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Attorneys for Plaintiff

FILED
ALAMEDA COUNTY

APR 17 2023

CLERK OF THE SUPERIOR COURT

By *Stephan Kaus* Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ALAMEDA

ANTHONY FERREIRO,
Plaintiff,
v.
HORI (U.S.A.), INC., BEST BUY CO., INC.,
Defendants.

Case No.: RG21101989
CONSENT JUDGMENT
Judge: Stephen Kaus
Dept.: 19
Hearing Date: March 29, 2023
Hearing Time: 3:00 PM
Reservation #: 450199715282

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 HORI (U.S.A.), Inc.
4 (“HORI” or “Defendant”) with Ferreiro and Defendant collectively referred to as the “Parties” and
5 each of them as a “Party.” Ferreiro is an individual residing in California that seeks to promote
6 awareness of exposures to toxic chemicals and improve human health by reducing or eliminating
7 hazardous substances contained in consumer products. HORI is alleged to be a person in the course
8 of doing 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 Bisphenol A (BPA) from its sales of HORI Hybrid System Armor for Nintendo
11 Switch Lite, UPC# 873124008708, without providing a clear and reasonable exposure warning
12 pursuant to Proposition 65. BPA is listed under Proposition 65 as a chemical known to the State of
13 California to cause reproductive toxicity.

14 **1.3 Notice of Violation/Complaint.** On or about October 19, 2020, Ferreiro served
15 HORI, Best Buy Co., Inc., and various public enforcement agencies with documents entitled “60-
16 Day Notice of Violation” pursuant to Health & Safety Code §25249.7(d) (the “Notice”), alleging
17 that Defendant violated Proposition 65 for failing to warn consumers and customers that use of the
18 Products expose users in California to BPA. No public enforcer has brought and is diligently
19 prosecuting the claims alleged in the Notice. May 13, 2021, Ferreiro filed a complaint (the
20 “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 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.**

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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 HORI Hybrid System
10 Armor for Nintendo Switch Lite with the UPC Numbers:

11 UPC# 873124008708 (Turquoise);

12 UPC# 873124008395 (Black);

13 UPC# 873124008692 (Yellow);

14 UPC# 873124008715 (Gray); and

15 Any other versions or colors of the HORI Hybrid System Armor, including any colors or
16 versions released subsequent to the Effective Date, that are manufactured, distributed, sold, and/or
17 offered for sale in California by HORI, that expose users to BPA.

18 2.2 **Effective Date.** The term "Effective Date" means the date this Consent Judgment is
19 entered as a Judgment of the Court.

20 **3. INJUNCTIVE RELIEF: COMMITMENT TO WARN**

21 3.1 **Clear and Reasonable Warning.** As of the Effective Date, HORI agrees to
22 manufacture, import, or purchase for sale in California only Covered Products that are accompanied
23 by either of the following warnings:

24 (a) **Warning.** The "Warning" shall consist of the statement:

25 ⚠ **WARNING:** This product can expose you to chemicals including Bisphenol A
26 (BPA), which is known to the State of California to cause birth defects or other
27 reproductive harm. For more information go to www.P65Warnings.ca.gov.

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

3 **⚠ WARNING:** Reproductive Harm - www.P65Warnings.ca.gov.

4 3.2 A **Warning** or **Alternative Warning** provided pursuant to § 3.1 must print the word
5 “**WARNING:**” in all capital letters and in bold font, followed by a colon. The warning symbol to
6 the left of the word “**WARNING:**” must be a black exclamation point in a yellow equilateral
7 triangle with a black outline, except that if the sign or label for the Covered Product does not use
8 the color yellow, the symbol may be in black and white. The symbol must be in a size no smaller
9 than the height of the word “**WARNING:**”. The warning shall be affixed to or printed on the
10 Covered Product’s packaging or labeling, or on a placard, shelf tag, sign or electronic device or
11 automatic process, providing that the warning is displayed with such conspicuousness, as compared
12 with other words, statements, or designs as to render it likely to be read and understood by an
13 ordinary individual under customary conditions of purchase or use. A warning may be contained
14 in the same section of the packaging, labeling, or instruction booklet that states other safety
15 warnings, if any, concerning the use of the Covered Product and shall be at least the same size as
16 those other safety warnings.

17 If HORI sells Covered Products via an internet website to customers located in California,
18 the warning requirements of this section shall be satisfied if the foregoing warning appears either:
19 (a) on the same web page on which a Covered Product is displayed and/or described; (b) on the
20 same page as the price for the Covered Product; or (c) on one or more web pages displayed to a
21 purchaser prior to purchase during the checkout process. Alternatively, a symbol consisting of a
22 black exclamation point in a yellow or white equilateral triangle may appear adjacent to or
23 immediately following the display, description, price, or checkout listing of the Covered Product,
24 if the warning statement appears elsewhere on the same web page in a manner that clearly associates
25 it with the product(s) to which the warning applies. HORI shall instruct any third-party internet
26 sellers to which it sells, ships or distributes the Covered Product to provide the warning as a
27 condition of sale of the Covered Product.

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1 3.3 **Compliance with Warning Regulations.** Defendant shall be deemed to be in
2 compliance with this Consent Judgment by (1) adhering to § 3 of this Consent Judgment; or (2)
3 complying with warning requirements adopted by the State of California's Office of Environmental
4 Health Hazard Assessment ("OEHHA") applicable to the Covered Product and the exposures at
5 issue after the Effective Date.

6 **4. MONETARY TERMS**

7 4.1 **Civil Penalty.** HORI shall pay \$7,000.00 as a Civil Penalty pursuant to Health and
8 Safety Code section 25249.7(b), to be apportioned in accordance with California Health & Safety
9 Code § 25192, with 75% of these funds remitted to OEHHA and the remaining 25% of the Civil
10 Penalty remitted to Ferreiro, as provided by California Health & Safety Code § 25249.12(d).

11 4.1.1 Within ten (10) days of the Effective Date, HORI shall issue two separate checks
12 for the Civil Penalty payment to (a) "OEHHA" in the amount of \$5,250.00; and to (b) "Anthony
13 Ferreiro" in the amount of \$1,750.00. Payment owed to Ferreiro pursuant to this Section shall be
14 delivered to the following payment address:

15 Evan J. Smith, Esquire
16 Brodsky Smith
17 Two Bala Plaza, Suite 805
18 Bala Cynwyd, PA 19004

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

21 For United States Postal Service Delivery:
22 Mike Gyurics
23 Fiscal Operations Branch Chief
24 Office of Environmental Health Hazard Assessment
25 P.O. Box 4010
26 Sacramento, CA 95812-4010

27 For Non-United States Postal Service Delivery:
28 Mike Gyurics
29 Fiscal Operations Branch Chief
30 Office of Environmental Health Hazard Assessment
31 1001 I Street
32 Sacramento, CA 95814

33 A copy of the check payable to OEHHA shall be mailed to Brodsky Smith at the address set forth
34 above as proof of payment to OEHHA.

1 4.2 **Attorneys' Fees.** Within ten (10) days of the Effective Date, HORI shall pay
2 \$70,000.00 to Brodsky Smith ("Brodsky Smith") as complete reimbursement for Ferreiro's
3 attorneys' fees and costs incurred as a result of investigating, bringing this matter to HORI
4 attention, litigating and negotiating and obtaining judicial approval of a settlement in the public
5 interest, pursuant to Code of Civil Procedure § 1021.5.

6 **5. RELEASE OF ALL CLAIMS**

7 5.1 This Consent Judgment is a full, final, and binding resolution between Ferreiro
8 acting on his own behalf, and on behalf of the public interest, and HORI, and its parents,
9 shareholders, members, directors, officers, managers, employees, representatives, agents,
10 attorneys, divisions, subdivisions, subsidiaries, partners, sister companies, and affiliates, and their
11 predecessors, successors and assigns ("Defendant Releasees"), and all entities from whom they
12 obtain and to whom they directly or indirectly distribute or sell Covered Products, including but
13 not limited to manufacturers, suppliers, distributors, wholesalers, customers, licensors, licensees
14 retailers, franchisees, and cooperative members ("Downstream Releasees"), of all claims for
15 violations of Proposition 65 based on exposure to BPA from Covered Products as set forth in the
16 Notice, with respect to any Covered Products manufactured, distributed, or sold by HORI prior to
17 the Effective Date, provided that this release will not extend to online sales to consumers that occur
18 after the Effective Date as to retailers who do not provide a warning in compliance with Section 3
19 of this Judgment. It is the Parties' intention that this Consent Judgment shall have preclusive effect
20 such that no other actions by private enforcers, whether purporting to act in his, her, or its interests
21 or the public interest shall be permitted to pursue and/or take any action with respect to any violation
22 of Proposition 65 that was alleged in the Complaint, or that could have been brought pursuant to
23 the Notice against HORI and/or the Downstream Releasees of the Covered Products ("Proposition
24 65 Claims"). Compliance with the terms of this Consent Judgment constitutes compliance with
25 Proposition 65 with regard to exposure to BPA from use of the Covered Products.

26 5.2 In addition to the foregoing, Ferreiro, on behalf of himself, his past and current
27 agents, representatives, attorneys, and successors and/or assignees, and *not* in his representative
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1 capacity, hereby waives all rights to institute or participate in, directly or indirectly, any form of
2 legal action and releases HORI, Defendant Releasees, and Downstream Releasees from any and all
3 manner of actions, causes of action, claims, demands, rights, suits, obligations, debts, contracts,
4 agreements, promises, liabilities, damages, charges, losses, costs, expenses, and attorneys' fees, of
5 any nature whatsoever, known or unknown, in law or equity, fixed or contingent, now or in the
6 future, with respect to any alleged violations of Proposition 65 related to or arising from exposure
7 to BPA from Covered Products manufactured, distributed, or sold by HORI, Defendant Releasees
8 or Downstream Releasees. With respect to the foregoing waivers and releases in this paragraph,
9 Ferreiro hereby specifically waives any and all rights and benefits which he now has, or in the
10 future may have, conferred by virtue of the provisions of § 1542 of the California Civil Code, which
11 provides as follows:

12 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS THAT THE
13 CREDITOR OR RELEASING PARTY DOES NOT KNOW OR SUSPECT TO
14 EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE
15 RELEASE AND THAT, IF KNOWN BY HIM OR HER, WOULD HAVE
16 MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE
17 DEBTOR OR RELEASED PARTY.

18 5.3 HORI waives any and all claims against Ferreiro, his attorneys and other
19 representatives, for any and all actions taken or statements made (or those that could have been
20 taken or made) by Ferreiro and his attorneys and other representatives, whether in the course of
21 investigating claims or otherwise seeking enforcement of Proposition 65 against it in this matter,
22 and/or with respect to exposure to BPA From Covered Products.

23 **6. INTEGRATION**

24 6.1 This Consent Judgment contains the sole and entire agreement of the Parties and
25 any and all prior negotiations and understandings related hereto shall be deemed to have been
26 merged within it. No representations or terms of agreement other than those contained herein exist
27 or have been made by any Party with respect to the other Party or the subject matter hereof.

28 **7. GOVERNING LAW**

7.1 The terms of this Consent Judgment shall be governed by the laws of the State of
California and apply within the State of California. In the event that Proposition 65 is repealed or

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is otherwise rendered inapplicable by reason of law generally, or as to Covered Products, then Defendant shall have no further obligations pursuant to this Consent Judgment with respect to, and to the extent that, Covered Products are so affected.

8. NOTICES

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

For Defendant:

Ryo Mihara
HORI (U.S.A.), Inc.
24330 Garnier St.
Torrance, CA 90505

For Plaintiff:

Evan J. Smith, Esquire
Brodsky & Smith
Two Bala Plaza, Suite 805
Bala Cynwyd, PA 19004

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

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9. COUNTERPARTS; FACSIMILE SIGNATURES

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

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

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

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

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

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.

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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: 3/8/23
By: Anthony Ferreiro
ANTHONY FERREIRO

Date: 3.6.2023
By: [Signature]
HORI (U.S.A.), INC.

IT IS SO ORDERED, ADJUDGED AND DECREED:

Dated: 4/17/23

[Signature]
Judge of Superior Court