

1 Evan Smith (Bar No. SBN 242352)
2 BRODSKY SMITH
3 9595 Wilshire Blvd., Ste. 900
4 Beverly Hills, CA 90212
5 Tel: (877) 534-2590
6 Fax: (310) 247-0160

7 *Attorneys for Plaintiff*

FILED
San Francisco County Superior Court

APR 30 2024

CLERK OF THE COURT
BY: 
Deputy Clerk

8
9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 COUNTY OF SAN FRANCISCO

11 EMA BELL,

12 Plaintiff,

13 v.

14 SM BEAUTY LLC, BURLINGTON STORES,
15 INC., BURLINGTON COAT FACTORY OF
16 TEXAS, INC.,

17 Defendants.

Case No.: CGC-23-608449

CONSENT JUDGMENT

Judge: Richard B. Ulmer

Dept.: 302

Hearing Date: April 30, 2024

Hearing Time: 9:30 AM

Complaint Filed: August 17, 2023

1 **1. INTRODUCTION**

2 **1.1 The Parties.** This Consent Judgment is entered into by and between Ema Bell acting
3 on behalf of the public interest (hereinafter “Bell”) and SM Beauty LLC (“SM Beauty” or
4 “Defendant”) with Bell and Defendant collectively referred to as the “Parties” and each of them as
5 a “Party.” Bell is an individual residing in California that allegedly seeks to promote awareness of
6 exposures to toxic chemicals and improve human health by reducing or eliminating hazardous
7 substances contained in consumer products. SM Beauty is alleged to be a person in the course of
8 doing business for purposes of Proposition 65, Cal. Health & Safety Code §§ 25249.6 et seq.
9 (“Proposition 65”).

10 **1.2 Allegations and Representations.** Bell alleges that Defendant has exposed
11 individuals to diethanolamine (DEA) from its sales of face masks that are manufactured and/or
12 distributed by SM Beauty including the *K-Beauty*® acne care face masks, UPC # 818307026025
13 without providing a clear and reasonable exposure warning pursuant to Proposition 65. DEA is
14 listed pursuant to Proposition 65 as a chemical known to the State of California to cause cancer.

15 **1.3 Notice of Violation/Action.** On or about August 24, 2022, Bell served Burlington
16 Stores, Inc., Burlington Coat Factory of Texas, Inc. (collectively, “Burlington”), SM Beauty, and
17 various public enforcement agencies with documents entitled “60-Day Notice of Violation”
18 pursuant to Health & Safety Code §25249.7(d) (the “Notice”), alleging that Defendant violated
19 Proposition 65 for failing to warn consumers and customers that use of the Products expose users
20 in California to DEA. No public enforcer has brought and is diligently prosecuting the claims
21 alleged in the Notice. On August 17, 2023, Bell filed a complaint (the “Complaint”).

22 **1.4** For purposes of this Consent Judgment only, the Parties stipulate that this Court has
23 jurisdiction over Defendant as to the allegations contained in the Complaint filed in this matter, that
24 venue is proper in the County of San Francisco, and that this Court has jurisdiction to approve,
25 enter, and oversee the enforcement of this Consent Judgment as a full and final binding resolution
26 of all claims which were or could have been raised in the Complaint based on the facts alleged
27 therein and in the Notice.

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1 1.5 Defendant denies the material allegations contained in Bell's Notice and Complaint
2 and maintains that it has not violated Proposition 65. Nothing in this Consent Judgment shall be
3 construed as an admission by Defendant of any fact, finding, issue of law, or violation of law; nor
4 shall compliance with this Consent Judgment constitute or be construed as an admission by
5 Defendant of any fact, finding, conclusion, issue of law, or violation of law, such being specifically
6 denied by Defendant. However, this section shall not diminish or otherwise affect the obligations,
7 responsibilities, and duties of Defendant under this Consent Judgment.

8 **2. DEFINITIONS**

9 2.1 **Covered Products.** The term "Covered Products" means *K-Beauty*® acne care face
10 masks, UPC # 818307026025 that are manufactured, distributed, shipped into California and
11 offered for sale in California by SM Beauty that expose users to DEA.

12 2.2 **Effective Date.** The term "Effective Date" means the date this Consent Judgment is
13 entered as a Judgment of the Court and SM Beauty receives notice from Bell (including by email)
14 that the Consent Judgment has been entered.

15 **3. INJUNCTIVE RELIEF: REFORMULATION AND/OR WARNINGS**

16 3.1 **Reformulation of Products.** As of the Effective Date, or within ninety (90) days of
17 the Effective Date, and continuing thereafter, Covered Products that SM Beauty directly
18 manufactures, imports, distributes, sells, or offers for sale in California shall either be: (a)
19 reformulated Products pursuant to § 3.2, below; or (b) labeled with a clear and reasonable exposure
20 warning pursuant to §§ 3.3 and 3.4, below. For purposes of this Settlement Agreement, a "DEA
21 Free Reformulated Product" is a Covered Product that is in compliance with the standard set forth
22 in § 3.2, below. The warning requirements set forth in §§ 3.3 and 3.4 shall not apply to any DEA
23 Free Reformulated Product or to any Covered Product manufactured prior to the Effective Date, or
24 within 90 days of the Effective Date.

25 3.2 **DEA Free Reformulation Standard.** To qualify as a "DEA Free Reformulated
26 Product" the Covered Product must meet the following standard: DEA content that is not detectable
27 (i.e., zero) or below the Reporting Limit (defined herein) when analyzed pursuant to liquid
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1 chromatography/tandem mass spectrometry (LC/MS/MS), inductively coupled mass-spectroscopy
2 (ICP-MS) or other method of analysis utilized by the International Organization for Standardization
3 (ISO) for qualitative and quantitative screening of cosmetics and cosmetic raw materials.

4 3.2.1 **Reporting Limit.** The "Reporting Limit"¹ is 5.1 mg/kg.

5 3.3 **Clear and Reasonable Warning.** As of the date this Consent Judgment is signed
6 by both Parties, and continuing thereafter, a clear and reasonable exposure warning as set forth in
7 this §§ 3.3 and 3.4 must be provided for all Covered Products that Defendant manufacturers,
8 imports, distributes, sells, or offers for sale in California that is not a Reformulated Product. There
9 shall be no obligation for Defendant to provide a warning for Covered Products that enter the stream
10 of commerce or are in inventory prior to the Effective Date or within 90 days of the Effective Date.
11 The warning shall consist of either the **Warning** or **Alternative Warning** described in §§ 3.3(a)
12 or (b), respectively:

13 (a) **Warning.** The "Warning" shall consist of the statement:

14 **⚠ WARNING:** This product can expose you to chemicals including
15 diethanolamine (DEA), which is known to the State of California to cause cancer.
16 For more information go to www.P65Warnings.ca.gov.

17 (b) **Alternative Warning:** SM Beauty may, but is not required to, use the alternative
18 short-form warning as set forth in this § 3.3(b) ("**Alternative Warning**") as follows:

19 **⚠ WARNING:** Cancer - www.P65Warnings.ca.gov.

20 3.4 A **Warning** or **Alternative Warning** provided pursuant to § 3.3 must print the word
21 "**WARNING:**" in all capital letters and in bold font, followed by a colon. The warning symbol to
22 the left of the word "**WARNING:**" must be a black exclamation point in a yellow equilateral
23 triangle with a black outline, except that if the sign or label for the Covered Product does not use
24 the color yellow, the symbol may be in black and white. The symbol must be in a size no smaller
25 than the height of the word "**WARNING:**". The **Warning** or **Alternative Warning** shall be affixed

26 ¹ The "Reporting Limit" the lowest concentration at which DEA can be detected in a
27 sample of a Covered Product by an accredited testing laboratory employing LC/MS/MS analysis
28 or other method of analysis utilized by the ISO for qualitative and quantitative screening of
cosmetics and cosmetic raw materials.

1 to or printed on the Covered Product's packaging or labeling, or on a placard, shelf tag, sign or
2 electronic device or automatic process, providing that the **Warning or Alternative Warning** is
3 displayed with such conspicuousness, as compared with other words, statements, or designs as to
4 render it likely to be read and understood by an ordinary individual under customary conditions of
5 purchase or use. The **Warning or Alternative Warning** may be contained in the same section of
6 the packaging, labeling, or instruction booklet that states other safety warnings, if any, concerning
7 the use of the Covered Product and shall be at least the same size as those other safety warnings. If
8 "consumer information," as that term is defined in Title 27, California Code of Regulations, Section
9 25600.1(c) as it may be amended from time to time, is provided in a foreign language, SM Beauty
10 shall provide the **Warning or Alternative Warning** in the foreign language in accordance with
11 applicable warning regulations adopted by the Office of Environmental Health Hazard Assessment
12 ("OEHHA").

13 In addition to affixing the **Warning or Alternative Warning** to the Covered Product's
14 packaging or labeling, the **Warning or Alternative Warning** shall be posted on websites where
15 SM Beauty offers Products for sale to consumers in California. The requirements of this Section
16 shall be satisfied if the **Warning or Alternative Warning**, or a clearly marked hyperlink using the
17 word "**WARNING**," appears on the product display page, or by otherwise prominently displaying
18 the warning to the purchaser prior to completing the purchase. To comply with this Section, SM
19 Beauty shall (a) post the **Warning or Alternative Warning** on its own website and, if it has the
20 ability to do so, on the websites of its third-party internet sellers; and (b) if it does not have the
21 ability to post the **Warning or Alternative Warning** on the websites of its third-party internet
22 sellers, provide such sellers with written notice in accordance with Title 27, California Code of
23 Regulations, § 25600.2. Third-party internet sellers of the Covered Product that have been provided
24 with written notice in accordance with Title 27, California Code of Regulations, § 25600.2 are not
25 released in Section 5 of this Agreement if they fail to meet the warning requirements herein.

26 **3.5 Compliance with Warning Regulations.** Defendant shall be deemed to be in
27 compliance with this Consent Judgment by either adhering to §§ 3.3 and 3.4 of this Consent
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1 Judgment or by complying with warning regulations adopted by OEHHA applicable to the Covered
2 Product and exposures at issue after the Effective Date, or within 90 days of the Effective Date.
3 No Proposition 65 warning shall be required as to any Covered Products that are already in the
4 stream of commerce or inventory as of the Effective Date or within ninety (90) days of the Effective
5 Date.

6 **4. MONETARY TERMS**

7 4.1 **Civil Penalty.** SM Beauty shall pay \$2,000.00 as a Civil Penalty pursuant to Health
8 and Safety Code section 25249.7(b), to be apportioned in accordance with California Health &
9 Safety Code § 25192, with 75% of these funds remitted to OEHHA and the remaining 25% of the
10 Civil Penalty remitted to Bell, as provided by California Health & Safety Code § 25249.12(d).

11 4.1.1 Within fifteen (15) days of the Effective Date, SM Beauty shall issue two
12 separate checks for the Civil Penalty payment to (a) "OEHHA" in the amount of \$1,500.00; and
13 to (b) "Ema Bell" in the amount of \$500.00. Payment owed to Bell pursuant to this Section shall
14 be delivered to the following payment address:

15 Evan J. Smith, Esquire
16 Brodsky Smith
17 Two Bala Plaza, Suite 805
18 Bala Cynwyd, PA 19004

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

21 For United States Postal Service Delivery:

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

27 For Non-United States Postal Service Delivery:

28 Mike Gyurics
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 at the address set forth
2 above as proof of payment to OEHHA.

3 4.2 **Attorneys' Fees.** Within fifteen (15) days of the Effective Date, SM Beauty shall
4 pay \$23,000.00 to Brodsky Smith as complete reimbursement for Bell's attorneys' fees and costs
5 incurred as a result of investigating, bringing this matter to the attention of SM Beauty, litigating
6 and negotiating and obtaining judicial approval of a settlement in the public interest, pursuant to
7 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 SM Beauty, and its parents,
11 shareholders, members, directors, officers, managers, employees, representatives, agents,
12 attorneys, divisions, subdivisions, subsidiaries, partners, sister companies, and affiliates, and their
13 predecessors, successors and assigns ("Defendant Releasees"), and all entities from whom they
14 obtain and to whom they directly or indirectly distribute or sell Covered Products, including but
15 not limited to manufacturers, upstream suppliers, distributors, wholesalers, customers, licensors,
16 licensees retailers, including but not limited to Burlington and its respective parents, subsidiaries,
17 and affiliates, franchisees, and cooperative members ("Releasees"), of all claims for violations of
18 Proposition 65 based on exposure to DEA from use of the Covered Products manufactured,
19 distributed, or sold by SM Beauty prior to the Effective Date, or within 90 days of the Effective
20 Date, as set forth in the Notice. It is the Parties' intention that this Consent Judgment shall have
21 preclusive effect such that no other actions by private enforcers, whether purporting to act in his,
22 her, or its interests or the public interest shall be permitted to pursue and take any action with respect
23 to any violation of Proposition 65 based on exposure to DEA from use of the Covered Products
24 that was alleged in the Complaint, or that could have been brought pursuant to the Notice against
25 SM Beauty and the Releasees ("Proposition 65 Claims"). SM Beauty's compliance with the terms
26 of this Consent Judgment constitutes compliance with Proposition 65 by SM Beauty with regard to
27 exposure to DEA from use of the Covered Products. The Release shall also cover any Covered
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1 Products that were in the stream of commerce or in inventory prior to the Effective Date or within
2 ninety (90) days of the Effective Date.

3 5.2 In addition to the foregoing, Bell, on behalf of herself, her past and current agents,
4 representatives, attorneys, and successors and assignees, and not in her representative capacity,
5 hereby waives all rights to institute or participate in, directly or indirectly, any form of legal action
6 and releases SM Beauty, Defendant Releasees, and Releasees from any and all manner of actions,
7 causes of action, claims, demands, rights, suits, obligations, debts, contracts, agreements, promises,
8 liabilities, damages, charges, losses, costs, expenses, and attorneys' fees, of any nature whatsoever,
9 known or unknown, in law or equity, fixed or contingent, now or in the future, with respect to any
10 alleged violations of Proposition 65 related to or arising from Covered Products manufactured,
11 distributed, or sold by SM Beauty, Defendant Releasees or Releasees. With respect to the foregoing
12 waivers and releases in this paragraph, Bell hereby specifically waives any and all rights and
13 benefits which she now has, or in the future may have, conferred by virtue of the provisions of §
14 1542 of the California Civil Code, which provides as follows:

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

21 5.3 SM Beauty waives any and all claims against Bell, her attorneys and other
22 representatives, for any and all actions taken, or statements made (or those that could have been
23 taken or made) by Bell and her attorneys and other representatives, whether in the course of
24 investigating claims or otherwise seeking enforcement of Proposition 65 against it in this matter,
25 and with respect to Covered Products.

26 **6. INTEGRATION**

27 6.1 This Consent Judgment contains the sole and entire agreement of the Parties and
28 any and all prior negotiations and understandings related hereto shall be deemed to have been
merged within it. No representations or terms of agreement other than those contained herein exist
or have been made by any Party with respect to the other Party or the subject matter hereof.

1 **7. GOVERNING LAW**

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

7 **8. NOTICES**

8 8.1 Unless specified herein, all correspondence and notices required to be provided
9 pursuant to this Consent Judgment shall be in writing and personally delivered or sent by: (i) first-
10 class, (registered or certified mail) return receipt requested; or (ii) overnight courier on any party
11 by the other party at the following addresses:

12 For Defendant:

13 Sedina L. Banks
14 Sherry E. Jackman
15 Greenberg Glusker LLP
2049 Century Park E., Ste. 2600
Los Angeles, CA 90067

16 And

17 For Bell:

18 Evan Smith
19 Brodsky Smith
9595 Wilshire Blvd., Ste. 900
20 Beverly Hills, CA 90212

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

23 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

24 9.1 This Consent Judgment may be executed in counterparts and by facsimile, each of
25 which shall be deemed an original, and all of which, when taken together, shall constitute one and
26 the same document.

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1 **10. COMPLIANCE WITH HEALTH & SAFETY CODE § 25249.7(f)/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.
5 Defendant 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, the
8 Parties agree to meet and confer on how to proceed and if such agreement is not reached within 30
9 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.

20 12.2 Nothing in this Section shall preclude a Party from seeking an award of sanctions
21 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: 3/12/24
By: [Signature]
EMMA BELL

Date: 2/25/2024
By: [Signature]
SM BEAUTY LLC

IT IS SO ORDERED, ADJUDGED AND DECREED:

Dated: 4/20/24

[Signature]
Judge of Superior Court

RICHARD ULMER