

## **SETTLEMENT AGREEMENT**

### **1. INTRODUCTION**

#### **1.1 The Parties**

This Settlement Agreement is entered into by and between Anthony Ferreiro ("Ferreiro") and Gill North America, LTD ("Gill"). Together, Ferreiro and Gill are collectively referred to as the "Parties." Ferreiro is an individual that resides in the State of California, and seeks to promote awareness of exposures to toxic chemicals and to improve human health by reducing or eliminating hazardous substances contained in consumer products. Gill is considered a person in the course of doing business for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, Health & Safety Code section 25249.6, *et seq.* ("Proposition 65").

#### **1.2 General Allegations**

Ferreiro alleges that Gill has imported, distributed and/or sold in the State of California bags containing Di(2-ethylhexyl)phthalate (DEHP) without the requisite Proposition 65 warning. On January 1, 1998, the State of California listed DEHP as a chemical known to the State to cause cancer.

#### **1.3 Product Description**

The products covered by this Settlement Agreement are Gill Wet/Dry Bag 10L, including UPC No. 5 052316 041531 (the "Product" or "Products") that are manufactured, imported, distributed, and/or sold in the State of California by Gill, and that contain DEHP.

#### **1.4 Notice of Violation**

On July 13, 2017, Ferreiro served Gill and various public enforcement agencies with a document entitled "Notice of Violation of California Health & Safety Code § 25249.5, *et seq.*" (the "Notice"). The Notice provided Gill and such others, including public enforcers, with notice that alleged that Gill was in violation of California Health & Safety Code § 25249.5, for failing to warn consumers and customers that the Product exposed users in California to DEHP. No public enforcer has diligently prosecuted the allegations set forth in the Notice.

### **1.5 No Admission**

Gill denies the material factual and legal allegations contained in the Notice and maintains that, to the best of its knowledge, all products that are or have been sold and distributed in California, including the Products, have been and are in compliance with all laws. Nothing in this Settlement Agreement shall be construed as an admission by Gill of any fact, finding, issue of law, or violation of law; nor shall compliance with this Settlement Agreement constitute or be construed as an admission by Gill of any fact, finding, conclusion, issue of law or violation of law, such being specifically denied by Gill. However, this section shall not diminish or otherwise affect the obligations, responsibilities and duties under this Settlement Agreement. Notwithstanding the allegations in the Notice, Gill maintains that it has not knowingly manufactured, or caused to be manufactured, the Products for sale in California in violation of Proposition 65.

### **1.6 Effective Date**

For purposes of this Settlement Agreement, the term "Effective Date" shall mean the date this Agreement is last executed by the Parties.

## **2. INJUNCTIVE RELIEF**

### **2.1 Reformulation of the Products**

Commencing ninety (90) days after the Effective Date, and continuing thereafter, Gill agrees to manufacture, distribute, or purchase for sale in California only (a) reformulated Products pursuant to Section 2.2, or (b) Products that are labeled with a clear and reasonable warning pursuant to Section 2.3. Gill and its downstream retailers shall have no obligation to reformulate or label Product that entered the stream of commerce prior to the Effective Date.

### **2.2 Reformulation Standard**

“Reformulated Product” shall mean Product that contains in any accessible component less than or equal to 1,000 parts per million (“ppm”) of DEHP when analyzed pursuant to U.S. Environmental Protection Agency testing methodologies 3580A and 8270C or other reliable and generally accepted testing methods.

### **2.3 Clear and Reasonable Warnings**

Commencing ninety (90) days after the Effective Date, Gill shall provide a clear and reasonable warning for any Product that it manufactures, distributes, or purchases for sale in California that is not a Reformulated Product. Gill shall provide the warning affixed to the packaging or labeling using language similar to the warnings below:

WARNING: This product contains a chemical known to the State of California to cause cancer and birth defects or other reproductive harm.

Or

WARNING: This product can expose you to chemicals including Di(2-ethylhexyl)phthalate (DEHP), which are known to the State of California to cause cancer and birth defects or other reproductive harm. For more information go to [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov).

Or

A warning that complies with Tit. 27, Cal. Code Regs. §25601 *et seq.*

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

In the event that the Office of Environmental Health Hazard Assessment promulgates one or more regulations requiring or permitting warning text and/or methods of transmission different than those set forth above, Gill shall be entitled to use, at its discretion, such other warning text and/or method of transmission without being deemed in breach of this Agreement.

### **3. PENALTIES PURSUANT TO HEALTH & SAFETY CODE § 25249.7(b)**

In settlement of all the claims referred to in this Settlement Agreement, Gill shall pay a total of \$500.00 in civil penalties in accordance with this Section. Each penalty payment will be allocated in accordance with California Health & Safety Code § 25249.12(c)(1) and (d), with 75% of the funds remitted to the California Office of Environmental Health Hazard Assessment ("OEHHA") and the

remaining 25% of the penalty remitted to Ferreiro . Each penalty payment shall be delivered to the addresses listed in Section 3.2 below.

### **3.1 Civil Penalty**

Within ten (10) business days of receiving a W-9 form for Ferreiro after the Effective Date, Gill shall issue two separate checks for the Civil Penalty payment to (a) "OEHHA" in the amount of \$375.00; and (b) "Brodsky & Smith, LLC in Trust for Ferreiro " in the amount of \$125.00. All penalty payments shall be delivered to the addresses listed in Section 3.2 below.

### **3.2 Payment Procedures**

**(a) Issuance of Payments.** Payments shall be delivered as follows:

(i) All payments owed to Ferreiro, pursuant to Section 3.1 shall be delivered to the following payment address:

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

(ii) All payments owed to OEHHA (EIN: 68-0284486), pursuant to Section 3.1 shall be delivered directly to OEHHA (Memo Line "Prop 65 Penalties") at the following addresses:

For United States Postal Service Delivery:

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

For Non-United States Postal Service Delivery:

Mike Gyurics  
Fiscal Operations Branch Chief  
Office of Environmental Health Hazard Assessment  
1001 I Street  
Sacramento, CA 95814

**(b) Copy of Payments to OEHHA.** Gill agrees to provide Ferreiro 's counsel with a copy of the checks payable to OEHHA, simultaneous with its penalty payments to Ferreiro , to be delivered to the address provided in Section 3.2(a)(i), as proof of payment to OEHHA.

**(C) Tax Documentation.** Gill agrees to provide a completed IRS 1099 for its payments to, and Ferreiro agrees to provide IRS W-9 forms for, each of the following payees under this Settlement Agreement:

(i) "Gabriel Ferreiro " whose address and tax identification number shall be provided within five (5) days after this Settlement Agreement is fully executed by the Parties;

(ii) "Brodsky & Smith, LLC" (EIN: 23-2971061) at the address provided in Section 3.2(a)(i); and

(iii) "Office of Environmental Health Hazard Assessment" 1001 I Street, Sacramento, CA 95814.

#### **4. REIMBURSEMENT OF FEES AND COSTS**

The Parties acknowledge that Ferreiro and his counsel offered to reach preliminary agreement on the material terms of this dispute before reaching terms on the amount of fees and costs to be reimbursed to them. The Parties thereafter reached an accord on the compensation due to Ferreiro and his counsel under general contract principles and the private attorney general doctrine and principles codified at California Code of Civil Procedure § 1021.5, for all work performed through the mutual execution of this agreement. Under these legal principles, Gill shall reimburse Ferreiro's counsel for fees and costs incurred as a result of investigating and bringing this matter to Gill's attention, and negotiating a settlement in the public interest. Within ten (10) business days of receipt of a W-9 form for Brodsky & Smith LLC after the Effective Date, Gill shall issue a check payable to "Brodsky & Smith, LLC" in the amount of \$11,500.00 for delivery to the address identified in Section 3.2(a)(i) above.

## **5. RELEASE OF ALL CLAIMS**

### **5.1 Release of Gill and Downstream Customers and Entities**

This Settlement Agreement is a full, final and binding resolution between Ferreiro, acting on his own behalf, and Gill, of any violation of Proposition 65 that was or could have been asserted by Ferreiro or on behalf of his past and current agents, representatives, attorneys, successors, and/or assigns (“Releasors”) for failure to provide warnings for alleged exposures to DEHP contained in the Products, and Releasors hereby release any such claims against Gill and its parents, subsidiaries, affiliated entities, shareholders, marketplaces, directors, officers, agents, employees, attorneys, successors and assignees, and each entity to whom Gill directly or indirectly distributes or sells the Products, including but not limited to, downstream distributors, wholesalers, customers, retailers, including but not limited to West Marine, Inc. and its respective subsidiaries, affiliates and parents, franchisees, cooperative members and licensees, (collectively, the “Releasees”), from all claims for violations of Proposition 65 through the Effective Date based on their failure to warn about alleged exposures to the chemical DEHP that is contained in the Products, and were manufactured, distributed, sold and/or offered for sale by Gill to customers and consumers in the State of California.

In further consideration of the promises and agreements herein contained, and for the payments to be made pursuant to Sections 3 and 4 above, Ferreiro, on behalf of himself, his past and current agents, representatives, attorneys, successors and/or assignees, hereby covenants not to sue and waives any right to institute, participate in, directly or indirectly, any form of legal action and releases all claims that she may have, including without limitation, all actions and causes of action in law and in equity, all obligations, expenses (including without limitation all attorneys’ fees, expert fees, and investigation fees, and costs), damages, losses, liabilities and demands against any of the Releasees of any nature, character, or kind, whether known or unknown, suspected or unsuspected, limited to and arising out of the alleged or actual exposure to the chemical DEHP in the Products.

### **5.2 Gill’s Release of Ferreiro**

Gill, on behalf of itself, its past and current agents, representatives, attorneys, successors and/or assignees, hereby waives any and all claims against Ferreiro, his attorneys and other

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

### **5.3 California Civil Code Section 1542**

It is possible that other claims not known to the Parties arising out of the facts alleged in the Notice and relating to the Products will develop or be discovered. Ferreiro on behalf of himself only, on one hand, and Gill, on the other hand, acknowledge that this Agreement is expressly intended to cover and include all such claims up through the Effective Date, including all rights of action therefor. The Parties acknowledge that the claims released in Sections 5.1 and 5.2 above may include unknown claims, and nevertheless waive California Civil Code section 1542 as to any such unknown claims. California Civil Code section 1542 reads as follows:

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

Ferreiro and Gill each acknowledge and understand the significance and consequences of this specific waiver of California Civil Code section 1542.

### **5.4 Deemed Compliance with Proposition 65**

Compliance by Gill with this Settlement Agreement constitutes compliance with Proposition 65 with respect to exposures to DEHP in the Products.

### **5.5. Public Benefit**

It is Gill's understanding that the commitments it has agreed to herein, and actions to be taken by Gill under this Settlement Agreement, would confer a significant benefit to the general public, as set forth in Code of Civil Procedure section 1021.5 and Cal. Admin. Code tit. 11, section 3201. As such, it is the intent of Gill that to the extent any other private party initiates an action alleging a violation of Proposition 65 with respect to Gill's failure to provide a warning concerning exposure to

DEHP with respect to the Products it has manufactured, distributed, sold, or offered for sale in California, or will manufacture, distribute, sell, or offer for sale in California, such private party action would not confer a significant benefit on the general public as to those Products addressed in this Settlement Agreement, provided that Gill is in material compliance with this Settlement Agreement.

**6. SEVERABILITY**

If, subsequent to the execution of this Settlement Agreement, any of the provisions of this Settlement Agreement are deemed by a court to be unenforceable, the validity of the enforceable provisions remaining shall not be adversely affected but only to the extent the deletion of the provision deemed unenforceable does not materially affect, or otherwise result in the effect of the Settlement Agreement being contrary to the intent of the Parties in entering into this Settlement Agreement.

**7. GOVERNING LAW**

The terms of this Settlement Agreement shall be governed by the law of the State of California and apply within the State of California. In the event that Proposition 65 is repealed or is otherwise rendered inapplicable or limited by reason of law generally, or as to the Products, Gill shall have no further obligations pursuant to this Settlement Agreement with respect to, and to the extent that, a Product is so affected.

**8. NOTICES**

Unless specified herein, all correspondence and notices required to be provided pursuant to this Settlement Agreement shall be in writing and personally delivered or sent by: (i) first-class (registered or certified mail) return receipt requested; or (ii) overnight or two-day courier on any party by the other party to the following addresses:

For Gill:

David Pritchard  
President  
Gill North America Ltd.  
1025 Parkway Industrial Park Drive  
Buford, Georgia 30518

For Ferreiro:

Evan J. Smith  
Brodsky & Smith, LLC



Two 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: SIGNATURES**

This Settlement Agreement may be executed in counterparts and by facsimile or .pdf signature, 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)**

Ferreiro agrees to comply with the reporting requirements referenced in Health & Safety Code section 25249.7(f).

11. **MODIFICATION**

This Settlement Agreement may be modified only by a written agreement of the Parties.

12. **AUTHORIZATION**

The undersigned are authorized to execute this Settlement Agreement and have read, understood and agree to all of the terms and conditions contained of this Settlement Agreement.

**AGREED TO:**

**AGREED TO:**

Date: \_\_\_\_\_

Date: 9/14/17

By: \_\_\_\_\_  
Anthony Ferreiro

By:   
Gill North America, LTD

Two Bala Plaza, Suite 510  
Bala Cynwyd, PA 19004

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Ferreiro agrees to comply with the reporting requirements referenced in Health & Safety Code section 25249.7(f).

**11. MODIFICATION**

This Settlement Agreement may be modified only by a written agreement of the Parties.

**12. AUTHORIZATION**

The undersigned are authorized to execute this Settlement Agreement and have read, understood and agree to all of the terms and conditions contained of this Settlement Agreement.

**AGREED TO:**

**AGREED TO:**

Date: 10/5/17

Date: \_\_\_\_\_

By: Anthony Ferreiro  
Anthony Ferreiro

By: \_\_\_\_\_  
Gill North America, LTD