

1 Evan Smith (Bar No. SBN 242352)
2 BRODSKY & SMITH, LLC.
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*

8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ALAMEDA

EMA BELL,

Plaintiff,

v.

PRODUCT QUEST MANUFACTURING, LLC,

Defendant.

Case No.: RG18893722

CONSENT JUDGMENT

Judge: Paul D. Herbert

Dept.: 20

Hearing Date: June 1, 2018

Hearing Time: 3:00 PM

Reservation #: R – 1951252

1 **1. INTRODUCTION**

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

9 1.2 **Allegations and Representations.** Bell alleges that Defendant has exposed
10 individuals to chemicals including, but not limited to Diisononyl phthalate (DINP) from earwax
11 removal kits manufactured by Product Quest without providing clear and reasonable exposure
12 warnings under Proposition 65. DINP is listed under Proposition 65 as a chemical known to the
13 State of California to cause cancer.

14 1.3 **Notice(s) of Violation/Complaint.** On or about July 12, 2017, Bell served Product
15 Quest, and various public enforcement agencies with a document entitled “60-Day Notice of
16 Violation” pursuant to Health & Safety Code §25249.7(d) (the “Notice”)¹, alleging that Defendant
17 was in violation of Proposition 65 for failing to warn consumers and customers that earwax removal
18 kits manufactured by Product Quest exposed users in California to DINP. No public enforcer has
19 brought and is diligently prosecuting the claims alleged in the Notice. On February 21, 2018, Bell
20 filed a complaint (the “Complaint”) in the matter.

21 1.4 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
22 jurisdiction over Defendant as to the allegations contained in the Complaint filed in this matter, that
23 venue is proper in the County of Alameda, and that this Court has jurisdiction to approve, enter,
24 and oversee the enforcement of this Consent Judgment as a full and final binding resolution of all
25 claims which were or could have been raised in the Complaint based on the facts alleged therein
26 and/or in the Notice.

27 _____
28 ¹ The Notice was amended on or about October 20, 2017.

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 earwax removal kits
10 manufactured by Product Quest, including but not limited to, Rite Aid earwax removal kits, UPC
11 No. 0 11822 33711 3, that are manufactured, distributed, sold and/or offered for sale in California.

12 2.2 **Effective Date.** The term “Effective Date” means the date this Consent Judgment is
13 entered as a Judgment of the Court.

14 **3. INJUNCTIVE RELIEF: WARNINGS**

15 3.1 Commencing ninety (90) days after the Effective Date, Product Quest shall not
16 manufacture, import, or purchase for sale in California any Covered Product that contains more
17 than 1,000 parts per million DINP, Di(2-ethylhexyl) phthalate, Dibutyl phthalate, Benzyl butyl
18 phthalate, Diisodecyl phthalate, Di-n-octyl phthalate and/or Di-n-hexyl phthalate that Product
19 Quest knows will be, or intends to, be sold or offered for sale in California, unless the Covered
20 Product is accompanied by either of the following warning(s):

21 **WARNING:** This product contains a chemical known to the State of California to
22 cause cancer.

23 Or

24 **WARNING:** This product can expose you to chemicals including Diisononyl
25 phthalate, which is known to the State of California to cause cancer. For more
26 information go to www.P65Warnings.ca.gov.

27 3.2 The warning provided pursuant to Section 3.1 shall be affixed to or printed on the
28 Covered Product’s packaging or labeling. The warning shall be prominently affixed to or printed

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

6 **4. MONETARY TERMS**

7 4.1 **Civil Penalty.** Product Quest shall pay a Civil Penalty of \$3,000.00 pursuant to
8 Health and Safety Code section 25249.7(b), to be apportioned in accordance with California Health
9 & Safety Code § 25192, with 75% of the Penalty remitted to the State of California's Office of
10 Environmental Health Hazard Assessment and the remaining 25% of the Civil Penalty remitted to
11 Bell, as provided by California Health & Safety Code § 25249.12(d).

12 4.1.1 Within fourteen (14) business days of the Effective Date, Product Quest
13 shall issue two separate checks for the Civil Penalty payment to (a) "OEHHA" in the amount of
14 \$2,250.00; and (b) "Brodsky & Smith, LLC in Trust for Bell" in the amount of \$750.00. Payment
15 owed to Bell pursuant to this Section shall be delivered to the following payment 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

1 Sacramento, CA 95814

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

4 4.2 **Attorney Fees.** Product Quest shall pay \$29,000.00 to Brodsky & Smith, LLC
5 (“Brodsky Smith”) as complete reimbursement for Plaintiff Bell’s attorneys’ fees and costs incurred
6 as a result of investigating, bringing this matter to Product Quest’s attention, litigating and
7 negotiating and obtaining judicial approval of a settlement in the public interest, pursuant to Code
8 of Civil Procedure section 1021.5. Payment shall be made within fourteen (14) business days of
9 the Effective Date and sent to the address for Brodsky & Smith set forth in section 4.1.1, above.

10 **5. RELEASE OF ALL CLAIMS**

11 5.1 This Consent Judgment is a full, final, and binding resolution between Bell acting
12 on her own behalf, and on behalf of the public and in the public interest, and Product Quest, and its
13 parents, shareholders, directors, officers, employees, representatives, agents, attorneys, divisions,
14 subdivisions, subsidiaries, partners, sister companies, and affiliates, and their predecessors,
15 successors and assigns (“Defendant Releasees”), and all entities from whom they obtain and to
16 whom they directly or indirectly distribute or sell Covered Products, including but not limited to
17 manufacturers, suppliers, distributors, wholesalers, customers, licensors, licensees retailers,
18 franchisees, and cooperative members (“Downstream Releasees”), of all claims for violations of
19 Proposition 65, Business & Professions Code sections 17200 *et seq.*, or any other statutory or
20 common law claims that have been or could have been asserted in the Complaint against Product
21 Quest based on exposure to DINP, Diisodecyl phthalate, Di(2-ethylhexyl) phthalate, Dibutyl
22 phthalate, Benzyl butyl phthalate, Di-n-octyl phthalate and/or Di-n-hexyl phthalate from Covered
23 Products, with respect to any Covered Products manufactured, distributed, or sold by Product
24 Quest, Defendant Releasees or Downstream Releasees prior to the Effective Date, or any other
25 claim based on the facts or conduct alleged in the Complaint, whether based on actions committed
26 by Product Quest, Defendant Releasees or Downstream Releasees. This Consent Judgment shall
27 have preclusive effect such that no other person or entity, whether purporting to act in his, her, or
28 its interests or the public interest shall be permitted to pursue and/or take any action with respect to

1 any violation of Proposition 65 related to the chemicals listed in section 3.1 above against Product
2 Quest, Defendant Releasees or Downstream Releasees.

3 5.2 Compliance with the terms of this Consent Judgment resolves any issue now, in the
4 past, and in the future concerning compliance by Product Quest, Defendant Releasees and
5 Downstream Releasees, with the requirements of Proposition 65, Business & Professions Code
6 sections 17200 *et seq.*, or any other statutory or common law claims with regard to the Covered
7 Products.

8 5.3 In any action brought by the Attorney General or another enforcer alleging
9 subsequent violations of Proposition 65, Business & Professions Code sections 17200 *et seq.*, or
10 any other statutory or common law claims, Product Quest, Defendant Releasees and/or
11 Downstream Releasees may assert any and all defenses that are available, including the *res judicata*
12 or collateral estoppel effect of this Consent Judgment.

13 5.4 In addition to the foregoing, Bell, on behalf of herself, her past and current agents,
14 representatives, attorneys, and successors and/or assignees, and *not* in her representative capacity,
15 hereby waives all rights to institute or participate in, directly or indirectly, any form of legal action
16 and releases any Product Quest, Defendant Releasees, and Downstream Releasees from any and all
17 manner of actions, causes of action, claims, demands, rights, suits, obligations, debts, contracts,
18 agreements, promises, liabilities, damages, charges, losses, costs, expenses, and attorneys' fees, of
19 any nature whatsoever, known or unknown, in law or equity, fixed or contingent, now or in the
20 future, with respect to any alleged violations of Proposition 65, Business & Professions Code
21 sections 17200 *et seq.*, or any other statutory or common law claims related to or arising from
22 Covered Products manufactured distributed or sold by Product Quest, Defendant Releasees or
23 Downstream Releasees. With respect to the foregoing waivers and releases in this paragraph, Bell
24 hereby specifically waives any and all rights and benefits which she now has, or in the future may
25 have, conferred by virtue of the provisions of Section 1542 of the California Civil Code, which
26 provides as follows:

27 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE
28 CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER

1 FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF
2 KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS
3 SETTLEMENT WITH THE DEBTOR.

4 5.5 Product Quest waives any and all claims against Bell, her attorneys and other
5 representatives, for any and all actions taken or statements made (or those that could have been
6 taken or made) by Bell and her attorneys and other representatives, whether in the course of
7 investigating claims or otherwise seeking enforcement of Proposition 65 against it in this matter,
8 and/or with respect to Covered Products.

9 **6. INTEGRATION**

10 6.1 This Consent Judgment contains the sole and entire agreement of the Parties and
11 any and all prior negotiations and understandings related hereto shall be deemed to have been
12 merged within it. No representations or terms of agreement other than those contained herein exist
13 or have been made by any Party with respect to the other Party or the subject matter hereof.

14 **7. GOVERNING LAW**

15 7.1 The terms of this Consent Judgment shall be governed by the laws of the State of
16 California and apply within the State of California. In the event that Proposition 65 is repealed or
17 is otherwise rendered inapplicable by reason of law generally, or as to Covered Products, then
18 Defendant shall have no further obligations pursuant to this Consent Judgment with respect to, and
19 to the extent that, Covered Products are so affected.

20 **8. NOTICES**

21 8.1 Unless specified herein, all correspondence and notices required to be provided
22 pursuant to this Consent Judgment shall be in writing and personally delivered or sent by: (i) first-
23 class, (registered or certified mail) return receipt requested; or (ii) overnight courier on any party
24 by the other party at the following addresses:

25 For Defendant:

26 Sean Meenan
27 Winston & Strawn LLP
28 101 California St., 35th Fl.
San Francisco, CA 94111-5802

And

1 For Bell:

2 Evan Smith
3 Brodsky & Smith, LLC
4 9595 Wilshire Blvd., Ste. 900
5 Beverly Hills, CA 90212

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

8 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

9 9.1 This Consent Judgment may be executed in counterparts and by facsimile, each of
10 which shall be deemed an original, and all of which, when taken together, shall constitute one and
11 the same document.

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

14 10.1 Bell agrees to comply with the requirements set forth in California Health & Safety
15 Code §25249.7(f) and to promptly bring a Motion for Approval of this Consent Judgment and
16 Defendant agrees it shall support approval of such Motion.

17 10.2 This Consent Judgment shall not be effective until it is approved and entered by the
18 Court and shall be null and void if, for any reason, it is not approved by the Court. In such case,
19 the Parties agree to meet and confer on how to proceed and if such agreement is not reached within
20 30 days, the case shall proceed on its normal course.

21 10.3 If the Court approves this Consent Judgment and is reversed or vacated by an
22 appellate court, the Parties shall meet and confer as to whether to modify the terms of this Consent
23 Judgment. If the Parties do not jointly agree on a course of action to take, the case shall proceed on
24 its normal course on the trial court's calendar.

25 **11. MODIFICATION**

26 11.1 This Consent Judgment may be modified only by further stipulation of the Parties
27 and the approval of the Court or upon the granting of a motion brought to the Court by either Party.
28

1 **12. ATTORNEY'S FEES**

2 12.1 A party who unsuccessfully brings or contests an action arising out of this Consent
3 Judgment shall be required to pay the prevailing party's reasonable attorney's fees and costs unless
4 the unsuccessful party has acted with substantial justification. For purposes of this Consent
5 Judgment, the term substantial justification shall carry the same meaning as used in the Civil
6 Discovery Act of 1986, Code of Civil Procedure Section 2016, *et seq.*

7 12.2 Nothing in this Section shall preclude a Party from seeking an award of sanctions
8 pursuant to law.

9 **13. RETENTION OF JURISDICTION**

10 13.1 This Court shall retain jurisdiction of this matter to implement or modify the
11 Consent Judgment.

12 **14. AUTHORIZATION**

13 14.1 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 certifies 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. Except as
17 explicitly provided herein each Party is to bear its own fees and costs.

18
19 **AGREED TO:**

AGREED TO:

20
21 Date: _____

Date: 4/9/18

22 By: _____

By: [Signature]

23 EMA BELL

PRODUCT QUEST MANUFACTURING
24 LLC.

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

26
27 Dated: _____

Judge of Superior Court

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

12. ATTORNEY'S FEES

12.1 A party who unsuccessfully brings or contests an action arising out of this Consent Judgment shall be required to pay the prevailing party's reasonable attorney's fees and costs unless the unsuccessful party has acted with substantial justification. For purposes of this Consent Judgment, the term substantial justification shall carry the same meaning as used in the Civil Discovery Act of 1986, Code of Civil Procedure Section 2016, *et seq.*

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

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 certifies 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: 4/11/18
By: 
EMA BELL

Date: _____
By: _____
PRODUCT QUEST MANUFACTURING, LLC.

IT IS SO ORDERED, ADJUDGED AND DECREED:

Dated: _____ Judge of Superior Court