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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 ALLEGRO INDUSTRIES,

15 Defendant.

Case No.: RG18902236

CONSENT JUDGMENT

Judge: Paul D. Herbert

Dept.: 20

Hearing Date: June 28, 2018

Hearing Time: 3:00 PM

Reservation #: R-1962635

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 No-Fade Coatings, Inc.,
4 a California Corporation, dba Allegro Industries (“Allegro” or “Defendant”) with Ferreiro and
5 Defendant collectively referred to as the “Parties” and each of them as a “Party.” Ferreiro is an
6 individual residing in California that seeks to promote awareness of exposures to toxic chemicals
7 and improve human health by reducing or eliminating hazardous substances contained in consumer
8 products. Allegro is alleged to be a person in the course of doing business for purposes of
9 Proposition 65, Cal. Health & Safety 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 Allegro Industries Vortex
12 Cooling Vests without providing clear and reasonable warnings under Proposition 65. DEHP is
13 listed under Proposition 65 as a chemical known to the State of California to cause cancer and
14 reproductive toxicity.

15 **1.3 Notice of Violation/Complaint.** On or about January 30, 2018, Ferreiro served
16 Allegro, 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 Allegro
19 Industries Vortex Cooling Vests exposed users in California to DEHP. No public enforcer has
20 brought and is diligently prosecuting the claims alleged in the Notices. On April 25, 2018, Ferreiro
21 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 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 Allegro Industries Vortex
10 Cooling Vests and accessory and component parts that are manufactured, distributed and/or offered
11 for sale in California by Allegro.

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

14 **3. INJUNCTIVE RELIEF: WARNINGS**

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

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

25 (b) (1) A symbol consisting of a black exclamation point in a yellow equilateral triangle
26 with a bold black outline to the left of the word “warning” in bold all capital letters, followed
27 by the statement “This product can expose you to chemicals including Di(2-
28

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

7 For Covered Products manufactured on and after August 30, 2018, the warning set forth in Section
8 3.1(b) shall be used.

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

17 4. MONETARY TERMS

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

23 4.1.1 Within fourteen (14) days of the date this Agreement is entered as a
24 Judgment by the Court, Allegro shall issue two separate checks for the Civil Penalty payment to
25 (a) “OEHHA” in the amount of \$750.00; and (b) “Brodsky & Smith, LLC in Trust for Ferreiro”
26

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 in the amount of \$250.00. Payment owed to Ferreiro pursuant to this Section shall be delivered to
2 the following payment address:

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

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

9 For United States Postal Service Delivery:

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

15 For Non-United States Postal Service Delivery:

16 Mike Gyurics
17 Fiscal Operations Branch Chief
18 Office of Environmental Health Hazard Assessment
19 1001 I Street
20 Sacramento, CA 95814

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

23 4.2 **Conditional Civil Penalty.** One Hundred Eighty (180) days after the Effective
24 Date, Allegro shall make a Conditional Civil Penalty payment of \$1,000.00 on the same terms as
25 set forth in Section 4.1.1 pertaining to the Civil Penalty. Pursuant to Title 11 California Code of
26 Regulations, Section 3203(c), Ferreiro agrees that the Conditional Civil Penalty payment shall be
27 waived in its entirety if, on or before the date the Conditional Civil Penalty payment is due, an
28 officer of Allegro provides Ferreiro with a signed declaration certifying that all Covered Products
it ships for sale or distributes for sale in California as of the date of its certification are Reformulated
Products or are marked with the warnings required by this Consent Decree (hereinafter "Labeled
Product") and that Allegro will continue to offer only Reformulated Products or Labeled Products
in California in the future. The option to provide a declaration certifying its complete early

1 reformulation or labeling of the Covered Products in lieu of making the Conditional Civil Penalty
2 payment otherwise required by this Section is a material term, and time is of the essence.

3 4.3 **Attorneys' Fees.** Within fourteen (14) days of the date this Agreement is entered as
4 a Judgment by the Court, Allegro shall pay \$16,500.00 to Brodsky & Smith, LLC ("Brodsky
5 Smith") as complete reimbursement for Plaintiff Ferreiro's attorneys' fees and costs incurred as a
6 result of investigating, bringing this matter to Allegro's attention, litigating and negotiating and
7 obtaining judicial approval of a settlement in the public interest, pursuant to Code of Civil
8 Procedure section 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, his agents, representatives, attorneys, successors and/or assignees and on
12 behalf of the public interest, and Allegro, and its parents, shareholders, members, directors, officers,
13 managers, employees, representatives, agents, attorneys, divisions, subdivisions, subsidiaries,
14 partners, sister companies, and affiliates, and their predecessors, successors and assigns
15 ("Defendant Releasees"), and all entities from whom they obtain and to whom they directly or
16 indirectly distribute or sell Covered Products, including but not limited to manufacturers, suppliers,
17 distributors, wholesalers, customers, licensors, licensees retailers, franchisees, and cooperative
18 members, including but not limited to W.W. Grainger, Inc. ("Downstream Releasees"), of all
19 claims for violations of Proposition 65 based on exposure to DEHP from Covered Products as set
20 forth in the Notice, with respect to any Covered Products manufactured, distributed, or sold by
21 Allegro and/or Defendant Releasees and Downstream Releasees, prior to the Effective Date. This
22 Consent Judgment shall have preclusive effect such that no other person or entity, whether
23 purporting to act in his, her, or its interests or the public interest shall be permitted to pursue and/or
24 take any action with respect to any violation of Proposition 65 that was alleged in the Complaint,
25 or that could have been brought pursuant to the Notice against Allegro or its Downstream Releasees
26 of the Product including but not limited to ("Proposition 65 Claims"). Compliance with the terms
27
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1 of this Consent Judgment constitutes compliance with Proposition 65 with regard to the Covered
2 Products.

3 5.2 In addition to the foregoing, Ferreiro, on behalf of himself, his past and current
4 agents, representatives, attorneys, and successors and/or assignees, and “not” in his representative
5 capacity, hereby waives all rights to institute or participate in, directly or indirectly, any form of
6 legal action and releases Allegro, Defendant Releasees, and Downstream Releasees from any and
7 all manner of actions, causes of action, claims, demands, rights, suits, obligations, debts, contracts,
8 agreements, promises, liabilities, damages, charges, losses, costs, expenses, and attorneys’ fees, of
9 any nature whatsoever, known or unknown, in law or equity, fixed or contingent, now or in the
10 future, with respect to any alleged violations of Proposition 65 related to or arising from Covered
11 Products manufactured, distributed, or sold by Allegro, Defendant Releasees or Downstream
12 Releasees. With respect to the foregoing waivers and releases in this paragraph, Ferreiro hereby
13 specifically waives any and all rights and benefits which he/she now has, or in the future may have,
14 conferred by virtue of the provisions of Section 1542 of the California Civil Code, which provides
15 as follows:

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

21 5.3 Allegro 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,
25 and/or with respect to Covered Products.

26 **6. INTEGRATION**

27 6.1 This Consent Judgment contains the sole and entire agreement of the Parties and
28 any and all prior negotiations and understandings related hereto shall be deemed to have been

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 Samuel J. Arsht, Esq.
16 SILVER & ARSHT
17 1860 Bridgegate Street, Suite 100
Westlake Village, CA 91361

18 And

19 For Ferreiro:

20 Evan Smith
21 Brodsky & Smith, LLC
22 9595 Wilshire Blvd., Ste. 900
Beverly Hills, CA 90212

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 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.

20 12.2 Nothing in this Section shall preclude a Party from seeking an award of sanctions
21 pursuant to law.

22 **13. RETENTION OF JURISDICTION**

23 13.1 This Court shall retain jurisdiction of this matter to implement or modify the
24 Consent Judgment.

25 **14. AUTHORIZATION**

26 14.1 The undersigned are authorized to execute this Consent Judgment on behalf of their
27 respective Parties and have read, understood and agree to all of the terms and conditions of this
28

1 document and certify that he or she is fully authorized by the Party he or she represents to execute
2 the Consent Judgment on behalf of the Party represented and legally bind that Party. Except as
3 explicitly provided herein each Party is to bear its own fees and costs.
4

5 **AGREED TO:**

AGREED TO:

6 Date: 5/9/18
7
8 By: Anthony Ferreiro
9 ANTHONY FERREIRO

Date: 5-7-18
By: [Signature]
NO FADE COATINGS, INC, A California
Corporation, dba ALLEGRO
INDUSTRIES

10
11 **IT IS SO ORDERED, ADJUDGED AND DECREED:**

12
13 Dated: _____

Judge of Superior Court

14
15 **APPROVED AS TO FORM**

16 Dated: 5/9/18

BRODSKY & SMITH, LLC

17
18 By: [Signature]
EVAN SMITH, ESQ.
Attorneys for Anthony Ferreiro

19
20 Dated: 5/8/18

SILVER & ARSHT, Attorneys at Law

21
22 By: [Signature]
SAMUEL J. ARSHT, ESQ.
Attorneys for No-Fade Coatings, Inc., a
California Corporation dba ALLEGRO
INDUSTRIES