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17 Attorneys for Plaintiff
18 Kim Embry

19 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

20 **IN AND FOR THE COUNTY OF ALAMEDA**

21 KIM EMBRY, an individual,

22 Plaintiff,

23 v.

24 FOCUS PRODUCTS GROUP
25 INTERNATIONAL, LLC, an Illinois
26 corporation, W.W. GRAINGER, INC., an
27 Illinois corporation, and DOES 1 through 100,
28 inclusive,

Defendants.

Case No. HG19045023

[PROPOSED] CONSENT JUDGMENT

(Health & Safety Code § 25249.6 *et seq.* and
Code Civ. Proc. § 664.6)

1 **1. INTRODUCTION**

2 **1.1 Parties**

3 This Consent Judgment is entered into by and between Kim Embry (“Embry” or “Plaintiff”) and Focus Products Group International, LLC (“Focus” or “Defendant”), with Embry and Focus each individually referred to as a “Party” and collectively referred to as the “Parties.”

6 **1.2 Plaintiff**

7 Embry is a citizen of the state of California, acting in the interest of the general public. She seeks to promote awareness of exposures to toxic chemicals and to improve human health by reducing or eliminating hazardous substances contained in consumer products.

10 **1.3 Defendant**

11 Focus employs ten or more individuals and is a “person in the course of doing business” for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, Health and Safety Code section 25249.6 *et seq.* (“Proposition 65”).

14 **1.4 General Allegations**

15 Embry alleges that Focus manufactures, imports, sells, and distributes for sale shower curtains that contain Di(2-ethylhexyl)phthalate (“DEHP”). Embry further alleges that Focus does so without providing a sufficient health hazard warning as required by Proposition 65 and related Regulations. Pursuant to Proposition 65, DEHP is listed as a chemical known to cause cancer, birth defects and other reproductive harm.

20 **1.5 Notices of Violation**

21 On June 26, 2019, Embry served Focus, W.W. Grainger, Inc. (“Grainger”), the California Attorney General, and all other required public enforcement agencies with a 60-Day Notice of Violation of Proposition 65. (“Notice”). The Notice alleged that Focus and/or Grainger violated Proposition 65 by failing to sufficiently warn consumers in California of the health hazards associated with exposures to DEHP contained in Focus’ Hookless White Vinyl Shower Curtain. On January 17, 2020, Embry issued an amended notice to correct Grainger’s agent for service. (“Amended Notice”).

27 No public enforcer has commenced or is otherwise prosecuting an action to enforce the violations alleged in the Notice or Amended Notice (the “Notices”).

1 **1.6 “Covered Products” Description**

2 “Covered Products” as used in this Consent Judgment is defined as, and expressly limited to,
3 shower curtains that contain DEHP at a concentration greater than 1,000 parts per million, examples
4 of which include, but are not limited to, Hookless White Vinyl Shower Curtains that contain DEHP at
5 a concentration greater than 1,000 parts per million and that are manufactured, sold, imported, or
6 distributed for sale in California by Focus.

7 **1.7 Complaint**

8 On November 27, 2019, Embry filed a Complaint for the alleged violations of Proposition 65
9 that are the subject of the Notices (“Complaint”).

10 **1.8 No Admission**

11 Focus denies the material factual and legal allegations of the Notices and Complaint and
12 maintains that all of the products it has manufactured, imported, sold, and/or distributed for sale in
13 California, including the Covered Products, have been, and are, in compliance with all laws. Nothing
14 in this Consent Judgment shall be construed as an admission of any fact, finding, conclusion of law,
15 issue of law, or violation of law, nor shall compliance with this Consent Judgment be construed as an
16 admission of any fact, finding, conclusion of law, issue of law, or violation of law. This Section shall
17 not, however, diminish or otherwise affect Focus’ obligations, responsibilities, and duties under this
18 Consent Judgment.

19 **1.9 Jurisdiction**

20 For purposes of this Consent Judgment and the Complaint only, the Parties stipulate that this
21 Court has jurisdiction over Focus as to the allegations in the Complaint, that venue is proper in the
22 County of Alameda, and that the Court has jurisdiction to enter and enforce the provisions of this
23 Consent Judgment pursuant to Proposition 65 and Code of Civil Procedure section 664.6.

24 **1.10 Effective Date and Compliance Date**

25 For purposes of this Consent Judgment, the term “Effective Date” means the date on which
26 Notice that the Court has granted the motion for approval of this Consent Judgment, as discussed in
27 Section 5, is served by mail or otherwise on the Parties.
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1 **2. INJUNCTIVE RELIEF: REFORMULATION OF PRODUCTS**

2 **2.1 Clear and Reasonable Warnings**


3 Commencing on the Effective Date, and continuing thereafter, Focus agrees to engage in online
4 sales into California of Covered Products only with a warning as provided for in Section 2.2.

5 **2.2 General Warning Requirements**

6 For purposes of this Consent Judgment, a clear and reasonable warning shall consist of one of
7 the alternate forms of warning shown below, displayed with such conspicuousness, as compared with
8 other words, statements, designs, or devices as to render it likely to be seen, read, and understood by
9 an ordinary individual under customary conditions prior to completing an online purchase. The
10 warning shall include a symbol consisting of a black exclamation point in a yellow equilateral triangle
11 with a bold black outline. The symbol shall be placed to the left of the text of the warning, in a size no
12 smaller than the height of the word “WARNING”, as follows:

13  **WARNING:** This product can expose you to chemicals
14 including DEHP, which is known to the State of California
15 to cause cancer, birth defects or other reproductive harm.
16 For more information go to www.P65Warnings.ca.gov.

17 Or (alternate form of warning):

18  **WARNING:** Cancer and Reproductive Harm –
19 www.P65Warnings.cs.gov

20 For selling Covered Products via an internet website to customers located in California, the
21 warning requirements of this section shall be satisfied if the foregoing warning appears: (a) on the same
22 web page on which a Covered Product is displayed and/or described; (b) on the same page as the price
23 for the Covered Product; or (c) on one or more web pages displayed to a purchaser prior to completing
24 an online purchase. Alternatively, a symbol consisting of a black exclamation point in a yellow or white
25 equilateral triangle may appear adjacent to or immediately following the display, description, price, or
26
27
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checkout listing of the Covered Product, if the warning statement appears elsewhere on the same web page in a manner that clearly associates it with the product(s) to which the warning applies.

2.3 Grace Period for Existing Inventory of Covered Products

The injunctive requirements of Section 2 shall not apply to Covered Products that are already in the stream of commerce as of the Effective Date, which Covered Products are expressly subject to the releases provided in Section 4.

3. MONETARY SETTLEMENT TERMS

3.1 Settlement Amount

Focus shall pay sixty-two thousand five hundred dollars (\$62,500.00) in settlement and total satisfaction of all the claims referred to in the Notices, the Complaint, and this Consent Judgment. This includes civil penalties in the amount of six thousand two hundred and fifty dollars (\$6,250.00) pursuant to Health and Safety Code section 25249.7(b) and attorneys' fees and costs in the amount of fifty-six thousand two hundred and fifty dollars (\$56,250.00) pursuant to Code of Civil Procedure section 1021.5.

3.2 Civil Penalty

The portion of the settlement attributable to civil penalties shall be allocated according to Health and Safety Code section 25249.12(c)(1) and (d), with seventy-five percent (75%) of the penalty paid to the California Office of Environmental Health Hazard Assessment ("OEHHA"), and the remaining twenty-five percent (25%) of the penalty paid to Embry individually.

All payments owed to Embry shall be delivered to the following address:

Glick Law Group
225 Broadway, Suite 1900
San Diego, CA 92101

All payments owed to OEHHA (EIN: 68-0284486) shall be delivered directly to OEHHA (Memo Line "Prop 65 Penalties") at the following addresses:

For United States Postal Service Delivery:

Mike Gyurics
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 Focus agrees to provide Embry's counsel with a copy of the check payable to OEHHA,
8 simultaneous with its penalty payments to Embry.

9 Plaintiff and its counsel will provide completed IRS 1099, W-9, or other tax forms as required.
10 Relevant information is set out below:

- 11 • "Glick Law Group" (EIN: 47-1838518) at the address provided in Section 3.2(a)(i);
- 12 • "Nicholas & Tomasevic" (EIN: 46-3474065) at the address provided in Section 3.2(a)(i);
- 13 and
- 14 • "Office of Environmental Health Hazard Assessment" 1001 I Street, Sacramento, CA
15 95814.

16 **3.3 Attorneys' Fees and Costs**

17 The portion of the settlement attributable to attorney's fees and costs shall be paid to Embry's
18 counsel, who are entitled to attorneys' fees and costs incurred by it in this action, including but not
19 limited to investigating potential violations, bringing this matter to Focus' attention, as well as litigating
20 and negotiating a settlement in the public interest.

21 Focus shall provide their payment to Embry's counsel in two checks, divided equally, payable
22 to Glick Law Group, PC (\$28,125.00) and Nicholas & Tomasevic, LLP (\$28,125.00) respectively. The
23 addresses for these two entities are:

24 Noam Glick
25 Glick Law Group
26 225 Broadway, 19th Floor
27 San Diego, CA 92101

28 Craig Nicholas
Nicholas & Tomasevic, LLP
225 Broadway, 19th Floor
San Diego, CA 92101

3.4 Timing

The above-mentioned checks will be issued the later of April 1, 2021 or fourteen (14) days after the Effective Date.

4. **CLAIMS COVERED AND RELEASED**

4.1 Embry's Public Release of Proposition 65 Claims

For any claim or violation arising under Proposition 65 alleging a failure to warn about exposures to DEHP from Covered Products manufactured, imported, sold, or distributed by Focus prior to the Effective Date, Embry, acting for the general public, releases Focus of any and all liability. This includes Focus' owners, parents, subsidiaries, affiliated entities under common ownerships, its directors, officers, agents, employees, attorneys, and each entity to whom Focus directly or indirectly distributes or sells Covered Products, including but not limited to downstream distributors, including but not limited to W.W. Grainger, Inc., wholesalers, customers, retailers, online marketplaces, franchisees, cooperative members and licensees, (collectively, the "Releasees"). Releasees include defendants, their parents, and all subsidiaries and affiliates thereof and their respective employees, agents, and assigns that sell Focus' Covered Products. Compliance with the terms of this Consent Judgment constitutes compliance with Proposition 65 with respect to the alleged or actual failure to warn about exposures to DEHP from Covered Products manufactured, imported, sold, or distributed by Focus after the Effective Date. This Consent Judgment is a full, final and binding resolution of all claims that were or could have been asserted against Focus and/or Releasees for failure to provide warnings for alleged exposure to DEHP contained in Covered Products.

4.2 Embry's Individual Release of Claims

Embry, in her individual capacity, also provides a release to Focus and/or Releasees, which shall be a full and final accord and satisfaction of, as well as a bar to, all actions, causes of action, obligations, costs, expenses, attorney's fees, damages, losses, claims, liabilities, and demands of every nature, character, and kind, whether known or unknown, suspected or unsuspected, arising out of

1 alleged or actual exposures to DEHP in Covered Products manufactured, imported, sold, or distributed
2 by Focus before the Effective Date.

3 **4.3 Focus' Release of Embry**

4 Focus on its own behalf, and on behalf of Releasees as well as its past and current agents,
5 representatives, attorneys, successors, and assignees, hereby waives any and all claims against Embry
6 and her attorneys and other representatives, for any and all actions taken or statements made by Embry
7 and her attorneys and other representatives, whether in the course of investigating claims, otherwise
8 seeking to enforce Proposition 65 against them, in this matter or with respect to the Covered Products.
9

10 **5. COURT APPROVAL**

11 This Consent Judgment is not effective until it is approved by the Court and shall be null and
12 void if it is not approved by the Court within one year after it has been fully executed by the Parties, or
13 by such additional time as the Parties may agree to in writing.
14

15 **6. SEVERABILITY**

16 Subsequent to the Court's approval and entry of this Consent Judgment, if any provision is held
17 by a court to be unenforceable, the validity of the remaining provisions shall not be adversely affected.
18

19 **7. GOVERNING LAW**

20 The terms of this Consent Judgment shall be governed by the laws of the state of California as
21 applied within the state of California. In the event that Proposition 65 is repealed, or is otherwise
22 rendered inapplicable for reasons, including but not limited to changes in the law, then Focus may
23 provide written notice to Embry of any asserted change, and shall have no further injunctive obligations
24 pursuant to this Consent Judgment with respect to, and to the extent that, the Covered Products are so
25 affected.
26

27 **8. NOTICE**

28 Unless otherwise specified herein, all correspondence and notice required by this Consent
Judgment shall be in writing and sent by: (i) personal delivery; (ii) first-class, registered, or certified
mail, return receipt requested; or (iii) a recognized overnight courier to the following addresses:

If to Focus :

Ms. Michele J. Young
Chief Legal Officer
Focus Products Group, LLC
1500 S. Wolf Road
Wheeling, IL 60090

If to Embry:

Jake Schulte
Nicholas & Tomasevic LLP
225 Broadway, 19th Floor
San Diego, CA 92101

With a copy to:

Peter McGaw
Buchalter
55 Second St., Ste. 1700
San Francisco, CA 94105

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

9. COUNTERPARTS; DIGITAL SIGNATURES

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

10. POST EXECUTION ACTIVITIES

Embry agrees to comply with the reporting form requirements referenced in Health and Safety Code section 25249.7(f). The Parties further acknowledge that, pursuant to Health and Safety Code section 25249.7(f), a noticed motion is required to obtain judicial approval of the settlement, which motion Embry shall draft and file. In furtherance of obtaining such approval, the Parties agree to mutually employ their best efforts, including those of their counsel, to support the entry of this agreement as judgment, and to obtain judicial approval of their settlement in a timely manner. For purposes of this Section, "best efforts" shall include, at a minimum, supporting the motion for approval, responding to any objection that any third-party may make, and appearing at the hearing before the Court if so requested. The Parties shall each bear their own costs and attorneys' fees incurred fulfilling the requirements of this Section.

1 **11. MODIFICATION**

2 This Consent Judgment may be modified by: (i) a written agreement of the Parties and entry of
3 a modified consent judgment thereon by the Court; or (ii) a successful motion or application of any
4 Party, and the entry of a modified consent judgment thereon by the Court.

5 **12. AUTHORIZATION**

6 The undersigned are authorized to execute this Consent Judgment and acknowledge that they
7 have read, understand, and agree to all of the terms and conditions contained herein.

8 **13. GOOD FAITH ATTEMPT TO RESOLVE DISPUTES**

9 If a dispute arises with respect to either Party's compliance with the terms of this Consent
10 Judgment entered by the Court, the Parties shall meet and confer in person, or by telephone, and/or in
11 writing and endeavor to resolve the dispute in an amicable manner. No action or motion may be filed
12 in the absence of such a good faith attempt to resolve the dispute beforehand.

13 **14. ENTIRE AGREEMENT**

14 This Consent Judgment contains the sole and entire agreement and understanding of the Parties
15 with respect to the entire subject matter herein, and any and all prior discussions, negotiations,
16 commitments, and understandings related hereto. No representations, oral or otherwise, express or
17 implied, other than those contained herein have been made by any Party. No other agreements, oral or
18 otherwise, unless specifically referred to herein, shall be deemed to exist or to bind any Party.

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1 **15. DISMISSAL OF REMAINDER OF ACTION**

2 The Complaint as to Defendant W.W. Grainger and Does 1-100 shall be and is hereby dismissed
3 with prejudice.

4 **AGREED TO:**

AGREED TO:

6 Date: 02/01/2021

Date: February 11, 2021

8 By: 

9 KIM EMBRY

By: 

FOCUS PRODUCTS GROUP
INTERNATIONAL, LLC

12 **IT IS SO ORDERED.**

14 Date: _____

16 JUDGE OF THE SUPERIOR COURT