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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ALAMEDA

10 ANTHONY FERREIRO,
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12 Plaintiff,
13 vs.
14 KLEAR-VU CORPORATION,
15 Defendant.

Case No. RG16823648

[PROPOSED] CONSENT JUDGMENT

Judge: Sandra Bean

Dept.: 301

Hearing Date: September 19, 2016

Hearing Time: 2:30 PM

Reservation #: R-1764900

1 **1. Introduction**

2 1.1 On April 29, 2016, Anthony Ferreiro (“Ferreiro”) served Klear-Vu Corporation
3 (“Klear-Vu”), Wal-Mart Stores, Inc., Walmart.com USA, LLC (“Wal-Mart”) and various public
4 enforcement agencies with a document entitled “Notice of Violation of California Health &
5 Safety Code § 25249.6, *et seq.*” (the “Notice”). The Notice provided Klear-Vu and such others,
6 including public enforcers, with notice that alleged Klear-Vu was in violation of California
7 Health & Safety Code § 25249.6 (“Proposition 65”), for failing to warn consumers and customers
8 that chair cushions sold or offered for sale by Klear-Vu, including but not limited to The Gripper
9 Chair Cushion, UPC No. 028448635394, (“Product” or “Products”) exposed users in California
10 to the chemical Di(2-ethylhexyl) phthalate (“DEHP”). No public enforcer has diligently
11 prosecuted the allegations set forth in the Notice.

12 1.2 On July 18, 2016, Ferreiro filed a Complaint for Civil Penalties and Injunctive
13 Relief (“Complaint”) in Alameda County Superior Court, Case No. RG-16-823648, against
14 Klear-Vu alleging violations of Proposition 65.

15 1.3 Klear-Vu is a corporation that employs more than ten persons under California
16 Health and Safety Code §25249.6 and offered the Products for sale within the State of California.

17 1.4 Ferreiro’s Complaint alleges, among other things, that Klear-Vu sold the Products
18 in California and/or to California citizens, that the Products contains DEHP, and that the resulting
19 exposure violated provisions of Proposition 65, by knowingly and intentionally exposing persons
20 to a chemical known to the State of California to cause both cancer and reproductive toxicity
21 without first providing a clear and reasonable warning to such individuals.

22 1.5 For purposes of this Consent Judgment only, the parties stipulate that this Court
23 has jurisdiction over the allegations of violations contained in the Complaint and personal
24 jurisdiction over Klear-Vu as to the acts alleged in the Complaint, that venue is proper in the
25 County of Alameda, and that this Court has jurisdiction to enter this Consent Judgment as a
26 resolution of the allegations contained in the Complaint.

27 1.6 The parties enter into this Consent Judgment pursuant to a full, final and binding
28 settlement of disputed claims between the parties, as alleged in the Notice and/or Complaint for

1 the purpose of avoiding prolonged litigation. By execution of this Consent Judgment, Klear-Vu
2 does not admit any violation of Proposition 65 and specifically denies that it has committed any
3 such violation. Nothing in this Consent Judgment shall be construed as an admission by Klear-
4 Vu of any fact, issue of law or violation of law, nor shall compliance with the Consent Judgment
5 constitute or be construed as an admission by Klear-Vu of any fact, issue of law, or violation of
6 law. Nothing in this Consent Judgment shall prejudice, waive, or impair any right, remedy or
7 defense that Klear-Vu may have in any other future legal proceeding. However, this paragraph
8 shall not diminish or otherwise affect the obligations, responsibilities and duties of Klear-Vu
9 under this Consent Judgment.

10 1.7 For purposes of this Consent Judgment, the term "Effective Date" shall mean the
11 date that the Consent Judgment is entered by the Court.

12 **2. Injunctive Relief**

13 2.1 Commencing no later than 120 days after the Effective Date, and continuing
14 thereafter, Klear-Vu shall only ship, sell, or offer for sale in California, Reformulated Product
15 pursuant to Section 2.2 or Product that is labeled with a clear and reasonable warning pursuant to
16 Section 2.3. For purposes of this Settlement Agreement, a "Reformulated Product" is Product
17 that is in compliance with the standard set forth below in section 2.2.

18 2.2 "Reformulated Product" shall mean Product that contains less than or equal to
19 1,000 parts per million ("ppm") of DEHP when analyzed pursuant to CPSC-CH-C1001-09.3
20 Standard Operating Procedure for Determination of Phthalates method, as it may be amended
21 from time to time, or pursuant to other methods approved by federal or state authorities for the
22 analysis of DEHP in solids.

23 2.3 Commencing no later than 120 days after the Effective Date, Klear-Vu shall, for
24 all Products it sells or distributes and that is intended for sale in California and that is not a
25 Reformulated Product (including non-Reformulated Product that Klear-Vu has reason to believe
26 contains one or more other Proposition 65-listed reproductive toxicants), provide clear and
27 reasonable warnings as set forth in subsections 2.3(a) and (b) below. The warning shall be
28 prominently placed with such conspicuousness as compared with other words, statements,

1 designs, or devices as to render it likely to be read and understood by an ordinary individual
2 under customary conditions before purchase or use. Each warning shall be provided in a manner
3 such that the consumer or user understands to which specific Product the warning applies, so as to
4 minimize the risk of consumer confusion.

5 **(a) Retail Store Sales**

6 **(i) Product Labeling.** Klear-Vu shall affix a warning to the
7 packaging, labeling or directly on each Product that Klear-Vu sells or distributes
8 for sale in California that states:

9 **[PROPOSITION 65] WARNING:**

10 This product contains a chemical known to the State of California to cause [cancer
and] birth defects or other reproductive harm.

11 The bracketed text may, but is not required to, be used. Klear-Vu
12 also may use the bracketed phrase “cancer and” if it has reason to believe
13 that one or more other Proposition 65-listed carcinogens are present in the
14 non-Reformulated Product.

15
16 **(ii) Point of Sale Warnings.** Alternatively to the Product
17 Labeling set forth in Section 2.3(a)(i) above, Klear-Vu may provide
18 warning signs in the form below to its customers in California with
19 instructions to post the warning signs in close proximity to the point of
20 display of the Product. Such instruction sent to Klear-Vu customers shall
21 be sent by certified mail, return receipt requested.

22 **[PROPOSITION 65] WARNING:**

23 This product contains a chemical known to the State of California to cause [cancer
and] birth defects or other reproductive harm.

24 The bracketed text may, but is not required to, be used. Klear-Vu
25 also may use the bracketed phrase “cancer and” if it has reason to believe
26 that one or more other Proposition 65-listed carcinogens are present in the
27 non-Reformulated Product.
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(b) Mail Order Catalog Warning. Alternatively to the Product Labeling in Section 2.3(a)(i) above, for those Products, if any, that Klear-Vu sells via mail order catalog directly to consumers located in California after the Effective Date that is not a Reformulated Product, Klear-Vu 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 a chemical known to the State of California to cause [cancer and] birth defects or other reproductive harm.

The bracketed text may, but is not required to, be used. Klear-Vu also may use the bracketed phrase “cancer and” if it has reason to believe that one or more other Proposition 65-listed carcinogens are present in the non-Reformulated Product. 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, Klear-Vu 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:

[PROPOSITION 65] WARNING: Certain products identified with this symbol ▼ and offered for sale in this catalog contain a chemical known to the State of California to cause [cancer and] birth defects or other reproductive harm.

The bracketed text may, but is not required to, be used. Klear-Vu also may use the bracketed phrase “cancer and” if it has reason to believe that one or more other Proposition 65-listed carcinogens are present in the non-Reformulated Product. 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, Klear-Vu must provide a header or footer directing the consumer to the warning language and definition of the designated symbol.

1 (c) **Internet Sales Warning.** Alternatively to the Product Labeling in
2 Section 2.3(a)(i) above, for Products, if any, that Klear-Vu sells via the internet directly to
3 consumers located in California after the Effective Date that is not a Reformulated Product,
4 Klear-Vu shall provide a warning for such Product sold via the internet to such California
5 residents. A warning that is given on the internet shall be in the same type size or larger than the
6 Product description text and shall be given in conjunction with the direct sale of the Product. The
7 warning shall appear either: (a) on the same web page on which the Product is displayed; (b) on
8 the same web page as the order form for the Product; (c) on the same page as the price for the
9 Product; or (d) on one or more web pages displayed to a California purchaser during the checkout
10 process. The following warning shall be provided:

11 **[PROPOSITION 65] WARNING:**

12 This product contains a chemical known to the State of California to cause [cancer and]
13 birth defects or other reproductive harm.

14 The bracketed text may, but is not required to, be used. Klear-Vu also may use the bracketed
15 phrase “cancer and” if it has reason to believe that one or more other Proposition 65-listed
16 carcinogens are present in the non-Reformulated Product.

17 **3. Entry of Consent Judgment**

18 3.1 The parties hereby request that the Court promptly enter this Consent Judgment.
19 Upon entry of this Consent Judgment, Ferreiro and Klear-Vu waive their respective rights to a
20 hearing or trial on the allegations of the Complaint and 60-Day Notice.

21 3.2 In the event that the Attorney General objects or otherwise comments on one or
22 more provisions of this Consent Judgment, Ferreiro and Klear-Vu agree to take reasonable steps
23 to satisfy such concerns or objections.

24 **4. Release of Claims and Matters Covered By This Consent Judgment**

25 4.1 **Plaintiff’s Public Release of Proposition 65 Claims.** This Consent Judgment is a
26 full, final and binding resolution between Ferreiro, acting on his own behalf, and on behalf of the
27 public and in the public interest, and Defendant Klear-Vu, its parents, subsidiaries, affiliated
28 entities under common ownership, directors, officers, employees, attorneys and the successors

1 and assigns of any of them (“Releasees”) or any entity to whom they directly or indirectly
2 distribute or sell the Products including, but not limited to, their downstream distributors,
3 wholesalers, customers, franchisers, cooperative members, licensors and licensees, marketplace
4 hosts and retailers (including but not limited to Wal-Mart Stores, Inc. and Walmart.com USA
5 LLC and their respective parents, affiliates and subsidiaries), and the successors and assigns of
6 any of them (“Downstream Releasees”), and shall have preclusive effect such that no other person
7 or entity, whether purporting to act in his, her, or its interests or the public interest shall be
8 permitted to pursue and/or take any action with respect to any violation of Proposition 65 that was
9 alleged in the Complaint, or that could have been brought in an action pursuant to the Notice
10 against Klear-Vu, Releasees and/or Downstream Releasees (“Proposition 65 Claims”). Ferreiro,
11 acting on his own behalf and on behalf of the public in the public interest releases Klear-Vu,
12 Releasees and Downstream Releasees for any violations arising under Proposition 65 for
13 unwarned exposures to DEHP from the Products sold by Klear-Vu prior to 120 days after the
14 Effective Date, even if such Products are sold by Downstream Releasees after such date. As to
15 alleged exposures to DEHP in the Product, compliance with the terms of this Consent Judgment
16 by Klear-Vu shall be deemed sufficient to satisfy all obligations concerning compliance by Klear-
17 Vu, Releasees and Downstream Releasees with the requirements of Proposition 65 with respect to
18 the Products.

19 **4.2 Plaintiff’s Release of Additional Claims.** As to Ferreiro for and in his individual
20 capacity only, this Consent Judgment shall have preclusive effect such that he shall not be
21 permitted to pursue and/or take any action with respect to any other statutory or common law
22 claim, to the fullest extent that any such claim was or could have been asserted by him against
23 Klear-Vu, Releasees or Downstream Releasees, based on alleged exposures DEHP in the
24 Products, or their failure to provide a clear and reasonable warning of exposure to Ferreiro as
25 well as any other claim based in whole or in part on the facts alleged in the Complaint and the
26 Notice, whether based on actions committed by Klear-Vu, Releasees or Downstream Releasees.
27 (“DEHP Exposure Claims”). Ferreiro, for and in his individual capacity only, also provides a
28 release to Defendant, Releasees, and Downstream Releasees which shall be effective as a full and

1 final accord and satisfaction, as a bar to all actions, causes of action, obligations, costs, expenses,
2 attorneys' fees, damages, losses, claims, liabilities and demands of Ferreiro of any nature,
3 character or kind, whether known or unknown, suspected or unsuspected, arising out of alleged
4 exposures to DEHP in the Products sold or distributed for sale by Klear-Vu before 120 days after
5 the Effective Date, even if such Products are sold after such date.

6 **4.3 Waiver of Rights Under Section 1542 of the California Civil Code.** As to
7 Ferreiro's public release of Proposition 65 Claims set forth in Section 4.1 ("Public Release") and
8 his individual release of DEHP Exposure Claims set forth in Section 4.2 ("Individual Release"),
9 Ferreiro, acting on his own behalf and on behalf of the public with respect to the Public Release
10 and acting in his individual capacity with respect to the Individual Release, waives all rights to
11 institute any form of legal action, and releases all claims against Klear-Vu, Releasees and
12 Downstream Releasees (including their parents, subsidiaries, affiliates, assigns, and acquiring
13 entities of any of them, who may use, maintain, distribute or sell the Products) for the
14 Proposition 65 Claims and the DEHP Exposure Claims (referred to collectively in this Section as
15 "Claims"). In furtherance of the foregoing, Ferreiro, acting on his own behalf and on behalf of
16 the public with respect to the Public Release and acting in his individual capacity with respect to
17 the Individual Release, waives any and all rights and benefits which he now has, or in the future
18 may have, conferred upon him with respect to the Claims by virtue of the provisions of § 1542 of
19 the California Civil Code, which provides as follows:

20 **A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE**
21 **CREDITOR DOES NOT KNOW OR SUSPECT EXIST IN HIS OR HER**
22 **FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF**
23 **KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED**
24 **HIS SETTLEMENT WITH THE DEBTOR.**

25 **4.4 Klear-Vu's Release of Plaintiff Ferreiro.** Klear-Vu, on behalf of itself, its past
26 and current agents, representatives, attorneys, successors and/or assignees, hereby waives any and
27 all claims against Ferreiro, his attorneys, and other representatives for any and all actions taken or
28 statements made (or those that could have been taken or made) by Ferreiro and his attorneys and

1 other representatives, whether in the course of investigating claims or otherwise seeking
2 enforcement of Proposition 65 against Klear-Vu in this matter through the Effective Date.

3 **5. Enforcement of Judgment**

4 5.1 The terms of this Consent Judgment shall be enforced exclusively by the parties
5 hereto. The parties may, by noticed motion or order to show cause before the Superior Court of
6 Alameda County, giving the notice required by law, enforce the terms and conditions contained
7 herein. In any proceeding brought by either party to enforce this Consent Judgment, such party
8 may seek whatever fines, costs, penalties or remedies as may be provided by law for any violation
9 of Proposition 65 or this Consent Judgment.

10 **6. Modification of Judgment**

11 6.1 This Consent Judgment may be modified only by written agreement of the parties
12 upon entry of a modified Consent Judgment by the Court thereon, or upon motion of any party as
13 provided by law and upon an entry of a modified Consent Judgment by the Court.

14 6.2 Should any court enter final judgment in a case brought by Ferreiro or the People
15 involving the Products that sets forth standards defining when Proposition 65 warnings will or
16 will not be required (“Alternative Standards”), or if the California Attorney General’s office
17 otherwise provides written endorsement (i.e., a writing that is circulated by the Attorney General
18 that is not intended for the purpose of soliciting further input or comments) of Alternative
19 Standards applicable to products that are of the same general type and function as the Products
20 and constructed from the same materials, Klear-Vu shall be entitled to seek a modification of this
21 Consent Judgment on sixty (60) days’ notice to Ferreiro so as to be able to utilize and rely on such
22 Alternative Standards in lieu of those set forth in Section 2 of this Consent Judgment. Ferreiro
23 shall not unreasonably contest any proposed application to effectuate such a modification
24 provided that the Products for which such a modification is sought are of the same general type
25 and function as those to which the Alternative Standards apply.

26 **7. Settlement Payment**

27 7.1 In settlement of all the claims referred to in this Consent Judgment, and without
28 any admission of liability therefore, Klear-Vu shall make the following monetary payments:

1 7.1.1 **Civil Penalty.** Within seven (7) business days of the Effective Date, Klear-
2 Vu shall pay a total of \$5,000.00 in civil penalties in accordance with this Section. The civil
3 penalty payment will be allocated in accordance with California Health & Safety Code §§
4 25249.12(c)(1) and (d), with 75% of the funds remitted to the California Office of Environmental
5 Health Hazard Assessment ("OEHHA") and the remaining 25% of the civil penalty remitted to
6 Ferreiro. Within seven (7) business days of the Effective Date, Klear-Vu shall issue two separate
7 checks for the civil penalty payment to (a) "OEHHA" in the amount of 3,750.00; and (b)
8 "Brodsky & Smith, LLC in Trust for Ferreiro" in the amount of 1,250.00. Payment owed to
9 Ferreiro pursuant to this Section shall be delivered to the following payment address:

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

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

16 For United States Postal Service Delivery:

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

22 For Non-United States Postal Service Delivery:

23 Mike Gyurics
24 Fiscal Operations Branch Chief
25 Office of Environmental Health Hazard Assessment
26 1001 I Street
27 Sacramento, CA 95814

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

7.1.2 **Attorney Fees and Costs.** In addition to the payment above, Klear-Vu
shall pay \$42,000.00 to Brodsky & Smith, LLC ("Brodsky & Smith") as complete reimbursement
for Ferreiro's attorneys' fees and costs, including any investigation and laboratory costs or expert
fees, incurred in the course of bringing the Complaint and in enforcing Proposition 65, including

1 without limitation, preparation of the 60-Day Notice letter and discussions with the office of the
2 Attorney General. Payment shall be made within seven (7) business days of the Effective Date
3 and sent to the address for Brodsky & Smith set forth in Section 7.1.1, above.

4 **8. Notices**

5 8.1 Any and all notices between the parties provided for or permitted under this
6 Agreement, or by law, shall be in writing and personally delivered or sent by: (i) first-class
7 (registered or certified mail) return receipt requested; or (ii) overnight or two-day courier on any
8 party by the other party to the following addresses:

9 For Klear-Vu:

10 Legal Department
11 Klear-Vu Corporation
12 600 Airport Road
13 Fall River, MA 02720

14 With Copy to:

15 Ann G. Grimaldi
16 Grimaldi Law Offices
17 50 California Street, Suite 1500
18 San Francisco, CA 94111

19 For Ferreiro:

20 Evan J. Smith
21 BRODSKY & SMITH, LLC
22 9595 Wilshire Blvd., Suite 900
23 Beverly Hills, CA 90212

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

26 **9. Authority to Stipulate**

27 9.1 Each signatory to this Consent Judgment certifies that he or she is fully authorized
28 by the party he or she represents to enter into this Consent Judgment and to execute it on behalf of
the party represented and legally to bind that party.

10. Counterparts

10.1 This Stipulation may be signed in counterparts and shall be binding upon the
parties hereto as if all said parties executed the original hereof.

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11. Retention of Jurisdiction

11.1 This Court shall retain jurisdiction of this matter to implement the Consent Judgment.

12. Service on the Attorney General

12.1 Ferreiro shall serve a copy of this Consent Judgment, signed by both parties, on the California Attorney General on behalf of the parties so that the Attorney general may review this Consent Judgment prior to its submittal to the Court for Approval. No sooner than forty-five (45) days after the Attorney General has received the aforementioned copy of this Consent 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.

13. Entire Agreement

13.1 This Consent Judgment contains the sole and entire agreement and understanding of the parties with respect to the entire subject matter hereof, and any and all discussions, negotiations, commitment and understandings related thereto. No representations, oral or otherwise, express or implied, other than those contained herein have been made by any party hereto. No other agreements not specifically referred to herein, oral or otherwise, shall be deemed to exist or to bind any of the parties.

14. Governing Law and Construction

14.1 The validity, construction and performance of this Consent Judgment shall be governed by the laws of the State of California, without reference to any conflicts of law provisions of California law.

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15. Court Approval

15.1 If this Consent Judgment is not approved by the Court, it shall be of no force or effect, and cannot be used in any proceeding for any purpose.

IT IS SO STIPULATED:

Dated: 8/11/16

Dated: _____

By: Anthony Ferreira
Anthony Ferreira

By: _____
Klear-Vu Corp.

IT IS SO ORDERED, ADJUDGED AND DECREED:

Dated: _____

Judge of Superior Court

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15. Court Approval

15.1 If this Consent Judgment is not approved by the Court, it shall be of no force or effect, and cannot be used in any proceeding for any purpose.

IT IS SO STIPULATED:

Dated: _____

Dated: August 5, 2016

By: _____
Anthony Ferreiro

By: Brian M. Lu
Klear-Vu Corp.

IT IS SO ORDERED, ADJUDGED AND DECREED:

Dated: _____

Judge of Superior Court