los Angeles, CA 90013.

21 And

22 For Bell:

23 Evan Smith
24 Brodsky & Smith, LLC
25 9595 Wilshire Blvd., Ste. 900
 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. Courtesy copies of notices may be
28 provided by email.

1 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

2 9.1 This Consent Judgment may be executed in counterparts and by PDF signatures,
3 each of which shall be deemed an original, and all of which, when taken together, shall constitute
4 one and the same document.

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

7 10.1 Bell agrees to comply with the requirements set forth in California Health & Safety
8 Code §25249.7(f) and to promptly bring a Motion for Approval of this Consent Judgment.
9 Defendant agrees to file a Notice of Non-Opposition with the Court if requested to do so by Bell.

10 10.2 This Consent Judgment shall not be effective until the Effective Date and shall be
11 null and void if, for any reason, it is not approved by the Court within six months of execution by
12 all Parties. In such case, the Parties agree to meet and confer on how to proceed and if such
13 agreement is not reached within 30 days, the case shall proceed on its normal course.

14 10.3 If the Court approves this Consent Judgment and is reversed or vacated by an
15 appellate court, the Parties shall meet and confer as to whether to modify the terms of this Consent
16 Judgment. If the Parties do not jointly agree on a course of action to take, the case shall proceed on
17 its normal course on the trial court's calendar.

18 **11. MODIFICATION**

19 11.1 This Consent Judgment may be modified only by further stipulation of the Parties
20 and the approval of the Court or upon the granting of a motion brought to the Court by either Party.

21 **12. ATTORNEY'S FEES**

22 12.1 A Party who unsuccessfully brings or contests an action arising out of this Consent
23 Judgment shall be required to pay the prevailing party's reasonable attorney's fees and costs.

24 12.2 Nothing in this Section shall preclude a Party from seeking an award of sanctions
25 pursuant to law.
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13. RETENTION OF JURISDICTION

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

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 certify 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: 1/29/2018

Date: _____

By: 
EMMA BELL

By: _____
FASHIONCRAFT-EXCELLO, LLC

IT IS SO ORDERED, ADJUDGED AND DECREED:

Dated: 5-15-18


Judge of Superior Court

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AGREED TO:

AGREED TO:

Date: _____
By: _____
EMA BELL

Date: 4/29/2018
By: [Signature] member
FASHIONCRAFT-EXCELLO, LLC

IT IS SO ORDERED, ADJUDGED AND DECREED:

Dated: _____

Judge of Superior Court