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

11 ANTHONY FERREIRO,

12 Plaintiff,

13 v.

14 CARNATION HOME FASHIONS, INC.,

15 Defendant.

Case No.: RG18895108

**CONSENT JUDGMENT**

Judge: Robert McGuiness

Dept.: 22

Hearing Date: June 19, 2018

Hearing Time: 3:00 PM

Reservation #: R-1954948

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 Carnation Home  
4           Fashions, Inc. (“Carnation” or “Defendant”) with Ferreiro and Defendant collectively referred to  
5           as the “Parties” and each of them as a “Party.” Ferreiro is an individual residing in California that  
6           seeks to promote awareness of exposures to toxic chemicals and improve human health by reducing  
7           or eliminating hazardous substances contained in consumer products. Carnation is alleged to be a  
8           person in the course of doing business for purposes of Proposition 65, Cal. Health & Safety Code  
9           §§ 25249.6 et seq.

10          1.2     **Allegations and Representations.** Ferreiro alleges that Defendant has exposed  
11          individuals to Diisononyl phthalate (DINP) from its sales of Carnation Home Shower Liners  
12          without providing clear and reasonable warnings under Proposition 65. DINP is listed under  
13          Proposition 65 as a chemical known to the State of California to cause cancer.

14          1.3     **Notice of Violation/Complaint.** On or about April 24, 2017, Ferreiro served  
15          Carnation, and various public enforcement agencies with documents 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 sales of  
18          Carnation Home Shower Liners has exposed users in California to DINP. No public enforcer has  
19          brought and is diligently prosecuting the claims alleged in the Notices. On March 1, 2018, Ferreiro  
20          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 Carnation Home Shower  
10 Liners that are manufactured, distributed and/or offered for sale in California by Carnation.

11           2.2 **Effective Date.** The term “Effective Date” means the date this Consent Judgment is  
12 entered as a Judgment of the Court.

13 **3. INJUNCTIVE RELIEF: WARNINGS**

14           3.1 As of the date this Consent Judgment is signed by both Parties, Carnation shall not  
15 manufacture or order from any supplier any Covered Products intended for retail sale in California  
16 that contain DINP on any component to which consumers are exposed in excess of 0.1% (1,000  
17 ppm) (hereinafter “Reformulated Products”) unless the Covered Product is accompanied by a  
18 warning that complies with Article 6 of Title 27 of the California Code of Regulations. Covered  
19 Products sold by Carnation before the date this Consent Judgment is signed by both Parties may  
20 sell through without a warning even if not Reformulated Products. Until August 30, 2018, the  
21 warning shall consist of either:

22           (a) The statement: “WARNING: This product contains a chemical known to the State  
23 of California to cause cancer.”; or

24           (b) (1) A symbol consisting of a black exclamation point in a yellow equilateral triangle  
25 with a bold black outline to the left of the word “warning” in bold all capital letters, followed  
26 by the statement “This product can expose you to chemicals including Diisononyl phthalate  
27 (DINP), which is known to the State of California to cause cancer. For more information,  
28

1 go to www.P65Warnings.ca.gov.”; or (2) a warning consisting of a symbol that is a black  
2 exclamation point in a yellow equilateral triangle with a bold black outline to the left of the  
3 word “warning” in bold all capital letters, followed by the statement “Cancer and  
4 Reproductive Harm - www.P65Warnings.ca.gov.”<sup>1</sup>

5 For Covered Products manufactured on and after August 30, 2018, the warning set forth in Section  
6 3.1(b) shall be used.

7 3.2 The warning provided pursuant to Section 3.1 shall be affixed to or printed on the  
8 Covered Product’s packaging or labeling, or on a placard, shelf tag, sign or electronic device or  
9 automatic process, providing that the warning is displayed with such conspicuousness, as compared  
10 with other words, statements, or designs as to render it likely to be read and understood by an  
11 ordinary individual under customary conditions of purchase or use. A warning may be contained  
12 in the same section of the packaging, labeling, or instruction booklet that states other safety  
13 warnings, if any, concerning the use of the product and shall be at least the same size as those other  
14 safety warnings.

15 **4. MONETARY TERMS**

16 4.1 **Civil Penalty.** Carnation shall pay a Civil Penalty of \$2,000.00 pursuant to Health  
17 and Safety Code section 25249.7(b), to be apportioned in accordance with California Health &  
18 Safety Code § 25192, with 75% of these funds remitted to the State of California’s Office of  
19 Environmental Health Hazard Assessment (“OEHHA”) and the remaining 25% of the Civil Penalty  
20 remitted to Ferreiro, as provided by California Health & Safety Code § 25249.12(d).

21 4.1.1 Within fourteen (14) days of the date this Agreement is entered as a  
22 Judgment by the Court, Carnation shall issue two separate checks for the Civil Penalty payment  
23 to (a) “OEHHA” in the amount of \$1,500.00; and (b) “Brodsky & Smith, LLC in Trust for  
24 Ferreiro” in the amount of \$500.00. Payment owed to Ferreiro pursuant to this Section shall be  
25 delivered to the following payment address:

26  
27 <sup>1</sup> The triangular symbol need only be in yellow where the sign, label, shelf tag or other  
28 transmission format is being printed in color for purposes of other language, symbols or designs.

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

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

7 For United States Postal Service Delivery:

8 Mike Gyurics  
9 Fiscal Operations Branch Chief  
10 Office of Environmental Health Hazard Assessment  
11 P.O. Box 4010  
12 Sacramento, CA 95812-4010

13 For Non-United States Postal Service Delivery:

14 Mike Gyurics  
15 Fiscal Operations Branch Chief  
16 Office of Environmental Health Hazard Assessment  
17 1001 I Street  
18 Sacramento, CA 95814

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

21 4.2 **Attorneys' Fees.** Within fourteen (14) days of the date this Agreement is entered as  
22 a Judgment by the Court, Carnation shall pay \$25,000.00 to Brodsky & Smith, LLC ("Brodsky  
23 Smith") as complete reimbursement for Plaintiff Ferreiro's attorneys' fees and costs incurred as a  
24 result of investigating, bringing this matter to Carnation's attention, litigating and negotiating and  
25 obtaining judicial approval of a settlement in the public interest, pursuant to Code of Civil  
26 Procedure section 1021.5.

27 **5. RELEASE OF ALL CLAIMS**

28 5.1 This Consent Judgment is a full, final, and binding resolution between Ferreiro  
acting on his own behalf, and on behalf of the public interest, and Carnation, and its parents,  
shareholders, members, directors, officers, managers, employees, representatives, agents,  
attorneys, divisions, subdivisions, subsidiaries, partners, sister companies, and affiliates, and their  
predecessors, successors and assigns ("Defendant Releasees"), and all entities from whom they  
obtain and to whom they directly or indirectly distribute or sell Covered Products, including but

1 not limited to manufacturers, suppliers, distributors, wholesalers, customers, licensors, licensees  
2 retailers, franchisees, and cooperative members, including but not limited to Amazon.com, Inc.  
3 (“Downstream Releasees”), of all claims for violations of Proposition 65 based on exposure to  
4 DINP from Covered Products as set forth in the Notice, with respect to any Covered Products  
5 manufactured, distributed, or sold by Carnation prior to the Effective Date. This Consent Judgment  
6 shall have preclusive effect such that no other person or entity, whether purporting to act in his,  
7 her, or its interests or the public interest shall be permitted to pursue and/or take any action with  
8 respect to any violation of Proposition 65 that was alleged in the Complaint, or that could have  
9 been brought pursuant to the Notice against Carnation or its Downstream Releasees of the Product  
10 including but not limited to (“Proposition 65 Claims”). Compliance with the terms of this Consent  
11 Judgment constitutes compliance with Proposition 65 with regard to the Covered Products.

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

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

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

6     **6.     INTEGRATION**

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

11     **7.     GOVERNING LAW**

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

17     **8.     NOTICES**

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

22     For Defendant:

23                 Harlan M. Doliner  
24                 Verrill Dana LLP  
25                 One Boston Place  
26                 Suite 1600  
27                 Boston, MA 02108 USA

28     And

For Ferreiro:

1           Evan Smith  
2           Brodsky & Smith, LLC  
3           9595 Wilshire Blvd., Ste. 900  
4           Beverly Hills, CA 90212

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

7 **9.     COUNTERPARTS; FACSIMILE SIGNATURES**

8           9.1     This Consent Judgment may be executed in counterparts and by facsimile, each of  
9 which shall be deemed an original, and all of which, when taken together, shall constitute one and  
10 the same document.

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

13           10.1    Ferreiro agrees to comply with the requirements set forth in California Health &  
14 Safety Code §25249.7(f) and to promptly bring a Motion for Approval of this Consent Judgment.  
15 Defendant agrees it shall support approval of such Motion.

16           10.2    This Consent Judgment shall not be effective until it is approved and entered by the  
17 Court and shall be null and void if, for any reason, it is not approved by the Court. In such case,  
18 the Parties agree to meet and confer on how to proceed and if such agreement is not reached within  
19 30 days, the case shall proceed on its normal course.

20           10.3    If the Court approves this Consent Judgment and is reversed or vacated by an  
21 appellate court, the Parties shall meet and confer as to whether to modify the terms of this Consent  
22 Judgment. If the Parties do not jointly agree on a course of action to take, the case shall proceed on  
23 its normal course on the trial court's calendar. Unless otherwise determined by mutual Agreement  
24 of the Parties, any attorneys' fees and costs paid pursuant to this Consent Judgment shall be placed  
25 into an escrow account until the disposition of said fees and cost is determined by the trial court.

26 **11.    MODIFICATION**

27           11.1    This Consent Judgment may be modified only by further stipulation of the Parties  
28 and the approval of the Court or upon the granting of a motion brought to the Court by either Party.



1 **12. ATTORNEY'S FEES**

2 12.1 A Party who unsuccessfully brings or contests an action arising out of this Consent  
3 Judgment shall be required to pay the prevailing party's reasonable attorney's fees and costs.

4 12.2 Nothing in this Section shall preclude a Party from seeking an award of sanctions  
5 pursuant to law.

6 **13. RETENTION OF JURISDICTION**

7 13.1 This Court shall retain jurisdiction of this matter to implement or modify the  
8 Consent Judgment.

9 **14. AUTHORIZATION**

10 14.1 The undersigned are authorized to execute this Consent Judgment on behalf of their  
11 respective Parties and have read, understood and agree to all of the terms and conditions of this  
12 document and certify that he or she is fully authorized by the Party he or she represents to execute  
13 the Consent Judgment on behalf of the Party represented and legally bind that Party. Except as  
14 explicitly provided herein each Party is to bear its own fees and costs.

15  
16 **AGREED TO:**

**AGREED TO:**

17 Date: 4/26/18

Date: 4-13-18

18  
19 By: Anthony Ferreiro  
ANTHONY FERREIRO

By: Lawrence B. Mays  
CARNATION HOME FASHIONS, INC.

20  
21  
22 **IT IS SO ORDERED, ADJUDGED AND DECREED:**

23  
24 Dated: \_\_\_\_\_

\_\_\_\_\_  
Judge of Superior Court