

1 Evan Smith (Bar No. SBN 242352)
2 BRODSKY & SMITH
3 9595 Wilshire Blvd., Ste. 900
4 Beverly Hills, CA 90212
5 Tel: (877) 534-2590
6 Fax: (310) 247-0160

7 *Attorneys for Plaintiff*

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

11 EMA BELL,

12 Plaintiff,

13 v.

14 SYLVERMAX, INC.,

15 Defendant.

Case No.: CPF21517648

CONSENT JUDGMENT

Judge: Ethan P. Schulman

Dept.: 302

Hearing Date: March 21, 2022

Hearing Time: 9:30 AM

Reservation #:

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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 Sylvermax, Inc. (“Sylvermax” 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. Sylvermax 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) from its sales of Aimee Kestenberg lanyards 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.

1.3 **Notice of Violation/Complaint.** On or about March 23, 2021, Bell served Sylvermax, and various public enforcement agencies with documents entitled “60-Day Notice of Violation” pursuant to Health & Safety Code §25249.7(d) (the “Notice”), alleging that Defendant violated Proposition 65 for failing to warn consumers and customers that use of Aimee Kestenberg lanyards expose users in California to DINP. No public enforcer has brought and is diligently prosecuting the claims alleged in the Notice. On December 27, 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 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.

1.5 Defendant denies the material allegations contained in Bell’s Notice and Complaint and maintains that it has not violated Proposition 65. Nothing in this Consent Judgment shall be

1 construed as an admission by Defendant of any fact, finding, issue of law, or violation of law; nor
2 shall compliance with this Consent Judgment constitute or be construed as an admission by
3 Defendant of any fact, finding, conclusion, issue of law, or violation of law, such being specifically
4 denied by Defendant. However, this section shall not diminish or otherwise affect the obligations,
5 responsibilities, and duties of Defendant under this Consent Judgment.

6 **2. DEFINITIONS**

7 2.1 **Covered Products.** The term “Covered Products” means Aimee Kestenberg
8 lanyards that are manufactured, distributed and/or offered for sale in California by Sylvermax.

9 2.2 **Effective Date.** The term “Effective Date” means the date this Consent Judgment is
10 entered as a Judgment of the Court.

11 **3. INJUNCTIVE RELIEF: WARNINGS**


12 3.1 **Reformulation of Covered Products.** As of the date this Consent Judgment is
13 signed by both Parties, and continuing thereafter, Covered Products that Sylvermax directly
14 manufactures, imports, distributes, sells, or offers for sale in California shall either: (a) be
15 Reformulated Products pursuant to § 3.2, below; or (b) be labeled with a clear and reasonable
16 exposure warning pursuant to §§ 3.3 and 3.4, below. For purposes of this Consent Judgment, a
17 “Reformulated Product” is a Covered Product that is in compliance with the standard set forth in §
18 3.2 below. The warning requirement set forth in §§ 3.3 and 3.4 shall not apply to any Reformulated
19 Product.

20 3.2 **Reformulation Standard.** “Reformulated Products” shall mean Covered Products
21 that contain concentrations less than or equal to 0.1% (1,000 parts per million (ppm)) of DINP
22 when analyzed pursuant to U.S. Environmental Protection Agency testing methodologies 3580A
23 and 8270C or other methodology utilized by federal or state government agencies for the purpose
24 of determining the phthalate content in a solid substance.

25 3.3 **Clear and Reasonable Warning.** As of the date this Consent Judgment is signed
26 by both Parties, and continuing thereafter, a clear and reasonable exposure warning as set forth in
27 this §§ 3.3 and 3.4 must be provided for all Covered Products that Defendant manufactures,
28

1 imports, distributes, sells, or offers for sale in California that are not Reformulated Products. There
2 shall be no obligation for Defendant to provide a warning for Covered Products that enter the stream
3 of commerce prior to the date this Consent Judgment is signed by both Parties. The warning shall
4 consist of either the **Warning** or **Alternative Warning** described in §§ 3.3(a) or (b), respectively:

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

6  **WARNING:** This product can expose you to chemicals including diisononyl
7 phthalate (DINP), which is known to the State of California to cause cancer. For
8 more information go to www.P65Warnings.ca.gov.

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

11  **WARNING:** Cancer - www.P65Warnings.ca.gov.

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

25 If Sylvermax sells Covered Products via an internet website to customers located in
26 California, the warning requirements of this section shall be satisfied if the foregoing warning
27 appears either: (a) on the same web page on which a Covered Product is displayed and/or described;
28 (b) on the same page as the price for the Covered Product; or (c) on one or more web pages

1 displayed to a purchaser prior to purchase during the checkout process. Alternatively, a symbol
2 consisting of a black exclamation point in a yellow or white equilateral triangle may appear adjacent
3 to or immediately following the display, description, price, or checkout listing of the Covered
4 Product, if the warning statement appears elsewhere on the same web page in a manner that clearly
5 associates it with the product(s) to which the warning applies.

6 **3.5 Compliance with Warning Regulations.** Defendant shall be deemed to be in
7 compliance with this Consent Judgment by either adhering to §§ 3.3 and 3.4 of this Consent
8 Judgment or by complying with warning requirements adopted by the State of California’s Office
9 of Environmental Health Hazard Assessment (“OEHHA”) after the Effective Date.

10 **3.6 Modifications to Warning Statements.** If modifications or amendments to
11 Proposition 65 or its regulations after the Effective Date are inconsistent with, or provide warning
12 specifications different from, the specifications in this Consent Judgment, Sylvermax may modify
13 the content and delivery methods of its warnings to conform to the modified or amended provisions
14 of Proposition 65 or its regulations.

15 **3.7 Products Already In Stream of Commerce.** There shall be no obligation for
16 Sylvermax to recall, reformulate or provide an exposure warning for Products that left Sylvermax’s
17 possession prior to date this Consent Judgment is signed by both Parties.

18 **4. MONETARY TERMS**

19 **4.1 Civil Penalty.** Sylvermax shall pay \$2,000.00 as a Civil Penalty pursuant to Health
20 and Safety Code section 25249.7(b), to be apportioned in accordance with California Health &
21 Safety Code § 25192, with 75% of these funds remitted to OEHHA and the remaining 25% of the
22 Civil Penalty remitted to Bell, as provided by California Health & Safety Code § 25249.12(d).

23 **4.1.1** Within ten (10) business days of the Effective Date, Sylvermax shall issue
24 two separate checks for the Civil Penalty payment to (a) “OEHHA” in the amount of \$1,500.00;
25 and to (b) “Brodsky & Smith in Trust for Bell” in the amount of \$500.00. Payment owed to Bell
26 pursuant to this Section shall be delivered to the following payment address:

27 Evan J. Smith, Esquire
28 Brodsky & Smith

1 Two Bala Plaza, Suite 805
2 Bala Cynwyd, PA 19004

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

5 For United States Postal Service Delivery:

6 Mike Gyurics
7 Fiscal Operations Branch Chief
8 Office of Environmental Health Hazard Assessment
9 P.O. Box 4010
10 Sacramento, CA 95812-4010

11 For Non-United States Postal Service Delivery:

12 Mike Gyurics
13 Fiscal Operations Branch Chief
14 Office of Environmental Health Hazard Assessment
15 1001 I Street
16 Sacramento, CA 95814

17 A copy of the check payable to OEHHA shall be mailed to Brodsky & Smith at the address set
18 forth above as proof of payment to OEHHA.

19 4.2 **Attorneys' Fees.** Within ten (10) business days of the Effective Date, Sylvermax
20 shall pay \$27,000.00 to Brodsky & Smith as complete reimbursement for Bell's attorneys' fees and
21 costs incurred as a result of investigating, bringing this matter to Sylvermax attention, litigating and
22 negotiating and obtaining judicial approval of a settlement in the public interest, pursuant to Code
23 of Civil Procedure § 1021.5.

24 **5. RELEASE OF ALL CLAIMS**

25 5.1 This Consent Judgment is a full, final, and binding resolution between Bell acting
26 on his own behalf, and on behalf of the public interest, and Sylvermax, and its parents, shareholders,
27 members, directors, officers, managers, employees, representatives, agents, attorneys, divisions,
28 subdivisions, subsidiaries, partners, sister companies, and affiliates, and their predecessors,
successors and assigns ("Defendant Releasees"), and all entities from whom they obtain and to
whom they directly or indirectly distribute or sell Covered Products, 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

1 Proposition 65 based on exposure to DINP from Covered Products as set forth in the Notice, with
2 respect to any Covered Products manufactured, distributed, or sold by Sylvermax prior to the
3 Effective Date. It is the Parties' intention that this Consent Judgment shall have preclusive effect
4 such that no other actions by private enforcers, whether purporting to act in his, her, or its interests
5 or the public interest shall be permitted to pursue and/or take any action with respect to any violation
6 of Proposition 65 that was alleged in the Complaint, or that could have been brought pursuant to
7 the Notice against Sylvermax and/or the Downstream Releasees of the Covered Products
8 ("Proposition 65 Claims"). Compliance with the terms of this Consent Judgment constitutes
9 compliance with Proposition 65 with regard to the 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 waives all rights to institute or participate in, directly or indirectly, any form of legal action
13 and releases Sylvermax, 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 Sylvermax, Defendant Releasees or Downstream Releasees.
19 With respect to the foregoing waivers and releases in this paragraph, Bell hereby specifically
20 waives any and all rights and benefits which she now has, or in the future may have, conferred by
21 virtue of the 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 Sylvermax 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

1 taken or made) by Bell and her attorneys and other representatives, whether in the course of
2 investigating claims or otherwise seeking enforcement of Proposition 65 against it in this matter,
3 and/or with respect to Covered Products.

4 **6. INTEGRATION**

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

9 **7. GOVERNING LAW**

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

15 **8. NOTICES**

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

20 For Defendant:

21 Michael J. Gleason
22 Hahn Loeser & Parks LLP
23 One America Plaza, 600 West Broadway, Suite 1500
San Diego, CA 92101

24 For Bell:

25 Evan Smith
26 Brodsky & Smith
9595 Wilshire Blvd., Ste. 900
27 Beverly Hills, CA 90212

28 Any party, from time to time, may specify in writing to the other party a change of address to

1 which all notices and other communications shall be sent.

2 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

3 9.1 This Consent Judgment may be executed in counterparts and by facsimile, each of
4 which shall be deemed an original, and all of which, when taken together, shall constitute one and
5 the same document.

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

8 10.1 Bell agrees to comply with the requirements set forth in California Health & Safety
9 Code § 25249.7(f) and to promptly bring a Motion for Approval of this Consent Judgment.
10 Defendant agrees it shall support approval of such Motion.

11 10.2 This Consent Judgment shall not be effective until it is approved and entered by the
12 Court and shall be null and void if, for any reason, it is not approved by the Court. In such case, the
13 Parties agree to meet and confer on how to proceed and if such agreement is not reached within 30
14 days, the case shall proceed on its normal course.

15 10.3 If the Court approves this Consent Judgment and is reversed or vacated by an
16 appellate court, the Parties shall meet and confer as to whether to modify the terms of this Consent
17 Judgment. If the Parties do not jointly agree on a course of action to take, the case shall proceed on
18 its normal course on the trial court's calendar.

19 **11. MODIFICATION**

20 11.1 This Consent Judgment may be modified only by further stipulation of the Parties
21 and the approval of the Court or upon the granting of a motion brought to the Court by either Party.

22 **12. ATTORNEY'S FEES**

23 12.1 A Party who unsuccessfully brings or contests an action arising out of this Consent
24 Judgment shall be required to pay the prevailing party's reasonable attorney's fees and costs.

25 12.2 Nothing in this Section shall preclude a Party from seeking an award of sanctions
26 pursuant to law.

27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

13. RETENTION OF JURISDICTION

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

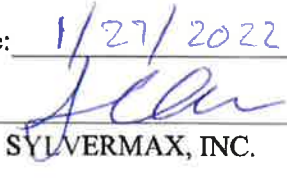
14. AUTHORIZATION

14.1 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: 1/20/22
By: 
EMA BELL

Date: 1/27/2022
By: 
SILVERMAX, INC.

IT IS SO ORDERED, ADJUDGED AND DECREED:

Dated: _____

Judge of Superior Court