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8
9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 COUNTY OF SAN FRANCISCO

11 DONATUS MCCOY,
12 Plaintiff,
13 v.
14 FIRST TEXAS PRODUCTS, LLC,
15 Defendant.

Case No.: CGC-22-600182
**[PROPOSED] CONSENT
JUDGMENT**
Judge: Richard B. Ulmer
Dept.: 302
Hearing Date: May 9, 2023
Hearing Time: 9:30 AM
Complaint Filed: June 15, 2022

1 **1. INTRODUCTION**

2 1.1 **The Parties.** This Consent Judgment is entered into by and between Donatus
3 McCoy acting on behalf of the public interest (hereinafter “McCoy”) and First Texas Products,
4 LLC (“First Texas” or “Defendant”) with McCoy and Defendant collectively referred to as the
5 “Parties” and each of them as a “Party.” McCoy is an individual residing in California that seeks to
6 promote awareness of exposures to toxic chemicals and improve human health by reducing or
7 eliminating hazardous substances contained in consumer products. First Texas 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.** McCoy alleges that Defendant has exposed
11 individuals to di(2-ethylhexyl) phthalate (DEHP) from its sales of are Bounty Hunter Professional
12 Headphones, UPC# 089723123005 without providing a clear and reasonable exposure warning
13 pursuant to Proposition 65. DEHP is listed under Proposition 65 as a chemical known to the State
14 of California to cause cancer and reproductive toxicity.

15 1.3 **Notice of Violation/Complaint.** On or about October 13, 2021, McCoy served First
16 Texas Products Corporation, First Texas Products, LLC, First Texas Products, LLC dba First Texas
17 Products, LLC., Sportsman’s Warehouse, Inc., and various public enforcement agencies with
18 documents entitled “60-Day Notice of Violation” pursuant to Health & Safety Code §25249.7(d)
19 (the “Notice”), alleging that Defendant violated Proposition 65 for failing to warn consumers and
20 customers that use of Bounty Hunter Professional Headphones, UPC# 089723123005 expose users
21 in California to DEHP. No public enforcer has brought and is diligently prosecuting the claims
22 alleged in the Notice. On June 15, 2022, McCoy filed a complaint (the “Complaint”) in the matter.

23 1.4 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
24 jurisdiction over Defendant as to the allegations contained in the Complaint filed in this matter, that
25 venue is proper in the County of San Francisco, and that this Court has jurisdiction to approve,
26 enter, and enforce this Consent Judgment as a full and final binding resolution of all claims which
27 were or could have been raised in the Complaint based on the facts alleged therein and/or in the
28

1 Notice.

2 1.5 Defendant denies the material allegations contained in McCoy's Notice and
3 Complaint and maintains that it has not violated Proposition 65. Nothing in this Consent Judgment
4 shall be construed as an admission by Defendant of any fact, finding, issue of law, or violation of
5 law; nor shall compliance with this Consent Judgment constitute or be construed as an admission
6 by Defendant of any fact, finding, conclusion, issue of law, or violation of law, such being
7 specifically denied by Defendant. However, this section shall not diminish or otherwise affect the
8 obligations, responsibilities, and duties of Defendant under this Consent Judgment.

9 **2. DEFINITIONS**

10 2.1 **Covered Products.** The term "Covered Products" means headphones, including but
11 not limited to Bounty Hunter Professional Headphones, UPC# 089723123005 that are
12 manufactured, distributed and/or offered for sale in California by First Texas.

13 2.2 **Effective Date.** The term "Effective Date" means the date that McCoy serves notice
14 of entry of this Consent Judgment.

15 **3. INJUNCTIVE RELIEF**

16 3.1 **Reformulation of Covered Products.** As of the Effective Date, and continuing
17 thereafter, Covered Products that First Texas directly manufactures, imports, distributes, sells, or
18 offers for sale in California shall either: (a) be Reformulated Products pursuant to § 3.2, below; or
19 (b) be labeled with a clear and reasonable warning pursuant to §§ 3.3 and 3.4, below. First Texas
20 may rely on its supplier's test results for compliance with this Consent Judgment. The warning
21 requirement set forth in §§ 3.3 and 3.4 shall not apply to any Reformulated Product.

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 DEHP
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.

1 3.3 **Clear and Reasonable Warning.** As of the Effective Date, the warnings set forth
2 in this §§ 3.3 and 3.4 must be provided for any Covered Product that Defendant manufacturers,
3 imports, distributes, sells, or offers for sale in California that is not a Reformulated Product. There
4 shall be no obligation for Defendant to provide a warning for Covered Products that enter the stream
5 of commerce prior to the Effective Date. For purposes of this Consent Judgment, “enter the stream
6 of commerce” means that the Covered Product is no longer in the custody of First Texas.

7 The warning shall consist of either the **Warning** or **Alternative Warning** described in §§
8 3.3(a) or (b), respectively:

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

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

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

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

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

1 In addition to affixing the **Warning** or **Alternative Warning** to the Covered Product's
2 packaging or labeling, the **Warning** or **Alternative Warning** shall be posted on websites where
3 First Texas offers Covered Products for sale to consumers in California and the consumer is able
4 to complete the purchase on the website. The requirements of this Section shall be satisfied if the
5 **Warning** or **Alternative Warning**, or a clearly marked hyperlink using the word "WARNING,"
6 appears on the product display page, or by otherwise prominently displaying the warning to the
7 purchaser prior to completing the purchase. To comply with this Section, First Texas shall (a) post
8 the **Warning** or **Alternative Warning** on its own website if the website allows for the consumer
9 to complete the purchase on the website and, if it has the ability to do so, on the websites of its
10 third-party internet sellers where First Texas controls the content of the product display page.

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

16 **4. MONETARY TERMS**

17 4.1 **Civil Penalty.** First Texas shall pay \$2,000.00 as a Civil Penalty pursuant to Health
18 and Safety Code section 25249.7(b), to be apportioned in accordance with California Health &
19 Safety Code § 25249.12(c)(1) and (d), with 75% of these funds remitted to OEHHA and the
20 remaining 25% of the Civil Penalty remitted to McCoy, as provided by California Health & Safety
21 Code § 25249.12(d).

22 4.1.1 Within ten (10) business days of the Effective Date, First Texas shall issue
23 two separate checks for the Civil Penalty payment to (a) "OEHHA" in the amount of \$1,500.00;
24 and to (b) "Donatus McCoy" in the amount of \$500.00. Payment owed to McCoy pursuant to this
25 Section shall be delivered to the following payment address:

26 Evan J. Smith, Esquire
27 Brodsky & Smith
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 at the address set
16 forth above as proof of payment to OEHHA.

17 4.2 **Attorneys' Fees.** Within ten (10) business days of the Effective Date, First Texas
18 shall pay \$20,000.00 to Brodsky & Smith ("Brodsky & Smith") as complete reimbursement for
19 McCoy's attorneys' fees and costs incurred as a result of investigating, bringing this matter to First
20 Texas attention, litigating and negotiating and obtaining judicial approval of a settlement in the
21 public 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 McCoy
24 acting on his own behalf, and on behalf of the public interest, and First Texas, 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 (including Sportsman's Warehouse, Inc.), franchisees, and cooperative members
("Downstream Releasees"), of all claims for violations of Proposition 65 based on exposure to

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

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

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

28 5.3 First Texas waives any and all claims against McCoy, his attorneys and other
representatives, for any and all actions taken, or statements made by McCoy and her attorneys and
other representatives, whether in the course of investigating claims or otherwise seeking

1 enforcement of Proposition 65 against it in this matter, and/or with respect to exposure to DEHP
2 from the Covered Products.

3 **6. INTEGRATION**

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

8 **7. GOVERNING LAW**

9 7.1 The terms of this Consent Judgment shall be governed by the laws of the State of
10 California and apply within the State of California. If Proposition 65 is repealed or is otherwise
11 rendered inapplicable by reason of law generally, or as to Covered Products, then Defendant shall
12 have no further obligations pursuant to this Consent Judgment with respect to, and to the extent
13 that, Covered Products are so affected.

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 the other party at the following addresses:

19 For Defendant:

20 Peg Carew Toledo
21 Arnold & Porter Kaye Scholer LLP
22 Three Embarcadero Center, 10th Floor
San Francisco, CA 94111-4024

23 And

24 For McCoy:

25 Evan Smith
26 Brodsky & Smith
27 9595 Wilshire Blvd., Ste. 900
Beverly Hills, CA 90212

28 Any party, from time to time, may specify in writing to the other party a change of address to

1 which all notices and other communications shall be sent.

2 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

3 9.1 This Consent Judgment may be executed in counterparts and by facsimile, each of
4 which shall be deemed an original, and all of which, when taken together, shall constitute one and
5 the same document.

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

8 10.1 McCoy agrees to comply with the requirements set forth in California Health &
9 Safety Code § 25249.7(f) and to promptly bring a Motion for Approval of this Consent Judgment.
10 Defendant agrees it shall support approval of the Consent Judgment.

11 10.2 This Consent Judgment shall not be effective until it is approved and entered by the
12 Court and shall be null and void if, for any reason, it is not approved by the Court. In such case, the
13 Parties agree to meet and confer on how to proceed and if such agreement is not reached within
14 thirty (30) days, the case shall proceed on its normal course.

15 **11. MODIFICATION**

16 11.1 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 either Party.

18 **12. ATTORNEY'S FEES**

19 12.1 A Party who unsuccessfully brings or contests an action arising out of this Consent
20 Judgment shall be required to pay the prevailing party's reasonable attorney's fees and costs.

21 12.2 Nothing in this Section shall preclude a Party from seeking an award of sanctions
22 pursuant to law.

23 **13. RETENTION OF JURISDICTION**

24 13.1 This Court shall retain jurisdiction of this matter to implement, modify, and/or
25 enforce the Consent Judgment.

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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: 3/20/22
By: [Signature]
DONATUS MCCOY

Date: 10-14-22
By: [Signature]
FIRST TEXAS PRODUCTS, LLC

IT IS SO ORDERED, ADJUDGED AND DECREED:

Dated: _____

Judge of Superior Court