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

11 ANTHONY FERREIRO,
12 Plaintiff,
13 vs.
14 GUNTERSVILLE BREATHABLES,
15 INC.,
16 Defendants.

Case No. RG17859877

[PROPOSED] CONSENT JUDGMENT

Judge: Jo-Lynne Q. Lee

Dept.: 18

Hearing Date: July 25, 2017

Hearing Time: 3:00 PM

Reservation #: R-1857172

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1 **1. Introduction**

2 1.1 On February 27, 2017, Anthony Ferreiro (“Ferreiro”) served Guntersville
3 Breathables, Inc. t/a Froggs Toggs (“Guntersville Breathables”), Farwest Sports, Inc. (“Farwest”)
4 Wal-Mart Stores, Inc. (“Walmart”) and various public enforcement agencies with a document
5 entitled “Notice of Violation of California Health & Safety Code § 25249.6, *et seq.*” (the
6 “Notice”). The Notice provided Guntersville Breathables and such others, including public
7 enforcers, with notice that alleged that Guntersville Breathables was in violation of California
8 Health & Safety Code § 25249.6 (“Proposition 65”), for failing to warn consumers and customers
9 that Frogg Toggs’ chest waders, including its Rana II PVC Chest Waders, UPC No. 6 47484
10 04981 3 (the “Product” or “Products”) manufactured, sold and/or distributed by Guntersville
11 Breathables in California, exposed users in California to the chemical Diisononyl phthalate
12 (DINP). No public enforcer has prosecuted the allegations set forth in the Notice.

13 1.2 On May 11, 2017, Ferreiro filed a Complaint for Civil Penalties and Injunctive
14 Relief (“Complaint”) in Alameda County Superior Court, Case No. RG17859877, against
15 Guntersville Breathables alleging violations of Proposition 65.

16 1.3 Guntersville Breathables is a considered a person under California Health and
17 Safety Code §25249.6 and offered the Products for sale within the State of California.

18 1.4 Guntersville Breathables and Ferreiro are collectively referred to herein as, the
19 “Parties”.

20 1.5 Ferreiro’s Complaint alleges, among other things, that Guntersville Breathables
21 sold the Products in California and/or to California citizens, that the Products contain DINP, and
22 that the resulting exposure violated provisions of Proposition 65, by knowingly and intentionally
23 exposing persons to a chemical known to the State of California to cause both cancer and
24 reproductive toxicity without first providing a clear and reasonable warning to such individuals.

25 1.6 For purposes of this Consent Judgment only, the Parties stipulate that this Court
26 has jurisdiction over the allegations of violations contained in the Complaint and personal
27 jurisdiction over Guntersville Breathables as to the acts alleged in the Complaint, that venue is
28 proper in the County of Alameda, and that this Court has jurisdiction to enter this Consent

1 Judgment as a resolution of the allegations contained in the Complaint.

2 1.7 The Parties enter into this Consent Judgment pursuant to a full settlement of
3 disputed claims between the Parties as alleged in the Complaint for the purpose of avoiding
4 prolonged litigation. By execution of this Consent Judgment, Guntersville Breathables does not
5 admit any violation of Proposition 65 and specifically denies that it has committed any such
6 violation. Nothing in this Consent Judgment shall be construed as an admission by Guntersville
7 Breathables of any fact, issue of law or violation of law, nor shall compliance with the Consent
8 Judgment constitute or be construed as an admission by Guntersville Breathables of any fact,
9 issue of law, or violation of law. Nothing in this Consent Judgment shall prejudice, waive, or
10 impair any right, remedy or defense that Guntersville Breathables may have in any other future
11 legal proceeding. However, this paragraph shall not diminish or otherwise affect the obligations,
12 responsibilities and duties of Guntersville Breathables under this Consent Judgment.

13 1.8 For purposes of this Consent Judgment, the term "Effective Date" shall mean the
14 date that the Consent Judgment is entered by the Court.

15 **2. Injunctive Relief**

16 2.1 Commencing ninety (90) days after the Effective Date, and continuing thereafter,
17 with respect to the Products, Guntersville Breathables shall only ship, sell, or offer for sale in
18 California, Reformulated Product pursuant to Section 2.2 or Product that is labeled with a clear
19 and reasonable warning pursuant to Section 2.3. Guntersville Breathables and its downstream
20 retailers shall have no obligation to label Products that entered the stream of commerce prior to
21 the Effective Date or within ninety (90) days after the Effective Date. For purposes of this
22 Settlement Agreement, a "Reformulated Product" is Product that is in compliance with the
23 standard set forth below in section 2.2.

24 2.2 "Reformulated Product" shall mean Product that contains less than or equal to
25 1,000 parts per million ("ppm") of DINP when analyzed pursuant to CPSC-CH-C1001-09.3
26 Standard Operating Procedure for Determination of Phthalates method.

27 2.3 Commencing ninety (90) days after the Effective Date, Guntersville Breathables
28 shall, for all Products it sells or distributes and that is intended for sale in California and that is not

1 a Reformulated Product, provide clear and reasonable warnings as set forth in subsection 2.3(a)
2 below. The warning shall be prominently placed with such conspicuousness as compared with
3 other words, statements, designs, or devices as to render it likely to be read and understood by an
4 ordinary individual under customary conditions before purchase or use. Each warning shall be
5 provided in a manner such that the consumer or user understands to which specific Product the
6 warning applies, so as to minimize the risk of consumer confusion.

7 (a) **Product Labeling.** Guntersville Breathables shall affix a warning to the
8 packaging, labeling or directly on each Product they sell or distribute and that are intended for sale
9 in California and that is not a Reformulated Product that states:

10 WARNING: This product contains a chemical known to the State of California to
11 cause cancer.

12 Or

13 WARNING: This product can expose you to chemicals including DINP, which is
14 known to the State of California to cause cancer. For more information go to
15 www.P65Warnings.ca.gov.

16 **3. Entry of Consent Judgment**

17 3.1 The Parties hereby request that the Court promptly enter this Consent Judgment.

18 Upon entry of this Consent Judgment, Ferreiro and Guntersville Breathables waive their
19 respective rights to a hearing or trial on the allegations of the Complaint and 60-Day Notice.

20 3.2 In the event that the Attorney General objects or otherwise comments on one or
21 more provisions of this Consent Judgment, Guntersville Breathables agrees not to oppose, object
22 to, or otherwise impede any reasonable steps taken by Ferreiro to satisfy such concerns or
23 objections.

24 **4. Matters Covered By This Consent Judgment**

25 4.1 **Plaintiff's Public Release of Proposition 65 Claims.** This Consent Judgment is a
26 final and binding resolution between Plaintiff Ferreiro, acting on his own behalf, and on behalf of
27 the public and in the public interest, and Defendant Guntersville Breathables, and shall have
28 preclusive effect such that no other person or entity, whether purporting to act in his, her, or its
interests or the public interest shall be permitted to pursue and/or take any action with respect to

1 any violation of Proposition 65 that was alleged in the Complaint, or that could have been brought
2 pursuant to the Notice (“Proposition 65 Claims”) against Guntersville Breathables and/or its
3 parents, subsidiaries, affiliated entities under common ownership, directors, officers, agents,
4 employees, attorneys and each entity to whom Guntersville Breathables directly or indirectly
5 distributes or sells the Products, including but not limited to, downstream distributors,
6 marketplace hosts, wholesalers, customers (including, but not limited to, Farwest and its affiliates
7 and subsidiaries), retailers (including, but not limited to, Walmart and its affiliates and
8 subsidiaries), franchisees, cooperative members and licensees (collectively, the “Releasees”). As
9 to alleged exposures to DINP in the Products, compliance with the terms of this Consent
10 Judgment by Guntersville Breathables is deemed sufficient to satisfy all obligations concerning
11 compliance by Guntersville Breathables, Farwest, Walmart, and the other Releasees with the
12 requirements of Proposition 65 with respect to the Products.

13 **4.2 Plaintiff’s Release of Additional Claims.** As to Ferreiro for and in his individual
14 capacity only, this Consent Judgment shall have preclusive effect such that he shall not be
15 permitted to pursue and/or take any action with respect to any other statutory or common law
16 claim, to the fullest extent that any such claim was or could have been asserted by him against
17 Guntersville Breathables, Farwest, Walmart or any of the other Releasees of the Products based
18 on their alleged exposure of Ferreiro to DINP in the Products, or their failure to provide a clear
19 and reasonable warning of alleged exposure to Ferreiro as well as any other claim based in whole
20 or in part on the facts alleged in the Complaint and the Notice, whether based on actions
21 committed by Guntersville Breathables, Farwest, Walmart, or any of the other Releasees (“DINP
22 Exposure Claims”).

23 **4.3 Waiver of Rights Under Section 1542 of the California Civil Code.** As to
24 Ferreiro’s individual release of DINP Exposure Claims set forth in Section 4.2 (“Individual
25 Release”), Ferreiro, acting on his own behalf in his individual capacity with respect to the
26 Individual Release, waives all rights to institute any form of legal action, and releases all claims
27 against Guntersville Breathables, Farwest, Walmart, the other Releasees, and each of them, for
28 the Proposition 65 Claims and the DINP Exposure Claims (referred to collectively in this Section

1 as “Claims”). In furtherance of the foregoing, Ferreiro, acting on his own behalf in his individual
2 capacity with respect to the Individual Release, waives any and all rights and benefits which he
3 now has, or in the future may have, conferred upon him with respect to the Claims by virtue of
4 the provisions of § 1542 of the California Civil Code, which provides as follows:

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

10 4.4 **Guntersville Breathables’ Release of Plaintiff Ferreiro.** Guntersville
11 Breathables, on behalf of itself, its past and current agents, representatives, attorneys, successors
12 and/or assignees, hereby waives any and all claims against Ferreiro, his attorneys, and other
13 representatives for any and all actions taken or statements made (or those that could have been
14 taken or made) by Ferreiro and his attorneys and other representatives, whether in the course of
15 investigating claims or otherwise seeking enforcement of Proposition 65 against Guntersville
16 Breathables in this matter.

17 **5. Enforcement of Judgment**

18 5.1 The terms of this Consent Judgment shall be enforced exclusively by the Parties
19 hereto. The Parties may, by noticed motion or order to show cause before the Superior Court of
20 Alameda County, giving the notice required by law, enforce the terms and conditions contained
21 herein. In any proceeding brought by either party to enforce this Consent Judgment, such party
22 may seek whatever fines, costs, penalties or remedies as may be provided by law for any violation
23 of Proposition 65 or this Consent Judgment.

24 **6. Modification of Judgment**

25 6.1 This Consent Judgment may be modified only by written agreement of the Parties
26 upon entry of a modified Consent Judgment by the Court thereon, or upon motion of any party as
27 provided by law and upon an entry of a modified Consent Judgment by the Court.

28 6.2 Should any court enter final judgment in a case brought by Ferreiro or the People
involving the Products that sets forth standards defining when Proposition 65 warnings will or

1 will not be required ("Alternative Standards"), or if the California Attorney General's office
2 otherwise provides written endorsement (i.e., a writing that is circulated by the Attorney General
3 that is not intended for the purpose of soliciting further input or comments) of Alternative
4 Standards applicable to products that are of the same general type and function as the Products
5 and constructed from the same materials, Guntersville Breathables shall be entitled to seek a
6 modification of this Consent Judgment on sixty (60) days' notice to Ferreiro so as to be able to
7 utilize and rely on such Alternative Standards in lieu of those set forth in Section 2 of this
8 Consent Judgment. Ferreiro shall not unreasonably contest any proposed application to effectuate
9 such a modification provided that the Products for which such a modification is sought are of the
10 same general type and function as those to which the Alternative Standards apply.

11 **7. Settlement Payment**

12 7.1 In settlement of all the claims referred to in this Consent Judgment, and without
13 any admission of liability therefore, Guntersville Breathables shall make the following monetary
14 payments:

15 7.1.1 **Initial Civil Penalty.** Within ten (10) business days of the entry of this
16 Consent Judgment by the Court, Guntersville Breathables shall pay a total of \$2,500.00 in Initial
17 Civil Penalties in accordance with this Section. The Initial Civil Penalty payment will be
18 allocated in accordance with California Health & Safety Code §§ 25249.12(c)(1) and (d), with
19 75% of the funds remitted to the California Office of Environmental Health Hazard Assessment
20 ("OEHHA") and the remaining 25% of the civil penalty remitted to Ferreiro. Within ten (10)
21 business days of the entry of this Consent Judgment by the Court, Guntersville Breathables shall
22 issue two separate checks for the civil penalty payment to (a) "OEHHA" in the amount of
23 \$1,875.00; and (b) "Brodsky & Smith, LLC in Trust for Ferreiro" in the amount of \$625.00.
24 Payment owed to Ferreiro pursuant to this Section shall be delivered to the following payment
25 address:

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

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

3 For United States Postal Service Delivery:

4 Mike Gyurics
5 Fiscal Operations Branch Chief
6 Office of Environmental Health Hazard Assessment
7 P.O. Box 4010
8 Sacramento, CA 95812-4010

7 For Non-United States Postal Service Delivery:

8 Mike Gyurics
9 Fiscal Operations Branch Chief
10 Office of Environmental Health Hazard Assessment
11 1001 I Street
12 Sacramento, CA 95814

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

13 7.1.2 **Final Civil Penalty.** Ninety (90) days after the Effective Date,
14 Guntersville Breathables shall make a Final Civil Penalty payment of \$2,500.00 on the same
15 terms as set forth in Section 7.1.1 pertaining to the Initial Civil Penalty. Pursuant to Title 11
16 California Code of Regulations, Section 3203(c), Ferreiro agrees that the Final Civil Penalty
17 payment shall be waived in its entirety if, on or before the date the Final Civil Penalty payment is
18 due, an officer of Guntersville Breathables provides Ferreiro with a signed declaration certifying
19 that all Products it ships for sale or distributes for sale in California as of the date of its
20 certification are Reformulated Products or are marked with the warnings required by this Consent
21 Decree (hereinafter "Labeled Product") and that Guntersville Breathables will continue to offer
22 only Reformulated Products or Labeled Products in California in the future. The option to
23 provide a declaration certifying its complete early reformulation or labeling of the Products in
24 lieu of making the Final Civil Penalty payment otherwise required by this Section is a material
25 term, and time is of the essence.

26 7.1.3 **Attorney Fees and Costs.** In addition to the payment above, Guntersville
27 Breathables shall pay \$22,500.00 to Brodsky & Smith, I.I.C. ("Brodsky & Smith") as complete
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1 reimbursement for Ferreiro's attorneys' fees and costs, including any investigation and laboratory
2 costs or expert fees, incurred in the course of bringing the Complaint and in enforcing Proposition
3 65, including without limitation, preparation of the 60-Day Notice letter and discussions with the
4 office of the Attorney General. Payment shall be made within ten (10) business days of the entry
5 of this Consent Judgment by the Court and sent to the address for Brodsky & Smith set forth in
6 Section 7.1.1, above.

7 **8. Notices**

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

12 For Guntersville Breathables:

13 Richard J. Marsden
14 Lanier Ford Shaver & Payne P.C.
2101 West Clinton Avenue, Suite 102
15 P.O. Box 2087
Huntsville, AL 35804-2087

16 For Ferreiro:

17 Evan J. Smith
18 BRODSKY & SMITH, LLC
9595 Wilshire Blvd., Suite 900
19 Beverly Hills, CA 90212

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

22 **9. Authority to Stipulate**

23 9.1 Each signatory to this Consent Judgment certifies that he or she is fully authorized
24 by the party he or she represents to enter into this Consent Judgment and to execute it on behalf of
25 the party represented and legally to bind that party.

26 **10. Counterparts**

27 10.1 This Stipulation may be signed in counterparts and shall be binding upon the
28 Parties hereto as if all said Parties executed the original hereof.

1 **11. Retention of Jurisdiction**

2 11.1 This Court shall retain jurisdiction of this matter to implement the Consent
3 Judgment.

4 **12. Service on the Attorney General**

5 12.1 Ferreiro shall serve a copy of this Consent Judgment, signed by all Parties, on the
6 California Attorney General on behalf of the Parties so that the Attorney General may review this
7 Consent Judgment prior to its submittal to the Court for Approval. No sooner than forty-five (45)
8 days after the Attorney General has received the aforementioned copy of this Consent Judgment,
9 and in the absence of any written objection by the Attorney General to the terms of this Consent
10 Judgment, the Parties may then submit it to the Court for Approval.

11 **13. Entire Agreement**

12 13.1 This Consent Judgment contains the sole and entire agreement and understanding
13 of the Parties with respect to the entire subject matter hereof, and any and all discussions,
14 negotiations, commitment and understandings related thereto. No representations, oral or
15 otherwise, express or implied, other than those contained herein have been made by any party
16 hereto. No other agreements not specifically referred to herein, oral or otherwise, shall be deemed
17 to exist or to bind any of the Parties.

18 **14. Governing Law and Construction**

19 14.1 The validity, construction and performance of this Consent Judgment shall be
20 governed by the laws of the State of California, without reference to any conflicts of law
21 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.

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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: 5-11-2017

By: _____
Anthony Ferreiro

By: 
Guntersville Breathables, Inc.

Its: CEO

IT IS SO ORDERED, ADJUDGED AND DECREED:

Dated: _____

Judge of Superior Court

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IT IS SO STIPULATED:

Dated: 6/5/17 Dated: _____

By: Anthony Ferreira By: _____
Anthony Ferreira Guntersville Breathables, Inc.

IT IS SO ORDERED, ADJUDGED AND DECREED:

Dated: _____ Judge of Superior Court _____