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Attorneys for Plaintiff

FILED
ALAMEDA COUNTY
MAR 14 2017
CLERK OF THE SUPERIOR COURT
By *Pam Williams* Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ALAMEDA

ANTHONY FERREIRO,
Plaintiff,
v.
KENTAK PRODUCTS COMPANY,
Defendant.

Case No.: RG17844787
~~PROPOSED~~ CONSENT JUDGEMENT
Judge: Ioana Petrou
Dept.: 15
Hearing Date: March 14, 2017
Hearing Time: 9:30 AM
Reservation #: R-1815921

1 **1. Introduction**

2 1.1 On July 29, 2016, Anthony Ferreiro (“Ferreiro”) served Kentak Products Company
3 (“Kentak”), MSC Industrial Supply Company, MSC Industrial Supply Co. (Mass.) Inc., MSC
4 Industrial Direct Co., Inc., MSC Services Corp. (collectively, “MSC”) and various public
5 enforcement agencies with a document entitled “Notice of Violation of California Health &
6 Safety Code § 25249.6, *et seq.*” (the “Notice”). The Notice provided Kentak and such others,
7 including public enforcers, with notice that alleged that Kentak was in violation of California
8 Health & Safety Code § 25249.6 (“Proposition 65”), for failing to warn consumers and customers
9 that Kentak products, including but not limited to, *UPC No. 5002503710JP* exposed users in
10 California to the chemicals Di-isodecyl phthalate (DIDP) and Diisononyl phthalate (DINP). The
11 Kentak products covered by this Consent Judgment are polyvinyl chloride (“PVC”) hosing and
12 tubing products manufactured or sold by Kentak, including but not limited to UPC No.
13 5002503710JP (“Products”). No public enforcer has diligently prosecuted the allegations set
14 forth in the Notice.

15 1.2 On January 9, 2017, Ferreiro filed a Complaint for Civil Penalties and Injunctive
16 Relief (“Complaint”) in Alameda County Superior Court, Case No. RG17844787, against Kentak
17 alleging violations of Proposition 65.

18 1.3 For purposes of this Consent Judgment only, the Parties¹ stipulate that this Court
19 has jurisdiction over the allegations of violations contained in the Complaint and personal
20 jurisdiction over Kentak as to the acts alleged in the Complaint, that venue is proper in the
21 County of Alameda, and that this Court has jurisdiction to enter this Consent Judgment as a
22 resolution of the allegations contained in the Complaint.

23 1.4 The Parties enter into this Consent Judgment pursuant to a full settlement of
24 disputed claims between the Parties as alleged in the Complaint for the purpose of avoiding
25 prolonged litigation. By execution of this Consent Judgment, Kentak does not admit any
26 violation of Proposition 65 and specifically denies that it has committed any such violation.
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¹ Kentak and Ferreiro are collectively referred to herein as, the “Parties”.

1 Nothing in this Consent Judgment shall be construed as an admission by Kentak of any fact, issue
2 of law or violation of law, nor shall compliance with the Consent Judgment constitute or be
3 construed as an admission by Kentak of any fact, issue of law, or violation of law. Nothing in
4 this Consent Judgment shall prejudice, waive, or impair any right, remedy or defense that Kentak
5 may have in any other future legal proceeding. However, this paragraph shall not diminish or
6 otherwise affect the obligations, responsibilities and duties of Kentak under this Consent
7 Judgment.

8 1.5 For purposes of this Consent Judgment, the term “Effective Date” shall mean the
9 date that this Consent Judgment is entered by the Court.

10 **2. Injunctive Relief**

11 2.1 Commencing ninety (90) days after the Effective Date, and continuing thereafter,
12 Kentak shall only ship, sell, or offer for sale in California, Products that are (1) Reformulated
13 Products pursuant to Section 2.2, or (2) sold or offered for sale with a “clear and reasonable”
14 warning pursuant to Section 2.3. Kentak and downstream distributors or retailers of the Products
15 and downstream manufacturer of products of which the Products are a component part shall have
16 no obligation to label or provide warnings as to Products that entered the stream of commerce
17 prior to the Effective Date or within ninety (90) days after the Effective Date. For purposes of
18 this Settlement Agreement, a “Reformulated Product” is a Product that is in compliance with the
19 standard set forth below in Section 2.2.

20 2.2 “Reformulated Product” shall mean a Product that contains less than or equal to
21 1,000 parts per million (“ppm”) of DIDP, DINP or, Di(2-ethylhexyl)phthalate (DEHP) when
22 analyzed pursuant to CPSC-CH-C1001-09.3 Standard Operating Procedure for Determination of
23 Phthalates method or U.S. Environmental Protection Agency testing methodologies 3580A and
24 8270C.

25 2.3 Commencing on the Effective Date, Kentak agrees to only manufacture for
26 distribution or sale in California Products that are (1) Reformulated Products, or (2) that are
27 accompanied by “clear and reasonable” warnings as set forth in this Section 2.3.
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1 2.3.1 The warning shall be prominently placed with such conspicuousness as
2 compared with other words, statements, designs, or devices as to render it likely to be read and
3 understood by an ordinary individual under customary conditions before purchase or use. Each
4 warning shall be provided in a manner that the consumer or user is reasonably likely to understand
5 the Product to which the warning applies, so as to minimize the risk of user or consumer confusion.

6 2.3.2 Kentak manufactures the Products, which it then distributes and sells. The
7 Products then are in some instances incorporated as component parts in other products. After the
8 Effective Date, if Kentak sells or offers for sale Products that are not Reformulated Products to
9 downstream manufacturers for use as component parts in other products intended for sale in
10 California or to downstream distributors or retailers who market, sell or otherwise distribute the
11 Products to customers in California, Kentak shall provide the following warning:

12 **[PROPOSITION 65] WARNING:**

13 This product contains chemicals known to the State of California to cause cancer,
14 birth defects or other reproductive harm.

15 The bracketed text may, but is not required to, be used. The warning may be provided in a
16 written purchase/sale agreement, in the packaging material for the Products, or otherwise
17 affixed or stamped directly onto the Products.

18 2.4 **Exception to Warning Requirement.** The warning requirements set forth
19 in Section 2.3 shall not apply to any Reformulated Product.

20 **3. Entry of Consent Judgment**

21 3.1 The Parties hereby request that the Court promptly enter this Consent
22 Judgment. Upon entry of this Consent Judgment, Ferreiro waives his and Kentak waives
23 its rights to a hearing or trial on the allegations of the Complaint and 60-Day Notice.

24 3.2 In the event that the Attorney General objects or otherwise comments on
25 one or more provisions of this Consent Judgment, Ferreiro and Kentak agree to take
26 reasonable steps to satisfy such concerns or objections.

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

2 **4.1 Plaintiff's Public Release of Proposition 65 Claims.** This Consent Judgment is a
3 final and binding resolution between Ferreiro, acting on his own behalf and on behalf of the
4 public and in the public interest, and Kentak, and its parents, subsidiaries, affiliates under
5 common ownership, directors, officers, employees, owners, shareholders, agents and attorneys
6 ("Releasees") and each downstream manufacturer of products of which the Products are a
7 component part, distributor, retailer, or other entity to whom the Products have been directly or
8 indirectly distributed or sold, including MSC (collectively, "Downstream Releasees") of
9 violations arising under Proposition 65 for exposure without providing a warning as to Products
10 manufactured and/or distributed and sold prior to the Effective Date, and shall have preclusive
11 effect such that no other person or entity, whether purporting to act in his, her, or its interests or
12 the public interest shall be permitted to pursue and/or take any action with respect to any violation
13 of Proposition 65 with respect to the Products, including those violations alleged in the Complaint
14 or that could have been brought pursuant to the Notice ("Proposition 65 Claims"). Compliance
15 with the terms of this Consent Judgment constitutes compliance with the requirements of
16 Proposition 65 with respect to exposures to DIDP, DINP, and/or DEHP in the Products.

17 **4.2 Plaintiff's Private Release of Additional Claims.** As to Ferreiro, in his
18 individual capacity only, this Consent Judgment shall have a preclusive effect and bar him from
19 pursuing any and all actions, causes of action, obligations, costs, expenses, attorney's fees,
20 damages, losses, claims, liability and demands of any nature, character or kind, whether known or
21 unknown, suspected or unsuspected, to the fullest extent they were or could be asserted by him
22 against Releasees or Downstream Releasees, arising out of his alleged or actual exposure to
23 DIDP, DINP, and/or DEHP in the Products and the failure to provide a "clear and reasonable"
24 warning with respect to the Products, or based in whole or in part on the facts alleged in the
25 Complaint or the Notice, whether based on the actions of Releasees or Downstream Releasees,
26 including but not limited to MSC ("Exposure Claims"). Ferreiro, in his individual capacity,
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1 acknowledges that compliance with the terms of this Consent Judgment constitutes compliance
2 with Proposition 65 with respect to exposures to DIDP, DINP, and/or DEHP in the Products.

3 **4.3 Waiver and Release of Claims; Waiver of Rights Under Section 1542 of the**
4 **California Civil Code.** As to Ferreiro's public release of Proposition 65 Claims set forth in
5 Section 4.1 ("Public Release") and his individual release of Exposure Claims set forth in Section
6 4.2 ("Individual Release"), Ferreiro, acting on his own behalf and on behalf of the public with
7 respect to the Public Release and acting in his individual capacity with respect to the Individual
8 Release, waives all rights to institute any form of legal action, and releases all claims against
9 Releasees and Downstream Releasees, including but not limited to MSC, for the Proposition 65
10 Claims and the Exposure Claims (referred to collectively in this Section as "Claims"). In
11 furtherance of the foregoing, Ferreiro, acting on his own behalf and on behalf of the public with
12 respect to the Public Release and acting in his individual capacity with respect to the Individual
13 Release, waives any and all rights and benefits which he now has, or in the future may have,
14 conferred upon him with respect to the Claims by virtue of the provisions of § 1542 of the
15 California 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 EXIST IN HIS OR HER**
19 **FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF**
20 **KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED**
21 **HIS SETTLEMENT WITH THE DEBTOR.**

22 **4.4 Kentak's Release of Plaintiff Ferreiro.** Kentak, on behalf of itself, its past and
23 current agents, representatives, attorneys, successors and/or assignees, hereby waives any and all
24 claims against Ferreiro, his attorneys, and other representatives for any and all actions taken or
25 statements made (or those that could have been taken or made) by Ferreiro and his attorneys and
26 other representatives, whether in the course of investigating claims or otherwise seeking
27 enforcement of Proposition 65 against Kentak 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, Kentak 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. Without limiting the application of the foregoing, Kentak shall also be entitled but not required to use, at its discretion, any other warning text and/or method of transmission permitted under any

1 regulations that have or may be promulgated by the State of California without being
2 deemed to be in breach of this Consent Judgment.

3 **7. Settlement Payment**

4 7.1 In settlement of all the claims referred to in this Consent Judgment, and without
5 any admission of liability therefore, Kentak shall make the following monetary payments:

6 7.1.1 **Civil Penalty.** Within seven (7) business days of the Effective Date,
7 Kentak shall pay a total of \$2,500.00 in civil penalties in accordance with this Section. The
8 Initial Civil Penalty payment will be allocated in accordance with California Health & Safety
9 Code §§ 25249.12(c)(1) and (d), with 75% of the funds remitted to the California Office of
10 Environmental Health Hazard Assessment (“OEHHA”) and the remaining 25% of the civil
11 penalty remitted to Ferreiro. Within seven (7) business days of the Effective Date, Kentak shall
12 issue two separate checks for the civil penalty payment to (a) “OEHHA” in the amount of
13 \$1,875.00; and (b) “Brodsky & Smith, LLC in Trust for Ferreiro” in the amount of \$625.00.
14 Payment owed to Ferreiro pursuant to this Section shall be delivered to the following payment
15 address:

16
17 Evan J. Smith, Esquire
18 Brodsky & Smith, LLC
19 Two Bala Plaza, Suite 510
20 Bala Cynwyd, PA 19004

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

23 For United States Postal Service Delivery:

24 Mike Gyurics
25 Fiscal Operations Branch Chief
26 Office of Environmental Health Hazard Assessment
27 P.O. Box 4010
28 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

1 Sacramento, CA 95814

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

4 7.1.2 **Attorney Fees and Costs.** In addition to the payment above, Kentak
5 shall pay \$22,250.00 to Brodsky & Smith, LLC (“Brodsky & Smith”) as complete reimbursement
6 for Ferreiro’s attorneys’ fees and costs, including any investigation and laboratory costs or expert
7 fees, incurred in the course of bringing the Complaint and in enforcing Proposition 65, including
8 without limitation, preparation of the 60-Day Notice letter and discussions with the office of the
9 Attorney General. Payment shall be made within seven (7) business days of the Effective Date
10 and sent to the address for Brodsky & Smith set forth in Section 7.1.1, above.

11 **8. Notices**

12 8.1 Any and all notices between the Parties provided for or permitted under this
13 Agreement, or by law, shall be in writing and personally delivered or sent by: (i) first-class
14 (registered or certified mail) return receipt requested; or (ii) overnight or two-day courier on any
15 party by the other party to the following addresses:

16 For Kentak:

17 Sonja A. Inglin
18 BAKER HOSTETLER LLP
11601 Wilshire Boulevard, Suite 1400
19 Los Angeles, CA 90025-0509

20 For Ferreiro:

21 Evan J. Smith
22 BRODSKY & SMITH, LLC
9595 Wilshire Blvd., Suite 900
Beverly Hills, CA 90212

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. Authority to Stipulate**

26 9.1 Each signatory to this Consent Judgment certifies that he or she is fully authorized
27 by the party he or she represents to enter into this Consent Judgment and to execute it on behalf of
28 the party represented and legally to bind that party.

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10. Counterparts

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

11. Retention of Jurisdiction

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

12. Service on the Attorney General

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

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

14. Governing Law and Construction

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

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15. Court Approval

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

IT IS SO STIPULATED:

Dated: 1/23/2017

Dated: 12-16-2016

By: *Anthony Ferreira*
Anthony Ferreira

KENTAK PRODUCTS COMPANY
By: *Douglas Gamah*
Name: Douglas Gamah

IT IS SO ORDERED, ADJUDGED AND DECREED:

Dated: 3/14/17

[Signature]
Judge of Superior Court