

## SETTLEMENT AGREEMENT

### 1. INTRODUCTION

#### 1.1 **Anthony Ferreiro and Absolute Outdoor, Inc.**

This Settlement Agreement is entered into by and between Anthony Ferreiro (“Ferreiro”) and Absolute Outdoor, Inc. (“Absolute Outdoor”). Together, Ferreiro and Absolute Outdoor 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. Absolute Outdoor 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 Absolute Outdoor has imported, distributed, and/or sold in the State of California rainwear, including but not limited to, a blue PVC rain suit marketed under UPC No. 043311000086 (the “Products”), without requisite Proposition 65 warnings. Ferreiro further alleges that such warnings are required because the Products contain the chemical Di(2-ethylhexyl) phthalate (DEHP). On January 1, 1988, the State of California listed DEHP under Proposition 65 as a chemical known to the State to cause cancer. On October 24, 2003, the State of California further listed DEHP under Proposition 65 as a chemical known to cause reproductive harm.

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

On June 6, 2016, Ferreiro served Absolute Outdoor, Sears Holdings Management Corporation, Sears Holdings Corporation, and Sears Holdings, Inc. (collectively, “Sears”), and various public enforcement agencies with a document entitled “Notice of Violation of California

Health & Safety Code § 25249.6, *et seq.*” (“Notice”). The Notice provided Absolute Outdoor and such others, including public enforcers, with notice that alleged that Absolute Outdoor was in violation of California Health & Safety Code § 25249.6, for failing to provide Proposition 65 warnings to consumers and customers that the Products exposed consumers in California to DEHP. No public enforcer has diligently prosecuted the allegations set forth in the Notice.

#### **1.4 No Admission**

Absolute Outdoor denies the material factual and legal allegations contained in the Notice and maintains that, to the best of its knowledge, all of its products that are or have been sold and distributed in California, including the Products, have been and are in compliance with all laws, including Proposition 65. Nothing in this Settlement Agreement shall be construed as an admission by Absolute Outdoor 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 Absolute Outdoor of any fact, finding, conclusion, issue of law, or violation of law, such being specifically denied by Absolute Outdoor. However, this section shall not diminish or otherwise affect the obligations, responsibilities, and duties under this Settlement Agreement.

#### **1.5 Effective Date**

For purposes of this Settlement Agreement, the term “Effective Date” shall mean the date that this Settlement Agreement is signed by both parties.

## **2. INJUNCTIVE RELIEF**

### **2.1 Reformulation of the Products**

Commencing on the Effective Date, and continuing thereafter, Absolute Outdoor shall only manufacture, import, or otherwise source or distribute for authorized sale in California, Reformulated Products as defined pursuant to Section 2.2 below or Products that are labeled with a clear and reasonable Proposition 65 warning pursuant to Section 2.3 below. Products distributed

by Absolute Outdoor prior to the Effective Date are exempted from the foregoing obligation and may be offered for sale in California and sold through by downstream distributors, dealers, and retailers, including but not limited to Sears, with or without Proposition 65 warnings as previously packaged and received.

## **2.2 Reformulation Standard**

“Reformulated Products” shall mean Products that contain less than or equal to 1,000 parts per million (“ppm”) each of DEHP, DBP, BBP, DnHP, DIDP, and DINP when analyzed pursuant to U.S. Environmental Protection Agency testing methodologies 3580A and 8270C or equivalent testing methodologies authorized by government agencies for the detection of phthalate chemicals in consumer products.

## **2.3 Clear and Reasonable Warnings**

Commencing on the Effective Date, Absolute Outdoor shall, for all Products it distributes and which are authorized by it for sale in California that are not Reformulated Products, affix a warning to the consumer-facing packaging or directly on each Product that states:

**WARNING:** This product contains [a] chemical[s] known to the State of California to cause cancer, and birth defects or other reproductive harm.<sup>1</sup>

Or

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

Or

**WARNING:** This product can expose you to chemicals, including DEHP, which are known to the State of California to cause cancer and birth defects or other reproductive harm. For more information go to [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov).

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<sup>1</sup> As underscored by use of bracketed language, Absolute Outdoor may elect to have this warning statement refer to the work “chemical” in the singular or the plural

The last warning statement shown above shall be used for any non-Reformulated Products manufactured after July 31, 2018, in which event it shall be preceded by a symbol consisting of a yellow equilateral triangle outlined in bolded black and into which a bolded black exclamation point is inserted. (If yellow is not otherwise used on the Product's packaging, the triangle need not be yellow.)

Regardless of which warning statement is utilized, it 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 prior to purchase or use.

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

**3.1** In settlement of all the claims referred to in this Settlement Agreement, Absolute Outdoor shall pay a total of \$1,950.00 in civil penalties pursuant to California Health & Safety Code § 25249.7(b) in accordance with this Section. This penalty payment shall be allocated in accordance with California Health & Safety Code § 25249.12(c)(l) 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. More specifically, within ten (10) business days of the Effective Date, Absolute Outdoor shall issue two separate checks for the civil penalty payment to (a) "OEHHA" in the amount of \$1,462.50 and with the memo line on the check indicating "Prop 65 Penalties—Ferreiro v. Absolute/DEHP" (Absolute Outdoor may reference OEHHA's Tax Identification Number of 68-0284486 for this check); and (b) "Brodsky & Smith, LLC in Trust for Ferreiro" in the amount of \$487.50 (for which Ferreiro shall provide Absolute Outdoor a completed IRS Form W-9 with a tax identification number within two days following the Effective Date, if not beforehand). These checks shall be delivered as follows:

- (a) The check to Ferreiro shall be delivered to the following address:



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

- (b) The check for OEHHA shall be delivered to one of 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

or

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

Absolute Outdoor further agrees to provide Ferreiro's counsel with a copy of its check payable to OEHHA along with its penalty payment to Ferreiro.

#### 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 this Settlement Agreement had been mutually agreed upon. 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 Settlement Agreement. Under these

legal principles, Absolute Outdoor shall reimburse Ferreiro's counsel for fees and costs incurred as a result of investigating and bringing this matter to Absolute Outdoor's attention, and negotiating a settlement thereof. Within ten (10) business days of the Effective Date, Absolute Outdoor shall issue a check payable to "Brodsky & Smith, LLC" in the amount of \$17,550.00 for delivery to the following address:

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

To facilitate timely payment, within two days following the Effective Date, if not beforehand, Brodsky & Smith LLC shall provide Absolute Outdoor with a completed IRS Form W-9 with its tax identification number.

**5. RELEASE OF ALL CLAIMS**

**5.1 Release of Absolute Outdoor and Downstream Retailers and Entities**

Ferreiro, acting on his own behalf, releases Absolute Outdoor, its parents, subsidiaries, affiliated entities under common ownership, directors, officers, agents, employees, attorneys, and each entity to whom Absolute Outdoor directly or indirectly distributes or sells the Products, including, but not limited to, downstream distributors, wholesalers, customers, marketplace hosts, retailers (including, but not limited to, Sears), and their respective parents, affiliates, and subsidiaries, franchisees, cooperative members, and licensees (collectively, the "Releasees"), from all claims for violations of Proposition 65 based on the failure to warn about alleged exposures to DEHP in the Products as distributed by Absolute Outdoor prior to the Effective Date.

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 Absolute Outdoor or the Releasees of any nature, character, or kind, whether known or unknown, suspected or unsuspected, arising out of Proposition 65 or otherwise, with respect to the Products. In this regard Ferreiro acknowledges that he is familiar with Section 1542 of the California Civil Code, which provides as follows:

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

Ferreiro is, in this regard, therefore expressly waiving and relinquishing any and all rights and benefits which he may have under, or which may be conferred on him by the provisions of, California Civil Code § 1542, as well as under any other state or federal statute or common law principle of similar effect, to the fullest extent that he may lawfully waive such rights or benefits pertaining to the released matters.

#### **5.2 Absolute Outdoor's Release of Ferreiro**

Absolute Outdoor, on behalf of itself, 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 Products.

#### **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 DEHP or the Products, Absolute Outdoor 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 Products are 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 Absolute Outdoor:

Beth Muntifering  
VP - Sourcing/Purchasing  
Absolute Outdoor, Inc.  
1209 Franklin Avenue NE  
Sauk Rapids, MN 56379

*With a copy to:*

Robert Falk  
RFalk@mofo.com  
Morrison & Foerster LLP  
425 Market Street, 32<sup>nd</sup> Floor  
San Francisco, CA 94105

For Ferreiro:



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

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: 11/22/16

Date: 11/28/16

By: Anthony Ferreiro  
Anthony Ferreiro

By: David J. Cook  
Absolute Outdoor, Inc.