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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 KOHL'S CORPORATION, et al.,

15 Defendants.

Case No.: RG19025662

CONSENT JUDGMENT

Judge: Noel Wise

Dept.: 24

Hearing Date: March 5, 2020

Hearing Time: 9:00 AM

Reservation #: R-2153114

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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 Blue Wave Products,
4 Inc. (“Blue Wave Products” or “Defendant”) with Ferreiro and Defendant collectively referred to
5 as the “Parties” and each of them as a “Party.” Ferreiro is an individual residing in California that
6 seeks to promote awareness of exposures to toxic chemicals and improve human health by reducing
7 or eliminating hazardous substances contained in consumer products. Blue Wave Products is
8 alleged to be a person in the course of doing business for purposes of Proposition 65, Cal. Health
9 & 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 (a) Fast Patch vinyl repair kits,
12 UPC #6 7287520000 9, and (b) Hathaway table tennis sets, UPC #672875903177 without providing
13 a clear and reasonable exposure warning pursuant to Proposition 65. DEHP is listed under
14 Proposition 65 as a chemical known to the State of California to cause cancer and reproductive
15 toxicity.

16 1.3 **Notice of Violation/Complaint.** On or about July 23, 2018, Ferreiro served Blue
17 Wave Products, and various public enforcement agencies with documents entitled “60-Day Notice
18 of Violation” pursuant to Health & Safety Code §25249.7(d) (the “Notice”), alleging that
19 Defendant violated Proposition 65 for failing to warn consumers and customers that use of (a) Fast
20 Patch vinyl repair kits, UPC #6 7287520000 9, and (b) Hathaway table tennis sets, UPC
21 #672875903177 expose users in California to DEHP. No public enforcer has brought and is
22 diligently prosecuting the claims alleged in the Notice. On July 3, 2019, Ferreiro filed a complaint
23 (the “Complaint”) in the matter.

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

3 1.5 Defendant denies the material allegations contained in the 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 (a) Fast Patch vinyl repair
12 kits, UPC #6 7287520000 9, and (b) Hathaway table tennis sets, UPC #672875903177 that are
13 manufactured, distributed and/or offered for sale in California by Blue Wave Products.

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 **Reformulation of Covered Products.** As of the date this Consent Judgment is
18 signed by both Parties, and continuing thereafter, Covered Products that Blue Wave Products
19 directly manufactures, imports, distributes, sells, or offers for sale in California shall either: (a) be
20 Reformulated Products pursuant to § 3.2, below; or (b) be labeled with a clear and reasonable
21 exposure warning pursuant to §§ 3.3 and 3.4, below. For purposes of this Consent Judgment, a
22 “Reformulated Product” is a Covered Product that is in compliance with the standard set forth in §
23 3.2 below. The warning requirement set forth in §§ 3.3 and 3.4 shall not apply to any Reformulated
24 Product.

25 3.2 **Reformulation Standard.** “Reformulated Products” shall mean Covered Products
26 that contain concentrations less than or equal to 0.1% (1,000 parts per million (ppm)) of DEHP
27 when analyzed pursuant to U.S. Environmental Protection Agency testing methodologies 3580A
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1 and 8270C or other methodology utilized by federal or state government agencies for the purpose
2 of determining the phthalate content in a solid substance.

3 **3.3 Clear and Reasonable Warning.** As of the date this Consent Judgment is signed
4 by both Parties, and continuing thereafter, a clear and reasonable exposure warning as set forth in
5 this §§ 3.3 and 3.4 must be provided for all Covered Products that Defendant manufacturers,
6 imports, distributes, sells, or offers for sale in California that is not a Reformulated Product. There
7 shall be no obligation for Defendant to provide a warning for Covered Products that enter the stream
8 of commerce prior to the date this Consent Judgment is signed by both Parties. The warning shall
9 consist of either the **Warning** or **Alternative Warning** described in §§ 3.3(a) or (b), respectively:

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

11 ⚠ **WARNING:** This product can expose you to chemicals including di(2-
12 ethylhexyl) phthalate (DEHP), which is known to the State of California to cause
13 cancer and birth defects or other reproductive harm. For more information go to
www.P65Warnings.ca.gov.

14 (b) **Alternative Warning:** Blue Wave Products may, but is not required to, use the
15 alternative short-form warning as set forth in this § 3.3(b) (“**Alternative Warning**”) as follows:

16 ⚠ **WARNING:** Cancer and Reproductive Harm - www.P65Warnings.ca.gov.

17 **3.4 A Warning or Alternative Warning** provided pursuant to § 3.3 must print the word
18 “**WARNING:**” in all capital letters and in bold font, followed by a colon. The warning symbol to
19 the left of the word “**WARNING:**” must be a black exclamation point in a yellow equilateral
20 triangle with a black outline, except that if the sign or label for the Covered Product does not use
21 the color yellow, the symbol may be in black and white. The symbol must be in a size no smaller
22 than the height of the word “**WARNING:**”. The warning shall be affixed to or printed on the
23 Covered Product’s packaging or labeling, or on a placard, shelf tag, sign or electronic device or
24 automatic process, providing that the warning is displayed with such conspicuousness, as compared
25 with other words, statements, or designs as to render it likely to be read and understood by an
26 ordinary individual under customary conditions of purchase or use. A warning may be contained
27 in the same section of the packaging, labeling, or instruction booklet that states other safety
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1 warnings, if any, concerning the use of the Covered Product and shall be at least the same size as
2 those other safety warnings.

3 If Blue Wave Products sells Covered Products via an internet website to customers located
4 in California, the warning requirements of this section shall be satisfied if the foregoing warning
5 appears either: (a) on the same web page on which a Covered Product is displayed and/or described;
6 (b) on the same page as the price for the Covered Product; or (c) on one or more web pages
7 displayed to a purchaser prior to purchase during the checkout process. Alternatively, a symbol
8 consisting of a black exclamation point in a yellow or white equilateral triangle may appear adjacent
9 to or immediately following the display, description, price, or checkout listing of the Covered
10 Product, if the warning statement appears elsewhere on the same web page in a manner that clearly
11 associates it with the product(s) to which the warning applies.

12 **3.5 Compliance with Warning Regulations.** Defendant shall be deemed to be in
13 compliance with this Consent Judgment by either adhering to §§ 3.3 and 3.4 of this Consent
14 Judgment or by complying with warning requirements adopted by the State of California’s Office
15 of Environmental Health Hazard Assessment (“OEHHA”) after the Effective Date.

16 **4. MONETARY TERMS**

17 **4.1 Civil Penalty.** Blue Wave Products shall pay \$2,000.00 as a Civil Penalty pursuant
18 to Health and Safety Code section 25249.7(b), to be apportioned in accordance with California
19 Health & Safety Code § 25192, with 75% of these funds remitted to OEHHA and the remaining
20 25% of the Civil Penalty remitted to Ferreiro, as provided by California Health & Safety Code
21 § 25249.12(d).

22 **4.1.1** Within ten (10) days of the Effective Date, Blue Wave Products shall issue
23 two separate checks for the Civil Penalty payment to (a) “OEHHA” in the amount of \$1,500.00;
24 and to (b) “Brodsky & Smith, LLC in Trust for Ferreiro” in the amount of \$500.00. Payment
25 owed to Ferreiro pursuant to this Section shall be delivered to the following payment address:

26 Evan J. Smith, Esquire
27 Brodsky & Smith, LLC
28 Two Bala Plaza, Suite 510
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 of the Effective Date, Blue Wave Products
18 shall pay \$22,000.00 to Brodsky & Smith, LLC ("Brodsky Smith") as complete reimbursement for
19 Ferreiro's attorneys' fees and costs incurred as a result of investigating, bringing this matter to Blue
20 Wave Products' attention, litigating and negotiating and obtaining judicial approval of a settlement
21 in the public interest, pursuant to Code of Civil Procedure § 1021.5.

22 **5. RELEASE OF ALL CLAIMS**

23 5.1 This Consent Judgment is a full, final, and binding resolution between Ferreiro
24 acting on his own behalf, and on behalf of the public interest, and Blue Wave Products, and its
25 parents, shareholders, members, directors, officers, managers, employees, representatives, agents,
26 attorneys, divisions, subdivisions, subsidiaries, partners, sister companies, and affiliates, and their
27 predecessors, successors and assigns ("Defendant Releasees"), and all entities from whom they
28 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
retailers, franchisees, and cooperative members, including but not limited to Kohl's Corporation,
Kohl's Department Stores, Inc. ("Downstream Releasees"), of all claims for violations of

1 Proposition 65 based on exposure to DEHP from Covered Products as set forth in the Notice, with
2 respect to any Covered Products manufactured, distributed, or sold by Blue Wave Products prior to
3 the Effective Date. This Consent Judgment shall have preclusive effect such that no other person
4 or entity, whether purporting to act in his, her, or its interests or the public interest shall be permitted
5 to pursue and/or take any action with respect to any violation of Proposition 65 that was alleged in
6 the Complaint, or that could have been brought pursuant to the Notice against Blue Wave Products
7 and/or the Downstream Releasees of the Covered Products (“Proposition 65 Claims”). Compliance
8 with the terms of this Consent Judgment constitutes compliance with Proposition 65 with regard to
9 the Covered Products.

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 Blue Wave Products, Defendant Releasees, and Downstream Releasees
14 from any and all manner of actions, causes of action, claims, demands, rights, suits, obligations,
15 debts, contracts, agreements, promises, liabilities, damages, charges, losses, costs, expenses, and
16 attorneys’ fees, of any nature whatsoever, known or unknown, in law or equity, fixed or contingent,
17 now or in the future, with respect to any alleged violations of Proposition 65 related to or arising
18 from Covered Products manufactured, distributed, or sold by Blue Wave Products, Defendant
19 Releasees or Downstream Releasees. 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
MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE
DEBTOR OR RELEASED PARTY.

27 5.3 Blue Wave Products waives any and all claims against Ferreiro, his attorneys and
28 other representatives, for any and all actions taken or statements made (or those that could have

1 been taken or made) by Ferreiro and his attorneys and other representatives, whether in the course
2 of investigating claims or otherwise seeking enforcement of Proposition 65 against it in this matter,
3 and/or with respect to Covered Products.

4 **6. INTEGRATION**

5 6.1 This Consent Judgment contains the sole and entire agreement of the Parties and
6 any and all prior negotiations and understandings related hereto shall be deemed to have been
7 merged within it. No representations or terms of agreement other than those contained herein exist
8 or have been made by any Party with respect to the other Party or the subject matter hereof.

9 **7. GOVERNING LAW**

10 7.1 The terms of this Consent Judgment shall be governed by the laws of the State of
11 California and apply within the State of California. In the event that Proposition 65 is repealed or
12 is otherwise rendered inapplicable by reason of law generally, or as to Covered Products, then
13 Defendant shall have no further obligations pursuant to this Consent Judgment with respect to, and
14 to the extent that, Covered Products are so affected.

15 **8. NOTICES**

16 8.1 Unless specified herein, all correspondence and notices required to be provided
17 pursuant to this Consent Judgment shall be in writing and personally delivered or sent by: (i) first-
18 class, (registered or certified mail) return receipt requested; or (ii) overnight courier on any party
19 by the other party at the following addresses:

20 For Defendant:

21 Garth Ward
22 Lewis Brisbois Bisgaard & Smith LLP
23 701 B St., Ste. 1900
San Diego, CA 92101

24 And

25 For Ferreiro:

26 Evan Smith
27 Brodsky & Smith, LLC
28 9595 Wilshire Blvd., Ste. 900
Beverly Hills, CA 90212

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

3 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

4 9.1 This Consent Judgment may be executed in counterparts and by facsimile, each of
5 which shall be deemed an original, and all of which, when taken together, shall constitute one and
6 the same document.

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

9 10.1 Ferreiro agrees to comply with the requirements set forth in California Health &
10 Safety Code § 25249.7(f) and to promptly bring a Motion for Approval of this Consent Judgment.
11 Defendant agrees it shall support approval of such Motion.

12 10.2 This Consent Judgment shall not be effective until it is approved and entered by the
13 Court and shall be null and void if, for any reason, it is not approved by the Court. In such case, the
14 Parties agree to meet and confer on how to proceed and if such agreement is not reached within 30
15 days, the case shall proceed on its normal course.

16 10.3 If the Court approves this Consent Judgment and is reversed or vacated by an
17 appellate court, the Parties shall meet and confer as to whether to modify the terms of this Consent
18 Judgment. If the Parties do not jointly agree on a course of action to take, the case shall proceed on
19 its normal course on the trial court's calendar.

20 **11. MODIFICATION**

21 11.1 This Consent Judgment may be modified only by further stipulation of the Parties
22 and the approval of the Court or upon the granting of a motion brought to the Court by either Party.

23 **12. ATTORNEY'S FEES**

24 12.1 A Party who unsuccessfully brings or contests an action arising out of this Consent
25 Judgment shall be required to pay the prevailing party's reasonable attorney's fees and costs.

26 12.2 Nothing in this Section shall preclude a Party from seeking an award of sanctions
27 pursuant to law.

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13. RETENTION OF JURISDICTION

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

14. AUTHORIZATION

14.1 The undersigned are authorized to execute this Consent Judgment on behalf of their respective Parties and have read, understood and agree to all of the terms and conditions of this document and certify 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: 1/17/20
By: Anthony Ferreira
ANTHONY FERREIRO

Date: 1-7-2020
By: [Signature]
BLUE WAVE PRODUCTS, INC.

IT IS SO ORDERED, ADJUDGED AND DECREED:

Dated: _____

Judge of Superior Court