

1 Evan J. Smith, Esquire (SBN 242352)
2 BRODSKY & SMITH, LLC
3 9595 Wilshire Blvd., Ste. 900
4 Beverly Hills, CA 90212
5 Telephone: (877) 534-2590
6 Facsimile: (310) 247-0160

7 *Attorneys for Plaintiff*

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

11 ANTHONY FERREIRO,

12 Plaintiff,

13 v.

14 ALIMED, INC.,

15 Defendant.

Case No.: RG16839779

CONSENT JUDGMENT

Judge: Stephen M. Pulido

Dept.: 16

Hearing Date: February 28, 2017

Hearing Time: 3:00 PM

Reservation #: R-1809304

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 AliMed, Inc. (“Alimed
4 or Defendant”) with Ferreiro and Defendant collectively referred to as the “Parties” and each of
5 them as a “Party.” Ferreiro is an individual residing in California who seeks to promote awareness
6 of exposures to toxic chemicals and improve human health by reducing or eliminating hazardous
7 substances contained in consumer products. Alimed is a person in the course of doing business for
8 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 *Alimed* wheelchair cushions without
11 providing clear and reasonable warnings under Proposition 65. DEHP is listed under Proposition
12 65 as a chemical known to the State of California to cause cancer and reproductive toxicity.

13 1.3 **Product Description.** The products that are covered by this Consent Judgment are
14 AliMed Wheelchair Cushions that are imported, manufactured, sold, and/or distributed by Alimed
15 for sale in California, including but not limited to the Wedge Basic, WC 14” X 14” SGF, Item
16 #1287, Registry #3272, P#38358 (“Product”).

17 1.4 **Notices of Violation/Complaint.** On or about July 15, 2016, Ferreiro served
18 Alimed, Sears Holdings Management Corporation, Sears Holdings Corporation (collectively,
19 “Sears”), and various public enforcement agencies with a document entitled “60-Day Notice of
20 Violation” pursuant to Health & Safety Code §25249.7(d) (the “Notice”), alleging that Defendant
21 was in violation of Proposition 65 for failing to warn consumers and customers that the *Alimed*
22 Product exposed users in California to DEHP. No public enforcer has brought and is diligently
23 prosecuting the claims alleged in the Notice. On November 22, 2016, Ferreiro filed a complaint in
24 the matter as captioned above (the “Complaint”).

25 1.5 **Consent to Jurisdiction.** For purposes of this Consent Judgment only, the Parties
26 stipulate that this Court has jurisdiction over Defendant as to the allegations contained in the
27 Complaint filed in this matter, that venue is proper in the County of Alameda, and that this Court
28

1 has jurisdiction to approve, enter, and oversee the enforcement of this Consent Judgment as a full
2 and final binding resolution of all claims which were or could have been raised in the Complaint
3 based on the facts alleged therein and/or in the Notice.

4 1.6 **No Admission.** Defendant denies the factual, legal, and material allegations
5 contained in Ferreiro’s Notice and Complaint and maintains that it has sold and distributed for sale
6 in California, including the Products, which have been, and are, in compliance with all laws.
7 Alimed specifically maintains that it has not violated Proposition 65. Nothing in this Consent
8 Judgment shall be construed as an admission by Defendant of any fact, finding, issue of law, or
9 violation of law; nor shall compliance with this Consent Judgment constitute or be construed as an
10 admission by Defendant of any fact, finding, conclusion, issue of law, or violation of law, such
11 being specifically denied by Defendant. However, this section shall not diminish or otherwise
12 affect the obligations, responsibilities, and duties of Defendant under this Consent Judgment.

13 **2. DEFINITIONS**

14 2.1 **Covered Products.** The term “Covered Products” means wheelchair cushions that
15 are manufactured, distributed and/or offered for sale in California by Alimed, including the Product.

16 2.2 **Effective Date.** The term “Effective Date” means the date this Consent Judgment is
17 entered as a Judgment of the Court.

18 **3. INJUNCTIVE RELIEF: WARNINGS**

19 3.1 Commencing ninety (90) days after the Effective Date, Alimed shall not
20 manufacture, import, or purchase for sale in California any Covered Product that contains more
21 than 1,000 parts per million DEHP, unless the Covered Product is accompanied by the following
22 warning: “WARNING: This product contains a chemical known to the State of California to cause
23 cancer, birth defects and other reproductive harm.”

24 3.2 The warning provided pursuant to Section 3.1 shall be affixed to or printed on the
25 Covered Product’s packaging or labeling. The warning shall be prominently affixed to or printed
26 on the packaging or labeling and displayed with such conspicuousness, as compared with other
27 words, statements, or designs as to render it likely to be read and understood by an ordinary
28

1 individual under customary conditions of purchase or use. A warning may be contained in the same
2 section of the packaging, labeling, or instruction booklet that states other safety warnings, if any,
3 concerning the use of the product and shall be at least the same size as those other safety warnings.

4 **4. MONETARY TERMS**

5 4.1 **Civil Penalty.** Alimed shall pay a civil penalty of \$1,500.00 pursuant to Health and
6 Safety Code section 25249.7(b), to be apportioned in accordance with California Health & Safety
7 Code § 25192, with 75% of these funds remitted to the State of California's Office of
8 Environmental Health Hazard Assessment and the remaining 25% of the penalty remitted to
9 Ferreiro, as provided by California Health & Safety Code § 25249.12(d).

10 4.1.1 Within ten (10) business days of the Effective Date, Alimed shall issue two
11 separate checks for the civil penalty payment to (a) "OEHHA" in the amount of \$1,125.00; and
12 (b) "Brodsky & Smith, LLC in Trust for Ferreiro" in the amount of \$375.00. Payment owed to
13 Ferreiro pursuant to this Section shall be delivered to the following payment 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

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 **Attorney Fees.** Alimed shall pay \$16,000.00 to Brodsky & Smith, LLC (“Brodsky
4 Smith”) as complete reimbursement for Plaintiff Ferreiro’s attorneys’ fees and costs incurred as a
5 result of investigating, bringing this matter to Alimed’s attention, litigating and negotiating and
6 obtaining judicial approval of a settlement in the public interest, pursuant to Code of Civil
7 Procedure section 1021.5. Payment shall be made within ten (10) business days of the Effective
8 Date and sent to the address for Brodsky & Smith set forth in section 4.1.1, above.

9 4.3 Alimed shall pay the civil penalty and attorney fees in Sections 4.1 and 4.2 within
10 ten (10) days of the Effective Date.

11 **5. RELEASE OF ALL CLAIMS**

12 5.1 **Ferreiro’s Public Release of Proposition 65 Claims.** This consent judgment is a
13 full, final, and binding resolution between Ferreiro acting on his own behalf and in the public
14 interest, and constitutes a full and binding release as to Alimed, and its parents, shareholders,
15 divisions, subdivisions, subsidiaries, partners, sister companies, and affiliates, and their successors
16 and assigns (“Defendant Releasees”), and all entities from whom they obtain and to whom they
17 directly or indirectly distribute or sell Covered Products, including but not limited to Sears,
18 manufacturers, suppliers, distributors, wholesalers, customers, licensors, licensees retailers,
19 franchisees, and cooperative members (“Downstream Defendant Releasees”), of all claims for
20 violations of Proposition 65 based on exposure to DEHP from Covered Products as set forth in the
21 Notice, with respect to any Covered Products manufactured, distributed, or sold by Alimed prior to
22 the Effective Date. Compliance with the terms of this consent judgment constitutes compliance
23 with Proposition 65 with regard to the Covered Products.

24 5.2 **Ferreiro’s Individual Release of Claims.** Ferreiro, in his individual capacity only
25 and not in his representative capacity, also provides a release to Alimed, Defendant Releasees, and
26 Downstream Defendant Releasees. In addition to the foregoing, Ferreiro, on behalf of himself, his
27 past and current agents, representatives, attorneys, and successors and/or assignees, and *not* in his
28

1 representative capacity, hereby waives all rights to institute or participate in, directly or indirectly,
2 any form of legal action and releases any Alimed, Defendant Releasees, and Downstream
3 Defendant Releasees from any and all manner of actions, causes of action, claims, demands, rights,
4 suits, obligations, debts, contracts, agreements, promises, liabilities, damages, charges, losses,
5 costs, expenses, and attorneys' fees, of any nature whatsoever, known or unknown, in law or equity,
6 fixed or contingent, now or in the future, with respect to any alleged violations of Proposition 65
7 related to or arising from Covered Products manufactured distributed or sold by Alimed or
8 Defendant Releasees, Downstream Defendant Releasees. With respect to the foregoing waivers
9 and releases in this paragraph, Ferreiro hereby specifically waives any and all rights and benefits
10 which he now has, or in the future may have, conferred by virtue of the provisions of Section 1542
11 of the California Civil Code, which provides as follows:

12
13 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE
14 CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS FAVOR
15 AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY
16 HIM MUST HAVE MATERIALLY AFFECTED HIS SETTLEMENT WITH
17 THE DEBTOR.

18 5.3 By executing this Consent Judgment, Ferreiro understands and acknowledges that
19 the significance and consequence of this waiver of California Civil Code Section 1542 is that even
20 if Ferreiro suffers future damages arising out of or resulting from, or related directly or indirectly
21 to, in whole or in part, the Covered Products, including but not limited to any exposure to, or failure
22 to warn with respect to exposure to DEHP from the Covered Products, Ferreiro will not be able to
23 make any claim for those damages against Alimed, Defendant Releasees, and Downstream
24 Defendant Releasees, and the successors and assigns of any of them, who may manufacture, use,
25 maintain, distribute, retail or sell the Covered Products. Furthermore, Ferreiro acknowledges that
26 it intends these consequences for any such claims and any other claims which may exist as of the
27 date of this release pertaining to the Covered Products listed in the Notice but which Ferreiro does
28 not know exist, and which, if known, would materially affect its decision to enter into this Consent

1 Judgment, regardless of whether its lack of knowledge is the result of ignorance, oversight, error,
2 negligence, or any other cause.

3 5.4 Alimed waives any and all claims against Ferreiro, his attorneys and other
4 representatives, for any and all actions taken or statements made (or those that could have been
5 taken or made) by Ferreiro and his attorneys and other representatives, whether in the course of
6 investigating claims or otherwise seeking enforcement of Proposition 65 against it in this matter,
7 and/or with respect to Covered Products.

8 **6. INTEGRATION/ENTIRE AGREEMENT**

9 6.1 This Consent Judgment contains the sole and entire agreement of the Parties and
10 any and all prior negotiations and understandings related hereto shall be deemed to have been
11 merged within it. No representations or terms of agreement other than those contained herein exist
12 or have been made by any Party with respect to the other Party or the subject matter hereof.

13 **7. GOVERNING LAW**

14 7.1 The terms of this Consent Judgment shall be governed by the laws of the State of
15 California and apply within the State of California. In the event that Proposition 65 is repealed or
16 is otherwise rendered inapplicable by reason of law generally, or as to Covered Products, then
17 Defendant shall have no further obligations pursuant to this Consent Judgment with respect to, and
18 to the extent that, Covered Products are so affected.

19 **8. NOTICES**

20 8.1 Unless specified herein, all correspondence and notices required to be provided
21 pursuant to this Consent Judgment shall be in writing and personally delivered or sent by: (i) first-
22 class, (registered or certified mail) return receipt requested; or (ii) overnight courier on any party
23 by the other party at the following addresses:

24 For Defendant:

25 Steven S. Wang
26 Miller Law Associates
27 411 S. Hewitt Street
28 Los Angeles, CA 90013

And

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

For Ferreiro:

Evan Smith
Brodsky & Smith, LLC
2 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; FACSIMILE SIGNATURES

9.1 This Consent Judgment may be executed in counterparts and by facsimile, 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)/COURT APPROVAL

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

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

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

11. MODIFICATION

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

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

12. SEVERABILITY

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

13. ATTORNEY’S FEES

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

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

14. RETENTION OF JURISDICTION

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

15. AUTHORIZATION

15.1 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.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

AGREED TO:

AGREED TO:

Date: 1/3/17

Date: _____

By: Anthony Ferreiro
ANTHONY FERREIRO

By: _____
SAM FOSTER,
CEO OF ALIMED, INC.

IT IS SO ORDERED, ADJUDGED AND DECREED:

Dated: _____

Judge of Superior Court

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

AGREED TO:

AGREED TO:

Date: _____

Date: 1/12/17

By: _____

By: 

ANTHONY FERREIRO

SAM FOSTER,
CEO OF ALIMED, INC.

IT IS SO ORDERED, ADJUDGED AND DECREED:

Dated: _____

Judge of Superior Court