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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 BAYLIS AND HARDING PLC,

15 Defendant.

Case No.: RG18926158

**CONSENT JUDGMENT**

Judge: Jo-Lynne Q. Lee

Dept.: 18

Hearing Date: March 26, 2019

Hearing Time: 3:00 PM

Reservation #: R-2039306

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**1. INTRODUCTION**

1.1 **The Parties.** This Consent Judgment is entered into by and between Ema Bell acting on behalf of the public interest (hereinafter “Bell”) and Baylis and Harding Plc (“Baylis & Harding” or “Defendant”) with Bell and Defendant collectively referred to as the “Parties” and each of them as a “Party.” Bell is an individual residing in California that seeks to promote awareness of exposures to toxic chemicals and improve human health by reducing or eliminating hazardous substances contained in consumer products. Baylis & Harding is alleged to be a person in the course of doing business for purposes of Proposition 65, Cal. Health & Safety Code §§ 25249.6 et seq.

1.2 **Allegations and Representations.** Bell alleges that Defendant has exposed individuals to diisononyl phthalate (DINP) and di(2-ethylhexyl) phthalate (DEHP) from its sales of Baylis & Harding gift bags without providing a clear and reasonable exposure warning pursuant to Proposition 65. DINP is listed under Proposition 65 as a chemical known to the State of California to cause cancer and DEHP is listed under Proposition 65 as a chemical known to the State of California to cause cancer and reproductive toxicity.

1.3 **Notices of Violation/Complaint.** On or about April 2, 2018, Bell served Baylis & Harding, and various public enforcement agencies with documents entitled “60-Day Notice of Violation” pursuant to Health & Safety Code §25249.7(d) (the “April 2 Notice”), alleging that Defendant violated Proposition 65 for failing to warn consumers and customers that use of Baylis & Harding gift bags expose users in California to DINP. No public enforcer has brought and is diligently prosecuting the claims alleged in the April 2 Notice. On or about August 8, 2018, Bell served Baylis & Harding, and various public enforcement agencies with documents entitled “60-Day Notice of Violation” pursuant to Health & Safety Code §25249.7(d) (the “August 8 Notice”), alleging that Defendant violated Proposition 65 for failing to warn consumers and customers that use of Baylis & Harding gift bags expose users in California to DEHP and DINP. No public enforcer has brought and is diligently prosecuting the claims alleged in the August 8 Notice. On October 25, 2018, Bell filed a complaint (the “Complaint”) in the matter.

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

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

**2. DEFINITIONS**

2.1 **Covered Products.** The term “Covered Products” means Baylis & Harding gift bags that are manufactured, distributed and/or offered for sale in California by Baylis & Harding, including but not limited to the products listed on Exhibit A.

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

**3. INJUNCTIVE RELIEF: WARNINGS**

3.1 As of the Effective Date, Baylis & Harding shall not manufacture or order from any supplier any Covered Products intended for retail sale in California that contains DEHP or DINP on any component to which consumers are exposed in excess of 0.1% (1,000 ppm) (hereinafter “Reformulated Products”) unless the Covered Product is accompanied by a warning that complies with Article 6 of Title 27 of the California Code of Regulations. Covered Products sold by Baylis & Harding before the Effective Date may sell through without a warning even if not Reformulated

1 Products. The warning shall consist of the following (language in brackets is optional, depending  
2 on which listed chemicals are present in a Covered Product):

3 (a) A symbol consisting of a black exclamation point in a yellow equilateral triangle with  
4 a bold black outline to the left of the word “warning” in bold all capital letters, followed by  
5 the statement “This product can expose you to chemicals including DEHP [and DINP],  
6 which is[/are] known to the State of California to cause cancer and birth defects or other  
7 reproductive harm. For more information, go to [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov).”; or

8 (b) a warning consisting of a symbol that is a black exclamation point in a yellow equilateral  
9 triangle with a bold black outline to the left of the word “warning” in bold all capital letters,  
10 followed by the statement “Cancer [and Reproductive Harm] -  
11 [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov).”<sup>1</sup>

12 3.2 The warning provided pursuant to Section 3.1 shall be affixed to or printed on the  
13 Covered Product’s packaging or labeling, or on a placard, shelf tag, sign or electronic device or  
14 automatic process, providing that the warning is displayed with such conspicuousness, as compared  
15 with other words, statements, or designs as to render it likely to be read and understood by an  
16 ordinary individual under customary conditions of purchase or use. A warning may be contained  
17 in the same section of the packaging, labeling, or instruction booklet that states other safety  
18 warnings, if any, concerning the use of the product and shall be at least the same size as those other  
19 safety warnings.

20 **4. MONETARY TERMS**

21 4.1 **Civil Penalty.** Baylis & Harding shall pay \$3,000.00 as a Civil Penalty pursuant to  
22 Health and Safety Code section 25249.7(b), to be apportioned in accordance with California Health  
23 & Safety Code § 25192, with 75% of these funds remitted to the State of California’s Office of  
24 Environmental Health Hazard Assessment (“OEHHA”) and the remaining 25% of the Civil Penalty  
25 remitted to Bell, as provided by California Health & Safety Code § 25249.12(d).

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

1                   4.1.1 Within ten (10) days of the Effective Date, Baylis & Harding shall issue  
2 two separate checks for the Civil Penalty payment to (a) "OEHHA" in the amount of \$2,250.00;  
3 and to (b) "Brodsky & Smith, LLC in Trust for Bell" in the amount of \$750.00. Payment owed to  
4 Bell pursuant to this Section shall be delivered to the following payment address:

5                   Evan J. Smith, Esquire  
6                   Brodsky & Smith, LLC  
7                   Two Bala Plaza, Suite 510  
8                   Bala Cynwyd, PA 19004

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

11                   For United States Postal Service Delivery:

12                   Mike Gyurics  
13                   Fiscal Operations Branch Chief  
14                   Office of Environmental Health Hazard Assessment  
15                   P.O. Box 4010  
16                   Sacramento, CA 95812-4010

17                   For Non-United States Postal Service Delivery:

18                   Mike Gyurics  
19                   Fiscal Operations Branch Chief  
20                   Office of Environmental Health Hazard Assessment  
21                   1001 I Street  
22                   Sacramento, CA 95814

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

25                   4.2     **Attorneys' Fees.** Within ten (10) days of the Effective Date, Baylis & Harding shall  
26 pay \$22,000.00 to Brodsky & Smith, LLC ("Brodsky Smith") as complete reimbursement for Bell's  
27 attorneys' fees and costs incurred as a result of investigating, bringing this matter to Baylis &  
28 Harding's attention, litigating and negotiating and obtaining judicial approval of a settlement in the  
public interest, pursuant to Code of Civil Procedure §1021.5.

**5.     RELEASE OF ALL CLAIMS**

5.1     This Consent Judgment is a full, final, and binding resolution between Bell acting  
on her own behalf, and on behalf of the public interest, and Baylis & Harding, and its parents,

1 shareholders, members, directors, officers, managers, employees, representatives, agents,  
2 attorneys, divisions, subdivisions, subsidiaries, partners, sister companies, and affiliates, and their  
3 predecessors, successors and assigns (“Defendant Releasees”), and all entities from whom they  
4 obtain and to whom they directly or indirectly distribute or sell Covered Products, including but  
5 not limited to manufacturers, suppliers, distributors, wholesalers, customers, licensors, licensees  
6 retailers, franchisees, and cooperative members, including but not limited to Kmart Corp.  
7 (“Downstream Releasees”), of all claims for violations of Proposition 65 based on exposure to  
8 DINP or DEHP from Covered Products as set forth in the Notice, with respect to any Covered  
9 Products manufactured, distributed, or sold by Baylis & Harding prior to the Effective Date. This  
10 Consent Judgment shall have preclusive effect such that no other person or entity, whether  
11 purporting to act in his, her, or its interests or the public interest shall be permitted to pursue and/or  
12 take any action with respect to any violation of Proposition 65 that was alleged in the Complaint,  
13 or that could have been brought pursuant to the Notice against Baylis & Harding or its Downstream  
14 Releasees of the Product including but not limited to (“Proposition 65 Claims”). Compliance with  
15 the terms of this Consent Judgment constitutes compliance with Proposition 65 with regard to the  
16 Covered Products.

17           5.2     In addition to the foregoing, Bell, on behalf of herself, her past and current agents,  
18 representatives, attorneys, and successors and/or assignees, and *not* in her representative capacity,  
19 hereby waives all rights to institute or participate in, directly or indirectly, any form of legal action  
20 and releases Baylis & Harding, Defendant Releasees, and Downstream Releasees from any and all  
21 manner of actions, causes of action, claims, demands, rights, suits, obligations, debts, contracts,  
22 agreements, promises, liabilities, damages, charges, losses, costs, expenses, and attorneys’ fees, of  
23 any nature whatsoever, known or unknown, in law or equity, fixed or contingent, now or in the  
24 future, with respect to any alleged violations of Proposition 65 related to or arising from Covered  
25 Products manufactured, distributed, or sold by Baylis & Harding, Defendant Releasees or  
26 Downstream Releasees. With respect to the foregoing waivers and releases in this Section, Bell  
27 hereby specifically waives any and all rights and benefits which she now has, or in the future may  
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have, conferred by virtue of the provisions of §1542 of the California Civil Code, which provides as follows:

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

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

**6. ENFORCEMENT**

6.1 The terms of this Consent Judgment shall be enforced exclusively by the Parties hereto. A Party may enforce any of the terms and conditions of this Consent Judgment only after that Party first provides 60 days' notice to the Party allegedly failing to comply with the terms and conditions of this Consent Judgment and attempts to resolve such Party's failure to comply in an open and good faith manner.

6.2 **Notice of Violation.** Prior to bringing any proceeding to enforce the terms of this Consent Judgment, Bell shall provide a written notice of violation ("NOV") to Baylis & Harding that includes information sufficient for Baylis & Harding to be able to understand and correct the violation, including but not limited to: (a) the name of the product, (b) specific dates when the product was sold in California, (c) the store or other place at which the product was available for sale to consumers, and (d) any other evidence or other support for the allegations in the notice, including all test data obtained by Bell regarding the Covered Product.

6.3 **Notice of Election Response.** Within 30 days of receiving an NOV, Baylis & Harding shall serve a Notice of Election ("NOE") either contesting or not contesting the NOV.

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6.2.1 **Non-Contested NOV.** Bell shall take no further action regarding the alleged violation if Baylis & Harding serves a NOE that elects not to contest the NOV and meets one of the following conditions:

(a) The Covered Product was shipped by Baylis & Harding for sale in California before the Effective Date, or

(b) Since receiving the NOV Baylis & Harding has taken corrective action by either (i) taking all steps necessary to bring the sale of the product into compliance under the terms of this Consent Judgment, or (ii) requesting that its customers in California remove the Covered Products identified in the NOV from sale in California and destroy or return the Covered Products to Baylis & Harding, or (iii) refute the information provided in Section 6.2.

6.2.2 **Contested NOV.** If Baylis & Harding serves a NOE electing to contest the NOV, the provisions of this Section 6.2.2 shall apply.

(a) Baylis & Harding may request that the sample(s) of Covered Products tested by Bell be subject to confirmatory testing at an EPA or California-accredited laboratory.

(b) If the confirmatory testing establishes that the Covered Products do not contain DEHP or DINP in excess of the levels allowed in Section 3.1, above, Bell shall take no further action regarding the alleged violation. If the testing does not establish compliance with Section 3.1, above, Baylis & Harding may withdraw its NOE to contest the violation and may serve a new NOE pursuant to Section 6.2.1.

(c) If Baylis & Harding does not withdraw an NOE to contest the NOV or take action under Section 6.2.1, above, the Parties shall meet and confer for a period of no less than 30 days before Bell may take action seeking to enforce the terms of this Consent Judgment.

6.3 In any proceeding brought by either Party to enforce this Consent Judgment, the prevailing party shall be entitled to recover its reasonable attorney's fees and costs.



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**7. INTEGRATION**

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

**8. GOVERNING LAW**

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

**9. NOTICES**

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

For Defendant:

Jeffrey Margulies  
Norton Rose Fulbright US LLP  
555 South Flower Street  
Forty-First Floor  
Los Angeles, CA 90071

And

For Bell:

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

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

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**10. COUNTERPARTS; FACSIMILE SIGNATURES**

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

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

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

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

11.3 If the Court approves this Consent Judgment and is reversed or vacated by an appellate court, the Parties shall meet and confer as to whether to modify the terms of this Consent 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.

**12. MODIFICATION**

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

**13. ATTORNEY’S FEES**

13.1 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.

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

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**14. RETENTION OF JURISDICTION**

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

**15. AUTHORIZATION**

15.1 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 certify 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: 2/4/19  
By:   
EMA BELL

Date: \_\_\_\_\_  
By: \_\_\_\_\_  
BAYLIS & HARDING PLC

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

Dated: \_\_\_\_\_

\_\_\_\_\_  
Judge of Superior Court

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**AGREED TO:**

**AGREED TO:**

Date: \_\_\_\_\_

Date: 21/12/2018

By: \_\_\_\_\_  
EMA BELL

By:  \_\_\_\_\_  
BAYLIS & HARDING PLC

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

Dated: \_\_\_\_\_

\_\_\_\_\_  
Judge of Superior Court