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

11 ANTHONY FERREIRO,

12 Plaintiff,

13 v.

14 MARINE ACQUISITION CORP., et al.,

15 Defendants.

Case No.: RG18904506

CONSENT JUDGMENT

Judge: Paul D. Herbert

Dept.: 20

Hearing Date: December 6, 2018

Hearing Time: 3:00 PM

Reservation #: R - 2004914

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”), Marine Acquisition Corp.
4 (“Marine Acquisition”), and West Marine, Inc. (“West Marine”); collectively, Marine Acquisition
5 and West Marine are referred to as “Defendants” with Ferreiro and Defendants collectively referred
6 to as the “Parties” and each of them as a “Party.” Ferreiro is an individual residing in California
7 that seeks to promote awareness of exposures to toxic chemicals and improve human health by
8 reducing or eliminating hazardous substances contained in consumer products. Marine Acquisition
9 is alleged to be a person in the course of doing business for purposes of Proposition 65, Cal. Health
10 & Safety Code §§ 25249.6 et seq.

11 **1.2 Plaintiff’s Allegations and Representations.** Ferreiro alleges that Defendants
12 have exposed individuals to di(2-ethylhexyl) phthalate (DEHP) from its sales of SeaStar Solutions
13 Hydraulic Steering Filler Kits without providing a clear and reasonable exposure warning pursuant
14 to Proposition 65. DEHP is listed under Proposition 65 as a chemical known to the State of
15 California to cause cancer and reproductive toxicity.

16 **1.3 Defendant’s Allegations and Representations.** Defendants deny the material
17 allegations contained in Ferreiro’s Notice and Complaint and maintain that they have not violated
18 Proposition 65. Defendants specifically deny that any exposure whatsoever is associated with any
19 proper or foreseeable use of its SeaStar Solutions Hydraulic Steering Filler Kits. Nothing in this
20 Consent Judgment shall be construed as an admission by Defendants of any fact, finding, issue of
21 law, or violation of law; nor shall compliance with this Consent Judgment constitute or be construed
22 as an admission by Defendants of any fact, finding, conclusion, issue of law, or violation of law,
23 such being specifically denied by Defendants. However, this section shall not diminish or
24 otherwise affect the obligations, responsibilities, and duties of Defendants under this Consent
25 Judgment.

26 **1.4 Notice of Violation/Complaint.** On or about August 31, 2017, Ferreiro served
27 Defendants, and various public enforcement agencies with documents entitled “60-Day Notice of
28

1 Violation” pursuant to Health & Safety Code §25249.7(d) (the “Notice”), alleging that Defendants
2 violated Proposition 65 for failing to warn consumers and customers that use of SeaStar Solutions
3 Hydraulic Steering Filler Kits expose users in California to DEHP. No public enforcer has brought
4 and is diligently prosecuting the claims alleged in the Notice. On May 11, 2018, Ferreiro filed a
5 complaint (the “Complaint”) in the matter.

6 1.5 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
7 jurisdiction over Defendants as to the allegations contained in the Complaint filed in this matter,
8 that venue is proper in the County of Alameda, and that this Court has jurisdiction to approve, enter,
9 and oversee the enforcement of this Consent Judgment as a full and final binding resolution of all
10 claims which were or could have been raised in the Complaint based on the facts alleged therein
11 and/or in the Notice.

12 **2. DEFINITIONS**

13 2.1 **Covered Products.** The term “Covered Products” means SeaStar Solutions
14 Hydraulic Steering Filler Kits that are manufactured, distributed and/or offered for sale in
15 California by Defendants.

16 2.2 **Effective Date.** The term “Effective Date” means the date this Consent Judgment is
17 entered as a Judgment of the Court.

18 **3. INJUNCTIVE RELIEF: WARNINGS**

19 3.1 As of the date this Consent Judgment is signed by both Parties, Marine Acquisition
20 shall not manufacture or order from any supplier any Covered Products intended for retail sale in
21 California that contains DEHP on any component to which consumers are exposed in excess of
22 0.1% (1,000 ppm) (hereinafter “Reformulated Products”) unless the Covered Product is
23 accompanied by a warning that complies with Article 6 of Title 27 of the California Code of
24 Regulations. Covered Products sold by Marine Acquisition before the date this Consent Judgment
25 is signed by both Parties may sell through without a warning even if not Reformulated Products.
26 After the Effective Date of this Consent Judgment, one of the following warnings shall accompany
27 Covered Products:
28

(1) A symbol consisting of a black exclamation point in an equilateral triangle with a bold black outline to the left of the word “warning” in bold all capital letters, followed by the statement “This product can expose you to chemicals including di(2-ethylhexyl)phthalate (DEHP), which is known to the State of California to cause cancer and birth defects or other reproductive harm. For more information, go to www.P65Warnings.ca.gov.”; or (2) a warning consisting of a symbol that is a black exclamation point in an equilateral triangle with a bold black outline to the left of the word “warning” in bold all capital letters, followed by the statement “Cancer and Reproductive Harm - www.P65Warnings.ca.gov.”¹

3.2 The warning provided pursuant to Section 3.1 shall be affixed to or printed on the Covered Product’s packaging or labeling, or on a placard, shelf tag, sign or electronic device or automatic process, providing that the warning is displayed with such conspicuousness, as compared with other words, statements, or designs as to render it likely to be read and understood by an ordinary individual under customary conditions of purchase or use. A warning may be contained in the same section of the packaging, labeling, or instruction booklet that states other safety warnings, if any, concerning the use of the product and shall be at least the same size as those other safety warnings.

4. MONETARY TERMS

4.1 **Civil Penalty.** Marine Acquisition shall pay \$2,000.00 as a Civil Penalty pursuant to Health and Safety Code § 25249.7(b), to be apportioned in accordance with California Health & Safety Code § 25192, with 75% of these funds remitted to the State of California’s Office of Environmental Health Hazard Assessment (“OEHHA”) and the remaining 25% of the Civil Penalty remitted to Ferreiro, as provided by California Health & Safety Code § 25249.12(d).

4.1.1 Within ten (10) days of the Effective Date, Marine Acquisition, on behalf of Defendants, shall issue two separate checks for the Civil Penalty payment to (a) “OEHHA” in the amount of \$1,500.00; and to (b) “Brodsky & Smith, LLC in Trust for Ferreiro” in the amount

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.

of \$500.00. Payment owed to Ferreiro pursuant to this Section shall be delivered to the following payment address:

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

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

For United States Postal Service Delivery:

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

For Non-United States Postal Service Delivery:

Mike Gyurics
Fiscal Operations Branch Chief
Office of Environmental Health Hazard Assessment
1001 I Street
Sacramento, CA 95814

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

4.2 **Attorneys' Fees.** Within ten (10) days of the Effective Date, Marine Acquisition, on behalf of Defendants, shall pay \$17,500.00 to Brodsky & Smith, LLC ("Brodsky Smith") as complete reimbursement for Ferreiro's attorneys' fees and costs incurred as a result of investigating, bringing this matter to Defendants' attention, litigating and negotiating and obtaining judicial approval of a settlement in the public interest, pursuant to Code of Civil Procedure § 1021.5.

5. RELEASE OF ALL CLAIMS

5.1 This Consent Judgment is a full, final, and binding resolution between Ferreiro acting on his own behalf, and on behalf of the public interest, and Defendants, and Defendants' parents, shareholders, members, directors, officers, managers, employees, representatives, agents, attorneys, divisions, subdivisions, subsidiaries, partners, sister companies, and affiliates, and their

1 predecessors, successors and assigns (“Defendant Releasees”), and all entities from whom they
2 obtain and to whom they directly or indirectly distribute or sell Covered Products, including but
3 not limited to manufacturers, suppliers, distributors, wholesalers, customers, licensors, licensees
4 retailers, franchisees, and cooperative members, including but not limited to West Marine
5 (“Downstream Releasees”), of all claims for violations of Proposition 65 based on exposure to
6 DEHP from Covered Products as set forth in the Notice, with respect to any Covered Products
7 manufactured, distributed, or sold by Marine Acquisition prior to the Effective Date. This Consent
8 Judgment shall have preclusive effect such that no other person or entity, whether purporting to act
9 in his, her, or its interests or the public interest shall be permitted to pursue and/or take any action
10 with respect to any violation of Proposition 65 that was alleged in the Complaint, or that could have
11 been brought pursuant to the Notice against Marine Acquisition or its Downstream Releasees of
12 the Product (“Proposition 65 Claims”). Compliance with the terms of this Consent Judgment
13 constitutes compliance with Proposition 65 with regard to the Covered Products.

14 5.2 In addition to the foregoing, Ferreiro, on behalf of himself, his past and current
15 agents, representatives, attorneys, and successors and/or assignees, and not in his representative
16 capacity, hereby waives all rights to institute or participate in, directly or indirectly, any form of
17 legal action and releases Marine Acquisition, West Marine, all other Defendant Releasees, and all
18 other Downstream Releasees from any and all manner of actions, causes of action, claims, demands,
19 rights, suits, obligations, debts, contracts, agreements, promises, liabilities, damages, charges,
20 losses, costs, expenses, and attorneys’ fees, of any nature whatsoever, known or unknown, in law
21 or equity, fixed or contingent, now or in the future, with respect to any alleged violations of
22 Proposition 65 related to or arising from Covered Products manufactured, distributed, or sold by
23 Marine Acquisition, West Marine, any other Defendant Releasees or any other Downstream
24 Releasees. With respect to the foregoing waivers and releases in this paragraph, Ferreiro hereby
25 specifically waives any and all rights and benefits which he now has, or in the future may have,
26 conferred by virtue of the provisions of § 1542 of the California Civil Code, which provides as
27 follows:
28

1 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE
2 CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER
3 FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF
4 KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS
5 SETTLEMENT WITH THE DEBTOR.

6 5.3 Defendants waive any and all claims against Ferreiro, his attorneys and other
7 representatives, for any and all actions taken or statements made (or those that could have been
8 taken or made) by Ferreiro and his attorneys and other representatives, whether in the course of
9 investigating claims or otherwise seeking enforcement of Proposition 65 against it in this matter,
10 and/or with respect to Covered Products.

11 **6. INTEGRATION**

12 6.1 This Consent Judgment contains the sole and entire agreement of the Parties and
13 any and all prior negotiations and understandings related hereto shall be deemed to have been
14 merged within it. No representations or terms of agreement other than those contained herein exist
15 or have been made by any Party with respect to the other Party or the subject matter hereof.

16 **7. GOVERNING LAW**

17 7.1 The terms of this Consent Judgment shall be governed by the laws of the State of
18 California and apply within the State of California. In the event that Proposition 65 is repealed or
19 is otherwise rendered inapplicable by reason of law generally, or as to Covered Products, then
20 Defendants shall have no further obligations pursuant to this Consent Judgment with respect to,
21 and to the extent that, Covered Products are so affected.

22 **8. NOTICES**

23 8.1 Unless specified herein, all correspondence and notices required to be provided
24 pursuant to this Consent Judgment shall be in writing and personally delivered or sent by: (i) first-
25 class, (registered or certified mail) return receipt requested; or (ii) overnight courier on any party
26 by the other party at the following addresses:

27 For Defendants:

28 Daniel S. Hurwitz
Wilson Elser Moskowitz Edelman & Dicker LLP
555 S. Flower Street - Suite 2900
Los Angeles, CA 90071-2407

1 And

2 For Ferreiro:

3 Evan Smith
4 Brodsky & Smith, LLC
5 9595 Wilshire Blvd., Ste. 900
6 Beverly Hills, CA 90212

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. COUNTERPARTS; FACSIMILE SIGNATURES**

10 9.1 This Consent Judgment may be executed in counterparts and by facsimile, each of
11 which shall be deemed an original, and all of which, when taken together, shall constitute one and
12 the same document.

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

15 10.1 Ferreiro agrees to comply with the requirements set forth in California Health &
16 Safety Code § 25249.7(f) and to promptly bring a Motion for Approval of this Consent Judgment.
17 Defendant agrees it shall support approval of such Motion.

18 10.2 This Consent Judgment shall not be effective until it is approved and entered by the
19 Court and shall be null and void if, for any reason, it is not approved by the Court. In such case,
20 the Parties agree to meet and confer on how to proceed and if such agreement is not reached within
21 30 days, the case shall proceed on its normal course.

22 10.3 If the Court approves this Consent Judgment and is reversed or vacated by an
23 appellate court, the Parties shall meet and confer as to whether to modify the terms of this Consent
24 Judgment. If the Parties do not jointly agree on a course of action to take, the case shall proceed on
25 its normal course on the trial court's calendar.

26 **11. MODIFICATION**

27 11.1 This Consent Judgment may be modified only by further stipulation of the Parties
28 and the approval of the Court or upon the granting of a motion brought to the Court by either Party.

1 **11. MODIFICATION**

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4 Party.

5 **12. ATTORNEY'S FEES**

6 12.1 A Party who unsuccessfully brings or contests an action arising out of this Consent
7 Judgment shall be required to pay the prevailing party's reasonable attorney's fees and costs.

8 12.2 Nothing in this Section shall preclude a Party from seeking an award of sanctions
9 pursuant to law.

10 **13. RETENTION OF JURISDICTION**

11 13.1 This Court shall retain jurisdiction of this matter to implement or modify the
12 Consent Judgment.

13 **14. AUTHORIZATION**

14 14.1 The undersigned are authorized to execute this Consent Judgment on behalf of
15 their respective Parties and have read, understood and agree to all of the terms and conditions of
16 this document and certify that he or she is fully authorized by the Party he or she represents to
17 execute the Consent Judgment on behalf of the Party represented and legally bind that Party.
18 Except as explicitly provided herein each Party is to bear its own fees and costs.

19
20 **AGREED TO:**

AGREED TO:

21 Date: Oct. 18, 2018

Date: Aug 22/18

22 By: Anthony Ferreiro
23 ANTHONY FERREIRO

By: BD Duda
MARINE ACQUISITION CORP.

24
25
26 **IT IS SO ORDERED, ADJUDGED AND DECREED:**

27 Dated: _____
28