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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 BH PET GEAR, LLC, et al.,

15 Defendant.

Case No.: RG19010802

CONSENT JUDGMENT

Judge: Dennis Hayashi

Dept.: 518

Hearing Date: October 9, 2019

Hearing Time: 2:30 PM

Reservation #: R-2106681

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 Tuesday Morning, Inc. (“Tuesday Morning”
4 or “Defendant”) with Bell and Defendant collectively referred to as the “Parties” and each of them
5 as a “Party.” Bell is an individual residing in California that 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. Tuesday Morning is alleged to be a person in the course
8 of 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 di(2-ethylhexyl) phthalate (DEHP) from its sales of Rain Boots for Dogs
11 manufactured by BH Pet Gear, LLC without providing a clear and reasonable exposure warning
12 pursuant to Proposition 65. DEHP is listed under Proposition 65 as a chemical known to the State
13 of California to cause cancer and reproductive toxicity.

14 1.3 **Notice of Violation/Complaint.** On or about March 16, 2018, Bell served Tuesday
15 Morning, and various public enforcement agencies with documents entitled “60-Day Notice of
16 Violation” pursuant to Health & Safety Code §25249.7(d) (the “Notice”), alleging that Defendant
17 violated Proposition 65 for failing to warn consumers and customers that use of Jelly Wellies
18 expose users in California to DEHP. No public enforcer has brought and is diligently prosecuting
19 the claims alleged in the Notice. On March 13, 2019, Bell filed a complaint (the “Complaint” or
20 “Action”) in the matter. On August 19, 2019, defendant BH Pet Gear, LLC was dismissed from
21 the Action.

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.
28

1 1.5 Defendant denies the material allegations contained in the 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 Rain Boots for Dogs
10 manufactured by BH Pet Gear, LLC that are distributed, sold and/or offered for sale in California
11 by Tuesday Morning.

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 **Reformulation of Covered Products.** As of 90 days after the Effective Date, and
16 continuing thereafter, Covered Products that Tuesday Morning directly imports, distributes, sells,
17 or offers for sale in California shall either: (a) be Reformulated Products pursuant to § 3.2, below;
18 or (b) be labeled with a clear and reasonable exposure warning pursuant to §§ 3.3 and 3.4, below.
19 For purposes of this Consent Judgment, a “Reformulated Product” is a Covered Product that is in
20 compliance with the standard set forth in § 3.2 below. The warning requirement set forth in §§ 3.3
21 and 3.4 shall not apply to any Reformulated Product.

22 3.2 **Reformulation Standard.** “Reformulated Products” shall mean Covered Products
23 that contain concentrations less than or equal to 0.1% (1,000 parts per million (ppm) of DEHP when
24 analyzed pursuant to U.S. Environmental Protection Agency testing methodologies 3580A and
25 8270C or other methodology utilized by federal or state government agencies for the purpose of
26 determining the phthalate content in a solid substance.

1 3.5 **Compliance with Warning Regulations.** Defendant shall be deemed to be in
2 compliance with this Consent Judgment by either adhering to §§ 3.3 and 3.4 of this Consent
3 Judgment or by complying with warning requirements adopted by the State of California’s Office
4 of Environmental Health Hazard Assessment (“OEHHA”) after the Effective Date.

5 **4. MONETARY TERMS**

6 4.1 **Civil Penalty.** Tuesday Morning shall pay \$2,000.00 as a Civil Penalty pursuant to
7 Health and Safety Code section 25249.7(b), to be apportioned in accordance with California Health
8 & Safety Code § 25192, with 75% of these funds remitted to OEHHA and the remaining 25% of
9 the Civil Penalty remitted to Bell, as provided by California Health & Safety Code § 25249.12(d).

10 4.1.1 Within thirty (30) days of the Effective Date, Tuesday Morning shall issue
11 two separate checks for the Civil Penalty payment to (a) “OEHHA” in the amount of \$1,500.00;
12 and to (b) “Brodsky & Smith, LLC in Trust for Bell” in the amount of \$500.00. Payment owed to
13 Bell pursuant to this Section shall be delivered to the following payment address:

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

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

20 For United States Postal Service Delivery:

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

26 For Non-United States Postal Service Delivery:

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

3 4.2 **Attorneys' Fees.** Tuesday Morning shall pay a total of \$20,000.00 to Brodsky &
4 Smith, LLC ("Brodsky Smith") as complete reimbursement for Bell's attorneys' fees and costs
5 incurred as a result of investigating, bringing this matter to Tuesday Morning's attention, litigating
6 and negotiating and obtaining judicial approval of a settlement in the public interest, pursuant to
7 Code of Civil Procedure § 1021.5. This amount shall be paid in two installments. The first
8 installment of \$10,000 shall be paid within thirty (30) days of the Effective Date, and the second
9 installment of \$10,000 shall be paid within sixty (60) days of the Effective Date.

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, her past and current agents, representatives, attorneys, successors, and/or
13 assignees, and on behalf of the public interest, and Tuesday Morning, and its parents, shareholders,
14 members, directors, officers, managers, employees, representatives, agents, attorneys, divisions,
15 subdivisions, subsidiaries, partners, sister companies, and affiliates, and their predecessors,
16 successors and assigns including but not limited to Tuesday Morning Partners, Ltd. and Tuesday
17 Morning Corporation and all past and current owners, parents, subsidiaries, affiliates, sister and
18 related companies, employees, shareholders, officers, directors, insurers, agents, attorneys,
19 predecessors, successors, and assigns of the entities and individuals identified, above ("Defendant
20 Releasees"), and all entities to whom they directly or indirectly distribute or sell Covered Products,
21 customers, licensors, licensees retailers, franchisees, and cooperative members ("Downstream
22 Releasees"), of all claims for violations of Proposition 65 based on exposure to DEHP from
23 Covered Products as set forth in the Notice, with respect to any Covered Products distributed, sold
24 and/or offered for sale by Tuesday Morning prior to the Effective Date. This Consent Judgment
25 shall have preclusive effect such that no other person or entity, whether purporting to act in his,
26 her, or its interests or the public interest shall be permitted to pursue and/or take any action with
27 respect to any violation of Proposition 65 that was alleged in the Complaint, or that could have
28

1 been brought pursuant to the Notice against Tuesday Morning and/or the Downstream Releasees
2 of the Covered Products (“Proposition 65 Claims”). Compliance with the terms of this Consent
3 Judgment constitutes compliance with Proposition 65 with regard to the Covered Products.

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

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

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

28 **6. INTEGRATION**

 6.1 This Consent Judgment contains the sole and entire agreement of the Parties and
any and all prior negotiations and understandings related hereto shall be deemed to have been

1 merged within it. No representations or terms of agreement other than those contained herein exist
2 or have been made by any Party with respect to the other Party or the subject matter hereof.

3 **7. GOVERNING LAW**

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

9 **8. NOTICES**

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

14 For Defendant:

15 Vanessa C. Adriance
16 Arnold & Porter
17 777 South Figueroa St., 44th Floor
Los Angeles, CA 90017-5844

18 And

19 For Bell:

20 Evan Smith
21 Brodsky & Smith, LLC
22 9595 Wilshire Blvd., Ste. 900
Beverly Hills, CA 90212

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

25 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

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

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,
8 the Parties agree to meet and confer on how to proceed and if such agreement is not reached within
9 30 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.

22 **13. RETENTION OF JURISDICTION**

23 13.1 This Court shall retain jurisdiction of this matter to implement or modify the
24 Consent Judgment.

25 **14. AUTHORIZATION**

26 14.1 The undersigned are authorized to execute this Consent Judgment on behalf of their
27 respective Parties and have read, understood and agree to all of the terms and conditions of this
28

1 document and certify that he or she is fully authorized by the Party he or she represents to execute
2 the Consent Judgment on behalf of the Party represented and legally bind that Party. Except as
3 explicitly provided herein each Party is to bear its own fees and costs.
4

5 **AGREED TO:**

AGREED TO:

6
7 Date: 8/19/19
8 By: [Signature]
9 EMIL BENT

Date: August 13, 2019
By: Jennifer Gray
TUESDAY MORNING, INC.

10
11 **IT IS SO ORDERED, ADJUDGED AND DECREED:**

12
13 Dated: _____

Judge of Superior Court _____