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14 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
15 COUNTY OF ALAMEDA

16 ANTHONY FERREIRO,  
17 Plaintiff,

18 v.

19 MEDICAL DEPOT, INC.,  
20 Defendant.

Case No.: RG18914924

**[PROPOSED] CONSENT  
JUDGMENT**

Judge: Julia Spain  
Dept.: 520  
Hearing Date: September 18, 2019  
Hearing Time: 2:00 PM  
Reservation #: R-2098144

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 Medical Depot, Inc.  
4           (“Medical Depot” or “Defendant”) with Ferreiro and Defendant collectively referred to as the  
5           “Parties” and each of them as a “Party.” Ferreiro is an individual residing in California that seeks  
6           to promote awareness of exposures to toxic chemicals and improve human health by reducing or  
7           eliminating hazardous substances contained in consumer products. Medical Depot is alleged to be  
8           a 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 Drive Universal bather pouches without  
12           providing a clear and reasonable exposure warning pursuant to 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 March 27, 2018, Ferreiro served  
15           Medical Depot, and various public enforcement agencies with documents entitled “60-Day Notice  
16           of Violation” pursuant to Health & Safety Code §25249.7(d) (the “Notice”), alleging that  
17           Defendant violated Proposition 65 for failing to warn consumers and customers that use of Drive  
18           Universal bather pouches expose users in California to DINP. No public enforcer has brought and  
19           is diligently prosecuting the claims alleged in the Notice. On July 31, 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 Drive Universal bather  
10 pouches that are manufactured, distributed and/or offered for sale in California by Medical Depot.

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 **Clear and Reasonable Warning.** As of the date this Consent Judgment is signed  
15 by both Parties, and continuing thereafter, a clear and reasonable exposure warning as set forth in  
16 this § 3.1 must be provided for all Covered Products that Defendant manufactures, imports,  
17 distributes, sells, or offers for sale in California that is not a Reformulated Product. There shall be  
18 no obligation for Defendant to provide a warning for Covered Products that enter the stream of  
19 commerce prior to the date this Consent Judgment is signed by both Parties. The warning shall  
20 consist of either the **Warning** or **Alternative Warning** described in §§ 3.1(a) or (b), respectively:

21           (a) **Warning.** The “Warning” shall consist of the statement:

22           ⚠ **WARNING:** This product can expose you to chemicals including diisononyl  
23 phthalate (DINP), which is known to the State of California to cause cancer. For  
24 more information go to [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov).

25           (b) **Alternative Warning:** Medical Depot may, but is not required to, use the alternative  
26 short-form warning as set forth in this § 3.1(b) (“**Alternative Warning**”) as follows:

27           ⚠ **WARNING:** Cancer - [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov).

1           3.2     A **Warning** or **Alternative Warning** provided pursuant to § 3.1 must print the word  
2 “**WARNING:**” in all capital letters and in bold font, followed by a colon. The warning symbol to  
3 the left of the word “**WARNING:**” must be a black exclamation point in a yellow equilateral  
4 triangle with a black outline, except that the symbol may be in black and white if the symbol is not  
5 printed against a yellow background. The symbol must be in a size no smaller than the height of  
6 the word “**WARNING:**”. The warning shall be affixed to or printed on the Covered Product’s  
7 packaging or labeling, or on a placard, shelf tag, sign or electronic device or automatic process,  
8 provided that the warning is displayed with such conspicuousness, as compared with other words,  
9 statements, or designs as to render it likely to be read and understood by an ordinary individual  
10 under customary conditions of purchase or use. A warning may be contained in the same section  
11 of the packaging, labeling, or instruction booklet that states other safety warnings, if any,  
12 concerning the use of the Covered Product and shall be at least the same size as the largest of those  
13 other safety warnings.

14           3.3     **Compliance with Warning Regulations.** The Parties agree that Defendant shall be  
15 deemed to be in compliance with this Consent Judgment by either adhering to § 3.1 of this Consent  
16 Judgment or by complying with warning requirements adopted by the State of California’s Office  
17 of Environmental Health Hazard Assessment (“OEHHA”) after the Effective Date.

18     **4.     MONETARY TERMS**

19           4.1     **Civil Penalty.** Medical Depot shall pay \$1,500.00 as a Civil Penalty pursuant to  
20 Health 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 OEHHA and the remaining 25% of  
22 the Civil Penalty remitted to Ferreiro, as provided by California Health & Safety Code  
23 § 25249.12(d).

24           4.1.1    Within ten (10) business days of the Effective Date, Medical Depot shall  
25 issue two separate checks for the Civil Penalty payment to (a) “OEHHA” in the amount of  
26 \$1,125.00; and to (b) “Brodsky & Smith, LLC in Trust for Ferreiro” in the amount of \$375.00.  
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1 Payment owed to Ferreiro pursuant to this Section shall be delivered to the following payment  
2 address:

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

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

8 For United States Postal Service Delivery:

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

12 For Non-United States Postal Service Delivery:

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

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

18 4.2 **Attorneys' Fees.** Within ten (10) business days of the Effective Date, Medical  
19 Depot shall pay \$16,000.00 to Brodsky & Smith, LLC ("Brodsky Smith") as complete  
20 reimbursement for Ferreiro's attorneys' fees and costs incurred as a result of investigating, bringing  
21 this matter to Medical Depot's attention, litigating and negotiating and obtaining judicial approval  
22 of a settlement in the public interest, pursuant to Code of Civil Procedure § 1021.5.

23 **5. RELEASE OF ALL CLAIMS**

24 5.1 This Consent Judgment is a full, final, and binding resolution between Ferreiro  
25 acting on his own behalf, and on behalf of the public interest, and Medical Depot, and its parents,  
26 shareholders, members, directors, officers, managers, employees, representatives, agents,  
27 attorneys, divisions, subdivisions, subsidiaries, partners, sister companies, and affiliates, and their  
28

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

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

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

1 FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF  
2 KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS  
3 SETTLEMENT WITH THE DEBTOR.

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

9 **6. INTEGRATION**

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

14 **7. GOVERNING LAW**

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

20 **8. NOTICES**

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

25 For Defendant:

26 Stephanie Sheridan  
27 Steptoe & Johnson LLP  
28 1 Market Street  
Suite 1800  
San Francisco, CA 94105

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For Ferreiro:

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

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; FACSIMILE SIGNATURES**

9.1 This Consent Judgment may be executed in counterparts and by facsimile, 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)/COURT APPROVAL**

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

10.2 This Consent Judgment shall not be effective until it is approved and entered by the Court and shall be null and void and not binding on any Party if, for any reason, it is not approved by the Court. In such case, the Parties agree to meet and confer on how to proceed and if such agreement is not reached within 30 days, the case shall proceed on its normal course. Also in such case, the Consent Judgment cannot be used in any proceeding for any purpose.

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

**11. ENFORCEMENT**

11.1 In the event that a dispute arises with respect to any provisions of this Consent Judgment, the Parties shall meet and confer within thirty (30) days of receiving written notice of the alleged violation. In the event that the respective Parties are unable to resolve their dispute



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AGREED TO:

AGREED TO:

Date: 7/2/19  
By: Anthony Ferreiro  
ANTHONY FERREIRO

Date: 7/11/19  
By: [Signature]  
MEDICAL DEPOT, INC.

IT IS SO ORDERED, ADJUDGED AND DECREED:

Dated: \_\_\_\_\_

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

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Dated: \_\_\_\_\_

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Judge of Superior Court