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FILED
ALAMEDA COUNTY

MAY 13 2022

CLERK OF THE SUPERIOR COURT
By _____ Deputy

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

11 EMA BELL,
12 Plaintiff,

13 v.

14 NATERRA INTERNATIONAL, INC.
15 CVS PHARMACY, INC.,
16 Defendants.

Lead Case No.: RG20075323
Consolidated With: RG20075339

(PROPOSED) CONSENT JUDGMENT

Judge: Richard Seabolt
Dept.: 521
Hearing Date: December 9, 2021
Hearing Time: 02:30 PM
Reservation #: R-2297395

17 **1. INTRODUCTION**

18 1.1 **The Parties.** This Consent Judgment is entered into by and between Ema Bell
19 (“Bell”) and Precila Balabbo (“Balabbo”) (collectively, “Plaintiffs”) acting on behalf of the public
20 interest and Naterra International, Inc. (“Naterra” or “Defendant”) with Plaintiffs and Defendant
21 collectively referred to as the “Parties” and each of them as a “Party.” Bell and Balabbo are
22 individuals who reside in California that seek to promote awareness of exposures to toxic chemicals
23 and improve human health by reducing or eliminating hazardous substances contained in consumer
24 products. Naterra is alleged to be a person in the course of doing business for purposes of Proposition
25 65, Cal. Health & Safety Code §§ 25249.6 et seq.

26 1.2 **Allegations and Representations.** Plaintiffs allege that Defendant has exposed
27 individuals to diethanolamine (DEA) from its sale of Tree Hut Shea Moisturizing Body Lotion and
28

1 di(2-ethylhexyl) phthalate (DEHP) from its sales of Tree Hut Essential Travel Kits, without
2 providing a clear and reasonable warning pursuant to Proposition 65. DEHP is listed pursuant to
3 Proposition 65 as a chemical known to the State of California to cause cancer and reproductive
4 toxicity. DEA is listed pursuant to Proposition 65 as a chemical known to the State of California to
5 cause cancer.

6 **1.3 Notices of Violation/Complaints.**

7 1.3.1 On or about July 1, 2019, Bell served Naterra, CVS Pharmacy, Inc. (“CVS”),
8 and various public enforcement agencies with documents entitled “60-Day Notice of Violation”
9 pursuant to Health & Safety Code §25249.7(d) (the “Bell Notice”), alleging that the noticed entities
10 violated Proposition 65 by failing to warn that use of Tree Hut Shea Moisturizing Body Lotion
11 exposes users in California to DEA. No public enforcer has brought and is diligently prosecuting
12 the claims alleged in the Bell Notice.

13 1.3.2 On or about September 12, 2019, Balabbo served Naterra, Ulta Beauty, Inc.
14 (“Ulta”), and various public enforcement agencies with documents entitled “60-Day Notice of
15 Violation” pursuant to Health & Safety Code §25249.7(d) (the “Balabbo Notice”), alleging that the
16 noticed entities violated Proposition 65 by failing to warn that use of Tree Hut Essential Travel Kits
17 exposes users in California to DEHP. No public enforcer has brought and is diligently prosecuting
18 the claims alleged in the Balabbo Notice.

19 1.3.3 The Bell Notice and Balabbo Notice are collectively referred to herein as,
20 the “Notices.”

21 1.3.4 On September 25, 2020, Bell filed a complaint in Alameda County Superior
22 Court against defendants Naterra and CVS regarding allegations found in the Bell Notice (the “Bell
23 Action”). The Bell Action was assigned case number RG20075323.

24 1.3.5 On September 25, 2020, Balabbo filed a complaint in Alameda County
25 Superior Court against defendants Naterra and Ulta regarding allegations found in the Balabbo
26 Notice (the “Balabbo Action”). The Balabbo Action was assigned case number RG20075339.

1 1.3.6 On May 27, 2021, Plaintiffs and defendants Naterra, CVS and Ulta
2 stipulated and agreed to consolidate the Bell Action and the Balabbo Action. The Bell Action and
3 the Balabbo Action are collectively referred to herein as, the “Action.”

4 1.4 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
5 jurisdiction over Defendant as to the allegations contained in the Action, that venue is proper in the
6 County of Alameda, and that this Court has jurisdiction to approve, enter, and oversee the
7 enforcement of this Consent Judgment as a full and final binding resolution of all claims which
8 were or could have been raised in the Action based on the facts alleged therein and/or in the Notices.

9 1.5 Defendant denies the material allegations contained in Plaintiffs’ Notices and
10 Action and maintains that it has not violated Proposition 65. Nothing in this Consent Judgment is
11 or shall be construed as an admission by Defendant of any fact, finding, conclusion of law, issue of
12 law, or violation of law; nor shall compliance with this Consent Judgment constitute or be construed
13 as an admission by Defendant of any fact, finding, conclusion of law, issue of law, or violation of
14 law, such being specifically denied by Defendant. Nothing in this Consent Judgment shall
15 prejudice, waive, or impair any right, remedy, argument, or defense the Parties may have in any
16 other legal proceeding. This Consent Judgment is the product of negotiation and compromise and
17 is accepted by the Parties for purposes of settling, compromising, and resolving issues disputed in
18 this Action. However, this section shall not diminish or otherwise affect the obligations,
19 responsibilities, and duties of Defendant under this Consent Judgment.

20 **2. DEFINITIONS**

21 2.1 **Covered Products.** The term “Covered Products” means Tree Hut (a) Shea
22 Moisturizing Body Lotion , and (b) Essential Travel Kits, that are manufactured, distributed and/or
23 offered for sale in California by Naterra.

24 2.2 **Effective Date.** The term “Effective Date” means the date this Consent Judgment is
25 entered as a Judgment of the Court.

1 **3. INJUNCTIVE RELIEF**

2 **3.1 Tree Hut Shea Moisturizing Body Lotion.** As of the date this Consent Judgment
3 is signed by both Parties, and continuing thereafter, Naterra shall not sell or offer for sale in
4 California **Tree Hut Shea Moisturizing Body Lotion** that contains the ingredient triethanolamine
5 (TEA), which is the ingredient that caused the alleged presence of DEA.

6 **3.2 Tree Hut Essential Travel Kits.** As of the date this Consent Judgment is signed by
7 both Parties, and continuing thereafter, **Tree Hut Essential Travel Kits** shall not be manufactured
8 to sell in California. Should the product be reproduced in the future, it shall contain concentrations
9 less than or equal to 0.1% (1,000 parts per million (ppm)) of DEHP or have a clear and reasonable
10 exposure warning as set forth in this section and section 3.3, when the product is manufactured for
11 subsequent sale in California. There shall be no obligation for Defendant to provide a warning for
12 **Tree Hut Essential Travel Kits** that entered the stream of commerce prior to the date this Consent
13 Judgment is signed by the Parties. The warning shall consist of either the **Warning** or **Alternative**
14 **Warning** described in §§ 3.2(a) or (b), respectively:

15 (a) **Warning.** The “Warning” shall consist of the statement:

16 ⚠ **WARNING:** This product can expose you to chemicals including di(2-
17 ethylhexyl) phthalate (DEHP), which is known to the State of California to cause
18 cancer and birth defects or other reproductive harm. For more information go to
www.P65Warnings.ca.gov.

19 (b) **Alternative Warning:** Naterra may, but is not required to, use the alternative short-
20 form warning as set forth in this § 3.2(b) (“**Alternative Warning**”) as follows:

21 ⚠ **WARNING:** Cancer and Reproductive Harm - www.P65Warnings.ca.gov.

22 **3.3 A Warning or Alternative Warning** provided pursuant to § 3.2 must print the word
23 “**WARNING:**” in all capital letters and in bold font, followed by a colon. The warning symbol to
24 the left of the word “**WARNING:**” must be a black exclamation point in a yellow equilateral
25 triangle with a black outline, except that if the sign or label for the **Tree Hut Essential Travel Kits**
26 does not use the color yellow, the symbol may be in black and white. The symbol must be in a size
27 no smaller than the height of the word “**WARNING:**”. The warning shall be affixed to or printed
28 on the **Tree Hut Essential Travel Kits**’ packaging or labeling, or on a placard, shelf tag, sign or

1 electronic device or automatic process, providing that the warning is displayed with such
2 conspicuousness, as compared with other words, statements, or designs as to render it likely to be
3 read and understood by an ordinary individual under customary conditions of purchase or use. A
4 warning may be contained in the same section of the packaging, labeling, or instruction booklet
5 that states other safety warnings, if any, concerning the use of the **Tree Hut Essential Travel Kits**
6 and shall be at least the same size as those other safety warnings.

7 If Naterra sells **Tree Hut Essential Travel Kits** via an internet website to customers located
8 in California, the warning requirements of this section shall be satisfied if the foregoing warning
9 appears either: (a) on the same web page the **Tree Hut Essential Travel Kits** is displayed and/or
10 described; (b) on the same page as the price for a **Tree Hut Essential Travel Kit**; or (c) on one or
11 more web pages displayed to a purchaser prior to purchase during the checkout process.
12 Alternatively, a symbol consisting of a black exclamation point in a yellow or white equilateral
13 triangle may appear adjacent to or immediately following the display, description, price, or
14 checkout listing of a **Tree Hut Essential Travel Kit**, if the warning statement appears elsewhere
15 on the same web page in a manner that clearly associates it with the product(s) to which the warning
16 applies.

17 3.4 **Compliance with Warning Regulations.** Defendant shall be deemed to be in
18 compliance with Proposition 65 by adhering to §§ 3.1 - 3.3 of this Consent Judgment after the
19 Effective Date.

20 **4. MONETARY TERMS**

21 4.1 **Civil Penalty.** Naterra shall pay \$3,000.00 as a Civil Penalty pursuant to Health and
22 Safety Code section 25249.7(b), to be apportioned in accordance with California Health & Safety
23 Code § 25192, with 75% of these funds remitted to OEHHA and the remaining 25% of the Civil
24 Penalty remitted to Plaintiffs, as provided by California Health & Safety Code § 25249.12(d).

25 4.1.1 Within ten (10) days of the Effective Date, Naterra shall issue two separate
26 checks for the Civil Penalty payment to (a) "OEHHA" in the amount of \$2,250.00; and to (b)
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1 "Brodsky Smith in Trust for Plaintiffs" in the amount of \$750.00. Payment owed to Plaintiffs
2 pursuant to this Section shall be delivered to the following payment address:

3 Evan J. Smith, Esquire
4 Brodsky & Smith
5 Two Bala Plaza, Suite 805
6 Bala Cynwyd, PA 19004

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

9 For United States Postal Service Delivery:

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

15 For Non-United States Postal Service Delivery:

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

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

23 4.2 **Attorneys' Fees.** Within ten (10) days of the Effective Date, Naterra shall pay
24 \$27,000.00 to Brodsky & Smith as complete reimbursement for Plaintiffs' attorneys' fees and costs
25 incurred as a result of investigating, bringing this matter to Naterra attention, litigating and
26 negotiating and obtaining judicial approval of a settlement in the public interest, pursuant to Code
27 of Civil Procedure § 1021.5.

28 **5. RELEASE OF ALL CLAIMS**

5.1 This Consent Judgment is a full, final, and binding resolution between Plaintiffs
each acting on their own behalf, and on behalf of the public interest, and Naterra, and its parents,
shareholders, members, directors, officers, managers, employees, representatives, agents,
attorneys, divisions, subdivisions, subsidiaries, partners, sister companies, and affiliates, and their
predecessors, successors and assigns ("Defendant Releasees"), and all entities from whom they

1 obtain and to whom they directly or indirectly distribute or sell Covered Products, including but
2 not limited to manufacturers, suppliers, distributors, wholesalers, customers, licensors, licensees
3 retailers, franchisees, and cooperative members, including but not limited to CVS and Ulta and
4 each of their parents, shareholders, members, directors, officers, managers, employees,
5 representatives, agents, attorneys, divisions, subdivisions, subsidiaries, partners, sister companies,
6 and affiliates, and their predecessors, successors and assigns (“Downstream Releasees”), of all
7 claims alleged in the Action arising from any alleged violation of Proposition 65 that have been or
8 could have been asserted in the public interest against Defendant Releasees and Downstream
9 Releasees regarding the failure to warn about alleged exposure to DEA and/or DEHP from use of
10 the Covered Products as set forth in the Notices, with respect to any Covered Products
11 manufactured prior to the Effective Date. It is the Parties’ intention that this Consent Judgment
12 shall have preclusive effect such that no other actions by private enforcers, whether purporting to
13 act in his, her, or its interests or the public interest shall be permitted to pursue and/or take any
14 action with respect to any violation of Proposition 65 that was alleged in the Action, or that could
15 have been brought pursuant to the Notices against Naterra and/or the Downstream Releasees for
16 use of the Covered Products.

17 5.2 In addition to the foregoing, Plaintiffs, on behalf of themselves, their past and
18 current agents, representatives, attorneys, and successors and/or assignees, and not in their
19 representative capacity, hereby waive all rights to institute or participate in, directly or indirectly,
20 any form of legal action and releases Defendant Releasees and Downstream Releasees from any
21 and all manner of actions, causes of action, claims, demands, rights, suits, obligations, debts,
22 contracts, agreements, promises, liabilities, damages, charges, losses, costs, expenses, and
23 attorneys’ fees, of any nature whatsoever, known or unknown, in law or equity, fixed or contingent,
24 now or in the future, with respect to any alleged violations of Proposition 65 related to or arising
25 from use of the Covered Products manufactured, distributed, offered for sale or sold by Defendant
26 Releasees or Downstream Releasees. With respect to the foregoing waivers and releases in this
27 paragraph, Plaintiffs hereby specifically waive any and all rights and benefits which they now have,
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1 or in the future may have, conferred by virtue of the provisions of § 1542 of the California Civil
2 Code, which provides as follows:

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

9 5.3 Naterra waives any and all claims against Plaintiffs, their attorneys and other
10 representatives, for any and all actions taken or statements made (or those that could have been
11 taken or made) by Plaintiffs and their attorneys and other representatives, whether in the course of
12 investigating claims or otherwise seeking enforcement of Proposition 65 against it in this matter,
13 and/or with respect to Covered Products.

14 **6. INTEGRATION**

15 6.1 This Consent Judgment contains the sole and entire agreement of the Parties and
16 any and all prior discussions, negotiations, commitments, and understandings related thereto shall
17 be deemed to have been merged within it. No representations, oral or otherwise, express or implied,
18 or terms of agreement other than those contained herein exist or have been made by any Party with
19 respect to the other Party or the subject matter hereof. No other agreements, oral or otherwise,
20 unless specifically referred to herein, shall be deemed to exist or to bind any Party

21 6.2 No supplementation, modification, waiver, or termination of this Consent Judgment
22 shall be binding unless executed in writing by the Party to be bound thereby.

23 6.3 No waiver of any of the provisions of this Consent Judgment shall be deemed or
24 shall constitute a waiver of any of the other provisions hereof whether or not similar, nor shall such
25 waiver constitute a continuing waiver.

26 **7. GOVERNING LAW**

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

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

3 **8. NOTICES**

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

8 For Defendant:

9 Will Wagner
10 Arnold & Porter
11 Three Embarcadero Center, 10th Floor
San Francisco, CA 94111

12 And

13 For Plaintiffs:

14 Evan Smith
15 Brodsky & Smith
9595 Wilshire Blvd., Ste. 900
Beverly Hills, CA 90212

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

18 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

19 9.1 This Consent Judgment may be executed in counterparts and by facsimile, each of
20 which shall be deemed an original, and all of which, when taken together, shall constitute one and
21 the same document.

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

24 10.1 Plaintiffs agree to comply with the requirements set forth in California Health &
25 Safety Code § 25249.7(f) and to promptly bring a Motion for Approval of this Consent Judgment.
26 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, the
3 Parties agree to meet and confer on how to proceed and if such agreement is not reached within 30
4 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 A Party seeking to modify this Consent Judgment for any reason shall attempt in good faith to meet
13 and confer with the other Party prior to filing a motion to modify the Consent Judgment.

14 **12. ATTORNEY'S FEES**

15 12.1 Except as otherwise provided in this Consent Judgment, each Party shall bear its
16 own attorneys' fees and costs.

17 12.2 A Party who unsuccessfully brings or contests an action arising out of this Consent
18 Judgment shall be required to pay the prevailing party's reasonable attorney's fees and costs.

19 12.3 Nothing in this Section shall preclude a Party from seeking an award of sanctions
20 pursuant to law.

21 **13. RETENTION OF JURISDICTION**

22 13.1 This Court shall retain jurisdiction of this matter to implement or modify the
23 Consent Judgment.

24 **14. GOOD FAITH ATTEMPT TO RESOLVE DISPUTES**

25 If a dispute arises with respect to either Party's compliance with the terms of this Consent
26 Judgment entered by the Court, the Parties shall meet and confer in person, by telephone, and/or in
27 writing and endeavor to resolve the dispute in an amicable manner. No action or motion may be
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1 filed in the absence of such a good faith attempt to resolve the dispute beforehand. Only the Parties
2 may enforce this Consent Judgment.

3 **15. DRAFTING**

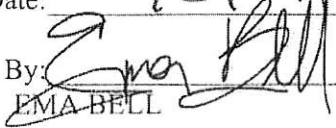
4 The terms of this Consent Judgment have been reviewed by the respective counsel for each
5 Party prior to its signing, and each Party has had an opportunity to fully discuss the terms and
6 conditions with legal counsel. The Parties agree that, in any subsequent interpretation and
7 construction of this Consent Judgment, no inference, assumption, or presumption shall be drawn,
8 and no provision of this Consent Judgment shall be construed against any Party, based on the fact
9 that one of the Parties and/or one of the Parties' legal counsel prepared and/or drafted all or any
10 portion of the Consent Judgment. It is conclusively presumed that all of the Parties participated
11 equally in the preparation and drafting of this Consent Judgment.

12 **16. AUTHORIZATION**

13 16.1 The undersigned are authorized to execute this Consent Judgment on behalf of their
14 respective Parties and have read, understood, and agree to all of the terms and conditions of this
15 document and certify that he or she is fully authorized by the Party he or she represents to execute
16 the Consent Judgment on behalf of the Party represented and legally bind that Party.

17 **AGREED TO:**

AGREED TO:

18
19 Date: 10/31/2021
20 By: 
21 EMA BELL

Date: _____
By: _____
NATERRA INTERNATIONAL, INC.

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2 may enforce this Consent Judgment.

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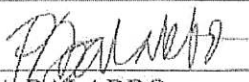
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16 the Consent Judgment on behalf of the Party represented and legally bind that Party.

17	AGREED TO:	AGREED TO:
18		
19	Date: _____	Date: <u>9/22/2021</u>
20	By: _____	By: <u>[Signature]</u>
21	EMA BELL	NATERRA INTERNATIONAL, INC.
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AGREED TO:

Date: 10/08/2021

By: 
PRECILA BALABBO

IT IS SO ORDERED, ADJUDGED AND DECREED:

Dated: 5/12/22


Judge of Superior Court