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9 *Ema Bell*

10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 COUNTY OF ALAMEDA

12 EMA BELL,

13 Plaintiff,

14 v.

15 THE MIBRO GROUP, L.C.,

16 Defendant.

Case No.: RG18893615

CONSENT JUDGMENT

Judge: Stephen Pulido

Dept.: 517

Hearing Date: July 10, 2018

Hearing Time: 3:00 PM

Reservation #: R-1952039

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1 **1. INTRODUCTION**

2 1.1 **The Parties.** This Consent Judgment is entered into by and between Ema Bell acting
3 in the public interest (“**Bell**”) and The MIBRO Group, L.C. (“**MIBRO**” or “**Defendant**”) with Bell
4 and Defendant collectively referred to as the “**Parties**” and each of them as a “**Party.**” Bell is an
5 individual residing in California who 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. MIBRO is a person in the course of doing business for purposes of Proposition 65, Cal.
8 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 Heavy Duty Dog Chains without providing clear
11 and reasonable exposure warnings under Proposition 65. DINP is listed under Proposition 65 as a
12 chemical known to the State of California to cause cancer. Bell represents and warrants that as of
13 the date of her execution of this Consent Judgment, other than the violations alleged in the Notice
14 as to the Covered Products, she: (a) has no current knowledge or information based upon any
15 investigation or otherwise that MIBRO is currently manufacturing, distributing, shipping, selling
16 or offering for sale in California any product(s) that Bell believes is causing a violation of
17 Proposition 65; and (b) that she has no present intention of filing suit or providing a 60-Day Notice
18 to MIBRO with respect to any other listed chemical under Proposition 65 with respect to any
19 products manufactured or sold by MIBRO, including but not limited to the Covered Products.

20 1.3 **Notices of Violation/Complaint.** On or about June 6, 2017 Bell served MIBRO and
21 various public enforcement agencies with a document entitled “60-Day Notice of Violation”
22 pursuant to Health & Safety Code §25249.7(d) (the “**Notice**”), alleging that Defendant was in
23 violation of Proposition 65 for failing to warn consumers and customers that Heavy Duty Dog
24 Chains exposed users in California to DINP. No public enforcer has brought and is diligently
25 prosecuting the claims alleged in the Notice. On February 8, 2018, Bell filed a complaint in the
26 matter (the “**Complaint**”).

27 1.4 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
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1 jurisdiction over Defendant as to the allegations contained in the Complaint filed in this matter, that
2 venue is proper in the County of Alameda, and that this Court has jurisdiction to approve, enter,
3 and oversee the enforcement of this Consent Judgment as a full and final binding resolution of all
4 claims which were or could have been raised in the Complaint based on the facts alleged therein
5 and/or in the Notice.

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

13 **2. DEFINITIONS**

14 2.1 **Covered Products.** The term “Covered Products” means Heavy Duty Dog Chains,
15 including but not limited to UPC No. 0 66366 64319 0 and sometimes referred to as Heavy Duty
16 Dog Tie Outs, that are manufactured, distributed and/or offered for sale in California by MIBRO,
17 and that contain DINP.

18 2.2 **Effective Date.** The term “Effective Date” means the date this Consent Judgment is
19 entered as a Judgment of the Court.

20 **3. INJUNCTIVE RELIEF: WARNINGS**

21 3.1 Commencing ninety (90) days after the Effective Date, MIBRO shall not
22 manufacture, import, or purchase for sale in California any Covered Product that contains in or on
23 any component to which consumers are exposed more than 1,000 parts per million DINP (the
24 “**Reformulated Products**”), unless the Product is accompanied by a warning that complies with
25 Article 6 of Title 27 of the California Code of Regulations. Products sold by MIBRO before the
26 Effective Date may sell through and be sold by others downstream in the retail chain without a
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1 warning even if it is not a Reformulated Product. Until August 30, 2018, the warning shall consist
2 of one of the following warning(s):


3
4 (a) WARNING: This product contains a chemical known to the State of California to
5 cause cancer, birth defects and other reproductive harm.


6 Or

7 (b) WARNING: This product contains a chemical known to the State of California to
8 cause cancer.

9 Or

10 (c)(1) A symbol consisting of a black exclamation point in a yellow equilateral triangle
11 with a bold black outline to the left of the word “warning” in bold all capital letters, followed
12 by the statement “This product can expose you to chemicals including Diisononyl phthalate
13 (DINP), which are known to the State of California to cause cancer [and birth defects or
14 other reproductive harm]. For more information, go to www.P65Warnings.ca.gov.” [see
15 the sample below]; or

16  **WARNING:** This product can expose you to chemicals including
17 Diisononyl phthalate (DINP), which are known to the State of California to
18 cause cancer. For more information go to www.P65Warnings.ca.gov

19  **WARNING:** This product can expose you to Diisononyl phthalate (DINP),
20 which is known to the State of California to cause cancer. For more information
21 go to www.P65Warnings.ca.gov

22 (2) a warning consisting of a symbol that is a black exclamation point in a yellow
23 equilateral triangle with a bold black outline to the left of the word “warning” in bold all
24 capital letters, followed by one of the following three statements, as appropriate: (a)
25 “Cancer - www.P65Warnings.ca.gov,” (b) “Reproductive Harm -
26 www.P65Warnings.ca.gov,” or (c) “Cancer and Reproductive Harm -
27 www.P65Warnings.ca.gov.”¹

28 For Products manufactured on and after August 30, 2018, the warning set forth in Paragraph
3.1(c) shall be used.

3.2 Language that appears within the brackets [...] may, but is not, required to be
included in the warning. The warning provided pursuant to Section 3.1 shall be affixed to or printed

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

1 on the Covered Product's packaging or labeling. The warning shall be prominently affixed to or
2 printed on the packaging or labeling and displayed with such conspicuousness, as compared with
3 other words, statements, or designs as to render it likely to be read and understood by an ordinary
4 individual under customary conditions of purchase or use. A warning may be contained in the same
5 section of the packaging, labeling, or instruction booklet that states other safety warnings, if any,
6 concerning the use of the product and shall be at least the same size as those other safety warnings.

7 **4. MONETARY TERMS**

8 4.1 **Civil Penalty.** MIBRO shall pay a Civil Penalty of two thousand five-hundred
9 dollars (\$2,500) pursuant to Health and Safety Code section 25249.7(b), to be apportioned in
10 accordance with California Health & Safety Code § 25192, with 75% of the Civil Penalty remitted
11 to the State of California's Office of Environmental Health Hazard Assessment (OEHHA) and the
12 remaining 25% of the Civil Penalty remitted to Bell, as provided by California Health & Safety
13 Code § 25249.12(d).

14 4.1.1 Within ten (10) business days after the Effective Date, MIBRO shall issue
15 two separate checks for the Civil Penalty payment to (a) "OEHHA" in the amount of \$1,875.00;
16 and (b) "Brodsky & Smith, LLC in Trust for Bell" in the amount of \$625.00. Payment owed to
17 Bell pursuant to this Section shall be delivered to the following payment address:

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

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

23 For United States Postal Service Delivery:

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

27 For Non-United States Postal Service Delivery:
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1 Mike Gyurics
2 Fiscal Operations Branch Chief
3 Office of Environmental Health Hazard Assessment
4 1001 I Street
5 Sacramento, CA 95814

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

8 4.2 **Conditional Civil Penalty.** One-Hundred-Twenty (120) days after the Effective
9 Date, MIBRO shall make a Conditional Civil Penalty payment of two thousand five-hundred
10 dollars (\$2,500) on the same terms as set forth in Section 4.1.1 pertaining to the Civil Penalty.
11 Pursuant to Title 11 California Code of Regulations, Section 3203(c), Bell agrees that the
12 Conditional Civil Penalty payment shall be waived in its entirety if, on or before the Conditional
13 Civil Penalty payment is due, an officer of MIBRO provides Plaintiff with a signed declaration
14 certifying that all Covered Products it ships for sale or distributes for sale in California as of the
15 date of its certification are Reformulated Products or are marked with the warnings required by this
16 Consent Decree (a “**Labeled Product**”) and that MIBRO will, to the best of its knowledge,
17 continue to offer only Reformulated Products or Labeled Products in California in the future. The
18 option to provide a declaration certifying its complete early reformulation or labeling of the
19 Covered Products in lieu of making the Conditional Civil Penalty payment otherwise required by
20 this Section is a material term, and time is of the essence.

21 4.3 **Attorney Fees.** MIBRO shall pay thirty thousand dollars (\$30,000) to Brodsky &
22 Smith, LLC (“**Brodsky Smith**”) as complete reimbursement for Plaintiff Bell’s attorneys’ fees and
23 costs incurred as a result of investigating, bringing this matter to MIBRO’s attention, litigating and
24 negotiating and obtaining judicial approval of a settlement in the public interest, pursuant to Code
25 of Civil Procedure section 1021.5. Payment shall be made not later than fourteen (14) business days
26 after the Effective Date and sent to the address for Brodsky & Smith set forth in section 4.1.1,
27 above.
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1 **5. RELEASE OF ALL CLAIMS**

2 5.1 This Consent Judgment is a full, final, and binding resolution between Bell acting
3 in the public interest, and MIBRO, and its parents, shareholders, officers, directors, employees,
4 divisions, subdivisions, subsidiaries, partners, sister companies, and affiliates, and their successors
5 and assigns (“**Defendant Releasees**”), and all entities from whom they obtain and to whom they
6 directly or indirectly distribute or sell Covered Products, including but not limited to Kmart Corp.,
7 manufacturers, suppliers, distributors, wholesalers, customers, licensors, licensees retailers,
8 franchisees, and cooperative members (collectively “**Downstream Defendant Releasees**”), of all
9 claims for violations of Proposition 65 based on exposure to DINP from Covered Products as set
10 forth in the Notice, with respect to any Covered Products manufactured, distributed, or sold by
11 MIBRO prior to one hundred twenty (120) days after the Effective Date. Compliance with the terms
12 of this Consent Judgment constitutes compliance with Proposition 65 with regard to the Covered
13 Products.

14 5.2 In addition to the foregoing, Bell, on behalf of herself, her past and current agents,
15 representatives, attorneys, and successors and/or assignees, and *not* in her representative capacity,
16 hereby waives all rights to institute or participate in, directly or indirectly, any form of legal action
17 and releases MIBRO, all Defendant Releasees, and all Downstream Defendant Releasees from any
18 and all manner of actions, causes of action, claims, demands, rights, suits, obligations, debts,
19 contracts, agreements, promises, liabilities, penalties, damages, charges, losses, costs, expenses,
20 and attorneys’ fees, of any nature whatsoever, known or unknown, in law or equity, fixed or
21 contingent, now or in the future, with respect to any alleged violations of Proposition 65 related to
22 or arising from Covered Products manufactured distributed or sold by MIBRO or any Defendant
23 Releasee. With respect to the foregoing waivers and releases in this paragraph, Bell hereby
24 specifically waives any and all rights and benefits which she now has, or in the future may have,
25 conferred by virtue of the provisions of Section 1542 of the California Civil Code, which provides
26 as follows:
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1 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE
2 CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS FAVOR
3 AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY
4 HIM MUST HAVE MATERIALLY AFFECTED HIS SETTLEMENT WITH
5 THE DEBTOR.

6 5.3 MIBRO waives any and all claims against Bell, her attorneys and other
7 representatives, for any and all actions taken or statements made (or those that could have been
8 taken or made) by Bell and her attorneys and other representatives, whether in the course of
9 investigating claims or otherwise seeking enforcement of Proposition 65 against it in this matter,
10 and/or with respect to Covered Products.

11 5.4 These releases and waivers are effective on the date the Court approves this Consent
12 Judgment.

13 **6. INTEGRATION**

14 6.1 This Consent Judgment contains the sole and entire agreement of the Parties and
15 any and all prior negotiations and understandings related hereto shall be deemed to have been
16 merged within it. No representations or terms of agreement other than those contained herein exist
17 or have been made by any Party with respect to the other Party or the subject matter hereof.

18 **7. GOVERNING LAW**

19 7.1 The terms of this Consent Judgment shall be governed by the laws of the State of
20 California and apply within the State of California. In the event that Proposition 65 is repealed or
21 is otherwise rendered inapplicable by reason of law generally, or as to Covered Products, then
22 Defendant shall have no further obligations pursuant to this Consent Judgment with respect to, and
23 to the extent that, Covered Products are so affected.

24 **8. NOTICES**

25 8.1 Unless specified herein, all correspondence and notices required to be provided
26 pursuant to this Consent Judgment shall be in writing and personally delivered or sent by: (i) first-
27 class, (registered or certified mail) return receipt requested; or (ii) overnight courier on any party
28 by the other party at the following addresses:

For Defendant:

1 Thomas N. FitzGibbon
2 Apex Law APC
3 233 Wilshire Blvd. Ste 400
Santa Monica, CA 90401

4 And

5 For Bell:

6 Evan Smith
7 Brodsky & Smith, LLC
8 2 Bala Plaza, Suite 510
Bala Cynwyd, PA 19004

9 Any party, from time to time, may specify in writing to the other party a change of address,
10 including electronic mail address, to which all notices and other communications shall be sent. As
11 a courtesy, each notice that must or may be given under this Consent Judgment shall also be sent
12 by electronic mail at the same time it is given by other means.

13 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

14 9.1 This Consent Judgment may be executed in counterparts and by facsimile, each of
15 which shall be deemed an original, and all of which, when taken together, shall constitute one and
16 the same document.

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

18 10.1 Bell shall comply with the requirements set forth in California Health & Safety Code
19 §25249.7(f) and will promptly bring a Motion for Approval of this Consent Judgment and
20 Defendant shall support approval of such Motion.

21 10.2 This Consent Judgment shall not be effective until it is approved and entered by the
22 Court and shall be null and void if, for any reason, it is not approved by the Court. In such case, the
23 Parties agree to meet and confer on how to proceed and if such agreement is not reached within 30
24 days, the case shall proceed on its normal course. The Parties expressly waive their right to appeal
25 this Consent Judgment, in the event it is entered by the Court.

26 10.3 If the Court approves this Consent Judgment and it is reversed or vacated by an
27 appellate court, the Parties shall meet and confer as to whether to modify the terms of this Consent
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1 Judgment. If the Parties do not jointly agree on a course of action to take, the case shall proceed on
2 its normal course on the trial court's calendar.

3 **11. MODIFICATION**

4 11.1 This Consent Judgment may be only modified (a) by an order of the Court approving
5 a future stipulation of the Parties or (b) an order of the Court in response to a motion by either Party.

6 **12. ATTORNEY'S FEES**

7 12.1 A party who unsuccessfully seeks or opposes enforcement or modification of this
8 Consent Judgment shall pay the prevailing party's reasonable attorney's fees and costs, in an
9 amount set by the Court, unless the Court finds that the unsuccessful party has acted with substantial
10 justification. For purposes of this Consent Judgment, the term substantial justification shall carry
11 the same meaning as used in the Civil Discovery Act of 1986, Code of Civil Procedure Section
12 2016, et seq.

13 12.2 Nothing in this Section shall preclude a Party from seeking an award of sanctions
14 pursuant to law.

15 **13. RETENTION OF JURISDICTION**

16 13.1 This Court shall retain jurisdiction of this matter to implement or modify the
17 Consent Judgment.

18 **14. AUTHORIZATION**

19 14.1 The undersigned are authorized to execute this Consent Judgment on behalf of their
20 respective Parties and have read, understood and agree to all of the terms and conditions of this
21 document and certifies that he or she is fully authorized by the Party he or she represents to execute
22 the Consent Judgment on behalf of the Party represented and legally bind that Party. Except as
23 explicitly provided in this Stipulation each Party is to bear its own fees and costs.
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AGREED TO:

Date: 5/14/18
By: *Ema Bell*
EMA BELL

AGREED TO:

Date: April 4/18
By: *Ray S...*
THE MIBRO GROUP, L.C.

IT IS SO ORDERED, ADJUDGED AND DECREED:

Dated: _____

Judge of Superior Court