

## SETTLEMENT AGREEMENT

### 1. INTRODUCTION

#### 1.1 **Anthony Ferreiro & Water Sports, LLC**

This Settlement Agreement is entered into by and between Anthony Ferreiro ("Ferreiro") and Water Sports, LLC ("Water Sports"). Together, Ferreiro and Water Sports are collectively referred to as the "Parties." Ferreiro is an individual that resides in the State of California, and seeks to promote awareness of exposures to toxic chemicals and to improve human health by reducing or eliminating hazardous substances contained in consumer products. Water Sports is considered a person in the course of doing business for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, Health & Safety Code section 25249.6, et seq. ("Proposition 65").

#### 1.2 **General Allegations**

Ferreiro alleges that Water Sports has imported, distributed and/or sold in the State of California the the Boat Buddy Stream Machine Hydraulic Water Launcher, UPC No. 7 55786 80040 4 (the "Product") without the requisite Proposition 65 warning that the Product contains the chemicals Diisononyl phthalate (DINP) and Di(2-ethylhexyl) phthalate (DEHP). On December 20, 2013, the State of California listed DINP as a chemical known to cause cancer.

On January 1, 1988, the State of California listed DEHP as a chemical known to the State to cause cancer, and on October 24, 2003, the State of California listed DEHP as a chemical known to cause developmental male reproductive toxicity. Water Sports does not admit and specifically denies these allegations.

#### 1.3 **Notice of Violation(s)**

On July 13, 2015 Ferreiro served Water Sports, Sears Holdings Management Corporation, Sears Holdings, Inc., Sears Corporation, Sears Holdings Corporation, Sears Brands Management Corporation (collectively, "Sears") and various public enforcement agencies with a document entitled "Notice of Violation of California Health & Safety

Code § 25249.6, *et seq.*” The Notice provided Water Sports and such others, including public enforcers, with notice that alleged that Water Sports was in violation of California Health & Safety Code § 25249.6, for failing to warn consumers and customers that the Product exposed users in California to DINP and DEHP. No public enforcer has diligently prosecuted the allegations set forth in the Notice.

#### **1.4 No Admission**

Water Sports denies the material factual and legal allegations contained in the Notice and maintains that, to the best of its knowledge, all products that are or have been sold and distributed in California, including the Product, have been and are in compliance with all laws. Nothing in this Settlement Agreement shall be construed as an admission by Water Sports of any fact, finding, issue of law, or violation of law; nor shall compliance with this Settlement Agreement constitute or be construed as an admission by Water Sports of any fact, finding, conclusion, issue of law or violation of law, such being specifically denied by Water Sports. However, this section shall not diminish or otherwise affect the obligations, responsibilities and duties under this Settlement Agreement. Notwithstanding the allegations in the Notice, Water Sports maintains that it has not knowingly manufactured, or caused to be manufactured, the Product for sale in California in violation of Proposition 65.

#### **1.5 Effective Date**

For purposes of this Settlement Agreement, the term "Effective Date" shall mean November 23, 2015.

## **2. INJUNCTIVE RELIEF**

### **2.1 Reformulation of the Product**

Commencing on the Effective Date, and continuing thereafter, Water Sports shall only ship, sell, or offer for sale in California, reformulated Product pursuant to Section 2.2 or Product that is labeled with a clear and reasonable warning pursuant to Section 2.3. Water Sports and its downstream retailers shall have no obligation to label Product that

entered the stream of commerce prior to the Effective Date. For purposes of this Settlement Agreement, a “Reformulated Product” is Product that is in compliance with the standard set forth below in section 2.2

## **2.2 Reformulation Standard**

“Reformulated Product” shall mean Product that contains less than or equal to 1,000 parts per million (“ppm”) of each of DEHP and DINP when analyzed pursuant to U.S. Environmental Protection Agency testing methodologies 3580A and 8270C.

## **2.3 Clear and Reasonable Warnings**

Commencing on the Effective Date, Water Sports shall, for all Product it sells or distributes and which is intended for sale in California or which Water Sports has reason to believe will be shipped or sold in California and that is not a Reformulated Product, provide clear and reasonable warnings as set forth in subsections 2.3(a) and (b) below. The warning shall be prominently placed with such conspicuousness as compared with other words, statements, designs, or devices as to render it likely to be read and understood by an ordinary individual under customary conditions before purchase or use. Each warning shall be provided in a manner such that the consumer or user understands to which specific Product the warning applies, so as to minimize the risk of consumer confusion.

### **(a) Retail Store Sales**

**(i) Product Labeling.** Water Sports shall affix a warning to the packaging, labeling or directly on each Product sold in retail outlets in California by Water Sports or any person selling the Product that states:

#### **PROPOSITION 65 WARNING:**

This product contains chemicals known to the State of California to cause cancer, birth defects or other reproductive harm.

(ii) **Point of Sale Warnings.** Alternatively, Water Sports may provide warning signs in the form below to its customers in California with instructions to post the warnings in close proximity to the point of display of the Product. Such instruction sent to Water Sports customers shall be sent by certified mail, return receipt requested.

**PROPOSITION 65 WARNING:**

This product contains chemicals known to the State of California to cause cancer, birth defects or other reproductive harm.

(b) **Mail Order Catalog Warning.** In the event that Water Sports directly sells Product via mail order catalog directly to consumers located in California after the Effective Date that is not a Reformulated Product, Water Sports shall provide a warning for such Product sold via mail order catalog to such California residents. A warning that is given in a mail order catalog shall be in the same type size or larger than the Product description text within the catalog. The following warning shall be provided on the same page and in the same location as the display and/or description of the Product:

**PROPOSITION 65 WARNING:**

This product contains chemicals known to the State of California to cause cancer, birth defects or other reproductive harm.

Where it is impracticable to provide the warning on the same page and in the same location as the display and/or description of the Product, Water Sports may utilize a designated symbol to cross reference the applicable warning and shall define the term “designated symbol” with the following language on the inside of the front cover of the catalog or on the same page as any order form for the Product:

**WARNING:** Certain products identified with this symbol ▼ and offered for sale in this catalog contain chemicals known to the State of California to cause cancer, birth defects or other reproductive harm.

The designated symbol must appear on the same page and in close proximity to the display and/or description of the Product. On each page where the designated symbol appears, Water Sports must provide a header or footer directing the consumer to the warning language and definition of the designated symbol.

(c) **Internet Sales Warning.** In the event that Water Sports directly sells Product via the internet directly to consumers located in California after the Effective Date that is not a Reformulated Product, Water Sports shall provide a warning for such Product sold via the internet to such California residents. A warning that is given on the internet shall be in the same type size or larger than the Product description text and shall be given in conjunction with the direct sale of the Product. The warning shall appear either: (a) on the same web page on which the Product is displayed; (b) on the same web page as the order form for the Product; (c) on the same page as the price for the Product; or (d) on one or more web pages displayed to a purchaser during the checkout process. The following warning shall be provided:

**PROPOSITION 65 WARNING:**

This product contains chemicals known to the State of California to cause cancer, birth defects or other reproductive harm.

**2.4 Exception to Warning Requirement**

The warning requirements set forth in Section 2.3 shall not apply to any Reformulated Product.

**3. PENALTIES PURSUANT TO HEALTH & SAFETY CODE § 25249.7(b)**

In settlement of all the claims referred to in this Settlement Agreement, Water Sports shall pay a total of \$2,500.00 in civil penalties in accordance with this Section. Each penalty payment will be allocated in accordance with California Health & Safety Code § 25249.12(c)(1) and (d), with 75% of the funds remitted to the California Office of Environmental Health Hazard Assessment ("OEHHA") and the remaining 25% of the

penalty remitted to Ferreiro. Each penalty payment shall be delivered to the addresses listed in Section 3.2 below.

### **3.1 Initial Civil Penalty**

Within seven (7) business days of the Effective Date, Water Sports shall issue two separate checks for the initial civil penalty payment to (a) "OEHHA" in the amount of \$1,875.00; and (b) "Brodsky & Smith, LLC in Trust for Ferreiro" in the amount of \$625.00. All penalty payments shall be delivered to the addresses listed in Section 3.2 below.

### **3.2 Payment Procedures**

**(a) Issuance of Payments.** Payments shall be delivered as follows:

(i) All payments owed to Ferreiro, pursuant to Section 3.1 shall be delivered to the following payment address:

Evan J. Smith, Esquire  
Brodsky & Smith, LLC  
Two Bala Plaza, Suite 510  
Bala Cynwyd, PA 19004

(ii) All payments owed to OEHHA (EIN: 68-0284486), pursuant to Section 3.1 shall be delivered directly to OEHHA (Memo Line "Prop 65 Penalties") at the following addresses:

For United States Postal Service Delivery:

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

For Non-United States Postal Service Delivery:

Mike Gyurics  
Fiscal Operations Branch Chief  
Office of Environmental Health Hazard Assessment  
1001 I Street

Sacramento, CA 95814

(b) **Copy of Payments to OEHHA.** Water Sports agrees to provide Ferreiro's counsel with a copy of the checks payable to OEHHA, simultaneous with its penalty payments to Ferreiro, to be delivered to the address provided in Section 3.2(a)(i), as proof of payment to OEHHA.

(C) **Tax Documentation.** Water Sports agrees to provide a completed IRS 1099 for its payments to each of the following payees under this Settlement Agreement:

(i) "Anthony Ferreiro" whose address and tax identification number shall be provided after this Settlement Agreement is fully executed by the Parties;

(ii) "Brotsky & Smith, LLC" (EIN: 23-2971061) at the address provided in Section 3.2(a)(i); and

(iii) "Office of Environmental Health Hazard Assessment" 1001 I Street, Sacramento, CA 95814.

#### **4. REIMBURSEMENT OF FEES AND COSTS**

The parties acknowledge that Ferreiro and his counsel offered to resolve this dispute without reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving this fee issue to be resolved after the material terms of the agreement had been settled. Ferreiro then expressed a desire to resolve the fee and cost issue shortly after the other settlement terms had been finalized. The Parties reached an accord on the compensation due to Ferreiro and his counsel under general contract principles and the private attorney general doctrine and principles codified at California Code of Civil Procedure § 1021.5, for all work performed through the mutual execution of this agreement. Under these legal principles, Water Sports shall reimburse Ferreiro's counsel for fees and costs incurred as a result of investigating and bringing this matter to Water

Sports' attention, and negotiating a settlement in the public interest. Within seven (7) days of the Effective Date, Water Sports shall issue a check payable to "Brodsky & Smith, LLC" in the amount of \$22,500.00 for delivery to the following address:

Evan Smith, Esquire  
Brodsky & Smith, LLC  
Two Bala Plaza, Ste. 510  
Bala Cynwyd, PA 19004

**5. RELEASE OF ALL CLAIMS**

**5.1 Release of Water Sports, Sears, and Downstream Retailers and Entities**

Ferreiro acting on his own behalf, and on behalf of the public and in the public interest, releases Water Sports, Sears, and their parents, subsidiaries, affiliated entities under common ownership, directors, officers, agents, employees, attorneys and each entity to whom Water Sports directly or indirectly distributes or sells the Product, including but not limited to, downstream distributors, wholesalers, customers, retailers, franchisees, cooperative members and licensees (collectively, the "Releasees"), from all claims for violations of Proposition 65 through the Effective Date based on their failure to warn about alleged exposures to the chemicals DINP and DEHP that are contained in the Product, and were distributed, sold and/or offered for sale by Water Sports to retailers, customers and consumers in the State of California.

In further consideration of the promises and agreements herein contained, and for the payments to be made pursuant to Section(s) 3 and 4 above, Ferreiro, on behalf of himself, his past and current agents, representatives, attorneys, successors and/or assignees, provides a release herein which shall be effective as a full and final accord and satisfaction, as a bar to all actions, causes of action, obligations, costs, expenses, attorneys' fees, damages, losses, claims, liabilities and demands against Water Sports or the Releasees of any nature, character, or kind, whether known or unknown, suspected or

unsuspected, limited to and arising out of the alleged or actual exposure to the chemicals DINP and DEHP in the Product.

**5.2 Water Sports' Release of Ferreiro**

Water Sports, on behalf of itself, Sears, its past and current agents, representatives, attorneys, successors and/or assignees, hereby waives any and all claims against Ferreiro, his attorneys and other representatives, for any and all actions taken or statements made (or those that could have been taken or made) by Ferreiro and/or his attorneys and other representatives, whether in the course of investigating claims or otherwise seeking to enforce Proposition 65 against it in this matter or with respect to the Product.

**6. SEVERABILITY**

If, subsequent to the execution of this Settlement Agreement, any of the provisions of this Settlement Agreement are deemed by a court to be unenforceable, the validity of the enforceable provisions remaining shall not be adversely affected.

**7. GOVERNING LAW**

The terms of this Settlement Agreement shall be governed by the law of the State of California and apply within the State of California. In the event that Proposition 65 is repealed or is otherwise rendered inapplicable by reason of law generally, or as to the Product, Water Sports shall provide written notice to Ferreiro of any asserted change in the law, and shall have no further obligations pursuant to this Settlement Agreement with respect to, and to the extent that, the Product is so affected.

**8. NOTICES**

Unless specified herein, all correspondence and notices required to be provided pursuant to this Settlement Agreement shall be in writing and personally delivered or sent by: (i) first-class (registered or certified mail) return receipt requested; or (ii) overnight or two-day courier on any party by the other party to the following addresses:

For Water Sports:

Kenneth J. Vanko  
Clingen Callow & McLean, LLC  
2300 Cabot Drive, Suite 500  
Lisle, Illinois 60532  
630-871-2609

For Ferreiro:

Evan J. Smith  
Brodsky & Smith, LLC  
Two Bala Plaza, Suite 510  
Bala Cynwyd, PA 19004  
877-534-2590

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

**9. COUNTERPARTS: SIGNATURES**

This Settlement Agreement may be executed in counterparts and by facsimile or .pdf signature, each of which shall be deemed an original, and all of which, when taken together, shall constitute one and the same document.

**10. COMPLIANCE WITH HEALTH & SAFETY CODE § 25249.7(f)**

Ferreiro agrees to comply with the reporting requirements referenced in Health & Safety Code section 25249.7(f).

**11. MODIFICATION**

This Settlement Agreement may be modified only by a written agreement of the Parties.

**12. AUTHORIZATION**

The undersigned are authorized to execute this Settlement Agreement and have read, understood and agree to all of the terms and conditions contained of this Settlement Agreement.

**AGREED TO:**

**AGREED TO:**

Date: Nov. 19, 2015

Date: \_\_\_\_\_

By: Anthony Ferreiro  
Anthony Ferreiro

By: \_\_\_\_\_  
Water Sports

Kenneth J. Vanko  
Clingen Callow & McLean, LLC  
2300 Cabot Drive, Suite 500  
Lisle, Illinois 60532  
630-871-2609

For Ferreiro:

Evan J. Smith  
Brodsky & Smith, LLC  
Two Bala Plaza, Suite 510  
Bala Cynwyd, PA 19004  
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**AGREED TO:**

Date: \_\_\_\_\_

By: \_\_\_\_\_

Anthony Ferreiro

**AGREED TO:**

Date: 11/23/2015

By: Scott J. Reynolds VP

Water Sports