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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 ROSS STORES, INC.,

15 Defendant.

Case No.: RG19041441

CONSENT JUDGMENT

Judge: Evelio Grillo

Dept.: 15

Hearing Date: August 11, 2020

Hearing Time: 1:30 PM

Reservation #: R-2184814

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 Spicebox Product
4 Development, Ltd. (“Spicebox” or “Defendant”) with Ferreiro and Defendant collectively referred
5 to as the “Parties” and each of them as a “Party.” Ferreiro is an individual residing in California
6 that seeks to promote awareness of exposures to toxic chemicals and improve human health by
7 reducing or eliminating hazardous substances contained in consumer products. Ferreiro alleges
8 Spicebox to be a “person” in the course of doing business for purposes of Proposition 65, Cal.
9 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 Instant Artist acrylic paint sets
12 without providing a clear and reasonable exposure warning pursuant to 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, 2019, Ferreiro served
16 Spicebox, 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 Instant Artist
19 acrylic paint sets expose users in California to DEHP. No public enforcer has brought and is
20 diligently prosecuting the claims alleged in the Notice. On October 31, 2019, Ferreiro filed a
21 complaint (the “Complaint”) in the matter. On or about June 24, 2020, Ferreiro filed an amended
22 complaint (the “Amended Complaint”) in the matter in order to identify Spicebox as a defendant.
23 The Complaint and Amended Complaint are collectively referred to herein as the “Action.”

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

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

9 **2. DEFINITIONS**

10 2.1 **Covered Products.** The term "Covered Products" means Instant Artist acrylic paint
11 sets that are manufactured, distributed and/or offered for sale in California by Spicebox.

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 **Reformulation of Covered Products.** As of the date this Consent Judgment is
16 signed by both Parties, and continuing thereafter, Covered Products that Spicebox directly
17 manufactures, imports, distributes, sells, or offers for sale in California shall either: (a) be
18 Reformulated Products pursuant to § 3.2, below; or (b) be labeled with a clear and reasonable
19 exposure warning pursuant to §§ 3.3 and 3.4, below. Products that were supplied to third parties by
20 Spice Box prior to the date that this Consent Judgment is signed by both parties shall be deemed
21 exempted from the requirements of § 3.2, 3.3, and 3.4 and shall be permitted to be sold through as
22 previously manufactured, packaged and labeled. For purposes of this Consent Judgment, a
23 "Reformulated Product" is a Covered Product that is in compliance with the standard set forth in §
24 3.2 below. The warning requirement set forth in §§ 3.3 and 3.4 shall not apply to any Reformulated
25 Product.

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

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

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

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

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

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

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

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 Spicebox sells Covered Products via an internet website to customers located in
4 California, the warning requirements of this section shall be satisfied if Spicebox, on its web site,
5 provides warning text and transmission methods conforming to 27 CA ADC § 25602, subpart (b)
6 or any other specifically applicable regulations related to such internet sales and Proposition 65.

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 or safe harbor warning provisions adopted
10 by the State of California's Office of Environmental Health Hazard Assessment ("OEHHA"), the
11 State of California Legislature or the California voters after the Effective Date.

12 **4. MONETARY TERMS**

13 4.1 **Civil Penalty.** Spicebox shall pay \$2,000.00 as a Civil Penalty pursuant to Health
14 and Safety Code section 25249.7(b), to be apportioned in accordance with California Health &
15 Safety Code § 25192, with 75% of these funds remitted to OEHHA and the remaining 25% of the
16 Civil Penalty remitted to Ferreiro, as provided by California Health & Safety Code § 25249.12(d).

17 4.1.1 Within ten (10) days of the Effective Date, Spicebox shall issue two
18 separate checks for the Civil Penalty payment to (a) "OEHHA" in the amount of \$1,500.00; and
19 to (b) "Brodsky & Smith, LLC in Trust for Ferreiro" in the amount of \$500.00. Payment owed to
20 Ferreiro pursuant to this Section shall be delivered to the following payment address:

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

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

27 For United States Postal Service Delivery:

28 Mike Gyurics
Fiscal Operations Branch Chief
Office of Environmental Health Hazard Assessment

1 P.O. Box 4010
2 Sacramento, CA 95812-4010

3 For Non-United States Postal Service Delivery:

4 Mike Gyurics
5 Fiscal Operations Branch Chief
6 Office of Environmental Health Hazard Assessment
7 1001 I Street
8 Sacramento, CA 95814

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

11 4.2 **Attorneys' Fees.** Within ten (10) days of the Effective Date, Spicebox shall pay
12 \$18,000.00 to Brodsky & Smith, LLC ("Brodsky Smith") as complete reimbursement for Ferreiro's
13 attorneys' fees and costs incurred as a result of investigating, bringing this matter to Spicebox
14 attention, litigating and negotiating and obtaining judicial approval of a settlement in the public
15 interest, pursuant to Code of Civil Procedure § 1021.5.

16 **5. RELEASE OF ALL CLAIMS**

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

1 been brought pursuant to the Notice against Spicebox and/or the Downstream Releasees of the
2 Covered Products ("Proposition 65 Claims"). Compliance with the terms of this Consent Judgment
3 constitutes compliance with Proposition 65 with regard to the Covered Products.

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

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

23 5.3 Spicebox waives any and all claims against Ferreiro, his attorneys and other
24 representatives, for any and all actions taken or statements made (or those that could have been
25 taken or made) by Ferreiro and his attorneys and other representatives, whether in the course of
26 investigating claims or otherwise seeking enforcement of Proposition 65 against it in this matter,
27 and/or with respect to Covered Products.

28 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

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 Bruce Nye
16 Scali Rasmussen, PC
17 1901 Harrison Street, 14th Floor
Oakland, CA 94612

18 For Ferreiro:

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

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

24 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

25 9.1 This Consent Judgment may be executed in counterparts and by facsimile, each of
26 which shall be deemed an original, and all of which, when taken together, shall constitute one and
27 the same document.
28

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, the
8 Parties agree to meet and confer on how to proceed and if such agreement is not reached within 30
9 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
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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
7 Date: June 18, 2020

Date: JUNE 23, 2020

8 By: Anthony Ferreiro
9 ANTHONY FERREIRO

By: [Signature]
SPICEBOX PRODUCT DEVELOPMENT,
LTD.

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

12
13 Dated: _____

Judge of Superior Court