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Attorneys for Plaintiff

FILED
ALAMEDA COUNTY

MAR 16 2017

CLERK OF THE SUPERIOR COURT

By *Paul D. Herbert* Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ALAMEDA

ANTHONY FERREIRO,

Plaintiff,

v.

COMPLETE MEDICAL SUPPLIES, INC.,

Defendant.

Case No.: RG16842507

CONSENT JUDGMENT

Judge: ~~Robert B. Freedman~~ *Paul D. Herbert*

Dept.: 20

Hearing Date: March 16, 2017

Hearing Time: 2:00 PM

Reservation #: R-1813121

1 **1. INTRODUCTION**

2 **1.1 The Parties.** This Consent Judgment is entered into by and between Anthony
3 Ferreiro acting on behalf of the public interest (hereinafter “Ferreiro”) and Complete Medical
4 Supplies, Inc. (“Complete Medical Supplies” or “Defendant”) with Ferreiro and Defendant
5 collectively referred to as the “Parties” and each of them as a “Party.” Ferreiro is an individual
6 residing in California who seeks to promote awareness of exposures to toxic chemicals and improve
7 human health by reducing or eliminating hazardous substances contained in consumer products.
8 Complete Medical Supplies employs ten or more persons and is a person in the course of doing
9 business for purposes of Proposition 65, Cal. Health & Safety Code §§ 25249.6 et seq.

10 **1.2 Allegations and Representations.** Ferreiro alleges that Defendant has exposed
11 individuals to Di(2-ethylhexyl) phthalate (DEHP) and/or Diisononyl phthalate (DINP) from
12 *Complete Medical Inflatable Vinyl Invalid Rings* and *Complete Medical Vinyl Bedside Mats*
13 without providing clear and reasonable warnings under Proposition 65. DEHP and DINP are listed
14 under Proposition 65 as chemicals known to the State of California to cause cancer and/or
15 reproductive toxicity.

16 **1.3 Notices of Violation/Complaint.** On or about July 8, 2016, Ferreiro served
17 Complete Medical Supplies, Sears Holdings Management Corporation, Sears Holdings
18 Corporation (collectively, “Sears”), and various public enforcement agencies with a document
19 entitled “60-Day Notice of Violation” pursuant to Health & Safety Code §25249.7(d) (“Notice 1”),
20 alleging that Defendant was in violation of Proposition 65 for failing to warn consumers and
21 customers that *Complete Medical Vinyl Bedside Mats* exposed users in California to DEHP. On or
22 about July 15, 2016, Ferreiro served Complete Medical Supplies, Mediscientific, Inc., Sears, and
23 various public enforcement agencies with a second document entitled “60-Day Notice of Violation”
24 pursuant to Health & Safety Code §25249.7(d) (“Notice 2”), alleging that Defendant was in
25 violation of Proposition 65 for failing to warn consumers and customers that *Complete Medical*
26 *Inflatable Vinyl Invalid Rings* exposed users in California to DINP. Collectively Notice 1 and
27 Notice 2 are referred to herein as the “Notices.” No public enforcer has brought and is diligently
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1 prosecuting the claims alleged in the Notices. On December 15, 2016, Ferreiro filed a complaint
2 in the matter as captioned above (the "Complaint").

3 1.4 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
4 jurisdiction over Defendant as to the allegations contained in the Complaint filed in this matter, that
5 venue is proper in the County of Alameda, and that this Court has jurisdiction to approve, enter,
6 and oversee the enforcement of this Consent Judgment as a full and final binding resolution of all
7 claims which were or could have been raised in the Complaint based on the facts alleged therein
8 and/or in the Notices.

9 1.5 Defendant denies the material allegations contained in Ferreiro's Notices and
10 Complaint and maintains that it has not violated Proposition 65. Nothing in this Consent Judgment
11 shall be construed as an admission by Defendant of any fact, finding, issue of law, or violation of
12 law; nor shall compliance with this Consent Judgment constitute or be construed as an admission
13 by Defendant of any fact, finding, conclusion, issue of law, or violation of law, such being
14 specifically denied by Defendant. However, this section shall not diminish or otherwise affect the
15 obligations, responsibilities, and duties of Defendant under this Consent Judgment.

16 **2. DEFINITIONS**

17 2.1 **Covered Products.** The term "Covered Products" means vinyl medical products,
18 such as mats and/or seating and cushions, including but not limited to *Complete Medical Vinyl*
19 *Invalid Rings*, and *Complete Medical Vinyl Bedside Mats* that are manufactured, distributed and/or
20 offered for sale in California by Complete Medical Supplies.

21 2.2 **Effective Date.** The term "Effective Date" means the date this Consent Judgment is
22 entered as a Judgment of the Court.

23 **3. INJUNCTIVE RELIEF: WARNINGS**

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

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

10 **4. MONETARY TERMS**

11 4.1 **Civil Penalty.** Complete Medical Supplies shall pay a civil penalty of \$1,500.00
12 pursuant to Health and Safety Code section 25249.7(b), to be apportioned in accordance with
13 California Health & Safety Code § 25192, with 75% of these funds remitted to the State of
14 California's Office of Environmental Health Hazard Assessment and the remaining 25% of the
15 penalty remitted to Ferreiro, as provided by California Health & Safety Code § 25249.12(d).

16 4.1.1 Within ten (10) business days of the Effective Date, Complete Medical
17 Supplies shall issue two separate checks for the civil penalty payment to (a) "OEHHA" in the
18 amount of \$1,125.00; and (b) "Brodsky & Smith, LLC in Trust for Ferreiro" in the amount of
19 \$375.00. Payment owed to Ferreiro pursuant to this Section shall be delivered to the following
20 payment address:

21 Evan J. Smith, Esquire
22 Brodsky & Smith, LLC
23 Two Bala Plaza, Suite 510
24 Bala Cynwyd, PA 19004

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

27 For United States Postal Service Delivery:

28 Mike Gyurics

1 Fiscal Operations Branch Chief
2 Office of Environmental Health Hazard Assessment
3 P.O. Box 4010
4 Sacramento, CA 95812-4010

5 For Non-United States Postal Service Delivery:

6 Mike Gyurics
7 Fiscal Operations Branch Chief
8 Office of Environmental Health Hazard Assessment
9 1001 I Street
10 Sacramento, CA 95814

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

13 4.2 **Attorney Fees.** Complete Medical Supplies shall pay \$16,000.00 to Brodsky &
14 Smith, LLC ("Brodsky Smith") as complete reimbursement for Plaintiff Ferreiro's attorneys' fees
15 and costs incurred as a result of investigating, bringing this matter to Complete Medical Supplies'
16 attention, litigating and negotiating and obtaining judicial approval of a settlement in the public
17 interest, pursuant to Code of Civil Procedure section 1021.5. Payment shall be made within ten
18 (10) business days of the Effective Date and sent to the address for Brodsky & Smith set forth in
19 section 4.1.1, above.

20 4.3 Complete Medical Supplies shall pay the civil penalty and attorney fees in Sections
21 4.1 and 4.2 within ten (10) days of the Effective Date.

22 **5. RELEASE OF ALL CLAIMS**

23 5.1 This consent judgment is a full, final, and binding resolution between Ferreiro acting
24 in the public interest, and Complete Medical Supplies, and its parents, shareholders, divisions,
25 subdivisions, subsidiaries, partners, sister companies, and affiliates, and their successors and
26 assigns ("Defendant Releasees"), and all entities from whom they obtain and to whom they directly
27 or indirectly distribute or sell Covered Products, including but not limited to Sears, manufacturers,
28 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 and DINP from Covered Products as set forth in the
Notices, with respect to any Covered Products manufactured, distributed, or sold by Complete

1 Medical Supplies prior to the Effective Date. Compliance with the terms of this consent judgment
2 constitutes compliance with Proposition 65 with regard to the Covered Products.

3 5.2 In addition to the foregoing, Ferreiro, on behalf of himself, his past and current
4 agents, representatives, attorneys, and successors and/or assignees, and not in his representative
5 capacity, hereby waives all rights to institute or participate in, directly or indirectly, any form of
6 legal action and releases any Complete Medical Supplies, Defendant Releasees, and Downstream
7 Defendant Releasees from any and all manner of actions, causes of action, claims, demands, rights,
8 suits, obligations, debts, contracts, agreements, promises, liabilities, damages, charges, losses,
9 costs, expenses, and attorneys' fees, of any nature whatsoever, known or unknown, in law or equity,
10 fixed or contingent, now or in the future, with respect to any alleged violations of Proposition 65
11 related to or arising from Covered Products manufactured distributed or sold by Complete Medical
12 Supplies or Defendant Releasees. With respect to the foregoing waivers and releases in this
13 paragraph, Ferreiro hereby specifically waives any and all rights and benefits which she now has,
14 or in the future may have, conferred by virtue of the provisions of Section 1542 of the California
15 Civil Code, which provides as follows:

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

22 5.3 Complete Medical Supplies waives any and all claims against Ferreiro, his attorneys
23 and other representatives, for any and all actions taken or statements made (or those that could have
24 been taken or made) by Ferreiro and his attorneys and other representatives, whether in the course
25 of investigating claims or otherwise seeking enforcement of Proposition 65 against it in this matter,
26 and/or with respect to Covered Products.

27 **6. INTEGRATION**

28 6.1 This Consent Judgment contains the sole and entire agreement of the Parties and
any and all prior negotiations and understandings related hereto shall be deemed to have been

1 merged within it. No representations or terms of agreement other than those contained herein exist
2 or have been made by any Party with respect to the other Party or the subject matter hereof.

3 **7. GOVERNING LAW**

4 7.1 The terms of this Consent Judgment shall be governed by the laws of the State of
5 California and apply within the State of California. In the event that Proposition 65 is repealed or
6 is otherwise rendered inapplicable by reason of law generally, or as to Covered Products, then
7 Defendant shall have no further obligations pursuant to this Consent Judgment with respect to, and
8 to the extent that, Covered Products are so affected.

9 **8. NOTICES**

10 8.1 Unless specified herein, all correspondence and notices required to be provided
11 pursuant to this Consent Judgment shall be in writing and personally delivered or sent by: (i) first-
12 class, (registered or certified mail) return receipt requested; or (ii) overnight courier on any party
13 by the other party at the following addresses:

14 For Defendant:

15 Corrie L. Plant
16 Pillsbury Winthrop Shaw Pittman LLP
17 725 South Figueroa Street, Suite 2800
Los Angeles, CA 90017-5406

18 And

19 For Ferreiro:

20 Evan Smith
21 Brodsky & Smith, LLC
22 2 Bala Plaza, Suite 510
Bala Cynwyd, PA 19004

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

25 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

26 9.1 This Consent Judgment may be executed in counterparts and by facsimile, each of
27 which shall be deemed an original, and all of which, when taken together, shall constitute one and
28 the same document.

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

3 10.1 Ferreiro agrees to comply with the requirements set forth in California Health &
4 Safety Code §25249.7(f) and to promptly bring a Motion for Approval of this Consent Judgment
5 and Defendant agrees it shall support approval of such Motion.

6 10.2 This Consent Judgment shall not be effective until it is approved and entered by the
7 Court and shall be null and void if, for any reason, it is not approved by the Court. In such case,
8 the Parties agree to meet and confer on how to proceed and if such agreement is not reached within
9 30 days, the case shall proceed on its normal course.

10 10.3 If the Court approves this Consent Judgment and is reversed or vacated by an
11 appellate court, the Parties shall meet and confer as to whether to modify the terms of this Consent
12 Judgment. If the Parties do not jointly agree on a course of action to take, the case shall proceed on
13 its normal course on the trial court's calendar.

14 **11. MODIFICATION**

15 11.1 This Consent Judgment may be modified only by further stipulation of the Parties
16 and the approval of the Court or upon the granting of a motion brought to the Court by either Party.

17 **12. ATTORNEY'S FEES**

18 12.1 A party who unsuccessfully brings or contests an action arising out of this Consent
19 Judgment shall be required to pay the prevailing party's reasonable attorney's fees and costs unless
20 the unsuccessful party has acted with substantial justification. For purposes of this Consent
21 Judgment, the term substantial justification shall carry the same meaning as used in the Civil
22 Discovery Act of 1986, Code of Civil Procedure Section 2016, et seq.

23 12.2 Nothing in this Section shall preclude a Party from seeking an award of sanctions
24 pursuant to law.

25 **13. RETENTION OF JURISDICTION**

26 13.1 This Court shall retain jurisdiction of this matter to implement or modify the
27 Consent Judgment.

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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 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: 1/26/17

By: _____
ANTHONY FERREIRO

By: [Signature]
COMPLETE MEDICAL SUPPLIES, INC.

IT IS SO ORDERED, ADJUDGED AND DECREED:

Dated: _____

Judge of Superior Court

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AGREED TO:

AGREED TO:

Date: 1/23/17
By: Anthony Ferrero
ANTHONY FERREIRO

Date: _____
By: _____
COMPLETE MEDICAL SUPPLIES, INC.

IT IS SO ORDERED, ADJUDGED AND DECREED:

Dated: 3/16/2017

Paul D. Herbert
Judge of Superior Court

PAUL D. HERBERT