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8
9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 COUNTY OF SAN FRANCISCO

11 EMA BELL,

12 Plaintiff,

13 v.

14 UNCAS INTERNATIONAL, LLC, CVS
15 PHARMACY, INC.,

16 Defendants.

Case No.: CGC-20-584324

CONSENT JUDGMENT

Judge: Ethan P. Schulman

Dept.: 302

Hearing Date: June 29, 2021

Hearing Time: 9:30 AM

Reservation #:

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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 Uncas International, LLC (“Uncas” or
4 “Defendant”) with Bell and Defendant collectively referred to as the “Parties” and each of them as
5 a “Party.” Bell is an individual residing in California that seeks to promote awareness of exposures
6 to toxic chemicals and improve human health by reducing or eliminating hazardous substances
7 contained in consumer products. Uncas is alleged to be a person in the course of doing business for
8 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 Scented lip gloss sets/kits and
11 Unicorn pouches without providing a clear and reasonable exposure warning pursuant to
12 Proposition 65. DEHP is listed under Proposition 65 as a chemical known to the State of California
13 to cause cancer and reproductive toxicity.

14 1.3 **Notices of Violation/Complaint.** On or about May 10, 2019 (Unicorn pouches) and
15 May 13, 2019 (Scented lip gloss sets/kits), Bell served Uncas, CVS Pharmacy, Inc., and various
16 public enforcement agencies with documents entitled “60-Day Notice of Violation” pursuant to
17 Health & Safety Code §25249.7(d) (the “Notices”), alleging that Defendant violated Proposition
18 65 for failing to warn consumers and customers that use of Scented lip gloss sets/kits and Unicorn
19 pouches expose users in California to DEHP. No public enforcer has brought and is diligently
20 prosecuting the claims alleged in the Notices. On May 4, 2020, Bell filed a complaint (the
21 “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 San Francisco, and that this Court has jurisdiction to approve,
25 enter, and oversee the enforcement of this Consent Judgment as a full and final binding resolution
26 of all claims which were or could have been raised in the Complaint based on the facts alleged
27 therein and/or in the Notice.
28

1 1.5 Defendant denies the material allegations contained in Bell’s Notices 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 are Scented lip gloss
10 sets/kits and Unicorn pouches, as described in Plaintiff’s Notices, that are or were manufactured,
11 distributed and/or offered for sale in California by Uncas.

12 2.2 **Effective Date.** The term “Effective Date” means the date that notice of entry of
13 this Consent Judgment is served on all parties.

14 **3. INJUNCTIVE RELIEF: WARNINGS**

15 3.1 **Reformulation of Covered Products.** As of the Effective Date, and continuing
16 thereafter, Covered Products that Uncas directly manufactures, imports, distributes, sells, or offers
17 for sale in California shall either: (a) be Reformulated Products pursuant to § 3.2, below; or (b) be
18 labeled with a clear and reasonable exposure warning pursuant to §§ 3.3 and 3.4, below. For
19 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 in any location on the product likely to be handled concentrations less than or equal to
24 0.1% (1,000 parts per million (ppm)) of DEHP when analyzed pursuant to U.S. Environmental
25 Protection Agency testing methodologies 3580A and 8270C or other methodology utilized by
26 federal or state government agencies for the purpose of determining the phthalate content in a solid
27 substance.
28

1 3.3 **Clear and Reasonable Warning.** As of the Effective Date, and continuing
2 thereafter, a clear and reasonable exposure warning as set forth in this §§ 3.3 and 3.4 must be
3 provided for all Covered Products that Defendant manufacturers, imports, distributes, sells, or
4 offers for sale in California that is not a Reformulated Product. There shall be no obligation for
5 Defendant to provide a warning for Covered Products that enter the stream of commerce prior to
6 the Effective Date. The warning shall consist of either the **Warning** or **Alternative Warning**
7 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:** Uncas may, but is not required to, use the alternative short-
13 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.

28

1 If Uncas sells Covered Products via an internet website to customers located in California,
2 the warning requirements of this section shall be satisfied if the foregoing warning appears either:
3 (a) on the same web page on which a Covered Product is displayed and/or described; (b) on the
4 same page as the price for the Covered Product; or (c) on one or more web pages displayed to a
5 purchaser prior to purchase during the checkout process. Alternatively, a symbol consisting of a
6 black exclamation point in a yellow or white equilateral triangle may appear adjacent to or
7 immediately following the display, description, price, or checkout listing of the Covered Product,
8 if the warning statement appears elsewhere on the same web page in a manner that clearly associates
9 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 and with Proposition 65 by either adhering to §§ 3.3 and
12 3.4 of this Consent Judgment or by complying with warning requirements adopted by the State of
13 California’s Office of Environmental Health Hazard Assessment (“OEHHA”) after the Effective
14 Date.

15 **4. MONETARY TERMS**

16 4.1 **Civil Penalty.** Uncas shall pay \$1,500.00 as a Civil Penalty pursuant to Health and
17 Safety Code section 25249.7(b), to be apportioned in accordance with California Health & Safety
18 Code § 25192, with 75% of these funds remitted to OEHHA and the remaining 25% of the Civil
19 Penalty remitted to Bell, as provided by California Health & Safety Code § 25249.12(d).

20 4.1.1 Within fifteen (15) days of the Effective Date and after being provided all
21 relevant taxpayer information, Uncas shall issue two separate checks for the Civil Penalty
22 payment to (a) “OEHHA” in the amount of \$1,125.00; and to (b) “Brodsky & Smith, LLC in
23 Trust for Bell” in the amount of \$375.00. Payment owed to Bell pursuant to this Section shall be
24 delivered to the following payment address:

25 Evan J. Smith, Esquire
26 Brodsky & Smith, LLC
27 Two Bala Plaza, Suite 805
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.** Uncas shall pay \$16,000.00 to Brodsky & Smith, LLC ("Brodsky
18 Smith") as complete reimbursement for Bell's attorneys' fees and costs incurred as a result of
19 investigating, bringing this matter to Uncas attention, litigating and negotiating and obtaining
20 judicial approval of a settlement in the public interest, pursuant to Code of Civil Procedure § 1021.5.
21 Payment shall be as follows: (a) Within fifteen (15) days of the Effective Date and being provided
22 taxpayer information, Uncas shall issue a check payable to "Brodsky & Smith, LLC" in the amount
23 of \$5,000.00 for delivery to the address identified in § 4.1.1, above; (b) Within forty-five (45) days
24 of the Effective Date, Uncas shall issue a check payable to "Brodsky & Smith, LLC" in the amount
25 of \$5,500.00 for delivery to the address identified in § 4.1.1, above; and (c) Within seventy-five
26 (75) days of the Effective Date, Uncas shall issue a check payable to "Brodsky & Smith, LLC" in
27 the amount of \$5,500.00 for delivery to the address identified in § 4.1.1, above.

28 **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 Uncas, and its parents, shareholders,
members, directors, officers, managers, employees, representatives, agents, attorneys, divisions,

1 subdivisions, subsidiaries, partners, sister companies, and affiliates, and their predecessors,
2 successors and assigns (“Defendant Releasees”), and all entities from whom they obtain and to
3 whom they directly or indirectly distribute or sell Covered Products, including but not limited to
4 manufacturers, suppliers, distributors, wholesalers, customers, licensors, licensees, retailers,
5 franchisees, and cooperative members, including but not limited to CVS Pharmacy, Inc.,
6 (“Downstream Releasees”), of all claims for violations of Proposition 65 based on exposure to
7 DEHP from Covered Products as set forth in the Notices, with respect to any Covered Products
8 manufactured, distributed, or sold by Uncas prior to the Effective Date. It is the Parties’ intention
9 that this Consent Judgment shall have preclusive effect such that no other actions by private
10 enforcers, whether purporting to act in his, her, or its interests or the public interest shall be
11 permitted to pursue and/or take any action with respect to any violation of Proposition 65 that was
12 alleged in the Complaint, or that could have been brought pursuant to the Notices against Uncas
13 and/or the Downstream Releasees of the Covered Products (“Proposition 65 Claims”). Compliance
14 with the terms of this Consent Judgment constitutes compliance with Proposition 65 with regard to
15 the Covered Products.

16 5.2 In addition to the foregoing, Bell, on behalf of herself, her past and current agents,
17 representatives, attorneys, and successors and/or assignees, and *not* in her representative capacity,
18 hereby waives all rights to institute or participate in, directly or indirectly, any form of legal action
19 and releases Uncas, Defendant Releasees, and Downstream Releasees from any and all manner of
20 actions, causes of action, claims, demands, rights, suits, obligations, debts, contracts, agreements,
21 promises, liabilities, damages, charges, losses, costs, expenses, and attorneys’ fees, of any nature
22 whatsoever, known or unknown, in law or equity, fixed or contingent, now or in the future, with
23 respect to any alleged violations of Proposition 65 related to or arising from Covered Products
24 manufactured, distributed, or sold by Uncas, Defendant Releasees or Downstream Releasees. With
25 respect to the foregoing waivers and releases in this paragraph, Bell hereby specifically waives any
26 and all rights and benefits which she now has, or in the future may have, conferred by virtue of the
27 provisions of § 1542 of the California Civil Code, which provides as follows:
28

1 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS THAT THE
2 CREDITOR OR RELEASING PARTY DOES NOT KNOW OR SUSPECT TO
3 EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE
4 RELEASE AND THAT, IF KNOWN BY HIM OR HER, WOULD HAVE
5 MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE
6 DEBTOR OR RELEASED PARTY.

7 5.3 Uncas waives any and all claims against Bell, her attorneys and other
8 representatives, for any and all actions taken or statements made (or those that could have been
9 taken or made) by Bell and her attorneys and other representatives, whether in the course of
10 investigating claims or otherwise seeking enforcement of Proposition 65 against it in this matter,
11 and/or with respect to Covered Products.

12 **6. INTEGRATION**

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

17 **7. GOVERNING LAW**

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

23 **8. NOTICES**

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

28 For Defendant:

Lauren M. Michals
Nixon Peabody LLP
One Embarcadero Center, 32nd Floor
San Francisco, CA 94111

1 And

2 For Bell:

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

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

9 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

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

13 **10. COMPLIANCE WITH HEALTH & SAFETY CODE § 25249.7(f)/COURT**
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.
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, the
19 Parties agree to meet and confer on how to proceed and if such agreement is not reached within 30
20 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.

4 12.2 Nothing in this Section shall preclude a Party from seeking an award of sanctions
5 pursuant to law.

6 **13. RETENTION OF JURISDICTION**

7 13.1 This Court shall retain jurisdiction of this matter to implement or modify the
8 Consent Judgment.

9 **14. AUTHORIZATION**

10 14.1 The undersigned are authorized to execute this Consent Judgment on behalf of their
11 respective Parties and have read, understood and agree to all of the terms and conditions of this
12 document and certify that he or she is fully authorized by the Party he or she represents to execute
13 the Consent Judgment on behalf of the Party represented and legally bind that Party. Except as
14 explicitly provided herein each Party is to bear its own fees and costs.

15 **AGREED TO:**

AGREED TO:

16 Date: _____

Date: 4/15/2021

17 By: _____
18 EMA BELL

By: 
UNCAS INTERNATIONAL, LLC

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

20 Dated: _____

Judge of Superior Court

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13 the Consent Judgment on behalf of the Party represented and legally bind that Party. Except as
14 explicitly provided herein each Party is to bear its own fees and costs.

15 **AGREED TO:**

AGREED TO:

16 Date: 5/6/2021

Date: _____

17 By: 

18 By: _____
19 UNCAS INTERNATIONAL, LLC

20
21 **IT IS SO ORDERED, ADJUDGED AND DECREED:**

22 Dated: _____

23 _____
24 Judge of Superior Court