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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 HOME ESSENTIALS & BEYOND, INC., et al.,

15 Defendants.

Case No.: RG18914799

CONSENT JUDGMENT

Judge: Ronni MacLaren

Dept.: 25

Hearing Date: March 15, 2019

Hearing Time: 9:00 AM

Reservation #: R-2041581

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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 Home Essentials & Beyond, Inc.
4 (“Home Essentials & Beyond” or “Defendant”) with Bell and Defendant collectively referred to as
5 the “Parties” and each of them as a “Party.” Bell is an individual residing in California that seeks
6 to promote awareness of exposures to toxic chemicals and improve human health by reducing or
7 eliminating hazardous substances contained in consumer products. Home Essentials & Beyond is
8 alleged to be a person in the course of doing business for purposes of Proposition 65, Cal. Health
9 & Safety Code §§ 25249.6 et seq.

10 **1.2 Allegations and Representations.** Bell alleges that Defendant has exposed
11 individuals to di(2-ethylhexyl) phthalate (DEHP) from its sales of Home Essentials & Beyond wine
12 bottle totes without providing a clear and reasonable exposure warning pursuant to Proposition 65.
13 DEHP is listed under Proposition 65 as a chemical known to the State of California to cause cancer
14 and reproductive toxicity.

15 **1.3 Notice of Violation/Complaint.** On or about March 5, 2018, Bell served Home
16 Essentials & Beyond and various public enforcement agencies with documents entitled “60-Day
17 Notice of Violation” pursuant to Health & Safety Code §25249.7(d) (the “Notice”), alleging that
18 Defendant violated Proposition 65 for failing to warn consumers and customers that use of Home
19 Essentials & Beyond wine bottle totes expose users in California to DEHP. No public enforcer has
20 brought and is diligently prosecuting the claims alleged in the Notice. On July 30, 2018, Bell filed
21 a complaint (the “Complaint”) in the matter.

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 Alameda, and that this Court has jurisdiction to approve, enter,
25 and oversee the enforcement of this Consent Judgment as a full and final binding resolution of all
26 claims which were or could have been raised in the Complaint based on the facts alleged therein
27 and/or 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 Home Essentials &
10 Beyond wine bottle totes that are manufactured, distributed and/or offered for sale in California by
11 Home Essentials & Beyond.

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 served on the parties.

14 **3. INJUNCTIVE RELIEF: WARNINGS**

15 3.1 **Reformulation of Covered Products.** As of the date this Consent Judgment is
16 signed by both Parties, and continuing thereafter, Covered Products that Home Essentials &
17 Beyond directly manufactures, imports, distributes, sells, or offers for sale in California shall either:
18 (a) be Reformulated Products pursuant to § 3.2, below; or (b) be labeled with a clear and reasonable
19 exposure warning pursuant to §§ 3.3 and 3.4, below. For purposes of this Consent Judgment, a
20 “Reformulated Product” is a Covered Product that is in compliance with the standard set forth in §
21 3.2 below. The warning requirement set forth in §§ 3.3 and 3.4 shall not apply to any Reformulated
22 Product.

23 3.2 **Reformulation Standard.** “Reformulated Products” shall mean Covered Products
24 that contain concentrations less than or equal to 0.1% (1,000 parts per million (ppm)) of DEHP
25 when analyzed pursuant to U.S. Environmental Protection Agency testing methodologies 3580A
26 and 8270C or other methodology utilized by federal or state government agencies for the purpose
27 of determining the phthalate content in a solid substance.
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1 3.3 **Clear and Reasonable Warning.** As of the date this Consent Judgment is signed
2 by both Parties, and continuing thereafter, a clear and reasonable exposure warning as set forth in
3 this §§ 3.3 and 3.4 must be provided for all Covered Products that Defendant manufacturers,
4 imports, distributes, sells, or offers for sale in California that are not Reformulated Products. There
5 shall be no obligation for Defendant to provide a warning for Covered Products that enter the stream
6 of commerce prior to the date this Consent Judgment is signed by both Parties. The warning shall
7 consist of either the **Warning** or **Alternative Warning** described in §§ 3.3(a) or (b), respectively:

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

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

12 (b) **Alternative Warning:** Home Essentials & Beyond may, but is not required to, use
13 the alternative short-form warning as set forth in this § 3.3(b) (“**Alternative Warning**”) as follows:

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

15 3.4 A **Warning** or **Alternative Warning** provided pursuant to § 3.3 must print the word
16 “**WARNING:**” in all capital letters and in bold font, followed by a colon. The warning symbol to
17 the left of the word “**WARNING:**” must be a black exclamation point in a yellow equilateral
18 triangle with a black outline, except that if the sign or label for the Covered Product does not use
19 the color yellow, the symbol may be in black and white. The symbol must be in a size no smaller
20 than the height of the word “**WARNING:**”. The warning shall be affixed to or printed on the
21 Covered Product’s packaging or labeling, or on a placard, shelf tag, sign or electronic device or
22 automatic process, providing that the warning is displayed with such conspicuousness, as compared
23 with other words, statements, or designs as to render it likely to be read and understood by an
24 ordinary individual under customary conditions of purchase or use. A warning may be contained
25 in the same section of the packaging, labeling, or instruction booklet that states other safety
26 warnings, if any, concerning the use of the Covered Product and shall be at least the same size as
27 those other safety warnings.

1 If Home Essentials & Beyond sells Covered Products via an internet website to customers
2 located in California, the warning requirements of this section shall be satisfied if the foregoing
3 warning appears either: (a) on the same web page on which a Covered Product is displayed and/or
4 described; (b) on the same page as the price for the Covered Product; or (c) on one or more web
5 pages displayed to a purchaser prior to purchase during the checkout process. Alternatively, a
6 symbol consisting of a black exclamation point in a yellow or white equilateral triangle may appear
7 adjacent to or immediately following the display, description, price, or checkout listing of the
8 Covered Product, if the warning statement appears elsewhere on the same web page in a manner
9 that clearly associates it with the product(s) to which the warning applies.

10 3.5 **Compliance with Warning Regulations.** Defendant shall be deemed to be in
11 compliance with this Consent Judgment by either adhering to §§ 3.3 and 3.4 of this Consent
12 Judgment or by complying with warning requirements adopted by the State of California’s Office
13 of Environmental Health Hazard Assessment (“OEHHA”) after the Effective Date.

14 **4. MONETARY TERMS**

15 4.1 **Civil Penalty.** Home Essentials & Beyond shall pay \$2,000.00 as a Civil Penalty
16 pursuant to Health and Safety Code section 25249.7(b), to be apportioned in accordance with
17 California Health & Safety Code § 25192, with 75% of these funds remitted to OEHHA and the
18 remaining 25% of the Civil Penalty remitted to Bell, as provided by California Health & Safety
19 Code § 25249.12(d).

20 4.1.1 Within ten (10) days of the Effective Date, Home Essentials & Beyond
21 shall issue two separate checks for the Civil Penalty payment to (a) “OEHHA” in the amount of
22 \$1,500.00; and to (b) “Brodsky & Smith, LLC in Trust for Bell” in the amount of \$500.00.
23 Payment owed to Bell pursuant to this Section shall be delivered to the following payment
24 address:

25 Evan J. Smith, Esquire
26 Brodsky & Smith, LLC
27 Two Bala Plaza, Suite 510
28 Bala Cynwyd, PA 19004

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

3 For United States Postal Service Delivery:

4 Mike Gyurics
5 Fiscal Operations Branch Chief
6 Office of Environmental Health Hazard Assessment
7 P.O. Box 4010
8 Sacramento, CA 95812-4010

9 For Non-United States Postal Service Delivery:

10 Mike Gyurics
11 Fiscal Operations Branch Chief
12 Office of Environmental Health Hazard Assessment
13 1001 I Street
14 Sacramento, CA 95814

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

17 4.2 **Attorneys' Fees.** Within ten (10) days of the Effective Date, Home Essentials &
18 Beyond shall pay \$18,000.00 to Brodsky & Smith, LLC ("Brodsky Smith") as complete
19 reimbursement for Bell's attorneys' fees and costs incurred as a result of investigating, bringing
20 this matter to Home Essentials & Beyond' attention, litigating and negotiating and obtaining
21 judicial approval of a settlement in the public interest, pursuant to Code of Civil Procedure § 1021.5.

22 **5. RELEASE OF ALL CLAIMS**

23 5.1 This Consent Judgment is a full, final, and binding resolution between Bell acting
24 on her own behalf, and on behalf of the public interest, and Home Essentials & Beyond, and its
25 parents, shareholders, members, directors, officers, managers, employees, representatives, agents,
26 attorneys, divisions, subdivisions, subsidiaries, partners, sister companies, and affiliates, and their
27 predecessors, successors and assigns ("Defendant Releasees"), and all entities from whom they
28 obtain and to whom they directly or indirectly distribute or sell Covered Products, including but
not limited to manufacturers, suppliers, distributors, wholesalers, customers, licensors, licensees
retailers, franchisees, and cooperative members, including but not limited to Tuesday Morning,
Inc., Tuesday Morning Partners, Ltd., and Tuesday Morning Corporation and all past and current

1 owners, parents, subsidiaries, affiliates, sister and related companies, employees, shareholders,
2 officers, directors, insurers, agents, attorneys, predecessors, successors, and assigns of the entities
3 and individuals identified in above (“Downstream Releasees”), of all claims for violations of
4 Proposition 65 based on exposure to DEHP from Covered Products as set forth in the Notice, with
5 respect to any Covered Products manufactured, distributed, or sold by Home Essentials & Beyond
6 prior to the Effective Date. This Consent Judgment shall have preclusive effect such that no other
7 person or entity, whether purporting to act in his, her, or its interests or the public interest shall be
8 permitted to pursue and/or take any action with respect to any violation of Proposition 65 that was
9 alleged in the Complaint, or that could have been brought pursuant to the Notice against Home
10 Essentials & Beyond and/or the Downstream Releasees of the Covered Products (“Proposition 65
11 Claims”). Compliance with the terms of this Consent Judgment constitutes compliance with
12 Proposition 65 with regard to the Covered Products.

13 5.2 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 Home Essentials & Beyond, Defendant Releasees, and Downstream Releasees from
17 any and all manner of actions, causes of action, claims, demands, rights, suits, obligations, debts,
18 contracts, agreements, promises, liabilities, damages, charges, losses, costs, expenses, investigation
19 fees, expert fees, and attorneys’ fees, of any nature whatsoever, known or unknown, in law or
20 equity, fixed or contingent, now or in the future (collectively, “Claims”), against Defendant
21 Releasees and/or Downstream Releasees that arise under Proposition 65 or any other statutory or
22 common law claims that were or could have been asserted related to or arising from Covered
23 Products manufactured, distributed, or sold by Home Essentials & Beyond, Defendant Releasees
24 or Downstream Releasees. With respect to the foregoing waivers and releases in this paragraph,
25 Bell hereby specifically waives any and all rights and benefits which she, her past and current
26 agents, representatives, attorneys, successors, and or assignees now have, or in the future may have,
27 conferred by virtue of the provisions of § 1542 of the California Civil Code, or any other state or
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1 federal statute or common law of similar effect, to the fullest extent she may lawfully waive such
2 rights or benefits pertaining to the released matters. § 1542 provides as follows:

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

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

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 Avrom R. Vann, P.C.
2 Attorney at Law
3 1211 Avenue of the Americas - 40th Floor
4 New York, NY 10036

5 And

6 For Bell:

7 Evan Smith
8 Brodsky & Smith, LLC
9 9595 Wilshire Blvd., Ste. 900
10 Beverly Hills, CA 90212

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

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**
18 **APPROVAL**

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

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


26 10.3 If the Court approves this Consent Judgment and 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
28 Judgment. If the Parties do not jointly agree on a course of action to take, the case shall proceed on
its normal course on the trial court's calendar.

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AGREED TO:

AGREED TO:

Date: 11/24/19
By: 
EMA BELL

Date: 11/20/19
By: 
HOME ESSENTIALS & BEYOND, INC.

IT IS SO ORDERED, ADJUDGED AND DECREED:

Dated: _____

Judge of Superior Court