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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 PREFERRED NATION, INC.,
15 Defendant.

Case No.: RG18900526
CONSENT JUDGMENT
Judge: Stephen Kaus
Dept.: 19
Hearing Date: November 14, 2018
Hearing Time: 3:00 PM
Reservation #: R-2002772

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 Preferred Nation, Inc.
4 (“Preferred Nation” 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 that 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. Preferred Nation is alleged to
8 be a person in the course of doing business for purposes of Proposition 65, Cal. Health & Safety
9 Code § 25249.6 et seq.

10 1.2 **Allegations and Representations.** Ferreiro alleges that Defendant has exposed
11 individuals to di(2-ethylhexyl) phthalate (DEHP) from its sales of garment bags without providing
12 clear and reasonable warnings under Proposition 65. DEHP is listed under Proposition 65 as a
13 chemical known to the State of California to cause cancer and reproductive toxicity.

14 1.3 **Notice of Violation/Complaint.** On or about December 22, 2017, Ferreiro served
15 Preferred Nation, and various public enforcement agencies with documents entitled “60-Day Notice
16 of Violation” pursuant to Health & Safety Code § 25249.7(d) (the “Notice”), alleging that
17 Defendant was in violation of Proposition 65 for failing to warn consumers and customers that
18 Preferred Nation Quick Trip See Through Garment Bags exposed users in California to DEHP. No
19 public enforcer has brought and is diligently prosecuting the claims alleged in the Notices. On
20 April 11, 2018, Ferreiro filed a complaint (the “Complaint”) in the matter.

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 garment bags that are
10 manufactured, distributed and/or offered for sale in California by Preferred Nation.

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

13 **3. INJUNCTIVE RELIEF: WARNINGS**

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

- 22 (a) The statement: “WARNING: This product contains a chemical known to the State
23 of California to cause cancer and birth defects or other reproductive harm.”; or (b)(1) A
24 symbol consisting of a black exclamation point in a yellow equilateral triangle with a bold
25 black outline to the left of the word “warning” in bold all capital letters, followed by the
26 statement “This product can expose you to chemicals including di(2-ethylhexyl)phthalate
27 (DEHP), which is known to the State of California to cause cancer and birth defects or other
28

1 reproductive harm. For more information, go to www.P65Warnings.ca.gov.”; or (2) a
2 warning consisting of a symbol that is a black exclamation point in a yellow equilateral
3 triangle with a bold black outline to the left of the word “warning” in bold all capital letters,
4 followed by the statement “Cancer and Reproductive Harm - www.P65Warnings.ca.gov.”¹

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 §3.1 shall be affixed to or printed on the Covered
8 Product’s packaging or labeling, or on a placard, shelf tag, sign or electronic device or automatic
9 process, providing that the warning is 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.** Preferred Nation shall pay a Civil Penalty of \$1,500.00 pursuant to
16 Health and Safety Code § 25249.7(b), to be apportioned in accordance with California Health &
17 Safety Code § 25192, with 75% of these funds remitted to the State of California’s Office of
18 Environmental Health Hazard Assessment (“OEHHA”) and the remaining 25% of the Civil Penalty
19 remitted to Ferreiro, as provided by California Health & Safety Code § 25249.12(d).

20 4.1.1 Within ten (10) days of the date this Agreement is entered as a Judgment
21 by the Court, Preferred Nation shall issue two separate checks for the Civil Penalty payment to (a)
22 “OEHHA” in the amount of \$1,125.00; and (b) “Brodsky & Smith, LLC in Trust for Ferreiro” in
23 the amount of \$375.00. Payment owed to Ferreiro pursuant to this Section shall be delivered to
24 the following payment address:

25 Evan J. Smith, Esquire
26 Brodsky & Smith, LLC

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

1 Two Bala Plaza, Suite 510
2 Bala Cynwyd, PA 19004

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

5 For United States Postal Service Delivery:

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

11 For Non-United States Postal Service Delivery:

12 Mike Gyurics
13 Fiscal Operations Branch Chief
14 Office of Environmental Health Hazard Assessment
15 1001 I Street
16 Sacramento, CA 95814

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

19 4.2 **Attorneys' Fees.** Within ten (10) days of the date this Agreement is entered as a
20 Judgment by the Court, Preferred Nation shall pay \$11,000.00 to Brodsky & Smith, LLC ("Brodsky
21 Smith") as complete reimbursement for Ferreiro's attorneys' fees and costs incurred as a result of
22 investigating, bringing this matter to Preferred Nation's attention, litigating and negotiating and
23 obtaining judicial approval of a settlement in the public interest, pursuant to Code of Civil
24 Procedure § 1021.5.

25 **5. RELEASE OF ALL CLAIMS**

26 5.1 This Consent Judgment is a full, final, and binding resolution between Ferreiro
27 acting on his own behalf, and on behalf of the public interest, and Preferred Nation, and its parents,
28 shareholders, members, directors, officers, managers, employees, representatives, agents,
attorneys, divisions, subdivisions, subsidiaries, partners, sister companies, and affiliates, and their
predecessors, 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

1 retailers, franchisees, and cooperative members, including but not limited to Wayfair, LLC
2 (“Downstream Releasees”), of all claims for violations of Proposition 65 based on exposure to
3 DEHP from Covered Products as set forth in the Notice, with respect to any Covered Products
4 manufactured, distributed, or sold by Preferred Nation prior to the Effective Date. This Consent
5 Judgment shall have preclusive effect such that no other person or entity, whether purporting to act
6 in his, her, or its interests or the public interest shall be permitted to pursue and/or take any action
7 with respect to any violation of Proposition 65 that was alleged in the Complaint, or that could have
8 been brought pursuant to the Notice against Preferred Nation or its Downstream Releasees of the
9 Product including but not limited to (“Proposition 65 Claims”). Compliance with the terms of this
10 Consent Judgment constitutes compliance with Proposition 65 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 Preferred Nation, Defendant Releasees, and Downstream Releasees from
15 any and all manner of actions, causes of action, claims, demands, rights, suits, obligations, debts,
16 contracts, agreements, promises, liabilities, damages, charges, losses, costs, expenses, and
17 attorneys’ fees, of any nature whatsoever, known or unknown, in law or equity, fixed or contingent,
18 now or in the future, with respect to any alleged violations of Proposition 65 related to or arising
19 from Covered Products manufactured, distributed, or sold by Preferred Nation, Defendant
20 Releasees or Downstream Releasees. With respect to the foregoing waivers and releases in this
21 paragraph, Ferreiro hereby specifically waives any and all rights and benefits which he now has, or
22 in the future may have, conferred by virtue of the provisions of § 1542 of the California Civil Code,
23 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
26 FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF
27 KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS
28 SETTLEMENT WITH THE DEBTOR.

1 5.3 Preferred Nation 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 Mark Brutzkus
24 Brutzkus Gubner Rozansky Seror Weber LLP
25 21650 Oxnard St., Suite 500
26 Woodland Hills, CA 91367-4911

27 And

28 For Ferreiro:

 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 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.
28

1 12.2 Nothing in this Section shall preclude a Party from seeking an award of sanctions
2 pursuant to law.

3 **13. RETENTION OF JURISDICTION**

4 13.1 This Court shall retain jurisdiction of this matter to implement or modify the
5 Consent Judgment.

6 **14. AUTHORIZATION**

7 14.1 The undersigned are authorized to execute this Consent Judgment on behalf of their
8 respective Parties and have read, understood and agree to all of the terms and conditions of this
9 document and certify that he or she is fully authorized by the Party he or she represents to execute
10 the Consent Judgment on behalf of the Party represented and legally bind that Party. Except as
11 explicitly provided herein each Party is to bear its own fees and costs.

12
13 **AGREED TO:**

AGREED TO:

14 Date: 9/26/18

Date: 8/20/2018

15
16 By: Anthony Ferreiro
ANTHONY FERREIRO

By: [Signature]
PREFERRED NATION, INC.

17
18
19 **IT IS SO ORDERED, ADJUDGED AND DECREED:**

20
21 Dated: _____

Judge of Superior Court