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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 CASL INDUSTRIES, LLC, et al.,

15 Defendants.

Case No.: RG19013888

CONSENT JUDGMENT

Judge: Ronni MacLaren

Dept.: 25

Hearing Date: February 5, 2019

Hearing Time: 9:00 AM

Reservation #: R-2142865

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 Sportsman’s Warehouse,
4 Inc. (“Sportsman’s” 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. Sportsman’s is alleged to be a
8 person in the course of doing business for purposes of Proposition 65, Cal. Health & Safety Code
9 §§ 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 TangleFree blind bags without
12 providing a clear and reasonable exposure warning pursuant to Proposition 65. DEHP is listed
13 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 4, 2019, Ferreiro served
16 Sportsman’s, 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 violated Proposition 65 for failing to warn consumers and customers that use of TangleFree blind
19 bags expose users in California to DEHP. No public enforcer has brought and is diligently
20 prosecuting the claims alleged in the Notice. On April 5, 2019, Ferreiro filed a complaint (the
21 “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.
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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 TangleFree blind bags that
10 are distributed and/or offered for sale in California by Sportsman’s.

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.** As of the date this Consent Judgment is
15 signed by both Parties, and continuing thereafter, Covered Products that Sportsman’s directly
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 contain concentrations less than or equal to 0.1% (1,000 parts per million (ppm)) of DEHP
23 when analyzed pursuant to U.S. Environmental Protection Agency testing methodologies 3580A
24 and 8270C or other methodology utilized by federal or state government agencies for the purpose
25 of determining the phthalate content in a solid substance.

26 3.3 **Clear and Reasonable Warning.** As of the date this Consent Judgment is signed
27 by both Parties, and continuing thereafter, a clear and reasonable exposure warning as set forth in
28

1 §§ 3.3 and 3.4 must be provided for all Covered Products that Defendant imports, distributes, sells,
2 or offers for sale in California that is not a Reformulated Product. There shall be no obligation for
3 Defendant to provide a warning for Covered Products that enter the stream of commerce prior to
4 the date this Consent Judgment is signed by both Parties. The warning shall consist of either the
5 **Warning** or **Alternative Warning** described in §§ 3.3(a) or (b), respectively:

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

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

11 (b) **Alternative Warning:** Sportsman’s may, but is not required to, use the alternative
12 short-form warning as set forth in this § 3.3(b) (“**Alternative Warning**”) as follows:

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

14 3.4 A **Warning** or **Alternative Warning** provided pursuant to § 3.3 must print the word
15 “**WARNING:**” in all capital letters and in bold font, followed by a colon. The warning symbol to
16 the left of the word “**WARNING:**” must be a black exclamation point in a yellow equilateral
17 triangle with a black outline, except that if the sign or label for the Covered Product does not use
18 the color yellow, the symbol may be in black and white. The symbol must be in a size no smaller
19 than the height of the word “**WARNING:**”. The warning shall be affixed to or printed on the
20 Covered Product’s packaging or labeling, or on a placard, shelf tag, sign or electronic device or
21 automatic process, providing that the warning is displayed with such conspicuousness, as compared
22 with other words, statements, or designs as to render it likely to be read and understood by an
23 ordinary individual under customary conditions of purchase or use. A warning may be contained
24 in the same section of the packaging, labeling, or instruction booklet that states other safety
25 warnings, if any, concerning the use of the Covered Product and shall be at least the same size as
26 those other safety warnings.

27 If Sportsman’s sells Covered Products via an internet website to customers located in
28 California, the warning requirements of this section shall be satisfied if the foregoing warning
appears either: (a) on the same web page on which a Covered Product is displayed and/or described;

1 (b) on the same page as the price for the Covered Product; or (c) on one or more web pages
2 displayed to a purchaser prior to purchase during the checkout process. Alternatively, a symbol
3 consisting of a black exclamation point in a yellow or white equilateral triangle may appear adjacent
4 to or immediately following the display, description, price, or checkout listing of the Covered
5 Product, if the warning statement appears elsewhere on the same web page in a manner that clearly
6 associates it with the product(s) to which the warning applies.

7 **3.5 Compliance with Warning Regulations.** Defendant shall be deemed to be in
8 compliance with this Consent Judgment by either adhering to §§ 3.3 and 3.4 of this Consent
9 Judgment or by complying with warning requirements adopted by the State of California’s Office
10 of Environmental Health Hazard Assessment (“OEHHA”) after the Effective Date.

11 **4. MONETARY TERMS**

12 **4.1 Civil Penalty.** Sportsman’s shall pay \$1,500.00 as a Civil Penalty pursuant to Health
13 and Safety Code section 25249.7(b), to be apportioned in accordance with California Health &
14 Safety Code § 25192, with 75% of these funds remitted to OEHHA and the remaining 25% of the
15 Civil Penalty remitted to Ferreiro, as provided by California Health & Safety Code § 25249.12(d).

16 **4.1.1** Within ten (10) days of the Effective Date, Sportsman’s shall issue two
17 separate checks for the Civil Penalty payment to (a) “OEHHA” in the amount of \$1,125.00; and
18 to (b) “Brodsky & Smith, LLC in Trust for Ferreiro” in the amount of \$375.00. Payment owed to
19 Ferreiro pursuant to this Section shall be delivered to the following payment address:

20 Evan J. Smith, Esquire
21 Brodsky & Smith, LLC
22 Two Bala Plaza, Suite 510
23 Bala Cynwyd, PA 19004

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

26 For United States Postal Service Delivery:

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

1 For Non-United States Postal Service Delivery:

2 Mike Gyurics
3 Fiscal Operations Branch Chief
4 Office of Environmental Health Hazard Assessment
5 1001 I Street
6 Sacramento, CA 95814

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

9 4.2 **Attorneys' Fees.** Within ten (10) days of the Effective Date, Sportsman's shall pay
10 \$16,000.00 to Brodsky & Smith, LLC ("Brodsky Smith") as complete reimbursement for Ferreiro's
11 attorneys' fees and costs incurred as a result of investigating, bringing this matter to Sportsman's
12 attention, litigating and negotiating and obtaining judicial approval of a settlement in the public
13 interest, pursuant to Code of Civil Procedure § 1021.5.

14 **5. RELEASE OF ALL CLAIMS**

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

1 limited to, any acts of unfair competition as defined by Business and Professions Code Sections
2 17200, et seq., or any violation of any other statutory or common law that have been or could have
3 been asserted in the Complaint. Compliance with the terms of this Consent Judgment constitutes
4 compliance with Proposition 65 with regard to the Covered Products.

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

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

24 5.3 Sportsman's waives any and all claims against Ferreiro, his attorneys and other
25 representatives, for any and all actions taken or statements made (or those that could have been
26 taken or made) by Ferreiro and his attorneys and other representatives, whether in the course of
27 investigating claims or otherwise seeking enforcement of Proposition 65 against it in this matter,
28 and/or with respect to Covered Products.

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6. INTEGRATION

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

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

7.2 If Proposition 65 or associated regulations are amended to require or allow different text, font, and/or methods of warning than specified above, Sportsman's, after providing written notice to Ferreiro, may substitute such text, font, and/or methods of warning for product warnings required under this Consent Judgment.

8. NOTICES

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

For Defendant:

Todd Kinney
Kutak Rock LLP
1650 Farnam Street
Omaha, NE 68102-2186

And

For Ferreiro:

Evan Smith
Brodsky & Smith, LLC
9595 Wilshire Blvd., Ste. 900

1 Beverly Hills, CA 90212

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

4 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

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

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

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

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

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

21 **11. MODIFICATION**

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

24 **12. ATTORNEY'S FEES**

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

27 12.2 Nothing in this Section shall preclude a Party from seeking an award of sanctions
28 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: 12/17/19
By: Anthony Ferreiro
ANTHONY FERREIRO

Date: 12/2/19
By: [Signature]
SPORTSMAN'S WAREHOUSE, INC.

IT IS SO ORDERED, ADJUDGED AND DECREED:

Dated: _____

Judge of Superior Court