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Attorneys for Plaintiff

FILED
ALAMEDA COUNTY

JUN 23 2017

CLERK OF THE SUPERIOR COURT
By T. J. Z. Deputy

MAY 09 2017

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ALAMEDA

ANTHONY FERREIRO,
Plaintiff,
v.
THE SURPLUS STORE,
Defendant.

Case No.: RG17845857
CONSENT JUDGMENT
Judge: Victoria S. Kolakowski
Dept.: 23
Hearing Date: June 20, 2017
Hearing Time: 3:00 PM
Reservation #: R-1834913

BY FAX

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1. INTRODUCTION

1.1 **The Parties.** This Consent Judgment is entered into by and between Anthony Ferreiro acting on behalf of the public interest (hereinafter "Ferreiro") and The Surplus Store ("The Surplus Store" or "Defendant") with Ferreiro and Defendant collectively referred to as the "Parties" and each of them as a "Party." Ferreiro is an individual residing in California who seeks to promote awareness of exposures to toxic chemicals and improve human health by reducing or eliminating hazardous substances contained in consumer products. Ferreiro alleges that The Surplus Store is 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.** Ferreiro alleges that Defendant has exposed individuals to Di(2-ethylhexyl) phthalate (DEHP) and Diisononyl phthalate (DINP) from PVC gloves and protective goggles without providing clear and reasonable warnings under Proposition 65. DEHP and DINP are listed under Proposition 65 as chemicals known to the State of California to cause cancer and/or reproductive toxicity.

1.3 **Notices of Violation/Complaint.** On or about June 3, and June 15, 2016, and on February 20, 2017, Ferreiro served The Surplus Store, and various public enforcement agencies with a document entitled "60-Day Notices of Violation" pursuant to Health & Safety Code §25249.7(d) (collectively, the "Notices"), alleging that Defendant was in violation of Proposition 65 for failing to warn consumers and customers that the Products exposed users in California to DEHP and/or DINP. No public enforcer has brought and is diligently prosecuting the claims alleged in the Notices. On January 17, 2017, Ferreiro filed a complaint in the matter as captioned above (the "Complaint").

1.4 **Consent to Jurisdiction.** 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 Alameda, 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

1 based on the facts alleged therein and/or in the Notices.

2 1.5 **No Admission.** Defendant denies the factual, legal, and material allegations
3 contained in the Notices and Complaint and maintains that it has sold and distributed for sale in
4 California, including the Products, which have been, and are, in compliance with all laws. The
5 Surplus Store specifically maintains that it has not violated Proposition 65 or that it is subject to
6 Proposition 65. Nothing in this Consent Judgment shall be construed as an admission by Defendant
7 of any fact, finding, issue of law, or violation of law; nor shall compliance with this Consent
8 Judgment constitute or be construed as an admission by Defendant of any fact, finding, conclusion,
9 issue of law, or violation of law, such being specifically denied by Defendant. However, this
10 section shall not diminish or otherwise affect the obligations, responsibilities, and duties of
11 Defendant under this Consent Judgment.

12 2. **DEFINITIONS**

13 2.1 **Covered Products.** The term "Covered Products" means (a) Hawk Industrial
14 Safety Goggles, UPC No. 768537001524, (b) Rapdom Tactical Gear Sniper Gloves, UPC No.
15 847418019176, and (c) Red Steer PVC Gloves, UPC No. 0 46065 01843 7 that have been purchased
16 for sale, imported, sold, and/or otherwise distributed by The Surplus Store for sale in California,
17 and that contain DEHP and/or DINP (the "Products").

18 2.2 **Effective Date.** The term "Effective Date" means the date this Consent Judgment is
19 entered as a Judgment of the Court.

20 3. **INJUNCTIVE RELIEF: WARNINGS**

21 3.1 Commencing ninety (90) days after the Effective Date, The Surplus Store shall not
22 purchase for sale, import, sell or distribute in California any Covered Product that contains more
23 than 1,000 parts per million DEHP and/or DINP, unless the Covered Product is accompanied by
24 the following warning: "WARNING: This product contains a chemical known to the State of
25 California to cause cancer, birth defects and other reproductive harm."

26 3.2 The warning provided pursuant to Section 3.1 shall be affixed to or printed on the
27 Covered Product's packaging or labeling. The warning shall be prominently affixed to or printed
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1 on the packaging or labeling and displayed with such conspicuousness, as compared with other
2 words, statements, or designs as to render it likely to be read and understood by an ordinary
3 individual under customary conditions of purchase or use. A warning may be contained in the same
4 section of the packaging, labeling, or instruction booklet that states other safety warnings, if any,
5 concerning the use of the product and shall be at least the same size as those other safety warnings.

6 **4. MONETARY TERMS**

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8 4.1 **Civil Penalty.** The Surplus Store shall pay a civil penalty of \$1,000.00 pursuant to
9 Health and Safety Code section 25249.7(b), to be apportioned in accordance with California Health
10 & Safety Code § 25192, with 75% of these funds remitted to the State of California's Office of
11 Environmental Health Hazard Assessment and the remaining 25% of the penalty remitted to
12 Ferreiro, as provided by California Health & Safety Code § 25249.12(d).

13 4.1.1 Within ten (10) business days of the Effective Date, The Surplus Store
14 shall issue two separate checks for the civil penalty payment to (a) "OEHHA" in the amount of
15 \$750.00; and (b) "Brodsky & Smith, LLC in Trust for Ferreiro" in the amount of \$250.00.

16 Payment owed to Ferreiro pursuant to this Section shall be delivered to the following payment
17 address:

18 Evan J. Smith, Esquire
19 Brodsky & Smith, LLC
20 Two Bala Plaza, Suite 510
21 Bala Cynwyd, PA 19004

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

24 For United States Postal Service Delivery:

25 Mike Gyurics
26 Fiscal Operations Branch Chief
27 Office of Environmental Health Hazard Assessment
28 P.O. Box 4010
Sacramento, CA 95812-4010

For Non-United States Postal Service Delivery:

Mike Gyurics
Fiscal Operations Branch Chief
Office of Environmental Health Hazard Assessment

1001 I Street
Sacramento, CA 95814

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

4.2 **Attorney Fees.** The Surplus Store shall pay \$11,500.00 to Brodsky & Smith, LLC ("Brodsky Smith") as complete reimbursement for Plaintiff Ferreiro's attorneys' fees and costs incurred as a result of investigating, bringing this matter to The Surplus Store's attention, litigating and negotiating and obtaining judicial approval of a settlement in the public interest, pursuant to Code of Civil Procedure section 1021.5. Payment shall be made within ten (10) business days of the Effective Date and sent to the address for Brodsky & Smith set forth in section 4.1.1, above.

4.3 The Surplus Store shall pay the civil penalty and attorney fees in Sections 4.1 and 4.2 within ten (10) days of the Effective Date.

5. **RELEASE OF ALL CLAIMS**

5.1 **Ferreiro's Public Release of Proposition 65 Claims.** This consent judgment is a full, final, and binding resolution between Ferreiro acting on his own behalf and in the public interest, and constitutes a full and binding release as to The Surplus Store, and its parents, shareholders, divisions, subdivisions, subsidiaries, partners, sister companies, and affiliates, and their 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 Defendant Releasees"), of all claims for violations of Proposition 65 based on exposure to DEHP from Covered Products as set forth in the Notices, with respect to any Covered Products manufactured, distributed, or sold by The Surplus Store prior to the Effective Date. Compliance with the terms of this consent judgment constitutes compliance with Proposition 65 with regard to the Covered Products.

5.2 **Ferreiro's Individual Release of Claims.** Ferreiro, in his individual capacity only and not in his representative capacity, also provides a release to The Surplus Store, Defendant Releasees, and Downstream Defendant Releasees. In addition to the foregoing, Ferreiro, on behalf

1 of himself, his past and current agents, representatives, attorneys, and successors and/or assignees,
2 and not in his representative capacity, hereby waives all rights to institute or participate in, directly
3 or indirectly, any form of legal action and releases any The Surplus Store, Defendant Releasees,
4 and Downstream Defendant Releasees from any and all manner of actions, causes of action, claims,
5 demands, rights, suits, obligations, debts, contracts, agreements, promises, liabilities, damages,
6 charges, losses, costs, expenses, and attorneys' fees, of any nature whatsoever, known or unknown,
7 in law or equity, fixed or contingent, now or in the future, with respect to any alleged violations of
8 Proposition 65 related to or arising from Covered Products manufactured distributed or sold by The
9 Surplus Store or Defendant Releasees, Downstream Defendant Releasees. With respect to the
10 foregoing waivers and releases in this paragraph, Ferreiro hereby specifically waives any and all
11 rights and benefits which he now has, or in the future may have, conferred by virtue of the
12 provisions of Section 1542 of the California Civil Code, which provides as follows:

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

17 5.3 By executing this Consent Judgment, Ferreiro understands and acknowledges that
18 the significance and consequence of this waiver of California Civil Code Section 1542 is that even
19 if Ferreiro suffers future damages arising out of or resulting from, or related directly or indirectly
20 to, in whole or in part, the Covered Products, including but not limited to any exposure to, or failure
21 to warn with respect to exposure to DEHP from the Covered Products, Ferreiro will not be able to
22 make any claim for those damages against The Surplus Store, Defendant Releasees, and
23 Downstream Defendant Releasees, and the successors and assigns of any of them, who may
24 manufacture, use, maintain, distribute, retail or sell the Covered Products. Furthermore, Ferreiro
25 acknowledges that it intends these consequences for any such claims and any other claims which
26 may exist as of the date of this release pertaining to the Covered Products listed in the Notices but
27 which Ferreiro does not know exist, and which, if known, would materially affect its decision to
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1 enter into this Consent Judgment, regardless of whether its lack of knowledge is the result of
2 ignorance, oversight, error, negligence, or any other cause.

3 5.4 The Surplus Store waives any and all claims against Ferreiro, his attorneys and other
4 representatives, for any and all actions taken or statements made (or those that could have been
5 taken or made) by Ferreiro and his attorneys and other representatives, whether in the course of
6 investigating claims or otherwise seeking enforcement of Proposition 65 against it in this matter,
7 and/or with respect to Covered Products.

8 **6. INTEGRATION/ENTIRE AGREEMENT**

9 6.1 This Consent Judgment contains the sole and entire agreement of the Parties and
10 any and all prior negotiations and understandings related hereto shall be deemed to have been
11 merged within it. No representations or terms of agreement other than those contained herein exist
12 or have been made by any Party with respect to the other Party or the subject matter hereof.

13 **7. GOVERNING LAW**

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

19 **8. NOTICES**

20 8.1 Unless specified herein, all correspondence and notices required to be provided
21 pursuant to this Consent Judgment shall be in writing and personally delivered or sent by: (i) first-
22 class, (registered or certified mail) return receipt requested; or (ii) overnight courier on any party
23 by the other party at the following addresses:

24 For Defendant:

25 Baret C. Fink
26 Perelman and Fink
27 1880 Century Park East, #315
28 Los Angeles, CA 90067

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For Ferreiro:

Evan Smith
Brodsky & Smith, LLC
2 Bala Plaza, Suite 510
Bala Cynwyd, PA 19004

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 Ferreiro 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 and 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.

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12. SEVERABILITY

12.1 If, subsequent to the Court's approval and entry of this Consent Judgment as a judgment, any provision is held to be unenforceable, the validity of the remaining provisions shall not be adversely affected.

13. ATTORNEY'S FEES

13.1 A party who unsuccessfully brings or contests an action arising out of this Consent Judgment shall be required to pay the prevailing party's reasonable attorney's fees and costs unless the unsuccessful party has acted with substantial justification. For purposes of this Consent Judgment, the term substantial justification shall carry the same meaning as used in the Civil Discovery Act of 1986, Code of Civil Procedure Section 2016, et seq.

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

14. RETENTION OF JURISDICTION

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

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15. AUTHORIZATION

15.1 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 certifies 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: _____

Date: 3/13/2017

By: _____
ANTHONY FERREIRO

By: J. Edell Naylor
THE SURPLUS STORE
JAIME EDELL NAYLOR
SECRETARY

IT IS SO ORDERED, ADJUDGED AND DECREED:

Dated: _____

Judge of Superior Court

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15.1 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 certifies 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: 5/21/17 Date: _____

By: Anthony Ferrreiro By: _____
ANTHONY FERREIRO THE SURPLUS STORE

IT IS SO ORDERED, ADJUDGED AND DECREED:

Dated: June 23, 2017 Victoria S. Kolakowski
Judge of Superior Court

Victoria S. Kolakowski