

FILED

FEB 05 2021

JAMES M. KIM, Court Executive Officer
MARIN COUNTY SUPERIOR COURT

By: J. Berg, Deputa

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2 BRODSKY & SMITH, LLC.
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4 Beverly Hills, CA 90212
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Attorneys for Plaintiff

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA

10 COUNTY OF MARIN

11 ANTHONY FERREIRO,

12 Plaintiff,

13 v.

14 SPENCER GIFTS, LLC,

15 Defendant.

Case No.: CIV 2002147

CONSENT JUDGMENT

Judge: Andrew E. Sweet

Dept.: Courtroom E

Hearing Date: FEB 05 2021

Hearing Time: 1:30 PM

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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 Spencer Gifts LLC
4 (“Spencer Gifts” 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. Spencer Gifts is alleged to be a
8 person in the course of doing business for purposes of Proposition 65, Cal. Health & Safety Code
9 §§ 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 Spencer’s butterfly backpacks/bags
12 without providing a clear and reasonable exposure warning pursuant to Proposition 65. DINP is
13 listed 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 November 8, 2019, Ferreiro served
15 Spencer Gifts, and various public enforcement agencies with documents entitled “60-Day Notice
16 of Violation” pursuant to Health & Safety Code §25249.7(d) (the “Notice”), alleging that
17 Defendant violated Proposition 65 for failing to warn consumers and customers that use of
18 Spencer’s butterfly backpacks/bags expose users in California to DINP. No public enforcer has
19 brought and is diligently prosecuting the claims alleged in the Notice. On August 17, 2020, Ferreiro
20 filed a complaint (the “Complaint”) in the matter.

21 1.4 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
22 jurisdiction over Defendant as to the allegations contained in the Complaint filed in this matter, that
23 venue is proper in the County of Marin, and that this Court has jurisdiction to approve, enter, and
24 oversee the enforcement of this Consent Judgment as a full and final binding resolution of all claims
25 which were or could have been raised in the Complaint based on the facts alleged therein and/or in
26 the Notice.

1 1.5 Defendant denies the material allegations contained in Ferreiro's Notice and
2 Complaint and maintains that it has not violated Proposition 65. Nothing in this Consent Judgment
3 shall be construed as an admission by Defendant of any fact, finding, issue of law, or violation of
4 law; nor shall compliance with this Consent Judgment constitute or be construed as an admission
5 by Defendant of any fact, finding, conclusion, issue of law, or violation of law, such being
6 specifically denied by Defendant. However, this section shall not diminish or otherwise affect the
7 obligations, responsibilities, and duties of Defendant under this Consent Judgment.

8 **2. DEFINITIONS**

9 2.1 **Covered Products.** The term "Covered Products" means Spencer's butterfly
10 backpacks/bags that are manufactured, distributed and/or offered for sale in California by Spencer
11 Gifts.

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 **Reformulation of Covered Products.** As of the date this Consent Judgment is
16 signed by both Parties, and continuing thereafter, Covered Products that Spencer Gifts directly
17 manufactures, imports, distributes, sells, or offers for sale in California shall either: (a) be
18 Reformulated Products pursuant to § 3.2, below; or (b) be labeled with a clear and reasonable
19 exposure warning pursuant to §§ 3.3 and 3.4, below. For purposes of this Consent Judgment, a
20 "Reformulated Product" is a Covered Product that is in compliance with the standard set forth in §
21 3.2 below. The warning requirement set forth in §§ 3.3 and 3.4 shall not apply to any Reformulated
22 Product.

23 3.2 **Reformulation Standard.** "Reformulated Products" shall mean Covered Products
24 that contain concentrations less than or equal to 0.1% (1,000 parts per million (ppm)) of DINP
25 when analyzed pursuant to U.S. Environmental Protection Agency testing methodologies 3580A
26 and 8270C or other methodology utilized by federal or state government agencies for the purpose
27 of determining the phthalate content in a solid substance.
28

1 3.3 **Clear and Reasonable Warning.** As of the date this Consent Judgment is signed
2 by both Parties, and continuing thereafter, a clear and reasonable exposure warning as set forth in
3 this §§ 3.3 and 3.4 must be provided for all Covered Products that Defendant manufactures,
4 imports, distributes, sells, or offers for sale in California that are not Reformulated Products. There
5 shall be no obligation for Defendant to provide a warning for Covered Products that enter the stream
6 of commerce prior to the date this Consent Judgment is signed by both Parties. The warning shall
7 consist of either the **Warning** or **Alternative Warning** described in §§ 3.3(a) or (b), respectively:

8 (a) **Warning.** The “Warning” shall consist of the statement:

9 ⚠ **WARNING:** This product can expose you to chemicals including diisononyl
10 phthalate (DINP), which is known to the State of California to cause cancer. For
11 more information go to www.P65Warnings.ca.gov.

12 (b) **Alternative Warning:** Spencer Gifts may, but is not required to, use the alternative
13 short-form warning as set forth in this § 3.3(b) (“**Alternative Warning**”) as follows:

14 ⚠ **WARNING:** Cancer - www.P65Warnings.ca.gov.

15 3.4 A **Warning** or **Alternative Warning** provided pursuant to § 3.3 must print the word
16 “**WARNING:**” in all capital letters and in bold font, followed by a colon. The warning symbol to
17 the left of the word “**WARNING:**” must be a black exclamation point in a yellow equilateral
18 triangle with a black outline, except that if the sign or label for the Covered Product does not use
19 the color yellow, the symbol may be in black and white. The symbol must be in a size no smaller
20 than the height of the word “**WARNING:**”. The warning shall be affixed to or printed on the
21 Covered Product’s packaging or labeling, or on a placard, shelf tag, sign or electronic device or
22 automatic process, providing that the warning is displayed with such conspicuousness, as compared
23 with other words, statements, or designs as to render it likely to be read and understood by an
24 ordinary individual under customary conditions of purchase or use. A warning may be contained
25 in the same section of the packaging, labeling, or instruction booklet that states other safety
26 warnings, if any, concerning the use of the Covered Product and shall be at least the same size as
27 those other safety warnings.
28

1 If Spencer Gifts sells Covered Products via an internet website to customers located in
2 California, the warning requirements of this section shall be satisfied if the foregoing warning
3 appears either: (a) on the same web page on which a Covered Product is displayed and/or described;
4 (b) on the same page as the price for the Covered Product; or (c) on one or more web pages
5 displayed to a purchaser prior to purchase during the checkout process. Alternatively, a symbol
6 consisting of a black exclamation point in a yellow or white equilateral triangle may appear adjacent
7 to or immediately following the display, description, price, or checkout listing of the Covered
8 Product, if the warning statement appears elsewhere on the same web page in a manner that clearly
9 associates it with the product(s) to which the warning applies.

10 **3.5 Compliance with Warning Regulations.** Defendant shall be deemed to be in
11 compliance with this Consent Judgment by either adhering to §§ 3.3 and 3.4 of this Consent
12 Judgment or by complying with warning requirements adopted by the State of California’s Office
13 of Environmental Health Hazard Assessment (“OEHHA”) after the Effective Date.

14 **3.6 Modifications to Warning Statements.** If modifications or amendments to
15 Proposition 65 or its regulations after the Effective Date are inconsistent with, or provide warning
16 specifications different from, the specifications in this Consent Judgment, Spencer Gifts may
17 modify the content and delivery methods of its warnings to conform to the modified or amended
18 provisions of Proposition 65 or its regulations.

19 **4. MONETARY TERMS**

20 **4.1 Civil Penalty.** Spencer Gifts shall pay \$2,500.00 as a Civil Penalty pursuant to
21 Health and Safety Code section 25249.7(b), to be apportioned in accordance with California Health
22 & Safety Code § 25192, with 75% of these funds remitted to OEHHA and the remaining 25% of
23 the Civil Penalty remitted to Ferreiro, as provided by California Health & Safety Code
24 § 25249.12(d).

25 **4.1.1** Within ten (10) business days of the Effective Date, Spencer Gifts shall
26 issue two separate checks for the Civil Penalty payment to (a) “OEHHA” in the amount of
27 \$1,875.00; and to (b) “Brodsky & Smith, LLC in Trust for Ferreiro” in the amount of \$625.00.
28

1 Payment owed to Ferreiro pursuant to this Section shall be delivered to the following payment
2 address:

3 Evan J. Smith, Esquire
4 Brodsky & Smith, LLC
5 Two Bala Plaza, Suite 805
6 Bala Cynwyd, PA 19004

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

9 For United States Postal Service Delivery:

10 Mike Gyurics
11 Fiscal Operations Branch Chief
12 Office of Environmental Health Hazard Assessment
13 P.O. Box 4010
14 Sacramento, CA 95812-4010

15 For Non-United States Postal Service Delivery:

16 Mike Gyurics
17 Fiscal Operations Branch Chief
18 Office of Environmental Health Hazard Assessment
19 1001 I Street
20 Sacramento, CA 95814

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

23 4.2 **Attorneys' Fees.** Within ten (10) business days of the Effective Date, Spencer Gifts
24 shall pay \$25,000.00 to Brodsky & Smith, LLC ("Brodsky Smith") as complete reimbursement for
25 Ferreiro's attorneys' fees and costs incurred as a result of investigating, bringing this matter to
26 Spencer Gifts attention, litigating and negotiating and obtaining judicial approval of a settlement in
27 the public interest, pursuant to Code of Civil Procedure § 1021.5.

28 **5. RELEASE OF ALL CLAIMS**

5.1 This Consent Judgment is a full, final, and binding resolution between Ferreiro
acting on his own behalf, and on behalf of the public interest, and Spencer Gifts, and its parents,
shareholders, members, directors, officers, managers, employees, representatives, agents,
attorneys, divisions, subdivisions, subsidiaries, partners, sister companies, and affiliates, and their

1 predecessors, successors and assigns (“Defendant Releasees”), and all entities from whom they
2 obtain and to whom they directly or indirectly distribute or sell Covered Products, including but
3 not limited to manufacturers, suppliers, distributors, wholesalers, customers, licensors, licensees
4 retailers, franchisees, and cooperative members (“Downstream Releasees”), of all claims for
5 violations of Proposition 65 based on exposure to DINP from Covered Products as set forth in the
6 Notice, with respect to any Covered Products manufactured, distributed, or sold by Spencer Gifts
7 prior to the Effective Date. It is the Parties’ intention that this Consent Judgment shall have
8 preclusive effect such that no other actions by private enforcers, whether purporting to act in his,
9 her, or its interests or the public interest shall be permitted to pursue and/or take any action with
10 respect to any violation of Proposition 65 that was alleged in the Complaint, or that could have
11 been brought pursuant to the Notice against Spencer Gifts and/or the Downstream Releasees of the
12 Covered Products (“Proposition 65 Claims”). Compliance with the terms of this Consent Judgment
13 constitutes compliance with Proposition 65 with regard to the Covered Products.

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

27 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS THAT THE
28 CREDITOR OR RELEASING PARTY DOES NOT KNOW OR SUSPECT TO

1 EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE
2 RELEASE AND THAT, IF KNOWN BY HIM OR HER, WOULD HAVE
3 MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE
4 DEBTOR OR RELEASED PARTY.

5 5.3 Spencer Gifts waives any and all claims against Ferreiro, his attorneys and other
6 representatives, for any and all actions taken or statements made (or those that could have been
7 taken or made) by Ferreiro and his attorneys and other representatives, whether in the course of
8 investigating claims or otherwise seeking enforcement of Proposition 65 against it in this matter,
9 and/or with respect to Covered Products.

10 **6. INTEGRATION**

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

15 **7. GOVERNING LAW**

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

21 **8. NOTICES**

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

26 For Defendant:

27 Kevin W. Mahoney, Esq.
28 Senior Vice President & General Counsel
Spencer Gifts LLC
6826 Black Horse Pike

1 Egg Harbor Township, NJ 08234

2 Jeffrey Margulies
3 Norton Rose Fulbright US LLP
4 555 South Flower Street, Forty-First Floor
5 Los Angeles, California 90071

6 For Ferreiro:

7 Evan Smith
8 Brodsky & Smith, LLC
9 9595 Wilshire Blvd., Ste. 900
10 Beverly Hills, CA 90212

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

13 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

14 9.1 This Consent Judgment may be executed in counterparts and by facsimile, each of
15 which shall be deemed an original, and all of which, when taken together, shall constitute one and
16 the same document.

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

19 10.1 Ferreiro agrees to comply with the requirements set forth in California Health &
20 Safety Code § 25249.7(f) and to promptly bring a Motion for Approval of this Consent Judgment.
21 Defendant agrees it shall support approval of such Motion.

22 10.2 This Consent Judgment shall not be effective until it is approved and entered by the
23 Court and shall be null and void if, for any reason, it is not approved by the Court. In such case, the
24 Parties agree to meet and confer on how to proceed and if such agreement is not reached within 30
25 days, the case shall proceed on its normal course.

26 10.3 If the Court approves this Consent Judgment and is reversed or vacated by an
27 appellate court, the Parties shall meet and confer as to whether to modify the terms of this Consent
28 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.

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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.

12. ATTORNEY'S FEES

12.1 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.

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: _____

Date: 11/20/22

By: _____
ANTHONY FERREIRO

By: [Signature]
SPENCER GIFTS LLC

IT IS SO ORDERED, ADJUDGED AND DECREED:

Dated: _____

Judge of Superior Court

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15 document and certify that he or she is fully authorized by the Party he or she represents to execute
16 the Consent Judgment on behalf of the Party represented and legally bind that Party. Except as
17 explicitly provided herein each Party is to bear its own fees and costs.

18 **AGREED TO:**

AGREED TO:

19 Date: 12/11/2020

Date: _____

20 By: Anthony Ferreiro
21 ANTHONY FERREIRO

22 By: _____
23 SPENCER GIFTS LLC

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

25 Dated: FEB 05 2021

26 ANDREW E. SWEET,
27 Judge of Superior Court