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

11 EMA BELL,

12 Plaintiff,

13 v.

14 MYSTIC APPAREL, LLC,

15 Defendant.

Case No.: RG17855650

**CONSENT JUDGMENT**

Judge: Sandra K. Bean

Dept.: 30

Hearing Date: July 12, 2017

Hearing Time: 2:30 PM

Reservation #: R-1852899

1           **1. Introduction**

2           1.1     On December 2, 2016, Ema Bell (“Bell”) served Mystic Apparel, Mystic Apparel,  
3     LLC, third parties described below and various public enforcement agencies with a document  
4     entitled “Notice of Violation of California Health & Safety Code § 25249.6, *et seq.*” (the  
5     “Notice”). The Notice alleged that Mystic Apparel and the others had violated California Health  
6     & Safety Code § 25249.6 (“Proposition 65”), for failing to warn consumers and customers that  
7     certain of Mystic Apparel’s Product or Products exposed users in California to the chemical Di(2-  
8     ethylhexyl) phthalate (DEHP). For purposes of the Notice and this Consent Judgment, “Product”  
9     or “Products” is defined as a duffel bag set with a small plastic bag attached in various colors and  
10    sizes, including but not limited to, UPC No. 7 09996 71732 8. No public enforcer has  
11    commenced or diligently prosecuted the allegations set forth in the Notice.

12          1.2     On April 6, 2017, Bell filed a Complaint for Civil Penalties and Injunctive Relief  
13    (“Complaint”) in Alameda County Superior Court, Case No. RG17855650, against Mystic  
14    Apparel alleging violations of Proposition 65.

15          1.3     Mystic Apparel is considered a person in the course of doing business for purposes  
16    of the Safe Drinking Water and Toxic Enforcement Act of 1986, Health & Safety Code section  
17    25249.6, *et seq.* and offered the Products for sale within the State of California.

18          1.4     Bell’s Complaint alleges, among other things, that Mystic Apparel sold the  
19    Products in California and/or to California citizens, that the Products contain DEHP, and that the  
20    resulting exposure violated provisions of Proposition 65, by knowingly and intentionally  
21    exposing persons to a chemical known to the State of California to cause both cancer and  
22    reproductive toxicity without first providing a clear and reasonable warning to such individuals.

23          1.5     For purposes of this Consent Judgment only, Bell and Mystic Apparel  
24    (collectively, the “Parties”) stipulate that this Court has jurisdiction over the allegations of  
25    violations contained in the Complaint and personal jurisdiction over Mystic Apparel as to the acts  
26    alleged in the Complaint, that venue is proper in the County of Alameda, and that this Court has  
27    jurisdiction to enter this Consent Judgment as a resolution of the allegations contained in the  
28    Complaint.

1           1.6     The Parties enter into this Consent Judgment pursuant to a full settlement of  
2     disputed claims between the Parties as alleged in the Complaint for the purpose of avoiding  
3     prolonged litigation. By execution of this Consent Judgment, Mystic Apparel does not admit any  
4     violation of Proposition 65 and specifically denies that it has committed any such violation.  
5     Nothing in this Consent Judgment shall be construed as an admission by Mystic Apparel of any  
6     fact, issue of law or violation of law, nor shall compliance with the Consent Judgment constitute  
7     or be construed as an admission by Mystic Apparel of any fact, issue of law, or violation of law.  
8     Nothing in this Consent Judgment shall prejudice, waive, or impair any right, remedy or defense  
9     that Mystic Apparel may have in any other future legal proceeding. However, this paragraph  
10    shall not diminish or otherwise affect the obligations, responsibilities and duties of Mystic  
11    Apparel under this Consent Judgment. Notwithstanding the allegation in the Notice and this  
12    Complaint, Mystic Apparel maintains that it has not knowingly manufactured, or caused to be  
13    manufactured, the Product for sale in California in violation of Proposition 65.

14           1.7     For purposes of this Consent Judgment, the term "Effective Date" shall mean the  
15    date that the Consent Judgment is entered by the Court.

16           **2.     Injunctive Relief**

17           2.1     Commencing ninety (90) days after the Effective Date, and continuing thereafter,  
18    Mystic Apparel shall only ship, sell, or offer for sale in California, Reformulated Product pursuant  
19    to Section 2.2 or Product that is labeled with a clear and reasonable warning pursuant to Section  
20    2.3. Mystic Apparel and its downstream retailers shall have no obligation to label Products that  
21    entered the stream of commerce prior to the Effective Date or within ninety (90) days after the  
22    Effective Date. For purposes of this Settlement Agreement, a "Reformulated Product" is Product  
23    that is in compliance with the standard set forth below in section 2.2.

24           2.2     "Reformulated Product" shall mean Product that contains less than or equal to  
25    1,000 parts per million ("ppm") of DEHP when analyzed pursuant to CPSC-CH-C1001-09.3  
26    Standard Operating Procedure for Determination of Phthalates method, or an equivalent method  
27    utilized for federal or state agencies for the proposed of determining DEHP concentrations.

28           2.3     Commencing 90 days after the Effective Date, Mystic Apparel shall, for all Products

1 it sells or distributes and that is intended for sale in California and that is not a Reformulated  
2 Product, provide clear and reasonable warnings as set forth in subsections 2.3(a) below. The  
3 warning shall be prominently placed with such conspicuousness as compared with other words,  
4 statements, designs, or devices as to render it likely to be read and understood by an ordinary  
5 individual under customary conditions before purchase or use. Each warning shall be provided in  
6 a manner such that the consumer or user understands to which specific Product the warning applies,  
7 so as to minimize the risk of consumer confusion.

8 **(a) Retail Store Sales or Product Shipped to California Consumers**

9 **(i) Product Labeling.** Mystic Apparel shall affix a warning to the  
10 packaging, labeling or directly on each Product is either (a) shipped to California  
11 consumers, or (b) sold in retail outlets in California by Mystic Apparel or any  
12 authorized person selling the Product that states:

13 **WARNING:** This product contains a chemical known to the State of California to  
14 cause cancer, and birth defects or other reproductive harm.

15 Or

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

18 2.4 **Exception to Warning Requirement.** The warning requirement set forth in  
19 Section 2.3 shall not apply to any Reformulated Product.

20 **3. Entry of Consent Judgment**

21 3.1 The Parties hereby request that the Court promptly enter this Consent Judgment.  
22 Upon entry of this Consent Judgment, Bell and Mystic Apparel waive their respective rights to a  
23 hearing or trial on the allegations of the Complaint and 60-Day Notice.

24 3.2 In the event that the Attorney General objects or otherwise comments on one or  
25 more provisions of this Consent Judgment, Bell and Mystic Apparel agree engage in good faith  
26 negotiations to take reasonable steps to satisfy such concerns or objections in order to effectuate  
27 the intent of the Consent Judgment.  
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1           **4.       Matters Covered By This Consent Judgment**

2           **4.1       Plaintiff's Public Release of Proposition 65 Claims.** This Consent Judgment is a  
3 final and binding resolution between Bell, acting on her own behalf and in the public interest, and  
4 Mystic Apparel, their parents, direct or indirect equity holders, direct or indirect controlling  
5 persons, any entities affiliated with any of the foregoing, subsidiaries, affiliated entities under  
6 common ownership, directors, officers, agents, representatives, employees, attorneys (all persons  
7 or entities listed in this subparagraph as related to Mystic Apparel are hereinafter referred to as  
8 "Mystic Apparel Releasees") as well as Mystic's licensors (including but not limited to LTD2  
9 Brand Holdings LLC) and any entity to whom Mystic directly or indirectly distributes or sells the  
10 Products, including but not limited to, their downstream distributors, wholesalers, customers,  
11 franchisers, cooperative members, licensors and licensees, marketplace hosts and retailers  
12 (including but not limited to Marshalls of MA, Inc.) and its parents, affiliates and subsidiaries,  
13 and the successors and assigns of any of them ("Additional Releasees") and shall have preclusive  
14 effect such that no other person or entity, whether purporting to act in his, her, or its interests or  
15 the public interest shall be permitted to pursue and/or take any action with respect to any violation  
16 of Proposition 65 that was alleged in the Notice or Complaint, or that could have been brought  
17 pursuant to the Notice against Mystic Apparel, Mystic Apparel Releasees, and/or the Additional  
18 Releasees. As to alleged exposures to DEHP in the Products, compliance with the terms of this  
19 Consent Judgment by Mystic Apparel is deemed sufficient to satisfy all obligations concerning  
20 compliance by Mystic Apparel, Mystic Apparel Releasees, and/or Additional Releasees, with the  
21 requirements of Proposition 65 with respect to the Products.

22           **4.2       Plaintiff's Private Release of Additional Claims.** As to Bell for and in her  
23 individual capacity only, this Consent Judgment shall have preclusive effect such that Bell shall  
24 not be permitted to pursue and/or take any action with respect to any other statutory or common  
25 law claim, to the fullest extent that any such claim was or could have been asserted by her against  
26 any and all of Mystic Apparel, Mystic Apparel Releasees and/or Downstream Releasees, of the  
27 Products, including but not limited to Marshalls, based on their exposure of Bell to DEHP in the  
28 Products, or their failure to provide a clear and reasonable warning of exposure to Bell as well as

1 any other claim based in whole or in part on the facts alleged in the Complaint and the Notice,  
2 whether based on actions committed by Mystic Apparel Releasees, Mystic Apparel or its  
3 Representatives or its downstream retailers of the Products, including but not limited to Marshalls  
4 (“DEHP Exposure Claims”).

5       **4.3 Waiver of Rights Under Section 1542 of the California Civil Code.** As to  
6 Bell’s public release of Proposition 65 Claims set forth in Section 4.1 (“Public Release”) and her  
7 individual release of DEHP Exposure Claims set forth in Section 4.2 (“Individual Release”), Bell,  
8 acting on her own behalf and on behalf of the public with respect to the Public Release and acting  
9 in her individual capacity with respect to the Individual Release, waives all rights to institute any  
10 form of legal action, and releases all claims against Mystic Apparel, any and all of Mystic  
11 Apparel’s Representatives and Mystic Apparel’s Releasees and the Additional Releasees,  
12 including but not limited to LTD2 Brand Holdings LLC and Marshalls of MA (including their  
13 parents, subsidiaries, affiliates, assigns, and acquiring entities of any of them, who may use,  
14 maintain, distribute or sell the Products) for the Proposition 65 claims and the DEHP Exposure  
15 Claims (referred to collectively in this Section as “Claims”). In furtherance of the foregoing,  
16 Bell, acting on her own behalf and on behalf of the public with respect to the Public Release and  
17 acting in her individual capacity with respect to the Individual Release, waives any and all rights  
18 and benefits which she now has, or in the future may have, conferred upon her with respect to the  
19 Claims by virtue of the provisions of § 1542 of the California Civil Code, which provides as  
20 follows:

21       A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE  
22       CREDITOR DOES NOT KNOW OR SUSPECT EXIST IN HIS OR HER  
23       FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF  
24       KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS  
25       SETTLEMENT WITH THE DEBTOR.

26       **4.4 Mystic Apparel’s Release of Plaintiff Bell.** Mystic Apparel, on behalf of itself,  
27 its past and current agents, representatives, attorneys, successors and/or assignees, hereby waives  
28 any and all claims against Bell, her attorneys, and other representatives for any and all actions  
taken or statements made (or those that could have been taken or made) by Bell and her attorneys

1 and other representatives, whether in the course of investigating claims or otherwise seeking  
2 enforcement of Proposition 65 against Mystic Apparel in this matter.

3 **5. Enforcement of Judgment**

4 5.1 The terms of this Consent Judgment shall be enforced exclusively by the Parties  
5 hereto. The Parties may, by noticed motion or order to show cause before the Superior Court of  
6 Alameda County, giving the notice required by law, enforce the terms and conditions contained  
7 herein. In any proceeding brought by either party to enforce this Consent Judgment, such party  
8 may seek whatever fines, costs, penalties or remedies as may be provided by law for any violation  
9 of Proposition 65 or this Consent Judgment. Before bringing any such noticed motion or order to  
10 show cause, each party agrees to provide the party against which the motion or order would be  
11 brought not less than ten (10) days written notice and a reasonable period to cure the alleged  
12 breach of this Consent Judgment.

13 **6. Modification of Judgment**

14 6.1 This Consent Judgment may be modified only by written agreement of the Parties  
15 upon entry of a modified Consent Judgment by the Court thereon, or upon motion of any party as  
16 provided by law and upon an entry of a modified Consent Judgment by the Court.

17 6.2 Should any court enter final judgment in a case brought by Bell or the People  
18 involving the Products that sets forth standards defining when Proposition 65 warnings will or  
19 will not be required ("Alternative Standards"), or if the California Attorney General's office  
20 otherwise provides written endorsement (i.e., a writing that is circulated by the Attorney General  
21 that is not intended for the purpose of soliciting further input or comments) of Alternative  
22 Standards applicable to products that are of the same general type and function as the Products  
23 and constructed from the same materials, Mystic Apparel shall be entitled to seek a modification  
24 of this Consent Judgment on sixty (60) days' notice to Bell so as to be able to utilize and rely on  
25 such Alternative Standards in lieu of those set forth in Section 2 of this Consent Judgment. Bell  
26 shall not unreasonably contest any proposed application to effectuate such a modification  
27 provided that the Products for which such a modification is sought are of the same general type  
28 and function as those to which the Alternative Standards apply.

1           **7. Settlement Payment**

2           7.1     In settlement of all the claims referred to in this Consent Judgment, and without  
3 any admission of liability therefore, Mystic Apparel shall make the following monetary  
4 payments:

5                   7.1.1   **Initial Civil Penalty.** Within fifteen (15) business days of the Effective  
6 Date, Mystic Apparel shall pay a total of Two Thousand Dollars (\$2,000.00) in civil penalties in  
7 accordance with this Section. The Initial Civil Penalty payment will be allocated in accordance  
8 with California Health & Safety Code §§ 25249.12(c)(1) and (d), with 75% of the funds remitted  
9 to the California Office of Environmental Health Hazard Assessment ("OEHHA") and the  
10 remaining 25% of the civil penalty remitted to Bell. Within fifteen (15) business days of the  
11 Effective Date, Mystic Apparel shall issue two separate checks for the civil penalty payment to  
12 (a) "OEHHA" in the amount of One Thousand Five Hundred Dollars (\$1,500.00); and (b)  
13 "Brodsky & Smith, LLC in Trust for Bell" in the amount of Five Hundred Dollars (\$500.00).

14 Payment owed to Bell pursuant to this Section shall be delivered to the following payment  
15 address:

16                               Evan J. Smith, Esquire  
17                               Brodsky & Smith, LLC  
18                               Two Bala Plaza, Suite 510  
19                               Bala Cynwyd, PA 19004

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

22                   For United States Postal Service Delivery:

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

28                   For Non-United States Postal Service Delivery:

   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, LLC at the  
2 address set forth above as proof of payment to OEHHA.

3 7.1.2 **Final Civil Penalty.** Sixty (60) days after the Effective Date, Mystic  
4 Apparel shall make a final civil penalty payment of Two Thousand Dollars (\$2,000.00) on the  
5 same terms as set forth in Section 7.1.1 pertaining to the Initial Civil Penalty. Pursuant to Title 11  
6 California Code of Regulations, Section 3203(c), Bell agrees that the Final Civil Penalty payment  
7 shall be waived in its entirety if, on or before the Final Civil Penalty payment is due, an officer of  
8 Mystic Apparel provides Bell with a signed declaration certifying that all Products it ships for  
9 sale or distributes for sale in California as of the date of its certification are Reformulated  
10 Products or are marked with the warnings required by this Consent Decree (hereinafter "Labeled  
11 Product") and that Mystic Apparel will continue to offer only Reformulated Products or Labeled  
12 Products in California in the future. The option to provide a declaration certifying its complete  
13 early reformulation or labeling of the Products in lieu of making the Final Civil Penalty payment  
14 otherwise required by this Section is a material term, and time is of the essence.

15 7.1.3 **Attorney Fees and Costs.** In addition to the payment above, Mystic  
16 Apparel shall pay Twenty Three Thousand Dollars (\$23,000.00) to Brodsky & Smith, LLC  
17 ("Brodsky & Smith") as complete reimbursement for Bell's attorneys' fees and costs, including  
18 any investigation and laboratory costs or expert fees, incurred in the course of bringing the  
19 Complaint and in enforcing Proposition 65, including without limitation, preparation of the 60-  
20 Day Notice letter and discussions with the office of the Attorney General. Payment shall be made  
21 within fifteen (15) business days of the Effective Date and sent to the address for Brodsky &  
22 Smith set forth in Section 7.1.1, above.

## 23 **8. Notices**

24 8.1 Any and all notices between the Parties provided for or permitted under this  
25 Agreement, or by law, shall be in writing and personally delivered or sent by: (i) first-class  
26 (registered or certified mail) return receipt requested; or (ii) overnight or two-day courier on any  
27 party by the other party to the following addresses:  
28

1 For Mystic Apparel;

2 Mark R. Kaster  
3 DORSEY & WHITNEY LLP  
4 50 South Sixth Street  
Suite 1500  
Minneapolis, MN 55402-1498

5 For Bell:

6 Evan J. Smith  
7 BRODSKY & SMITH, LLC  
8 9595 Wilshire Blvd., Suite 900  
Beverly Hills, CA 90212

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

11 **9. Authority to Stipulate**

12 9.1 Each signatory to this Consent Judgment certifies that he or she is fully authorized  
13 by the party he or she represents to enter into this Consent Judgment and to execute it on behalf of  
14 the party represented and legally to bind that party.

15 **10. Counterparts**

16 10.1 This Stipulation may be signed in counterparts and shall be binding upon the  
17 Parties hereto as if all said Parties executed the original hereof.

18 **11. Retention of Jurisdiction**

19 11.1 This Court shall retain jurisdiction of this matter to implement the Consent  
20 Judgment.

21 **12. Service on the Attorney General**

22 12.1 Bell shall serve a copy of this Consent Judgment, signed by both Parties, on the  
23 California Attorney General on behalf of the Parties so that the Attorney general may review this  
24 Consent Judgment prior to its submittal to the Court for Approval. No sooner than forty-five (45)  
25 days after the Attorney General has received the aforementioned copy of this Consent Judgment,  
26 and in the absence of any written objection by the Attorney General to the terms of this Consent  
27 Judgment, the Parties may then submit it to the Court for Approval.  
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**13. Entire Agreement**

13.1 This Consent Judgment contains the sole and entire agreement and understanding of the Parties with respect to the entire subject matter hereof, and any and all discussions, negotiations, commitment and understandings related thereto. No representations, oral or otherwise, express or implied, other than those contained herein have been made by any party hereto. No other agreements not specifically referred to herein, oral or otherwise, shall be deemed to exist or to bind any of the Parties.


**14. Governing Law and Construction**

14.1 The validity, construction and performance of this Consent Judgment shall be governed by the laws of the State of California, without reference to any conflicts of law provisions of California law.

**15. Court Approval**

15.1 If this Consent Judgment is not approved by the Court, it shall be of no force or effect, and cannot be used in any proceeding for any purpose.

**IT IS SO STIPULATED:**

Dated: _____	Dated: <u>5/11/17</u>
By: _____	By: 
Ena Bell	Mystic Apparel, LLC Charles Misrahi, President

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

Dated: _____	_____ Judge of Superior Court
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**15. Court Approval**

15.1 If this Consent Judgment is not approved by the Court, it shall be of no force or effect, and cannot be used in any proceeding for any purpose.

**IT IS SO STIPULATED:**

Dated: 5/16/17 Dated: \_\_\_\_\_  
By: Ema Bell By: \_\_\_\_\_  
Ema Bell Mystic Apparel, LLC

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

Dated: \_\_\_\_\_ Judge of Superior Court