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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 Q.E.P. CO., INC., ACE HARDWARE
15 CORPORATION,
16 Defendants.

Case No.: CGC-22-600431
CONSENT JUDGMENT
Judge: Richard B. Ulmer
Dept.: 302
Hearing Date: April 4, 2023
Hearing Time: 9:30 AM

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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 Q.E.P. Co., Inc. (“Q.E.P.”) and Ace Hardware Corporation (collectively with Q.E.P. “Defendants”), with Ferreiro and Defendants 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. Defendants are alleged to be persons 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 Defendants have exposed individuals to Bisphenol A (BPA) from sales of Q.E.P. Diamond Hole Saws without providing a clear and reasonable exposure warning pursuant to Proposition 65. BPA is listed under Proposition 65 as a chemical known to the State of California to cause reproductive toxicity.

1.3 **Notice of Violation/Complaint.** On or about August 13, 2021, Ferreiro served Q.E.P., Ace Hardware Corporation, 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 Defendants violated Proposition 65 for failing to warn consumers and customers that use of Q.E.P. Diamond Hole Saws expose users in California to BPA. No public enforcer has brought and is diligently prosecuting the claims alleged in the Notice. On June 29, 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 Defendants as to the allegations contained in the Complaint filed in this matter, that venue is proper in the County of Alameda, 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 Defendants deny the material allegations contained in Ferreiro’s Notice and
2 Complaint and maintains that they have not violated Proposition 65, and that, to the best of their
3 knowledge, the Covered Products that are or have been sold and distributed for sale in California,
4 have been and are in compliance with all laws. Nothing in this Consent Judgment shall be construed
5 as an admission by Defendants of any fact, finding, issue of law, or violation of law; nor shall
6 compliance with this Consent Judgment constitute or be construed as an admission by Defendants
7 of any fact, finding, conclusion, issue of law, or violation of law, such being specifically denied by
8 Defendants. Furthermore, nothing in this Consent Judgment shall prejudice, waive, or impair any
9 right, remedy, argument, or defense Defendants may have in any other or future legal proceeding,
10 except as expressly provided in this Consent Judgment. However, this section shall not diminish
11 or otherwise affect the obligations, responsibilities, and duties of Defendants under this Consent
12 Judgment.

13 **2. DEFINITIONS**

14 2.1 **Covered Products.** The term “Covered Products” means Q.E.P. Diamond Hole
15 Saws, Item #s 10571 and 10572, that are manufactured, distributed and/or offered for sale in
16 California by Q.E.P.

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

19 **3. INJUNCTIVE RELIEF: WARNINGS**

20 3.1 **Clear and Reasonable Warning.** Commencing within one hundred eighty (180)
21 days of the Effective Date, and continuing thereafter, a clear and reasonable exposure warning as
22 set forth in this §§ 3.1 and 3.2 must be provided for all Covered Products that Defendants
23 manufacturer, import, distribute, sell, or offer for sale in California. There shall be no obligation
24 for Defendants to provide a warning for Covered Products that enter the stream of commerce prior
25 to 180 days after the Effective Date. The warning shall consist of either the **Warning** or **Alternative**
26 **Warning** described in §§ 3.3(a) or (b), respectively:

27 (a) **Warning.** The “Warning” shall consist of the statement:
28

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

4 (b) **Alternative Warning:** Q.E.P. may, but is not required to, use the alternative short-
5 form warning as set forth in this § 3.3(b) (“**Alternative Warning**”) as follows:

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

7 3.2 A **Warning** or **Alternative Warning** provided pursuant to § 3.1 must print the word
8 “**WARNING:**” in all capital letters and in bold font, followed by a colon. The warning symbol to
9 the left of the word “**WARNING:**” must be a black exclamation point in a yellow equilateral
10 triangle with a black outline, except that if the sign or label for the Covered Product does not use
11 the color yellow, the symbol may be in black and white. The symbol must be in a size no smaller
12 than the height of the word “**WARNING:**”. The warning shall be affixed to or printed on the
13 Covered Product’s packaging or labeling, or on a placard, shelf tag, sign or electronic device or
14 automatic process, providing that the warning is displayed with such conspicuousness, as compared
15 with other words, statements, or designs as to render it likely to be read and understood by an
16 ordinary individual under customary conditions of purchase or use. A warning may be contained
17 in the same section of the packaging, labeling, or instruction booklet that states other safety
18 warnings, if any, concerning the use of the Covered Product and shall be at least the same size as
19 those other safety warnings.

20 In addition to affixing the **Warning** or **Alternative Warning** to the Covered Product’s
21 packaging or labeling, the **Warning** or **Alternative Warning** shall be posted on websites where
22 Q.E.P. offers Covered Products for sale to consumers in California. The requirements of this
23 Section shall be satisfied if the **Warning** or **Alternative Warning**, or a clearly marked hyperlink
24 using the word “**WARNING,**” appears on the product display page, or by otherwise prominently
25 displaying the warning to the purchaser prior to completing the purchase. To comply with this
26 Section, Q.E.P. shall (a) post the **Warning** or **Alternative Warning** on its own website and, if it
27 has the ability to do so, on the websites of its third-party internet sellers; and (b) if it does not have
28 the ability to post the **Warning** or **Alternative Warning** on the websites of its third-party internet

1 sellers, provide such sellers with written notice in accordance with Title 27, California Code of
2 Regulations, Section 25600.2. Third-party internet sellers of the Covered Products that have been
3 provided with written notice in accordance with Title 27, California Code of Regulations, Section
4 25600.2 are not released in Section 5 of this Agreement if they fail to meet the warning
5 requirements of this Section.

6 **3.3 Compliance with Warning Regulations.** Defendants shall be deemed to be in
7 compliance with this Consent Judgment by either adhering to § 3 of this Consent Judgment or by
8 complying with warning requirements adopted by the State of California’s Office of Environmental
9 Health Hazard Assessment (“OEHHA”) applicable to the Covered Products and the exposure at
10 issue after the Effective Date.

11 **4. MONETARY TERMS**

12 **4.1 Civil Penalty.** Q.E.P. shall pay \$2,000.00 as a Civil Penalty pursuant to Health and
13 Safety Code section 25249.7(b), to be apportioned in accordance with California Health & Safety
14 Code § 25249.12(c)(1) and (d), with 75% of these funds remitted to OEHHA and the remaining
15 25% of the Civil Penalty remitted to Ferreiro, as provided by California Health & Safety Code
16 § 25249.12(d).

17 **4.1.1** Ferreiro agrees to provide Q.E.P. with IRS W-9 forms for each of the
18 payees under this Consent Judgment (“Tax Documents”).

19 **4.1.2** Within ten (10) days of the Effective Date and receipt by Q.E.P. of the
20 applicable Tax Documents, whichever is later, Q.E.P. shall issue two separate checks for the Civil
21 Penalty payment to (a) “OEHHA” in the amount of \$1,500.00; and to (b) “Anthony Ferreiro” in
22 the amount of \$500.00. Payment owed to Ferreiro pursuant to this Section shall be delivered to
23 the following payment address:

24 Evan J. Smith, Esquire
25 Brodsky & Smith
26 Two Bala Plaza, Suite 805
27 Bala Cynwyd, PA 19004

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

1 For United States Postal Service Delivery:

2 Mike Gyurics
3 Fiscal Operations Branch Chief
4 Office of Environmental Health Hazard Assessment
5 P.O. Box 4010
6 Sacramento, CA 95812-4010

7 For Non-United States Postal Service Delivery:

8 Mike Gyurics
9 Fiscal Operations Branch Chief
10 Office of Environmental Health Hazard Assessment
11 1001 I Street
12 Sacramento, CA 95814

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

15 4.2 **Attorneys' Fees.** Within ten (10) days of the Effective Date and receipt by Q.E.P.
16 of the applicable Tax Documents, whichever is later, Q.E.P. shall pay \$23,000.00 to Brodsky &
17 Smith ("Brodsky & Smith") as complete reimbursement for Ferreiro's attorneys' fees and costs
18 incurred as a result of investigating, bringing this matter to Q.E.P. attention, litigating and
19 negotiating and obtaining judicial approval of a settlement in the public interest, pursuant to Code
20 of Civil Procedure § 1021.5.

21 **5. RELEASE OF ALL CLAIMS**

22 5.1 This Consent Judgment is a full, final, and binding resolution between Ferreiro
23 acting on his own behalf, and on behalf of the public interest, and Defendants and their parents,
24 shareholders, members, directors, officers, managers, employees, representatives, agents,
25 attorneys, divisions, subdivisions, subsidiaries, partners, sister companies, and affiliates, and their
26 predecessors, successors and assigns ("Defendant Releasees"), and all entities from whom they
27 obtain and to whom they directly or indirectly distribute or sell Covered Products, including but
28 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 based on exposure to BPA from use of the Covered Products as set
forth in the Notice, with respect to any Covered Products manufactured, distributed, or sold by

1 Q.E.P. prior to the Effective Date. It is the Parties' intention that this Consent Judgment shall have
2 preclusive effect such that no other actions by private enforcers, whether purporting to act in his,
3 her, or its interests or the public interest shall be permitted to pursue and/or take any action with
4 respect to any violation of Proposition 65 based on exposure to BPA that was alleged in the
5 Complaint, or that could have been brought pursuant to the Notice against Defendants and/or the
6 Downstream Releasees of the Covered Products ("Proposition 65 Claims").

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

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

26 5.3 Q.E.P. waives any and all claims against Ferreiro, his attorneys and other
27 representatives, for any and all actions taken, or statements made (or those that could have been
28 taken or made) by Ferreiro and his attorneys and other representatives, whether in the course of
investigating claims or otherwise seeking enforcement of Proposition 65 against it in this matter,
and/or with respect to exposure to BPA from Covered Products.

1 **6. INTEGRATION**

2 6.1 This Consent Judgment contains the sole and entire agreement of the Parties and all
3 prior negotiations and understandings related hereto shall be deemed to have been merged within
4 it. No representations or terms of agreement other than those contained herein exist or have been
5 made by any Party with respect to any other Party or the subject matter hereof.

6 **7. GOVERNING LAW**

7 7.1 The terms of this Consent Judgment shall be governed by the laws of the State of
8 California and apply within the State of California. If Proposition 65 is repealed or is otherwise
9 rendered inapplicable by reason of law generally, or as to Covered Products, then Defendants shall
10 have no further obligations pursuant to this Consent Judgment with respect to, and to the extent
11 that, Covered Products are so affected. This Consent Judgment shall not apply to Covered Products
12 that are not sold to consumers in California or which do not otherwise cause exposure to BPA in
13 California from the Covered Products.

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 any other Party at the following addresses:

19 For Defendants:

For Plaintiff

20 Karen Palladino Ciccone
21 Cermak & Inglin LLP
22 12121 Wilshire Blvd., Suite 322
23 Los Angeles, CA 90025

 Evan Smith
 Brodsky & Smith
 9595 Wilshire Blvd., Ste. 900
 Beverly Hills, CA 90025

24 Any Party, from time to time, may specify in writing to the other Parties a change of address to
25 which all notices and other communications shall be sent.

26 **8. COUNTERPARTS; FACSIMILE SIGNATURES**

27 8.1 This Consent Judgment may be executed in counterparts and by facsimile, each of
28 which shall be deemed an original, and all of which, when taken together, shall constitute one and

1 the same document.

2 **9. COMPLIANCE WITH HEALTH & SAFETY CODE § 25249.7(f)/COURT**
3 **APPROVAL**

4 9.1 Ferreiro agrees to comply with the requirements set forth in California Health &
5 Safety Code § 25249.7(f) and to promptly bring a Motion for Approval of this Consent Judgment.
6 Defendants agree they shall support approval of such Motion.

7 9.2 This Consent Judgment shall not be effective until it is approved and entered by the
8 Court and shall be null and void if, for any reason, it is not approved by the Court. In such case, the
9 Parties agree to meet and confer on how to proceed and if such agreement is not reached within 30
10 days, the case shall proceed on its normal course.

11 9.3 If the Court approves this Consent Judgment and is reversed or vacated by an
12 appellate court, the Parties shall meet and confer as to whether to modify the terms of this Consent
13 Judgment. If the Parties do not jointly agree on a course of action to take, the case shall proceed on
14 its normal course on the trial court's calendar.

15 **10. MODIFICATION**

16 10.1 This Consent Judgment may be modified only by further stipulation of the Parties
17 and the approval of the Court or upon the granting of a motion brought to the Court by any Party.

18 **11. RETENTION OF JURISDICTION**

19 11.1 This Court shall retain jurisdiction of this matter to implement or modify the
20 Consent Judgment.

21 **12. AUTHORIZATION**

22 12.1 The undersigned are authorized to execute this Consent Judgment on behalf of their
23 respective Parties and have read, understood and agree to all of the terms and conditions of this
24 document and certify that he or she is fully authorized by the Party he or she represents to execute
25 the Consent Judgment on behalf of the Party represented and legally bind that Party. Except as
26 explicitly provided herein each Party is to bear its own fees and costs.

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AGREED TO:

AGREED TO:

Date: 2/14/23

Date: 8/3/2022

By: Anthony Ferrero
ANTHONY FERRETO

By: [Signature] CLAO
Q.E.P. CO., INC.

AGREED TO:

Date: 8/8/2022

By: [Signature]
ACE HARDWARE CORPORATION

IT IS SO ORDERED, ADJUDGED AND DECREED:

Dated: _____

Judge of Superior Court