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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 NO RINSE LABORATORIES, LLC,
15 CVS PHARMACY, INC.,

16 Defendants.

Case No.: CGC-21-594409

**[PROPOSED] CONSENT
JUDGMENT**

Judge: Richard B. Ulmer

Dept.: 302

Hearing Date: May 5, 2023

Hearing Time: 9:30 AM

Complaint Filed: August 10, 2021

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1. INTRODUCTION

1.1 **The Parties.** This Consent Judgment is entered into by and between Ema Bell (“Bell” or “Plaintiff”) and No Rinse Laboratories, LLC (“No Rinse” or “Defendant”) with Bell and Defendant collectively referred to as the “Parties” and each of them as a “Party.” Plaintiff 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. No Rinse 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 diethanolamine (DEA) from its sales of shampoos without providing a clear and reasonable exposure warning pursuant to Proposition 65. DEA is listed under Proposition 65 as a chemical known to the State of California to cause cancer.

1.3 **Notice of Violation/Complaint.** On or about August 14, 2020, Bell served Defendant, CVS Pharmacy, Inc., and various public enforcement agencies with documents entitled “60-Day Notice of Violation” pursuant to Health & Safety Code §25249.7(d) (the “Notice”). The Notice provided Defendant and such others, including public enforcers, with notice that alleged that Defendant was in violation of California Health & Safety Code § 25249.6, for failing to warn California consumers and customers that use of the Products will expose them to DEA. No public enforcer has brought and is diligently prosecuting the claims alleged in the Notice. On August 10, 2021, Bell filed a complaint (the “Complaint”) in the matter.

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 Notice and Complaint filed in this matter, that venue is proper in the County of San Francisco, 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 1.5 Defendant denies the material allegations contained in the Notice and Action and
2 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
9 **2. DEFINITIONS**

10 2.1 **Covered Products.** The term “Covered Products” means dermally applied no rinse
11 products such as shampoo/conditioner that are manufactured, imported, distributed, sold and/or
12 offered for sale in California by Defendant.

13 2.2 **Effective Date.** The term “Effective Date” means the date this Consent Judgment is
14 entered as a Judgment of the Court.

15 **3. INJUNCTIVE RELIEF: WARNINGS**

16 3.1 **Reformulation of Covered Products.** Commencing by or before one hundred
17 eighty (180) days after the Effective Date, and continuing thereafter, Covered Products that
18 Defendant manufactures or imports for sale to wholesale or retail businesses, or individuals in
19 California shall either: (a) be a Reformulated Product pursuant to § 3.2, below; or (b) be labeled
20 with a clear and reasonable exposure warning pursuant to §§ 3.3 and 3.4, below. The warning
21 requirement set forth in §§ 3.3 and 3.4 shall not apply to any Reformulated Product. There shall be
22 no obligation for No Rinse to provide a warning for Covered Products that entered the stream of
23 commerce prior to 180 days after the Effective Date whether or not it is a Reformulated Product,
24 and the Section 5 release applies to all such Covered Products.

25 3.2 **DEA Free Reformulation Standard.** “Reformulated Product” shall mean Covered
26 Product with DEA content that is below the Reporting Limit (defined herein) when analyzed
27 pursuant to liquid chromatography/tandem mass spectrometry (LC/MS/MS), inductively coupled
28 mass-spectroscopy (ICP-MS) or other method of analysis utilized by the International Organization

1 for Standardization (ISO) for qualitative and quantitative screening of cosmetics and cosmetic raw
2 materials.

3 3.2.1 **Reporting Limit.** The Reporting Limit for Covered Products is 10 mg/kg,
4 using LC/MS/MS analysis or other methods of analysis utilized by the ISO for qualitative and
5 quantitative screening of cosmetics and cosmetic raw materials.

6 3.3 **Clear and Reasonable Warning.** Except for Covered Products already in the
7 stream of commerce, as of 180 days after the Effective Date, and continuing thereafter, No Rinse
8 must provide a clear and reasonable exposure warning as set forth in this §§ 3.3 and 3.4 for all
9 Covered Products that Defendant manufacturers or imports for sale to wholesale or retail businesses
10 in California that is not a Reformulated Product. The warning shall consist of either the **Warning**
11 or **Alternative Warning** described in §§ 3.3(a) or (b), respectively:

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

13 **⚠ WARNING:** This product can expose you to chemicals including
14 diethanolamine (DEA), which is known to the State of California to cause cancer.
15 For more information go to www.P65Warnings.ca.gov.

16 (b) **Alternative Warning:** Defendant may, but is not required to, use the alternative
17 short-form warning as set forth in this § 3.3(b) (“**Alternative Warning**”) as follows:

18 **⚠ WARNING:** Cancer - www.P65Warnings.ca.gov.

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

1 that states other safety warnings, if any, concerning the use of the Covered Product and shall be at
2 least the same size as those other safety warnings.

3 In addition to affixing the **Warning** or **Alternative Warning** to the Covered Product's
4 packaging or labeling, the **Warning** or **Alternative Warning** shall be posted on websites where
5 No Rinse offers Covered Products for sale to consumers in California. The requirements of this
6 Section shall be satisfied if the **Warning** or **Alternative Warning**, or a clearly marked hyperlink
7 using the word "**WARNING**," appears on the product display page, or by otherwise prominently
8 displaying the warning to the purchaser prior to completing the purchase. To comply with this
9 Section, No Rinse shall (a) post the **Warning** or **Alternative Warning** on its own website and, if
10 it has the ability to do so, on the websites of its third-party internet sellers; and (b) if it does not
11 have the ability to post the **Warning** or **Alternative Warning** on the websites of its third-party
12 internet sellers, provide such sellers with written notice in accordance with Title 27, California
13 Code of Regulations, Section 25600.2. Third-party internet sellers of the Product that have been
14 provided with written notice in accordance with Title 27, California Code of Regulations, Section
15 25600.2 are not released in Section 5 of this Agreement if they fail to meet the warning
16 requirements of this Section.

17 **3.5 Compliance with Warning Regulations.** The Parties agree that Defendant shall be
18 deemed in compliance with the warning requirements in this Consent Judgment by either adhering
19 to §§ 3.3 and 3.4 of this Consent Judgment or by complying with warning requirements adopted by
20 the State of California's Office of Environmental Health Hazard Assessment ("OEHHA")
21 applicable to the Covered Product and the exposures at issue after the Effective Date.

22 **4. MONETARY TERMS**

23 **4.1 Civil Penalty.** Defendant shall pay \$3,000.00 as a Civil Penalty pursuant to Health
24 and Safety Code section 25249.7(b), to be apportioned in accordance with California Health &
25 Safety Code § 25192, with 75% of these funds remitted to OEHHA and the remaining 25% of the
26 Civil Penalty remitted to Plaintiff, as provided by California Health & Safety Code § 25249.12(d).
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1 4.1.1 Within ten (10) business days of the Effective Date, Defendant 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 in Trust for Bell" in the amount of \$750.00. Payment owed to Bell
4 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 805
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 at the address set
24 forth above as proof of payment to OEHHA.

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

29 **5. RELEASE OF ALL CLAIMS**

30 5.1 This Consent Judgment is a full, final, and binding resolution between Plaintiff
31 acting on her own behalf, and on behalf of the public interest, and Defendant, and its parents,

1 subsidiaries, shareholders, affiliates and each of their members, directors, officers, managers,
2 employees, representatives, agents, attorneys, divisions, subdivisions, and their predecessors,
3 successors and assigns (“Defendant Releasees”), and all entities from whom they obtain and to
4 whom they directly or indirectly distribute or sell Covered Products, including CVS Pharmacy, Inc.
5 and including but not limited to manufacturers, suppliers, distributors, wholesalers, customers,
6 licensors, licensees retailers, franchisees, and cooperative members, (“Downstream Releasees”), of
7 all claims for violations of Proposition 65 based on exposure to DEA from use of Covered Products,
8 including any Covered Products manufactured or imported by Defendant prior to 180 days after
9 the Effective Date without a warning. It is the Parties’ intention that this Consent Judgment shall
10 have preclusive effect such that no other actions by private enforcers, whether purporting to act in
11 his, her, or its interests or the public interest shall be permitted to pursue and/or take any action
12 with respect to any violation of Proposition 65 that was alleged in the Complaint, or that could have
13 been brought pursuant to the Notice against Defendant and/or the Downstream Releasees of the
14 Covered Products (“Proposition 65 Claims”). Compliance with the terms of this Consent Judgment
15 constitutes compliance with Proposition 65 as regards exposure to DEA from use of the Covered
16 Products.

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

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

10 5.3 Defendant waives any and all claims against Plaintiff, his attorneys and other
11 representatives, for any and all actions taken, or statements made (or those that could have been
12 taken or made) by Plaintiff and his attorneys and other representatives, whether in the course of
13 investigating claims or otherwise seeking enforcement of Proposition 65 against it in this Action,
14 and/or with respect to Covered Products.

15 **6. INTEGRATION**

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

20 **7. GOVERNING LAW**

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

26 **8. NOTICES**

27 8.1 Unless specified herein, all correspondence and notices required to be provided
28 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:

8 For Plaintiff:

1 Will Wagner
2 Arnold & Porter
3 Three Embarcadero Center | 10th Floor
4 San Francisco, CA 94111-4024
5 Will.Wagner@arnoldporter.com

Evan Smith
Brodsky & Smith
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.

6 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

7 9.1 This Consent Judgment may be executed in counterparts and by facsimile or
8 electronically (such as by PDF), each of which shall be deemed an original, and all of which, when
9 taken together, shall constitute one and the same document.

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

12 10.1 Plaintiff agrees to comply with the requirements set forth in California Health &
13 Safety Code § 25249.7(f) and to promptly bring a Motion for Approval of this Consent Judgment.
14 Defendant agrees it shall not oppose such Motion unless such Motion is materially inconsistent
15 with the terms of this Consent Judgment.

16 10.2 This Consent Judgment shall not be effective until it is approved and entered by the
17 Court and shall be null and void if, for any reason, it is not approved by the Court. In such case, the
18 Parties agree to meet and confer on how to proceed and if such agreement is not reached within 30
19 days, the case shall proceed on its normal course.

20 10.3 If the Court approves this Consent Judgment and is reversed or vacated by an
21 appellate court, the Parties shall meet and confer as to whether to modify the terms of this Consent
22 Judgment. If the Parties do not jointly agree on a course of action to take, the case shall proceed on
23 its normal course on the trial court's calendar.

24 **11. MODIFICATION AND ENFORCEMENT**

25 11.1 This Consent Judgment may be modified only by further stipulation of the Parties
26 and the approval of the Court or upon the granting of a motion brought to the Court by either Party.
27 Notwithstanding the foregoing, if Plaintiff, the Attorney General, or any public enforcer
28

1 represented by Brodsky Smith agrees to terms in a judicially entered consent judgment with any
2 manufacturer of cosmetics as defined by California Health and Safety Code 109900 which permits
3 a higher level of DEA in cosmetics without requiring an exposure warning, the Parties agree that
4 Defendant shall be deemed in compliance with the terms of this Consent Judgment if it elects to
5 adhere to such reformulation terms as provided in such other DEA judicially entered consent
6 judgment.

7 11.2 If a dispute arises with respect to either Party's compliance with the terms of this
8 Consent Judgment, the Parties shall meet and confer in writing and endeavor to resolve the dispute
9 in an amicable manner. No action or motion may be filed in the absence of such a good faith attempt
10 to resolve the dispute beforehand, which shall not be less than thirty (30) days. No private enforcer
11 other than Plaintiff may enforce the terms of this Consent Judgment.

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.

15 12.2 Nothing in this Section shall preclude a Party from seeking an award of sanctions
16 pursuant to law.

17 **13. RETENTION OF JURISDICTION**

18 13.1 This Court shall retain jurisdiction of this matter to implement or modify the
19 Consent Judgment.

20 **14. AUTHORIZATION**

21 14.1 The undersigned are authorized to execute this Consent Judgment on behalf of their
22 respective Parties and have read, understood, and agree to all of the terms and conditions of this
23 document and certify that he or she is fully authorized by the Party he or she represents to execute
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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: 3/15/23

Date: 12/26/2022

By: [Signature]
EMA BEER

By: [Signature]
NO RINSE LABORATORIES, LLC

IT IS SO ORDERED, ADJUDGED AND DECREED:

Dated: _____

Judge of Superior Court