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ALAMEDA COUNTY

OCT 12 2018

CLERK OF THE SUPERIOR COURT
By: *Christine M. Hallock*
Deputy

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 COUNTY OF ALAMEDA

11 ANTHONY FERREIRO,
12 Plaintiff,

13 v.

14 ARSENAL GAMING, INC., FRY'S
15 ELECTRONICS, INC.

16 Defendants.

Case No.: RG18906448

CONSENT JUDGMENT

Judge: Julia Spain
Dept.: 520
Hearing Date: October 11, 2018
Hearing Time: 2:00 PM
Reservation #: R-1993062

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CONSENT JUDGMENT

BY FAX

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 Arsenal Gaming, Inc.
4 ("Arsenal Gaming" or "Defendant") with Ferreiro and Defendant collectively referred to as the
5 "Parties" and each of them as a "Party." Ferreiro is an individual residing in California that seeks
6 to promote awareness of exposures to toxic chemicals and improve human health by reducing or
7 eliminating hazardous substances contained in consumer products. Arsenal Gaming is alleged to
8 be a person in the course of doing business for purposes of Proposition 65, Cal. Health & Safety
9 Code §§ 25249.6 et seq.

10 **1.2 Allegations and Representations.** Ferreiro alleges that Defendant has exposed
11 individuals to diisononyl phthalate (DINP) from its sales of Arsenal Gaming Xbox 360 headsets
12 without providing clear and reasonable exposure warnings under Proposition 65. DINP is listed
13 under Proposition 65 as a chemical known to the State of California to cause cancer.

14 **1.3 Notice of Violation/Complaint.** On or about February 19, 2018, Ferreiro served
15 Arsenal Gaming, Fry's Electronics, Inc. ("Fry's") and various public enforcement agencies with a
16 document entitled "60-Day Notice of Violation" pursuant to Health & Safety Code § 25249.7(d)
17 (the "Notice"), alleging that Defendant and Fry's had violated Proposition 65 for failing to warn
18 consumers and customers that use of Arsenal Gaming Xbox 360 headsets exposed users in
19 California to DINP. No public enforcer has brought and is diligently prosecuting the claims alleged
20 in the Notice. On May 25, 2018, Ferreiro filed a complaint (the "Complaint" or "Action") in the
21 matter against Defendant and Fry's¹.

22 **1.4** For purposes of this Consent Judgment only, the Parties stipulate that this Court has
23 jurisdiction over Defendant as to the allegations contained in the Complaint filed in this matter, that
24 venue is proper in the County of Alameda, and that this Court has jurisdiction to approve, enter,
25 and oversee the enforcement of this Consent Judgment as a full and final binding resolution of all
26 claims which were or could have been raised in the Complaint based on the facts alleged therein

27
28 ¹ On July 5, 2018, defendant Fry's was dismissed from the Action.

1 and/or in the Notice.

2 1.5 Defendant denies the material allegations contained in Ferreiro's Notice and
3 Complaint and maintains that it has not violated Proposition 65. Nothing in this Consent Judgment
4 shall be construed as an admission by Defendant of any fact, finding, issue of law, or violation of
5 law; nor shall compliance with this Consent Judgment constitute or be construed as an admission
6 by Defendant of any fact, finding, conclusion, issue of law, or violation of law, such being
7 specifically denied by Defendant. However, this section shall not diminish or otherwise affect the
8 obligations, responsibilities, and duties of Defendant under this Consent Judgment.

9 **2. DEFINITIONS**

10 2.1 **Covered Products.** The term "Covered Products" means Arsenal Gaming Xbox
11 360 headsets manufactured, distributed and/or offered for sale in California by Arsenal Gaming.

12 2.2 **Effective Date.** The term "Effective Date" means the date this Consent Judgment is
13 entered as a Judgment of the Court.

14 **3. INJUNCTIVE RELIEF: WARNINGS**

15 3.1 As of the date this Consent Judgment is signed by both Parties, Arsenal Gaming
16 shall not manufacture or order from any supplier any Covered Products intended for retail sale in
17 California that contain DINP on any component to which consumers are exposed in excess of 0.1%
18 (1,000 ppm) (hereinafter "Reformulated Products") unless the Covered Product is accompanied by
19 a warning that complies with Article 6 of Title 27 of the California Code of Regulations. Covered
20 Products sold by Arsenal Gaming before the date this Consent Judgment is signed by both Parties
21 may be sold without a warning even if not Reformulated Products. Until August 30, 2018, the
22 warning shall consist of either:

- 23 (a) The statement: "**WARNING:** This product contains a chemical known to the State
24 of California to cause cancer."; or (b)(1) A symbol consisting of a black exclamation point
25 in a yellow equilateral triangle with a bold black outline to the left of the word
26 "**WARNING**" in bold all capital letters, followed by the statement "This product can
27 expose you to chemicals including diisononyl phthalate (DINP), which is known to the State
28

1 of California to cause cancer. For more information, go to www.P65Warnings.ca.gov.”; or
2 (2) a warning consisting of a symbol that is a black exclamation point in a yellow equilateral
3 triangle with a bold black outline to the left of the word “**WARNING**” in bold all capital
4 letters, followed by the statement “Cancer - www.P65Warnings.ca.gov.”²

5 For Covered Products manufactured on and after August 30, 2018, the warning set forth in Section
6 3.1(b) shall be used.

7 3.2 The warning provided pursuant to Section 3.1 shall be affixed to or printed on the
8 Covered Product’s packaging or labeling, or on a placard, shelf tag, sign or electronic device or
9 automatic process, provided that the warning is displayed with such conspicuousness, as compared
10 with other words, statements, or designs as to render it likely to be read and understood by an
11 ordinary individual under customary conditions of purchase or use. A warning may be contained
12 in the same section of the packaging, labeling, or instruction booklet that states other safety
13 warnings, if any, concerning the use of the product and shall be at least the same size as those other
14 safety warnings.

15 **4. MONETARY TERMS**

16 4.1 **Civil Penalty.** Arsenal Gaming shall pay a Civil Penalty of \$1,000.00 pursuant to
17 Health and Safety Code section 25249.7(b), to be apportioned in accordance with California Health
18 & Safety Code § 25192, with 75% of these funds remitted to the State of California’s Office of
19 Environmental Health Hazard Assessment (“OEHHA”) and the remaining 25% of the Civil Penalty
20 remitted to Ferreiro, as provided by California Health & Safety Code § 25249.12(d).

21 4.1.1 By or before December 1, 2018, Arsenal Gaming shall issue two separate
22 checks for the Civil Penalty payment to (a) “OEHHA” in the amount of \$750.00; and to (b)
23 “Brodsky & Smith, LLC in Trust for Ferreiro” in the amount of \$250.00. Payment owed to
24 Ferreiro pursuant to this Section shall be delivered to the following payment address:

25 Evan J. Smith, Esquire
26 Brodsky & Smith, LLC

27 ² The triangular symbol need only be in yellow where the sign, label, shelf tag or other
28 transmission format is being printed in color for purposes of other language, symbols or designs.

1 Two Bala Plaza, Suite 510
2 Bala Cynwyd, PA 19004

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

5 For United States Postal Service Delivery:

6 Mike Gyurics
7 Fiscal Operations Branch Chief
8 Office of Environmental Health Hazard Assessment
9 P.O. Box 4010
10 Sacramento, CA 95812-4010

11 For Non-United States Postal Service Delivery:

12 Mike Gyurics
13 Fiscal Operations Branch Chief
14 Office of Environmental Health Hazard Assessment
15 1001 I Street
16 Sacramento, CA 95814

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

19 4.2 **Attorneys' Fees.** By or before December 1, 2018, Arsenal Gaming shall pay
20 \$9,000.00 to Brodsky & Smith, LLC ("Brodsky Smith") as complete reimbursement for Ferreiro's
21 attorneys' fees and costs incurred as a result of investigating, bringing this matter to Arsenal
22 Gaming's attention, litigating and negotiating and obtaining judicial approval of a settlement in the
23 public interest, pursuant to Code of Civil Procedure § 1021.5.

24 **5. RELEASE OF ALL CLAIMS**

25 5.1 This Consent Judgment is a full, final, and binding resolution between Ferreiro
26 acting on his own behalf, and on behalf of the public interest, and Arsenal Gaming, and its parents,
27 shareholders, members, directors, officers, managers, employees, representatives, agents,
28 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 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, including but not limited to Fry's ("Downstream

1 Releases”), of all claims for violations of Proposition 65 based on exposure to DINP from Covered
2 Products as set forth in the Notice, with respect to any Covered Products manufactured, distributed,
3 or sold by Arsenal Gaming prior to the Effective Date. This Consent Judgment shall have
4 preclusive effect such that no other person or entity, whether purporting to act in his, her, or its
5 interests or the public interest shall be permitted to pursue and/or take any action with respect to
6 any violation of Proposition 65 that was alleged in the Complaint, or that could have been brought
7 pursuant to the Notice against Arsenal Gaming or its Downstream Releasees of the Product
8 (“Proposition 65 Claims”). Compliance with the terms of this Consent Judgment constitutes
9 compliance with Proposition 65 with regard to the Covered Products.

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

23 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE
24 CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER
25 FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF
26 KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS
27 SETTLEMENT WITH THE DEBTOR.

28 5.3 Arsenal Gaming waives any and all claims against Ferreiro, his attorneys and other
representatives, for any and all actions taken or statements made (or those that could have been

1 taken or made) by Ferreiro and his attorneys and other representatives, whether in the course of
2 investigating claims or otherwise seeking enforcement of Proposition 65 against it in this matter,
3 and/or with respect to Covered Products.

4 **6. INTEGRATION**

5 6.1 This Consent Judgment contains the sole and entire agreement of the Parties and
6 any and all prior negotiations and understandings related hereto shall be deemed to have been
7 merged within it. No representations or terms of agreement other than those contained herein exist
8 or have been made by any Party with respect to the other Party or the subject matter hereof.

9 **7. GOVERNING LAW**

10 7.1 The terms of this Consent Judgment shall be governed by the laws of the State of
11 California and apply within the State of California. In the event that Proposition 65 is repealed or
12 is otherwise rendered inapplicable by reason of law generally, or as to Covered Products, then
13 Defendant shall have no further obligations pursuant to this Consent Judgment with respect to, and
14 to the extent that, Covered Products are so affected.

15 **8. NOTICES**

16 8.1 Unless specified herein, all correspondence and notices required to be provided
17 pursuant to this Consent Judgment shall be in writing and personally delivered or sent by: (i) first-
18 class, (registered or certified mail) return receipt requested; or (ii) overnight courier on any party
19 by the other party at the following addresses:

20 For Defendant:

21 Arsenal Gaming, Inc.
22 c/o Elaine Nourhian
23 2037 Pontius Avenue
Los Angeles, CA 90025

24 And

25 For Ferreiro:

26 Evan Smith
27 Brodsky & Smith, LLC
9595 Wilshire Blvd., Ste. 900
28 Beverly Hills, CA 90212

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

3 **9. COUNTERPARTS, FACSIMILE SIGNATURES**

4 9.1 This Consent Judgment may be executed in counterparts and by facsimile, each of
5 which shall be deemed an original, and all of which, when taken together, shall constitute one and
6 the same document.

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

9 10.1 Ferreiro agrees to comply with the requirements set forth in California Health &
10 Safety Code § 25249.7(f) and to promptly bring a Motion for Approval of this Consent Judgment.
11 Defendant agrees it shall support approval of such Motion.

12 10.2 This Consent Judgment shall not be effective until it is approved and entered by the
13 Court and shall be null and void if, for any reason, it is not approved by the Court. In such case,
14 the Parties agree to meet and confer on how to proceed and if such agreement is not reached within
15 30 days, the case shall proceed on its normal course.

16 10.3 If the Court approves this Consent Judgment and is reversed or vacated by an
17 appellate court, the Parties shall meet and confer as to whether to modify the terms of this Consent
18 Judgment. If the Parties do not jointly agree on a course of action to take, the case shall proceed on
19 its normal course on the trial court's calendar.

20 **11. MODIFICATION**

21 11.1 This Consent Judgment may be modified only by further stipulation of the Parties
22 and the approval of the Court or upon the granting of a motion brought to the Court by either Party.

23 **12. ATTORNEY'S FEES**

24 12.1 A Party who unsuccessfully brings or contests an action arising out of this Consent
25 Judgment shall be required to pay the prevailing party's reasonable attorney's fees and costs.

26 12.2 Nothing in this Section shall preclude a Party from seeking an award of sanctions
27 pursuant to law.

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

13. RETENTION OF JURISDICTION

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

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 certify 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: 8/23/18
By: Anthony Ferreiro
ANTHONY FERREIRO

Date: 8/10/18
By: [Signature]
ARSENAL GAMING, INC.

IT IS SO ORDERED, ADJUDGED AND DECREED:

Dated: 10/12/18

[Signature]
Judge of Superior Court JULIA A. SPAIN