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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 WAXMAN CONSUMER PRODUCTS GROUP,
15 INC.,

16 Defendant.

Case No.: RG18914617

CONSENT JUDGMENT

Judge: Frank Roesch

Dept.: 24

Hearing Date: October 18, 2018

Hearing Time: 3:45 PM

Reservation #: R-1996604

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 Waxman Consumer Products Group,
4 Inc. (“Waxman Consumer Products” or “Defendant”) with Bell and Defendant collectively referred
5 to as the “Parties” and each of them as a “Party.” Bell is an individual residing in California that
6 seeks to promote awareness of exposures to toxic chemicals and improve human health by reducing
7 or eliminating hazardous substances contained in consumer products. Waxman Consumer Products
8 is 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 a chemical known to the State of California to cause cancer and reproductive toxicity
12 from its sales of PlumbCraft sink and faucet drain guards without providing a clear and reasonable
13 exposure warning pursuant to Proposition 65.

14 **1.3 Notice of Violation/Complaint.** On or about March 23, 2018, Bell served Waxman
15 Consumer Products, and various public enforcement agencies with documents entitled “60-Day
16 Notice of Violation” pursuant to Health & Safety Code §25249.7(d) (the “Notice”), alleging that
17 Defendant violated Proposition 65 for failing to warn consumers and customers that use of
18 PlumbCraft sink and faucet drain guards expose users in California to a chemical known to the
19 State of California to cause cancer and reproductive toxicity. No public enforcer has brought and
20 is diligently prosecuting the claims alleged in the Notice. On July 27, 2018, Bell filed a complaint
21 (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.
28

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 PlumbCraft sink and
10 faucet drain guards that are manufactured, distributed and/or offered for sale in California by
11 Waxman Consumer Products

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

23 3.2 **Reformulation Standard.** “Reformulated Products” shall mean Covered Products
24 that contain concentrations less than or equal to safe harbor levels, consisting of no significant risk
25 levels for chemicals listed as causing cancer and maximum allowable does levels for chemicals
26 listed as causing reproductive harm, as set forth by the State of California’s Office of Environmental
27 Health Hazard Assessment (“OEHHA”).
28

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 is not a Reformulated Product. 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 comply with the warning requirements adopted by the OEHHA, as set forth in Title 27 California
8 Code of Regulations section 25600, et seq, as amended from time to time.

9 **3.4** A warning provided pursuant to § 3.3 must print the word “**WARNING:**” in all
10 capital letters and in bold font, followed by a colon. The warning symbol to the left of the word
11 “**WARNING:**” must be a black exclamation point in a yellow equilateral triangle with a black
12 outline, except that if the sign or label for the Covered Product does not use the color yellow, the
13 symbol may be in black and white. The symbol must be in a size no smaller than the height of the
14 word “**WARNING:**”. The warning shall be affixed to or printed on the Covered Product’s
15 packaging or labeling, or on a placard, shelf tag, sign or electronic device or automatic process,
16 providing that the warning is displayed with such conspicuousness, as compared with other words,
17 statements, or designs as to render it likely to be read and understood by an ordinary individual
18 under customary conditions of purchase or use. A warning may be contained in the same section
19 of the packaging, labeling, or instruction booklet that states other safety warnings, if any,
20 concerning the use of the Covered Product and shall be at least the same size as those other safety
21 warnings.

22 **3.5 Compliance with Warning Regulations.** Defendant shall be deemed to be in
23 compliance with this Consent Judgment by either adhering to §§ 3.3 and 3.4 of this Consent
24 Judgment or by complying with warning requirements adopted by the OEHHA after the Effective
25 Date.
26
27
28

1 **4. MONETARY TERMS**

2 4.1 **Civil Penalty.** Waxman Consumer Products shall pay \$3,000.00 as a Civil Penalty
3 pursuant to Health and Safety Code section 25249.7(b), to be apportioned in accordance with
4 California Health & Safety Code § 25192, with 75% of these funds remitted to OEHHA and the
5 remaining 25% of the Civil Penalty remitted to Bell, as provided by California Health & Safety
6 Code § 25249.12(d).

7 4.1.1 Within ten (10) days of the Effective Date, Waxman Consumer Products
8 shall issue two separate checks for the Civil Penalty payment to (a) "OEHHA" in the amount of
9 \$2,250.00; and to (b) "Brodsky & Smith, LLC in Trust for Bell" in the amount of \$750.00.

10 Payment owed to Bell pursuant to this Section shall be delivered to the following payment
11 address:

12 Evan J. Smith, Esquire
13 Brodsky & Smith, LLC
14 Two Bala Plaza, Suite 510
 Bala Cynwyd, PA 19004

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

17 For United States Postal Service Delivery:

18 Mike Gyurics
19 Fiscal Operations Branch Chief
20 Office of Environmental Health Hazard Assessment
 P.O. Box 4010
 Sacramento, CA 95812-4010

21 For Non-United States Postal Service Delivery:

22 Mike Gyurics
23 Fiscal Operations Branch Chief
24 Office of Environmental Health Hazard Assessment
 1001 I Street
 Sacramento, CA 95814

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

1 4.2 **Attorneys' Fees.** Within ten (10) days of the Effective Date, Waxman Consumer
2 Products shall pay \$26,000.00 to Brodsky & Smith, LLC ("Brodsky Smith") as complete
3 reimbursement for Bell's attorneys' fees and costs incurred as a result of investigating, bringing
4 this matter to Waxman Consumer Products' attention, litigating and negotiating and obtaining
5 judicial approval of a settlement in the public interest, pursuant to Code of Civil Procedure § 1021.5.

6 **5. RELEASE OF ALL CLAIMS**

7 5.1 This Consent Judgment is a full, final, and binding resolution between Bell acting
8 on her own behalf, and on behalf of the public interest, and Waxman Consumer Products, and its
9 parents, shareholders, members, directors, officers, managers, employees, representatives, agents,
10 attorneys, divisions, subdivisions, subsidiaries, partners, sister companies, and affiliates, and their
11 predecessors, successors and assigns ("Defendant Releasees"), and all entities from whom they
12 obtain and to whom they directly or indirectly distribute or sell Covered Products, including but
13 not limited to manufacturers, suppliers, distributors, wholesalers, customers, licensors, licensees
14 retailers, franchisees, and cooperative members, including but not limited to Kmart Corp.
15 ("Downstream Releasees"), of all claims for violations of Proposition 65 based on exposure to a
16 chemical known to the State of California to cause cancer and reproductive toxicity from Covered
17 Products as set forth in the Notice, with respect to any Covered Products manufactured, distributed,
18 or sold by Waxman Consumer Products prior to the Effective Date. This Consent Judgment shall
19 have preclusive effect such that no other person or entity, whether purporting to act in his, her, or
20 its interests or the public interest shall be permitted to pursue and/or take any action with respect to
21 any violation of Proposition 65 that was alleged in the Complaint, or that could have been brought
22 pursuant to the Notice against Waxman Consumer Products and/or the Downstream Releasees of
23 the Covered Products ("Proposition 65 Claims"). Compliance with the terms of this Consent
24 Judgment constitutes compliance with Proposition 65 with regard to the Covered Products.

25 5.2 In addition to the foregoing, Bell, on behalf of herself, her past and current agents,
26 representatives, attorneys, and successors and/or assignees, and not in her representative capacity,
27 hereby waives all rights to institute or participate in, directly or indirectly, any form of legal action
28

1 and releases Waxman Consumer Products, Defendant Releasees, and Downstream Releasees from
2 any and all manner of actions, causes of action, claims, demands, rights, suits, obligations, debts,
3 contracts, agreements, promises, liabilities, damages, charges, losses, costs, expenses, and
4 attorneys' fees, of any nature whatsoever, known or unknown, in law or equity, fixed or contingent,
5 now or in the future, with respect to any alleged violations of Proposition 65 related to or arising
6 from Covered Products manufactured, distributed, or sold by Waxman Consumer Products,
7 Defendant Releasees or Downstream Releasees. With respect to the foregoing waivers and releases
8 in this paragraph, Bell hereby specifically waives any and all rights and benefits which she now
9 has, or in the future may have, conferred by virtue of the provisions of § 1542 of the California
10 Civil Code, which provides as follows:

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

15 5.3 Waxman Consumer Products waives any and all claims against Bell, her attorneys
16 and other representatives, for any and all actions taken or statements made (or those that could have
17 been taken or made) by Bell and her attorneys and other representatives, whether in the course of
18 investigating claims or otherwise seeking enforcement of Proposition 65 against it in this matter,
19 and/or with respect to Covered Products.

20 6. INTEGRATION

21 6.1 This Consent Judgment contains the sole and entire agreement of the Parties and
22 any and all prior negotiations and understandings related hereto shall be deemed to have been
23 merged within it. No representations or terms of agreement other than those contained herein exist
24 or have been made by any Party with respect to the other Party or the subject matter hereof.

25 7. GOVERNING LAW

26 7.1 The terms of this Consent Judgment shall be governed by the laws of the State of
27 California and apply within the State of California. In the event that Proposition 65 is repealed or
28 is otherwise rendered inapplicable by reason of law generally, or as to Covered Products, then

1 Defendant shall have no further obligations pursuant to this Consent Judgment with respect to, and
2 to the extent that, Covered Products are so affected.

3 **8. NOTICES**

4 8.1 Unless specified herein, all correspondence and notices required to be provided
5 pursuant to this Consent Judgment shall be in writing and personally delivered or sent by: (i) first-
6 class, (registered or certified mail) return receipt requested; or (ii) overnight courier on any party
7 by the other party at the following addresses:

8 For Defendant:

9 Eric L. Zalud
10 Benesch, Friedlander, Coplan & Aronoff LLP
11 200 Public Square, Suite 2300
Cleveland, OH 44114-2378

12 And

13 For Bell:

14 Evan Smith
15 Brodsky & Smith, LLC
16 9595 Wilshire Blvd., Ste. 900
Beverly Hills, CA 90212

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

19 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

20 9.1 This Consent Judgment may be executed in counterparts and by facsimile, each of
21 which shall be deemed an original, and all of which, when taken together, shall constitute one and
22 the same document.

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

25 10.1 Bell agrees to comply with the requirements set forth in California Health & Safety
26 Code § 25249.7(f) and to promptly bring a Motion for Approval of this Consent Judgment.
27 Defendant agrees it shall support approval of such Motion.
28

1 10.2 This Consent Judgment shall not be effective until it is approved and entered by the
2 Court and shall be null and void if, for any reason, it is not approved by the Court. In such case,
3 the Parties agree to meet and confer on how to proceed and if such agreement is not reached within
4 30 days, the case shall proceed on its normal course.

5 10.3 If the Court approves this Consent Judgment and is reversed or vacated by an
6 appellate court, the Parties shall meet and confer as to whether to modify the terms of this Consent
7 Judgment. If the Parties do not jointly agree on a course of action to take, the case shall proceed on
8 its normal course on the trial court's calendar.

9 **11. MODIFICATION**

10 11.1 This Consent Judgment may be modified only by further stipulation of the Parties
11 and the approval of the Court or upon the granting of a motion brought to the Court by either Party.

12 **12. ATTORNEY'S FEES**

13 12.1 A Party who unsuccessfully brings or contests an action arising out of this Consent
14 Judgment shall be required to pay the prevailing party's reasonable attorney's fees and costs unless
15 the unsuccessful party has acted with substantial justification. For purposes of this Consent
16 Judgment, the term substantial justification shall carry the same meaning as used in the Civil
17 Discovery Act of 1986, Code of Civil § Section 2016, et seq.

18 12.2 Nothing in this Section shall preclude a Party from seeking an award of sanctions
19 pursuant to law.

20 **13. RETENTION OF JURISDICTION**

21 13.1 This Court shall retain jurisdiction of this matter to implement or modify the
22 Consent Judgment.

23 **14. AUTHORIZATION**

24 14.1 The undersigned are authorized to execute this Consent Judgment on behalf of their
25 respective Parties and have read, understood and agree to all of the terms and conditions of this
26 document and certify that he or she is fully authorized by the Party he or she represents to execute
27
28

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3 Consent Judgment.

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6 their respective Parties and have read, understood and agree to all of the terms and conditions of
7 this document and certify that he or she is fully authorized by the Party he or she represents to
8 execute the Consent Judgment on behalf of the Party represented and legally bind that Party.
9 Except as explicitly provided herein each Party is to bear its own fees and costs.

10
11 **AGREED TO:**

AGREED TO:

12 Date: 8/29/18

Date: AUGUST 24, 2018

13
14 By: [Signature]

EMA BELL

By: [Signature]

WAXMAN CONSUMER PRODUCTS
GROUP, INC.

15
16
17 **IT IS SO ORDERED, ADJUDGED AND DECREED:**

18
19 Dated: _____

Judge of Superior Court