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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 ACE HARDWARE CORPORATION,

15 Defendant.

Case No.: RG20082106

CONSENT JUDGMENT

Judge: Delbert C. Gee

Dept.: 514

Hearing Date: June 8, 2021

Hearing Time: 3:00 PM

Reservation #: R-2253124

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 Ace Hardware
4 Corporation (“Ace” 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. Ace is alleged to be a person in
8 the course of doing business for purposes of Proposition 65, Cal. Health & Safety Code §§ 25249.6
9 et seq.

10 1.2 **Allegations and Representations.** This Consent Judgement seeks to resolve three
11 separate notices and related products. Ferreiro alleges that Defendant has exposed individuals to
12 diisononyl phthalate (DINP), from plastic containers, di(2-ethylhexyl) phthalate (DEHP) from
13 coated anchor chains and carbon monoxide from its sales of firelighters, without providing a clear
14 and reasonable exposure warning pursuant to Proposition 65. DEHP is listed pursuant to
15 Proposition 65 as a chemical known to the State of California to cause cancer and reproductive
16 toxicity. DINP is listed pursuant to Proposition 65 as a chemical known to the State of California
17 to cause cancer. Carbon monoxide is listed pursuant to Proposition 65 as a chemical known to the
18 State of California to cause reproductive toxicity.

19 1.3 **Notice of Violation/Complaint.** On or about November 19, 2019 (firelighters),
20 February 26, 2020 (chains), and March 13, 2020 (containers). Ferreiro served Ace and various
21 public enforcement agencies with the respective documents entitled “60-Day Notice of Violation”
22 pursuant to Health & Safety Code §25249.7(d) (the “Notice”), alleging that Defendant violated
23 Proposition 65 for failing to warn consumers and customers that use of Reddy Heat Premium
24 Firelighters, UPC #761644893204 (carbon monoxide), Seachoice Vinyl Coated Anchor Lead
25 Chain, UPC# 719249444017 (DEHP), and Viewtainer Candy Container – Black Vinyl Cap,
26 UPC#787660388067 (DINP) expose users in California to DEHP, DINP, and/or carbon monoxide.
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1 No public enforcer has brought and is diligently prosecuting the claims alleged in the Notice. On
2 November 19, 2020, Ferreiro filed a complaint (the “Complaint”) in the matter.

3 1.4 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
4 jurisdiction over Defendant as to the allegations contained in the Complaint filed in this matter, that
5 venue is proper in the County of Alameda, and that this Court has jurisdiction to approve, enter,
6 and oversee the enforcement of this Consent Judgment as a full and final binding resolution of all
7 claims which were or could have been raised in the Complaint based on the facts alleged therein
8 and/or in the Notice.

9 1.5 Defendant denies the material allegations contained in Ferreiro’s Notice and
10 Complaint and maintains that it has not violated Proposition 65. Nothing in this Consent Judgment
11 shall be construed as an admission by Defendant of any fact, finding, issue of law, or violation of
12 law; nor shall compliance with this Consent Judgment constitute or be construed as an admission
13 by Defendant of any fact, finding, conclusion, issue of law, or violation of law, such being
14 specifically denied by Defendant. However, this section shall not diminish or otherwise affect the
15 obligations, responsibilities, and duties of Defendant under this Consent Judgment.

16 **2. DEFINITIONS**

17 2.1 **Covered Products.** The term “Covered Products” means the products that are
18 alleged to have been manufactured, distributed and/or offered for sale in California by Ace that
19 were identified in their respective notices:

- 20 1) AG 2019-02143 “Firelighters” manufactured by Reddy Heat Premium Firelighters
21 including UPC# 761644893204;
22 2) AG 2020-00488 Vinyl Coated Anchor Chains manufactured by Brunswick Corporation,
23 including all of its subsidiaries and divisions, specifically including Land ‘N’ Sea
24 Distributing Inc. including UPC# 71924944401744401, Item# 8092835, Ace Hardware
25 Order#13153198; and
26 3) AG 2020-00659 Plastic Containers manufactured by ARQ Enterprises, Inc.,
27 including Viewtainer Candy Container — Black Vinyl Cap UPC#787660388067.
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2.2 **Effective Date.** The term “Effective Date” means the date this Consent Judgment is entered as a Judgment of the Court.

3. **INJUNCTIVE RELIEF: WARNINGS**

3.1 **Reformulation of Covered Products.** As of the date this Consent Judgment is signed by both Parties, and continuing thereafter, Ace will not ship or otherwise distribute Covered Products into California unless they are either: (a) Reformulated Products pursuant to § 3.2, below; or (b) labeled with a clear and reasonable exposure warning pursuant to §§ 3.3 and 3.4, below. For purposes of this Consent Judgment, a “Reformulated Product” is a Covered Product that is in compliance with the standard set forth in § 3.2 below. The warning requirement set forth in §§ 3.3 and 3.4 shall not apply to any Reformulated Product.

3.2 **Reformulation Standard.** “Reformulated Products” shall mean Covered Products that contain concentrations less than or equal to 0.1% (1,000 parts per million (ppm)) of DEHP, DINP when analyzed pursuant to U.S. Environmental Protection Agency testing methodologies 3580A and 8270C or other methodology utilized by federal or state government agencies for the purpose of determining the phthalate content in a solid substance. For any Covered Product that will expose a purchaser, user or consumer to carbon monoxide, an exposure warning is required to be provided consistent with §§3.3(c) or (d), below.

3.3 **Clear and Reasonable Warning.** As of the date this Consent Judgment is signed by both Parties, and continuing thereafter, a clear and reasonable exposure warning as set forth in this §§ 3.3 and 3.4 must be provided for all Covered Products that Defendant ships or distributes, for sale into California that is not a Reformulated Product. There shall be no obligation for Defendant to provide a warning for Covered Products that entered the stream of commerce prior to the date this Consent Judgment is signed by both Parties. The warning shall consist of either the **Warning** or **Alternative Warning** described in §§ 3.3(a) - (d), respectively or otherwise complies with Proposition 65:

(a) **DEHP/DINP Warning.** The “Warning” shall consist of the statement:

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

5 (b) **DEHP/DINP Alternative Warning:** Ace may, but is not required to, use the
6 alternative short-form warning as set forth in this § 3.3(b) (“**Alternative Warning**”) as follows:

7 ⚠ **WARNING:** Cancer and Reproductive Harm - www.P65Warnings.ca.gov.¹

8 (c) **Carbon Monoxide Warning.** The “Warning” shall consist of the statement:

9 ⚠ **WARNING:** This product can expose you to chemicals including carbon
10 monoxide, which is known to the State of California to cause birth defects or other
11 reproductive harm. For more information go to www.P65Warnings.ca.gov.

12 (d) **Carbon Monoxide Alternative Warning:** Ace may, but is not required to, use the
13 alternative short-form warning as set forth in this § 3.3(b) (“**Alternative Warning**”) as follows:

14 ⚠ **WARNING:** Reproductive Harm - www.P65Warnings.ca.gov.

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

26 ¹ To the extent Ace determines that the Products for which a warning statement is required
27 under § 3.3 above contain DINP in concentrations in excess of 1,000 ppm, and **does not contain**
28 **DEHP in concentrations in excess of 1,000 ppm**, if it chooses not to use an **Alternative**
 Warning, it shall substitute the name DINP in place of DEHP in the **Warning** shown in § 2.3(a),
 herein. In this event, Ace shall delete the language “and birth defects or other reproductive harm”
 from the warning statement shown in § 3.3(a), and, if Ace **does** elect to use the **Alternative**
 Warning, it shall delete the language “and Reproductive Harm” from § 3.3(b), herein.

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 Ace sells Covered Products via an internet website to customers located in California, the
4 warning requirements of this section shall be satisfied if the foregoing warning or a warning
5 otherwise in compliance with Prop 65, appears either: (a) on the same web page on which a Covered
6 Product is displayed and/or described; (b) on the same page as the price for the Covered Product;
7 or (c) on one or more web pages displayed to a purchaser prior to purchase during the checkout
8 process or otherwise complies with Proposition 65. Alternatively, a symbol consisting of a black
9 exclamation point in a yellow or white equilateral triangle may appear adjacent to or immediately
10 following the display, description, price, or checkout listing of the Covered Products, if the warning
11 statement appears elsewhere on the same web page in a manner that clearly associates it with the
12 product(s) to which the warning applies.

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

17 **4. MONETARY TERMS**

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

22 4.1.1 Within thirty (30) days of the Effective Date, Ace shall issue two separate
23 checks for the Civil Penalty payment to (a) "OEHHA" in the amount of \$1,500.00; and to (b)
24 "Brodsky & Smith, LLC in Trust for Ferreiro" in the amount of \$500.00. Payment owed to
25 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 805
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 thirty (30) days of the Effective Date, Ace shall pay
18 \$28,000.00 to Brodsky & Smith, LLC ("Brodsky Smith") as complete reimbursement for Ferreiro's
19 attorneys' fees and costs incurred as a result of investigating, bringing this matter to Ace attention,
20 litigating and negotiating and obtaining judicial approval of a settlement in the public interest,
21 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 Ace and its parents, shareholders,
25 members, retailers, directors, officers, managers, employees, representatives, agents, attorneys,
26 divisions, subdivisions, subsidiaries, partners, sister companies, and affiliates, and their
27 predecessors, successors and assigns ("Defendant Releasees"), and all entities including Brunswick
28 Corporation, (including all of its subsidiaries and divisions, specifically including Land 'N' Sea
Distributing.), Viewtainer dba ARQ Enterprises, Inc., ARQ Enterprises, Inc. Calvidge C. Perry and
from whom they directly or indirectly obtain products ("Upstream Releasees") and to whom they
directly or indirectly distribute or sell Covered Products, including but not limited to manufacturers,

1 suppliers, distributors, wholesalers, customers, licensors, licensees, retailers, including but not
2 limited to Ace Hardware Corporation, franchisees, cooperative members, and their affiliates,
3 subsidiaries, successors, or assigns (“Downstream Releasees”), of all claims for violations of
4 Proposition 65 based on exposure to DEHP, DINP or carbon monoxide (as applicable to the specific
5 Covered Product) from Covered Products as set forth in the Notices and defined herein, with respect
6 to any Covered Products manufactured, distributed, or sold prior to the Effective Date. It is the
7 Parties’ intention that this Consent Judgment shall have preclusive effect such that no other actions
8 by private enforcers, which includes persons and entities, whether purporting to act in his, her, or
9 its interests or the public interest shall be permitted to pursue and/or take any action with respect to
10 any violation of Proposition 65 that was alleged in the Complaint, or that could have been brought
11 pursuant to the Notices against Ace and/or the Defendant Releasees and/or the Upstream Releasees
12 and/or the Downstream Releasees of the Covered Products (“Proposition 65 Claims”). It is the
13 Parties’ intention that compliance with the terms of this Consent Judgment constitutes compliance
14 with Proposition 65 with regard to the Covered Products.

15 5.2 In addition to the foregoing, Ferreiro on behalf of himself, his past and current
16 agents, representatives, attorneys, and successors and/or assignees, and not in his representative
17 capacity, hereby releases Defendant Releasees, Upstream Releasees and Downstream Releasees
18 from all claims that he has asserted or could have asserted against said Releasees arising out of
19 Proposition 65. Ferreiro acting on behalf of himself, his past and current agents, representatives,
20 attorneys, and successors and/or assignees, and not in his representative capacity further waives all
21 rights to institute or participate in, directly or indirectly, any form of legal action and releases Ace,
22 Defendant Releasees, Upstream Releasees and Downstream Releasees from any and all manner of
23 actions, causes of action, claims, demands, rights, suits, obligations, debts, contracts, agreements,
24 promises, liabilities, damages, charges, losses, costs, expenses, and attorneys’ fees, of any nature
25 whatsoever, known or unknown, in law or equity, fixed or contingent, now or in the future, with
26 respect to any alleged violations of Proposition 65 related to or arising from Covered Products
27 manufactured, distributed, or sold by Ace, Defendant Releasees, Upstream Releasees or
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1 Downstream Releasees. With respect to the foregoing waivers and releases in this paragraph,
2 Ferreiro hereby specifically waives any and all rights and benefits which he now has, or in the
3 future may have, conferred by virtue of the provisions of § 1542 of the California Civil Code, which
4 provides as follows:

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

9 5.3 Ace waives any and all claims against Ferreiro, his attorneys and other
10 representatives, for any and all actions taken or statements made (or those that could have been
11 taken or made) by Ferreiro and his attorneys and other representatives, whether in the course of
12 investigating claims or otherwise seeking enforcement of Proposition 65 against it in this matter,
13 and/or with respect to Covered Products.

14 **6. INTEGRATION**

15 6.1 This Consent Judgment contains the sole and entire agreement of the Parties and
16 any and all prior negotiations and understandings related hereto shall be deemed to have been
17 merged within it. No representations or terms of agreement other than those contained herein exist
18 or have been made by any Party with respect to the other Party or the subject matter hereof.

19 **7. GOVERNING LAW**

20 7.1 The terms of this Consent Judgment shall be governed by the laws of the State of
21 California and apply within the State of California. In the event that Proposition 65 is repealed or
22 is otherwise rendered inapplicable by reason of law generally, or as to Covered Products, then
23 Defendant shall have no further obligations pursuant to this Consent Judgment with respect to, and
24 to the extent that, Covered Products are so affected.

25 **8. NOTICES**

26 8.1 Unless specified herein, all correspondence and notices required to be provided
27 pursuant to this Consent Judgment shall be in writing and personally delivered or sent by: (i) first-
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1 class, (registered or certified mail) return receipt requested; or (ii) overnight courier on any party
2 by the other party at the following addresses:

3 For Defendant:

4 Craig A. Tristao
5 Coleman & Horowitz, LLP
6 499 W Shaw Ave Ste. 116
Fresno, CA 93704

7 And

8 For Ferreiro:

9 Evan Smith
10 Brodsky & Smith, LLC
11 9595 Wilshire Blvd., Ste. 900
Beverly Hills, CA 90212

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

14 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

15 9.1 This Consent Judgment may be executed in counterparts and by facsimile, each of
16 which shall be deemed an original, and all of which, when taken together, shall constitute one and
17 the same document.

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

20 10.1 Ferreiro agrees to comply with the requirements set forth in California Health &
21 Safety Code § 25249.7(f) and to promptly bring a Motion for Approval of this Consent Judgment.
22 Defendant agrees it shall support approval of such Motion.

23 10.2 This Consent Judgment shall not be effective until it is approved and entered by the
24 Court and shall be null and void if, for any reason, it is not approved by the Court. In such case, the
25 Parties agree to meet and confer on how to proceed and if such agreement is not reached within 30
26 days, the case shall proceed on its normal course.

27 10.3 If the Court approves this Consent Judgment and is reversed or vacated by an
28 appellate court, the Parties shall meet and confer as to whether to modify the terms of this Consent

1 Judgment. If the Parties do not jointly agree on a course of action to take, the case shall proceed on
2 its normal course on the trial court's calendar.

3 **11. MODIFICATION**

4 11.1 This Consent Judgment may be modified only by further stipulation of the Parties
5 and the approval of the Court or upon the granting of a motion brought to the Court by either Party.

6 **12. ATTORNEY'S FEES**

7 12.1 A Party who unsuccessfully brings or contests an action arising out of this Consent
8 Judgment shall be required to pay the prevailing party's reasonable attorney's fees and costs.

9 12.2 Nothing in this Section shall preclude a Party from seeking an award of sanctions
10 pursuant to law.

11 **13. RETENTION OF JURISDICTION**

12 13.1 This Court shall retain jurisdiction of this matter to implement or modify the
13 Consent Judgment.

14 **14. AUTHORIZATION**

15 14.1 The undersigned are authorized to execute this Consent Judgment on behalf of their
16 respective Parties and have read, understood and agree to all of the terms and conditions of this
17 document and certify that he or she is fully authorized by the Party he or she represents to execute
18 the Consent Judgment on behalf of the Party represented and legally bind that Party. Except as
19 explicitly provided herein each Party is to bear its own fees and costs.

20
21 **AGREED TO:**

AGREED TO:

22
23 Date: April 22, 2009

Date: _____

24 By: Anthony Ferreira

25 ANTHONY FERREIRO

By: _____

26 ACE HARDWARE CORPORATION

27 **IT IS SO ORDERED, ADJUDGED AND DECREED:**

Judgment. If the Parties do not jointly agree on a course of action to take, the case shall proceed on its normal course on the trial court's calendar.

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AGREED TO:

AGREED TO:

Date: _____

Date: April 22, 2021

By: _____
ANTHONY FERREIRO

By: [Signature]
ACE HARDWARE CORPORATION
John Surane, EVP

IT IS SO ORDERED, ADJUDGED AND DECREED:

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Dated: _____

Judge of Superior Court