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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 TENACIOUS HOLDINGS, INC.,

15 HD SUPPLY, INC.,

16 Defendants.

Case No.: CGC-22-597651

**CONSENT JUDGMENT**

Judge: Richard B. Ulmer

Dept.: 302

Hearing Date: January 27, 2023

Hearing Time: 9:30 AM

Complaint Filed: January 14, 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 Tenacious Holdings, Inc. (“Tenacious Holdings” 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. Tenacious Holdings 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(2-ethylhexyl) phthalate (DEHP) from its sales of are Ergodyne Glowear High Visibility Apparel vests without providing a clear and reasonable exposure warning pursuant to Proposition 65. DEHP is listed under Proposition 65 as a chemical known to the State of California to cause cancer and reproductive toxicity.

1.3 **Notice of Violation/Complaint.** On or about March 17, 2021, Ferreiro served Tenacious Holdings, Tenacious Holdings, Inc. dba Ergodyne (Collectively “Tenacious Holdings”), HD Supply, Inc., HDS IP Holding, LLC, HD Supply Holdings, Inc. (Collectively “HD Supply”), 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 Ergodyne Glowear High Visibility Apparel vests expose users in California to DEHP. No public enforcer has brought and is diligently prosecuting the claims alleged in the Notice. On January 14, 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

1 of all claims which were or could have been raised in the Complaint based on the facts alleged  
2 therein and/or in the Notice.

3 1.5 Defendant denies the material allegations contained in Ferreiro's Notice and  
4 Complaint and maintains that it has not violated Proposition 65. Nothing in this Consent Judgment  
5 shall be construed as an admission by Defendant of any fact, finding, issue of law, or violation of  
6 law; nor shall compliance with this Consent Judgment constitute or be construed as an admission  
7 by Defendant of any fact, finding, conclusion, issue of law, or violation of law, such being  
8 specifically denied by Defendant. However, this section shall not diminish or otherwise affect the  
9 obligations, responsibilities, and duties of Defendant under this Consent Judgment.

10 **2. DEFINITIONS**

11 2.1 **Covered Products.** The term "Covered Products" means Ergodyne Glowear High  
12 Visibility Apparel vests that are manufactured, distributed and/or offered for sale in California by  
13 Tenacious Holdings.

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

16 **3. INJUNCTIVE RELIEF: WARNINGS**

17 3.1 **Reformulation of Covered Products.** As of the date this Consent Judgment is  
18 signed by both Parties, and continuing thereafter, Covered Products that Tenacious Holdings  
19 directly manufactures, imports, distributes, sells, or offers for sale in California shall either: (a) be  
20 Reformulated Products pursuant to § 3.2, below; or (b) be labeled with a clear and reasonable  
21 exposure warning pursuant to §§ 3.3 and 3.4, below. For purposes of this Consent Judgment, a  
22 "Reformulated Product" is a Covered Product that is in compliance with the standard set forth in §  
23 3.2 below. The warning requirement set forth in §§ 3.3 and 3.4 shall not apply to any Reformulated  
24 Product.

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

3           **3.3 Clear and Reasonable Warning.** As of the date this Consent Judgment is signed  
4 by both Parties, and continuing thereafter, a clear and reasonable exposure warning as set forth in  
5 this §§ 3.3 and 3.4 must be provided for all Covered Products that Defendant manufacturers,  
6 imports, distributes, sells, or offers for sale in California that is not a Reformulated Product. There  
7 shall be no obligation for Defendant to provide a warning for Covered Products that enter the stream  
8 of commerce prior to the date this Consent Judgment is signed by both Parties. The warning shall  
9 consist of either the **Warning** or **Alternative Warning** described in §§ 3.3(a) or (b), respectively:

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

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

14           (b) **Alternative Warning:** Tenacious Holdings may, but is not required to, use the  
15 alternative short-form warning as set forth in this § 3.3(b) (“**Alternative Warning**”) as follows:

16           ⚠ **WARNING:** Cancer and Reproductive Harm - [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov).

17           **3.4** A **Warning** or **Alternative Warning** provided pursuant to § 3.3 must print the word  
18 “**WARNING:**” in all capital letters and in bold font, followed by a colon. The warning symbol to  
19 the left of the word “**WARNING:**” must be a black exclamation point in a yellow equilateral  
20 triangle with a black outline, except that if the sign or label for the Covered Product does not use  
21 the color yellow, the symbol may be in black and white. The symbol must be in a size no smaller  
22 than the height of the word “**WARNING:**”. The warning shall be affixed to or printed on the  
23 Covered Product’s packaging or labeling, or on a placard, shelf tag, sign or electronic device or  
24 automatic process, providing that the warning is displayed with such conspicuousness, as compared  
25 with other words, statements, or designs as to render it likely to be read and understood by an  
26 ordinary individual under customary conditions of purchase or use. A warning may be contained  
27 in the same section of the packaging, labeling, or instruction booklet that states other safety  
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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 In addition to affixing the **Warning** or **Alternative Warning** to the Covered Product's  
4 packaging or labeling, the **Warning** or **Alternative Warning** shall be posted on websites where  
5 Tenacious Holdings offers Covered Products for sale to consumers in California. The requirements  
6 of this Section shall be satisfied if the **Warning** or **Alternative Warning**, or a clearly marked  
7 hyperlink using the word "**WARNING**," appears on the product display page, or by otherwise  
8 prominently displaying the warning to the purchaser prior to completing the purchase. To comply  
9 with this Section, Tenacious Holdings shall (a) post the **Warning** or **Alternative Warning** on its  
10 own website and, if it has the ability to do so, on the websites of its third-party internet sellers; and  
11 (b) if it does not have the ability to post the **Warning** or **Alternative Warning** on the websites of  
12 its third-party internet sellers, provide such sellers with written notice in accordance with Title 27,  
13 California Code of Regulations, § 25600.2. Third-party internet sellers of the Product that have  
14 been provided with written notice in accordance with Title 27, California Code of Regulations, §  
15 25600.2 are not released in § 5 of this Agreement if they fail to meet the warning requirements of  
16 this Section.

17 **3.5 Compliance with Warning Regulations.** Defendant shall be deemed to be in  
18 compliance with this Consent Judgment by either adhering to §§ 3.3 and 3.4 of this Consent  
19 Judgment or by complying with warning requirements adopted by the State of California's Office  
20 of Environmental Health Hazard Assessment ("OEHHA") applicable to the Covered Product and  
21 exposures at issue.

#### 22 **4. MONETARY TERMS**

23 **4.1 Civil Penalty.** Tenacious Holdings shall pay \$2,000.00 as a Civil Penalty pursuant  
24 to Health and Safety Code section 25249.7(b), to be apportioned in accordance with California  
25 Health & Safety Code § 25249.12(c)(1) and (d), with 75% of these funds remitted to OEHHA and  
26 the remaining 25% of the Civil Penalty remitted to Ferreiro, as provided by California Health &  
27 Safety Code § 25249.12(d).  
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1                   4.1.1 Within ten (10) days of the Effective Date, Tenacious Holdings shall issue  
2 two separate checks for the Civil Penalty payment to (a) "OEHHA" in the amount of \$1,500.00;  
3 and to (b) "Brodsky & Smith in Trust for Ferreiro" in the amount of \$500. Payment owed to  
4 Ferreiro pursuant to this Section shall be delivered to the following payment address:

5                   Evan J. Smith, Esquire  
6                   Brodsky & Smith  
7                   Two Bala Plaza, Suite 805  
8                   Bala Cynwyd, PA 19004

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

11                   For United States Postal Service Delivery:

12                   Mike Gyurics  
13                   Fiscal Operations Branch Chief  
14                   Office of Environmental Health Hazard Assessment  
15                   P.O. Box 4010  
16                   Sacramento, CA 95812-4010

17                   For Non-United States Postal Service Delivery:

18                   Mike Gyurics  
19                   Fiscal Operations Branch Chief  
20                   Office of Environmental Health Hazard Assessment  
21                   1001 I Street  
22                   Sacramento, CA 95814

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

25                   4.2     **Attorneys' Fees.** Within ten (10) days of the Effective Date, Tenacious Holdings  
26 shall pay \$27,000.00 to Brodsky & Smith ("Brodsky & Smith") as complete reimbursement for  
27 Ferreiro's attorneys' fees and costs incurred as a result of investigating, bringing this matter to  
28 Tenacious Holdings attention, litigating and negotiating and obtaining judicial approval of a  
settlement in the public interest, pursuant to Code of Civil Procedure § 1021.5.

## 29     **5.     RELEASE OF ALL CLAIMS**

30                   5.1     This Consent Judgment is a full, final, and binding resolution between Ferreiro  
31 acting on his own behalf, and on behalf of the public interest, and Tenacious Holdings, and its

1 parents, shareholders, members, directors, officers, managers, employees, representatives, agents,  
2 attorneys, divisions, subdivisions, subsidiaries, partners, sister companies, and affiliates, and their  
3 predecessors, successors and assigns (“Defendant Releasees”), and all entities from whom they  
4 obtain and to whom they directly or indirectly distribute or sell Covered Products, including but  
5 not limited to HD Supply, manufacturers, suppliers, distributors, wholesalers, customers, licensors,  
6 licensees retailers, franchisees, and cooperative members (“Downstream Releasees”), of all claims  
7 for violations of Proposition 65 based on exposure to DEHP from use of the Covered Products as  
8 set forth in the Notice, with respect to any Covered Products manufactured, distributed, or sold by  
9 Tenacious Holdings prior to the Effective Date. It is the Parties’ intention that this Consent  
10 Judgment shall have preclusive effect such that no other actions by private enforcers, whether  
11 purporting to act in his, her, or its interests or the public interest shall be permitted to pursue and/or  
12 take any action with respect to any violation of Proposition 65 based on exposure to DEHP that  
13 was alleged in the Complaint, or that could have been brought pursuant to the Notice against  
14 Tenacious Holdings and/or the Downstream Releasees of the Covered Products (“Proposition 65  
15 Claims”).

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

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

9 5.3 Tenacious Holdings waives any and all claims against Ferreiro, her attorneys and  
10 other representatives, for any and all actions taken, or statements made (or those that could have  
11 been taken or made) by Ferreiro and his attorneys and other representatives, whether in the course  
12 of 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 all  
16 prior negotiations and understandings related hereto shall be deemed to have been merged within  
17 it. No representations or terms of agreement other than those contained herein exist or have been  
18 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. If Proposition 65 is repealed or is otherwise  
22 rendered inapplicable by reason of law generally, or as to Covered Products, then Defendant shall  
23 have no further obligations pursuant to this Consent Judgment with respect to, and to the extent  
24 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-  
28 class, (registered or certified mail) return receipt requested; or (ii) overnight courier on any party  
by the other party at the following addresses:

For Defendant:



1 Erik K. Swanholt  
2 Foley & Lardner LLP  
3 555 South Flower Street, Suite 3300  
4 Los Angeles, CA 90071-2418

4 And

5 For Ferreiro:

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

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

12 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

13 9.1 This Consent Judgment may be executed in counterparts and by facsimile, each of  
14 which shall be deemed an original, and all of which, when taken together, shall constitute one and  
15 the same document.

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

18 10.1 Ferreiro agrees to comply with the requirements set forth in California Health &  
19 Safety Code § 25249.7(f) and to promptly bring a Motion for Approval of this Consent Judgment.  
20 Defendant agrees it shall support approval of such Motion.

21 10.2 This Consent Judgment shall not be effective until it is approved and entered by the  
22 Court and shall be null and void if, for any reason, it is not approved by the Court. In such case, the  
23 Parties agree to meet and confer on how to proceed and if such agreement is not reached within 30  
24 days, the case shall proceed on its normal course.

25 10.3 If the Court approves this Consent Judgment and is reversed or vacated by an  
26 appellate court, the Parties shall meet and confer as to whether to modify the terms of this Consent  
27 Judgment. If the Parties do not jointly agree on a course of action to take, the case shall proceed on  
28 its normal course on the trial court's calendar.

1 **11. MODIFICATION**

2 11.1 This Consent Judgment may be modified only by further stipulation of the Parties  
3 and the approval of the Court or upon the granting of a motion brought to the Court by either Party.

4 **12. ATTORNEY'S FEES**

5 12.1 A Party who unsuccessfully brings or contests an action arising out of this Consent  
6 Judgment shall be required to pay the prevailing party's reasonable attorney's fees and costs.

7 12.2 Nothing in this Section shall preclude a Party from seeking an award of sanctions  
8 pursuant to law.

9 **13. RETENTION OF JURISDICTION**

10 13.1 This Court shall retain jurisdiction of this matter to implement or modify the  
11 Consent Judgment.

12 **14. AUTHORIZATION**

13 14.1 The undersigned are authorized to execute this Consent Judgment on behalf of their  
14 respective Parties and have read, understood and agree to all of the terms and conditions of this  
15 document and certify that he or she is fully authorized by the Party he or she represents to execute  
16 the Consent Judgment on behalf of the Party represented and legally bind that Party. Except as  
17 explicitly provided herein each Party is to bear its own fees and costs.

18  
19 **AGREED TO:**

**AGREED TO:**

20  
21 Date: 12/7/22

Date: November 18, 2022

22 By: Anthony Ferreiro  
23 ANTHONY FERREIRO

By: [Signature]  
TENACIOUS HOLDINGS, INC.

24  
25 **IT IS SO ORDERED, ADJUDGED AND DECREED:**

26  
27 Dated: \_\_\_\_\_

\_\_\_\_\_  
Judge of Superior Court