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

10 ANTHONY FERREIRO,
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12 Plaintiff,
vs.
13 ADVANCE MEDICAL
MANUFACTURING LLC d/b/a
14 CROWN MEDICAL PRODUCTS, INC.,
15 Defendant.

Case No. RG16838441

[PROPOSED] CONSENT JUDGMENT

Judge: Delbert C. Gee

Dept.: 302

Hearing Date: January 17, 2017

Hearing Time: 2:30 PM

Reservation #: R-1801070

1 **1. INTRODUCTION**

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

11 1.2 **Allegations and Representations.** Ferreiro alleges that Crown Medical’s
12 products, including bolster rolls and wedges, have exposed individuals to diisononyl phthalate
13 (DINP) without providing clear and reasonable warnings under Proposition 65. On December 20,
14 2013, the State of California’s Office of Environmental Health Hazard Assessment (“OEHHA”)
15 listed DINP as a chemical known to the State to cause cancer.

16 1.3 **Notices of Violation/Complaint.** On or about July 5th, July 7th and September
17 7th, 2016, Ferreiro served Crown Medical, Sears Holding Management Corporation, Sears
18 Holdings Corporation (collectively, “Sears”), Fabrication Enterprises, Inc. (“Fabrication
19 Enterprises”), and various public enforcement agencies with a document entitled “Notice of
20 Violation of California Health & Safety Code § 25249.5, *et seq.*” (collectively, the “Notices”),
21 alleging violations of Proposition 65 for failing to warn consumers that the bolster rolls and
22 wedges exposed users in California to DINP. No public enforcer has brought and is diligently
23 prosecuting the claims alleged in the Notices. On November 9, 2016, Ferreiro filed a complaint
24 in the matter as captioned above (“Complaint”) naming Crown Medical as defendant for alleged
25 violations of Health and Safety Code section 25249.6 that are the subject of the Notices.

26 1.4 For purposes of this Consent Judgment only, the Parties stipulate that this Court
27 has jurisdiction over Crown Medical as to the allegations contained in the complaint filed in this
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1 matter, that venue is proper in the County of Alameda, and that this Court has jurisdiction to
2 approve, enter, and oversee the enforcement of this Consent Judgment pursuant to Proposition 65
3 and California Code of Civil Procedure Section 664.6

4 1.5 Crown Medical denies the material, factual, and legal allegations contained in the
5 Notices and Complaint, and maintains that, to the best of its knowledge, based on testing in the
6 normal course of business, its products that are or have been sold and distributed in California,
7 including the Covered Products, have been and are in compliance with all laws. Nothing in this
8 Consent Judgment shall be construed as an admission by Crown Medical of any fact, finding,
9 conclusion of law, issue of law, or violation of law; nor shall compliance with this Consent
10 Judgment constitute or be construed as an admission by Crown Medical of any fact, finding,
11 conclusion of law, issue of law or violation of law, such being specifically denied by Crown
12 Medical. However, this section shall not diminish or otherwise affect the obligations,
13 responsibilities and duties under this Consent Judgment. Notwithstanding the allegations in the
14 Notices, Crown Medical maintains that it has not knowingly manufactured, or caused to be
15 manufactured, or distributed the Covered Products for sale in California in violation of
16 Proposition 65.

17 **2. DEFINITIONS**

18 2.1 **Covered Products.** The term “Covered Products” means bolster rolls and wedges
19 that contain DINP, including, but not limited to, the *BSSN Vinyl Covered Bolster Roll, Navy –*
20 *8”x18” Item #10860H*, and the *Cando Foam Wedge w/ Vinyl Cover, Royal, 20”x22”x6”*, *Item*
21 *#312001*, manufactured, imported, sold, or distributed for sale in California.

22 2.2 **Effective Date.** For the purposes of this Consent Judgment, the term “Effective
23 Date” shall be five (5) days after Ferreiro’s counsel provides written notice to Crown Medical’s
24 counsel that the Motion to Approve the Consent Judgment has been granted and entered by the
25 Court.

1 **3. INJUNCTIVE RELIEF: WARNINGS**

2 **3.1 Reformulation of the Covered Products.** Commencing one hundred and eighty
3 (180) days after the Effective Date, and continuing thereafter, Covered Products which Crown
4 Medical manufactures for sale in California shall either: (a) be Reformulated Products pursuant to
5 Section 3.2 below; or (b) have a clear and reasonable warning pursuant to Section 3.3 or 3.4.

6 There shall be no obligation for Crown Medical to label Covered Products that entered the stream
7 of commerce prior to one hundred and eighty (180) days after the Effective Date. For purposes of
8 this Consent Judgment, a “Reformulated Product” is a Covered Product that is in compliance with
9 the standard set forth below in section 3.2

10 **3.2 Reformulation Standard.** “Reformulated Products” shall mean Covered
11 Products that contain less than or equal to 1,000 parts per million (“ppm”) of DINP when
12 analyzed pursuant to U.S. Environmental Protection Agency testing methodologies 3580A and
13 8270C or other methodology utilized by federal or state government agencies for the purpose of
14 determining DINP content in a solid substance.

15 **3.3 Clear and Reasonable Warning.** Commencing one hundred and eighty (180)
16 days after the Effective Date, for all Covered Products Crown Medical manufactures either for
17 sale in or which Crown Medical has reason to believe will be shipped to or sold in California, and
18 that is not a Reformulated Product, a clear and reasonable warning as set forth in this Section 3.3
19 or Section 3.4, below, must be provided. Crown Medical shall affix or cause to be affixed a
20 warning to the packaging, labeling or directly on each Covered Product sold in retail outlets in
21 California that states:

22 **WARNING:** This product contains a chemical known to the State of California to cause
23 cancer.

24 **3.4** The warning shall be prominently placed with such conspicuousness as compared
25 with other words, statements, designs, or devices as to render it likely to be read and understood
26 by an ordinary individual under customary conditions before purchase or use. Each warning shall
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1 be provided in a manner such that the consumer or user is reasonably likely to understand to
2 which specific Covered Product the warning applies.

3 **3.5 Alternative Warning.** Crown Medical may, but is not required to, use the
4 alternative warning as set forth in this Section 3.5 (the “Alternative Warning”), if it has
5 knowledge that the Covered Products will expose users to other chemicals. Crown Medical shall
6 affix or cause to be affixed the Alternative Warning to the packaging, labeling or directly on each
7 Covered Product sold in retail outlets in California by Crown Medical or any person selling the
8 Covered Product that states:

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

11 **3.6 Exception to Warning Requirement.** The warning requirements set forth in
12 Sections 3.3 and 3.4 shall not apply to any Reformulated Product.

13 **3.7 Adoption of New Warning Regulation.** Further, the parties acknowledge that
14 the Office of Environmental Health Hazard Assessment adopted new warning regulations,
15 effective on or about August 30, 2016. Crown Medical shall be deemed to be in compliance with
16 this Consent Judgment by either adhering to Section 3.3 or 3.4 of this Consent Judgment or by
17 complying with the newly adopted warning requirements.

18 **4. MONETARY TERMS**

19 **4.1 Civil Penalty.** Crown Medical shall pay a civil penalty of \$2,250.00 pursuant to
20 Health and Safety Code section 25249.7(b), to be apportioned in accordance with California
21 Health & Safety Code § 25192, with 75% of these funds remitted to the State of California’s
22 Office of Environmental Health Hazard Assessment and the remaining 25% of the penalty
23 remitted to Ferreiro, as provided by California Health & Safety Code § 25249.12(d).

24 **4.2 Attorney Fees.** Crown Medical agrees to pay and will not oppose an application
25 made by Ferreiro’s counsel for an award of attorney fees, inclusive of all expenses and costs
26 incurred as a result of investigating, bringing this matter to Crown Medical’s attention, litigating
27 and negotiating and obtaining judicial approval of a settlement in the public interest, pursuant to
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1 Code of Civil Procedure section 1021.5, in an amount not to exceed \$20,250.00. Other than the
2 payment required hereunder, each side is to bear its own attorneys' fees and costs.

3 4.3 Crown Medical shall pay the civil penalty and attorney fees in Sections 4.1 and 4.2
4 within ten days of the Effective Date.

5 **5. RELEASE OF ALL CLAIMS**

6 5.1 This Consent Judgment is a full, final, and binding resolution between Ferreiro
7 acting in the public interest, and Crown Medical and its parents, subsidiaries, affiliated entities
8 under common ownership or control, directors, officers, agents, employees, attorneys, successors
9 and assignees ("Defendant Releasees"), and all entities from whom they obtain and to whom they
10 directly or indirectly distribute or sell Covered Products, including but not limited to
11 manufacturers, suppliers, distributors, wholesalers, customers, licensors, licensees, retailers,
12 franchisees, and cooperative members, including without limitation Fabrication Enterprises,
13 Wayfair LLC and Sears, and their respective parents, affiliates and subsidiaries, shareholders,
14 directors, officers, agents, employees, attorneys, successors and assignees, franchisees,
15 cooperative members and licensees (all collectively referred to as "Downstream Releasees"), of
16 all claims for violations of Proposition 65 based on exposure to DINP from Covered Products as
17 set forth in the Notices, with respect to any Covered Products manufactured, distributed, or sold
18 prior to one hundred eighty (180) days after the Effective Date. Compliance with the terms of
19 this Consent Judgment constitutes compliance with Proposition 65 with regard to the Covered
20 Products.

21 5.2 In addition to the foregoing, Ferreiro, on behalf of himself, his past and current
22 agents, representatives, attorneys, and successors and/or assignees, and not in his representative
23 capacity, hereby waives all rights to institute or participate in, directly or indirectly, any form of
24 legal action against, and releases Crown Medical, Defendant Releasees, and the Downstream
25 Releasees from any and all manner of actions, causes of action, claims, demands, rights, suits,
26 obligations, debts, contracts, agreements, promises, liabilities, damages, charges, losses, costs,
27 expenses, and attorneys' fees, of any nature whatsoever, known or unknown, in law or equity,
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1 fixed or contingent, now or in the future, with respect to any alleged violations of Proposition 65
2 related to or arising from Covered Products manufactured distributed or sold by Crown Medical
3 or Defendant Releasees or Downstream Releasees. With respect to the foregoing waivers and
4 releases in this paragraph, Ferreiro hereby specifically waives any and all rights and benefits
5 which he now has, or in the future may have, conferred by virtue of the provisions of Section
6 1542 of the California Civil Code, which provides as follows:

7 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE
8 CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER
9 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.

10 5.3 Crown Medical waives any and all claims against Ferreiro, his attorneys and other
11 representatives, for any and all actions taken or statements made (or those that could have been
12 taken or made) by Ferreiro and his attorneys and other representatives, whether in the course of
13 investigating claims or otherwise seeking enforcement of Proposition 65 against it in this matter,
14 and/or with respect to Covered Products.

15 **6. INTEGRATION**

16 6.1 This Consent Judgment contains the sole and entire agreement of the Parties and
17 any and all prior negotiations and understandings related hereto shall be deemed to have been
18 merged within it. No representations or terms of agreement other than those contained herein
19 exist or have been made by any Party with respect to the other Party or the subject matter hereof.

20 **7. GOVERNING LAW**

21 7.1 The terms of this Consent Judgment shall be governed by the law of the State of
22 California. In the event that Proposition 65 is repealed, preempted, or is otherwise rendered
23 inapplicable by reason of law generally, or as to the Covered Products, Crown Medical shall
24 provide written notice to Ferreiro of any asserted change in the law, and shall have no further
25 obligations pursuant to this Consent Judgment with respect to, and to the extent that, the Covered
26 Products are so affected.

1 **8. NOTICES**

2 8.1 Unless specified herein, all correspondence and notices required to be provided
3 pursuant to this Consent Judgment shall be in writing and personally delivered or sent by: (i)
4 first-class, (registered or certified mail) return receipt requested; (ii) valid email, or (iii) overnight
5 courier on any party by the other party at the following addresses:

6 For Crown Medical:

7 Malcom C. Weiss, Esq. (mweiss@hunton.com) and
8 Vidya Venugopal Esq. (vvenugopal@hunton.com)
9 Hunton & Williams LLP
550 South Hope Street, Suite 2000
Los Angeles, CA 90071

and

10 For Ferreiro:

11 Jordan Schatz, Esq. (jschatz@brodsky-smith.com)
12 Brodsky & Smith, LLC
13 2 Bala Plaza, Suite 510
Bala Cynwyd, PA 19004

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 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

17 9.1 This Consent Judgment may be executed in counterparts and by facsimile or
18 portable document format (PDF) signature, each of which shall be deemed an original, and all of
19 which, when taken together, shall constitute one and the same document.

20 **10. POST EXECUTION ACTIVITIES**

21 10.1 Ferreiro agrees to comply with the requirements set forth in California Health &
22 Safety Code §25249.7(f) and to promptly bring a Motion for Approval of this Consent Judgment
23 and Crown Medical agrees it shall not object to such Motion.

24 10.2 This Consent Judgment shall not be effective until it is approved and entered by
25 the Court and shall be null and void if, for any reason, it is not approved and entered by the Court
26 within one (1) year after it has been fully executed by the Parties. In such case, the Parties agree
27 to meet and confer on how to proceed.

1 10.3 If the Court approves this Consent Judgment and is reversed or vacated by an
2 appellate court, the Parties shall meet and confer as to whether to modify the terms of this
3 Consent Judgment. If the Parties do not jointly agree on a course of action to take, the case shall
4 proceed on its normal course on the trial court's calendar.

5 **11. MODIFICATION**

6 11.1 This Consent Judgment may be modified only by : (a) a written agreement of the
7 Parties and entry of a modified consent judgment by the Court; or (b) a successful motion or
8 application of any Party, and the entry of a modified consent judgment by the Court.

9 **12. ATTORNEY'S FEES**

10 12.1 A party who unsuccessfully brings or contests an action arising out of this Consent
11 Judgment shall be required to pay the prevailing party's reasonable attorney's fees and costs
12 unless the unsuccessful party has acted with substantial justification. For purposes of this
13 Consent Judgment, the term substantial justification shall carry the same meaning as used in the
14 Civil Discovery Act of 1986, Code of Civil Procedure Section 2016, et seq.

15 12.2 Nothing in this Section shall preclude a Party from seeking an award of sanctions
16 pursuant to law.

17 **13. RETENTION OF JURISDICTION**

18 13.1 This Court shall retain jurisdiction of this matter to implement or modify the
19 Consent Judgment.

20 **14. AUTHORIZATION**

21 14.1 The undersigned are authorized to execute this Consent Judgment on behalf of
22 their respective Parties and have read, understood and agree to all of the terms and conditions of
23 this document and certifies that he or she is fully authorized by the Party he or she represents to
24 execute the Consent Judgment on behalf of the Party represented and legally bind that Party.
25 Except as explicitly provided herein each Party is to bear its own fees and costs.

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15. SEVERABILITY

15.1 If, subsequent to to the Court's approval and entry of this Consent Judgment as a judgment, any provision of this Consent Judgment is deemed by a court to be unenforceable, the parties shall give full meaning to the intent of the parties to resolve and settle this matter in its entirety, and the validity of the enforceable provisions remaining shall not be adversely affected.

AGREED TO:

AGREED TO:

Date: 10/29/16

Date: _____

By: Anthony Ferreiro
ANTHONY FERREIRO

By: _____
ADVANCE MEDICAL
MANUFACTURING LLC d/b/a/ CROWN
MEDICAL PRODUCTS

IT IS SO ORDERED, ADJUDGED AND DECREED:

Dated: _____

Judge of Superior Court

1 **15. SEVERABILITY**

2 15.1 If, subsequent to to the Court's approval and entry of this Consent Judgment as a
3 judgment, any provision of this Consent Judgment is deemed by a court to be unenforceable, the
4 parties shall give full meaning to the intent of the parties to resolve and settle this matter in its
5 entirety, and the validity of the enforceable provisions remaining shall not be adversely affected.
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7 **AGREED TO:**

8 Date: _____
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10 By: _____
11 ANTHONY FERREIRO

AGREED TO:

Date: 10/27/2016
By: _____
ADVANCE MEDICAL
MANUFACTURING LLC d/b/a/ CROWN
MEDICAL PRODUCTS
"General Manager"

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

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15 Dated: _____

Judge of Superior Court

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