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FILED
ALAMEDA COUNTY

MAY 21 2020

CLERK OF THE SUPERIOR COURT
By A. Ampson Deputy

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

11 ANTHONY FERREIRO,

12 Plaintiff,

13 v.

14 MESSINGSCHLAGER GMBH & CO. KG,
15 WALMART, INC.,

16 Defendants.

Case No.: RG19032851

CONSENT JUDGMENT

Judge: Noel Wise

Dept.: 24

Hearing Date: ~~April 16, 2020~~ May 21, 2020

Hearing Time: 9:00 AM

Reservation #: R-2162710

Filed By Fax

1
CONSENT JUDGMENT

11524387.1

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 Cycle Force Group
4 ("Cycle Force" 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. Cycle Force is alleged to be a
8 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 di(2-ethylhexyl) phthalate (DEHP) from its sales of (a) M-Wave (phone) armbands,
12 and (b) Ventura cable locks without providing a clear and reasonable exposure warning pursuant
13 to Proposition 65. DEHP is listed under Proposition 65 as a chemical known to the State of
14 California to cause cancer and reproductive toxicity.

15 **1.3 Notices of Violation/Complaint.**

16 **1.3.1** On or about August 27, 2018, Ferreiro served Messingschlager GmbH & Co.
17 KG ("Messingschlager"), Walmart Inc. ("Walmart"), and various public enforcement agencies with
18 documents entitled "60-Day Notice of Violation" pursuant to Health & Safety Code §25249.7(d)
19 (the "August Notice"), alleging that Messingschlager and Walmart violated Proposition 65 for
20 failing to warn consumers and customers that use of M-Wave (phone) armbands expose users in
21 California to DEHP. No public enforcer has brought and is diligently prosecuting the claims alleged
22 in the August Notice. On August 27, 2019, Ferreiro filed a complaint (the "Complaint") in the
23 matter, naming Messingschlager and Walmart as defendants.

24 **1.3.2** Thereafter, on or about April 11, 2019, Ferreiro served Kohl's Department
25 Stores, Inc. ("Kohl's"), and various public enforcement agencies with documents entitled "60-Day
26 Notice of Violation" pursuant to Health & Safety Code §25249.7(d) (the "April Notice"), alleging
27 that Kohl's violated Proposition 65 for failing to warn consumers and customers that use of Ventura
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1 cable locks expose users in California to DEHP. No public enforcer has brought and is diligently
2 prosecuting the claims alleged in the April Notice.

3 1.3.3 The August Notice and the April Notice are collectively referred to herein
4 as, the "Notices."

5 1.3.4 Following the filing of the Complaint, defendant Cycle Force, the US
6 distributor for Messingschlager, was subsequently identified as the supplier of the products
7 identified in the Notices and entered negotiations with Plaintiff to resolve claims concerning the
8 products identified in the Notices and in the Complaint.

9 1.3.5 On or about February 25, 2020, the Complaint was amended in order to name
10 Cycle Force as defendant, and in order to add claims related to the April Notice (the "Amended
11 Complaint")

12 1.3.6 The Complaint and the Amended Complaint are collectively referred to
13 herein as, the Action.

14 1.4 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
15 jurisdiction over Defendant as to the allegations contained in the Action, that venue is proper in the
16 County of Alameda, and that this Court has jurisdiction to approve, enter, and oversee the
17 enforcement of this Consent Judgment as a full and final binding resolution of all claims which
18 were or could have been raised in the Action based on the facts alleged therein and/or in the Notices.

19 1.5 Defendant denies the material allegations contained in the Notices and the Action
20 and maintains that it has not violated Proposition 65. Nothing in this Consent Judgment shall be
21 construed as an admission by Defendant of any fact, finding, issue of law, or violation of law; nor
22 shall compliance with this Consent Judgment constitute or be construed as an admission by
23 Defendant of any fact, finding, conclusion, issue of law, or violation of law, such being specifically
24 denied by Defendant. However, this section shall not diminish or otherwise affect the obligations,
25 responsibilities, and duties of Defendant under this Consent Judgment.

26 **2. DEFINITIONS**

27 2.1 **Covered Products.** The term "Covered Products" means (a) M-Wave (phone)
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1 armbands, and (b) Ventura cable locks that are manufactured, distributed and/or offered for sale in
2 California by Cycle Force.

3 2.2 **Effective Date.** The term "Effective Date" means the date this Consent Judgment is
4 entered as a Judgment of the Court.

5 **3. INJUNCTIVE RELIEF: WARNINGS**

6 3.1 **Reformulation of Covered Products.** As of the date this Consent Judgment is
7 signed by both Parties, and continuing thereafter, Covered Products that Cycle Force directly
8 manufactures, imports, distributes, sells, or offers for sale in California shall either: (a) be
9 Reformulated Products pursuant to § 3.2, below; or (b) be labeled with a clear and reasonable
10 exposure warning pursuant to §§ 3.3 and 3.4, below. For purposes of this Consent Judgment, a
11 "Reformulated Product" is a Covered Product that is in compliance with the standard set forth in §
12 3.2 below. The warning requirement set forth in §§ 3.3 and 3.4 shall not apply to any Reformulated
13 Product.

14 3.2 **Reformulation Standard.** "Reformulated Products" shall mean Covered Products
15 that contain concentrations less than or equal to 0.1% (1,000 parts per million (ppm)) of DEHP
16 when analyzed pursuant to U.S. Environmental Protection Agency testing methodologies 3580A
17 and 8270C or other methodology utilized by federal or state government agencies for the purpose
18 of determining the phthalate content in a solid substance.


19 3.3 **Clear and Reasonable Warning.** As of the date this Consent Judgment is signed
20 by both Parties, and continuing thereafter, a clear and reasonable exposure warning as set forth in
21 this §§ 3.3 and 3.4 must be provided for all Covered Products that Defendant manufacturers,
22 imports, distributes, sells, or offers for sale in California that is not a Reformulated Product. There
23 shall be no obligation for Defendant to provide a warning for Covered Products that enter the stream
24 of commerce prior to the date this Consent Judgment is signed by both Parties. The warning shall
25 consist of either the **Warning** or **Alternative Warning** described in §§ 3.3(a) or (b), respectively:

26 (a) **Warning.** The "Warning" shall consist of the statement:

27 **⚠ WARNING:** This product can expose you to chemicals including di(2-
28 ethylhexyl) phthalate (DEHP), which is known to the State of California to cause

1 cancer and birth defects or other reproductive harm. For more information go to
2 www.P65Warnings.ca.gov.

3 (b) **Alternative Warning:** Cycle Force may, but is not required to, use the alternative
4 short-form warning as set forth in this § 3.3(b) ("**Alternative Warning**") as follows:

5  **WARNING:** Cancer and Reproductive Harm - www.P65Warnings.ca.gov.

6 3.4 A **Warning** or **Alternative Warning** provided pursuant to § 3.3 must print the word
7 "**WARNING:**" in all capital letters and in bold font, followed by a colon. The warning symbol to
8 the left of the word "**WARNING:**" must be a black exclamation point in a yellow equilateral
9 triangle with a black outline, except that if the sign or label for the Covered Product does not use
10 the color yellow, the symbol may be in black and white. The symbol must be in a size no smaller
11 than the height of the word "**WARNING:**". The warning shall be affixed to or printed on the
12 Covered Product's packaging or labeling, or on a placard, shelf tag, sign or electronic device or
13 automatic process, providing that the warning is displayed with such conspicuousness, as compared
14 with other words, statements, or designs as to render it likely to be read and understood by an
15 ordinary individual under customary conditions of purchase or use. A warning may be contained
16 in the same section of the packaging, labeling, or instruction booklet that states other safety
17 warnings, if any, concerning the use of the Covered Product and shall be at least the same size as
18 those other safety warnings.

19 If Cycle Force sells Covered Products via an internet website to customers located in
20 California, the warning requirements of this section shall be satisfied if the foregoing warning
21 appears either: (a) on the same web page on which a Covered Product is displayed and/or described;
22 (b) on the same page as the price for the Covered Product; or (c) on one or more web pages
23 displayed to a purchaser prior to purchase during the checkout process. Alternatively, a symbol
24 consisting of a black exclamation point in a yellow or white equilateral triangle may appear adjacent
25 to or immediately following the display, description, price, or checkout listing of the Covered
26 Product, if the warning statement appears elsewhere on the same web page in a manner that clearly
27 associates it with the product(s) to which the warning applies.
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1 3.5 **Compliance with Warning Regulations.** Defendant shall be deemed to be in
2 compliance with this Consent Judgment by either adhering to §§ 3.3 and 3.4 of this Consent
3 Judgment or by complying with warning requirements adopted by the State of California's Office
4 of Environmental Health Hazard Assessment ("OEHHA") after the Effective Date.

5 **4. MONETARY TERMS**

6 4.1 **Civil Penalty.** Cycle Force shall pay \$2,000.00 as a Civil Penalty pursuant to Health
7 and Safety Code section 25249.7(b), to be apportioned in accordance with California Health &
8 Safety Code § 25192, with 75% of these funds remitted to OEHHA and the remaining 25% of the
9 Civil Penalty remitted to Ferreiro, as provided by California Health & Safety Code § 25249.12(d).

10 4.1.1 By or before July, 1, 2020, Cycle Force shall issue two separate checks for
11 the Civil Penalty payment to (a) "OEHHA" in the amount of \$1,500.00; and to (b) "Brodsky &
12 Smith, LLC in Trust for Ferreiro" in the amount of \$500.00. Payment owed to Ferreiro pursuant
13 to this Section shall be delivered to the following payment address:

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

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

20 For United States Postal Service Delivery:

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

26 For Non-United States Postal Service Delivery:

27 Mike Gyurics
28 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 address
2 set forth above as proof of payment to OEHHA.

3 4.2 **Attorneys' Fees.** Cycle Force shall pay \$18,000.00 to Brodsky & Smith, LLC
4 ("Brodsky Smith") as complete reimbursement for Ferreiro's attorneys' fees and costs incurred as
5 a result of investigating, bringing this matter to Cycle Force's attention, litigating and negotiating
6 and obtaining judicial approval of a settlement in the public interest, pursuant to Code of Civil
7 Procedure § 1021.5. Payment pursuant to this Section shall be as follows:

8 4.2.1 By or before August 1, 2020, Cycle Force shall issue a check to "Brodsky &
9 Smith, LLC" in the amount of \$2,000.00 for delivery to the Brodsky Smith address identified in
10 Section 4.1.1, above;

11 4.2.2 By or before September 1, 2020, Cycle Force shall issue a check to "Brodsky
12 & Smith, LLC" in the amount of \$2,000.00 for delivery to the Brodsky Smith address identified in
13 Section 4.1.1, above;

14 4.2.3 By or before November 1, 2020, Cycle Force shall issue a check to "Brodsky
15 & Smith, LLC" in the amount of \$2,000.00 for delivery to the Brodsky Smith address identified in
16 Section 4.1.1, above;

17 4.2.4 By or before December 1, 2020, Cycle Force shall issue a check to "Brodsky
18 & Smith, LLC" in the amount of \$2,000.00 for delivery to the Brodsky Smith address identified in
19 Section 4.1.1, above;

20 4.2.5 By or before January 1, 2021, Cycle Force shall issue a check to "Brodsky
21 & Smith, LLC" in the amount of \$2,000.00 for delivery to the Brodsky Smith address identified in
22 Section 4.1.1, above;

23 4.2.6 By or before February 1, 2021, Cycle Force shall issue a check to "Brodsky
24 & Smith, LLC" in the amount of \$2,000.00 for delivery to the Brodsky Smith address identified in
25 Section 4.1.1, above;
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1 4.2.7 By or before March 1, 2021, Cycle Force shall issue a check to "Brotsky &
2 Smith, LLC" in the amount of \$2,000.00 for delivery to the Brodsky Smith address identified in
3 Section 4.1.1, above;

4 4.2.8 By or before April 1, 2021, Cycle Force shall issue a check to "Brotsky &
5 Smith, LLC" in the amount of \$2,000.00 for delivery to the Brodsky Smith address identified in
6 Section 4.1.1, above; and

7 4.2.9 By or before May 1, 2021, Cycle Force shall issue a check to "Brotsky &
8 Smith, LLC" in the amount of \$2,000.00 for delivery to the Brodsky Smith address identified in
9 Section 4.1.1, above.

10 4.2.10 For all amounts due and owing pursuant to this Section that are not received
11 within five (5) calendar days of the date it is due, Cycle Force shall be liable for late payment fees
12 equal to \$100/day for each day the payment is late.

13 **5. RELEASE OF ALL CLAIMS**

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

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

17 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS THAT THE
18 CREDITOR OR RELEASING PARTY DOES NOT KNOW OR SUSPECT TO
19 EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE
20 RELEASE AND THAT, IF KNOWN BY HIM OR HER, WOULD HAVE
21 MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE
22 DEBTOR OR RELEASED PARTY.

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

28 6. INTEGRATION

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

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

7. GOVERNING LAW

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

8. NOTICES

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

For Defendant:

Michael J. Gleason
Hahn Loeser & Parks LLP
One America Plaza
600 West Broadway, Suite 1500
San Diego, CA 92101

And

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.

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, the
8 Parties agree to meet and confer on how to proceed and if such agreement is not reached within 30
9 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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1 document and certify that he or she is fully authorized by the Party he or she represents to execute
2 the Consent Judgment on behalf of the Party represented and legally bind that Party. Except as
3 explicitly provided herein each Party is to bear its own fees and costs.
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5 **AGREED TO:**

AGREED TO:

6 Date: 2/20/20

Date: SEP. 17, 2020

7 By: Anthony Ferreiro
8 ANTHONY FERREIRO

By: [Signature]
CYCLE FORCE GROUP

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10
11 **IT IS SO ORDERED, ADJUDGED AND DECREED:**

12 Dated: 5/21/20

13 [Signature]
14 Judge of Superior Court
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