

1 Evan Smith (Bar No. SBN 242352)
2 BRODSKY & SMITH, LLC.
3 9595 Wilshire Blvd., Ste. 900
4 Beverly Hills, CA 90212
5 Tel: (877) 534-2590
6 Fax: (310) 247-0160

7 *Attorneys for Plaintiff*

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

10 ANTHONY FERREIRO,

11 Plaintiff,

12 v.

13 WHITMOR, INC.,

14 Defendant.

Case No.: RG18890363

CONSENT JUDGMENT

Judge: Michael M. Markman

Dept.: 16

Hearing Date: April 10, 2018

Hearing Time: 9:00 AM

Reservation #: R-1933046

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

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

14 1.3 **Notices of Violation/Complaint.** On or about July 18, 2017, Ferreiro served
15 Whitmor, and various public enforcement agencies with a document 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 Whitmor
18 shower curtain liners exposed users in California to DINP. No public enforcer has brought and is
19 diligently prosecuting the claims alleged in the Notice. On January 24, 2018, Ferreiro filed a
20 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 Whitmor Shower Curtain
10 Liners in all sizes and colors, including but not limited to Style Numbers 6942-2481-CLR and
11 6942-2481-WHT that have been manufactured, distributed and/or offered for sale in California by
12 Whitmor, and that contain DINP.

13 2.2 **Effective Date.** The term “Effective Date” means the date this Consent Judgment is
14 entered as a Judgment of the Court.

15 **3. INJUNCTIVE RELIEF: WARNINGS**

16 3.1 As of the date this Consent Judgment is signed by both Parties, Whitmor shall not
17 manufacture or order from any supplier any Covered Products intended for retail sale in California
18 that contains DINP on any component to which consumers are exposed in excess of 0.1% (1,000
19 ppm) (hereinafter “Reformulated Products”) unless the Covered Product is accompanied by a
20 warning that complies with Article 6 of Title 27 of the California Code of Regulations. Whitmor
21 shall have a period of one year from the date this Consent Judgment is signed by both Parties to
22 sell through its inventory of Covered Products that were ordered prior to the date this Consent
23 Judgment is signed. Until August 30, 2018, the warning shall consist of either:

- 24 (a) The statement: “WARNING: This product may contain a chemical known to the
25 State of California to cause cancer, birth defects, or other reproductive harm;” or
26 (b) The statement: “WARNING: This product may contain a chemical known to the
27 State of California to cause cancer.”
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1 (c) (1) A symbol consisting of a black exclamation point in a yellow equilateral triangle
2 with a bold black outline to the left of the word “warning” in bold all capital letters, followed
3 by the statement “This product can expose you to chemicals including Diisononyl phthalate
4 (DINP), which is known to the State of California to cause cancer. For more information,
5 go to www.P65Warnings.ca.gov,” or (2) a warning on the Products consisting of a symbol
6 that is a black exclamation point in a yellow equilateral triangle with a bold black outline to
7 the left of the word “warning” in bold all capital letters, followed by the statement “Cancer
8 and Reproductive Harm - www.P65Warnings.ca.gov.”¹

9 On and after August 30, 2018, the warning set forth in Section 3.1(c) shall be used.

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

18 **4. MONETARY TERMS**

19 4.1 **Civil Penalty.** Whitmor shall pay a Civil Penalty of \$3,000.00 pursuant to Health
20 and Safety Code section 25249.7(b), to be apportioned in accordance with California Health &
21 Safety Code § 25192, with 75% of these funds remitted to the State of California’s Office of
22 Environmental Health Hazard Assessment and the remaining 25% of the penalty remitted to
23 Ferreiro, as provided by California Health & Safety Code § 25249.12(d).

24 4.1.1 Within fourteen (14) business days of the Effective Date, Whitmor shall
25 issue two separate checks for the Civil Penalty payment to (a) "OEHHA" in the amount of

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

1 \$2,250.00; and (b) "Brodsky & Smith, LLC in Trust for Ferreiro" in the amount of \$750.00.

2 Payment owed to Ferreiro pursuant to this Section shall be delivered to the following payment
3 address:

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

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

10 For United States Postal Service Delivery:

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

16 For Non-United States Postal Service Delivery:

17 Mike Gyurics
18 Fiscal Operations Branch Chief
19 Office of Environmental Health Hazard Assessment
20 1001 I Street
21 Sacramento, CA 95814

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

24 4.2 **Attorney Fees.** Whitmor shall pay \$32,000.00 to Brodsky & Smith, LLC ("Brodsky
25 Smith") as complete reimbursement for Plaintiff Ferreiro's attorneys' fees and costs incurred as a
26 result of investigating, bringing this matter to Whitmor's attention, litigating and negotiating and
27 obtaining judicial approval of a settlement in the public interest, pursuant to Code of Civil
28 Procedure section 1021.5.

4.3 **Conditional Civil Penalty.** One Hundred Eighty (180) days after the Effective
Date, Whitmor shall make a Conditional Civil Penalty payment of \$3,000.00 on the same terms as
set forth in Section 4.1.1 pertaining to the Civil Penalty. Pursuant to Title 11 California Code of
Regulations, Section 3203(c), Ferreiro agrees that the Conditional Civil Penalty payment shall be

1 waived in its entirety if, on or before the date the Conditional Civil Penalty payment is due, an
2 officer of Whitmor provides Ferreiro with a signed declaration certifying that all Products it ships
3 for sale or distributes for sale in California as of the date of its certification are Reformulated
4 Products or are marked with the warnings required by this Consent Decree (hereinafter “Labeled
5 Product”) and that Whitmor will continue to offer only Reformulated Products or Labeled Products
6 in California in the future. The option to provide a declaration certifying its complete early
7 reformulation or labeling of the Products in lieu of making the Conditional Civil Penalty payment
8 otherwise required by this Section is a material term, and time is of the essence.

9 4.4 Whitmor shall pay the Civil Penalty and Attorney Fees identified in Sections 4.1
10 and 4.2 within fourteen (14) days of the Effective Date.

11 **5. RELEASE OF ALL CLAIMS**

12 5.1 This Consent Judgment is a full, final, and binding resolution between Ferreiro
13 acting on his own behalf, and on behalf of the public interest, and Whitmor, and its parents,
14 shareholders, members, directors, officers, managers, employees, representatives, agents,
15 attorneys, divisions, subdivisions, subsidiaries, partners, sister companies, and affiliates, and their
16 predecessors, successors and assigns (“Defendant Releasees”), and all entities from whom they
17 obtain and to whom they directly or indirectly distribute or sell Covered Products, including but
18 not limited to manufacturers, suppliers, distributors, wholesalers, customers, licensors, licensees
19 retailers, franchisees, and cooperative members, including but not limited to CVS Pharmacy, Inc.
20 (“Downstream Releasees”), of all claims for violations of Proposition 65 based on exposure to
21 DINP from Covered Products as set forth in the Notice, with respect to any Covered Products
22 manufactured, distributed, or sold by Whitmor prior to the Effective Date. This Consent Judgment
23 shall have preclusive effect such that no other person or entity, whether purporting to act in his,
24 her, or its interests or the public interest shall be permitted to pursue and/or take any action with
25 respect to any violation of Proposition 65 that was alleged in the Complaint, or that could have
26 been brought pursuant to the Notice against Whitmor or its Downstream Releasees of the Product
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1 including but not limited to ("Proposition 65 Claims"). Compliance with the terms of this Consent
2 Judgment constitutes compliance with Proposition 65 with regard to the Covered Products.

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

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

21 5.3 Whitmor waives any and all claims against Ferreiro, his attorneys and other
22 representatives, for any and all actions taken or statements made (or those that could have been
23 taken or made) by Ferreiro and his attorneys and other representatives, whether in the course of
24 investigating claims or otherwise seeking enforcement of Proposition 65 against it in this matter,
25 and/or with respect to Covered Products.

26 **6. INTEGRATION**

27 6.1 This Consent Judgment contains the sole and entire agreement of the Parties and
28 any and all prior negotiations and understandings related hereto shall be deemed to have been

1 merged within it. No representations or terms of agreement other than those contained herein exist
2 or have been made by any Party with respect to the other Party or the subject matter hereof.

3 **7. GOVERNING LAW**

4 7.1 The terms of this Consent Judgment shall be governed by the laws of the State of
5 California and apply within the State of California. In the event that Proposition 65 is repealed or
6 is otherwise rendered inapplicable by reason of law generally, or as to Covered Products, then
7 Defendant shall have no further obligations pursuant to this Consent Judgment with respect to, and
8 to the extent that, Covered Products are so affected.

9 **8. NOTICES**

10 8.1 Unless specified herein, all correspondence and notices required to be provided
11 pursuant to this Consent Judgment shall be in writing and personally delivered or sent by: (i) first-
12 class, (registered or certified mail) return receipt requested; or (ii) overnight courier on any party
13 by the other party at the following addresses:

14 For Defendant:

15 W. Blaine Early, III
16 Stites & Harbison PLLC
17 250 West Main Street, Suite 2300
Lexington, KY 40507-1758

18 And

19 For Ferreiro:

20 Evan Smith
21 Brodsky & Smith, LLC
22 9595 Wilshire Blvd., Ste. 900
Beverly Hills, CA 90212

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

25 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

26 9.1 This Consent Judgment may be executed in counterparts and by facsimile, each of
27 which shall be deemed an original, and all of which, when taken together, shall constitute one and
28 the same document.

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

3 10.1 Ferreiro agrees to comply with the requirements set forth in California Health &
4 Safety Code §25249.7(f) and to promptly bring a Motion for Approval of this Consent Judgment.
5 Defendant agrees it shall support approval of such Motion.

6 10.2 This Consent Judgment shall not be effective until it is approved and entered by the
7 Court and shall be null and void if, for any reason, it is not approved by the Court. In such case,
8 the Parties agree to meet and confer on how to proceed and if such agreement is not reached within
9 30 days, the case shall proceed on its normal course.

10 10.3 If the Court approves this Consent Judgment and is reversed or vacated by an
11 appellate court, the Parties shall meet and confer as to whether to modify the terms of this Consent
12 Judgment. If the Parties do not jointly agree on a course of action to take, the case shall proceed on
13 its normal course on the trial court's calendar.

14 **11. MODIFICATION**

15 11.1 This Consent Judgment may be modified only by further stipulation of the Parties
16 and the approval of the Court or upon the granting of a motion brought to the Court by either Party.

17 **12. ATTORNEY'S FEES**

18 12.1 A party who unsuccessfully brings or contests an action arising out of this Consent
19 Judgment shall be required to pay the prevailing party's reasonable attorney's fees and costs.

20 12.2 Nothing in this Section shall preclude a Party from seeking an award of sanctions
21 pursuant to law.

22 **13. RETENTION OF JURISDICTION**

23 13.1 This Court shall retain jurisdiction of this matter to implement or modify the
24 Consent Judgment.

25 **14. AUTHORIZATION**

26 14.1 The undersigned are authorized to execute this Consent Judgment on behalf of their
27 respective Parties and have read, understood and agree to all of the terms and conditions of this
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document and certify 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.

AGREED TO:

AGREED TO:

Date: _____

Date: 1/29/2018

By: _____
ANTHONY FERREIRO

By: [Signature], EXECUTIVE VICE PRESIDENT
WHITMOR, INC.

IT IS SO ORDERED, ADJUDGED AND DECREED:

Dated: _____

Judge of Superior Court

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document and certify 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.

AGREED TO:

AGREED TO:

Date: 2/14/18

Date: _____

By: *Anthony Ferreiro*
ANTHONY FERREIRO

By: _____
WHITMOR, INC.

IT IS SO ORDERED, ADJUDGED AND DECREED:

Dated: _____

Judge of Superior Court