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6
7 SUPERIOR COURT OF THE STATE OF CALIFORNIA
8 COUNTY OF ALAMEDA
9

10 ANTHONY FERREIRO,

11 Plaintiff,

12 vs.

13 BASS PRO OUTDOOR WORLD, L.L.C.
14 and BPS DIRECT, LLC,

15 Defendants.
16

Case No. RG16829471

[PROPOSED] CONSENT JUDGMENT

Judge: Dennis Hayashi

Dept.: 303

Hearing Date: December 7, 2016

Hearing Time: 2:30 PM

Reservation #: R-1784488
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1. Introduction

1.1 On October 12, 2015, Anthony Ferreiro (“Ferreiro”) served Bass Pro Outdoor World L.L.C., and BPS Direct LLC (collectively, “Bass Pro” or “Defendants”), and various public enforcement agencies with a 60-Day Notice of Violation of California Health & Safety Code §25249.5, *et seq.*, letter (the “Notice 1”) that alleged that Bass Pro, through its sales in California of the “Tactical Fly Fishing System – PVC Rolltop Pouch, UPC No. 0 92229 622378” was knowingly and intentionally exposing persons to Di(2-ethylhexyl) phthalate (DEHP) without first providing clear and reasonable warnings to those persons as required by the Safe Drinking Water and Toxic Enforcement Act of 1986, Health & Safety Code § 25249.5, *et seq.* (“Proposition 65”).

1.2 On October 16, 2015, Ferreiro served Bass Pro, and various public enforcement agencies with additional 60-Day Notice(s) of Violation of California Health & Safety Code §25249.5, *et seq.*, that alleged that Bass Pro, through its sales in California of “Beretta Standard Hearing Muffs, UPC No. 082442092195” (“Notice 2”), and “Heavy Duty Rod Holders, UPC No. 033548352386” (“Notice 3”), was knowingly and intentionally exposing persons to Diisononyl Phthalate (DINP) and DEHP without first providing clear and reasonable warnings to those persons as required by Proposition 65.

1.3 Notice 1, Notice 2, and Notice 3 are collectively referred to herein as, the “Notices.”

1.4 The (a) “Tactical Fly Fishing System – PVC Rolltop Pouch, UPC No. 0 92229 622378”, (b) “Beretta Standard Hearing Muffs, UPC No. 082442092195”, (c) “Heavy Duty Rod Holder, UPC No. 033548352386”, and (d) “RedHead Classic Blind Bags, UPC No. 033548944345” are collectively referred to herein as, the “Products.”

1.5 On August 31, 2016, Ferreiro (“Plaintiff”) filed a Complaint for Civil Penalties and Injunctive Relief (“Complaint”) in Alameda County Superior Court, Case No. RG16829471, against Bass Pro for alleged violations Proposition 65.

1 1.6 Bass Pro Outdoor World L.L.C., and BPS Direct LLC are each a corporation that
2 employs more than ten persons under California Health and Safety Code §25249.6 and offered
3 the Products for sale within the State of California.

4 1.7 The Complaint alleges, among other things, that Defendants sold the Products
5 containing phthalates, and that the resulting exposures violated provisions of Proposition 65 by
6 knowingly and intentionally exposing persons to chemicals known to the State of California to
7 cause both cancer and reproductive toxicity, without first providing a clear and reasonable
8 warning to such individuals.

9 1.8 For purposes of this Consent Judgment only, Plaintiff and Defendants (the
10 “Parties”) stipulate that this Court has jurisdiction over the allegations of violations contained in
11 the Complaint and personal jurisdiction over Defendants as to the acts alleged in the Complaint,
12 that venue is proper in the county of Alameda, and that this Court has jurisdiction to enter this
13 Consent Judgment as a resolution of the allegations contained in the Complaint.

14 1.9 The Parties enter into this Consent Judgment pursuant to a full settlement of
15 disputed claims between the parties as alleged in the Complaint for the purpose of avoiding
16 prolonged litigation. By execution of this Consent Judgment, Defendants do not admit any
17 violation of Proposition 65 and specifically deny that they have committed any such violations.
18 Nothing in this Consent Judgment shall be construed as an admission by Defendants of any fact,
19 issue of law or violation of law, nor shall compliance with the Consent Judgment constitute or be
20 construed as an admission by Defendants of any fact, issue of law, or violation of law. Nothing in
21 this Consent Judgment shall prejudice, waive, or impair any right, remedy or defense that
22 Defendants may have in any other future legal proceeding. However, this paragraph shall not
23 diminish or otherwise affect the obligations, responsibilities and duties of Defendants under this
24 Consent Judgment.

25 1.10 The term “Effective Date” means the date this Consent Judgment is entered as a
26 Judgment of the Court.

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2. Injunctive Relief

2.1 Commencing on the Effective Date, and continuing thereafter, Defendants shall only ship, sell, or offer for sale in California, reformulated Products pursuant to Section 2.2 or Products that are labeled with a clear and reasonable warning pursuant to Section 2.3. Defendants shall have no obligation to label Products that entered the stream of commerce prior to the Effective Date. For purposes of this Settlement Agreement, "Reformulated Products" are Products that are in compliance with the standard set forth below in section 2.2.

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

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

(a) Retail Store Sales

(i) Product Labeling. Defendants shall affix a warning to the packaging, labeling or directly on each Product sold in retail outlets in California by Defendants or any person selling the Products 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, Defendants may provide warning signs in the form below at at Bass Pro's retail stores in California in close proximity to the point of display of the Products.

1 **[PROPOSITION 65] WARNING:**

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

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

5 **(b) Mail Order Catalog Warning.** In the event that Defendants directly
6 sell Products via mail order catalog directly to consumers located in California after the Effective
7 Date that are not Reformulated Products, Defendants shall provide a warning for such Products
8 sold via mail order catalog to such California residents. A warning that is given in a mail order
9 catalog shall be in the same type size or larger than the Product description text within the
10 catalog. The following warning shall be provided on the same page and in the same location as
11 the display and/or description of the Product:

12 **[PROPOSITION 65] WARNING:**

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

15 Alternatively, Defendants may utilize a designated symbol to cross reference the applicable
16 warning and shall define the term “designated symbol” with the following language on the inside
17 of the front cover of the catalog or on the same page as any order form for the Product:

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

21 The designated symbol must appear on the same page and in close proximity to the
22 display and/or description of the Product. On each page where the designated symbol appears,
23 Defendants must provide a header or footer directing the consumer to the warning language and
24 definition of the designated symbol.

25 **(c) Internet Sales Warning.** In the event that Defendants directly sell
26 Products via the internet directly to consumers located in California after the Effective Date that
27 are not Reformulated Products, Defendants shall provide a warning for such Products sold via the
28 internet to California residents. A warning that is given on the internet shall be in the same type
 size or larger than the Products’ description text and shall be given in conjunction with the direct
 sale of the Products. The warning shall appear either: (a) on the same web page on which the

1 Products are displayed; (b) on the same web page as the order form for the Products; (c) on the
2 same page as the price for the Products; or (d) on one or more web pages displayed to a purchaser
3 during the checkout process. The following warning shall be provided:

4 **[PROPOSITION 65] WARNING:**

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

7 2.4 The warning requirements set forth in Section 2.3 shall not apply to any
8 Reformulated Product.

9 **3. Matters Covered By This Consent Judgment**

10 3.1 This Consent Judgment is a full, final, and binding resolution between Plaintiff
11 and Defendants and each of Defendants' past and present parents, affiliates, subsidiaries,
12 divisions, predecessors, successors, and assigns, and each of their respective owners, officers,
13 directors, board members, trustees, shareholders, managers, members, employees, agents,
14 insurers, attorneys, auditors, accountants, experts, stockholders, representatives, partners, and any
15 other persons acting on their behalf ("Released Parties") concerning or in any way relating to the
16 claims that have been or could have been asserted against Defendants and/or the Released Parties
17 up through the date on which this Consent Judgment is entered, provided that such claims are
18 based on or relate to the facts alleged in the operative complaint in the Action.

19 3.2 Plaintiff, acting on his own behalf and in the public interest pursuant to Health &
20 Safety Code § 25249.7(d), releases, waives, and forever discharges any and all claims against
21 Defendants and/or the Released Parties arising from any violation of Proposition 65 or any other
22 statutory or common law claims that have been or could have been asserted in the public interest
23 regarding the failure to warn about exposure to the Products prior to the date on which this
24 Consent Judgment is entered.

25 3.3 As to alleged exposures to the Products, Plaintiff waives all rights to institute any
26 form of legal action, and releases all claims against Defendants and/or the Released Parties
27 whether under Proposition 65 or otherwise, arising out of or resulting from, or related directly or
28 indirectly to, in whole or in part, the Products, including but not limited to any exposure to, or

1 failure to warn with respect to, the Products (referred to collectively in this Section as the
2 “Claims”). In furtherance of the foregoing, as to alleged exposures to the Products, Plaintiff
3 waives any and all rights and benefits which he now has, or in the future may have, conferred
4 upon him with respect to the Claims by virtue of the provisions of § 1542 of the California Civil
5 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 FAVOR AT
8 THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM
9 MUST HAVE MATERIALLY AFFECTED HIS SETTLEMENT WITH THE
10 DEBTOR.

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

16 **4. Enforcement of Judgment**

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

22 **5. Modification of Judgment**

23 5.1 This Consent Judgment may be modified only by written agreement of the Parties
24 upon entry of a modified Consent Judgment by the Court thereon, or upon motion of any party as
25 provided by law and upon an entry of a modified Consent Judgment by the Court.

26 5.2 Should any court enter final judgment in a case brought by Plaintiff or any other
27 private citizen acting in the interest of the general public to enforce Proposition 65, or the People,
28 involving the Products that sets forth standards defining when Proposition 65 warnings will or
will not be required (“Alternative Standards”), or if the California Attorney General’s office

1 otherwise provides written endorsement (i.e., a writing that is circulated by the Attorney General
2 that is not intended for the purpose of soliciting further input or comments) of Alternative
3 Standards applicable to the products that are of the same general type and function as the Products
4 and constructed from the same materials, Defendants shall be entitled to seek a modification of
5 this Consent Judgment on forty-five (45) days' notice to Plaintiff so as to be able to utilize and
6 rely on such Alternative Standards in lieu of those set forth in Section 7 of this Consent Judgment.
7 Plaintiff shall not unreasonably contest any proposed application to effectuate such a modification
8 provided that the Products for which such a modification is sought are of the same general type
9 and function as those to which the Alternative Standards apply.

10 **6. Settlement Payment**

11 6.1 In settlement of all the claims referred to in this Consent Judgment, and without
12 any admission of liability therefore, Defendants shall make the following monetary payments:

13 6.1.1 Defendants shall pay a total of \$2,000.00 in civil penalties in accordance
14 with this Section. The civil penalty payment will be allocated in accordance with California
15 Health & Safety Code §§ 25249.12(c)(1) and (d), with 75% of the funds remitted to the California
16 Office of Environmental Health Hazard Assessment ("OEHHA") and the remaining 25% of the
17 civil penalty remitted to Plaintiff.

18 6.1.2 In addition to the payment above, Defendants shall pay \$25,000.00 to
19 Brodsky & Smith, LLC ("Brodsky Smith") as complete reimbursement for Plaintiff's attorneys'
20 fees and costs, including any investigation and laboratory costs or expert fees, in bringing the
21 Complaint, and in enforcing Proposition 65, including without limitation, preparation of the 60-
22 Day Notice letters and discussions with the office of the Attorney General. Payment shall be
23 made within seven (7) days after entry of Judgment.

24 6.1.3 Within seven (7) business days after entry of Judgment, Defendants shall
25 issue checks for the initial civil penalty payment as follows: Defendants shall issue checks to the
26 following (a) "OEHHA" in the amount of \$1,500.00; and (b) "Brodsky & Smith, LLC Trust
27 Account" in the amount of \$500.00 which Brodsky & Smith will hold in trust for Ferreiro; and (c)
28 "Brodsky & Smith, LLC" in the amount of \$25,000.00.

1 6.1.4 Payment owed to Ferreiro and Brodsky Smith pursuant to this Section shall
2 be delivered to the following payment address:

3 Evan J. Smith, Esquire
4 Brodsky & Smith, LLC
5 Two Bala Plaza, Suite 510
6 Bala Cynwyd, PA 19004

7 6.1.5 Payment owed to OEHHA (EIN: 68-0284486) pursuant to this Section
8 shall be delivered directly to OEHHA (Memo Line "Prop 65 Penalties") at one of the following
9 addresses:

10 For United States Postal Service Delivery:

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

16 For Non-United States Postal Service Delivery:

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

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

24 6.1.6 In the event that the Attorney General objects or otherwise comments on
25 one or more provisions of this Consent Judgment, the Parties agree to take reasonable steps to
26 satisfy such concerns or objections.

27 7. **Notices**

28 Any and all notices between the Parties provided for or permitted under this Agreement,
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:

1 For Bass Pro:

2 Caroline L. Plant
3 Pillsbury Winthrop Shaw Pittman LLP
4 725 South Figueroa Street, Suite 2800
5 Los Angeles, CA 90017-5406

6 For Ferreiro:

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

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

13 **8. Authority to Stipulate**

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

17 **9. Counterparts**

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

20 **10. Retention of Jurisdiction**

21 This Court shall retain jurisdiction of this matter to implement the Consent Judgment.

22 **11. Service on the Attorney General**

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

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12. Entire Agreement

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

13. Governing Law and Construction

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

14. Court Approval

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

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

IT IS SO STIPULATED:

Dated: 9/21/2016

Dated: September 21, 2016

By: Anthony Ferreiro
Anthony Ferreiro

By: Larry K Wilcher
Bass Pro Outdoor World L.L.C., &
BPS Direct LLC

IT IS SO ORDERED, ADJUDGED AND DECREED:

Dated: _____

Judge of Superior Court