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ENDORSED
FILED
ALAMEDA COUNTY

APR - 2 2019

CLERK OF THE SUPERIOR COURT
By: ERICA BAKER, Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ALAMEDA

10 ANTHONY FERREIRO,
11 Plaintiff,
12 vs.
13 WESTERN POWER SPORTS, INC.,
14 CYCLE GEAR, INC.,
15 Defendants.

Case No.: RG19013276
COMPLAINT FOR CIVIL PENALTIES AND
INJUNCTIVE RELIEF
(Violation of Health & Safety Code § 25249.5 et
seq.)

16 Plaintiff Anthony Ferreiro ("Plaintiff"), by and through his attorneys, alleges the
17 following cause of action in the public interest of the citizens of the State of California.

BACKGROUND OF THE CASE

18
19 1. Plaintiff brings this representative action on behalf of all California citizens to
20 enforce relevant portions of Safe Drinking Water and Toxic Enforcement Act of 1986, codified
21 at the Health and Safety Code § 25249.5 et seq ("Proposition 65"), which reads, in relevant part,
22 "[n]o person in the course of doing business shall knowingly and intentionally expose any
23 individual to a chemical known to the state to cause cancer or reproductive toxicity without first
24 giving clear and reasonable warning to such individual ...". Health & Safety Code § 25249.6.

25 2. This complaint is a representative action brought by Plaintiff in the public interest
26 of the citizens of the State of California to enforce the People's right to be informed of the health
27 hazards caused by exposure to di(2-ethylhexyl) phthalate (DEHP) and diisononyl phthalate
28 (DINP), toxic chemicals found in Fly Racing rain jackets and/or helmet bags sold and/or

BY FAX

1 distributed by defendants Western Power Sports, Inc. (“Western Power Sports”) and Cycle Gear,
2 Inc. (“Cycle Gear”) (collectively, “Defendants”) in California.

3 3. DEHP and DINP are harmful chemicals known to the State of California to cause
4 cancer. On January 1, 1988 (DEHP), and on December 20, 2013 (DINP), the State of California
5 identified DEHP and DINP as chemicals known to the State to cause cancer and each chemical
6 has come under the purview of Proposition 65 regulations since that time. Cal. Code Regs. Tit.
7 27, § 27001(c); Health & Safety Code §§ 25249.8 & 25249.10(b). Additionally, on October 24,
8 2003, the State of California identified DEHP as a chemical known to cause reproductive
9 toxicity.

10 4. Proposition 65 requires all businesses with ten (10) or more employees that
11 operate within California or sell products therein to comply with Proposition 65 regulations.
12 Included in such regulations is the requirement that businesses must label any product containing
13 a Proposition 65-listed chemical with a “clear and reasonable” warning before “knowingly and
14 intentionally” exposing any person to it.

15 5. Proposition 65 allows for civil penalties of up to \$2,500.00 per day per violation
16 to be imposed upon defendants in a civil action for violations of Proposition 65. Health & Safety
17 Code § 25249.7(b). Proposition 65 also allows for any court of competent jurisdiction to enjoin
18 the actions of a defendant which “violate or threaten to violate” the statute. Health & Safety
19 Code § 25249.7.

20 6. Plaintiff alleges that Defendants manufacture, distribute and/or offer for sale in
21 California, without a requisite exposure warning, Fly Racing rain jackets and/or helmet bags (the
22 “Products”) that expose persons to DEHP and/or DINP.

23 7. Defendants’ failure to warn consumers and other individuals in California of the
24 health hazards associated with exposure to DEHP and/or DINP in conjunction with the sale
25 and/or distribution of the Products is a violation of Proposition 65 and subjects Defendants to the
26 enjoinder and civil penalties described herein.

27 8. Plaintiff seeks civil penalties against Defendants for their violations of
28 Proposition 65 in accordance with Health and Safety Code § 25249.7(b).

1 enforcement of violations of Proposition 65 in any Court of competent jurisdiction; therefore,
2 this Court has jurisdiction over this lawsuit.

3 15. This Court has jurisdiction over Defendants because each Defendant is either a
4 citizen of the State of California, has sufficient minimum contacts with the State of California, is
5 registered with the California Secretary of State as foreign corporations authorized to do business
6 in the State of California, and/or has otherwise purposefully availed itself of the California
7 market. Such purposeful availment has rendered the exercise of jurisdiction by California courts
8 consistent and permissible with traditional notions of fair play and substantial justice.

9 **SATISFACTION OF NOTICE REQUIREMENTS**

10 16. On April 6, 2018, and on May 8, 2018, Plaintiff gave notice of alleged violation
11 of Health and Safety Code § 25249.6 (collectively, the “Notices”) to Defendants concerning the
12 exposure of California citizens to DEHP and/or DINP contained in the Products without proper
13 warning, subject to a private action to Defendants and to the California Attorney General’s office
14 and the offices of the County District attorneys and City Attorneys for each city with a
15 population greater than 750,000 persons wherein the herein violations allegedly occurred.

16 17. The Notices complied with all procedural requirements of Proposition 65
17 including the attachment of a Certificate of Merit affirming that Plaintiff’s counsel had consulted
18 with at least one person with relevant and appropriate expertise who reviewed relevant data
19 regarding DEHP and/or DINP exposure, and that counsel believed there was meritorious and
20 reasonable cause for a private action.

21 18. After receiving the Notices, and to Plaintiff’s best information and belief, none of
22 the noticed appropriate public enforcement agencies have commenced and diligently prosecuted
23 a cause of action against Defendants under Proposition 65 to enforce the alleged violations which
24 are the subject of Plaintiff’s notice of violation.

25 19. Plaintiff is commencing this action more than sixty (60) days from the date of the
26 Notices to Defendants, as required by law.

27 **FIRST CAUSE OF ACTION**

28 **(By Plaintiff against Defendants for their Violation of Proposition 65)**

1 20. Plaintiff hereby repeats and incorporates by reference paragraphs 1 through 19 of
2 this complaint as though fully set forth herein.

3 21. Defendants have, at all times mentioned herein, acted as manufacturer, distributor,
4 and/or retailer of the Product.

5 22. The Products contain DEHP and/or DINP, hazardous chemicals found on the
6 Proposition 65 list of chemicals known to be hazardous to human health.

7 23. The Products do not comply with the Proposition 65 warning requirements.

8 24. Plaintiff, based on his best information and belief, avers that at all relevant times
9 herein, and at least since February 2, 2018, continuing until the present, that Defendants have
10 continued to knowingly and intentionally expose California users and consumers of the Products
11 to DEHP and/or DINP without providing required warnings under Proposition 65.

12 25. The exposures that are the subject of the Notices result from the purchase,
13 acquisition, handling and recommended use of the Product. Consequently, the primary route of
14 exposure to these chemicals is through dermal absorption. The rain jacket is likely to be in
15 constant contact with either bare exposed skin or the user's clothing when worn. If the jacket is
16 worn over bare exposed skin, dermal exposure is likely to occur. Should the wearer's skin
17 perspire inside the rain jacket or the interior of the jacket become wet from precipitation,
18 aqueous DEHP skin permeation rates have been reported to be faster than neat DEHP
19 permeation. Clothing worn within the PVC jacket are likely to absorb DEHP while the jacket is
20 worn. The contaminated articles of clothing will continue to be a source of dermal transfer after
21 the jacket is removed. If the jacket is stored in a drawer or transported in a carrier, DEHP that
22 leaches form the jacket may contaminate other articles contained within the drawer or carrier bag
23 that are subsequently handled, worn, or consumed. Finally, while mouthing of the jacket does
24 not seem likely, some amount of exposure through ingestion can occur by handling the jacket
25 with subsequent touching of the user's hand to mouth.

26 26. With respect to the helmet bag, the primary route of exposure to these chemicals
27 is through dermal absorption. Users may potentially be exposed to DINP by dermal absorption
28 through direct skin contact with the bag with bare hands. Finally, while mouthing of the product

1 does not seem likely, some amount of exposure through ingestion can occur by touching the bag
2 with subsequent touching of the user's hand to mouth.

3 27. Plaintiff, based on his best information and belief, avers that such exposures will
4 continue every day until clear and reasonable warnings are provided to purchasers and users of
5 the Products, or until these known toxic chemicals are removed from the Products.

6 27. Defendants have knowledge that the normal and reasonably foreseeable use of the
7 Products exposes individuals to DEHP and/or DINP, and Defendant intends that exposures to
8 DEHP and/or DINP will occur by their deliberate, non-accidental participation in the
9 manufacture, importation, distribution, sale and offering of the Products to consumers in
10 California

11 28. Plaintiff has engaged in good faith efforts to resolve the herein claims prior to this
12 Complaint.

13 29. Pursuant to Health and Safety Code § 25249.7(b), as a consequence of the above
14 described acts, Defendant is liable for a maximum civil penalty of \$2,500 per day per violation.

15 30. Pursuant to Health and Safety Code § 25249.7(a), this Court is specifically
16 authorized to grant injunctive relief in favor of Plaintiff and against Defendants.

17 **PRAYER FOR RELIEF**

18 WHEREFORE, Plaintiff demands judgment against Defendants and requests the
19 following relief:

- 20 A. That the court assess civil penalties against each Defendant in the amount
21 of \$2,500 per day for each violation in accordance with Health and Safety
22 Code § 25249.7(b);
- 23 B. That the court preliminarily and permanently enjoin Defendants
24 mandating Proposition 65 compliant warnings on the Product;
- 25 C. That the court grant Plaintiff reasonable attorney's fees and costs of suit.
- 26 D. That the court grant any further relief as may be just and proper.

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28 Dated: April 2, 2019

BRODSKY & SMITH, LLC

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