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10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 COUNTY OF ALAMEDA

12 ANTHONY FERREIRO,
13 Plaintiff,
14 v.
15 SKIL-CARE CORPORATION,
16 Defendant.

17 Case No.: RG16842503
18 **CONSENT JUDGMENT**
19 Judge: Julia Spain
20 Dept.: 19
21 Hearing Date: March 2, 2017
22 Hearing Time: 2:30 PM
23 Reservation #: R-1813056

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1 **1. INTRODUCTION**

2 1.1 **The Parties.** This Consent Judgment is entered into by and between Anthony
3 Ferreiro acting on behalf of the public interest (hereinafter “Ferreiro”) and Skil-Care Corporation
4 (“Skil-Care” or “Defendant”) with Ferreiro and Defendant collectively referred to as the “Parties”
5 and each of them as a “Party.” Ferreiro is an individual residing in California who seeks to promote
6 awareness of exposures to toxic chemicals and improve human health by reducing or eliminating
7 hazardous substances contained in consumer products. Skil-Care is a person in the course of doing
8 business for purposes of Proposition 65, Cal. Health & Safety Code §§ 25249.6 et seq.

9 1.2 **Allegations and Representations.** Ferreiro alleges that Defendant has exposed
10 individuals to Di(2-ethylhexyl) phthalate (DEHP) from wheelchair cushions without providing
11 clear and reasonable warnings under Proposition 65. DEHP is listed under Proposition 65 as a
12 chemical known to the State of California to cause cancer and reproductive toxicity.

13 1.3 **Notices of Violation/Complaint.** On or about July 12, 2016, Ferreiro served Skil-
14 Care, Sears Holdings Management Corporation, Sears Holdings Corporation (collectively,
15 “Sears”), and various public enforcement agencies with a document entitled “60-Day Notice of
16 Violation” pursuant to Health & Safety Code §25249.7(d) (the “Notice”), alleging that Defendant
17 was in violation of Proposition 65 for failing to warn consumers and customers that *Skil-Care*
18 *Econo-Gel Wheelchair Cushions* exposed users in California to DEHP. No public enforcer has
19 brought and is diligently prosecuting the claims alleged in the Notice. On December 15, 2016,
20 Ferreiro filed a complaint (the “Complaint”) in the matter.

21 1.4 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
22 jurisdiction over Defendant as to the allegations contained in the Complaint filed in this matter, that
23 venue is proper in the County of Alameda, and that this Court has jurisdiction to approve, enter,
24 and oversee the enforcement of this Consent Judgment as a full and final binding resolution of all
25 claims which were or could have been raised in the Complaint based on the facts alleged therein
26 and/or in the Notice.

1 1.5 Defendant denies the material allegations contained in Ferreiro’s Notice and
2 Complaint and maintains that it has not violated Proposition 65. Nothing in this Consent Judgment
3 shall be construed as an admission by Defendant of any fact, finding, issue of law, or violation of
4 law; nor shall compliance with this Consent Judgment constitute or be construed as an admission
5 by Defendant of any fact, finding, conclusion, issue of law, or violation of law, such being
6 specifically denied by Defendant. However, this section shall not diminish or otherwise affect the
7 obligations, responsibilities, and duties of Defendant under this Consent Judgment.

8 **2. DEFINITIONS**

9 2.1 **Covered Products.** The term “Covered Products” means *Skil-Care* vinyl seating
10 and/or cushions, including but not limited to *Skil-Care Econo-Gel Wheelchair Cushions*, SKU No.
11 671509141206 that are manufactured, distributed and/or offered for sale in California by Skil-Care.

12 2.2 **Effective Date.** The term “Effective Date” means the date this Consent Judgment is
13 entered as a Judgment of the Court.

14 **3. INJUNCTIVE RELIEF: WARNINGS**

15 3.1 Commencing ninety (90) days after the Effective Date, Skil-Care shall not
16 manufacture, import, or purchase for sale in California any Covered Product that contains more
17 than 1,000 parts per million DEHP, unless the Covered Product is accompanied by the following
18 warning: “WARNING: This product contains a chemical known to the State of California to cause
19 cancer, birth defects and other reproductive harm.” There shall be no obligation for Skil-Care to
20 label Covered Products that entered the stream of commerce prior to ninety (90) days after the
21 Effective Date.

22 3.2 The warning provided pursuant to Section 3.1 shall be affixed to or printed on the
23 Covered Product’s packaging or labeling. The warning shall be prominently affixed to or printed
24 on the packaging or labeling and displayed with such conspicuousness, as compared with other
25 words, statements, or designs as to render it likely to be read and understood by an ordinary
26 individual under customary conditions of purchase or use. A warning may be contained in the same
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1 section of the packaging, labeling, or instruction booklet that states other safety warnings, if any,
2 concerning the use of the product and shall be at least the same size as those other safety warnings.

3 **4. MONETARY TERMS**

4 4.1 **Initial Civil Penalty.** Skil-Care shall pay an Initial Civil Penalty of \$2,000.00
5 pursuant to Health and Safety Code section 25249.7(b), to be apportioned in accordance with
6 California Health & Safety Code § 25192, with 75% of these funds remitted to the State of
7 California's Office of Environmental Health Hazard Assessment and the remaining 25% of the
8 penalty remitted to Ferreiro, as provided by California Health & Safety Code § 25249.12(d).

9 4.1.1 Within ten (10) business days of the Effective Date, Skil-Care shall issue
10 two separate checks for the Initial Civil Penalty payment to (a) "OEHHA" in the amount of
11 \$1,500.00; and (b) "Brodsky & Smith, LLC in Trust for Ferreiro" in the amount of \$500.00.
12 Payment owed to Ferreiro pursuant to this Section shall be delivered to the following payment
13 address:

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

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

19 For United States Postal Service Delivery:

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

23 For Non-United States Postal Service Delivery:

24 Mike Gyurics
25 Fiscal Operations Branch Chief
Office of Environmental Health Hazard Assessment
26 1001 I Street
Sacramento, CA 95814
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1 A copy of the check payable to OEHHA shall be mailed to Brodsky & Smith, LLC at the
2 address set forth above as proof of payment to OEHHA.

3 4.2 **Final Civil Penalty.** Sixty (60) days after the Effective Date, Skil-Care shall make
4 a Final Civil Penalty payment of \$2,000.00 on the same terms as set forth in Section 4.1.1 pertaining
5 to the Initial Civil Penalty. Pursuant to Title 11 California Code of Regulations, Section 3203(c),
6 Ferreiro agrees that the Final Civil Penalty payment shall be waived in its entirety if, on or before
7 the Final Civil Penalty payment is due, an officer of Skil-Care provides Ferreiro with a signed
8 declaration certifying that all Products it ships for sale or distributes for sale in California as of the
9 date of its certification are Reformulated Products or are marked with the warnings required by this
10 Consent Decree (hereinafter "Labeled Product") and that Skil-Care will continue to offer only
11 Reformulated Products or Labeled Products in California in the future. The option to provide a
12 declaration certifying its complete early reformulation or labeling of the Products in lieu of making
13 the Final Civil Penalty payment otherwise required by this Section is a material term, and time is
14 of the essence.

15 4.3 **Attorney Fees.** Skil-Care shall pay \$18,000.00 to Brodsky & Smith, LLC
16 ("Brodsky Smith") as complete reimbursement for Plaintiff Ferreiro's attorneys' fees and costs
17 incurred as a result of investigating, bringing this matter to Skil-Care's attention, litigating and
18 negotiating and obtaining judicial approval of a settlement in the public interest, pursuant to Code
19 of Civil Procedure section 1021.5. Payment shall be made within ten (10) business days of the
20 Effective Date and sent to the address for Brodsky & Smith set forth in section 4.1.1, above.

21 4.4 Skil-Care shall pay the civil penalty and attorney fees in Sections 4.1 - 3 within ten
22 (10) days of the Effective Date.

23 **5. RELEASE OF ALL CLAIMS**

24 5.1 This consent judgment is a full, final, and binding resolution between Ferreiro acting
25 in the public interest, and Skil-Care, and its parents, shareholders, divisions, subdivisions,
26 subsidiaries, partners, sister companies, and affiliates, and their successors and assigns ("Defendant
27 Releasees"), and all entities from whom they obtain and to whom they directly or indirectly
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1 distribute or sell Covered Products, including but not limited to Sears, manufacturers, suppliers,
2 distributors, wholesalers, customers, licensors, licensees retailers, franchisees, and cooperative
3 members (“Downstream Defendant Releasees”), of all claims for violations of Proposition 65 based
4 on exposure to DEHP from Covered Products as set forth in the Notice, with respect to any Covered
5 Products manufactured, distributed, or sold by Skil-Care prior to the Effective Date. Compliance
6 with the terms of this consent judgment constitutes compliance with Proposition 65 with regard to
7 the Covered Products.

8 5.2 In addition to the foregoing, Ferreiro, on behalf of himself, his past and current
9 agents, representatives, attorneys, and successors and/or assignees, and *not* in his representative
10 capacity, hereby waives all rights to institute or participate in, directly or indirectly, any form of
11 legal action and releases any Skil-Care, Defendant Releasees, and Downstream Defendant
12 Releasees from any and all manner of actions, causes of action, claims, demands, rights, suits,
13 obligations, debts, contracts, agreements, promises, liabilities, damages, charges, losses, costs,
14 expenses, and attorneys’ fees, of any nature whatsoever, known or unknown, in law or equity, fixed
15 or contingent, now or in the future, with respect to any alleged violations of Proposition 65 related
16 to or arising from Covered Products manufactured distributed or sold by Skil-Care or Defendant
17 Releasees. With respect to the foregoing waivers and releases in this paragraph, Ferreiro hereby
18 specifically waives any and all rights and benefits which she now has, or in the future may have,
19 conferred by virtue of the provisions of Section 1542 of the California Civil Code, which provides
20 as follows:

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

25 5.3 Skil-Care waives any and all claims against Ferreiro, his attorneys and other
26 representatives, for any and all actions taken or statements made (or those that could have been
27 taken or made) by Ferreiro and his attorneys and other representatives, whether in the course of
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1 investigating claims or otherwise seeking enforcement of Proposition 65 against it in this matter,
2 and/or with respect to Covered Products.

3 **6. INTEGRATION**

4 6.1 This Consent Judgment contains the sole and entire agreement of the Parties and
5 any and all prior negotiations and understandings related hereto shall be deemed to have been
6 merged within it. No representations or terms of agreement other than those contained herein exist
7 or have been made by any Party with respect to the other Party or the subject matter hereof.

8 **7. GOVERNING LAW**

9 7.1 The terms of this Consent Judgment shall be governed by the laws of the State of
10 California and apply within the State of California. In the event that Proposition 65 is repealed or
11 is otherwise rendered inapplicable by reason of law generally, or as to Covered Products, then
12 Defendant shall have no further obligations pursuant to this Consent Judgment with respect to, and
13 to the extent that, Covered Products are so affected.

14 **8. NOTICES**

15 8.1 Unless specified herein, all correspondence and notices required to be provided
16 pursuant to this Consent Judgment shall be in writing and personally delivered or sent by: (i) first-
17 class, (registered or certified mail) return receipt requested; or (ii) overnight courier on any party
18 by the other party at the following addresses:

19 For Defendant:

20
21 John M. DeVito
22 VP of Finance
23 Skil-Care Corporation
24 29 Wells Avenue
25 Yonkers, NY 10701

26 And

27 For Ferreiro:

28 Evan Smith
29 Brodsky & Smith, LLC
30 2 Bala Plaza, Suite 510
31 Bala Cynwyd, PA 19004

Any party, from time to time, may specify in writing to the other party a change of address to

1 which all notices and other communications shall be sent.

2 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

3 9.1 This Consent Judgment may be executed in counterparts and by facsimile, each of
4 which shall be deemed an original, and all of which, when taken together, shall constitute one and
5 the same document.

6 **10. COMPLIANCE WITH HEALTH & SAFETY CODE § 25249.7(f)/COURT**
7 **APPROVAL**

8 10.1 Ferreiro agrees to comply with the requirements set forth in California Health &
9 Safety Code §25249.7(f) and to promptly bring a Motion for Approval of this Consent Judgment
10 and Defendant agrees it shall support approval of such Motion.

11 10.2 This Consent Judgment shall not be effective until it is approved and entered by the
12 Court and shall be null and void if, for any reason, it is not approved by the Court. In such case,
13 the Parties agree to meet and confer on how to proceed and if such agreement is not reached within
14 30 days, the case shall proceed on its normal course.

15 10.3 If the Court approves this Consent Judgment and is reversed or vacated by an
16 appellate court, the Parties shall meet and confer as to whether to modify the terms of this Consent
17 Judgment. If the Parties do not jointly agree on a course of action to take, the case shall proceed on
18 its normal course on the trial court's calendar.

19 **11. MODIFICATION**

20 11.1 This Consent Judgment may be modified only by further stipulation of the Parties
21 and the approval of the Court or upon the granting of a motion brought to the Court by either Party.

22 **12. ATTORNEY'S FEES**

23 12.1 A party who unsuccessfully brings or contests an action arising out of this Consent
24 Judgment shall be required to pay the prevailing party's reasonable attorney's fees and costs unless
25 the unsuccessful party has acted with substantial justification. For purposes of this Consent
26 Judgment, the term substantial justification shall carry the same meaning as used in the Civil
27 Discovery Act of 1986, Code of Civil Procedure Section 2016, *et seq.*

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12.2 Nothing in this Section shall preclude a Party from seeking an award of sanctions pursuant to law.

13. RETENTION OF JURISDICTION

13.1 This Court shall retain jurisdiction of this matter to implement or modify the Consent Judgment.

14. AUTHORIZATION

14.1 The undersigned are authorized to execute this Consent Judgment on behalf of their respective Parties and have read, understood and agree to all of the terms and conditions of this document and certifies that he or she is fully authorized by the Party he or she represents to execute the Consent Judgment on behalf of the Party represented and legally bind that Party. Except as explicitly provided herein each Party is to bear its own fees and costs.

AGREED TO:

AGREED TO:

Date: 1/3/2017

Date: _____

By: Anthony Ferreiro
ANTHONY FERREIRO

By: _____
SKIL-CARE CORPORATION

IT IS SO ORDERED, ADJUDGED AND DECREED:

Dated: _____

Judge of Superior Court

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AGREED TO:

AGREED TO:

Date: _____

Date: 1-13-2017

By: _____
ANTHONY FERREIRO

By: 
SKIL-CARE CORPORATION

IT IS SO ORDERED, ADJUDGED AND DECREED:

Dated: _____

Judge of Superior Court