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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 ROCKLER COMPANIES, INC.,

15 Defendant.

Case No.: RG18914245

CONSENT JUDGMENT

Judge: Jo-Lynne Q. Lee

Dept.: 18

Hearing Date: October 23, 2018

Hearing Time: 3:00 PM

Reservation #: R-1991101

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 Rockler Companies, Inc.
4 (“Rockler” or “Defendant”) with Ferreiro and Defendant collectively referred to as the “Parties”
5 and each of them as a “Party.” Ferreiro is an individual residing in California that 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. Rockler is alleged to be 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 di(2-ethylhexyl) phthalate (DEHP) from its sales of Dust Right flexible vacuum
12 hoses without providing clear and reasonable warnings under Proposition 65. DEHP is listed under
13 Proposition 65 as a chemical known to the State of California to cause cancer and reproductive
14 toxicity.

15 **1.3 Notice of Violation/Complaint.** On or about January 29, 2018, Ferreiro served
16 Rockler, and various public enforcement agencies with documents entitled “60-Day Notice of
17 Violation” pursuant to Health & Safety Code §25249.7(d) (the “Notice”), alleging that Defendant
18 was in violation of Proposition 65 for failing to warn consumers and customers that vacuum hose
19 products including the Dust Right hoses exposed users in California to DEHP. No public enforcer
20 has brought and is diligently prosecuting the claims alleged in the Notices. On July 25, 2018,
21 Ferreiro filed a complaint (the “Complaint”) in the matter.

22 **1.4** For purposes of this Consent Judgment only, the Parties stipulate that this Court has
23 jurisdiction over Defendant as to the allegations contained in the Complaint filed in this matter, that
24 venue is proper in the County of Alameda, and that this Court has jurisdiction to approve, enter,
25 and oversee the enforcement of this Consent Judgment as a full and final binding resolution of all
26 claims which were or could have been raised in the Complaint based on the facts alleged therein
27 and/or in the Notice.
28

1 1.5 The Parties enter into this Consent Judgment pursuant to a full settlement of disputed
2 claims between the parties as alleged in the Complaint for the purpose of avoiding prolonged
3 litigation. Defendant denies the material allegations contained in Ferreiro’s Notice and Complaint
4 and maintains that it has not violated Proposition 65. Nothing in this Consent Judgment shall be
5 construed as an admission by Defendant of any fact, finding, issue of law, or violation of law; nor
6 shall compliance with this Consent Judgment constitute or be construed as an admission by
7 Defendant of any fact, finding, conclusion, issue of law, or violation of law, such being specifically
8 denied by Defendant. However, this section shall not diminish or otherwise affect the obligations,
9 responsibilities, and duties of Defendant under this Consent Judgment.

10 **2. DEFINITIONS**

11 2.1 **Covered Products.** The term “Covered Products” means vacuum hose products
12 and accessories, including but not limited to the Dust Right Small Port Auxiliary hoses that are
13 manufactured, distributed and/or offered for sale in California by Rockler.

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

16 **3. INJUNCTIVE RELIEF: WARNINGS**

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

24 Until August 30, 2018, the warning shall consist of either:

- 25 (a) The statement: “**WARNING:** This product contains a chemical known to the State of
26 California to cause cancer and birth defects or other reproductive harm.”; or
27

1 (b) (1) A symbol consisting of a black exclamation point in a yellow equilateral triangle
2 with a bold black outline to the left of the word “**WARNING**” in bold all capital letters,
3 followed by the statement “This product can expose you to chemicals including di(2-
4 ethylhexyl)phthalate (DEHP), which is known to the State of California to cause cancer and
5 birth defects or other reproductive harm. For more information, go to
6 www.P65Warnings.ca.gov.”; or (2) A symbol consisting of a black exclamation point in a
7 yellow equilateral triangle with a bold black outline to the left of the word “**WARNING**”
8 in bold all capital letters, followed by the statement “This product can expose you to
9 chemicals including DEHP, which is known to the State of California to cause cancer and
10 birth defects or other reproductive harm. For more information, go to
11 www.P65Warnings.ca.gov.”; or (3) a warning consisting of a symbol that is a black
12 exclamation point in a yellow equilateral triangle with a bold black outline to the left of the
13 word “**WARNING**” in bold all capital letters, followed by the statement “Cancer and
14 Reproductive Harm - www.P65Warnings.ca.gov.”

15 For Covered Products manufactured on and after August 30, 2018, one of the warnings set forth in
16 Section 3.1(b) shall be used.¹

17 3.2 The warning provided pursuant to Section 3.1 shall be affixed to or printed on the
18 Covered Product’s packaging or labeling, or on a placard, shelf tag, sign or electronic device or
19 automatic process, providing that the warning is displayed with such conspicuousness, as compared
20 with other words, statements, or designs as to render it likely to be read and understood by an
21 ordinary individual under customary conditions of purchase or use. A warning may be contained
22 in the same section of the packaging, labeling, or instruction booklet that states other safety
23 warnings, if any, concerning the use of the product and shall be at least the same size as those other
24 safety warnings.

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26
27 ¹ Consistent with 27 Cal. Code of Regs. § 25603(a)(1), the triangular symbol need only be
28 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 3.3 In the event that California state law changes or OEHHA promulgates one or more
2 regulations requiring or permitting warning text and/or methods of warning different from those
3 set forth above, Rockler shall be entitled to use, at its discretion, other legally compliant warning
4 text and/or method of transmission without being deemed in breach of this Agreement.

5 **4. MONETARY TERMS**

6 4.1 **Civil Penalty.** Rockler shall pay a Civil Penalty of \$4,000 pursuant to Health and
7 Safety Code section 25249.7(b), to be apportioned in accordance with California Health & Safety
8 Code § 25192, with 75% of these funds remitted to the State of California’s Office of
9 Environmental Health Hazard Assessment (“OEHHA”) and the remaining 25% of the Civil Penalty
10 remitted to Ferreiro, as provided by California Health & Safety Code § 25249.12(d).

11 4.1.1 Within fourteen (14) days of the date this Agreement is entered as a
12 Judgment by the Court, Rockler shall issue two separate checks for the Civil Penalty payment to
13 (a) “OEHHA” in the amount of \$3,000; and to (b) “Brodsky & Smith, LLC in Trust for Ferreiro”
14 in the amount of \$1,000.00. Payment owed to Ferreiro pursuant to this Section shall be delivered
15 to the following payment address:

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

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

22 For United States Postal Service Delivery:

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

28 For Non-United States Postal Service Delivery:

 Mike Gyurics
 Fiscal Operations Branch Chief
 Office of Environmental Health Hazard Assessment
 1001 I Street

1 Sacramento, CA 95814

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

4 4.2 **Attorneys' Fees.** Within fourteen (14) days of the date this Agreement is entered as
5 a Judgment by the Court, Rockler shall pay \$31,000.00 to Brodsky & Smith, LLC ("Brodsky
6 Smith") as complete reimbursement for Ferreiro's attorneys' fees and costs incurred as a result of
7 investigating, bringing this matter to Rockler's attention, litigating and negotiating and obtaining
8 judicial approval of a settlement in the public interest, pursuant to Code of Civil Procedure § 1021.5.

9 **5. RELEASE OF ALL CLAIMS**

10 5.1 This Consent Judgment is a full, final, and binding resolution between Ferreiro
11 acting on his own behalf, and on behalf of the public interest, and Rockler, and its parents,
12 shareholders, members, directors, officers, managers, employees, representatives, agents,
13 attorneys, divisions, subdivisions, subsidiaries, partners, sister companies, and affiliates, and their
14 predecessors, successors and assigns ("Defendant Releasees"), and all entities from whom they
15 obtain and to whom they directly or indirectly distribute or sell Covered Products, including but
16 not limited to manufacturers, suppliers, distributors, wholesalers, customers, licensors, licensees
17 retailers, franchisees, and cooperative members ("Downstream Releasees"), of all claims for
18 violations of Proposition 65 based on exposure to DEHP from Covered Products as set forth in the
19 Notice, with respect to any Covered Products manufactured, distributed, or sold by Rockler prior
20 to the Effective Date. This Consent Judgment shall have preclusive effect such that no other person
21 or entity, whether purporting to act in his, her, or its interests or the public interest shall be permitted
22 to pursue and/or take any action with respect to any violation of Proposition 65 that was alleged in
23 the Complaint, or that could have been brought pursuant to the Notice against Rockler or its
24 Downstream Releasees of the Product ("Proposition 65 Claims"). Compliance with the terms of
25 this Consent Judgment constitutes compliance with Proposition 65 with regard to the Covered
26 Products.

27 5.2 In addition to the foregoing, Ferreiro, on behalf of himself, his past and current
28 agents, representatives, attorneys, and successors and/or assignees, and *not* in his representative

1 capacity, hereby waives all rights to institute or participate in, directly or indirectly, any form of
2 legal action and releases Rockler, Defendant Releasees, and Downstream Releasees from any and
3 all manner of actions, causes of action, claims, demands, rights, suits, obligations, debts, contracts,
4 agreements, promises, liabilities, damages, charges, losses, costs, expenses, and attorneys' fees, of
5 any nature whatsoever, known or unknown, in law or equity, fixed or contingent, now or in the
6 future, with respect to any alleged violations of Proposition 65 related to or arising from Covered
7 Products manufactured, distributed, or sold by Rockler, Defendant Releasees or Downstream
8 Releasees. With respect to the foregoing waivers and releases in this paragraph, Ferreiro hereby
9 specifically waives any and all rights and benefits which he now has, or in the future may have,
10 conferred by virtue of the provisions of § 1542 of the California Civil Code, which provides as
11 follows:

12
13 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE
14 CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER
15 FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF
16 KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS
17 SETTLEMENT WITH THE DEBTOR.

18 5.3 Rockler waives any and all claims against Ferreiro, his attorneys and other
19 representatives, for any and all actions taken or statements made (or those that could have been
20 taken or made) by Ferreiro and his attorneys and other representatives, whether in the course of
21 investigating claims or otherwise seeking enforcement of Proposition 65 against it in this matter,
22 and/or with respect to Covered Products.

23 6. INTEGRATION

24 6.1 This Consent Judgment contains the sole and entire agreement of the Parties and
25 any and all prior negotiations and understandings related hereto shall be deemed to have been
26 merged within it. No representations or terms of agreement other than those contained herein exist
27 or have been made by any Party with respect to the other Party or the subject matter hereof.

28 7. GOVERNING LAW

7.1 The terms of this Consent Judgment shall be governed by the laws of the State of
California and apply within the State of California. In the event that Proposition 65 is repealed or

1 is otherwise rendered inapplicable by reason of law generally, or as to Covered Products, then
2 Defendant shall have no further obligations pursuant to this Consent Judgment with respect to, and
3 to the extent that, Covered Products are so affected.

4 **8. NOTICES**

5 8.1 Unless specified herein, all correspondence and notices required to be provided
6 pursuant to this Consent Judgment shall be in writing and personally delivered or sent by: (i) first-
7 class, (registered or certified mail) return receipt requested; or (ii) overnight courier on any party
8 by the other party at the following addresses:

9 For Defendant:

10 Laura M. Duncan
11 Product Law Group
12 4 Embarcadero Center, Suite 1400
San Francisco, CA 94111

13 And

14 For Ferreiro:

15 Evan Smith
16 Brodsky & Smith, LLC
9595 Wilshire Blvd., Ste. 900
17 Beverly Hills, CA 90212

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

20 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

21 9.1 This Consent Judgment may be executed in counterparts and by facsimile, each of
22 which shall be deemed an original, and all of which, when taken together, shall constitute one and
23 the same document.

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

25 10.1 Ferreiro agrees to comply with the requirements set forth in California Health &
26 Safety Code § 25249.7(f) and to promptly bring a Motion for Approval of this Consent Judgment.
27 Defendant agrees it shall support approval of such Motion.
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10.2 This Consent Judgment shall not be effective until it is approved and entered by the Court and shall be null and void if, for any reason, it is not approved by the Court. In such case, the Parties agree to meet and confer on how to proceed and if such agreement is not reached within 30 days, the case shall proceed on its normal course.

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

11. MODIFICATION

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

12. ATTORNEY'S FEES

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

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.

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1 **14. AUTHORIZATION**

2 14.1 The undersigned are authorized to execute this Consent Judgment on behalf of
3 their respective Parties and have read, understood and agree to all of the terms and conditions of
4 this document and certify that he or she is fully authorized by the Party he or she represents to
5 execute the Consent Judgment on behalf of the Party represented and legally bind that Party.
6 Except as explicitly provided herein each Party is to bear its own fees and costs.
7

8 **AGREED TO:**

AGREED TO:

9 Date: 8/29/18

Date: 8/2/2018

10 By: *Anthony Ferreiro*
11 ANTHONY FERREIRO

By: *David Lamm*
ROCKLER COMPANIES, INC.

12
13
14 **IT IS SO ORDERED, ADJUDGED AND DECREED:**

15
16 Dated: _____

Judge of Superior Court