

1 Evan Smith (Bar No. SBN 242352)
2 BRODSKY SMITH
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
Superior Court of California
County of San Francisco

FEB 15 2023

CLERK OF THE COURT
BY: *[Signature]*
Deputy Clerk

8
9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 COUNTY OF SAN FRANCISCO

11 ANTHONY FERREIRO,

12 Plaintiff,

13 v.

14 99 CENTS ONLY STORES, LLC,

15 Defendant.

Case No.: CGC-21-591957

CONSENT JUDGMENT

Judge: Richard B. Ulmer

Dept.: 302

Hearing Date: January 17, 2023

Hearing Time: 9:30 AM

Complaint Filed: May 17, 2021

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 99 Cents Only Stores,
4 LLC ("99 Cents" 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. 99 Cents 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 di(2-ethylhexyl) phthalate (DEHP) from its sales of are Studio Art pencil pouches
12 without providing a clear and reasonable exposure warning pursuant to Proposition 65. DEHP is
13 listed under Proposition 65 as a chemical known to the State of California to cause cancer and
14 reproductive toxicity.

15 **1.3 Notice of Violation/Complaint.** On or about November 30, 2020, Ferreiro served
16 99 Cents, and various public enforcement agencies with documents entitled "60-Day Notice of
17 Violation" pursuant to Health & Safety Code §25249.7(d) (the "Notice"), alleging that Defendant
18 violated Proposition 65 for failing to warn consumers and customers that use of Studio Art pencil
19 pouches expose users in California to DEHP. No public enforcer has brought and is diligently
20 prosecuting the claims alleged in the Notice. On May 17, 2021, Ferreiro filed a complaint (the
21 "Complaint") in the matter.

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 San Francisco, and that this Court has jurisdiction to approve,
25 enter, and oversee the enforcement of this Consent Judgment as a full and final binding resolution
26 of all claims which were or could have been raised in the Complaint based on the facts alleged
27 therein and/or in the Notice.
28

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 are Studio Art pencil
10 pouches that are manufactured, distributed and/or offered for sale in California by 99 Cents.

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.** Commencing within 60 days of the Effective
15 Date, Covered Products that 99 Cents 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 concentrations less than or equal to 0.1% (1,000 parts per million (ppm)) of DEHP
23 when analyzed pursuant to U.S. Environmental Protection Agency testing methodologies 3580A
24 and 8270C or other methodology utilized by federal or state government agencies for the purpose
25 of determining the phthalate content in a solid substance.

26 3.3 **Clear and Reasonable Warning.** Commencing within 60 days of the Effective
27 Date, a clear and reasonable exposure warning as set forth in this §§ 3.3 and 3.4 must be provided
28

1 for all Covered Products that Defendant manufacturers, imports, distributes, sells, or offers for sale
2 in California that is not a Reformulated Product. There shall be no obligation for Defendant to
3 provide a warning for Covered Products that enter the stream of commerce prior to the date this
4 Consent Judgment is signed by both Parties. The warning shall consist of either the **Warning** or
5 **Alternative Warning** described in §§ 3.3(a) or (b), respectively:

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

7 **⚠ WARNING:** This product can expose you to chemicals including di(2-
8 ethylhexyl) phthalate (DEHP), which is known to the State of California to cause
9 cancer and birth defects or other reproductive harm. For more information go to
10 www.P65Warnings.ca.gov.

11 (b) **Alternative Warning:** 99 Cents may, but is not required to, use the alternative
12 short-form warning as set forth in this § 3.3(b) ("**Alternative Warning**") as follows:

13 **⚠ WARNING:** Cancer and Reproductive Harm - www.P65Warnings.ca.gov.

14 3.4 A **Warning** or **Alternative Warning** provided pursuant to § 3.3 must print the word
15 "**WARNING:**" in all capital letters and in bold font, followed by a colon. The warning symbol to
16 the left of the word "**WARNING:**" must be a black exclamation point in a yellow equilateral
17 triangle with a black outline, except that if the sign or label for the Covered Product does not use
18 the color yellow, the symbol may be in black and white. The symbol must be in a size no smaller
19 than the height of the word "**WARNING:**". The warning shall be affixed to or printed on the
20 Covered Product's packaging or labeling, or on a placard, shelf tag, sign or electronic device or
21 automatic process, providing that the warning is displayed with such conspicuousness, as compared
22 with other words, statements, or designs as to render it likely to be read and understood by an
23 ordinary individual under customary conditions of purchase or use. A warning may be contained
24 in the same section of the packaging, labeling, or instruction booklet that states other safety
25 warnings, if any, concerning the use of the Covered Product and shall be at least the same size as
26 those other safety warnings.

27 If 99 Cents sells Covered Products via an internet website to customers located in
28 California, the warning requirements of this section shall be satisfied if the foregoing warning
appears either: (a) on the same web page on which a Covered Product is displayed and/or described;

(b) on the same page as the price for the Covered Product; or (c) on one or more web pages displayed to a purchaser prior to purchase during the checkout process. Alternatively, a symbol consisting of a black exclamation point in a yellow or white equilateral triangle may appear adjacent to or immediately following the display, description, price, or checkout listing of the Covered Product, if the warning statement appears elsewhere on the same web page in a manner that clearly associates it with the product(s) to which the warning applies. Defendant shall instruct any third party internet sellers to provide the warning as a condition of sale of the Covered Product.

3.5 **Compliance with Warning Regulations.** Defendant shall be deemed to be in compliance with this Consent Judgment by either adhering to §§ 3.3 and 3.4 of this Consent Judgment or by complying with warning requirements adopted by the State of California's Office of Environmental Health Hazard Assessment ("OEHHA") applicable to the Product and the exposure at issue after the Effective Date.

4. **MONETARY TERMS**

4.1 **Civil Penalty.** 99 Cents shall pay \$5,000.00 as a Civil Penalty pursuant to Health and Safety Code section 25249.7(b), to be apportioned in accordance with California Health & Safety Code § 25192, with 75% of these funds remitted to OEHHA and the remaining 25% of the Civil Penalty remitted to Ferreiro, as provided by California Health & Safety Code § 25249.12(d).

4.1.1 Within ten (10) days of the Effective Date, 99 Cents shall issue two separate checks for the Civil Penalty payment to (a) "OEHHA" in the amount of \$3,750.00; and to (b) "Brodsky Smith in Trust for Ferreiro" in the amount of \$1,250.00. Payment owed to Ferreiro pursuant to this Section shall be delivered to the following payment address:

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

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

For United States Postal Service Delivery:

Mike Gyurics

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

5 For Non-United States Postal Service Delivery:

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

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

13 4.2 **Attorneys' Fees.** Within ten (10) days of the Effective Date, 99 Cents shall pay
14 \$50,000.00 to Brodsky Smith ("Brodsky Smith") as complete reimbursement for Ferreiro's
15 attorneys' fees and costs incurred as a result of investigating, bringing this matter to 99 Cents
16 attention, litigating and negotiating and obtaining judicial approval of a settlement in the public
17 interest, pursuant to Code of Civil Procedure § 1021.5.

18 **5. RELEASE OF ALL CLAIMS**

19 5.1 This Consent Judgment is a full, final, and binding resolution between Ferreiro
20 acting on his own behalf, and on behalf of the public interest, and 99 Cents, and its parents,
21 shareholders, members, directors, officers, managers, employees, representatives, agents,
22 attorneys, divisions, subdivisions, subsidiaries, partners, sister companies, and affiliates, and their
23 predecessors, successors and assigns (collectively, "Defendant Releasees"), and all entities from
24 whom they obtain and to whom they directly or indirectly distribute or sell Covered Products,
25 including but not limited to Two Powers Enterprise Co., Ltd.) and any other manufacturers,
26 suppliers, distributors, wholesalers, customers, licensors, licensees retailers, franchisees, and
27 cooperative members (collectively, "Additional Releasees"), of all claims for violations of
28 Proposition 65 based on exposure to DEHP from Covered Products as set forth in the Notice, with
respect to any Covered Products manufactured, distributed, or sold by 99 Cents prior to 60 days
after the Effective Date. It is the Parties' intention that this Consent Judgment shall have preclusive
effect such that no other actions by private enforcers, whether purporting to act in his, her, or its

1 interests or the public interest shall be permitted to pursue and/or take any action with respect to
2 any violation of Proposition 65 that was alleged in the Complaint, or that could have been brought
3 pursuant to the Notice against 99 Cents and/or the Additional Releasees of the Covered Products
4 ("Proposition 65 Claims"). Compliance with the terms of this Consent Judgment constitutes
5 compliance with Proposition 65 with regard to DEHP content in the Covered Products. Third party
6 internet sellers who do not provide a warning in compliance with §§ 3.4, above are expressly not
7 covered by this release.

8 5.2 In addition to the foregoing, Ferreiro, on behalf of himself, his past and current
9 agents, representatives, attorneys, and successors and/or assignees, and not in his representative
10 capacity, hereby waives all rights to institute or participate in, directly or indirectly, any form of
11 legal action and releases 99 Cents, Defendant Releasees, and Additional Releasees from any and
12 all manner of actions, causes of action, claims, demands, rights, suits, obligations, debts, contracts,
13 agreements, promises, liabilities, damages, charges, losses, costs, expenses, and attorneys' fees, of
14 any nature whatsoever, known or unknown, in law or equity, fixed or contingent, now or in the
15 future, with respect to any alleged violations of Proposition 65 related to or arising from exposure
16 to DEHP from use of Covered Products manufactured, distributed, or sold by 99 Cents, Defendant
17 Releasees or Additional Releasees. With respect to the foregoing waivers and releases in this
18 paragraph, Ferreiro hereby specifically waives any and all rights and benefits which he now has, or
19 in the future may have, conferred by virtue of the provisions of § 1542 of the California Civil Code,
20 which provides as follows:

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

27 5.3 99 Cents waives any and all claims against Ferreiro, his attorneys and other
28 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 exposure to DEHP from use of 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 Joseph D. Lee
21 Munger, Tolles & Olson LLP
22 350 South Grand Avenue, 50th Floor
Los Angeles, CA 90071

23 And

24 For Ferreiro:

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

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

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 **13. RETENTION OF JURISDICTION**

2 13.1 This Court shall retain jurisdiction of this matter to implement or modify the
3 Consent Judgment.

4 **14. AUTHORIZATION**

5 14.1 The undersigned are authorized to execute this Consent Judgment on behalf of their
6 respective Parties and have read, understood and agree to all of the terms and conditions of this
7 document and certify that he or she is fully authorized by the Party he or she represents to execute
8 the Consent Judgment on behalf of the Party represented and legally bind that Party. Except as
9 explicitly provided herein each Party is to bear its own fees and costs.

10
11 **AGREED TO:**

AGREED TO:

12 Date: 11/29/22

Date: 7/15/22

13 By: Anthony Ferreiro
14 ANTHONY FERREIRO

By: M. N. V.
99 CENTS ONLY STORES, LLC

15
16
17 **IT IS SO ORDERED, ADJUDGED AND DECREED:**

18 Dated: 2/15/23

19 lll
Judge of Superior Court
20 RICHARD ULMER