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

10 ANTHONY FERREIRO,

11 Plaintiff,

12 vs.

13 TSA STORES, INC., and SMITH
VENTURES, LTD.,

14 Defendants.

Case No. RG15782469

[PROPOSED] CONSENT JUDGMENT

Judge: Ioana Petrou

Dept.: 15

1 **1. Introduction**

2 1.1 On May 26, 2015, Anthony Ferreiro (“Ferreiro”) served TSA Stores, Inc. (“TSA”),
3 Smith Ventures, Ltd. (“Smith”) (collectively, the “Parties”), and various public enforcement
4 agencies with a document entitled “Notice of Violation of California Health & Safety Code §
5 25249.6, *et seq.*” (the “Notice”). The Notice provided TSA, Smith, and such others, including
6 public enforcers, with notice that alleged that TSA and Smith were in purported violation of
7 California Health & Safety Code § 25249.6 (“Proposition 65”) for failing to warn consumers and
8 customers that Training Rope, including but not limited to *R2 Training Rope; Color: green;*
9 *UPC# 8 81905 01034 1* (the “Product”), exposed users in California to the chemicals Diisononyl
10 phthalate (DINP) and Di-isodecyl phthalate (DIDP). No public enforcer has diligently prosecuted
11 the allegations set forth in the Notice.

12 1.2 On August 18, 2015, Ferreiro filed a Complaint for Civil Penalties and Injunctive
13 Relief (“Complaint”) in the Alameda County Superior Court (the “Court”), Case No.:
14 RG15782469, against TSA and Smith, alleging violations of Proposition 65 with respect to the
15 Product (the “Action”).

16 1.3 TSA and Smith are corporations that employ more than ten persons under
17 California Health and Safety Code §25249.6 and offered the Product for sale within the State of
18 California.

19 1.4 Ferreiro’s Complaint alleges, among other things, that TSA and Smith sold the
20 Products in California and/or to California citizens, that the Products contain DINP and DIDP,
21 and that the resulting exposure violated provisions of Proposition 65, by knowingly and
22 intentionally exposing persons to a chemicals known to the State of California to cause cancer
23 and reproductive toxicity, without first providing a clear and reasonable warning to such
24 individuals.

25 1.5 For purposes of this Consent Judgment only, the Parties stipulate that this Court
26 has jurisdiction over the allegations of violations contained in the Complaint and personal
27 jurisdiction over TSA and Smith as to the acts alleged in the Complaint, that venue is proper in
28 the County of Alameda, and that this Court has jurisdiction to enter this Consent Judgment as a

1 resolution of the allegations contained in the Complaint.

2 1.6 The Parties enter into this Consent Judgment pursuant to a full settlement and
3 release of disputed claims between the Parties as alleged in the Complaint for the purpose of
4 avoiding prolonged litigation. By execution of this Consent Judgment, TSA and Smith do not
5 admit any violation of Proposition 65 and specifically deny that they have committed any such
6 violation. Nothing in this Consent Judgment shall be construed as an admission by TSA or Smith
7 of any fact, issue of law, or violation of law, nor shall compliance with the Consent Judgment
8 constitute or be construed as an admission by TSA or Smith of any fact, issue of law, or violation
9 of law. Nothing in this Consent Judgment shall prejudice, waive, or impair any right, remedy or
10 defense that TSA or Smith may have in any other future legal proceeding. However, this
11 paragraph shall not diminish or otherwise affect the obligations, responsibilities and duties of
12 TSA and Smith under this Consent Judgment.

13 1.7 For purposes of this Consent Judgment, the term "Effective Date" shall mean the
14 date the Court enters the Consent Judgment.

15 **2. Injunctive Relief**

16 2.1 Commencing on the Effective Date, and continuing thereafter, TSA and Smith
17 shall only ship, sell, or offer for sale in California, Reformulated Products pursuant to Section 2.2
18 of this Consent Judgment. TSA, Smith, and their downstream retailers shall have no obligation to
19 reformulate or label Products that entered the stream of commerce prior to the Effective Date.
20 Nonetheless, following the filing of the Complaint and prior to the execution of this Consent
21 Judgment, Smith labeled all units of its Product with Proposition 65 labels. For purposes of this
22 Consent Judgment, "Reformulated Products" are Products that are in compliance with the
23 standard set forth below in Section 2.2.

24 2.2 "Reformulated Products" shall mean Products that contain less than or equal to
25 1,000 parts per million ("ppm") of both DINP and DIDP when analyzed pursuant to CPSC-CH-
26 C1001-09.3 Standard Operating Procedure for Determination of Phthalates method.

27 **3. Entry of Consent Judgment**

28 3.1 The Parties hereby request that the Court promptly approve and enter this Consent

1 Judgment. Upon entry of this Consent Judgment, Ferreiro, TSA, and Smith waive their
2 respective rights to a hearing or trial on the allegations of the Ferreiro Complaint and Notice
3 which are at issue in the Action.

4 3.2 In the event that the California Attorney General objects or otherwise comments
5 on one or more provisions of this Consent Judgment, Ferreiro, TSA and Smith agree to take into
6 consideration such objections or comments and whether reasonable steps should be taken to
7 satisfy such concerns or objections.

8 4. **Matters Covered By This Consent Judgment**

9 4.1 This Consent Judgment is a final and binding resolution between Ferreiro, acting
10 on his own behalf, and on behalf of the public and in the public interest, and TSA and Smith, and
11 shall have preclusive effect such that no other person or entity, whether purporting to act in his,
12 her, or its interests or the public interest shall be permitted to pursue and/or take any action with
13 respect to: (i) any violation of Proposition 65 that was alleged in the Complaint, or that could
14 have been brought pursuant to the Notice; or (ii) any other statutory or common law claim, to the
15 fullest extent that any of the foregoing described in (i) or (ii) were or could have been asserted by
16 any person or entity against TSA or Smith (or their parents, subsidiaries or affiliates, and assigns
17 of any of them, who may use, maintain, distribute or sell the Product) based on its alleged
18 exposure of persons to the Product, or its alleged failure to provide a clear and reasonable
19 warning of exposure to such individuals, or (iii) as to alleged exposures to the Product, any other
20 claim based on whole or in part on the facts alleged in the Complaint and the Notice, whether or
21 not based on actions committed by TSA or Smith (or their parents, subsidiaries or affiliates, and
22 assigns of any of them, who may use, maintain, distribute or sell the Product). As to alleged
23 exposures to the Product, compliance with the terms of this Consent Judgment resolves any issue,
24 now and in the future, and is deemed sufficient to satisfy all obligations concerning, compliance
25 by TSA and Smith with the requirements of Proposition 65 with respect to the Product, and any
26 alleged resulting exposure.

27 4.2 As to alleged exposures to the Products, Ferreiro waives all rights to institute any
28 form of legal action, and releases all claims against TSA and Smith (including their parents,

1 subsidiaries or affiliates, and assigns of any of them, who may use, maintain, distribute or sell the
2 Product) (collectively, "Releasees"), whether under Proposition 65 or otherwise, arising out of or
3 resulting from, or related directly or indirectly to, in whole or in part, the Product or the Action,
4 including but not limited to any exposure to, or failure to warn with respect to, the Product
5 (referred to collectively in this Section as the "Claims"). In furtherance of the foregoing, as to
6 alleged exposures to the Products, Ferreiro waives any and all rights and benefits which he now
7 has, or in the future may have, conferred upon him with respect to the Claims by virtue of the
8 provisions of § 1542 of the California Civil Code, which provides as follows:

9 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE
10 CREDITOR DOES NOT KNOW OR SUSPECT EXIST IN HIS FAVOR AT
11 THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM
12 MUST HAVE MATERIALLY AFFECTED HIS SETTLEMENT WITH THE
13 DEBTOR.

14 Ferreiro understands and acknowledges that the significance and consequence of this waiver of
15 California Civil Code § 1542 is that even if Ferreiro suffers future damages arising out of or
16 resulting from, or related directly or indirectly to, in whole or in part, the Product, including but
17 not limited to any exposure to, or failure to warn with respect to exposure to, the Products,
18 Ferreiro will not be able to make any claim for those damages against Releasees.

19 **5. Enforcement of Judgment**

20 5.1 The terms of this Consent Judgment shall be enforced exclusively by the Parties
21 hereto. The Parties may, by noticed motion or order to show cause before the Court, giving the
22 notice required by law, enforce the terms and conditions contained herein. In any proceeding
23 brought by either Party to enforce this Consent Judgment, such Party may seek whatever fines,
24 costs, penalties or remedies as may be provided by law for any violation of Proposition 65 or this
25 Consent Judgment.

26 **6. Modification of Judgment**

27 6.1 This Consent Judgment may be modified only by written agreement of the Parties
28 upon entry of a modified Consent Judgment by the Court thereon, or upon motion of any Party as

1 provided by law and upon an entry of a modified Consent Judgment by the Court.

2 6.2 Should any court enter final judgment in a case brought by Ferreiro or the People
3 involving the Products that sets forth standards defining when Proposition 65 warnings will or
4 will not be required (“Alternative Standards”), or if the California Attorney General otherwise
5 provides written endorsement (i.e., a writing that is circulated by the Attorney General that is not
6 intended for the purpose of soliciting further input or comments) of Alternative Standards
7 applicable to products that are of the same general type and function as the Products and
8 constructed from the same materials, TSA or Smith shall be entitled to seek a modification of this
9 Consent Judgment on forty-five (45) days’ notice to Ferreiro so as to be able to utilize and rely on
10 such Alternative Standards in lieu of those set forth in Section 7 of this Consent Judgment.
11 Ferreiro shall not unreasonably contest any proposed application to effectuate such a modification
12 provided that the Products for which such a modification is sought are of the same general type
13 and function as those to which the Alternative Standards apply.

14 7. Settlement Payment

15 7.1 In settlement of all the claims referred to in this Consent Judgment, and without
16 any admission of liability therefore, TSA and Smith shall make the following monetary
17 payments:

18 7.1.1 TSA and Smith shall pay a total of \$3,000.00 in civil penalties (the “Civil
19 Penalty”) in accordance with this Section. The Civil Penalty will be allocated in accordance with
20 California Health & Safety Code §§ 25249.12(c)(1) and (d), with 75% of the funds remitted to the
21 California Office of Environmental Health Hazard Assessment (“OEHHA”) and the remaining
22 25% of the funds remitted to Ferreiro. Each respective portion of the Civil Penalty shall be
23 delivered to the addresses listed in Section 2.1.3 below.

24 7.1.2 In addition to the Civil Penalty, TSA and Smith shall pay \$27,000.00 to
25 Brodsky & Smith, LLC (“Brodsky Smith”) as complete reimbursement for Ferreiro’s attorneys’
26 fees and costs, including all investigation and laboratory costs and expert fees, incurred in the
27 course of serving the Notice and bringing the Action, and in enforcing Proposition 65, including
28 without limitation, preparation of the Notice letter and discussions with the California Attorney

1 General. Payment shall be made within seven (7) days of the Effective Date.

2 7.1.3 Within seven (7) days of the Effective Date, TSA and Smith shall issue two
3 separate checks for the Civil Penalty amounts to (a) "OEHHA" in the amount of \$2,000.00; and
4 (b) "Brodsky & Smith, LLC in Trust for Ferreiro" in the amount of \$1,000.00. Payment owed to
5 Ferreiro pursuant to this Section shall be delivered to the following payment address:

6 Evan J. Smith, Esquire
7 Brodsky & Smith, LLC
8 Two Bala Plaza, Suite 510
9 Bala Cynwyd, PA 19004

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

12 For United States Postal Service Delivery:

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

18 For Non-United States Postal Service Delivery:

19 Mike Gyurics
20 Fiscal Operations Branch Chief
21 Office of Environmental Health Hazard Assessment
22 1001 I Street
23 Sacramento, CA 95814

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

26 **8. Notices**

27 8.1 Any and all notices between the Parties provided for or permitted under this
28 Consent Judgment, or by law, shall be in writing and personally delivered or sent by: (i) first-
class (registered or certified mail) return receipt requested; or (ii) overnight or two-day courier on
any Party by the other Party to the following addresses:

For TSA and Smith:

Charles Merrill, Esq.
Megan Caldwell, Esq.
Husch Blackwell LLP
190 Carondlet Plaza, Suite 600

1 St. Louis, MO 63105-3433
2 T: 314.480.1952

3 For Ferreiro:

4 Evan J. Smith, Esq.
5 BRODSKY & SMITH, LLC
6 Two Bala Plaza, Suite 510
7 Bala Cynwyd, PA 19004
8 T: 877.354.2590

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

11 **9. Authority to Stipulate**

12 9.1 Each signatory to this Consent Judgment certifies that he or she is fully authorized
13 by the Party he or she represents to enter into this Consent Judgment and to execute it on behalf of
14 the Party represented and legally to bind that Party.

15 **10. Counterparts**

16 10.1 This Consent Judgment may be signed in counterparts and shall be binding upon
17 the Parties hereto as if all said Parties executed the original hereof.

18 **11. Retention of Jurisdiction**

19 11.1 This Court shall retain jurisdiction of this matter to implement the Consent
20 Judgment.

21 **12. Service on the California Attorney General**

22 12.1 Ferreiro shall serve a copy of this Consent Judgment, signed by both Parties, on
23 the California Attorney General on behalf of the Parties so that the Attorney General may review
24 this Consent Judgment prior to its submittal to the Court for Approval. No sooner than forty-five
25 (45) days after the Attorney General has received the aforementioned copy of this Consent
26 Judgment, and in the absence of any written objection by the Attorney General to the terms of this
27 Consent Judgment, the Parties may then submit it to the Court for Approval.

28 **13. Entire Agreement**

13.1 This Consent Judgment contains the sole and entire agreement and understanding
of the Parties with respect to the entire subject matter hereof, and any and all discussions,

1 negotiations, commitments and understandings related thereto. No representations, oral or
2 otherwise, express or implied, other than those contained herein have been made by any Party
3 hereto. No other agreements not specifically referred to herein, oral or otherwise, shall be deemed
4 to exist or to bind any of the Parties.

5 **14. Governing Law and Construction**

6 14.1 The validity, construction and performance of this Consent Judgment shall be
7 governed by the laws of the State of California, without reference to any conflicts of law
8 provisions under California law.

9 **15. Court Approval**

10 15.1 If this Consent Judgment is not approved by the Court, it shall be of no force or
11 effect, and cannot be used in any proceeding for any purpose.

12 15.2 The Effective Date of this Consent Judgment shall be the date on which it is
13 entered by the Court.

14 **IT IS SO STIPULATED:**

15
16 Dated: _____

Dated: 1-6-2016

17
18 By: _____
19 Anthony Ferreiro

By: [Signature]
TSA

20
21 Dated: _____

22
23 By: _____
Smith

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

25
26 Dated: _____

27 Judge of the Superior Court

1 negotiations, commitments and understandings related thereto. No representations, oral or
2 otherwise, express or implied, other than those contained herein have been made by any Party
3 hereto. No other agreements not specifically referred to herein, oral or otherwise, shall be deemed
4 to exist or to bind any of the Parties.

5 **14. Governing Law and Construction**

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11 effect, and cannot be used in any proceeding for any purpose.

12 15.2 The Effective Date of this Consent Judgment shall be the date on which it is
13 entered by the Court.

14 **IT IS SO STIPULATED:**

15
16 Dated: _____ Dated: _____

17
18 By: _____ By: _____
19 Anthony Ferreiro TSA

20
21 Dated: 1/7/15
22 By: Jamara Smith
23 Smith

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

25
26 Dated: _____
27 _____
28 Judge of the Superior Court

1 negotiations, commitments and understandings related thereto. No representations, oral or
2 otherwise, express or implied, other than those contained herein have been made by any Party
3 hereto. No other agreements not specifically referred to herein, oral or otherwise, shall be deemed
4 to exist or to bind any of the Parties.

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8 provisions under California law.

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11 effect, and cannot be used in any proceeding for any purpose.

12 15.2 The Effective Date of this Consent Judgment shall be the date on which it is
13 entered by the Court.

14 **IT IS SO STIPULATED:**

15
16 Dated: 11/7/16 Dated: _____

17
18 By: Anthony Ferreira By: _____
19 Anthony Ferreira TSA

20
21 Dated: _____

22
23 By: _____
Smith

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

25
26 Dated: _____ Judge of the Superior Court
27