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

11 ANTHONY FERREIRO,
12 Plaintiff,
13 v.
14 MIZUNO USA, INC.,
15 Defendant.

Case No.: RG19010563

CONSENT JUDGMENT

Judge: Ronni MacLaren
Dept.: 25
Hearing Date: June 14, 2019
Hearing Time: 9:00 AM
Reservation #: R-2071873

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 Mizuno USA, Inc.
4 (“Mizuno” 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 who 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. Mizuno is a person in the course of doing
8 business for purposes of Proposition 65, Cal. Health & Safety Code §§ 25249.6 et seq.

9 1.2 **Allegations and Representations.** Ferreiro alleges that Defendant has exposed
10 individuals to bisphenol A (BPA) from Mizuno Batting Helmet--Face Guards MBH MVP PC Mask
11 L/XL without providing clear and reasonable warnings under Proposition 65. BPA is listed under
12 Proposition 65 as a chemical known to the State of California to cause reproductive toxicity.

13 1.3 **Notice of Violation/Complaint.** On or about March 12, 2018, Ferreiro served
14 Mizuno Incorporated and various public enforcement agencies with a document entitled “60-Day
15 Notice of Violation” pursuant to Health & Safety Code § 25249.7(d) (the “Notice”), alleging that
16 Defendant was in violation of Proposition 65 for failing to warn consumers and customers that
17 Mizuno Batting Helmet - Face Guards MBH MVP PC Mask L/XL exposed users in California to
18 BPA. No public enforcer has brought and is diligently prosecuting the claims alleged in the Notice.
19 On March 12, 2019, Ferreiro filed a complaint in the matter against Mizuno Incorporated (the
20 “Complaint” or “Action”).

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 Action, that venue is proper in the
23 County of Alameda, and that this Court has jurisdiction to approve, enter, and oversee the
24 enforcement of this Consent Judgment as a full and final binding resolution of all claims which
25 were or could have been raised in the Action based on the facts alleged therein and/or in the Notice.

26 1.5 Defendant denies the material allegations contained in the Notice and the Action
27 and maintains that it has not violated Proposition 65. Nothing in this Consent Judgment shall be
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1 construed as an admission by Defendant of any fact, finding, issue of law, or violation of law; nor
2 shall compliance with this Consent Judgment constitute or be construed as an admission by
3 Defendant of any fact, finding, conclusion, issue of law, or violation of law, such being specifically
4 denied by Defendant. However, this section shall not diminish or otherwise affect the obligations,
5 responsibilities, and duties of Defendant under this Consent Judgment.

6 **2. DEFINITIONS**

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8 2.1 **Covered Products.** The term “Covered Products” means Mizuno Batting Helmet -
9 Face Guards MBH MVP PC Mask L/XL that are manufactured, distributed and/or offered for sale
10 in California by Mizuno, or any entity to whom Mizuno directly or indirectly distributes.

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 **Reformulation of Covered Products.** Commencing thirty (30) days after the
15 Effective Date, and continuing thereafter, Covered Products that Mizuno directly manufactures,
16 imports, distributes, sells, or offers for sale in California shall either: (a) be Reformulated Products
17 pursuant to § 3.2 below; or (b) be labeled with a clear and reasonable exposure warning pursuant
18 to §§ 3.3 and 3.4 below. For purposes of this Consent Judgment, a “Reformulated Product” is a
19 Covered Product that is in compliance with the standard set forth in § 3.2 below. The warning
20 requirement set forth in §§ 3.3 and 3.4 shall not apply to any Reformulated Product.

21 3.2 **Reformulation Standard.** “Reformulated Products” shall mean Covered Products
22 that are BPA-Free. For purposes of this Consent Judgment, “BPA-Free” is defined as (i) products
23 with a sample result below 0.1 parts per billion (ppb) of BPA, (see *Assembly Bill 1319 (2011) West's*
24 *Ann. Cal. Health & Safety Code § 108940-108941*, enacted in October 2011 and effective in 2013),
25 or (ii) products with a sample result greater than 0.1 ppb BPA that is demonstrated via an exposure
26 calculation that probable exposures would not result in an exceedance of the proposed Maximum
27 Allowable Dose Level (MADL) for BPA of 3 micrograms per day from solid materials. Product
28 testing shall be performed by an accredited laboratory utilizing a validated method including

1 ISO/IEC 17025, USP <1225>, ICH Q2 (R1), 2002/657/EC, SANTE/11813/2017. Field sampling
2 of products may be conducted following protocols provided by the Occupational Safety and Health
3 Administration (OSHA), 2014, or reviewed by the United States Environmental Protection Agency
4 (USEPA). Wipe sampling may be conducted using an appropriate solvent, including artificial
5 perspiration, as described by the USEPA, 2015 and the California Office of Environmental Health
6 Hazard Assessment, 2015.

7
8 **3.3 Clear and Reasonable Warning.** As of the date that is thirty (30) days after the
9 Effective Date, and continuing thereafter, a clear and reasonable exposure warning as set forth in
10 this §§ 3.3 and 3.4 must be provided for all Covered Products that Defendant manufacturers,
11 imports, distributes, sells, or offers for sale in California that is not a Reformulated Product. There
12 shall be no obligation for Defendant to provide a warning for Covered Products that enter the stream
13 of commerce prior to thirty (30) days after the Effective Date. The warning shall consist of either
14 the **Warning** or **Alternative Warning** described in §§ 3.3(a) or (b), respectively:

15 (a) **Warning.** The “Warning” shall consist of the statement:

16 **⚠ WARNING:** This product can expose you to chemicals including bisphenol A
17 (BPA), which are known to the State of California to cause birth defects or other
18 reproductive harm. For more information go to www.P65Warnings.ca.gov.

19 (b) **Alternative Warning:** Mizuno may, but is not required to, use the alternative short-
20 form warning as set forth in this § 3.3(b) (“**Alternative Warning**”) as follows:

21 **⚠ WARNING:** Reproductive Harm - www.P65Warnings.ca.gov.

22 **3.4** A **Warning** or **Alternative Warning** provided pursuant to § 3.3 must print the word
23 “**WARNING:**” in all capital letters and in bold font, followed by a colon. The warning symbol to
24 the left of the word “**WARNING:**” must be a black exclamation point in a yellow equilateral
25 triangle with a black outline, except that if the sign or label for the Covered Product does not use
26 the color yellow, the symbol may be in black and white. The symbol must be in a size no smaller
27 than the height of the word “**WARNING:**”. The warning shall be affixed to or printed on the
28 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

1 with other words, statements, or designs as to render it likely to be read and understood by an
2 ordinary individual under customary conditions of purchase or use. A warning may be contained
3 in the same section of the packaging, labeling, or instruction booklet that states other safety
4 warnings, if any, concerning the use of the product and shall be at least the same size as those other
5 safety warnings.

6 **3.5 Compliance with Warning Regulations.** Defendant shall be deemed to be in
7 compliance with this Consent Judgment and the Safe Drinking Water and Toxic Enforcement Act
8 of 1986, California Section Health and Safety Code Section 25249.5, et seq., by either adhering to
9 §§ 3.3 and 3.4 of this Consent Judgment or by complying with warning requirements adopted by
10 OEHHA after the Effective Date.

11 **4. MONETARY TERMS**

12 **4.1 Civil Penalty.** Mizuno shall pay a total settlement amount of twenty five thousand
13 dollars (\$25,000.00) inclusive of and in full satisfaction of all claims for a Civil Penalty pursuant
14 to Health and Safety Code § 25249.7(b) and any and all costs, expenses of litigation and attorneys’
15 fees or other claims regarding the Covered Products, to be allocated pursuant to this § 4 of this
16 Agreement. The amount of two thousand five hundred dollars (\$2,500.00) shall be allocated to a
17 Civil Penalty, and shall be apportioned in accordance with California Health & Safety Code §
18 25192, with 75% of the Civil Penalty remitted to the State of California’s Office of Environmental
19 Health Hazard Assessment (“OEHHA”) and the remaining 25% of the Civil Penalty remitted to
20 Ferreiro, as provided by California Health & Safety Code § 25249.12(d).

21 **4.1.1** Within ten (10) days of the Effective Date, Mizuno shall issue two separate
22 checks for the Civil Penalty payment to (a) “OEHHA” in the amount of \$1,875.00; and to (b)
23 “Brodsky & Smith, LLC in Trust for Ferreiro” in the amount of \$625.00. Payment owed to
24 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 address
16 set forth above as proof of payment to OEHHA.

17 4.2 **Attorneys' Fees.** Within ten (10) days after the Effective Date, Mizuno shall pay
18 the remaining amount of twenty two thousand five hundred dollars (\$22,500.00) to Brodsky &
19 Smith, LLC ("Brodsky Smith") as complete reimbursement for Plaintiff Ferreiro's attorneys' fees
20 and costs incurred as a result of investigating, bringing this matter to Mizuno's attention, litigating
21 and negotiating and obtaining judicial approval of a settlement in the public interest, pursuant to
22 Code of Civil Procedure § 1021.5. Except as explicitly provided herein, each Party shall bear its
23 own fees and costs.

24 **5. RELEASE OF ALL CLAIMS**

25 5.1 This Consent Judgment is a full, final, and binding resolution between Ferreiro
26 acting in the public interest, and Mizuno, and its parents, shareholders, divisions, subdivisions,
27 subsidiaries, partners, sister companies, and affiliates, and their predecessors, successors and
28 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 Walmart, Inc., Wal-
Mart Stores East, Inc., and Wal-Mart Stores, Inc., Concourse Team Express, LLC, manufacturers,
suppliers, distributors, wholesalers, customers, licensors, licensees, retailers, marketplace hosts,

1 franchisees, and cooperative members (“Downstream Defendant Releasees”), all other upstream
2 and downstream entities in the distribution chain of any Covered Product, and the successors and
3 assigns of any of them, who may use, maintain, distribute or sell the Covered Products (all of the
4 foregoing together, the “Released Entities”), of all claims for violations of Proposition 65 based on
5 exposure to BPA from Covered Products, with respect to any Covered Product manufactured,
6 distributed, or sold by Mizuno prior to thirty (30) days after the Effective Date, and all claims
7 asserted or which could have been asserted in the Complaint. Compliance with the terms of this
8 Consent Judgment constitutes compliance with Proposition 65 with regard to the Covered Products.

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

23 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS THAT THE
24 CREDITOR OR RELEASING PARTY DOES NOT KNOW OR SUSPECT TO
25 EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE
26 RELEASE AND THAT, IF KNOWN BY HIM OR HER, WOULD HAVE
27 MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE
28 DEBTOR OR RELEASED PARTY.

29 5.3 Mizuno waives any and all claims against Ferreiro, his attorneys and other
30 representatives, for any and all actions taken or statements made by Ferreiro and his attorneys and

1 other representatives, whether in the course of investigating claims or otherwise seeking
2 enforcement of Proposition 65 against it in this matter, and/or with respect to Covered Products.

3 5.4 Compliance with the terms of this Consent Judgment shall be deemed to constitute
4 compliance with Proposition 65 by Mizuno and all other Released Entities regarding alleged
5 exposures to BPA in the Covered Products as set forth in the Notice and Complaint.

6 5.5 Nothing in this Consent Judgment is intended to apply to any occupational or
7 environmental exposures arising under Proposition 65, nor shall it apply to any of Mizuno's or any
8 other Released Entities' products other than the Covered Products.

9 5.6 For any future Proposition 65 Notice of Intent to Sue that Anthony Ferreiro intends
10 to serve on a Released Entity, the parties agree to engage in a good faith mediation or ADR within
11 a reasonable time after the Notice is served, costs to be split equally by the parties, and Anthony
12 Ferreiro further agrees that in any event he will not file any civil action in less than ninety (90) days
13 from the date of the Notice. Anthony Ferreiro further agrees that for any subsequent Proposition
14 65 Notice of Intent to Sue served upon a Released Entity, if the Released Entity cures the alleged
15 violation within three (3) weeks of receipt of the Notice and provides written confirmation of such
16 compliance to Anthony Ferreiro within four (4) weeks of receipt of the Notice then the Notice will
17 be withdrawn and each side shall bear its own costs.

18 **6. INTEGRATION, AUTHORIZATION**

19 6.1 This Consent Judgment contains the sole and entire agreement of the Parties and
20 any and all prior negotiations and understandings related hereto shall be deemed to have been
21 merged within it. No representations or terms of agreement other than those contained herein exist
22 or have been made by any Party with respect to the other Party or the subject matter hereof.

23 6.2 Each signatory to this Consent Judgment certifies that he or she is fully authorized
24 by the Party he or she represents to stipulate to this Consent Judgment.

25 **7. GOVERNING LAW**

26 7.1 The terms of this Consent Judgment shall be governed by the laws of the State of
27 California and apply within the State of California. In the event that Proposition 65 is repealed or
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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. SEVERABILITY OF UNENFORCEABLE PROVISIONS**

5 In the event that any of the provisions of this Consent Judgment are held by a court to be
6 unenforceable, the validity of the remaining enforceable provisions shall not be adversely
7 affected.

8 **9. NOTICES**

9 9.1 Unless specified herein, all correspondence and notices required to be provided
10 pursuant to this Consent Judgment shall be in writing and personally delivered or sent by: (i) first-
11 class, (registered or certified mail) return receipt requested; or (ii) overnight courier on any party
12 by the other party at the following addresses:

13 For Defendant:

14 Stephen O'Day
15 Smith, Gambrell & Russell, LLP
16 Promenade, Suite 3100
17 1230 Peachtree St. N.E.
18 Atlanta, GA 30309

19 And

20 For Ferreiro:

21 Evan Smith
22 Brodsky & Smith, LLC
23 2 Bala Plaza, Suite 510
24 Bala Cynwyd, PA 19004

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

27 **10. COUNTERPARTS; FACSIMILE SIGNATURES**

28 10.1 This Consent Judgment may be executed in counterparts and by facsimile or other
electronically transmitted signatures, each of which shall be deemed an original, and all of which,
when taken together, shall constitute one and the same document.

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

3 11.1 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 11.2 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 11.3 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 **12. MODIFICATION**

15 12.1 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 **13. ATTORNEY'S FEES**

18 13.1 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 13.2 Nothing in this Section shall preclude a Party from seeking an award of sanctions
24 pursuant to law.

25 **14. RETENTION OF JURISDICTION**

26 14.1 This Court shall retain jurisdiction of this matter to implement or modify the
27 Consent Judgment.
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15. AUTHORIZATION

15.1 Each of the undersigned is authorized to execute this Consent Judgment on behalf of his or her respective Party and has read, understood and agreed to all of the terms and conditions of this document and certifies that he or she is fully authorized by the Party he or she represents to execute the Consent Judgment on behalf of the Party represented and legally bind that Party. Except as explicitly provided herein each Party is to bear its own fees and costs.

AGREED TO:

AGREED TO:

Date: 4/24/19
By: Anthony Ferreiro
ANTHONY FERREIRO

Date: 4/24/19
By: [Signature]
MIZUNO USA, INC.

IT IS SO ORDERED, ADJUDGED AND DECREED:

Dated: _____

Judge of Superior Court