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10 Attorneys for Defendant
11 FKA DISTRIBUTING COMPANY, LLC
DBA HOMEDICS USA, LLC
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14 SUPERIOR COURT OF THE STATE OF CALIFORNIA
15 COUNTY OF SAN FRANCISCO
16 UNLIMITED CIVIL JURISDICTION
17

18 KEEP AMERICA SAFE AND BEAUTIFUL,

19 Plaintiff,

20 v.

21 FKA DISTRIBUTING COMPANY, LLC
22 DBA HOMEDICS USA, LLC; and DOES
1-30, inclusive,

23 Defendants.
24

Case No. CGC-22-599163

[PROPOSED] CONSENT JUDGMENT

(Health & Safety Code § 25249.6 et seq. and
Code of Civil Procedure § 664.6)

1 **1. INTRODUCTION**

2 This Consent Judgment is entered into by and between plaintiff Keep America Safe and Beautiful
3 (“**KASB**”) and defendant FKA Distributing Company, LLC dba HoMedics USA, LLC (“**HoMedics**”),
4 with KASB and HoMedics each individually referred to as a “**Party**” and collectively, as the “**Parties**,”
5 to resolve the allegations in the July 9, 2021 60-Day Notice of Violation in compliance with the Safe
6 Drinking Water and Toxic Enforcement Act of 1986, Health & Safety Code § 25249.6 *et seq.*
7 (“**Proposition 65**”).

8 **1.1 The Parties**

9 KASB is a California-based non-profit organization proceeding in the public interest pursuant
10 to California Health & Safety Code § 25249.7(d) to ensure that chemicals known to the State of
11 California to cause cancer, birth defects, or other reproductive harm are disclosed or eliminated from
12 consumer products sold in California. HoMedics is a person in the course of doing business for
13 purposes of California Health & Safety Code § 25249.11(b).

14 **1.2 Consumer Product Description**

15 KASB alleges that HoMedics manufactures, imports, sells, or distributes for sale in California
16 massagers containing di(2ethylhexyl) phthalate (“**DEHP**”), including but not limited to, the *HoMedics*
17 *Deep Kneading Back Massager with Heat*, UPC: 031262060389, without providing the health hazard
18 warning KASB alleges is required by California Health & Safety Code § 25249.5 *et seq.* (“**Proposition**
19 **65**”).) All such massagers are referred to hereinafter as the “**Products**.” DEHP is listed pursuant to
20 Proposition 65 as a chemical known to the State of California to cause cancer, birth defects and other
21 reproductive harm.

22 **1.3 Notice of Violation**

23 On July 9, 2021, KASB served HoMedics, the California Attorney General, and the requisite
24 public enforcement agencies with a 60-Day Notice of Violation (“**Notice**”), alleging HoMedics
25 violated Proposition 65 by failing to warn its customers and consumers in California that the Products
26 can expose users to DEHP. No public enforcer has commenced and is diligently prosecuting an action
27 to enforce the allegations set forth in the Notice.

28

1 **1.4 Complaint**

2 On April 12, 2022, KASB commenced the instant action (“**Complaint**”), naming HoMedics
3 as a defendant for the alleged violations of Proposition 65 that are the subject of the Notice.

4 **1.5 No Admission**

5 HoMedics denies the material, factual and legal allegations contained in the Notice and
6 Complaint and maintains that all products it sold or distributed for sale in California, including the
7 Products, have been, and are, in compliance with all laws. Nothing in this Consent Judgment shall be
8 construed as, nor shall compliance with this Consent Judgment constitute or be construed as, an
9 admission by HoMedics of any fact, finding, conclusion of law, issue of law, or violation of law. This
10 section shall not, however, diminish or otherwise affect HoMedics' obligations, responsibilities, and
11 duties under this Consent Judgment. HoMedics maintains that it has not knowingly manufactured or
12 caused to be manufactured the Products for sale in California in violation of Proposition 65.

13 **1.6 Jurisdiction**

14 For purposes of this Consent Judgment only, the Parties stipulate: this Court has jurisdiction
15 over HoMedics as to the allegations contained in the Complaint; venue is proper in San Francisco
16 County; and the Court has jurisdiction to enter and enforce the provisions of this Consent Judgment,
17 pursuant to Proposition 65 and Code of Civil Procedure § 664.6.

18 **1.7 Effective Date**

19 The term “Effective Date” means the date on which the Court approves this Consent Judgment
20 and enters Judgment pursuant to its terms, and KASB provides notice, including by an electronic
21 message, to HoMedics the judgment has been entered in the Court’s records as a consent judgment.

22 **2. INJUNCTIVE RELIEF: REFORMULATION**

23 **2.1 Reformulation Commitment**

24 Commencing on the Effective Date and continuing thereafter, all Products HoMedics
25 manufactures, imports, sells, ships, or distributes for sale, in or into California, directly or through
26 one or more third party retailers or e-commerce marketplaces, shall meet the Reformulation Standard
27 for Reformulated Products, as defined by Section 2.2, subject to the releases set forth below.

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1 **2.2 Reformulation Standard Defined**

2 For purposes of this Consent Judgment, “**Reformulated Products**” are defined as Products
3 which, if they contain di(2-ethylhexyl) phthalate (“**DEHP**”), di-n-butyl phthalate (“**DBP**”),
4 diisononyl phthalate (“**DINP**”), butyl benzyl phthalate (“**BBP**”), di-isodecyl phthalate (“**DIDP**”) and
5 di-n-hexyl phthalate (“**DnHP**”), contain any or all such chemicals each in a maximum concentration
6 of less than 0.1 percent (1,000 parts per million) when analyzed by a laboratory accredited by the
7 State of California, a federal agency, or a nationally recognized accrediting organization. For
8 purposes of compliance with this reformulation standard, testing samples shall be prepared and
9 extracted using Consumer Product Safety Commission (“**CPSC**”) methodology CPSC CH-
10 C1001.09.3 and analyzed using U.S. Environmental Protection Agency methodology 8270D, or
11 other methodologies utilized by federal or state government agencies to determine phthalate content
12 in a solid substance. (“**Reformulation Standard**”.)

13 **2.3 Certification of Compliance with Reformulation Standard**

14 HoMedics shall provide its most recent test result performed after the date of the Notice,
15 demonstrating the Products were tested and analyzed according to the parameters previously set forth
16 in Section 2.2 and comply with the definition of Reformulated Products. HoMedics shall provide its
17 test result, along with other relief sought by this Consent Judgment under Section 3, to the address
18 provided in Section 3.3 within ten (10) business days of the Effective Date. Failure to comply with
19 this Section shall render this agreement null and void.

20 **3. MONETARY SETTLEMENT TERMS**

21 **3.1 Civil Penalty**

22 Pursuant to Health and Safety Code § 25249.7(b), HoMedics agrees to pay a civil penalty of
23 \$9,000 within ten (10) business days of the Effective Date. HoMedics’ civil penalty payment will be
24 allocated according to Health and Safety Code § 25249.12(c)(1) and (d), with seventy-five percent
25 (75%) of the penalty paid to the California Office of Environmental Health Hazard Assessment
26 (“**OEHHA**”), and the remaining twenty-five percent (25%) retained by KASB. HoMedics shall issue
27 its payment in two checks made payable to: (a) “**OEHHA**” in the amount of \$6,750; and (b) “**Keep**
28 **America Safe and Beautiful**” in the amount of \$2,250. KASB’s counsel shall deliver to OEHHA and

1 KASB their respective portions of the penalty payment. HoMedics shall deliver its civil penalty
2 payments to the address listed in Section 3.3, below.

3 **3.2 Reimbursement of Attorneys' Fees and Costs**

4 KASB and its counsel offered to resolve the allegations in the Notice and Complaint without
5 reaching terms on the amount of reimbursement of attorneys' fees and costs. Shortly after the Parties
6 finalized the other material settlement terms, they negotiated and reached an accord on the amount of
7 reimbursement to be paid to KASB's counsel, under general contract principles and the private
8 attorney general doctrine, codified at California Code of Civil Procedure § 1021.5, for all work
9 performed through the mutual execution and reporting of this Consent Judgment to the Office of the
10 California Attorney General and entry of Judgment pursuant its terms, but exclusive of fees and costs
11 on appeal, if any. Within ten (10) business days of the Effective Date, HoMedics shall issue a check
12 in the amount of \$31,000 and made payable to "Seven Hills LLP" for all fees and other costs incurred
13 investigating, bringing this matter to HoMedics' attention, litigating, negotiating a settlement in the
14 public interest, obtaining the Court's approval of its terms pursuant to Section 5, and reporting to the
15 California Attorney General. HoMedics shall deliver its payment to the address listed in Section 3.3.

16 **3.3 Payments**

17 All payments payable and due under this Consent Judgment shall be delivered to KASB's
18 counsel at the following address:

19 Seven Hills LLP
20 Attn: Kimberly Gates Johnson
21 4 Embarcadero Center, Suite 1400
San Francisco, CA 94111

22 **4. CLAIMS COVERED AND RELEASED**

23 **4.1 KASB's Release of Proposition 65 Claims**

24 This Consent Judgment is a full, final, and binding resolution of the claims that were or could
25 have been asserted by KASB arising out of the allegations in the Notice and in the Complaint. KASB,
26 acting on its own behalf, in the public interest, and on behalf of its past and current officers, agents,
27 shareholders, employees, predecessors, representatives, attorneys, successors and assignees
28 ("Releasors") releases HoMedics, and its respective officers, directors, shareholders, employees,

1 agents, parent companies, subsidiaries, divisions, suppliers, franchisees, licensees, customers (not
2 including private label customers of HoMedics), distributors, wholesalers, retailers, and all other
3 downstream entities in the distribution chain of any of the Products, and the predecessors, successors,
4 and assigns of any of them (collectively, “**Released Parties**”) based on any purported failure to
5 provide a clear and reasonable warning about alleged exposures to DEHP contained in the Products
6 that were manufactured, processed, distributed, sold and/or offered for sale in California before the
7 Effective Date, as set forth in the Notice and Complaint. The Parties further agree that compliance
8 with Section 2 of this Consent Judgment shall be deemed compliance with Proposition 65 with respect
9 to alleged exposures to DEHP in the Products.

10 The Parties understand and agree that this Section 4.1 release shall not extend upstream to any
11 entities that sold, supplied or manufactured the Products or any component parts thereof, or any
12 distributors or suppliers who sold the Products or any component parts thereof to HoMedics.

13 **4.2 KASB’s Individual Release of Claims**

14 KASB, in its individual capacity only and not in its representative capacity, also hereby
15 provides a release to HoMedics and the Releasees which shall be effective as a full and final accord
16 and satisfaction, as a bar to all actions, causes of actions, obligations, costs, expenses, attorneys’
17 fees, damages, losses, claims, liabilities and demands of KASB of any nature, character, or kind
18 arising out of alleged or actual exposures to DEHP in Products manufactured, imported, sold or
19 distributed for sale, in or into the State of California, by HoMedics prior to the Execution Date, as
20 alleged in the Notice and Complaint. The Parties understand and agree that this Section 4.2 release
21 shall not extend upstream to any entities that sold, supplied or manufactured the Products or any
22 component parts thereof to HoMedics. Nothing in this section shall affect KASB’s right to
23 commence or prosecute an action under Proposition 65 against a Releasee that does not involve
24 HoMedics’ Products.

25 **4.3 HoMedics’ Release of KASB**

26 HoMedics, on behalf of itself, its past and current officers, agents, shareholders, employees,
27 predecessors, representatives, attorneys, successors, and assignees, hereby waives any and all claims
28 against KASB and its attorneys and other representatives for any and all actions taken or statements

1 made (or those that could have been taken or made) by KASB, its attorneys and other representatives,
2 whether in the course of investigating claims or otherwise seeking to enforce Proposition 65 against it
3 in this matter with respect to the Products.

4 **5. COURT APPROVAL**

5 Pursuant to California Health and Safety Code § 25249.7(f)(4), KASB shall file a noticed
6 motion for judicial approval of this Consent Judgment. The Parties agree to mutually employ their best
7 efforts, and those of their counsel, to support the entry of a judgment pursuant to the terms of this
8 Consent Judgment and to judicial approval of their settlement in a timely manner. For purposes of this
9 section, “best efforts” shall include, at a minimum, supporting the motion for approval, responding to
10 any third-party objection, and appearing at the hearing before the Court, if so requested.

11 **6. SEVERABILITY**

12 If, subsequent to the Court’s approval and entry of this Consent Judgment as a judgment, any
13 provision of this Consent Judgment is deemed by a court to be unenforceable, the validity of the
14 remaining provisions shall not be adversely affected.

15 **7. GOVERNING LAW**

16 The terms of this Consent Judgment shall be governed by the laws of the State of California
17 and apply within California. In the event Proposition 65 is repealed, preempted, or is otherwise
18 rendered inapplicable, by reason of law, generally, as to the Products or as to DEHP, then HoMedics
19 may provide KASB with written notice of any asserted change in the law and shall have no further
20 injunctive obligations pursuant to this Consent Judgment, with respect to, and to the extent that, the
21 Products are so affected. Nothing in this Consent Judgment shall be interpreted to relieve HoMedics
22 from its obligation to comply with any pertinent state or federal law or regulation.

23 **8. NOTICE**

24 Unless specified herein, all correspondence and notice required by this Consent Judgment shall
25 be in writing and sent by: (i) first-class registered or certified mail, return receipt requested; or (ii) a
26 recognized overnight courier to any Party by the other at the following addresses:
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1 For HoMedics:
2 Steven S. Spaulding, Esq.
3 Berkes Crane Santana & Spangler LLP
4 515 South Figueroa Street, Suite 1500
5 Los Angeles, CA 90071

For KASB:
Kimberly Gates Johnson, Partner
Seven Hills LLP
4 Embarcadero Center, Suite 1400
San Francisco, CA 94111

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

6 **9. COUNTERPARTS AND PDF SIGNATURES**

7 This Consent Judgment may be executed in counterparts and by portable document format
8 (pdf) signature, each of which shall be deemed an original and, all of which, when taken together, shall
9 constitute one and the same document.

10 **10. COMPLIANCE WITH REPORTING REQUIREMENTS**

11 KASB and its counsel agree to comply with the reporting form requirements referenced in
12 California Health and Safety Code § 25249.7(f).

13 **11. ENTIRE AGREEMENT**

14 This Consent Judgment contains the sole and entire agreement and understanding of the Parties
15 with respect to the entire subject matter hereof, and any and all prior discussions, negotiations,
16 commitments, or understandings related thereto, if any, are hereby merged herein and therein. There
17 are no warranties, representations, or other agreements between the Parties except as expressly set
18 forth herein. No representations, oral or otherwise, express or implied, other than those specifically
19 referred to in this Consent Judgment have been made by any Party hereto. No other agreements not
20 specifically contained or referenced herein, oral or otherwise, shall be deemed to exist or to bind any
21 of the Parties hereto.

22 **12. MODIFICATION**

23 This Consent Judgment may be modified only by: (i) a written agreement of the Parties and
24 the entry of a modified Consent Judgment by the Court thereon; or (ii) upon a successful motion of
25 any party and the entry of a modified Consent Judgment by the Court thereon.

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13. AUTHORIZATION

The undersigned are authorized to execute this Consent Judgment on behalf of their respective Parties and have read, understood, and agreed to all the terms and conditions of this Consent Judgment.

AGREED TO:

AGREED TO:

Date: January 12, 2023

Date: January 12, 2023

By: 

By: 

My Nguyen, CFO
Keep America Safe and Beautiful

Alon Kaufman, CEO
FKA Distributing Company, LLC
dba HoMedics USA, LLC