

~~COPY~~



12323458

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Evan J. Smith, Esquire (SBN 242352)
Ryan P. Cardona, Esquire (SBN 302113)
BRODSKY & SMITH, LLC
9595 Wilshire Blvd., Ste. 900
Beverly Hills, CA 90212
Telephone: (877) 534-2590
Facsimile: (310) 247-0160

Attorneys for Plaintiff

FILED
ALAMEDA COUNTY

JAN - 9 2018

CLERK OF THE SUPERIOR COURT
By *[Signature]* Deputy

NOV 21 2017

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ALAMEDA

ANTHONY FERREIRO,
Plaintiff,
v.
POLARIS INDUSTRIES, INC.,
Defendant.

Case No.: RG17880148
CONSENT JUDGMENT
Judge: Robert McGuiness
Dept.: 22
Hearing Date: January 11, 2018
Hearing Time: 3:00 PM
Reservation #: R-1909529

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 Polaris Industries, Inc.
4 (“Polaris” or “Defendant”) with Ferreiro and Defendant collectively referred to as the “Parties” and
5 each of them as a “Party.” Ferreiro is an individual residing in California who 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. Polaris is a person in the course of doing
8 business for purposes of Proposition 65, Cal. Health & Safety Code §§ 25249.6 et seq.

9 1.2 **Allegations and Representations.** Ferreiro alleges that Defendant has exposed
10 individuals to Diisononyl phthalate (DINP) from Cycle Country Hot Thermal Grips without
11 providing clear and reasonable exposure warnings under Proposition 65. DINP is listed under
12 Proposition 65 as a chemical known to the State of California to cause cancer.

13 1.3 **Notices of Violation/Complaint.** On or about May 11, 2017 Ferreiro served Kolpin
14 Outdoors, Inc., a subsidiary of Polaris, and various public enforcement agencies with a document
15 entitled “60-Day Notice of Violation” pursuant to Health & Safety Code §25249.7(d) (the
16 “Notice”), alleging that Defendant was in violation of Proposition 65 for failing to warn consumers
17 and customers that Cycle Country Hot Thermal Grips exposed users in California to DINP. No
18 public enforcer has brought and is diligently prosecuting the claims alleged in the Notice. On
19 October 25, 2017, Ferreiro filed a complaint in the matter (the “Complaint”).

20 1.4 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
21 jurisdiction over Defendant as to the allegations contained in the Complaint filed in this matter, that
22 venue is proper in the County of Alameda, and that this Court has jurisdiction to approve, enter,
23 and oversee the enforcement of this Consent Judgment as a full and final binding resolution of all
24 claims which were or could have been raised in the Complaint based on the facts alleged therein
25 and/or in the Notice.

26 1.5 Defendant denies the material allegations contained in Ferreiro’s Notice and
27 Complaint and maintains that it has not violated Proposition 65. Nothing in this Consent Judgment
28

1 shall be construed as an admission by Defendant of any fact, finding, issue of law, or violation of
2 law; nor shall compliance with this Consent Judgment constitute or be construed as an admission
3 by Defendant of any fact, finding, conclusion, issue of law, or violation of law, such being
4 specifically denied by Defendant. However, this section shall not diminish or otherwise affect the
5 obligations, responsibilities, and duties of Defendant under this Consent Judgment.

6 **2. DEFINITIONS**

7 2.1 **Covered Products.** The term "Covered Products" means handlebar grips, including
8 but not limited to, Cycle Country Hot Thermal Grips, UPC No. 6 6010300694 3, that are
9 manufactured, distributed and/or offered for sale in California by Polaris, and that contain DINP.

10 2.2 **Effective Date.** The term "Effective Date" means the date this Consent Judgment is
11 entered as a Judgment of the Court.

12 **3. INJUNCTIVE RELIEF: WARNINGS**

13 3.1 Commencing ninety (90) days after the Effective Date, Polaris shall not
14 manufacture, import, or purchase for sale in California any Covered Product that contains more
15 than 1,000 parts per million DINP, unless the Covered Product is accompanied by one of the
16 following warning(s):

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

19 Or

20 WARNING: This product contains a chemical known to the State of California to cause
21 cancer.

22 Or

23 WARNING: This product can expose you to chemicals including DINP, which is known to
24 the State of California to cause cancer. For more information go to
25 www.P65Warnings.ca.gov

26 3.2 The warning provided pursuant to Section 3.1 shall be affixed to or printed on the
27 Covered Product's packaging or labeling. The warning shall be prominently affixed to or printed
28 on the packaging or labeling and displayed with such conspicuousness, as compared with other

1 words, statements, or designs as to render it likely to be read and understood by an ordinary
2 individual under customary conditions of purchase or use. A warning may be contained in the same
3 section of the packaging, labeling, or instruction booklet that states other safety warnings, if any,
4 concerning the use of the product and shall be at least the same size as those other safety warnings.

5 **4. MONETARY TERMS**

6 4.1 **Civil Penalty.** Polaris shall pay a Civil Penalty of \$1,000.00 pursuant to Health and
7 Safety Code section 25249.7(b), to be apportioned in accordance with California Health & Safety
8 Code § 25192, with 75% of these funds remitted to the State of California's Office of
9 Environmental Health Hazard Assessment and the remaining 25% of the penalty remitted to
10 Ferreiro, as provided by California Health & Safety Code § 25249.12(d).

11 4.1.1 Within ten (10) business days of the Effective Date, Polaris shall issue two
12 separate checks for the Civil Penalty payment to (a) "OEHHA" in the amount of \$750.00; and (b)
13 "Brodsky & Smith, LLC in Trust for Ferreiro" in the amount of \$250.00. Payment owed to
14 Ferreiro pursuant to this Section shall be delivered to the following payment address:

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

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

21 For United States Postal Service Delivery:

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

27 For Non-United States Postal Service Delivery:

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

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

3 4.2 **Conditional Civil Penalty.** One Hundred Twenty (120) days after the Effective
4 Date, Polaris shall make a Conditional Civil Penalty payment of \$1,000.00 on the same terms as
5 set forth in Section 4.1.1 pertaining to the Civil Penalty. Pursuant to Title 11 California Code of
6 Regulations, Section 3203(c), Ferreiro agrees that the Conditional Civil Penalty payment shall be
7 waived in its entirety if, on or before the Conditional Civil Penalty payment is due, an officer of
8 Polaris provides Plaintiff with a signed declaration certifying that all Covered Products it ships for
9 sale or distributes for sale in California as of the date of its certification are Reformulated Products¹
10 or are marked with the warnings required by this Consent Decree (hereinafter "Labeled Product")
11 and that Polaris will, to the best of its knowledge, continue to offer only Reformulated Products or
12 Labeled Products in California in the future. The option to provide a declaration certifying its
13 complete early reformulation or labeling of the Covered Products in lieu of making the Conditional
14 Civil Penalty payment otherwise required by this Section is a material term, and time is of the
15 essence.

16 4.3 **Attorney Fees.** Polaris shall pay \$14,000.00 to Brodsky & Smith, LLC ("Brodsky
17 Smith") as complete reimbursement for Plaintiff Ferreiro's attorneys' fees and costs incurred as a
18 result of investigating, bringing this matter to Polaris's attention, litigating and negotiating and
19 obtaining judicial approval of a settlement in the public interest, pursuant to Code of Civil
20 Procedure section 1021.5. Payment shall be made within fourteen (14) business days of the
21 Effective Date and sent to the address for Brodsky & Smith set forth in section 4.1.1, above.

22 **5. RELEASE OF ALL CLAIMS**

23 5.1 This Consent Judgment is a full, final, and binding resolution between Ferreiro
24 acting in the public interest, and Polaris, and its parents, shareholders, divisions, subdivisions,
25 subsidiaries, partners, sister companies, and affiliates, and their successors and assigns ("Defendant
26

27 ¹ "Reformulated Products" are defined as Products that contain no more than 1,000 parts
28 per million DINP.

1 Releasees”), and all entities from whom they obtain and to whom they directly or indirectly
2 distribute or sell Covered Products, including but not limited to Kolpin Outdoors, Inc., Cycle
3 Country Accessories Corporation, Cycle Country, Cabela’s Incorporated, manufacturers, suppliers,
4 distributors, wholesalers, customers, licensors, licensees retailers, franchisees, and cooperative
5 members (“Downstream Defendant Releasees”), of all claims for violations of Proposition 65 based
6 on exposure to DINP from Covered Products as set forth in the Notice, with respect to any Covered
7 Products manufactured, distributed, or sold by Polaris prior to one hundred twenty (120) days after
8 the Effective Date. Compliance with the terms of this Consent Judgment constitutes compliance
9 with Proposition 65 with regard to the Covered Products.

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

22
23 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE
24 CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS FAVOR
25 AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY
26 HIM MUST HAVE MATERIALLY AFFECTED HIS SETTLEMENT WITH
27 THE DEBTOR.

28 5.3 Polaris 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

1 taken or made) by Ferreiro and his attorneys and other representatives, whether in the course of
2 investigating claims or otherwise seeking enforcement of Proposition 65 against it in this matter,
3 and/or with respect to Covered Products.

4 **6. INTEGRATION**

5 6.1 This Consent Judgment contains the sole and entire agreement of the Parties and
6 any and all prior negotiations and understandings related hereto shall be deemed to have been
7 merged within it. No representations or terms of agreement other than those contained herein exist
8 or have been made by any Party with respect to the other Party or the subject matter hereof.

9 **7. GOVERNING LAW**

10 7.1 The terms of this Consent Judgment shall be governed by the laws of the State of
11 California and apply within the State of California. In the event that Proposition 65 is repealed or
12 is otherwise rendered inapplicable by reason of law generally, or as to Covered Products, then
13 Defendant shall have no further obligations pursuant to this Consent Judgment with respect to, and
14 to the extent that, Covered Products are so affected.

15 **8. NOTICES**

16 8.1 Unless specified herein, all correspondence and notices required to be provided
17 pursuant to this Consent Judgment shall be in writing and personally delivered or sent by: (i) first-
18 class, (registered or certified mail) return receipt requested; or (ii) overnight courier on any party
19 by the other party at the following addresses:

20 For Defendant:

21
22 General Counsel
23 Polaris Industries Inc.
24 2100 Highway 55
25 Medina, MN 55340-9770

26 With a copy to:

27 Will Troutman
28 Norton Rose Fulbright US LLP
555 South Flower Street
Forty-First Floor
Los Angeles, California 90071

1 And

2 For Ferreiro:

3 Evan Smith
4 Brodsky & Smith, LLC
5 2 Bala Plaza, Suite 510
6 Bala Cynwyd, PA 19004

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

9 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

10 9.1 This Consent Judgment may be executed in counterparts and by facsimile, each of
11 which shall be deemed an original, and all of which, when taken together, shall constitute one and
12 the same document.

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

15 10.1 Ferreiro agrees to comply with the requirements set forth in California Health &
16 Safety Code §25249.7(f) and to promptly bring a Motion for Approval of this Consent Judgment
17 and Defendant agrees it shall support approval of such Motion.

18 10.2 This Consent Judgment shall not be effective until it is approved and entered by the
19 Court and shall be null and void if, for any reason, it is not approved by the Court. In such case,
20 the Parties agree to meet and confer on how to proceed and if such agreement is not reached within
21 30 days, the case shall proceed on its normal course.

22 10.3 If the Court approves this Consent Judgment and is reversed or vacated by an
23 appellate court, the Parties shall meet and confer as to whether to modify the terms of this Consent
24 Judgment. If the Parties do not jointly agree on a course of action to take, the case shall proceed on
25 its normal course on the trial court's calendar.

26 **11. MODIFICATION**

27 11.1 This Consent Judgment may be modified only by further stipulation of the Parties
28 and the approval of the Court or upon the granting of a motion brought to the Court by either Party.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

12. ATTORNEY'S FEES

12.1 A party who unsuccessfully brings or contests an action arising out of this Consent Judgment shall be required to pay the prevailing party's reasonable attorney's fees and costs unless the unsuccessful party has acted with substantial justification. For purposes of this Consent Judgment, the term substantial justification shall carry the same meaning as used in the Civil Discovery Act of 1986, Code of Civil Procedure Section 2016, et seq.

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

13. RETENTION OF JURISDICTION

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

//
//
//
//
//
//
//
//
//
//
//
//
//

14. AUTHORIZATION

14.1 The undersigned are authorized to execute this Consent Judgment on behalf of their respective Parties and have read, understood and agree to all of the terms and conditions of this document and certifies that he or she is fully authorized by the Party he or she represents to execute

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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: 11/17/2017

Date: October 31, 2017

By: Anthony Ferreiro
ANTHONY FERREIRO

By: [Signature]
POLARIS INDUSTRIES INC.

IT IS SO ORDERED, ADJUDGED AND DECREED:

Dated: 1/9/18

[Signature]
Judge of Superior Court

Robert D. McGuinness