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Evan Smith (Bar No. SBN 242352)
BRODSKY & SMITH, LLC.
9595 Wilshire Blvd., Ste. 900
Beverly Hills, CA 90212
Tel: (877) 534-2590
Fax: (310) 247-0160

Attorneys for Plaintiff

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ALAMEDA

ANTHONY FERREIRO,
Plaintiff,
v.
AARCO PRODUCTS, INC.,
Defendant.

Case No.: RG17846108
CONSENT JUDGMENT
Judge: Frank Roesch
Dept.: 24
Hearing Date: May 17, 2018
Hearing Time: 3:45 PM
Reservation #: R-1948437

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 Aarco Products, Inc.
4 (“Aarco” 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 who 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. Aarco is a person in the course of doing
8 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 Diisononyl phthalate (DINP) from bulletin boards without providing clear and
11 reasonable warnings under Proposition 65. DINP is listed under Proposition 65 as a chemical
12 known to the State of California to cause cancer.

13 1.3 **Notices of Violation/Complaint.** On or about September 6, 2016, Ferreiro served
14 Aarco, and various public enforcement agencies with a document entitled “60-Day Notice of
15 Violation” pursuant to Health & Safety Code §25249.7(d) (the “Notice”), alleging that Defendant
16 was in violation of Proposition 65 for failing to warn consumers and customers that dry gear bags
17 exposed users in California to DINP. No public enforcer has brought and is diligently prosecuting
18 the claims alleged in the Notice. On January 18, 2017, Ferreiro filed a complaint (the “Complaint”)
19 in the matter.

20 1.4 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
21 jurisdiction over Defendant as to the allegations contained in the Complaint filed in this matter, that
22 venue is proper in the County of Alameda, and that this Court has jurisdiction to approve, enter,
23 and oversee the enforcement of this Consent Judgment as a full and final binding resolution of all
24 claims which were or could have been raised in the Complaint based on the facts alleged therein
25 and/or in the Notice.

26 1.5 Defendant denies the material allegations contained in Ferreiro’s Notice and
27 Complaint and maintains that it has not violated Proposition 65. Nothing in this Consent Judgment
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1 shall be construed as an admission by Defendant of any fact, finding, issue of law, or violation of
2 law; nor shall compliance with this Consent Judgment constitute or be construed as an admission
3 by Defendant of any fact, finding, conclusion, issue of law, or violation of law, such being
4 specifically denied by Defendant. However, this section shall not diminish or otherwise affect the
5 obligations, responsibilities, and duties of Defendant under this Consent Judgment.

6 **2. DEFINITIONS**

7 2.1 **Covered Products.** The term “Covered Products” means Aarco Products Bulletin
8 Boards that are manufactured, distributed and/or offered for sale in California by Aarco, and that
9 contain DINP.

10 2.2 **Effective Date.** The term “Effective Date” means the date this Consent Judgment is
11 entered as a Judgment of the Court.

12 **3. INJUNCTIVE RELIEF: WARNINGS**

13 3.1 As of the date this Consent Judgment is signed by both Parties, Aarco shall not
14 manufacture or order from any supplier any Covered Products intended for retail sale in California
15 that contains DINP on any component to which consumers are exposed in excess of 0.1% (1,000
16 ppm) (hereinafter “Reformulated Products”) unless the Covered Product is accompanied by a
17 warning that complies with Article 6 of Title 27 of the California Code of Regulations. Covered
18 Products sold by Aarco before the date this Consent Judgment is signed by both Parties may sell
19 through without a warning even if not Reformulated Products. Until August 30, 2018, the warning
20 shall consist of either:

21 (a) The statement: “WARNING: This product contains a chemical known to the State
22 of California to cause cancer.”; or

23 (b) (1) A symbol consisting of a black exclamation point in a yellow equilateral triangle
24 with a bold black outline to the left of the word “warning” in bold all capital letters, followed
25 by the statement “This product can expose you to chemicals including Diisononyl phthalate
26 (DINP), which is known to the State of California to cause cancer. For more information,
27 go to www.P65Warnings.ca.gov.”; or (2) a warning consisting of a symbol that is a black
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1 exclamation point in a yellow equilateral triangle with a bold black outline to the left of the
2 word “warning” in bold all capital letters, followed by the statement “Cancer and
3 Reproductive Harm - www.P65Warnings.ca.gov.”¹
4

5 For Covered Products manufactured on and after August 30, 2018, the warning set forth in Section
6 3.1(b) shall be used.

7 3.2 The warning provided pursuant to Section 3.1 shall be affixed to or printed on the
8 Covered Product’s packaging or labeling. The warning shall be prominently affixed to or printed
9 on the packaging or labeling and displayed with such conspicuousness, as compared with other
10 words, statements, or designs as to render it likely to be read and understood by an ordinary
11 individual under customary conditions of purchase or use. A warning may be contained in the same
12 section of the packaging, labeling, or instruction booklet that states other safety warnings, if any,
13 concerning the use of the product and shall be at least the same size as those other safety warnings.

14 4. MONETARY TERMS

15 4.1 **Civil Penalty.** Aarco shall pay an Civil Penalty of \$500.00 pursuant to Health and
16 Safety Code section 25249.7(b), to be apportioned in accordance with California Health & Safety
17 Code § 25192, with 75% of these funds remitted to the State of California’s Office of
18 Environmental Health Hazard Assessment and the remaining 25% of the penalty remitted to
19 Ferreiro, as provided by California Health & Safety Code § 25249.12(d).

20 4.1.1 Within fourteen (14) business days of the Effective Date, Aarco shall issue
21 two separate checks for the Civil Penalty payment to (a) “OEHHA” in the amount of \$375.00;
22 and (b) “Brodsky & Smith, LLC in Trust for Ferreiro” in the amount of \$125.00. Payment owed
23 to Ferreiro pursuant to this Section shall be delivered to the following payment address:

24 Evan J. Smith, Esquire
25 Brodsky & Smith, LLC
26 Two Bala Plaza, Suite 510
27 Bala Cynwyd, PA 19004
28

¹ The triangular symbol need only be in yellow where the sign, label, shelf tag or other transmission format is being printed in color for purposes of other language, symbols or designs.

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

3 For United States Postal Service Delivery:

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

9 For Non-United States Postal Service Delivery:

10 Mike Gyurics
11 Fiscal Operations Branch Chief
12 Office of Environmental Health Hazard Assessment
13 1001 I Street
14 Sacramento, CA 95814

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

17 4.2 **Attorney Fees.** Arco shall pay \$12,000.00 to Brodsky & Smith, LLC ("Brodsky
18 Smith") as complete reimbursement for Plaintiff Ferreiro's attorneys' fees and costs incurred as a
19 result of investigating, bringing this matter to Arco's attention, litigating and negotiating and
20 obtaining judicial approval of a settlement in the public interest, pursuant to Code of Civil
21 Procedure section 1021.5. Payment shall be made within fourteen (14) business days of the
22 Effective Date and sent to the address for Brodsky & Smith set forth in section 4.1.1, above.

23 **5. RELEASE OF ALL CLAIMS**

24 5.1 This Consent Judgment is a full, final, and binding resolution between Ferreiro
25 acting on his own behalf, and on behalf of the public interest, and Arco, and its parents,
26 shareholders, directors, officers, employees, representatives, agents, attorneys, divisions,
27 subdivisions, subsidiaries, partners, sister companies, and affiliates, and their predecessors,
28 successors and assigns ("Defendant Releasees"), and all entities from whom they obtain and to
whom they directly or indirectly distribute or sell Covered Products, including but not limited to
manufacturers, suppliers, distributors, wholesalers, customers, licensors, licensees retailers,
franchisees, and cooperative members, including but not limited to Sears Holdings Corporation and

1 Sears Holdings Management Corporation (“Upstream and Downstream Releasees”), of all claims
2 for violations of Proposition 65 based on exposure to DINP from Covered Products as set forth in
3 the Notice, with respect to any Covered Products manufactured, distributed, or sold by Aarco prior
4 to the Effective Date. This Consent Judgment shall have preclusive effect such that no other person
5 or entity, whether purporting to act in his, her, or its interests or the public interest shall be permitted
6 to pursue and/or take any action with respect to any violation of Proposition 65 that was alleged in
7 the Complaint, or that could have been brought pursuant to the Notice against Aarco or its Upstream
8 and Downstream Releasees of the Product including but not limited to ("Proposition 65 Claims").
9 Compliance with the terms of this Consent Judgment constitutes compliance with Proposition 65
10 with regard to the Covered Products.

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

24 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE
25 CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR
26 AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY
27 HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS SETTLEMENT WITH
28 THE DEBTOR.

1 5.3 Aarco waives any and all claims against Ferreiro, his attorneys and other
2 representatives, for any and all actions taken or statements made (or those that could have been
3 taken or made) by Ferreiro and his attorneys and other representatives, whether in the course of
4 investigating claims or otherwise seeking enforcement of Proposition 65 against it in this matter,
5 and/or with respect to Covered Products.

6 **6. INTEGRATION**

7 6.1 This Consent Judgment contains the sole and entire agreement of the Parties and
8 any and all prior negotiations and understandings related hereto shall be deemed to have been
9 merged within it. No representations or terms of agreement other than those contained herein exist
10 or have been made by any Party with respect to the other Party or the subject matter hereof.

11 **7. GOVERNING LAW**

12 7.1 The terms of this Consent Judgment shall be governed by the laws of the State of
13 California and apply within the State of California. In the event that Proposition 65 is repealed or
14 is otherwise rendered inapplicable by reason of law generally, or as to Covered Products, then
15 Defendant shall have no further obligations pursuant to this Consent Judgment with respect to, and
16 to the extent that, Covered Products are so affected.

17 **8. NOTICES**

18 8.1 Unless specified herein, all correspondence and notices required to be provided
19 pursuant to this Consent Judgment shall be in writing and personally delivered or sent by: (i) first-
20 class, (registered or certified mail) return receipt requested; or (ii) overnight courier on any party
21 by the other party at the following addresses:

22 For Defendant:

23 Garth N. Ward
24 Lewis Brisbois Bisgaard & Smith LLP
25 701 B Street, Suite 1900
26 San Diego, CA 92101

26 And

27 For Ferreiro:

28 Evan Smith

1 Brodsky & Smith, LLC
2 9595 Wilshire Blvd., Ste. 900
3 Beverly Hills, CA 90212

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

6 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

7 9.1 This Consent Judgment may be executed in counterparts and by facsimile, each of
8 which shall be deemed an original, and all of which, when taken together, shall constitute one and
9 the same document.

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

11 10.1 Ferreiro agrees to comply with the requirements set forth in California Health &
12 Safety Code §25249.7(f) and to promptly bring a Motion for Approval of this Consent Judgment
13 and Defendant agrees it shall support approval of such Motion.

14 10.2 This Consent Judgment shall not be effective until it is approved and entered by the
15 Court and shall be null and void if, for any reason, it is not approved by the Court. In such case,
16 the Parties agree to meet and confer on how to proceed and if such agreement is not reached within
17 30 days, the case shall proceed on its normal course.

18 10.3 If the Court approves this Consent Judgment and is reversed or vacated by an
19 appellate court, the Parties shall meet and confer as to whether to modify the terms of this Consent
20 Judgment. If the Parties do not jointly agree on a course of action to take, the case shall proceed on
21 its normal course on the trial court's calendar.

22 **11. MODIFICATION**

23 11.1 This Consent Judgment may be modified only by further stipulation of the Parties
24 and the approval of the Court or upon the granting of a motion brought to the Court by either Party.

25 **12. ATTORNEY'S FEES**

26 12.1 A party who unsuccessfully brings or contests an action arising out of this Consent
27 Judgment shall be required to pay the prevailing party's reasonable attorney's fees and costs unless
28 the unsuccessful party has acted with substantial justification. For purposes of this Consent

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Judgment, the term substantial justification shall carry the same meaning as used in the Civil Discovery Act of 1986, Code of Civil Procedure Section 2016, *et seq.*

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 certifies 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: 3/26/18
By: Anthony Ferreiro
ANTHONY FERREIRO

Date: 3/23/2018
By: George M. DiMartino
AARCO PRODUCTS, INC.

IT IS SO ORDERED, ADJUDGED AND DECREED:

Dated: _____

Judge of Superior Court