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

10 ANTHONY FERREIRO,
11 Plaintiff,
12 vs.
13 MERC ACQUISITIONS INC. and BED
BATH & BEYOND, INC.,
14 Defendants.
15

Case No. RG15798078

[PROPOSED] CONSENT JUDGMENT

Judge: Ronni B. MacLaren

Dept.: 25

Hearing Date: September 1, 2016

Hearing Time: 9:00 AM

Reservation #: R-1756243

1 **1. Introduction**

2 1.1 On July 7, 2015, Anthony Ferreiro (“Ferreiro”) served Merc Acquisitions Inc.
3 (“Merc”), Bed Bath & Beyond, Inc. (“BB&B”), and various public enforcement agencies with a
4 document entitled “Notice of Violation of California Health & Safety Code § 25249.6, *et seq.*”
5 (the “Notice”). The Notice provided Merc and such others, including public enforcers, with
6 notice that alleged that Merc was in violation of California Health & Safety Code § 25249.6
7 (“Proposition 65”), for failing to warn consumers and customers that Cirrus Bagless Cyclonic
8 Upright Vacuum (the “Product”) hoses exposed users in California to the chemicals Di(2-
9 ethylhexyl) phthalate (DEHP) and Diisononyl phthalate (DiNP). No public enforcer has
10 diligently prosecuted the allegations set forth in the Notice.

11 1.2 On December 28, 2015, Ferreiro filed a Complaint for Civil Penalties and
12 Injunctive Relief (“Complaint”) in Alameda County Superior Court, Case No. RG15798078,
13 against Merc and BB&B alleging violations of Proposition 65.

14 1.3 Merc and BB&B are each a corporation that employs more than ten persons under
15 California Health and Safety Code §25249.6 and offered the Product for sale within California.

16 1.4 Ferreiro’s Complaint alleges, among other things, that Merc sold the Product in
17 California and/or to California citizens, that the Product contains DEHP and DiNP, and that the
18 resulting exposure violated provisions of Proposition 65, by knowingly and intentionally
19 exposing persons to chemicals known to the State of California to cause both cancer and
20 reproductive toxicity without first providing a clear and reasonable warning to such individuals.

21 1.5 For purposes of this Consent Judgment only, the parties stipulate that this Court
22 has jurisdiction over the allegations of violations contained in the Complaint and personal
23 jurisdiction over Merc as to the acts alleged in the Complaint, that venue is proper in the County
24 of Alameda, and that this Court has jurisdiction to enter this Consent Judgment as a resolution of
25 the allegations contained in the Complaint.

26 1.6 The parties enter into this Consent Judgment pursuant to a full settlement of
27 disputed claims between the parties as alleged in the Complaint for the purpose of avoiding
28 prolonged litigation. By execution of this Consent Judgment, Merc does not admit any violation

1 of Proposition 65 and specifically denies that it has committed any such violation. Nothing in this
2 Consent Judgment shall be construed as an admission by Merc of any fact, issue of law or
3 violation of law, nor shall compliance with the Consent Judgment constitute or be construed as an
4 admission by Merc of any fact, issue of law, or violation of law. Nothing in this Consent
5 Judgment shall prejudice, waive, or impair any right, remedy or defense that Merc may have in
6 any other future legal proceeding. However, this paragraph shall not diminish or otherwise affect
7 the obligations, responsibilities and duties of Merc under this Consent Judgment.

8 1.7 For purposes of this Consent Judgment, the term "Effective Date" shall mean the
9 date that the Consent Judgment is entered by the Court.

10 **2. Injunctive Relief**

11 2.1 Commencing on the Effective Date, and continuing thereafter, Merc shall only
12 ship, sell, or offer for sale in California, Reformulated Product pursuant to Section 2.2 or Product
13 that is labeled with a clear and reasonable warning pursuant to Section 2.3. Merc and its
14 downstream retailers shall have no obligation to label Product that entered the stream of
15 commerce prior to the Effective Date. For purposes of this Settlement Agreement, a
16 "Reformulated Product" is Product that is in compliance with the standard set forth below in
17 section 2.2.

18 2.2 "Reformulated Product" shall mean Product that contains less than or equal to
19 1,000 parts per million ("ppm") of each of DiNP and DEHP when analyzed pursuant to CPSC-
20 CH-C1001-09.3 Standard Operating Procedure for Determination of Phthalates method.

21 2.3 Commencing on the Effective Date, Merc shall, for all Product it sells or
22 distributes and which is intended for sale in California and which that is not a Reformulated
23 Product, provide clear and reasonable warnings as set forth in subsections 2.3(a) and (b) below.
24 The warning shall be prominently placed with such conspicuousness as compared with other
25 words, statements, designs, or devices as to render it likely to be read and understood by an
26 ordinary individual under customary conditions before purchase or use. Each warning shall be
27 provided in a manner such that the consumer or user understands to which specific Product the
28 warning applies, so as to minimize the risk of consumer confusion.

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(a) Retail Store Sales

(i) Product Labeling. Merc shall affix a warning to the packaging, labeling or directly on each Product sold in retail outlets in California by Merc or any person selling the Product that states:

[PROPOSITION 65] WARNING:

This product contains chemicals known to the State of California to cause cancer, birth defects or other reproductive harm.

The bracketed text may, but is not required to, be used.

(ii) Point of Sale Warnings. Alternatively, Merc may

provide warning signs in the form below to its customers in California with instructions to post the warnings in close proximity to the point of display of the Product. Such instruction sent to Merc customers shall be sent by certified mail, return receipt requested.

[PROPOSITION 65] WARNING:

This product contains chemicals known to the State of California to cause cancer, birth defects or other reproductive harm.

The bracketed text may, but is not required to, be used.

(b) Mail Order Catalog Warning. In the event that Merc directly sells

Product via mail order catalog directly to consumers located in California after the Effective Date that is not a Reformulated Product, Merc shall provide a warning for such Product sold via mail order catalog to such California residents. A warning that is given in a mail order catalog shall be in the same type size or larger than the Product description text within the catalog. The following warning shall be provided on the same page and in the same location as the display and/or description of the Product:

[PROPOSITION 65] WARNING:

This product contains chemicals known to the State of California to cause cancer, birth defects or other reproductive harm.

Where it is impracticable to provide the warning on the same page and in the same location as the display and/or description of the Product, Merc may utilize a designated symbol to cross

1 reference the applicable warning and shall define the term “designated symbol” with the
2 following language on the inside of the front cover of the catalog or on the same page as any
3 order form for the Product:

4 **[PROPOSITION 65] WARNING:** Certain products identified with this symbol
5 ▼ and offered for sale in this catalog contain chemicals known to the State of
6 California to cause cancer, birth defects or other reproductive harm.

7 The designated symbol must appear on the same page and in close proximity to the
8 display and/or description of the Product. On each page where the designated symbol appears,
9 Merc must provide a header or footer directing the consumer to the warning language and
10 definition of the designated symbol.

11 **(c) Internet Sales Warning.** In the event that Merc directly sells Product
12 via the internet directly to consumers located in California after the Effective Date that is not a
13 Reformulated Product, Merc shall provide a warning for such Product sold via the internet to such
14 California residents. A warning that is given on the internet shall be in the same type size or
15 larger than the Product description text and shall be given in conjunction with the direct sale of
16 the Product. The warning shall appear either: (a) on the same web page on which the Product is
17 displayed; (b) on the same web page as the order form for the Product; (c) on the same page as
18 the price for the Product; or (d) on one or more web pages displayed to a purchaser during the
19 checkout process. The following warning shall be provided:

20 **[PROPOSITION 65] WARNING:**

21 This product contains chemicals known to the State of California to cause cancer, birth
22 defects or other reproductive harm

23 2.4 The warning requirements set forth in Section 2.3 shall not apply to any
24 Reformulated Product.

25 **3. Entry of Consent Judgment**

26 3.1 The parties hereby request that the Court promptly enter this Consent Judgment.
27 Upon entry of this Consent Judgment, Ferreiro and Merc waive their respective rights to a hearing
28 or trial on the allegations of the Ferreiro Complaint and 60-Day Notice.

1 3.2 In the event that the Attorney General objects or otherwise comments on one or
2 more provisions of this Consent Judgment, Ferreiro and Merc agree to take reasonable steps to
3 satisfy such concerns or objections.

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

5 4.1 **Plaintiff's Public Release of Proposition 65 Claims.** This Consent
6 Judgment is a final and binding resolution between Plaintiff Ferreiro, acting on his own behalf,
7 and on behalf of the public and in the public interest, and Defendant Merc, and shall have
8 preclusive effect such that no other person or entity, whether purporting to act in his, her, or its
9 interests or the public interest shall be permitted to pursue and/or take any action with respect to:
10 (i) any violation of Proposition 65 that was alleged in the Complaint, or that could have been
11 brought pursuant to the Notice; or (ii) any other statutory or common law claim, to the fullest
12 extent that any of the foregoing described in (i) or (ii) were or could have been asserted by any
13 person or entity against Merc, including any and all downstream retailers of the Product
14 including but NOT limited to BB&B, based on its exposure of persons to the Product, or its
15 failure to provide a clear and reasonable warning of exposure to such individuals, or (iii) as to
16 alleged exposures to the Product, any other claim based on whole or in part on the facts alleged in
17 the Complaint and the Notice, whether based on actions committed by Merc or its downstream
18 retailers of the Product including but NOT limited to BB&B. As to alleged exposures to the
19 Product, compliance with the terms of this Consent Judgment resolves any issue, now and in the
20 future, and is deemed sufficient to satisfy all obligations concerning, compliance by Merc with
21 the requirements of Proposition 65 with respect to the Product, and any alleged resulting
22 exposure.

23 4.2 **Plaintiff's Release of Additional Claims & Waiver of Rights Under Section**
24 **1542 of the California Civil Code.** As to alleged exposures to the Product, Ferreiro waives all
25 rights to institute any form of legal action, and releases all claims against Merc, BB&B (including
26 their parents, subsidiaries or affiliates, and assigns of any of them, who may use, maintain,
27 distribute or sell the Product) whether under Proposition 65 or otherwise, arising out of or
28 resulting from, or related directly or indirectly to, in whole or in part, the Product, including but

1 not limited to any exposure to, or failure to warn with respect to, the Product (referred to
2 collectively in this Section as the "Claims"). In furtherance of the foregoing, as to alleged
3 exposures to the Product, Ferreiro waives any and all rights and benefits which he now has, or in
4 the future may have, conferred upon him with respect to the Claims by virtue of the provisions of
5 § 1542 of the California Civil Code, which provides as follows:

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

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

16 **5. Enforcement of Judgment**

17 5.1 The terms of this Consent Judgment shall be enforced exclusively by the parties
18 hereto. The parties may, by noticed motion or order to show cause before the Superior Court of
19 Alameda County, giving the notice required by law, enforce the terms and conditions contained
20 herein. In any proceeding brought by either party to enforce this Consent Judgment, such party
21 may seek whatever fines, costs, penalties or remedies as may be provided by law for any violation
22 of Proposition 65 or this Consent Judgment.

23 **6. Modification of Judgment**

24 6.1 This Consent Judgment may be modified only by written agreement of the parties
25 upon entry of a modified Consent Judgment by the Court thereon, or upon motion of any party as
26 provided by law and upon an entry of a modified Consent Judgment by the Court.

27 6.2 Should any court enter final judgment in a case brought by Ferreiro or the People
28 involving the Product that sets forth standards defining when Proposition 65 warnings will or will

1 not be required (“Alternative Standards”), or if the California Attorney General’s office otherwise
2 provides written endorsement (i.e., a writing that is circulated by the Attorney General that is not
3 intended for the purpose of soliciting further input or comments) of Alternative Standards
4 applicable to the products that are of the same general type and function as the Product and
5 constructed from the same materials, Merc shall be entitled to seek a modification of this Consent
6 Judgment on sixty (60) days’ notice to Ferreiro so as to be able to utilize and rely on such
7 Alternative Standards in lieu of those set forth in Section 2 of this Consent Judgment. Ferreiro
8 shall not unreasonably contest any proposed application to effectuate such a modification
9 provided that the Product for which such a modification is sought are of the same general type
10 and function as those to which the Alternative Standards apply.

11 **7. Settlement Payment**

12 7.1 In settlement of all the claims referred to in this Consent Judgment, and without
13 any admission of liability therefore, Merc shall make the following monetary payments:

14 7.1.1 Merc shall pay a total of \$1,500.00 in civil penalties in accordance with
15 this Section. The civil penalty payment will be allocated in accordance with California Health &
16 Safety Code §§ 25249.12(c)(1) and (d), with 75% of the funds remitted to the California Office of
17 Environmental Health Hazard Assessment ("OEHHA") and the remaining 25% of the civil
18 penalty remitted to Ferreiro.

19 7.1.2 Within seven (7) business days of the Effective Date, Merc shall issue two
20 separate checks for the initial civil penalty payment to (a) "OEHHA" in the amount of \$1,125.00;
21 and (b) "Brodsky & Smith, LLC in Trust for Ferreiro" in the amount of \$375.00. Payment owed
22 to 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
26 Bala Cynwyd, PA 19004

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

For United States Postal Service Delivery:

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

7 For Non-United States Postal Service Delivery:

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

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

15 7.1.3 In addition to the payment above, Merc shall pay \$13,500.00 to Brodsky &
16 Smith, LLC (“Brodsky Smith”) as complete reimbursement for Plaintiff Ferreiro’s attorneys’ fees
17 and costs, including any investigation and laboratory costs or expert fees, incurred in the course
18 of bringing the Ferreiro action, and in enforcing Proposition 65, including without limitation,
19 preparation of the 60-Day Notice letter and discussions with the office of the Attorney General.
20 Payment shall be made within seven (7) business days of the Effective Date and sent to the
21 address for Brodsky & Smith set forth in section 7.1.2, above.

22 **8. Notices**

23 8.1 Any and all notices between the parties provided for or permitted under this
24 Agreement, or by law, shall be in writing and personally delivered or sent by: (i) first-class
25 (registered or certified mail) return receipt requested; or (ii) overnight or two-day courier on any
26 party by the other party to the following addresses:

27 For Merc:

28 Jonathon J. Herzog
WESTON HERZOG LLP
550 N. Brand Blvd., Suite 1990
Glendale, CA 91203
T: 818.755.8555

1 For Ferreiro:

2 Evan J. Smith
3 BRODSKY & SMITH, LLC
4 9595 Wilshire Blvd., Suite 900
5 Beverly Hills, CA 90212
6 T: 877.354.2590

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

9 **9. Authority to Stipulate**

10 9.1 Each signatory to this Consent Judgment certifies that he or she is fully authorized
11 by the party he or she represents to enter into this Consent Judgment and to execute it on behalf of
12 the party represented and legally to bind that party.

13 **10. Counterparts**

14 10.1 This Stipulation may be signed in counterparts and shall be binding upon the
15 parties hereto as if all said parties executed the original hereof.

16 **11. Retention of Jurisdiction**

17 11.1 This Court shall retain jurisdiction of this matter to implement the Consent
18 Judgment.

19 **12. Service on the Attorney General**

20 12.1 Ferreiro shall serve a copy of this Consent Judgment, signed by both parties, on the
21 California Attorney General on behalf of the parties so that the Attorney general may review this
22 Consent Judgment prior to its submittal to the Court for Approval. No sooner than forty-five (45)
23 days after the Attorney General has received the aforementioned copy of this Consent Judgment,
24 and in the absence of any written objection by the Attorney General to the terms of this Consent
25 Judgment, the parties may then submit it to the Court for Approval.

26 **13. Entire Agreement**

27 13.1 This Consent Judgment contains the sole and entire agreement and understanding
28 of the parties with respect to the entire subject matter hereof, and any and all discussions,
negotiations, commitment and understandings related thereto. No representations, oral or
otherwise, express or implied, other than those contained herein have been made by any party

1 hereto. No other agreements not specifically referred to herein, oral or otherwise, shall be deemed
2 to exist or to bind any of the parties.

3 **14. Governing Law and Construction**

4 14.1 The validity, construction and performance of this Consent Judgment shall be
5 governed by the laws of the State of California, without reference to any conflicts of law
6 provisions of California law.

7 **15. Court Approval**

8 15.1 If this Consent Judgment is not approved by the Court, it shall be of no force or
9 effect, and cannot be used in any proceeding for any purpose.

10 **IT IS SO STIPULATED:**

11
12 Dated: July 14, 2016

Dated: 7/13/16

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14 By: Anthony Ferreira
15 Anthony Ferreira

By: Tim & Fide, CFO
Mere Acquisitions, Inc.

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

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19 Dated: _____

Judge of Superior Court

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