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8
9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 COUNTY OF SAN FRANCISCO

11 ANTHONY FERREIRO,

12 Plaintiff,

13 v.

14 LOWE'S COMPANIES, INC.,

15 Defendant.

Case No.: CGC-20-585519

CONSENT JUDGMENT

Judge: Ethan P. Schulman

Dept.: 302

Hearing Date: March 9, 2021

Hearing Time: 9:30 AM

Reservation #:

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 Lowe’s Home Centers,
4 LLC (“Lowe’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. Lowe’s is alleged to be a person
8 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 Blue Hawk log chains --
12 storage/carry bags without providing a clear and reasonable exposure warning pursuant to
13 Proposition 65. DEHP is listed under Proposition 65 as a chemical known to the State of California
14 to cause cancer and reproductive toxicity.

15 **1.3 Notice of Violation/Complaint.** On or about October 28, 2019, Ferreiro served
16 Lowe’s, Lowe’s Companies, Inc., AC Group Limited, LG Sourcing, Inc., LF, LLC and various
17 public enforcement agencies with documents entitled “60-Day Notice of Violation” pursuant to
18 Health & Safety Code §25249.7(d) (the “Notice”), alleging that Defendant violated Proposition 65
19 for failing to warn consumers and customers that use of Blue Hawk log chains exposes users in
20 California to DEHP. No public enforcer has brought and is diligently prosecuting the claims alleged
21 in the Notice. On July 15, 2020, Ferreiro filed a complaint (the “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 San Francisco, and that this Court has jurisdiction to approve,
25 enter, and oversee the enforcement of this Consent Judgment as a full and final binding resolution
26 of all claims which were or could have been raised in the Complaint based on the facts alleged
27 therein 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 plastic carry/storage bags
10 for Blue Hawk steel chains used for logging and other applications that are manufactured,
11 distributed and/or offered for sale in California by Lowe's, including, but not limited to, Blue Hawk
12 item numbers 0348436, 1329452, 1329455, and 1329461.

13 2.2 **Effective Date.** The term "Effective Date" means the date this Consent Judgment is
14 entered as a Judgment of the Court.

15 **3. INJUNCTIVE RELIEF: WARNINGS**

16 3.1 **Reformulation of Covered Products.** As of the Effective Date, and continuing
17 thereafter, Covered Products that Lowe's directly manufactures, imports, distributes, sells, or offers
18 for sale in California shall either: (a) be Reformulated Products pursuant to § 3.2, below; or (b) be
19 labeled with a clear and reasonable exposure warning compliant with Proposition 65 pursuant to
20 §§ 3.3 and 3.4, below. For purposes of this Consent Judgment, a "Reformulated Product" is a
21 Covered Product that is in compliance with the standard set forth in § 3.2 below. The warning
22 requirement set forth in §§ 3.3 and 3.4 shall not apply to any Reformulated Product.

23 3.2 **Reformulation Standard.** "Reformulated Products" shall mean Covered Products
24 that contain concentrations less than or equal to 0.1% (1,000 parts per million (ppm)) of DEHP
25 when analyzed pursuant to a proper and scientifically reliable application of U.S. Environmental
26 Protection Agency testing methodologies 3580A and 8270C or other scientifically reliable
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1 methodology utilized by federal or state government agencies for the purpose of determining the
2 DEHP content in a solid substance.

3 **3.3 Clear and Reasonable Warning.** As of the Effective Date, and continuing
4 thereafter, a clear and reasonable exposure warning as set forth in this §§ 3.3 and 3.4 must be
5 provided for all Covered Products that Defendant manufactures, imports, distributes, sells, or offers
6 for sale in California that are not a Reformulated Product. There shall be no obligation for
7 Defendant to provide a warning for Covered Products that enter the stream of commerce prior to
8 the Effective Date of this Consent Judgment. The warning shall consist of either the **Warning** or
9 **Alternative Warning** described in §§ 3.3(a) or (b), which the parties agree are in compliance with
10 current Proposition 65 regulations, 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:** Lowe’s may, but is not required to, use the alternative short-
16 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, provided 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. The 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 Lowe's sells Covered Products via an internet website to customers located in California,
4 the warning requirements of this section shall be satisfied if the foregoing **Warning** or a clearly
5 marked hyperlink using the word "**WARNING**" appears either: (a) on the same web page on which
6 a Covered Product is displayed; or (b) on one or more web pages displayed to a purchaser prior to
7 purchase during the checkout process. If warning on the Covered Products is provided using the
8 foregoing **Alternative Warning**, the warning provided on the web page may use the same content.
9 Alternatively, a symbol consisting of a black exclamation point in a yellow or white equilateral
10 triangle may appear adjacent to or immediately following the display, description, price, or
11 checkout listing of the Covered Product, if the warning statement appears elsewhere on the same
12 web page in a manner that clearly associates it with the product(s) to which the warning applies.

13 **3.5 Compliance with Warning Regulations.** The Parties agree that Defendant shall be
14 deemed to be in compliance with this Consent Judgment by either adhering to §§ 3.3 and 3.4 of this
15 Consent Judgment or by complying with warning requirements adopted by the State of California's
16 Office of Environmental Health Hazard Assessment ("OEHHA") in effect at the time after the
17 Effective Date. If modifications or amendments to Proposition 65 or its regulations after the
18 Effective Date are inconsistent with, or provide warning specifications or options different from,
19 the specifications in this Consent Judgment, Lowe's may modify the content and delivery methods
20 of its warnings to conform to the modified or amended provisions of Proposition 65 or its
21 regulations that are in effect at the time.

22 **4. MONETARY TERMS**

23 **4.1 Civil Penalty.** In settlement of all the claims referred to in this Consent Judgment,
24 Lowe's shall pay \$2,500.00 as a Civil Penalty pursuant to California Health and Safety Code
25 section 25249.7(b), to be apportioned and allocated in accordance with California Health & Safety
26 Code section 25192, with 75% of these funds remitted to OEHHA and the remaining 25% of the
27 Civil Penalty remitted to Ferreiro, as provided by California Health & Safety Code
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1 section 25249.12(d). Ferreiro's counsel shall be responsible for timely remitting OEHHA's and
2 Ferreiro's portions of the penalty payment made by Lowe's pursuant to the terms of this Section 4
3 and in accordance with California Health & Safety Code section 25249.12.

4 **4.2 Attorneys' Fees.** The Parties have reached an accord on the compensation due to
5 Ferreiro and his counsel under the private attorney general doctrine and principles of contract law.
6 Under these legal principles, Lowe's shall pay \$25,000.00 to Brodsky & Smith, LLC ("Brodsky
7 Smith") as complete reimbursement for Ferreiro's attorneys' fees and costs incurred as a result of
8 investigating, bringing this matter to Lowe's attention, litigating and negotiating and obtaining
9 judicial approval of a settlement in the public interest, pursuant to Code of Civil Procedure section
10 1021.5.

11 **4.3 Payment Information.** Within thirty (30) days of the Effective Date, Lowe's shall
12 make a total payment of \$27,500.00 for the civil penalties and attorneys' fees/costs set forth above
13 in this Section 4 by check payable to Brodsky & Smith, LLC to be sent to the following address:
14

15 Evan J. Smith, Esquire
16 Brodsky & Smith, LLC
17 Two Bala Plaza, Suite 805
18 Bala Cynwyd, PA 19004

Other than this payment, each Party is to bear its own attorneys' fees and costs.

19 **5. RELEASE OF ALL CLAIMS**

20 **5.1** This Consent Judgment is a full, final, and binding resolution between Ferreiro
21 acting on his own behalf, and on behalf of the public interest, and Lowe's, and its owners, parents,
22 shareholders, members, directors, officers, managers, employees, insurers, representatives, agents,
23 attorneys, divisions, subdivisions, subsidiaries, partners, sister companies, and affiliates, and their
24 predecessors, successors and assigns ("Defendant Releasees"), and all entities from whom they
25 obtain and to whom they directly or indirectly distribute or sell Covered Products, including but
26 not limited to manufacturers, vendors (including but not limited to AC Group, Limited), suppliers,
27 distributors, wholesalers, customers, licensors, licensees retailers, franchisees, dealers, purchasers,
28 and cooperative members ("Upstream and 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 or offered for sale by Lowe's
3 prior to the Effective Date. It is the Parties' intention that this Consent Judgment shall have
4 preclusive effect such that no other actions by private enforcers, whether purporting to act in his,
5 her, or its interests or the public interest shall be permitted to pursue and/or take any action with
6 respect to any violation of Proposition 65 that was alleged in the Complaint, or that could have
7 been brought pursuant to the Notice against Lowe's and/or the Upstream and Downstream
8 Releasees of the Covered Products ("Proposition 65 Claims"). Compliance with the terms of this
9 Consent Judgment constitutes compliance with Proposition 65 with regard to 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 Lowe's, Defendant Releasees, and Upstream 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 Lowe's, Defendant Releasees or
19 Upstream and 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 section 1542 of the California Civil
22 Code, 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.

27 5.3 Lowe's waives any and all claims against Ferreiro, his attorneys and other
28 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 **6. INTEGRATION**

4 6.1 This Consent Judgment contains the sole and entire agreement of the Parties and
5 any and all prior negotiations and understandings related hereto shall be deemed to have been
6 merged within it. No representations or terms of agreement other than those contained herein exist
7 or have been made by any Party with respect to the other Party or the subject matter hereof.

8 **7. GOVERNING LAW**

9 7.1 The terms of this Consent Judgment shall be governed by the laws of the State of
10 California and apply within the State of California. In the event that Proposition 65 is repealed or
11 is otherwise rendered inapplicable by reason of law generally, or as to Covered Products, then
12 Defendant shall have no further obligations pursuant to this Consent Judgment with respect to, and
13 to the extent that, Covered Products are so affected.

14 **8. NOTICES**

15 8.1 Unless specified herein, all correspondence and notices required to be provided
16 pursuant to this Consent Judgment shall be in writing and personally delivered or sent by: (i) first-
17 class, (registered or certified mail) return receipt requested; or (ii) overnight courier on any party
18 by the other party at the following addresses:

19 For Defendant:

20 Stephanie Forman
21 Gabriel J. Padilla
22 Tharpe & Howell, LLP
23 15250 Ventura Boulevard, Ninth Floor
24 Sherman Oaks, CA 91403

25 And

26 For Ferreiro:

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

Any party, from time to time, may specify in writing to the other party a change of address to

1 which all notices and other communications shall be sent.

2 **9. COUNTERPARTS; FACSIMILE/E- SIGNATURES**

3 9.1 This Consent Judgment may be executed in counterparts and by facsimile or e-
4 signatures, each of which shall be deemed an original, and all of which, when taken together, shall
5 constitute one and the same document.

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

8 10.1 Ferreiro agrees to comply with the requirements set forth in California Health &
9 Safety Code section 25249.7(f) and to promptly bring a Motion for Approval of this Consent
10 Judgment. Defendant agrees it shall not oppose approval of such Motion.

11 10.2 This Consent Judgment shall not be effective until it is approved and entered by the
12 Court and shall be null and void if, for any reason, it is not approved by the Court. In such case, the
13 Parties agree to meet and confer on how to proceed and if such agreement is not reached within
14 thirty (30) days, the case shall proceed on its normal course.

15 10.3 If the Court approves this Consent Judgment and is reversed or vacated by an
16 appellate court, the Parties shall meet and confer as to whether to modify the terms of this Consent
17 Judgment. If the Parties do not jointly agree on a course of action to take, the case shall proceed on
18 its normal course on the trial court's calendar.

19 **11. MODIFICATION**

20 11.1 This Consent Judgment may be modified only by further stipulation of the Parties
21 and the approval of the Court or upon the granting of a motion brought to the Court by either Party.

22 **12. ATTORNEY'S FEES**

23 12.1 A Party who unsuccessfully brings or contests an action arising out of this Consent
24 Judgment shall be required to pay the prevailing party's reasonable attorney's fees and costs.

25 12.2 Nothing in this Section shall preclude a Party from seeking an award of sanctions
26 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:

1/12/2021

Date:

By:

ANTHONY FERREIRO

By:

LOWE'S HOME CENTERS, LLC

IT IS SO ORDERED, ADJUDGED AND DECREED:

Dated:

Judge of Superior Court