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8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF ALAMEDA

10 HECTOR VELARDE,

11 Plaintiff,

12 vs.

13 PULL'R HOLDING COMPANY, LLC,

14 Defendant.

Case No.: RG16802902

Judge:

Dept.: 25

Reservation No.: 1712348

[PROPOSED] CONSENT JUDGMENT

Hearing Date: April 7, 2016

Time: 9:00 AM

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1. Introduction

1.1 This Consent Judgment is entered into by and between The Estate of Martha Velarde, Martha Velarde, Hector Velarde (“Plaintiff”) and Pull’R Holding Company, LLC (“Pull’R”), with Plaintiff and Pull’R each referred to individually as a “Party” and collectively as the “Parties.”

The original Notice of Violation dated April 20, 2015 was issued by Martha Velarde to Sears Brands Management Corporation, Sears Corporation, Sears Holdings Corporation, Sears Holdings, Inc., Sears Holdings Management Corporation (collectively, “Sears”). An amended 60-day Notice of Violation dated June 22, 2015 was issued by Martha Velarde to Sears. A second-amended 60-day Notice of Violation dated July 8, 2015 was issued by Martha Velarde to Sears and Pull’R. Finally, Hector Velarde provided Sears, Pull’R, and the requisite public enforcement agencies with a document entitled “Notice of Violation of California Health & Safety Code § 25249.5, *et seq.*” dated November 20, 2015. Collectively, the four Notices of Violation are referred to herein as the “Notices.” The Notices allege that Pull’R is causing consumer exposures in the state of California associated with bags containing Diisononyl phthalate (“DINP”) without first providing the clear and reasonable warning required by the Safe Drinking Water and Toxic Enforcement Act of 1986, California Health and Safety Code § 25249.5 *et seq.* (“Proposition 65”). The products covered by this Consent Judgment are defined as tool bags containing DINP, including, but not limited to, Craftsman 12” Large Mouth Tool Bags, UPC No. 7 21415 81027 4 (collectively, the “Covered Products”). No public enforcer has diligently prosecuted the allegations set forth in the Notices.

1.2 On February 5, 2016, Hector Velarde filed a Complaint for Civil Penalties and Injunctive Relief (“Complaint”) in the Alameda County Superior Court (the “Court”), Case No. RG16802902, naming Pull’R as a Defendant in that action.

1.3 Pull’R employs ten or more persons and is a “person in the course of doing business” for purposes of Proposition 65.

1 1.4 For purposes of this Consent Judgment only, the Parties stipulate that this Court
2 has jurisdiction over Pull'R as to the allegations contained in the Notices and operative Complaint
3 applicable to Pull'R, that venue is proper in the County of Alameda, and that this Court has
4 jurisdiction to enter and enforce the provisions of this Consent Judgment pursuant to Proposition
5 65 and Code of Civil Procedure § 664.6.

6 1.5 The Parties enter into this Consent Judgment pursuant to a full settlement and
7 release of disputed claims between the Parties as alleged in the Notices and Complaint for the
8 purpose of avoiding prolonged litigation. By execution of this Consent Judgment, Pull'R does
9 not admit any violation of Proposition 65 and specifically denies that it has committed any such
10 violation. Nothing in this Consent Judgment shall be construed as an admission by Pull'R of any
11 fact, finding, conclusion of law, issue of law, or violation of law, nor shall compliance with this
12 Consent Judgment constitute or be construed as an admission by Pull'R of any fact, finding,
13 conclusion of law, issue of law, or violation of law, such being specifically denied by Pull'R.
14 Nothing in this Consent Judgment shall prejudice, waive, or impair any right, remedy or defense
15 that Pull'R may have in any other future legal proceeding. However, this paragraph shall not
16 diminish or otherwise affect the obligations, responsibilities and duties of Pull'R under this
17 Consent Judgment.

18 1.6 For purposes of this Consent Judgment, the term "Effective Date" shall mean five
19 (5) days after the date Plaintiff's counsel of record provides written notice to Pull'R's counsel of
20 record that the Consent Judgment has been entered by the Court.

21 **2. Injunctive Relief**

22 2.1 Within five (5) days of the Effective Date, and continuing thereafter, Pull'R shall
23 only manufacture for sale, or purchase for sale in California: (i) "Reformulated Covered
24 Products" pursuant to Section 2.2 below; or (ii) Covered Products which have a compliant
25 Proposition 65 warning pursuant to Section 2.3 below.

26 2.2 "Reformulated Covered Products" shall mean Covered Products containing a
27 maximum concentration of 0.1 percent (1,000 parts per million) of DINP when sampled and
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1 analyzed pursuant to U.S. Environmental Protection Agency testing methodologies 3580A and
2 8270C, or other methodologies utilized by state or federal agencies for the purpose of determining
3 DINP content in a solid substance.

4 2.3 Within five (5) days of the Effective Date, Pull'R shall not manufacture, import,
5 distribute, sell, or offer non-Reformulated Covered Products for sale in the State of California,
6 unless they carry the Proposition 65 warnings specified in this Section 2. The warning shall be
7 prominently placed with such conspicuousness as compared with other words, statements,
8 designs, or devices as to render it likely to be read and understood by an ordinary individual
9 under customary conditions before purchase or use.

10 If the requirements of Proposition 65 are modified, changed or amended, compliance with
11 either the warning provisions in this Consent Judgment or compliance with the modified,
12 changed, or amended rules or regulations will be deemed as compliance with Proposition 65.

13 (a) **Retail Store Sales.** For all Covered Products that are not Reformulated
14 Covered Products, Pull'R agrees that it will only offer such Covered Products for sale in
15 California with a clear and reasonable Proposition 65 warning. A clear and reasonable warning
16 may consist of a warning affixed to the packaging, label, tag, or directly to each Covered Product,
17 containing language consistent with the following statement:

18 **WARNING:** This product contains chemicals known to the State of California to
19 cause cancer and birth defects or other reproductive harm.

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

27 **WARNING:** This product contains chemicals known to the State of California to
28 cause cancer and birth defects or other reproductive harm.

1 Where it is impracticable to provide the warning on the same page and in the same location as the
2 display and/or description of the Covered Product, Pull'R may utilize a designated symbol to
3 cross reference the applicable warning and shall define the term "designated symbol" with the
4 following language on the inside of the front cover of the catalog or on the same page as any
5 order form for the Covered Product:
6

7 **WARNING:** Certain products identified with this symbol ▼ contain chemicals
8 known to the State of California to cause cancer and birth defects or other
reproductive harm.

9 The designated symbol must appear on the same page and in close proximity to the display and/or
10 description of the Covered Product. On each page where the designated symbol appears, Pull'R
11 must provide a header or footer directing the consumer to the warning language and definition of
12 the designated symbol.

13 **3. Entry of Consent Judgment**

14 3.1 The Parties hereby request that the Court promptly approve and enter this Consent
15 Judgment. Upon successful entry of this Consent Judgment, Plaintiff and Pull'R waive their
16 respective rights to a hearing or trial on the allegations of the Hector Velarde Complaint and
17 Notices which are at issue in the Action.

18 3.2 In the event that the California Attorney General objects or otherwise comments
19 on one or more provisions of this Consent Judgment, Plaintiff and Pull'R agree to take reasonable
20 steps to satisfy such concerns or objections.

21 **4. Matters Covered By This Consent Judgment**

22 4.1 Plaintiff Hector Velarde acting on his own behalf and in the public interest,
23 releases Pull'R, Sears, and their parents, subsidiaries, affiliated entities under common ownership,
24 directors, officers, agents, employees, attorneys and each entity to whom Pull'R and/or Sears
25 directly or indirectly distributes or sells the Covered Products, including but not limited to,
26 downstream distributors, wholesalers, customers, retailers, franchisers, cooperative members,
27 licensors and licensees, and any other person or entity to whom they directly or indirectly
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1 distribute, distributed, sell, or sold Covered Products to (collectively, “Releasees”), from all
2 claims for alleged or actual violations arising under Proposition 65 for unwarned exposures to
3 DINP from the Covered Products sold by Pull’R prior to the Effective Date. Compliance with the
4 terms of this Consent Judgment constitutes compliance with Proposition 65 by Pull’R with
5 respect to the alleged or actual failure to warn about exposures to DINP from Covered Products
6 manufactured, sold, or distributed for sale by Pull’R after the Effective Date. This Consent
7 Judgment is a full, final and binding resolution of all claims that were or could have been asserted
8 against Pull’R, Sears and/or the Releasees for failure to provide warnings for alleged exposures to
9 DINP contained in the Covered Products.

10 4.2 Plaintiff, on behalf of himself and on behalf of his past and current agents,
11 representatives, attorneys, successors and/or assignees and *not* in his representative capacity,
12 hereby waives all rights to institute or participate in directly or indirectly, any form of legal
13 action, and releases all claims that he may have against the Releasees, including, without
14 limitation, all actions, causes of action, suits, obligations, costs, fines, penalties, expenses,
15 attorneys’ fees, damages, losses, claims, liabilities and demands of Pull’R, Sears and/or the
16 Releasees of any nature, character, or kind, whether known or unknown, suspected or
17 unsuspected, limited to and arising out of the alleged or actual exposures to DINP in the Covered
18 Products manufactured, imported, distributed, or sold by Pull’R prior to the Effective Date.

19 4.3 Pull’R hereby waives any and all claims against Plaintiff, his attorneys and other
20 representatives, for any and all actions taken or statements made (or those that could have been
21 taken or made) by Plaintiff and/or his attorneys and other representatives, whether in the course
22 of investigating claims or otherwise seeking to enforce Proposition 65 against it in this matter or
23 with respect to the Covered Products.

24 4.4 Plaintiff and Pull’R, each on their own behalf and on behalf of their past and
25 current agents, representatives, attorneys, successors, and/or assignees, in their individual
26 capacity only and not in the public interest, also provide a general release which shall be effective
27 as a full and final accord and satisfaction, as a bar to all actions, causes of actions, obligations,
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1 costs, expenses, attorneys' fees, damages, losses, claims, liabilities, and demands of Plaintiff of
2 any nature, character or kind, known or unknown, suspected or unsuspected, arising out of
3 alleged violations of Proposition 65 with respect to alleged exposures to DINP in the Covered
4 Products, as set forth in the Notices, manufactured, sold, or distributed by Pull'R or those matters
5 released by Pull'R in Section 4.3. Plaintiff and Pull'R each acknowledge and understand the
6 significance and consequences of this specific waiver of California Civil Code § 1542, which
7 provides as follows:

8 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE
9 CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER
10 FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF
11 KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS
12 OR HER SETTLEMENT WITH THE DEBTOR.

13 **5. Modification of Judgment**

14 5.1 This Consent Judgment may be modified only (i) by a written agreement of the
15 Parties and the entry of a modified Consent Judgment by the Court thereon; or (ii) upon a
16 successful motion of any Party as provided by law and the entry of a modified Consent Judgment
17 by the Court thereon.

18 5.2 **Competitive Fairness.** Should any court enter final judgment in a case
19 brought by Plaintiff or the People involving the Covered Products that sets forth standards
20 defining when Proposition 65 warnings will or will not be required ("Alternative Standards"), or
21 if the California Attorney General otherwise provides written endorsement (i.e., a writing that is
22 circulated by the Attorney General that is not intended for the purpose of soliciting further input
23 or comments) of Alternative Standards applicable to products that are of the same general type
24 and function as the Covered Products and constructed from similar materials, in order to ensure
25 competitive fairness, Pull'R shall be entitled to utilize and rely on, at its discretion, either the
26 Alternative Standards or the warning requirements set forth in this Consent Judgment and be
27 deemed to be in compliance with Proposition 65. Plaintiff shall not unreasonably contest any
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1 proposed application to effectuate such a modification provided that the Covered Products for
2 which such a modification is sought are of the same general type and function as those to which
3 the Alternative Standards apply.

4 **6. Civil Penalties and Reimbursement of Fees and Costs**

5 6.1 Pursuant to Health and Safety Code § 25249.7(b)(2), and in settlement of all the
6 claims referred to in this Consent Judgment, and without any admission of liability therefore,
7 Pull'R shall pay a total of \$3,000.00 in civil penalties in accordance with this Section. Each
8 penalty payment will be allocated in accordance with California Health & Safety Code
9 §§ 25249.12(c)(1) and (d), with 75% of the funds remitted to the California Office of
10 Environmental Health Hazard Assessment ("OEHHA") and the remaining 25% of the funds
11 remitted to Plaintiff. Each penalty payment shall be delivered to the addresses listed in Section
12 6.3 below.

13 6.1.1 Within five (5) days of the Effective Date, Pull'R shall issue two separate
14 checks for the Civil Penalty amounts to (a) "OEHHA" in the amount of \$2,250.00; and (b)
15 "Brodsky & Smith, LLC in Trust for Hector Velarde" in the amount of \$750.00.

16 6.2 The Parties acknowledge that Plaintiff and his counsel offered to resolve this
17 dispute without reaching terms on the amount of fees and costs to be reimbursed to them, thereby
18 leaving this fee issue to be resolved after the material terms of this Consent Judgment had been
19 settled. The Parties then reached an accord on the compensation due to Plaintiff and his counsel
20 under general contract principles and the private attorney general doctrine and principles codified
21 at California Code of Civil Procedure § 1021.5, for all work performed related to this matter.

22 6.2.1 Within five (5) days of the Effective Date, Pull'R shall issue a check
23 payable to Brodsky & Smith, LLC in the amount of \$32,000.00 for delivery to the address in
24 Section 6.3 as complete reimbursement for Plaintiff's attorneys' fees and costs, incurred and yet
25 to be incurred, including investigating, bringing this matter to Pull'R's attention, negotiating a
26 settlement of the matter in the public interest, complying with all reporting obligations, securing
27 the approval of this Consent Judgment in court, and laboratory costs and expert fees, incurred in
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1 the course of serving the Notices and bringing the Action, and in enforcing Proposition 65,
2 including without limitation, preparation of the Notice letters and discussions with the California
3 Attorney General.

4 6.3 Payments owed to Plaintiff and/or Brodsky & Smith, LLC pursuant to this entire
5 Section 6 shall be delivered to the following payment address:

6 Evan J. Smith, Esq.
7 Brodsky & Smith, LLC
8 Two Bala Plaza, Suite 510
9 Bala Cynwyd, PA 19004

9 Payment owed to OEHHA (EIN: 68-0284486) pursuant to this Section 6 shall be delivered
10 directly to OEHHA (Memo Line "Prop 65 Penalties") at one of the following addresses:

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, LLC at the address
24 set forth above as proof of payment to OEHHA.

25 7. **Notices**

26 7.1 Any and all notices between the Parties provided for or permitted under this
27 Consent Judgment, or by law, shall be in writing and personally delivered or sent by: (i) first-
28 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:

1 For Pull'R:

2 Malcolm C. Weiss, Esq.
3 Stephanie Chen, Esq.
4 Hunton & Williams LLP
5 550 South Hope Street, Suite 2000
6 Los Angeles, CA 90071
7 T: 213.532.2130

8 For Plaintiff Hector Velarde:

9 Evan J. Smith, Esq.
10 § & Smith, LLC
11 Two Bala Plaza, Suite 510
12 Bala Cynwyd, PA 19004
13 T: 877.354.2590

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

16 **8. Authority to Stipulate**

17 8.1 Each signatory to this Consent Judgment certifies that he or she is fully authorized
18 by the Party he or she represents to enter into and execute this Consent Judgment on behalf of the
19 Party represented and to legally bind that Party.

20 **9. Counterparts**

21 9.1 This Consent Judgment may be signed in counterparts and shall be binding upon
22 the Parties hereto as if all said Parties executed the original hereof.

23 **10. Service on the California Attorney General**

24 10.1 Plaintiff shall serve a copy of this Consent Judgment, signed by both Parties, on
25 the California Attorney General on behalf of the Parties so that the Attorney General may review
26 this Consent Judgment prior to his submittal to the Court for Approval. No sooner than forty-five
27 (45) days after the Attorney General has received the aforementioned copy of this Consent
28 Judgment, and in the absence of any written objection by the Attorney General to the terms of this
Consent Judgment, the Parties may then submit it to the Court for Approval.

1 **11. Entire Agreement**

2 11.1 This Consent Judgment contains the sole and entire agreement and understanding
3 of the Parties with respect to the entire subject matter hereof, and any and all prior discussions,
4 negotiations, commitments and understandings related thereto. There are no warranties,
5 representations, or other agreements between the Parties, except as expressly set forth herein. No
6 representations, oral or otherwise, express or implied, other than those specifically contained
7 herein have been made by any Party hereto. No other agreements not specifically referred to
8 herein, oral or otherwise, shall be deemed to exist or to bind any of the Parties. No
9 supplementation, modification, waiver, or termination of this Consent Judgment shall be binding
10 unless executed in writing by the Party to be bound thereby. No waiver of any of the provisions
11 of this Consent Judgment shall be deemed or shall constitute a waiver of any of the other
12 provisions hereof whether or not similar, nor shall such waiver constitute a continuing waiver.

13 **12. Severability**

14 12.1 If, subsequent to the Court’s approval and entry of this Consent Judgment as a
15 judgment, any provision of this Consent Judgment is held by a court to be unenforceable, the
16 validity of the enforceable provisions remaining shall not be adversely affected.

17 **13. Reporting Requirements**

18 13.1 Plaintiff and his counsel agree to comply with the reporting form requirements
19 referenced in California Health & Safety Code § 25249.7(f).

20 **14. Governing Law and Construction**

21 14.1 The terms, validity, construction and performance of this Consent Judgment shall
22 be governed by the laws of the State of California and apply within the state of California,
23 without reference to any conflicts of law provisions under California law. In the event that
24 Proposition 65 is repealed, preempted, or is otherwise rendered inapplicable by reason of law
25 generally, or if any of the provisions of this Consent Judgment are rendered inapplicable or no
26 longer required as a result of any such repeal or preemption, as to the Covered Products, then
27 Pull’R may provide Plaintiff with written notice of any asserted change in the law, and shall have
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1 no further obligations pursuant to this Consent Judgment, with respect to, and to the extent that,
2 the Covered Products are so affected. Nothing in this Consent Judgment shall be interpreted to
3 relieve Pull'R from any obligations to comply with any pertinent state or federal toxics control
4 law.

5 **15. Court Approval**

6 15.1 If this Consent Judgment is not approved by the Court within one year after it has
7 been fully executed by the Parties, it shall be of no force or effect, and cannot be used in any
8 proceeding for any purpose. The Parties acknowledge that, pursuant to California Health and
9 Safety Code § 25249.7(f), a noticed motion is required for judicial approval of this Consent
10 Judgment, which Plaintiff shall draft and file with the Court.

11 **IT IS SO STIPULATED:**

12
13 Dated: _____ Dated: _____

14
15 By: _____ By: _____
16 The Estate of Martha Velarde, Pull'R Holding Company LLC
17 Martha Velarde, and Hector Velarde

18 **IT IS SO ORDERED, ADJUDGED AND DECREED:**

19
20 Dated: _____
21 _____
22 Judge of the Superior Court
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1 no further obligations pursuant to this Consent Judgment, with respect to, and to the extent that,
2 the Covered Products are so affected. Nothing in this Consent Judgment shall be interpreted to
3 relieve Pull'R from any obligations to comply with any pertinent state or federal toxics control
4 law.

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7 been fully executed by the Parties, it shall be of no force or effect, and cannot be used in any
8 proceeding for any purpose. The Parties acknowledge that, pursuant to California Health and
9 Safety Code § 25249.7(f), a noticed motion is required for judicial approval of this Consent
10 Judgment, which Plaintiff shall draft and file with the Court.

11 **IT IS SO STIPULATED:**

12
13 Dated: 2/16/16 Dated: _____

14
15 By:  By: _____
16 The Estate of Martha Velarde, Pull'R Holding Company LLC
17 Martha Velarde, and Hector Velarde

18 **IT IS SO ORDERED, ADJUDGED AND DECREED:**

19
20 Dated: _____ Judge of the Superior Court
21

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1 no further obligations pursuant to this Consent Judgment, with respect to, and to the extent that,
2 the Covered Products are so affected. Nothing in this Consent Judgment shall be interpreted to
3 relieve Pull'R from any obligations to comply with any pertinent state or federal toxics control
4 law.

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7 been fully executed by the Parties, it shall be of no force or effect, and cannot be used in any
8 proceeding for any purpose. The Parties acknowledge that, pursuant to California Health and
9 Safety Code § 25249.7(f), a noticed motion is required for judicial approval of this Consent
10 Judgment, which Plaintiff shall draft and file with the Court.


11 **IT IS SO STIPULATED:**

12
13 Dated: _____

Dated: 2-15-16

14
15 By: _____

The Estate of Martha Velarde,
Martha Velarde, and Hector Velarde

16 By: 
Pull'R Holding Company LLC

17
18 **IT IS SO ORDERED, ADJUDGED AND DECREED:**

19
20 Dated: _____

Judge of the Superior Court