



21202734

1 Evan Smith (Bar No. SBN 242352)
2 BRODSKY & SMITH, LLC.
3 9595 Wilshire Blvd., Ste. 900
4 Beverly Hills, CA 90212
5 Tel: (877) 534-2590
6 Fax: (310) 247-0160

7 *Attorneys for Plaintiff*

FILED
ALAMEDA COUNTY

DEC 17 2020

CLERK OF THE SUPERIOR COURT
By *Robert Clarke*
Deputy

OCT 27 2020

8
9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 COUNTY OF ALAMEDA

11 ANTHONY FERREIRO,

12 Plaintiff,

13 v.

14 ATOMI, INC.,

15 Defendant.

Case No.: RG20076384

CONSENT JUDGMENT

Judge: Stephen Pulido

Dept.: 517

Hearing Date: 12/17/2020

Hearing Time: 3:00 PM

Reservation #: R-2213688

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

9 1.2 **Allegations and Representations.** Ferreiro alleges that Defendant has exposed
10 individuals to di(2-ethylhexyl) phthalate (DEHP) from its sales of U-Youse gaming headsets
11 without providing a clear and reasonable exposure warning pursuant to Proposition 65. DEHP is
12 listed under Proposition 65 as a chemical known to the State of California to cause cancer and
13 reproductive toxicity.

14 1.3 **Notice of Violation/Complaint.** On or about June 21, 2019, Ferreiro served Atomi,
15 and various public enforcement agencies with documents entitled “60-Day Notice of Violation”
16 pursuant to Health & Safety Code §25249.7(d) (the “Notice”), alleging that Defendant violated
17 Proposition 65 for failing to warn consumers and customers that use of U-Youse gaming headsets
18 expose users in California to DEHP. No public enforcer has brought and is diligently prosecuting
19 the claims alleged in the Notice. On October 5, 2020, Ferreiro filed a complaint (the “Complaint”)
20 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 Alameda, and that this Court has jurisdiction to approve, enter,
24 and oversee the enforcement of this Consent Judgment as a full and final binding resolution of all
25 claims which were or could have been raised in the Complaint based on the facts alleged therein
26 and/or in 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 U-Youse gaming headsets
10 that are manufactured, distributed and/or offered for sale in California by Atomi.

11 2.2 **Effective Date.** The term "Effective Date" means the date this Consent Judgment is
12 entered as a Judgment of the Court.

13 **3. INJUNCTIVE RELIEF: WARNINGS**

14 3.1 **Reformulation of Covered Products.** As of the Effective Date, and continuing
15 thereafter, Covered Products that Atomi directly manufactures, imports, distributes, sells, or offers
16 for sale in California shall either: (a) be Reformulated Products pursuant to § 3.2, below; or (b) be
17 labeled with a clear and reasonable exposure warning pursuant to §§ 3.3 and 3.4, below. For
18 purposes of this Consent Judgment, a "Reformulated Product" is a Covered Product that is in
19 compliance with the standard set forth in § 3.2 below. The warning requirement set forth in §§ 3.3
20 and 3.4 shall not apply to any Reformulated Product.

21 3.2 **Reformulation Standard.** "Reformulated Products" shall mean Covered Products
22 that contain plastic materials that may come into contact with a user of the product with
23 concentrations less than or equal to 0.1% (1,000 parts per million (ppm)) of DEHP when analyzed
24 pursuant to U.S. Environmental Protection Agency testing methodologies 3580A and 8270C or
25 other methodology utilized by federal or state government agencies for the purpose of determining
26 the phthalate content in a solid substance.

1 **3.3 Clear and Reasonable Warning.** As of the Effective Date, and continuing
2 thereafter, a clear and reasonable exposure warning as set forth in this §§ 3.3 and 3.4 must be
3 provided for all Covered Products that Defendant manufacturers, imports, distributes, sells, or
4 offers for sale in California that is not a Reformulated Product. There shall be no obligation for
5 Defendant to provide a warning for Covered Products that enter the stream of commerce prior to
6 the Effective Date. The warning shall consist of either the **Warning** or **Alternative Warning**
7 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 di(2-
10 ethylhexyl) phthalate (DEHP), which is known to the State of California to cause
11 cancer and birth defects or other reproductive harm. For more information go to
www.P65Warnings.ca.gov.

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

14 ⚠ **WARNING:** Cancer and Reproductive Harm - 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.

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

15 4.1 **Civil Penalty.** Atomi shall pay \$2,000.00 as a Civil Penalty pursuant to Health and
16 Safety Code section 25249.7(b), to be apportioned in accordance with California Health & Safety
17 Code § 25192, with 75% of these funds remitted to OEHHA and the remaining 25% of the Civil
18 Penalty remitted to Ferreiro, as provided by California Health & Safety Code § 25249.12(d).

19 4.1.1 Within ten (10) days after the Effective Date, Atomi shall issue two
20 separate checks for the Civil Penalty payment to (a) "OEHHA" in the amount of \$1,500.00; and
21 to (b) "Brodsky & Smith, LLC in Trust for Ferreiro" in the amount of \$500.00. Payment owed to
22 Ferreiro pursuant to this Section shall be delivered to the following payment address:

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

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

28 For United States Postal Service Delivery:

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

6 For Non-United States Postal Service Delivery:

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

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

14 4.2 **Attorneys' Fees.** Within ten (10) days after the Effective Date, Atomi shall pay
15 \$21,000.00 to Brodsky & Smith, LLC ("Brodsky Smith") as complete reimbursement for Ferreiro's
16 attorneys' fees and costs incurred as a result of investigating, bringing this matter to Atomi
17 attention, litigating and negotiating and obtaining judicial approval of a settlement in the public
18 interest, pursuant to Code of Civil Procedure § 1021.5.

19 **5. RELEASE OF ALL CLAIMS**

20 5.1 This Consent Judgment is a full, final, and binding resolution between Ferreiro
21 acting on his own behalf, and on behalf of the public interest, and Atomi, and its parents,
22 shareholders, members, directors, officers, managers, employees, representatives, agents,
23 attorneys, divisions, subdivisions, subsidiaries, partners, sister companies, and affiliates, and their
24 predecessors, successors and assigns ("Defendant Releasees"), and all entities from whom they
25 obtain and to whom they directly or indirectly distribute or sell Covered Products, including but
26 not limited to manufacturers, suppliers, distributors, wholesalers, customers, licensors, licensees
27 retailers, franchisees, and cooperative members, including but not limited to Five Below, Inc. and
28 its parents, shareholders, members, directors, officers, managers, employees, representatives,
agents, attorneys, divisions, subdivisions, subsidiaries, partners, sister companies, and affiliates,
and their predecessors, successors and assigns ("Downstream Releasees"), of all claims for
violations of Proposition 65 based on exposure to DEHP from Covered Products as set forth in the

1 Notice, with respect to any Covered Products manufactured, distributed, or sold by Atomi prior to
2 the Effective Date. This Consent Judgment shall have preclusive effect such that no other person
3 or entity, whether purporting to act in his, her, or its interests or the public interest shall be permitted
4 to pursue and/or take any action with respect to any violation of Proposition 65 that was alleged in
5 the Complaint, or that could have been brought pursuant to the Notice against Atomi and/or the
6 Downstream Releasees of the Covered Products ("Proposition 65 Claims"). Compliance with the
7 terms of this Consent Judgment constitutes compliance with Proposition 65 with regard to the
8 Covered Products.

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

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

28 5.3 Atomi 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
taken or made) by Ferreiro and his attorneys and other representatives, whether in the course of

1 investigating claims or otherwise seeking enforcement of Proposition 65 against it in this matter,
2 and/or with respect to Covered Products.

3 **6. INTEGRATION**

4 6.1 This Consent Judgment contains the sole and entire agreement of the Parties and
5 any and all prior negotiations and understandings related hereto shall be deemed to have been
6 merged within it. No representations or terms of agreement other than those contained herein exist
7 or have been made by any Party with respect to the other Party or the subject matter hereof.

8 **7. GOVERNING LAW**

9 7.1 The terms of this Consent Judgment shall be governed by the laws of the State of
10 California and apply within the State of California. In the event that Proposition 65 is repealed or
11 is otherwise rendered inapplicable by reason of law generally, or as to Covered Products, then
12 Defendant shall have no further obligations pursuant to this Consent Judgment with respect to, and
13 to the extent that, Covered Products are so affected.

14 **8. NOTICES**

15 8.1 Unless specified herein, all correspondence and notices required to be provided
16 pursuant to this Consent Judgment shall be in writing and personally delivered or sent by: (i) first-
17 class, (registered or certified mail) return receipt requested; or (ii) overnight courier on any party
18 by the other party at the following addresses:

19 For Defendant:

20 Rick R. Rothman
21 Morgan, Lewis & Bockius LLP
22 300 South Grand Avenue, Twenty-Second Floor
Los Angeles, CA 90071-3132

23 And

24 For Ferreiro:

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

28 Any party, from time to time, may specify in writing to the other party a change of address to

1 which all notices and other communications shall be sent.

2 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

3 9.1 This Consent Judgment may be executed in counterparts and by facsimile, each of
4 which shall be deemed an original, and all of which, when taken together, shall constitute one and
5 the same document.

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

8 10.1 Ferreiro agrees to comply with the requirements set forth in California Health &
9 Safety Code § 25249.7(f) and to promptly bring a Motion for Approval of this Consent Judgment.
10 Defendant agrees it shall support approval of such Motion.

11 10.2 This Consent Judgment shall not be effective until it is approved and entered by the
12 Court and shall be null and void if, for any reason, it is not approved by the Court. In such case, the
13 Parties agree to meet and confer on how to proceed and if such agreement is not reached within 30
14 days, the case shall proceed on its normal course.

15 10.3 If the Court approves this Consent Judgment and is reversed or vacated by an
16 appellate court, the Parties shall meet and confer as to whether to modify the terms of this Consent
17 Judgment. If the Parties do not jointly agree on a course of action to take, the case shall proceed on
18 its normal course on the trial court's calendar.

19 **11. MODIFICATION**

20 11.1 This Consent Judgment may be modified only by further stipulation of the Parties
21 and the approval of the Court or upon the granting of a motion brought to the Court by either Party.

22 **12. ATTORNEY'S FEES**

23 12.1 A Party who unsuccessfully brings or contests an action arising out of this Consent
24 Judgment shall be required to pay the prevailing party's reasonable attorney's fees and costs.

25 12.2 Nothing in this Section shall preclude a Party from seeking an award of sanctions
26 pursuant to law.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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: 10/23/2020

Date: _____

By: Anthony Ferreira
ANTHONY FERREIRO

By: Dalhousie Beale
ATOMI, INC.

IT IS SO ORDERED, ADJUDGED AND DECREED:

Dated: 12-17-2020

Judge of Superior Court


Stephen Pulido

**CLERK'S CERTIFICATE OF MAILING
(CCP 1013a)**

I certify that the following is true and correct:

I am a Deputy Clerk employed by the Alameda County Superior Court. I am over the age of 18 years. My business address is **24405 Amador Street Hayward, California 94544**. I served this **CONSENT JUDGMENT** by placing copies in envelope(s) addressed as shown below and then by sealing and placing them for collection, stamping or metering with prepaid postage, and mailing on the date stated below, in the United States mail in **Hayward**, California, following standard court practices.

▼ Smith, Evan J.
Brotsky & Smith, LLC
9595 Wilshire Boulevard
Suite 900
Beverly Hills, CA 90212

7 Rothman, Rick R.,
Morgan, Lewis & Bockius LLP
300 South Grand Ave.
Twenty-Second Floor
Los Angeles, CA 90071

Date: 12/18/2020

Executive Officer/Clerk of the Superior Court

By 
Kasha Clarke, Deputy Clerk