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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 2428392 INC.,

15 Defendant.

Case No.: CGC-22-603032

CONSENT JUDGMENT

Judge: Richard B. Ulmer

Dept.: 302

Hearing Date: December 14, 2023

Hearing Time: 9:30 AM

Complaint Filed: November 18, 2022

1 **1. INTRODUCTION**

2 1.1 **The Parties.** This Consent Judgment is entered into by and between Ema Bell
3 acting on behalf of the public interest (hereinafter “Bell”) and 2428392, Inc. dba FYE (“FYE” 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. FYE 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 Honeymaru plush toys, UPC #
11 0843074180113 without providing a clear and reasonable exposure warning pursuant to
12 Proposition 65. DEHP is listed pursuant to Proposition 65 as a chemical known to the State of
13 California to cause cancer and birth defects or other reproductive harm.

14 1.3 **Notice of Violation/Complaint.** On or about December 28, 2021, Bell served,
15 Aliquantum International, Inc., FYE and various public enforcement agencies with documents
16 entitled “60-Day Notice of Violation” pursuant to Health & Safety Code §25249.7(d) (the
17 “Notice”), alleging that Defendant violated Proposition 65 for failing to warn consumers and
18 customers that use of Honeymaru plush toys, UPC # 0843074180113 expose users in California to
19 DEHP. No public enforcer has brought and is diligently prosecuting the claims alleged in the
20 Notice. On November 18, 2022, Bell filed a complaint (the “Complaint”).

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

1 1.5 Defendant denies the material allegations contained in Bell’s Notice and Complaint
2 and maintains that it has not violated Proposition 65. Further, promptly after receipt of the Notice,
3 FYE removed all such items from its retail stores. Nothing in this Consent Judgment shall be
4 construed as an admission by Defendant of any fact, finding, issue of law, or violation of law; nor
5 shall compliance with this Consent Judgment constitute or be construed as an admission by
6 Defendant of any fact, finding, conclusion, issue of law, or violation of law, such being specifically
7 denied by Defendant. However, this section shall not diminish or otherwise affect the obligations,
8 responsibilities, and duties of Defendant under this Consent Judgment.

9 **2. DEFINITIONS**

10 2.1 **Covered Products.** The term “Covered Products” means Honeymaru plush toys,
11 UPC # 0843074180113 that are manufactured, distributed, shipped into California and offered for
12 sale in California by FYE.

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: REFORMULATION AND/OR WARNINGS**

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

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

1 3.3 **Clear and Reasonable Warning.** As of the date this Consent Judgment is signed
2 by both Parties, and continuing thereafter, a clear and reasonable exposure warning as set forth in
3 this §§ 3.3 and 3.4 must be provided for all Covered Products that Defendant manufacturers,
4 imports, distributes, sells, or offers for sale in California that is not a Reformulated Product. There
5 shall be no obligation for Defendant to provide a warning for Covered Products that enter the stream
6 of commerce prior to the date this Consent Judgment is signed by both Parties. The warning shall
7 consist of either the **Warning** or **Alternative Warning** 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
12 www.P65Warnings.ca.gov.

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

15 **⚠ WARNING:** Cancer and Reproductive Harm - www.P65Warnings.ca.gov.

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

1 In addition to affixing the **Warning** or **Alternative Warning** to the Covered Product’s
2 packaging or labeling, the **Warning** or **Alternative Warning** shall be posted on websites where
3 FYE offers Products for sale to consumers in California. The requirements of this Section shall be
4 satisfied if the **Warning** or **Alternative Warning**, or a clearly marked hyperlink using the word
5 “**WARNING**,” appears on the product display page, on the same page as the price for the Covered
6 Product, or on one or more web pages displayed to the purchaser prior to completing the purchase.
7 Alternatively, a symbol consisting of a black exclamation point in a yellow or white equilateral
8 triangle may appear adjacent to or immediately following the display, description, price, or
9 checkout listing of the Covered Product, if the **Warning** or **Alternative Warning** appears
10 elsewhere on the same web page in a manner that clearly associates it with the product(s) to which
11 the **Warning** or **Alternative Warning** applies. If FYE has actual knowledge third-party internet
12 sellers it has agreements concerning the Covered Products with are offering Covered Products for
13 sale in California, FYE shall provide such sellers with written notice in accordance with Title 27,
14 California Code of Regulations, § 25600.2.

15 **3.5 Compliance with Warning Regulations.** Defendant shall be deemed to be in
16 compliance with this Consent Judgment by either adhering to §§ 3.3 and 3.4 of this Consent
17 Judgment or by complying with warning requirements adopted by OEHHA applicable to the
18 Covered Product and exposures at issue after the Effective Date. If consumer information is
19 provided in a foreign language, FYE shall provide the **Warning** in the foreign language.

20 **4. MONETARY TERMS**

21 **4.1 Civil Penalty.** FYE shall pay \$1,000.00 as a Civil Penalty pursuant to Health and
22 Safety Code section 25249.7(b), to be apportioned in accordance with California Health & Safety
23 Code § 25192, with 75% of these funds remitted to OEHHA and the remaining 25% of the Civil
24 Penalty remitted to Bell, as provided by California Health & Safety Code § 25249.12(d).

25 **4.1.1** Within twenty (20) days of the Effective Date, FYE shall issue two
26 separate checks for the Civil Penalty payment to (a) “OEHHA” in the amount of \$750.00; and to
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1 (b) "Ema Bell" in the amount of \$250.00. Payment owed to Bell pursuant to this Section shall be
2 delivered to the following payment address:

3 Evan J. Smith, Esquire
4 Brodsky Smith
5 Two Bala Plaza, Suite 805
6 Bala Cynwyd, PA 19004

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

9 For United States Postal Service Delivery:

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

15 For Non-United States Postal Service Delivery:

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

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

23 4.2 **Attorneys' Fees.** Within twenty (20) days of the Effective Date, FYE shall pay
24 \$17,000.00 to Brodsky Smith ("Brodsky Smith") as complete reimbursement for Bell's attorneys'
25 fees and costs incurred as a result of investigating, bringing this matter to the attention of FYE,
26 litigating and negotiating and obtaining judicial approval of a settlement in the public interest,
27 pursuant to Code of Civil Procedure § 1021.5.

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 FYE, and its parents, shareholders,
members, directors, officers, managers, employees, representatives, agents, attorneys, divisions,
subdivisions, subsidiaries, partners, sister companies, and affiliates, and their predecessors,
successors and assigns ("Defendant Releasees"), and all entities from whom they obtain and to

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

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

27 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS THAT THE
28 CREDITOR OR RELEASING PARTY DOES NOT KNOW OR SUSPECT TO

1 EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE
2 RELEASE AND THAT, IF KNOWN BY HIM OR HER, WOULD HAVE
3 MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE
4 DEBTOR OR RELEASED PARTY.

5 5.3 FYE waives any and all claims against Bell, her attorneys and other representatives,
6 for any and all actions taken, or statements made (or those that could have been taken or made) by
7 Bell and her attorneys and other representatives, whether in the course of investigating claims or
8 otherwise seeking enforcement of Proposition 65 against it in this matter, and with respect to
9 Covered Products.

10 **6. INTEGRATION**

11 6.1 This Consent Judgment contains the sole and entire agreement of the Parties and
12 any and all prior negotiations and understandings related hereto shall be deemed to have been
13 merged within it. No representations or terms of agreement other than those contained herein exist
14 or have been made by any Party with respect to the other Party or the subject matter hereof.

15 **7. GOVERNING LAW**

16 7.1 The terms of this Consent Judgment shall be governed by the laws of the State of
17 California and apply within the State of California. In the event that Proposition 65 is repealed or
18 is otherwise rendered inapplicable by reason of law generally, or as to Covered Products, then
19 Defendant shall have no further obligations pursuant to this Consent Judgment with respect to, and
20 to the extent that, Covered Products are so affected.

21 **8. NOTICES**

22 8.1 Unless specified herein, all correspondence and notices required to be provided
23 pursuant to this Consent Judgment shall be in writing and personally delivered or sent by: (i) first-
24 class, (registered or certified mail) return receipt requested; or (ii) overnight courier on any party
25 by the other party at the following addresses:

26 For Defendant:

27 Andrew Cummings
28 Holland & Knight LLP
 4675 MacArthur Court, Suite 900
 Newport Beach, CA 92660

 And

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For Bell:

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.

9. COUNTERPARTS; FACSIMILE SIGNATURES

9.1 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.

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

10.1 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.

10.2 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.

10.3 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.

11. MODIFICATION

11.1 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.

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
17 Date:

10/24/23

Date:

6/22/23

18 By:

EMA BELL

By:

2428392, Inc/ dba FYE

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

22
23 Dated: _____

Judge of Superior Court