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FILED
 ALAMEDA COUNTY

OCT 05 2016

CLERK OF THE SUPERIOR COURT
 By *[Signature]* Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA
 COUNTY OF ALAMEDA

10 ANTHONY FERREIRO,
 11
 12 Plaintiff,
 13 vs.
 14 ETL, LLC,
 15
 16 Defendant.

Case No. RG16810766

~~[PROPOSED]~~ CONSENT JUDGMENT

Judge: Julia Spain

Dept.: 19

Hearing Date: June 29, 2016

Hearing Time: 2:00 PM

Reservation #: R-1740367

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1 **1. Introduction**

2 1.1 On October 27, 2015, Anthony Ferreiro (“Ferreiro”) served ETL, LLC (“ETL”),
3 ETL International, Inc. t/a Oxygenics®, Bed Bath & Beyond, Inc. (“Bed Bath & Beyond”) and
4 various public enforcement agencies with a document entitled “Notice of Violation of California
5 Health & Safety Code § 25249.6, *et seq.*” (the “Notice”). The Notice provided ETL and such
6 others, including public enforcers, with notice that alleged that ETL was in violation of California
7 Health & Safety Code § 25249.6 (“Proposition 65”), for failing to warn consumers and customers
8 that Oxygenics® Shower Head hoses, including but not limited to UPC No. 0 1014792668 2,
9 Model No. 92668 (“Product” or “Products”) exposed users in California to the chemical Di(2-
10 ethylhexyl) phthalate (DEHP). No public enforcer has diligently prosecuted the allegations set
11 forth in the Notice.

12 1.2 On April 8, 2016, Ferreiro filed a Complaint for Civil Penalties and Injunctive
13 Relief (“Complaint”) in Alameda County Superior Court, Case No. RG16810766, against ETL
14 alleging violations of Proposition 65.

15 1.3 ETL is a corporation that employs more than ten persons under California Health
16 and Safety Code §25249.6 and offered the Products for sale within the State of California.

17 1.4 Ferreiro’s Complaint alleges, among other things, that ETL sold the Products in
18 California and/or to California citizens, that the Products contains DEHP, and that the resulting
19 exposure violated provisions of Proposition 65, by knowingly and intentionally exposing persons
20 to a chemical known to the State of California to cause both cancer and reproductive toxicity
21 without first providing a clear and reasonable warning to such individuals.

22 1.5 For purposes of this Consent Judgment only, the parties stipulate that this Court
23 has jurisdiction over the allegations of violations contained in the Complaint and personal
24 jurisdiction over ETL as to the acts alleged in the Complaint, that venue is proper in the County
25 of Alameda, and that this Court has jurisdiction to enter this Consent Judgment as a resolution of
26 the allegations contained in the Complaint.

27 1.6 The parties enter into this Consent Judgment pursuant to a full settlement of
28 disputed claims between the parties as alleged in the Complaint for the purpose of avoiding

1 prolonged litigation. By execution of this Consent Judgment, ETL does not admit any violation
2 of Proposition 65 and specifically denies that it has committed any such violation. Nothing in this
3 Consent Judgment shall be construed as an admission by ETL of any fact, issue of law or
4 violation of law, nor shall compliance with the Consent Judgment constitute or be construed as an
5 admission by ETL of any fact, issue of law, or violation of law. Nothing in this Consent
6 Judgment shall prejudice, waive, or impair any right, remedy or defense that ETL may have in
7 any other future legal proceeding. However, this paragraph shall not diminish or otherwise affect
8 the obligations, responsibilities and duties of ETL under this Consent Judgment.

9 1.7 For purposes of this Consent Judgment, the term "Effective Date" shall mean the
10 date that the Consent Judgment is entered by the Court.

11 **2. Injunctive Relief**

12 2.1 Commencing ninety (90) days after the Effective Date, and continuing thereafter,
13 ETL shall only ship, sell, or offer for sale in California, Reformulated Product pursuant to Section
14 2.2 or Product that is labeled with a clear and reasonable warning pursuant to Section 2.3. ETL
15 and its downstream retailers shall have no obligation to label Products that entered the stream of
16 commerce prior to the Effective Date or within ninety (90) days after the Effective Date. For
17 purposes of this Settlement Agreement, a "Reformulated Product" is Product that is in compliance
18 with the standard set forth below in section 2.2.

19 2.2 "Reformulated Product" shall mean Product that contains less than or equal to
20 1,000 parts per million ("ppm") of DEHP when analyzed pursuant to CPSC-CH-C1001-09.3
21 Standard Operating Procedure for Determination of Phthalates method.

22 2.3 Commencing on the Effective Date, ETL shall, for all Products it sells or
23 distributes and that is intended for sale in California and that is not a Reformulated Product,
24 provide clear and reasonable warnings as set forth in subsections 2.3(a) and (b) below. The
25 warning shall be prominently placed with such conspicuousness as compared with other words,
26 statements, designs, or devices as to render it likely to be read and understood by an ordinary
27 individual under customary conditions before purchase or use. Each warning shall be provided in
28 a manner such that the consumer or user understands to which specific Product the warning

1 applies, so as to minimize the risk of consumer confusion.

2 **(a) Retail Store Sales**

3 **(i) Product Labeling.** ETL shall affix a warning to the packaging,
4 labeling or directly on each Product sold in retail outlets in California by ETL or
5 any person selling the Product that states:

6 **[PROPOSITION 65] WARNING:**

7 This product contains a chemical known to the State of California to cause cancer,
8 birth defects or other reproductive harm.

9 The bracketed text may, but is not required to, be used.

10 **(ii) Point of Sale Warnings.** Alternatively to the Product
11 Labeling set forth in Section 2.3(a)(i) above, ETL may provide warning
12 signs in the form below to its customers in California with instructions to
13 post the warning signs in close proximity to the point of display of the
14 Product. Such instruction sent to ETL customers shall be sent by certified
15 mail, return receipt requested.

16 **[PROPOSITION 65] WARNING:**

17 This product contains a chemical known to the State of California to cause cancer,
18 birth defects or other reproductive harm.

19 The bracketed text may, but is not required to, be used.

20 **(b) Mail Order Catalog Warning.** In the event that ETL directly sells
21 Product via mail order catalog directly to consumers located in California after the Effective Date
22 that is not a Reformulated Product, ETL shall provide a warning for such Product sold via mail
23 order catalog to such California residents. A warning that is given in a mail order catalog shall be
24 in the same type size or larger than the Product description text within the catalog. The following
25 warning shall be provided on the same page and in the same location as the display and/or
26 description of the Product:

27 **[PROPOSITION 65] WARNING:**

28 This product contains a chemical known to the State of California to cause cancer,
birth defects or other reproductive harm.

1 The bracketed text may, but is not required to, be used. Where it is impracticable to provide the
2 warning on the same page and in the same location as the display and/or description of the
3 Product, ETL may utilize a designated symbol to cross reference the applicable warning and shall
4 define the term “designated symbol” with the following language on the inside of the front cover
5 of the catalog or on the same page as any order form for the Product:
6

7 **[PROPOSITION 65] WARNING:** Certain products identified with this symbol
8 ▼ and offered for sale in this catalog contain a chemical known to the State of
California to cause cancer, birth defects or other reproductive harm.

9 The bracketed text may, but is not required to, be used. The designated symbol must appear on
10 the same page and in close proximity to the display and/or description of the Product. On each
11 page where the designated symbol appears, ETL must provide a header or footer directing the
12 consumer to the warning language and definition of the designated symbol.

13 **(c) Internet Sales Warning.** In the event that ETL sells Product via the
14 internet directly to consumers located in California after the Effective Date that is not a
15 Reformulated Product, ETL shall provide a warning for such Product sold via the internet to such
16 California residents. A warning that is given on the internet shall be in the same type size or
17 larger than the Product description text and shall be given in conjunction with the direct sale of
18 the Product. The warning shall appear either: (a) on the same web page on which the Product is
19 displayed; (b) on the same web page as the order form for the Product; (c) on the same page as
20 the price for the Product; or (d) on one or more web pages displayed to a purchaser during the
21 checkout process. The following warning shall be provided:

22 **[PROPOSITION 65] WARNING:**

23 This product contains a chemical known to the State of California to cause cancer, birth
24 defects or other reproductive harm.

25 The bracketed text may, but is not required to, be used.
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1 **3. Entry of Consent Judgment**

2 3.1 The parties hereby request that the Court promptly enter this Consent Judgment.
3 Upon entry of this Consent Judgment, Ferreiro and ETL waive their respective rights to a hearing
4 or trial on the allegations of the Complaint and 60-Day Notice.

5 3.2 In the event that the Attorney General objects or otherwise comments on one or
6 more provisions of this Consent Judgment, Ferreiro and ETL agree to take reasonable steps to
7 satisfy such concerns or objections.

8 **4. Matters Covered By This Consent Judgment**

9 4.1 **Plaintiff's Public Release of Proposition 65 Claims.** This Consent
10 Judgment is a final and binding resolution between Ferreiro, acting on his own behalf, and on
11 behalf of the public and in the public interest, and Defendant ETL, and shall have preclusive
12 effect such that no other person or entity, whether purporting to act in his, her, or its interests or
13 the public interest shall be permitted to pursue and/or take any action with respect to any violation
14 of Proposition 65 that was alleged in the Complaint, or that could have been brought pursuant to
15 the Notice against ETL or its downstream retailers of the Product including but not limited to Bed
16 Bath & Beyond ("Proposition 65 Claims"). As to alleged exposures to DEHP in the Product,
17 compliance with the terms of this Consent Judgment by ETL is deemed sufficient to satisfy all
18 obligations concerning compliance by ETL and its downstream retailers, including but not limited
19 to Bed Bath & Beyond with the requirements of Proposition 65 with respect to the Products.

20 4.2 **Plaintiff's Release of Additional Claims.** As to Ferreiro for and in his
21 individual capacity only, this Consent Judgment shall have preclusive effect such that he shall not
22 be permitted to pursue and/or take any action with respect to any other statutory or common law
23 claim, to the fullest extent that any such claim was or could have been asserted by him against
24 ETL or any and all downstream retailers of the Products, including but not limited to Bed Bath &
25 Beyond, based on their exposure of Ferreiro to DEHP in the Products, or their failure to provide a
26 clear and reasonable warning of exposure to Ferreiro as well as any other claim based in whole
27 or in part on the facts alleged in the Complaint and the Notice, whether based on actions
28 committed by ETL or its downstream retailers of the Products, including but not limited to Bed

1 Bath & Beyond (“DEHP Exposure Claims”).

2 **4.3 Waiver of Rights Under Section 1542 of the California Civil Code.** As to
3 Ferreiro’s public release of Proposition 65 Claims set forth in Section 4.1 (“Public Release”) and
4 his individual release of DEHP Exposure Claims set forth in Section 4.2 (“Individual Release”),
5 Ferreiro, acting on his own behalf and on behalf of the public with respect to the Public Release
6 and acting in his individual capacity with respect to the Individual Release, waives all rights to
7 institute any form of legal action, and releases all claims against ETL and its downstream
8 retailers, including but not limited to Bed Bath & Beyond (including their parents, subsidiaries,
9 affiliates, assigns, and acquiring entities of any of them, who may use, maintain, distribute or sell
10 the Products) for the Proposition 65 Claims and the DEHP Exposure Claims (referred to
11 collectively in this Section as “Claims”). In furtherance of the foregoing, Ferreiro, acting on his
12 own behalf and on behalf of the public with respect to the Public Release and acting in his
13 individual capacity with respect to the Individual Release, waives any and all rights and benefits
14 which he now has, or in the future may have, conferred upon him with respect to the Claims by
15 virtue of the provisions of § 1542 of the California Civil Code, which provides as follows:

16 **A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE**
17 **CREDITOR DOES NOT KNOW OR SUSPECT EXIST IN HIS OR HER**
18 **FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF**
19 **KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED**
20 **HIS SETTLEMENT WITH THE DEBTOR.**

21 **4.4 ETL’s Release of Plaintiff Ferreiro.** ETL, on behalf of itself, its past and
22 current agents, representatives, attorneys, successors and/or assignees, hereby waives any and all
23 claims against Ferreiro, his attorneys, and other representatives for any and all actions taken or
24 statements made (or those that could have been taken or made) by Ferreiro and his attorneys and
25 other representatives, whether in the course of investigating claims or otherwise seeking
26 enforcement of Proposition 65 against ETL in this matter.

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5. Enforcement of Judgment

5.1 The terms of this Consent Judgment shall be enforced exclusively by the parties hereto. The parties may, by noticed motion or order to show cause before the Superior Court of Alameda County, giving the notice required by law, enforce the terms and conditions contained herein. In any proceeding brought by either party to enforce this Consent Judgment, such party may seek whatever fines, costs, penalties or remedies as may be provided by law for any violation of Proposition 65 or this Consent Judgment.

6. Modification of Judgment

6.1 This Consent Judgment may be modified only by written agreement of the parties upon entry of a modified Consent Judgment by the Court thereon, or upon motion of any party as provided by law and upon an entry of a modified Consent Judgment by the Court.

6.2 Should any court enter final judgment in a case brought by Ferreiro or the People involving the Products that sets forth standards defining when Proposition 65 warnings will or will not be required (“Alternative Standards”), or if the California Attorney General’s office otherwise provides written endorsement (i.e., a writing that is circulated by the Attorney General that is not intended for the purpose of soliciting further input or comments) of Alternative Standards applicable to products that are of the same general type and function as the Products and constructed from the same materials, ETL shall be entitled to seek a modification of this Consent Judgment on sixty (60) days’ notice to Ferreiro so as to be able to utilize and rely on such Alternative Standards in lieu of those set forth in Section 2 of this Consent Judgment. Ferreiro shall not unreasonably contest any proposed application to effectuate such a modification provided that the Products for which such a modification is sought are of the same general type and function as those to which the Alternative Standards apply.

1 **7. Settlement Payment**

2 7.1 In settlement of all the claims referred to in this Consent Judgment, and without
3 any admission of liability therefore, ETL shall make the following monetary payments:

4 7.1.1 **Initial Civil Penalty.** Within seven (7) business days of the Effective Date,
5 ETL shall pay a total of \$7,000.00 in civil penalties in accordance with this Section. The Initial
6 Civil Penalty payment will be allocated in accordance with California Health & Safety Code §§
7 25249.12(c)(1) and (d), with 75% of the funds remitted to the California Office of Environmental
8 Health Hazard Assessment ("OEHHA") and the remaining 25% of the civil penalty remitted to
9 Ferreiro. Within seven (7) business days of the Effective Date, ETL shall issue two separate
10 checks for the civil penalty payment to (a) "OEHHA" in the amount of five-thousand two-
11 hundred fifty U.S. dollars (\$5,250); and (b) "Brodsky & Smith, LLC in Trust for Ferreiro" in the
12 amount of one-thousand seven-hundred fifty U.S. dollars (\$1,750.00). Payment owed to Ferreiro
13 pursuant to this Section shall be delivered to the following payment address:

14 Evan J. Smith, Esquire
15 Brodsky & Smith, LLC
16 Two Bala Plaza, Suite 510
 Bala Cynwyd, PA 19004

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

19 For United States Postal Service Delivery:

20 Mike Gyurics
21 Fiscal Operations Branch Chief
 Office of Environmental Health Hazard Assessment
 P.O. Box 4010
22 Sacramento, CA 95812-4010

23 For Non-United States Postal Service Delivery:

24 Mike Gyurics
25 Fiscal Operations Branch Chief
 Office of Environmental Health Hazard Assessment
 1001 I Street
26 Sacramento, CA 95814

27 A copy of the check payable to OEHHA shall be mailed to Brodsky & Smith, LLC at the
28 address set forth above as proof of payment to OEHHA.

1 7.1.2 **Final Civil Penalty.** Sixty (60) days after the Effective Date, ETL shall
2 make a final civil penalty payment of \$6,000.00 on the same terms as set forth in Section 7.1.1
3 pertaining to the Initial Civil Penalty. Pursuant to Title 11 California Code of Regulations,
4 Section 3203(c), Ferreiro agrees that the Final Civil Penalty payment shall be waived in its
5 entirety if, on or before the Final Civil Penalty payment is due, an officer of ETL provides
6 Ferreiro with a signed declaration certifying that all Products it ships for sale or distributes for
7 sale in California as of the date of its certification are Reformulated Products or are marked with
8 the warnings required by this Consent Decree (hereinafter “Labeled Product”) and that ETL will
9 continue to offer only Reformulated Products or Labeled Products in California in the future. The
10 option to provide a declaration certifying its complete early reformulation or labeling of the
11 Products in lieu of making the Final Civil Penalty payment otherwise required by this Section is a
12 material term, and time is of the essence.

13 7.1.3 **Attorney Fees and Costs.** In addition to the payment above, ETL shall
14 pay \$46,324.00 to Brodsky & Smith, LLC (“Brodsky & Smith”) as complete reimbursement for
15 Ferreiro’s attorneys’ fees and costs, including any investigation and laboratory costs or expert
16 fees, incurred in the course of bringing the Complaint and in enforcing Proposition 65, including
17 without limitation, preparation of the 60-Day Notice letter and discussions with the office of the
18 Attorney General. Payment shall be made within seven (7) business days of the Effective Date
19 and sent to the address for Brodsky & Smith set forth in Section 7.1.1, above.

20 **8. Notices**

21 8.1 Any and all notices between the parties provided for or permitted under this
22 Agreement, or by law, shall be in writing and personally delivered or sent by: (i) first-class
23 (registered or certified mail) return receipt requested; or (ii) overnight or two-day courier on any
24 party by the other party to the following addresses:

25 For ETL:

26 Brent E. Johnson, Esq.
27 Holland & Hart LLP
28 222 South Main Street, Suite 2200
 Salt Lake City, UT 84101
 T: 801.799.5800

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2 For Ferreiro:

3 Evan J. Smith
4 BRODSKY & SMITH, LLC
5 9595 Wilshire Blvd., Suite 900
6 Beverly Hills, CA 90212
7 T: 877.354.2590

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

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11 **9. Authority to Stipulate**

12 9.1 Each signatory to this Consent Judgment certifies that he or she is fully authorized
13 by the party he or she represents to enter into this Consent Judgment and to execute it on behalf of
14 the party represented and legally to bind that party.

15 **10. Counterparts**

16 10.1 This Stipulation may be signed in counterparts and shall be binding upon the
17 parties hereto as if all said parties executed the original hereof.

18 **11. Retention of Jurisdiction**

19 11.1 This Court shall retain jurisdiction of this matter to implement the Consent
20 Judgment.

21 **12. Service on the Attorney General**

22 12.1 Ferreiro shall serve a copy of this Consent Judgment, signed by both parties, on the
23 California Attorney General on behalf of the parties so that the Attorney general may review this
24 Consent Judgment prior to its submittal to the Court for Approval. No sooner than forty-five (45)
25 days after the Attorney General has received the aforementioned copy of this Consent Judgment,
26 and in the absence of any written objection by the Attorney General to the terms of this Consent
27 Judgment, the parties may then submit it to the Court for Approval.

28 **13. Entire Agreement**

13.1 This Consent Judgment contains the sole and entire agreement and understanding
of the parties with respect to the entire subject matter hereof, and any and all discussions,
negotiations, commitment and understandings related thereto. No representations, oral or

1 otherwise, express or implied, other than those contained herein have been made by any party
2 hereto. No other agreements not specifically referred to herein, oral or otherwise, shall be deemed
3 to exist or to bind any of the parties.

4 **14. Governing Law and Construction**

5 14.1 The validity, construction and performance of this Consent Judgment shall be
6 governed by the laws of the State of California, without reference to any conflicts of law
7 provisions of California law

8 **15. Court Approval**

9 15.1 If this Consent Judgment is not approved by the Court, it shall be of no force or
10 effect, and cannot be used in any proceeding for any purpose.

11 **IT IS SO STIPULATED:**

12
13 Dated: 5/12/16 Dated: 5/12/16

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15 By: [Signature] [Signature]
16 Anthony [unclear] ETL

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

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19 Dated: 10/5/16 [Signature]
20 Judge of Superior Court
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