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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 WEST CHESTER HOLDINGS, LLC,

15 Defendant.

Case No.: CGC-22-602368

CONSENT JUDGMENT

Judge: Richard B. Ulmer

Dept.: 302

Hearing Date: June 20, 2023

Hearing Time: 9:30 AM

Complaint Filed: October 12, 2022

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1. INTRODUCTION

1.1 **The Parties.** This Consent Judgment is entered into by and between Anthony Ferreiro acting on behalf of the public interest (hereinafter “Ferreiro”) and West Chester Holdings, LLC (“West Chester” or “Defendant”) with Ferreiro and Defendant collectively referred to as the “Parties” and each of them as a “Party.” Ferreiro is an individual residing in California that seeks to promote awareness of exposures to toxic chemicals and improve human health by reducing or eliminating hazardous substances contained in consumer products. West Chester is alleged to be a person in the course of doing business for purposes of Proposition 65, Cal. Health & Safety Code §§ 25249.6 et seq.

1.2 **Allegations and Representations.** Ferreiro alleges that Defendant has exposed individuals to di-isodecyl phthalate (DIDP) from its sales of HDX Earmuffs without providing a clear and reasonable exposure warning pursuant to Proposition 65. DIDP is listed under Proposition 65 as a chemical known to the State of California to cause birth defects and other reproductive harm.

1.3 **Notice of Violation/Complaint.** On or about March 17, 2021, Ferreiro served West Chester and various public enforcement agencies with documents entitled “60-Day Notice of Violation” pursuant to Health & Safety Code §25249.7(d) (the “Notice”), alleging that Defendant violated Proposition 65 for failing to warn consumers and customers that use of HDX Earmuffs expose users in California to DIDP. No public enforcer has brought and is diligently prosecuting the claims alleged in the Notice. On October 12, 2022, Ferreiro filed a complaint (the “Complaint”) in the matter.

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

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 HDX Earmuffs that are
10 manufactured, distributed and/or offered for sale in California by West Chester.

11 2.2 **Effective Date.** The term “Effective Date” means the date this Consent Judgment is
12 entered as a Judgment of the Court.

13 **3. INJUNCTIVE RELIEF: REFORMULATION AND/OR WARNINGS**

14 3.1 **Reformulation of Covered Products.** As of the Effective Date, and continuing
15 thereafter, Covered Products that West Chester directly manufactures, imports, distributes, sells, or
16 offers for sale in California shall either be: (a) reformulated Products pursuant to § 3.2, below; or
17 (b) be labeled with a clear and reasonable exposure warning pursuant to §§ 3.3 and 3.4, below. For
18 purposes of this Consent Judgment, a “Reformulated Product” is a Covered Product that is in
19 compliance with the standard set forth in § 3.2 below. The warning requirement set forth in §§ 3.3
20 and 3.4 shall not apply to any Reformulated Product or Covered Product that entered the stream of
21 commerce prior to the Effective Date.

22 3.2 **Reformulation Standard.** “Reformulated Products” shall mean Covered Products
23 that contain concentrations less than or equal to 0.1% (1,000 parts per million (ppm)) of DIDP
24 when analyzed pursuant to U.S. Environmental Protection Agency testing methodologies 3580A
25 and 8270C or other methodology utilized by federal or state government agencies for the purpose
26 of determining the phthalate content in a solid substance. West Chester is entitled to rely on test
27 results from accredited laboratories provided to West Chester.

1 3.3 **Clear and Reasonable Warning.** The warning required by § 3.1 shall consist of
2 either the **Warning** or **Alternative Warning** described in §§ 3.3(a) or (b), respectively:

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

4 ⚠ **WARNING:** This product can expose you to chemicals including di-isodecyl
5 phthalate (DIDP), which is known to the State of California to cause birth defects
6 or other reproductive harm. For more information go to www.P65Warnings.ca.gov.

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

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

10 3.4 A **Warning** or **Alternative Warning** provided pursuant to § 3.3 must print the word
11 “**WARNING:**” in all capital letters and in bold font, followed by a colon. The warning symbol to
12 the left of the word “**WARNING:**” must be a black exclamation point in a yellow equilateral
13 triangle with a black outline, except that if the sign or label for the Covered Product does not use
14 the color yellow, the symbol may be in black and white. The symbol must be in a size no smaller
15 than the height of the word “**WARNING:**”. The **Warning** or **Alternative Warning** shall be affixed
16 to or printed on the Covered Product’s packaging or labeling, or on a placard, shelf tag, sign or
17 electronic device or automatic process, provided that the **Warning** or **Alternative Warning** is
18 displayed with such conspicuousness, as compared with other words, statements, or designs as to
19 render it likely to be read and understood by an ordinary individual under customary conditions of
20 purchase or use. The **Warning** or **Alternative Warning** may be contained in the same section of
21 the packaging, labeling, or instruction booklet that states other safety warnings, if any, concerning
22 the use of the Covered Product and shall be at least the same size as those other safety warnings.

23 In addition to affixing the **Warning** or **Alternative Warning** to the Covered Product’s
24 packaging or labeling, the **Warning** or **Alternative Warning** shall be posted on websites where
25 West Chester offers Covered Products for sale to consumers in California. The requirements of this
26 Section shall be satisfied if the **Warning** or **Alternative Warning**, or a clearly marked hyperlink
27 using the word “**WARNING**” or similar language appears on the product display page, or by
28 otherwise prominently displaying the warning to the purchaser prior to completing the purchase.

1 To comply with this Section, West Chester shall (a) post the **Warning** or **Alternative Warning** on
2 its own website and, if it has the ability to do so, on the websites of its third-party internet sellers;
3 and (b) if it does not have the ability to post the **Warning** or **Alternative Warning** on the websites
4 of its third-party internet sellers, provide such sellers with written notice in accordance with Title
5 27, California Code of Regulations, Section 25600.2. Third-party internet sellers of the Covered
6 Product that have been provided with written notice in accordance with Title 27, California Code
7 of Regulations, Section 25600.2 are not released in Section 5 of this Consent Judgment if they fail
8 to meet the warning requirements of this Section for Products that entered the stream of commerce
9 after to the Effective Date.

10 3.5 **Compliance with Warning Regulations.** Defendant shall be deemed to be in
11 compliance with this Consent Judgment by either adhering to §§ 3.3 and 3.4 of this Consent
12 Judgment or by complying with warning requirements adopted by the State of California’s Office
13 of Environmental Health Hazard Assessment (“OEHHA”) applicable to the Covered Product and
14 the exposure at issue after the Effective Date.

15 **4. MONETARY TERMS**

16 4.1 **Civil Penalty.** West Chester shall pay \$6,000.00 as a Civil Penalty pursuant to
17 Health and Safety Code section 25249.7(b), to be apportioned in accordance with California Health
18 & Safety Code § § 25249.12(c)(1) and (d), with 75% of these funds remitted to OEHHA and the
19 remaining 25% of the Civil Penalty remitted to Ferreiro, as provided by California Health & Safety
20 Code § 25249.12(d).

21 4.1.1 Within ten (10) days of the Effective Date, West Chester shall issue two
22 separate checks for the Civil Penalty payment to (a) “OEHHA” in the amount of \$4,500.00; and
23 to (b) “Anthony Ferreiro” in the amount of \$1,500.00. Payment owed to Ferreiro pursuant to this
24 Section shall be delivered to the following payment address:

25 Evan J. Smith, Esquire
26 Brodsky & Smith
27 Two Bala Plaza, Suite 805
28 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 at the address set
16 forth above as proof of payment to OEHHA.

17 4.2 **Attorneys' Fees.** Within ten (10) days of the Effective Date, West Chester shall pay
18 \$56,500.00 to Brodsky & Smith ("Brodsky & Smith") as complete reimbursement for Ferreiro's
19 attorneys' fees and costs incurred as a result of investigating, bringing this matter to West Chester
20 attention, litigating and negotiating and obtaining judicial approval of a settlement in the public
21 interest, 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 West Chester, and its parents,
25 shareholders, members, directors, officers, managers, employees, representatives, agents,
26 attorneys, divisions, subdivisions, subsidiaries, partners, sister companies, and affiliates, and their
27 predecessors, successors and assigns ("Defendant Releasees"), and all entities from whom they
28 obtain and to whom they directly or indirectly distribute or sell Covered Products, including but
not limited to manufacturers, suppliers, distributors, wholesalers, customers, licensors, licensees
retailers, franchisees, and cooperative members ("Downstream Releasees"), of all claims for
violations of Proposition 65 that were or could have been or could later be asserted against

1 Defendant Releasees or Downstream Releasees based on exposure to DIDP from Covered Products
2 or failure to warn as set forth in the Notice, with respect to any Covered Products (i) manufactured,
3 distributed, or sold by West Chester prior to the Effective Date or (ii) sold or distributed by
4 Downstream Releasees after the Effective Date (but which were acquired by any such parties prior
5 to the Effective Date). It is the Parties' intention that this Consent Judgment shall have preclusive
6 effect such that no other actions by private enforcers, whether purporting to act in his, her, or its
7 interests or the public interest shall be permitted to pursue and/or take any action with respect to
8 any violation of Proposition 65 that was alleged in the Complaint, or that could have been brought
9 pursuant to the Notice against West Chester, Defendant Releasees, and/or the Downstream
10 Releasees of the Covered Products ("Proposition 65 Claims"). Compliance with the terms of this
11 Consent Judgment constitutes compliance with Proposition 65 with regard to exposure to DIDP
12 from use of the Covered Products.

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

26 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS THAT THE
27 CREDITOR OR RELEASING PARTY DOES NOT KNOW OR SUSPECT TO
28 EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE
 RELEASE AND THAT, IF KNOWN BY HIM OR HER, WOULD HAVE

1 MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE
2 DEBTOR OR RELEASED PARTY.

3 5.3 West Chester waives any and all claims against Ferreiro, his attorneys and other
4 representatives, for any and all actions taken or statements made by Ferreiro and his attorneys and
5 other representatives, whether in the course of investigating claims or otherwise seeking
6 enforcement of Proposition 65 against it in this matter, and/or with respect to Covered Products.

7 **6. INTEGRATION**

8 6.1 This Consent Judgment contains the sole and entire agreement of the Parties and
9 any and all prior negotiations and understandings related hereto shall be deemed to have been
10 merged within it. No representations or terms of agreement other than those contained herein exist
11 or have been made by any Party with respect to the other Party or the subject matter hereof.

12 **7. GOVERNING LAW**

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

18 **8. NOTICES**

19 8.1 Unless specified herein, all correspondence and notices required to be provided
20 pursuant to this Consent Judgment shall be in writing and personally delivered or sent by: (i) first-
21 class, (registered or certified mail) return receipt requested; or (ii) overnight courier on any party
22 by the other party at the following addresses:

23 For Defendant:

24 Bridget Milot-Ren, Esq.
25 General Counsel
26 Protective Industrial Products, Inc.
27 968 Albany Shaker Road
28 Latham, NY 12110
Bmren@pipusa.com

With a copy to:

Jeff Parker

1 Sheppard Mullin
2 333 South Hope Street, 43rd Floor
3 Los Angeles, CA 90071-1422
4 jparker@sheppardmullin.com

5 And

6 For Ferreiro:

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

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

13 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

14 9.1 This Consent Judgment may be executed in counterparts and by facsimile, each of
15 which shall be deemed an original, and all of which, when taken together, shall constitute one and
16 the same document.

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

19 10.1 Ferreiro agrees to comply with the requirements set forth in California Health &
20 Safety Code § 25249.7(f) and to promptly bring a Motion for Approval of this Consent Judgment.
21 Defendant agrees it shall support approval of such Motion.

22 10.2 This Consent Judgment shall not be effective until it is approved and entered by the
23 Court and shall be null and void if, for any reason, it is not approved by the Court. In such case, the
24 Parties agree to meet and confer on how to proceed and if such agreement is not reached within 30
25 days, the case shall proceed on its normal course.

26 10.3 If the Court approves this Consent Judgment and is reversed or vacated by an
27 appellate court, the Parties shall meet and confer as to whether to modify the terms of this Consent
28 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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11. MODIFICATION

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

12. ATTORNEY'S FEES

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

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

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: _____

Date: 4/27/2023

By: _____
ANTHONY FERREIRO

By: [Signature] - Deputy General Counsel
WEST CHESTER HOLDINGS, LLC

IT IS SO ORDERED, ADJUDGED AND DECREED:

Dated: _____

Judge of Superior Court

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AGREED TO:

AGREED TO:

Date: 5/1/23

Date: _____

By: *Anthony Ferreiro*
ANTHONY FERREIRO

By: _____
WEST CHESTER HOLDINGS, LLC

IT IS SO ORDERED, ADJUDGED AND DECREED:

Dated: _____

Judge of Superior Court