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4 LOS ANGELES
5 SUPERIOR COURT

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8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 FOR THE COUNTY OF LOS ANGELES

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11 AMERICAN ENVIRONMENTAL SAFETY
12 INSTITUTE, a non-profit California
corporation,

13 Plaintiff,

14 v.

15 THE PROCTER & GAMBLE DISTRIBUTING
16 COMPANY, a Ohio corporation, et al.,

17 Defendants.

Case No. BC334309

[Hon. Mary Thornton House]

**[PROPOSED] CONSENT JUDGMENT
ONLY AS TO XLEAR, INC.**

Complaint Filed: June 1, 2005

Location: Department 17, Room 313

Trial Date: October 14, 2008

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20 This Consent Judgment is entered into by and between the plaintiff American
21 Environmental Safety Institute ("AESI"), on the one hand, and defendant Xlear, Inc., a Utah
22 corporation, ("Settling Defendant"), on the other hand.

23 **1. Definitions.** As used in this Consent Judgment, the following definitions shall apply:

24 **1.1. "Toothpaste Products"** includes any toothpaste products previously (*i.e.*, at any
25 time up to or prior to the entry of this Consent Judgment) sold in California by Settling
26 Defendant, whether or not such products continue to be sold, as well as all toothpaste products
27 sold by Settling Defendant in or into California in the future (*i.e.*, at any time after entry of this
28 Consent Judgment).

1 **1.2. “Lead”** means the chemical element lead (Pb) and lead compounds as defined in
2 section 12000 of Title 22 of the California Code of Regulations.

3 **1.3. “Hydrated Silica”** is derived from a naturally-occurring mined material and is
4 used as a gentle abrasive in the Toothpaste Products.

5 **1.4. “ppm”** means parts per million.

6 **1.5. “Party”** shall mean AESI and Xlear, Inc., and when used in the plural shall mean
7 each of them.

8 **2. Background.**

9 **2.1.** AESI is a non-profit California corporation dedicated to investigating
10 environmental and public health hazards affecting children and adults in their regular daily lives.
11 AESI is based in Palo Alto, California, and was incorporated under the laws of the State of
12 California in 1998. AESI is a “person” within the meaning of Health & Safety Code
13 § 25249.11(a), and brought this enforcement action in the public interest pursuant to Health &
14 Safety Code § 25249.7(d).

15 **2.2.** AESI served a 60-day “Notice of Violation” (the “Notice”) on Settling Defendant.
16 AESI served the Notice on June 2, 2005, pursuant to California Health and Safety Code section
17 25249.7(d) and section 12903 of Title 22 of the California Code of Regulations.

18 **2.3.** The Notice alleged, among other things, that Settling Defendant was in violation
19 of the Safe Drinking Water and Toxic Enforcement Act of 1986, Health and Safety Code
20 sections 25249.5 *et seq.* (“Proposition 65”) for failing to warn purchasers of its Toothpaste
21 Products sold in California that the products allegedly expose users to Lead.

22 **2.4.** For purposes of this Consent Judgment only, the Parties stipulate that this Court
23 has jurisdiction over the allegations of the violations contained in the Notice, that venue is
24 proper in the County of Los Angeles, and that this Court has jurisdiction to enter this Consent
25 Judgment. No public prosecutor has commenced an action regarding the matters raised in the
26 Notice.

27 **2.5.** Settling Defendant denies that any Toothpaste Products have been or are in
28 violation of Proposition 65 or any other law, and further contend that all of its Toothpaste

1 Products have been and are safe for use as directed. Settling Defendant, however, wishes to
2 resolve this matter without further litigation or cost.

3 **2.6.** The Parties enter into this Consent Judgment to settle claims alleged in the Notice
4 and AESI's complaint (the "Complaint") in this action against Settling Defendant, to avoid
5 prolonged and costly litigation, and to promote the public interest. By executing and complying
6 with this Consent Judgment, no party admits any facts or conclusions of law including, but not
7 limited to, any facts or conclusions of law regarding any violations of Proposition 65, or any
8 other statutory, common law or equitable claim or requirement relating to or arising from the
9 Toothpaste Products. This Consent Judgment shall not be construed as an admission by Settling
10 Defendant as to any of the allegations in the Notice and/or the Complaint.

11 **3. Injunctive Relief.**

12 **3.1. Actions as to Hydrated Silica.**

13 (a) Within 60 days of the Effective Date, Settling Defendant shall establish
14 and thereafter maintain a Lead ("Pb") specification of 4.5 parts per million ("ppm") for any
15 Hydrated Silica to be used in Settling Defendant's Toothpaste Products that is obtained by
16 Settling Defendant 60 days after its Lead specification is established.

17 (b) The 4.5 ppm Lead standard shall be demonstrated by Settling Defendant's
18 Hydrated Silica supplier using the following testing protocol:

19 (i) once every six months, if the supplier manufactured Hydrated Silica
20 during such period, the Hydrated Silica supplier shall select five (5) randomly
21 chosen grab samples from a lot of Hydrated Silica that is ready for shipment to the
22 Settling Defendant, and the supplier shall test a composite of the 5 grab samples;

23 (ii) using a sample preparation method that permits recovery of at least
24 that amount of Lead in the sample that is bioavailable to humans, test the prepared
25 sample using Inductively Coupled Plasma/Mass Spectrometry ("ICP/MS") or
26 Inductively Coupled Plasma/Optical Emission Spectrometry ("ICP/OES")
27 laboratory equipment and protocols for Lead detection to demonstrate compliance
28 with the 4.5 ppm specification for Lead in Hydrated Silica for use in toothpaste;

1 (iii) failure of this testing protocol shall require rejection by the supplier
2 of the test lot, with written notice of that rejection provided to the Settling
3 Defendant customer, and a re-review by the supplier of its methods then in use to
4 meet the 4.5 ppm Lead specification; and

5 (iv) In the event of the failure described in subsection 3.1(b)(iii), the test
6 protocol set forth above must then be conducted on the next three lots of Hydrated
7 Silica from that supplier in succession; if any of these three additional lots fails
8 this test protocol, then the next five lots from that supplier must be tested, until all
9 lots in a test group of five demonstrate compliance with the 4.5 ppm Lead
10 specification.

11 (c) Because Hydrated Silica is derived from a mined substance, Settling
12 Defendant cannot ensure that Hydrated Silica with a Lead specification of 4.5 ppm will be
13 commercially feasible at all times. If Hydrated Silica with a Lead specification of 4.5 ppm
14 becomes commercially unfeasible, Settling Defendant will make every reasonable effort to use
15 Hydrated Silica with the lowest level of Lead feasible from the Hydrated Silica suppliers able to
16 meet Settling Defendant's quality and volume requirements. If Settling Defendant chooses to
17 use Hydrated Silica that does not meet the Lead specification of 4.5 ppm, then Settling
18 Defendant shall provide prompt notice to AESI of that election.

19 **3.2. Feasibility.** The term "feasible" as used in this Consent Judgment means
20 "reasonable" considering: (1) the availability and reliability of a supply to Settling Defendant of
21 Hydrated Silica meeting a Lead specification not to exceed 4.5 ppm; (2) the cost to Settling
22 Defendant of using such Hydrated Silica; (3) the performance characteristics, including, but not
23 limited to, formulation compatibility, performance, safety, taste, efficacy and stability, of an
24 ingredient in any Toothpaste Product or the Toothpaste Products as a whole; (4) the lawfulness
25 of the alternative (for example, no such alternative can be allowed to render Settling Defendant's
26 Toothpaste Products unlawful under state or federal law); and (5) other reasonable
27 considerations. Notwithstanding any other provision in this Consent Judgment, Settling
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1 Defendant shall be required to fulfill only those obligations respecting Lead in its Toothpaste
2 Products that are feasible as described in this paragraph.

3 **3.3. Naturally Occurring Lead.** Any Lead remaining in Settling Defendant's
4 Toothpaste Products after Settling Defendant has undertaken those actions required by
5 Paragraphs 3.1 and 3.2, above, is deemed "naturally occurring" within the meaning of section
6 12501 of Title 22 of the California Code of Regulations.

7 **3.4. Confirmation of Compliance.** AESI, at its sole expense, shall have the right for
8 three (3) years after the date of the entry of this Consent Judgment to request samples of the
9 Hydrated Silica manufactured to the specification level of 4.5 ppm and perform independent
10 testing of the material.

11 **3.5. Injunctive Relief Applies Only in California.** All of the foregoing injunctive
12 relief shall apply only to Toothpaste Products sold for use within California.

13 **3.6. Full and Complete Compliance.** Compliance by Settling Defendant with the
14 terms of this Consent Judgment shall be deemed to constitute its full and complete compliance
15 with Proposition 65 with respect to the provision of warnings for chemicals contained in or
16 otherwise associated with its Toothpaste Products.

17 **4. Settlement Payments.**

18 **4.1.** In keeping with the concept of, but in lieu of, statutory penalties and/or restitution,
19 under the statutes set forth in the Complaint, Settling Defendant shall pay to the Trust Account
20 of the Carrick Law Group, P.C., in immediately available funds \$37,500.00 (the "Settlement
21 Proceeds") within five (5) days from the entry of this Consent Judgment. Carrick Law
22 Group P.C. shall disburse these funds to AESI (a) to pay its attorneys' fees of \$18,000.00
23 pursuant to those parties' written contingent fee agreement; and (b) to further the remedial
24 purposes established under Proposition 65 by providing funds for AESI's ongoing costs of
25 monitoring compliance with this Consent Judgment, as well as for its future investigational and
26 enforcement activities regarding toxic chemicals and Proposition 65, in a manner that is
27 consistent with the private enforcement mechanism and funds allocation scheme established by
28 Health & Safety Code §§ 25249.7(d) and 25249.12(d) and AESI's non-profit mission.

1 **4.2.** Apart from the payments to be made pursuant to paragraph 4.1 above, each party
2 shall bear its own attorneys' fees and costs.

3 **5. Termination of All Claims; Claims Covered and Released.**

4 **5.1.** This Consent Judgment includes the resolution of all claims asserted in the Notice
5 and the Complaint, as well as all potential claims that were considered or could have been
6 brought by AESI on behalf of the public interest and the general public regarding Lead in the
7 Settling Defendant's Toothpaste Products, except with regard to any type of claim that AESI has
8 or may have against Sheffield Pharmaceuticals regarding the actions of Sheffield
9 Pharmaceuticals in manufacturing any Toothpaste Product on behalf of, or selling to, Settling
10 Defendant. This Consent Judgment is a final and binding resolution between AESI, on behalf of
11 the public interest and the general public, and Settling Defendant, of any and all alleged
12 violations of Proposition 65 and any other statutory or common law claims that were or could
13 have been asserted by AESI against Settling Defendant and its affiliated companies, officers,
14 directors, employees, and attorneys, as well as their suppliers, distributors, wholesalers, and
15 retailers of Settling Defendant's Toothpaste Products (except Sheffield Pharmaceuticals, as
16 indicated above) arising from or related to Lead in Settling Defendant's Toothpaste Products
17 and/or the claims alleged in the Complaint up through the date of entry of this Consent
18 Judgment, including, but not limited to, any claims for attorneys' fees and costs.

19 **5.2** AESI hereby releases Settling Defendant, and its affiliated companies, officers,
20 directors, employees, and attorneys, as well as their suppliers, distributors, wholesalers, and
21 retailers of Settling Defendant's Toothpaste Products (except Sheffield Pharmaceuticals, as
22 indicated above in paragraph 5.1) from any and all claims, causes of action, and actions based
23 upon or arising out of Lead in Settling Defendant's Toothpaste Products and/or the claims
24 alleged in the Complaint. However, (1) AESI expressly does not release any claims of any type
25 against Sheffield Pharmaceuticals, including but not limited to claims that are based upon or
26 arise out of conduct, acts, representations, omissions and/or any other behavior by Sheffield
27 Pharmaceuticals unrelated to Settling Defendant's Toothpaste Products; (2) AESI expressly does
28 not release any claims against Sheffield Pharmaceuticals regarding the actions of Sheffield

1 Pharmaceuticals in manufacturing any Toothpaste Products on behalf of, or selling to , Settling
2 Defendant, provided that this exception shall not limit the scope of the release of Settling
3 Defendant referred to in this section 5; and (3) AESI does not release any claims which AESI
4 does not have the authority to release, including specifically and without limitation any personal
5 injury claims (or claims directly related to personal injuries) on behalf of any person.

6 **5.3.** Nothing in this Consent Judgment shall be construed to terminate, release, or
7 otherwise resolve any claim AESI may have against Sheffield Pharmaceuticals, including but
8 not limited to any and all alleged violations of Proposition 65 and any other statutory or common
9 law claims that were or could have been asserted by AESI against Sheffield Pharmaceuticals that
10 are (1) based on conduct, acts, representations, omissions and/or any other behavior unrelated to
11 Settling Defendant's Toothpaste Products; and/or (2) based on Sheffield Pharmaceuticals'
12 actions in manufacturing any Toothpaste Products on behalf of, or selling to , Settling
13 Defendant, provided that this exception shall not limit the scope of the release of Settling
14 Defendant referred to in this section 5. Nothing in this Consent Judgment shall be construed to
15 terminate, release, or otherwise resolve any claims Settling Defendant has or may have against
16 Sheffield Pharmaceuticals, and Settling Defendant reserves the right to assert any or all claims it
17 has, has had, or may have in the future against Sheffield Pharmaceuticals based upon or arising
18 out of contract, tort, or statute, including, without limitation, any claims for express or implied
19 indemnity or contribution, and/or any claims for equitable indemnity or contribution.

20 Furthermore, nothing in this Consent Judgment shall be construed to assign to AESI or any other
21 person or entity any of Settling Defendant's claims it has, has had, or may have in the future
22 against Sheffield Pharmaceuticals based upon or arising out of breach of contract, indemnity,
23 contribution, and any other common law or statutory claim or cause of action.

24 **6. Covenant Not To Sue.** AESI and Settling Defendant agree that with regard to those
25 matters that AESI has herein released and that are described above in section 5, neither AESI nor
26 Settling Defendant will ever institute a lawsuit or administrative proceedings against any other
27 Party, nor shall any Party assert any claim of any nature against any person or entity hereby
28 released, with regard to any such matters which have been released. However, nothing in this

1 paragraph or in this Consent Judgment shall be interpreted to preclude AESI or Settling
2 Defendant from asserting, pursuing, filing, and/or prosecuting any of the claims against
3 Sheffield Pharmaceuticals referred to above in section 5.

4 **7. Application of Consent Judgment.** Paragraphs 5 and 6 of this Consent Judgment shall
5 apply to, be binding upon, and inure to the benefit of, the Parties, their divisions, subdivisions,
6 subsidiaries, affiliates, merged entities, acquired entities, successors, predecessors and assigns,
7 and the directors, officers, employees, counsel, and agents of each of them, as applicable, and
8 will inure to the benefit of the Parties' parent companies, and all of their retailers, and all of their
9 respective directors, officers, employees, counsel, and agents.

10 **8. Modification of Consent Judgment.**

11 **8.1.** This Consent Judgment may be modified or terminated upon written agreement of
12 Settling Defendant and AESI, with approval of the Court, or upon noticed motion for good cause
13 shown. The grounds for modification of this Consent Judgment include, but are not limited to,
14 the infeasibility of obtaining or using Hydrated Silica with a lead specification of 4.5 ppm in
15 Settling Defendant's Toothpaste Products as outlined in Paragraphs 3.1(b) and 3.2; provided
16 that, in such case of infeasibility, Settling Defendant is permitted, but not required, to seek
17 modification of this Consent Judgment. Any party seeking to modify this Consent Judgment
18 must first give notice to each other Party in writing of any proposed modification of this Consent
19 Judgment with the basis for the proposed modification. The Parties shall meet and confer in
20 good faith and attempt to reach agreement on proposed modification of the Consent Judgment.
21 If a resolution is not reached within forty-five (45) days of the notice, the Party seeking
22 modification may move the Court to modify this Consent Judgment.

23 **8.2.** The Parties agree that if AESI enters into a settlement agreement with another
24 toothpaste manufacturer or distributor in the future that imposes injunctive relief that is less
25 burdensome from the provisions contained in this Consent Judgment and the settlement
26 agreement is entered as a Consent Judgment, Settling Defendant has the right to seek
27 modification of the Consent Judgment pursuant to Paragraph 8.1 to allow Settling Defendant to
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1 modify this Consent Judgment to provide for the same injunctive relief imposed on the other
2 toothpaste manufacturer or distributor.

3 **9. Governing Law.** This Consent Judgment shall be governed by, and construed in
4 accordance with, the laws of the State of California, without regard to conflict of laws principles.

5 **10. Entire Agreement.** The Parties declare and represent that no promise, inducement or
6 other agreement has been made conferring any benefit upon any party except those contained
7 herein and that this Consent Judgment contains the entire agreement pertaining to the subject
8 matter hereof. This Consent Judgment supersedes any prior or contemporaneous negotiations,
9 representations, agreements and understandings of the Parties with respect to such matters,
10 whether written or oral. Parol evidence shall be inadmissible to show agreement by, between, or
11 among the Parties to any term or condition contrary to or in addition to the terms and conditions
12 contained in this Consent Judgment. The Parties acknowledge that each has not relied on any
13 promise, representation or warranty, expressed or implied, not contained in this Consent
14 Judgment.

15 **11. Challenges.** Subject to their rights to apply for a modification of this Consent Judgment
16 for good cause shown under Paragraph 8 hereof, the Parties agree that they, individually or
17 collectively, will not seek to challenge or to have determined invalid, void or unenforceable any
18 provision of this Consent Judgment or this Consent Judgment itself. The Parties understand that
19 this Consent Judgment contains the relinquishment of legal rights and each Party has, as each
20 has deemed appropriate, sought the advice of legal counsel, which each of the Parties has
21 encouraged the other to seek. Further, no Party has reposed trust or confidence in any other
22 Party so as to create a fiduciary, agency, or confidential relationship.

23 **12. Construction.** This Consent Judgment has been jointly negotiated and drafted. The
24 language of this Consent Judgment shall be construed as a whole according to its fair meaning
25 and not strictly for or against any Party.

26 **13. Authority to Stipulate to Consent Judgment.** Each signatory to this Consent Judgment
27 represents and warrants that the signatory has all requisite authorization, power, and legal right
28 necessary to execute and deliver this Consent Judgment and to perform and carry out the

1 transactions contemplated by this Consent Judgment. No other or further authorization or
2 approval from any person will be required for the validity and enforceability of the provisions of
3 this Consent Judgment.

4 **14. Cooperation and Further Assurances.** The Parties hereby will execute such other
5 documents and take such other actions as may be necessary to further the purposes and fulfill the
6 terms of this Consent Judgment.

7 **15. Counterparts.** This Consent Judgment may be executed in counterparts and has the
8 same force and effect as if all the signatures were obtained in one document.

9 **16. Notices.**

10 **16.1.** All correspondence and notices required by this Consent Judgment to AESI shall
11 be sent to:

12 Roger Lane Carrick
13 The Carrick Law Group, P.C.
14 350 S. Grand Avenue, Suite 2930
15 Los Angeles, CA 90071-3406
16 Tel: (213) 346-7930
17 Fax: (213) 346-7931
18 E-mail: roger@carricklawgroup.com

19 **16.2.** All correspondence and notices required by this Consent Judgment to Settling
20 Defendants shall be sent to each Settling Defendant as follows:

21 Nathan Jones
22 Xlear, Inc.
23 P.O. Box 970911
24 Orem, UT 84097
25 Phone: (877) 599-5327

26 With a copy to:
27 Jeffrey L. Fillerup, Esq.
28 Luce, Forward, Hamilton & Scripps LLP
Rincon Center II
121 Spear Street, Suite 200
San Francisco, CA 94105-1582
Phone: (415) 356-4600
Fax: (415) 356-3881
E-mail: jfillerup@luce.com

29 **17. Motion for Approval of Consent Judgment.** Following the execution of this Consent
30 Judgment by the Parties, counsel for AESI shall promptly prepare and submit to the Court a
31 motion seeking the Court's approval of this Consent Judgment.

32 **18. Entry of Stipulation For Entry of Consent Judgment Required.** This Consent
33 Judgment shall be null and void, and without any force or effect, unless fully approved as

1 required by law and entered by the Court. If the Court does not enter this Consent Judgment, the
2 execution thereof by Settling Defendants or AESI shall not be construed as an admission by
3 Settling Defendants or AESI of any fact, issue of law or violation of law.

4 **19. Jurisdiction.** This Court shall retain jurisdiction of this matter to implement this Consent
5 Judgment.

6 **20. Compliance with Reporting Requirements.** AESI shall comply with the reporting
7 form requirements referred to in Health and Safety Code section 25249.7(f) and established in
8 Title 11 of the California Code of Regulations sections 3000-3008. Copies of all such reports
9 shall be supplied to Settling Defendants as provided in Paragraph 17.2.

10 **21. Non-Interference in Settlement Approval Process.** The Parties will cooperate, as well
11 as use their respective best efforts, to secure the Attorney General's approval of this Consent
12 Judgment, and not to seek his disapproval of any portion of this Consent Judgment.

13 **IT IS SO STIPULATED:**

14 DATED: March 26, 2008

AMERICAN ENVIRONMENTAL SAFETY
INSTITUTE, a non-profit California corporation

15
16 By: Dullin Sivan

17
18 Title: President

19
20 DATED: March , 2008

XLEAR, INC.

21
22 By: _____

23
24 Title: _____

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1 required by law and entered by the Court. If the Court does not enter this Consent Judgment, the
2 execution thereof by Settling Defendants or AESI shall not be construed as an admission by
3 Settling Defendants or AESI of any fact, issue of law or violation of law.

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8 Title 11 of the California Code of Regulations sections 3000-3008. Copies of all such reports
9 shall be supplied to Settling Defendants as provided in Paragraph 17.2.

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11 as use their respective best efforts, to secure the Attorney General's approval of this Consent
12 Judgment, and not to seek his disapproval of any portion of this Consent Judgment.

13 **IT IS SO STIPULATED:**

14 DATED: March __, 2008

AMERICAN ENVIRONMENTAL SAFETY
INSTITUTE, a non-profit California corporation

16 By: _____

18 Title: _____

20 DATED: March 24, 2008

XLEAR, INC.

22 By: Thomas M. York

24 Title: C.E.O.

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5. In light of the findings made above, and based upon the Court's review of the proposed stipulated Consent Judgment executed among the Parties, the Court finds that this Consent Judgment is just, and serves and will serve the public interest.

IT IS SO ORDERED, ADJUDGED, AND DECREED.

DATED: APR 16 2008

Mary Thornton House

HON. MARY THORNTON HOUSE
JUDGE OF THE SUPERIOR COURT