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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ALAMEDA

10 ANTHONY FERREIRO,

11 Plaintiff,

12 v.

13 IMPULSE ! ENTERPRISES, LLC,
14 OVERSTOCK.COM, INC.,

15 Defendant.

Case No.: RG18891707

CONSENT JUDGMENT

Judge: Jo-Lynne Q. Lee

Dept.: 18

Hearing Date: June 19, 2018

Hearing Time: 3:00 PM

Reservation #: R-1958064

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 Impulse! Enterprises,
4 LLC (“Impulse!” 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 who 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. Impulse! is a person in the
8 course of doing business for purposes of Proposition 65, Cal. Health & Safety Code §§ 25249.6 et
9 seq.

10 1.2 **Allegations and Representations.** Ferreiro alleges that Defendant has exposed
11 individuals to Bisphenol A (BPA) from polycarbonate drinkware without providing clear and
12 reasonable warnings under Proposition 65. BPA is listed under Proposition 65 as a chemical known
13 to the State of California to cause reproductive toxicity.

14 1.3 **Notice of Violation/Complaint.** On or about August 4, 2017, Ferreiro served
15 Impulse! and various public enforcement agencies with a document entitled “60-Day Notice of
16 Violation” pursuant to Health & Safety Code § 25249.7(d) (the “Notice”), alleging that Defendant
17 was in violation of Proposition 65 for failing to warn consumers and customers that the
18 polycarbonate drinkware exposed users in California to BPA. No public enforcer has brought and
19 is diligently prosecuting the claims alleged in the Notice. On February 2, 2018, Ferreiro filed a
20 complaint in the matter (the “Complaint”).

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

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 Impulse! polycarbonate
10 drinkware, including but not limited to Capri Latte Sets, and Carafes, that are manufactured,
11 distributed and/or offered for sale in California by Impulse!, or an entity to whom Impulse! directly
12 or indirectly distributes, and that contains BPA.

13 2.2 **Effective Date.** The term “Effective Date” means the date this Consent Judgment is
14 entered as a Judgment of the Court.

15 **3. INJUNCTIVE RELIEF: WARNINGS**

16 3.1 Commencing ninety (90) days after the Effective Date, Impulse! agrees to
17 manufacture, import, or purchase for sale in California only (a) reformulated Covered Products
18 pursuant to Section 3.2, or (b) Covered Products that are accompanied by either of the following
19 warnings:

20 “WARNING: This product contains a chemical known to the State of California to cause
21 [cancer,] birth defects or other reproductive harm.”

22 Or

23 “WARNING: This product can expose you to chemicals including Bisphenol A (BPA),
24 which is known to the State of California to cause [cancer and] birth defects or other
25 reproductive harm. For more information go to www.P65Warnings.ca.gov.”

26 The bracketed text may, but is not required to be used. Impulse! and its downstream retailers shall
27 have no obligation to reformulate or label Covered Product that entered the stream of commerce
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1 prior to the Effective Date or within ninety (90) days after the Effective Date. For purposes of this
2 Settlement Agreement, a “Reformulated Covered Product” is Covered Product that meets the
3 standard set forth in Section 3.2, below.

4 3.2 “Reformulated Covered Product” shall mean Covered Product that is BPA-Free
5 when analyzed pursuant to ATS 367 Rev. 0 by LC/MS/MS.

6 3.3 The warning provided pursuant to § 3.1 above shall be affixed to or printed on the
7 Covered Product’s packaging or labeling, in the product description area where the product is
8 offered on an internet site, or on the shipping page of an internet sale, when a California address is
9 entered. The package warning shall be prominently affixed to or printed on the packaging or
10 labeling and displayed with such conspicuousness, as compared with other words, statements, or
11 designs as to render it likely to be read and understood by an ordinary individual under customary
12 conditions of purchase or use. A warning may be contained in the same section of the packaging,
13 labeling, or instruction booklet that states other safety warnings, if any, concerning the use of the
14 product and shall be at least the same size as those other safety warnings.

15 **4. MONETARY TERMS**

16 4.1 **Civil Penalty.** Impulse! shall pay a Civil Penalty of \$1,000.00 pursuant to Health
17 and Safety Code section 25249.7(b), to be apportioned in accordance with California Health &
18 Safety Code § 25192, with 75% of the Civil Penalty remitted to the State of California’s Office of
19 Environmental Health Hazard Assessment (“OEHHA”) and the remaining 25% of the Civil Penalty
20 remitted to Ferreiro, as provided by California Health & Safety Code § 25249.12(d).

21 4.1.1 Within ten (10) business days of the Effective Date, Impulse! shall issue
22 two separate checks for the Civil Penalty payment to (a) “OEHHA” in the amount of \$750.00;
23 and (b) “Brodsky & Smith, LLC in Trust for Ferreiro” in the amount of \$250.00. Payment owed
24 to Ferreiro pursuant to this Section shall be delivered to the following payment address:

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

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 **Attorneys' Fees.** Within ten (10) business days of the Effective Date, Impulse! shall
18 pay \$16,500.00 to Brodsky & Smith, LLC ("Brodsky Smith") as complete reimbursement for
19 Plaintiff Ferreiro's attorneys' fees and costs incurred as a result of investigating, bringing this
20 matter to Impulse!'s attention, litigating and negotiating and obtaining judicial approval of a
21 settlement in the public interest, pursuant to Code of Civil Procedure § 1021.5.

22 **5. RELEASE OF ALL CLAIMS**

23 5.1 This Consent Judgment is a full, final, and binding resolution between Ferreiro
24 acting in the public interest, and Impulse!, and its parents, shareholders, divisions, subdivisions,
25 subsidiaries, partners, sister companies, and affiliates, and their predecessors, successors and
26 assigns ("Defendant Releasees"), and all entities from whom they obtain and to whom they directly
27 or indirectly distribute or sell Covered Products, including but not limited to Wal-Mart Stores, Inc.,
28 Wayfair, LLC, Overstock.com, Inc., manufacturers, suppliers, distributors, wholesalers, customers,
licensors, licensees, retailers, marketplace hosts, franchisees, and cooperative members
("Downstream Defendant Releasees"), of all claims for violations of Proposition 65 based on
exposure to BPA from Covered Productss, with respect to any Covered Products manufactured,

1 distributed, or sold by Impulse! prior to ninety (90) days after the Effective Date. Compliance with
2 the terms of this Consent Judgment constitutes compliance with Proposition 65 with regard to the
3 Covered Products.

4 5.2 In addition to the foregoing, Ferreiro, on behalf of himself, his past and current
5 agents, representatives, attorneys, and successors and/or assignees, and *not* in his representative
6 capacity, hereby waives all rights to institute or participate in, directly or indirectly, any form of
7 legal action and releases any Impulse!, Defendant Releasees, and Downstream Defendant
8 Releasees from any and all manner of actions, causes of action, claims, demands, rights, suits,
9 obligations, debts, contracts, agreements, promises, liabilities, damages, charges, losses, costs,
10 expenses, and attorneys' fees, of any nature whatsoever, known or unknown, in law or equity, fixed
11 or contingent, now or in the future, with respect to any alleged violations of Proposition 65 related
12 to or arising from Covered Products manufactured distributed or sold by Impulse! or Defendant
13 Releasees. With respect to the foregoing waivers and releases in this paragraph, Ferreiro hereby
14 specifically waives any and all rights and benefits which she now has, or in the future may have,
15 conferred by virtue of the provisions of Section 1542 of the California Civil Code, which provides
16 as follows:

17 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE
18 CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS FAVOR
19 AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY
20 HIM MUST HAVE MATERIALLY AFFECTED HIS SETTLEMENT WITH
THE DEBTOR.

21 5.3 Impulse! waives any and all claims against Ferreiro, his attorneys and other
22 representatives, for any and all actions taken or statements made (or those that could have been
23 taken or made) by Ferreiro and his attorneys and other representatives, whether in the course of
24 investigating claims or otherwise seeking enforcement of Proposition 65 against it in this matter,
and/or with respect to Covered Products.

25 **6. INTEGRATION**

26 6.1 This Consent Judgment contains the sole and entire agreement of the Parties and
27 any and all prior negotiations and understandings related hereto shall be deemed to have been
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1 merged within it. No representations or terms of agreement other than those contained herein exist
2 or have been made by any Party with respect to the other Party or the subject matter hereof.

3 **7. GOVERNING LAW**

4 7.1 The terms of this Consent Judgment shall be governed by the laws of the State of
5 California and apply within the State of California. In the event that Proposition 65 is repealed or
6 is otherwise rendered inapplicable by reason of law generally, or as to Covered Products, then
7 Defendant shall have no further obligations pursuant to this Consent Judgment with respect to, and
8 to the extent that, Covered Products are so affected.

9 **8. NOTICES**

10 8.1 Unless specified herein, all correspondence and notices required to be provided
11 pursuant to this Consent Judgment shall be in writing and personally delivered or sent by: (i) first-
12 class, (registered or certified mail) return receipt requested; or (ii) overnight courier on any party
13 by the other party at the following addresses:

14 For Defendant:

15 Kerry E. Shea
16 Davis Wright Tremaine LLP
17 505 Montgomery Street, Suite 800
San Francisco, CA 94111

18 And

19 For Ferreiro:

20 Evan Smith
21 Brodsky & Smith, LLC
22 2 Bala Plaza, Suite 510
Bala Cynwyd, PA 19004

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

25 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

26 9.1 This Consent Judgment may be executed in counterparts and by facsimile, each of
27 which shall be deemed an original, and all of which, when taken together, shall constitute one and
28 the same document.

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

3 10.1 Ferreiro agrees to comply with the requirements set forth in California Health &
4 Safety Code §25249.7(f) and to promptly bring a Motion for Approval of this Consent Judgment
5 and Defendant agrees it shall support approval of such Motion.

6 10.2 This Consent Judgment shall not be effective until it is approved and entered by the
7 Court and shall be null and void if, for any reason, it is not approved by the Court. In such case,
8 the Parties agree to meet and confer on how to proceed and if such agreement is not reached within
9 30 days, the case shall proceed on its normal course.

10 10.3 If the Court approves this Consent Judgment and is reversed or vacated by an
11 appellate court, the Parties shall meet and confer as to whether to modify the terms of this Consent
12 Judgment. If the Parties do not jointly agree on a course of action to take, the case shall proceed on
13 its normal course on the trial court's calendar.

14 **11. MODIFICATION**

15 11.1 This Consent Judgment may be modified only by further stipulation of the Parties
16 and the approval of the Court or upon the granting of a motion brought to the Court by either Party.

17 **12. ATTORNEY'S FEES**

18 12.1 A party who unsuccessfully brings or contests an action arising out of this Consent
19 Judgment shall be required to pay the prevailing party's reasonable attorney's fees and costs unless
20 the unsuccessful party has acted with substantial justification. For purposes of this Consent
21 Judgment, the term substantial justification shall carry the same meaning as used in the Civil
22 Discovery Act of 1986, Code of Civil Procedure § 2016, et seq.

23 12.2 Nothing in this Section shall preclude a Party from seeking an award of sanctions
24 pursuant to law.

25 **13. RETENTION OF JURISDICTION**

26 13.1 This Court shall retain jurisdiction of this matter to implement or modify the
27 Consent Judgment.

