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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 BENEFIT COSMETICS, LLC, ULTA BEAUTY,  
15 INC.,  
16 Defendant.

Case No.: CGC-21-596018  
**[PROPOSED] CONSENT  
JUDGMENT**  
Judge: Ethan P. Schulman  
Dept.: 302  
Hearing Date: March 14, 2022  
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  
3 (“Bell” or “Plaintiff”) and Benefit Cosmetics LLC (“Benefit Cosmetics” or “Defendant”) with Bell  
4 and Defendant collectively referred to as the “Parties” and each of them as a “Party.” Plaintiff is an  
5 individual residing in California that seeks to promote awareness of exposures to toxic chemicals  
6 and improve human health by reducing or eliminating hazardous substances contained in consumer  
7 products. Benefit Cosmetics is alleged to be a person in the course of doing business for purposes  
8 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 diethanolamine (DEA) from its sales of mascaras, including “They’re Real!”  
11 mascara, without providing a clear and reasonable exposure warning pursuant to Proposition 65.  
12 DEA is listed under Proposition 65 as a chemical known to the State of California to cause cancer.

13           1.3    **Notice of Violation/Complaint.** On or about October 15, 2020, Bell served Ulta  
14 Salon, Cosmetics & Fragrance, Inc. and incorrectly named Ulta Beauty, Inc., (collectively, “Ulta”),  
15 Defendant and various public enforcement agencies with documents entitled “60-Day Notice of  
16 Violation” pursuant to Health & Safety Code §25249.7(d) (the “Notice”). The Notice provided  
17 Defendant and such others, including public enforcers, with notice that alleged that Defendant was  
18 in violation of California Health & Safety Code § 25249.6, for failing to warn California consumers  
19 and customers that use of the Products will expose them to DEA. On October 13, 2021, Bell filed  
20 a complaint (the “Complaint”) in the matter.

21           1.4    For purposes of this Consent Judgment only, the Parties stipulate that this Court has  
22 jurisdiction over Defendant as to the allegations contained in the Notice and Complaint filed in this  
23 matter, that venue is proper in the County of San Francisco, and that this Court has jurisdiction to  
24 approve, enter, and oversee the enforcement of this Consent Judgment as a full and final binding  
25 resolution of all claims which were or could have been raised in the Complaint based on the facts  
26 alleged therein and/or in the Notice.

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 mascaras, that are  
10 manufactured, distributed, sold and/or offered for sale in California by Defendant.

11           2.2     **Effective Date.** The term “Effective Date” means the date this Consent Judgment  
12 is entered as a Judgment of the Court.

13           **3.     INJUNCTIVE RELIEF: WARNINGS**

14           3.1     **Reformulation of Covered Products.** Commencing by or before 180 days after the  
15 Effective Date, and continuing thereafter, Covered Products that Defendant directly manufactures,  
16 imports, distributes, sells, or offers for sale to wholesale or retail businesses, or individuals in  
17 California shall either: (a) be DEA Free 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 “DEA Free Reformulated Product” is a Covered Product that  
20 complies 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     **DEA Free Reformulation Standard.** To qualify as a “DEA Free Reformulated  
23 Product” the Covered Product must meet the following standard: DEA content that is either (i) not  
24 detectable (i.e., zero) or below the reporting limit when measured in the Covered Product by an  
25 accredited testing laboratory; or (ii) less than or equal to one-tenth of one percent (0.1%) in any  
26 triethanolamine-containing ingredient in the Covered Product, in each case when analyzed pursuant  
27 to liquid chromatography/tandem mass spectrometry (LC/MS/MS), inductively coupled mass-  
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1 spectroscopy (ICP-MS) or other method of analysis utilized by the International Organization for  
2 Standardization (ISO) for qualitative and quantitative screening of cosmetics and cosmetic raw  
3 materials. Defendant agrees that it shall not increase the levels of TEA in the Covered Products  
4 after June 1, 2022.

5           3.3     **Clear and Reasonable Warning.** As of 180 days after the Effective Date, and  
6 continuing thereafter, Benefit Cosmetics must provide a clear and reasonable exposure warning as  
7 set forth in this §§ 3.3 and 3.4 for all Covered Products that Defendant manufacturers, imports,  
8 distributes, sells, or offers for sale to wholesale or retail businesses in California that is not a DEA  
9 Free Reformulated Product. There shall be no obligation for Defendant to provide a warning for  
10 Covered Products that enter the stream of commerce prior to 180 days after the Effective Date. The  
11 warning shall consist of either the **Warning** or **Alternative Warning** described in §§ 3.3(a) or (b),  
12 respectively:

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

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

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

19           ⚠ **WARNING:** Cancer - [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov).

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

1 warning may be contained in the same section of the packaging, labeling, or instruction booklet  
2 that states other safety warnings, if any, concerning the use of the Covered Product and shall be at  
3 least the same size as those other safety warnings.

4 If Defendant sells Covered Products via an internet website to customers located in  
5 California, the warning requirements of this section shall be satisfied if the foregoing warning  
6 appears either: (a) on the same web page on which Covered Products are displayed and/or  
7 described; (b) on the same page as the price for the Covered Products; or (c) on one or more web  
8 pages displayed to a purchaser prior to purchase during the checkout process. Alternatively, a  
9 symbol consisting of a black exclamation point in a yellow or white equilateral triangle may appear  
10 adjacent to or immediately following the display, description, price, or checkout listing of the  
11 Covered Products, if the warning statement appears elsewhere on the same web page in a manner  
12 that clearly associates it with the product(s) to which the warning applies.

13 **3.5 Compliance with Warning Regulations.** The Parties agree that Defendant shall be  
14 deemed in compliance with this Consent Judgment by either adhering to §§ 3.3 and 3.4 of this  
15 Consent Judgment or by complying with warning requirements adopted by the State of California's  
16 Office of Environmental Health Hazard Assessment ("OEHHA") after the Effective Date.

17 **4. MONETARY TERMS**

18 **4.1 Civil Penalty.** Defendant shall pay \$7,000.00 as a Civil Penalty pursuant to Health  
19 and Safety Code section 25249.7(b), to be apportioned in accordance with California Health &  
20 Safety Code § 25192, with 75% of these funds remitted to OEHHA and the remaining 25% of the  
21 Civil Penalty remitted to Plaintiff, as provided by California Health & Safety Code § 25249.12(d).

22 **4.1.1** Within ten (10) days of the Effective Date, Defendant shall issue two  
23 separate checks for the Civil Penalty payment to (a) "OEHHA" in the amount of \$5,250.00; and  
24 to (b) "Brodsky Smith in Trust for Bell" in the amount of \$1,750.00. Payment owed to Bell  
25 pursuant to this Section shall be delivered to the following payment address:

26 Evan J. Smith, Esquire  
27 Brodsky Smith  
28 Two Bala Plaza, Suite 805  
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 at the address set forth  
16 above as proof of payment to OEHHA.

17 4.2 **Attorneys' Fees.** Within ten (10) days of the Effective Date, Defendant shall pay  
18 \$68,000.00 to Brodsky Smith as complete reimbursement for Plaintiff's attorneys' fees and costs  
19 incurred as a result of investigating, bringing this matter to Benefit Cosmetics attention, litigating  
20 and negotiating and obtaining judicial approval of a settlement in the public interest, pursuant to  
21 Code of Civil Procedure § 1021.5.

22 **5. RELEASE OF ALL CLAIMS**

23 5.1 This Consent Judgment is a full, final, and binding resolution between Plaintiff  
24 acting on her own behalf, and on behalf of the public interest, and Defendant, and its parents,  
25 subsidiaries, shareholders, affiliates and each of their members, directors, officers, managers,  
26 employees, representatives, agents, attorneys, divisions, subdivisions, and their predecessors,  
27 successors and assigns ("Defendant Releasees"), and all entities from whom they obtain and to  
28 whom they directly or indirectly distribute or sell Covered Products, including Ulta, and including  
but not limited to manufacturers, suppliers, distributors, wholesalers, customers, licensors,  
licensees retailers, franchisees, and cooperative members, ("Downstream Releasees"), of all claims  
for violations of Proposition 65 based on exposure to DEA from Covered Products as set forth in

1 the Notice, with respect to any Covered Products manufactured, distributed, or sold by Defendant  
2 prior to 180 days after the Effective Date. It is the Parties' intention that this Consent Judgment  
3 shall have preclusive effect such that no other actions by private enforcers, whether purporting to  
4 act in his, her, or its interests or the public interest shall be permitted to pursue and/or take any  
5 action with respect to any violation of Proposition 65 that was alleged in the Complaint, or that  
6 could have been brought pursuant to the Notice against Defendant and/or the Downstream  
7 Releasees of the Covered Products ("Proposition 65 Claims"). The Parties agree that compliance  
8 with the terms of this Consent Judgment constitutes compliance with Proposition 65 as to the  
9 Covered Products.

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

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

28           5.3 Defendant waives any and all claims against Plaintiff, her attorneys and other  
representatives, for any and all actions taken, or statements made (or those that could have been  
taken or made) by Plaintiff and her attorneys and other representatives, in the course of

1 investigating claims or otherwise seeking enforcement of Proposition 65 against it in this matter,  
2 and/or with respect to Covered Products.

3 **6. INTEGRATION**

4 6.1 This Consent Judgment contains the sole and entire agreement of the Parties and all  
5 prior negotiations and understandings related hereto shall be deemed to have been merged within  
6 it. No representations or terms of agreement other than those contained herein exist or have been  
7 made by any Party with respect to the other Party or the subject matter hereof.

8 **7. GOVERNING LAW**

9 7.1 The terms of this Consent Judgment shall be governed by the laws of the State of  
10 California and apply within the State of California. If Proposition 65 is repealed or is otherwise  
11 rendered inapplicable by reason of law generally, or as to Covered Products, then Defendant shall  
12 have no further obligations pursuant to this Consent Judgment with respect to, and to the extent  
13 that, Covered Products are so affected.

14 **8. NOTICES**

15 8.1 Unless specified herein, all correspondence and notices required to be provided  
16 pursuant to this Consent Judgment shall be in writing and personally delivered or sent by: (i) first-  
17 class, (registered or certified mail) return receipt requested; or (ii) overnight courier on any party  
18 by the other party at the following addresses:

19 For Defendant:

20 Jillian Cho  
21 Benefit Cosmetics  
22 Attn: Legal Department  
23 595 Market Street, 28<sup>th</sup> Floor  
24 San Francisco, CA 94105

25 Rick R. Rothman  
26 Morgan, Lewis & Bockius LLP  
27 300 South Grand Ave., 22nd Floor  
28 Los Angeles, CA 90071

For Bell:

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



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

3 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

4 9.1 This Consent Judgment may be executed in counterparts and by facsimile, each of  
5 which shall be deemed an original, and all of which, when taken together, shall constitute one and  
6 the same document.

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

9 10.1 Plaintiff agrees to comply with the requirements set forth in California Health &  
10 Safety Code § 25249.7(f) and to promptly bring a Motion for Approval of this Consent Judgment.  
11 Defendant agrees it shall support approval of such Motion.

12 10.2 This Consent Judgment shall not be effective until it is approved and entered by the  
13 Court and shall be null and void if, for any reason, it is not approved by the Court. In such case, the  
14 Parties agree to meet and confer on how to proceed and if such agreement is not reached within 30  
15 days, the case shall proceed on its normal course.

16 10.3 If the Court approves this Consent Judgment and is reversed or vacated by an  
17 appellate court, the Parties shall meet and confer as to whether to modify the terms of this Consent  
18 Judgment. If the Parties do not jointly agree on a course of action to take, the case shall proceed on  
19 its normal course on the trial court's calendar.

20 **11. MODIFICATION**

21 11.1 This Consent Judgment may be modified only by further stipulation of the Parties  
22 and the approval of the Court or upon the granting of a motion brought to the Court by either Party.  
23 Notwithstanding the foregoing, if Plaintiff, the Attorney General, or any public enforcer  
24 represented by Brodsky & Smith agrees to terms in a settlement or judicially entered consent  
25 judgment with any manufacturer of mascaras which permits a higher level of DEA in mascaras  
26 without requiring an exposure warning, the Parties agree that Defendant shall be deemed in  
27 compliance with the terms of this Consent Judgment and Proposition 65 if it elects to adhere to  
28

1 such reformulation terms as provided in such other DEA settlement or judicially entered consent  
2 judgment. At a Party's request, the Parties agree to cooperate to modify this agreement to conform  
3 to a subsequently entered settlement.

4 **12. ATTORNEY'S FEES**

5 12.1 A Party who unsuccessfully brings or contests an action arising out of this Consent  
6 Judgment shall be required to pay the prevailing party's reasonable attorney's fees and costs.

7 12.2 Nothing in this Section shall preclude a Party from seeking an award of sanctions  
8 pursuant to law.

9 **13. RETENTION OF JURISDICTION**

10 13.1 This Court shall retain jurisdiction of this matter to implement or modify the  
11 Consent Judgment.

12 **14. AUTHORIZATION**

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

18  
19 **AGREED TO:**

**AGREED TO:**

20  
21 Date: 1/24/22  
22 By: [Signature]  
23 EMA BELL

Date: January 4, 2022  
By: [Signature]  
BENEFIT COSMETICS, LLC

24  
25 **IT IS SO ORDERED, ADJUDGED AND DECREED:**

26  
27 Dated: \_\_\_\_\_

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