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

11 ANTHONY FERREIRO,

12 Plaintiff,

13 v.

14 MYERS INDUSTRIES, INC.,

15 Defendant.

Case No.: CGC-21-597169

CONSENT JUDGMENT

Judge: Richard B. Ulmer

Dept.: 302

Hearing Date: February 1, 2024

Hearing Time: 9:30 AM

Complaint Filed: December 16, 2021

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 Myers Industries, Inc.
4 d/b/a Akro-Mils (“Myers” or “Defendant”) with Ferreiro and Defendant collectively referred to as
5 the “Parties” and each of them as a “Party.” Ferreiro is an individual residing in California that
6 seeks to promote awareness of exposures to toxic chemicals and improve human health by reducing
7 or eliminating hazardous substances contained in consumer products. Myers 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 bisphenol A (BPA) from its sales of storage/organization bins and/or containers and
12 the bin/container lids without providing a clear and reasonable exposure warning pursuant to
13 Proposition 65. BPA is listed under Proposition 65 as a chemical known to the State of California
14 to cause birth defects or other reproductive harm.

15 **1.3 Notice of Violation/Complaint.** On or about December 21, 2020, Ferreiro served
16 Myers, Wayfair, LLC, and various public enforcement agencies with documents entitled “60-Day
17 Notice of Violation” pursuant to Health & Safety Code §25249.7(d) (the “Notice”), alleging that
18 Defendant violated Proposition 65 for failing to warn consumers and customers that use of the
19 Covered Products (defined below) expose users in California to BPA. No public enforcer has
20 brought and is diligently prosecuting the claims alleged in the Notice. December 16, 2021, Ferreiro
21 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 **No Admission.** Defendant denies the material factual and legal allegations
2 contained in Ferreiro's Notice and Complaint and maintains that it has not violated Proposition 65.
3 Nothing in this Consent Judgment shall be construed as an admission by Defendant of any fact,
4 finding, issue of law, or violation of law; nor shall compliance with this Consent Judgment
5 constitute or be construed as an admission by Defendant of any fact, finding, conclusion, issue of
6 law, or violation of law, such being specifically denied by Defendant. However, this section shall
7 not diminish or otherwise affect the obligations, responsibilities, and duties of Defendant under this
8 Consent Judgment. Notwithstanding the allegations in the Notice, Defendant maintains that it has
9 not knowingly manufactured, or caused to be manufactured, the Covered Products for sale, import
10 or distribution in California in violation of Proposition 65.

11 **2. DEFINITIONS**

12 2.1 **Covered Products.** The term "Covered Products" means storage/organization
13 bins/containers including the bin/container lids, that are manufactured by or distributed by Myers
14 or its affiliates and sold and/or offered for sale in California by Myers or its affiliates, that expose
15 users to BPA.

16 2.2 **Effective Date.** The term "Effective Date" means the date this Consent Judgment is
17 entered as a Judgment of the Court.

18 **3. INJUNCTIVE RELIEF: REFORMULATION OR WARNINGS**

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

26 3.2 **Reformulation Standard.** "Reformulated Products" shall mean any Covered
27 Products subject to this Settlement Agreement that achieve a wipe test result equal to, or less than,
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1 3 micrograms of BPA. The "Wipe Test Protocol" for determining if a Product is a Reformulated
2 Product is as follows;

3 3.2.1 Accessible sample surface of the Covered Product is rubbed by wipe sample
4 swabs/paper wetted with HPLC grade water heated to 98 °F sixty (60) times along
5 longitudinal, latitudinal and diagonal orientation.

6 3.2.2 Wipe sample swabs/paper is extracted with methanol on wrist shaker for one
7 (1) hour and analyzed by LC/MS/MS.

8 3.3 **Clear and Reasonable Warning.** As of the Effective Date, excluding Covered
9 Products already in the stream of commerce as of the Effective Date and excluding Reformulated
10 Products, Myers agrees to manufacture, import, or purchase for sale in California only Covered
11 Products that are accompanied by either of the following warnings (a), (b), or (c):

12 (a) **Warning.** The "Warning" shall consist of the statement:

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

15 (b) **Alternative Warning:** Myers 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:** Reproductive Harm - www.P65Warnings.ca.gov.

18 Myers and its downstream retailers shall have no obligation to label Covered Products that
19 entered the stream of commerce prior to the Effective Date.

20 (c) **Safe Harbor:** Myers may use any form of "safe harbor" warning set forth in
21 Proposition 65 regulations that are adopted at the time it places a Covered Product in the stream of
22 commerce that is applicable to the Covered Product and the exposures at issue.

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

9 In addition to affixing the **Warning** or **Alternative Warning** to the Covered Product’s
10 packaging or labeling, the **Warning** or **Alternative Warning** shall be posted on websites where
11 Myers offers Covered Products for sale to consumers in California. The requirements of this
12 Section shall be satisfied if the **Warning** or **Alternative Warning**, or a clearly marked hyperlink
13 using the word “**WARNING,**” appears on the product display page, or by otherwise prominently
14 displaying the warning to the purchaser prior to completing the purchase. To comply with this
15 Section, Myers shall (a) post the **Warning** or **Alternative Warning** on its own website and, if it
16 has the ability to do so, on the websites of third-party internet sellers that Myers has written
17 agreements with; and (b) if Myers does not have the ability to post the **Warning** or **Alternative**
18 **Warning** on the websites of third-party internet sellers that it has written agreements with, Myers
19 shall provide such third-party internet sellers with written notice in accordance with Title 27,
20 California Code of Regulations, Section 25600.2. Third-party internet sellers of the Covered
21 Product that have been provided with written notice in accordance with Title 27, California Code
22 of Regulations, Section 25600.2 are not released in Section 5 of this Agreement if they fail to meet
23 the warning requirements of this Section.

24 3.5 **Compliance with Warning Regulations.** Defendant shall be deemed to be in
25 compliance with this Consent Judgment by either adhering to §§ 3.3 and 3.4 of this Consent
26 Judgment or by complying with warning requirements adopted by the State of California’s Office
27 of Environmental Health Hazard Assessment (“**OEHHA**”) applicable to the Covered Product and
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1 the exposures at issue after the Effective Date. If “consumer information,” as that term is defined
2 in Title 27, California Code of Regulations, Section 25600.1(c) as it may be amended from time to
3 time, is provided in a foreign language, Myers shall provide the **Warning** or **Alternative Warning**
4 in the foreign language in accordance with applicable warning regulations adopted by OEHHA.

5 **4. MONETARY TERMS**

6 4.1 **Civil Penalty.** Myers shall pay \$2,000.00 as a Civil Penalty pursuant to Health and
7 Safety Code section 25249.7(b), to be apportioned in accordance with California Health & Safety
8 Code § 25192, with 75% of these funds remitted to OEHHA and the remaining 25% of the Civil
9 Penalty remitted to Ferreiro, as provided by California Health & Safety Code § 25249.12(d).

10 4.1.1 Within thirty (30) days of the Effective Date, Myers shall issue two separate
11 checks for the Civil Penalty payment to (a) “OEHHA” in the amount of \$1,500.00; and to (b)
12 “Anthony Ferreiro” in the amount of \$500.00. Payment owed to Ferreiro pursuant to this Section
13 shall be delivered to the following payment address:

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

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

20 For United States Postal Service Delivery:

21 Mike Gyurics
22 Fiscal Operations Branch Chief
23 Office of Environmental Health Hazard Assessment
24 P.O. Box 4010
25 Sacramento, CA 95812-4010

26 For Non-United States Postal Service Delivery:

27 Mike Gyurics
28 Fiscal Operations Branch Chief
Office of Environmental Health Hazard Assessment
1001 I Street
Sacramento, CA 95814

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

1 4.2 **Attorneys' Fees.** Within thirty (30) days of the Effective Date, Myers shall pay
2 \$20,000.00 to Brodsky Smith as complete reimbursement for Ferreiro's attorneys' fees and costs
3 incurred as a result of investigating, bringing this matter to Myers attention, litigating and
4 negotiating and obtaining judicial approval of a settlement in the public interest, pursuant to Code
5 of Civil Procedure § 1021.5.

6 **5. RELEASE OF ALL CLAIMS**

7 5.1 This Consent Judgment is a full, final, and binding resolution between Ferreiro
8 acting on his own behalf, and on behalf of the public interest, and Myers, and its parents,
9 shareholders, members, directors, officers, managers, employees, representatives, agents,
10 attorneys, divisions, subdivisions, subsidiaries, partners, sister companies, and affiliates, and their
11 predecessors, successors and assigns ("Defendant Releasees"), and all entities from whom they
12 obtain and to whom they directly or indirectly distribute, import or sell Covered Products, including
13 but not limited to manufacturers, suppliers, distributors, wholesalers, customers, licensors,
14 licensees retailers, franchisees, and cooperative members ("Downstream Releasees"), of all claims
15 for violations of Proposition 65 based on exposure to BPA from Covered Products as set forth in
16 the Notice, with respect to any Covered Products manufactured, distributed, imported or sold by
17 Myers prior to the Effective Date. It is the Parties' intention that this Consent Judgment shall have
18 preclusive effect such that no other actions by private enforcers, whether purporting to act in his,
19 her, or its interests or the public interest shall be permitted to pursue and/or take any action with
20 respect to any violation of Proposition 65 that was alleged in the Complaint, or that could have
21 been brought pursuant to the Notice against Myers and/or the Downstream Releasees of the
22 Covered Products ("Proposition 65 Claims"). Myers' compliance with the terms of this Consent
23 Judgment constitutes compliance by Myers with Proposition 65 with regard to exposure to BPA
24 from the Covered Products.

25 5.2 In addition to the foregoing, Ferreiro, on behalf of himself, his past and current
26 agents, representatives, attorneys, and successors and/or assignees, and *not* in his representative
27 capacity, hereby waives all rights to institute or participate in, directly or indirectly, any form of
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1 legal action and releases Myers, Defendant Releasees, and Downstream Releasees from any and all
2 manner of actions, causes of action, claims, demands, rights, suits, obligations, debts, contracts,
3 agreements, promises, liabilities, damages, charges, losses, costs, expenses, and attorneys' fees, of
4 any nature whatsoever, known or unknown, in law or equity, fixed or contingent, now or in the
5 future, with respect to any alleged violations of Proposition 65 related to or arising from Covered
6 Products manufactured, distributed, or sold by Myers, Defendant Releasees or Downstream
7 Releasees. With respect to the foregoing waivers and releases in this paragraph, Ferreiro hereby
8 specifically waives any and all rights and benefits which he now has, or in the future may have,
9 conferred by virtue of the provisions of § 1542 of the California Civil Code, which provides as
10 follows:

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

15 5.3 Myers waives any and all claims against Ferreiro, his attorneys and other
16 representatives, for any and all actions taken or statements made (or those that could have been
17 taken or made) by Ferreiro and his attorneys and other representatives, whether in the course of
18 investigating claims or otherwise seeking enforcement of Proposition 65 against it in this matter,
19 and/or with respect to Covered Products.

20 **6. INTEGRATION**

21 6.1 This Consent Judgment contains the sole and entire agreement of the Parties and
22 any and all prior negotiations and understandings related hereto shall be deemed to have been
23 merged within it. No representations or terms of agreement other than those contained herein exist
24 or have been made by any Party with respect to the other Party or the subject matter hereof.

25 **7. GOVERNING LAW**

26 7.1 The terms of this Consent Judgment shall be governed by the laws of the State of
27 California and apply within the State of California. In the event that Proposition 65 is repealed or
28 is otherwise rendered inapplicable by reason of law generally, or as to Covered Products, then

1 Defendant shall have no further obligations pursuant to this Consent Judgment with respect to, and
2 to the extent that, Covered Products are so affected.

3 **8. NOTICES**

4 8.1 Unless specified herein, all correspondence and notices required to be provided
5 pursuant to this Consent Judgment shall be in writing and personally delivered or sent by: (i) first-
6 class, (registered or certified mail) return receipt requested; or (ii) overnight courier on any party
7 by the other party at the following addresses:

8 For Defendant:

9 Thomas J. Lloyd
10 Squire Patton Boggs (US) LLP
11 555 California Street, Suite 550
12 San Francisco, California 94104

12 and

13 Kendra S. Sherman
14 Squire Patton Boggs (US) LLP
15 41 S High St Ste 2000
16 Columbus, OH 43215

16 For Ferreiro:

17 Evan J. Smith, Esquire
18 Brodsky Smith
19 Two Bala Plaza, Suite 805
20 Bala Cynwyd, PA 19004

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

23 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

24 9.1 This Consent Judgment may be executed in counterparts and by facsimile, each of
25 which shall be deemed an original, and all of which, when taken together, shall constitute one and
26 the same document.
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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. BINDING**

23 13.1 This Consent Judgment shall be binding on and inure to the benefit of each Party
24 hereto and, to the extent applicable, such party's respective present or former directors, officers,
25 consultants, affiliated entities or corporations, parents, subsidiaries, divisions, franchisees, partners,
26 joint venturers, agents, shareholders, investors, creditors, insurers, attorneys, employees,
27 representatives, heirs, successors, licensees, customers, and assigns.

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1 **14. RETENTION OF JURISDICTION**

2 14.1 This Court shall retain jurisdiction of this matter to implement or modify the
3 Consent Judgment.

4 **15. AUTHORIZATION**

5 15.1 The undersigned are authorized to execute this Consent Judgment on behalf of their
6 respective Parties and have read, understood and agree to all of the terms and conditions of this
7 document and certify that he or she is fully authorized by the Party he or she represents to execute
8 the Consent Judgment on behalf of the Party represented and legally bind that Party. Except as
9 explicitly provided herein each Party is to bear its own fees and costs.

10 **AGREED TO:**

AGREED TO:

11
12 Date:

12 | 14 | 23

Date:

12-7-23

13 By:

13 *Anthony Ferreiro*
14 ANTHONY FERREIRO

By:

13 *Dr. Basque*
14 MYERS INDUSTRIES, INC.

15
16 **IT IS SO ORDERED, ADJUDGED AND DECREED:**

17
18 Dated: _____

19 _____
20 Judge of Superior Court
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