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9 PRECILA BALABBO

FILED
San Francisco County Superior Court

JUL 27 2023

CLERK OF THE COURT
BY: 
Deputy Clerk

10
11 SUPERIOR COURT OF THE STATE OF CALIFORNIA
12 COUNTY OF SAN FRANCISCO

13 PRECILA BALABBO,

14 Plaintiff,

15 v.

16 PACIFIC CYCLE, INC.,

17 Defendant.

Case No. CGC-22-603011

[PROPOSED] CONSENT JUDGMENT

Judge: Richard B. Ulmer

Dept.: 302

Hearing Date: July 27, 2023

Hearing Time: 9:30 AM

Complaint Filed: November 15, 2022

18 **1. INTRODUCTION**

19 1.1 **The Parties.** This Consent Judgment is entered into by and between Precila Balabbo
20 acting on behalf of the public interest ("Balabbo") and Pacific Cycle, Inc. ("Pacific Cycle" or
21 "Defendant") with Balabbo and Defendant collectively referred to as the "Parties" and each of them
22 as a "Party." Balabbo is an individual residing in California that seeks to promote awareness of
23 exposures to toxic chemicals and improve human health by reducing or eliminating hazardous
24 substances contained in consumer products. Pacific Cycle is alleged to be a person in the course of
25 doing business for purposes of Proposition 65, Cal. Health & Safety Code §§ 25249.6 et seq.

26 1.2 **Allegations and Representations.** Balabbo alleges that Defendant has exposed
27 individuals to bisphenol A (BPA) from its sales of Schwinn Water Bottle Cages without providing a
28 clear and reasonable exposure warning pursuant to Proposition 65. BPA is listed under Proposition
65 as a chemical known to the State of California to cause birth defects or other reproductive harm.

1 1.3 **Notice of Violation/Complaint.** On or about September 14, 2021, Balabbo served
2 Pacific Cycle, Target Corporation, Target Brands, Inc. (Collectively, “Target”), Dorel Industries
3 (“Dorel”), and various public enforcement agencies with documents entitled “60-Day Notice of
4 Violation” pursuant to Health & Safety Code § 25249.7(d) (the “Notice”), alleging that Defendant
5 violated Proposition 65 for failing to warn consumers and customers that use of Schwinn Water
6 Bottle Cages expose users in California to BPA. No public enforcer has brought and is diligently
7 prosecuting the claims alleged in the Notice. On November 15, 2022, Balabbo filed a complaint (the
8 “Complaint”) in the matter.

9 1.4 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
10 jurisdiction over Defendant as to the allegations contained in the Complaint filed in this matter, that
11 venue is proper in the County of San Francisco, and that this Court has jurisdiction to approve, enter,
12 and oversee the enforcement of this Consent Judgment as a full and final binding resolution of all
13 claims which were or could have been raised in the Complaint based on the facts alleged therein
14 and/or in the Notice.

15 1.5 Defendant denies the material allegations contained in Balabbo’s Notice and
16 Complaint and maintains that it has not violated Proposition 65. Nothing in this Consent Judgment
17 shall be construed as an admission by Defendant of any material allegation of the Complaint (each
18 and every allegation of which Defendant denies), any fact, conclusion of law, issue of law or
19 violation of law, including without limitation, any admission concerning any violation of Proposition
20 65 or any other statutory, regulatory, common law, or equitable doctrine, or the meaning of the terms
21 “knowingly and intentionally expose” or “clear and reasonable warning” as used in Health and
22 Safety Code § 25249.6. Nothing in this Consent Judgment, nor compliance with its terms, shall
23 constitute or be construed as an admission by Defendant of any fact, conclusion of law, issue of law,
24 or violation of law, or of fault, wrongdoing, or liability by any Defendant, its officers, directors,
25 employees, or parent, subsidiary, or affiliated corporations, or be offered or admitted as evidence in
26 any administrative or judicial proceeding or litigation in any court, agency, or forum. Nothing in this
27 Consent Judgment shall be construed as an admission by Defendant of any fact, finding, issue of
28 law, or violation of law; nor shall compliance with this Consent Judgment constitute or be construed

1 as an admission by Defendant of any fact, finding, conclusion, issue of law, or violation of law, such
2 being specifically denied by Defendant. However, this section shall not diminish or otherwise affect
3 the obligations, responsibilities, and duties of Defendant under this Consent Judgment.

4 **2. DEFINITIONS**

5 2.1 **Covered Products.** The term "Covered Products" means Schwinn Water Bottle
6 Cages that are manufactured, distributed and/or offered for sale in California.

7 2.2 **Effective Date.** The term "Effective Date" means the date this Consent Judgment is
8 entered as a Judgment of the Court.

9 **3. INJUNCTIVE RELIEF: REFORMULATION AND/OR WARNINGS**

10 3.1 **Reformulation of Covered Products.** As of the date this Consent Judgment is
11 signed by both Parties, and continuing thereafter, Covered Products that Pacific Cycle directly
12 manufactures, imports, distributes, sells, or offers for sale in California shall either: (a) be
13 Reformulated Products pursuant to § 3.2, below; or (b) be labeled with a clear and reasonable
14 exposure warning pursuant to §§ 3.3 and 3.4, below. For purposes of this Consent Judgment, a
15 "Reformulated Product" is a Covered Product that is in compliance with the standard set forth in §
16 3.2 below. The warning requirement set forth in §§ 3.3 and 3.4 shall not apply to any Reformulated
17 Product.

18 3.2 **Reformulation Standard.** "Reformulated Products" shall mean any Covered
19 Products subject to this Settlement Agreement that achieve a wipe result equal to, or less than, 3
20 micrograms of BPA.

21 3.2.1 **Wipe Test Protocol.** The "Wipe Test Protocol" for determining if a Covered
22 Product qualifies as a Reformulated Product is as follows:

23 3.2.1(a) Accessible sample surface of Product is rubbed by wipe sample
24 swabs/paper wetted with HPLC grade water heated to 98 °F sixty (60) times along
25 longitudinal, latitudinal and diagonal orientation.

26 3.2.1(b) Wipe sample swabs/paper is extracted with methanol on wrist
27 shaker for one (1) hour.
28

1 3.2.1(c) Reformulated Products are Covered Products achieving a wipe
2 result equal to, or less than, 3 micrograms of BPA.

3 3.3 **Clear and Reasonable Warning.** As of the date this Consent Judgment is signed by
4 both Parties, and continuing thereafter, a clear and reasonable exposure warning as set forth in this
5 §§ 3.3 and 3.4 must be provided for all Covered Products that Defendant manufacturers, imports,
6 distributes, sells, or offers for sale in California that is not a Reformulated Product. There shall be no
7 obligation for Defendant to provide a warning for Covered Products that enter the stream of
8 commerce (*i.e.* product that has been manufactured, has shipped, or has sold) prior to the Effective
9 Date. The warning shall consist of either the **Warning** or **Alternative Warning** described in §§
10 3.3(a) or (b), respectively:

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

12 **⚠ WARNING:** This product can expose you to chemicals including Bisphenol A
13 (BPA), which is known to the State of California to cause birth defects or other
14 reproductive harm. For more information go to www.P65Warnings.ca.gov.

15 (b) **Alternative Warning:** Pacific Cycle may, but is not required to, use the alternative
16 short-form warning as set forth in this § 3.3(b) (“**Alternative Warning**”) as follows:

17 **⚠ WARNING:** Reproductive Harm - www.P65Warnings.ca.gov.

18 (c) Pacific Cycle may use any form of “safe harbor” warning set forth in Proposition 65
19 regulations that are adopted at the time it places a Covered Product into the stream of commerce that
20 are applicable to the Covered Product and the exposures at issue.

21 3.4 A **Warning** or **Alternative Warning** provided pursuant to § 3.3 must print the word
22 “**WARNING:**” in all capital letters and in bold font, followed by a colon. The warning symbol to
23 the left of the word “**WARNING:**” must be a black exclamation point in a yellow equilateral
24 triangle with a black outline, except that if the sign or label for the Covered Product does not use the
25 color yellow, the symbol may be in black and white. The symbol must be in a size no smaller than
26 the height of the word “**WARNING:**”. The **Warning** or **Alternative Warning** shall be affixed to or
27 printed on the Covered Product’s packaging or labeling, or on a placard, shelf tag, sign or electronic
28 device or automatic process, provided that the **Warning** or **Alternative Warning** is displayed with

1 such conspicuousness, as compared with other words, statements, or designs as to render it likely to
2 be read and understood by an ordinary individual under customary conditions of purchase or use.
3 The **Warning** or **Alternative Warning** may be contained in the same section of the packaging,
4 labeling, or instruction booklet that states other safety warnings, if any, concerning the use of the
5 Covered Product and shall be at least the same size as those other safety warnings.

6 In addition to affixing the **Warning** or **Alternative Warning** to the Covered Product's
7 packaging or labeling, the **Warning** or **Alternative Warning** shall be posted on websites where
8 Defendant offers Covered Products for sale to consumers in California. The requirements of this
9 Section shall be satisfied if the **Warning** or **Alternative Warning**, or a clearly marked hyperlink
10 using the word "**WARNING**," appears on the product display page, or by otherwise prominently
11 displaying the warning to the purchaser prior to completing the purchase. To comply with this
12 Section, Defendant shall (a) post the **Warning** or **Alternative Warning** on its own website and, if it
13 has the ability to do so, on the websites of third-party internet sellers that Defendant has written
14 agreements with; and (b) if Defendant does not have the ability to post the **Warning** or **Alternative**
15 **Warning** on the websites of third-party internet sellers that it has written agreements with,
16 Defendant shall provide such third-party internet sellers with written notice in accordance with Title
17 27, California Code of Regulations, Section 25600.2. Third-party internet sellers of the Covered
18 Product that have been provided with written notice in accordance with Title 27, California Code of
19 Regulations, Section 25600.2 are not released, prospectively, following the Effective Date, in
20 Section 5 of this Agreement if they fail to meet the warning requirements of this Section.

21 3.5 **Compliance with Warning Regulations.** Defendant shall be deemed to be in
22 compliance with this Consent Judgment by either adhering to § 3 of this Consent Judgment or by
23 complying with warning requirements adopted by the State of California's Office of Environmental
24 Health Hazard Assessment ("OEHHA") applicable to the Covered Product and the exposures at
25 issue after the Effective Date.

26 **4. MONETARY TERMS**

27 4.1 **Civil Penalty.** Pacific Cycle shall pay \$3,000.00 as a Civil Penalty pursuant to Health
28 and Safety Code section 25249.7(b), to be apportioned in accordance with California Health &

1 Safety Code §§ 25249.12(c)(1) and (d), with 75% of these funds remitted to OEHHA and the
2 remaining 25% of the Civil Penalty remitted to Balabbo, as provided by California Health & Safety
3 Code § 25249.12(d).

4 4.1.1 Within ten (10) days of the Effective Date, Pacific Cycle shall issue two
5 separate checks for the Civil Penalty payment to (a) "OEHHA" in the amount of \$2,250.00; and to
6 (b) "Precila Balabbo" in the amount of \$750.00. Payment owed to Balabbo pursuant to this Section
7 shall be delivered to the following payment address:

8 Evan J. Smith, Esquire
9 Brodsky Smith
10 Two Bala Plaza, Suite 805
11 Bala Cynwyd, PA 19004

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

14 For United States Postal Service Delivery:

15 Mike Gyurics
16 Fiscal Operations Branch Chief
17 Office of Environmental Health Hazard Assessment
18 P.O. Box 4010
19 Sacramento, CA 95812-4010
20 For Non-United States Postal Service Delivery:

21 Mike Gyurics
22 Fiscal Operations Branch Chief
23 Office of Environmental Health Hazard Assessment
24 1001 I Street
25 Sacramento, CA 95814

26 A copy of the check payable to OEHHA shall be mailed to Brodsky Smith at the address set
27 forth above as proof of payment to OEHHA.

28 4.2 **Attorneys' Fees.** Within ten (10) days of the Effective Date, and upon provision of a
completed W-9 and payment instructions by Balabbo's attorneys, Defendant shall pay \$32,000.00 to
Brodsky Smith ("Brodsky Smith") as complete reimbursement for Balabbo's attorneys' fees and
costs incurred as a result of investigating, bringing this matter to Defendant's attention, litigating and
negotiating and obtaining judicial approval of a settlement in the public interest, pursuant to Code of
Civil Procedure § 1021.5.

1 **5. RELEASE OF ALL CLAIMS**

2 5.1 This Consent Judgment is a full, final, and binding resolution between Balabbo acting
3 on her own behalf, and on behalf of the public interest, and Defendant, and its past and present
4 parents, shareholders, members, directors, officers, managers, employees, representatives, agents,
5 insurers, attorneys, divisions, subdivisions, subsidiaries, partners, sister companies, and affiliates,
6 and their predecessors, successors and assigns (“Defendant Releasees”), and all entities from whom
7 they obtain, to whom they directly or indirectly distribute to, or sell Covered Products, or the
8 materials contained therein, including but not limited to, manufacturers, suppliers, distributors,
9 wholesalers, customers, licensors, licensees, retailers (including but not limited to, Pacific Cycle,
10 LLC, Dorel Industries Inc., Target Corporation, and Target Brands, Inc.) and each of their parents,
11 subsidiaries, and affiliated entities), franchisees, and cooperative members (“Downstream
12 Releasees”), of all claims for violations of Proposition 65 based on exposure to BPA from use of the
13 Covered Products as set forth in the Notice, with respect to any Covered Products manufactured,
14 distributed, or sold by Defendant prior to the Effective Date. It is the Parties’ intention that this
15 Consent Judgment shall have preclusive effect such that no other actions by private enforcers,
16 whether purporting to act in his, her, or its interests or the public interest shall be permitted to pursue
17 and/or take any action with respect to any violation of Proposition 65 based on exposure to BPA that
18 was alleged in the Complaint, or that could have been brought pursuant to the Notice against
19 Defendant, Defendant Releasees, and/or the Downstream Releasees of the Covered Products
20 (“Proposition 65 Claims”).

21 5.2 In addition to the foregoing, Balabbo, on behalf of herself, her past and current
22 agents, representatives, attorneys, and successors and/or assignees, and *not* in her representative
23 capacity, hereby waives all rights to institute or participate in, directly or indirectly, any form of
24 legal action and releases Defendant, Defendant Releasees, and Downstream Releasees from any and
25 all manner of actions, causes of action, claims, demands, rights, suits, obligations, debts, contracts,
26 agreements, promises, liabilities, damages, charges, losses, costs, expenses, and attorneys’ fees, of
27 any nature whatsoever, known or unknown, in law or equity, fixed or contingent, now or in the
28 future, with respect to any alleged violations of Proposition 65 related to or arising from Covered

1 Products manufactured, distributed, or sold by Pacific Cycle, Defendant Releasees or Downstream
2 Releasees. With respect to the foregoing waivers and releases in this paragraph, Balabbo hereby
3 specifically waives any and all rights and benefits which she now has, or in the future may have,
4 conferred by virtue of the provisions of § 1542 of the California Civil Code, which provides as
5 follows:

6
7 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS THAT THE
8 CREDITOR OR RELEASING PARTY DOES NOT KNOW OR SUSPECT TO
9 EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE
10 RELEASE AND THAT, IF KNOWN BY HIM OR HER, WOULD HAVE
11 MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR
12 OR RELEASED PARTY.

13
14 Balabbo understands and acknowledges that the significance and consequence of this waiver
15 of California Civil Code section 1542 is that even if she suffers future damages arising out of or
16 resulting from, or related directly or indirectly to, in whole or in part, Proposition 65 Claims arising
17 from any violation of Proposition 65 or any other statutory or common law regarding the failure to
18 warn about exposure to BPA from the Covered Products, including but not limited to any exposure
19 to, or failure to warn with respect to exposure to BPA from the Covered Products, Balabbo will not
20 be able to make any claim for those damages against Defendant, Defendant Releasees, and
21 Downstream Releasees. Furthermore, Balabbo acknowledges that she intends these consequences for
22 any such Proposition 65 Claims arising from any violation of Proposition 65 or any other statutory or
23 common law regarding the failure to warn about exposure to BPA from Covered Products as may
24 exist as of the date of this release but which she does not know exist, and which, if known, would
25 materially affect her decision to enter into this Consent Judgment, regardless of whether her lack of
26 knowledge is the result of ignorance, oversight, error, negligence, or any other cause.

27
28 5.3 Defendant waives any and all claims against Balabbo, her attorneys and other
representatives, for any and all actions taken, or statements made (or those that could have been
taken or made) by Balabbo and her attorneys and other representatives, whether in the course of
investigating claims or otherwise seeking enforcement of Proposition 65 against it in this matter,
and/or with respect to exposure to BPA from Covered Products.

1 **6. INTEGRATION**

2 6.1 This Consent Judgment contains the sole and entire agreement of the Parties and all
3 prior negotiations and understandings related hereto shall be deemed to have been merged within it.
4 No representations or terms of agreement other than those contained herein exist or have been made
5 by any Party with respect to the other Party or the subject matter hereof.

6 **7. GOVERNING LAW**

7 7.1 The terms of this Consent Judgment shall be governed by the laws of the State of
8 California and apply within the State of California. If Proposition 65 is repealed or is otherwise
9 rendered inapplicable by reason of law generally, or as to Covered Products, then Defendant shall
10 have no further obligations pursuant to this Consent Judgment with respect to, and to the extent that,
11 Covered Products are so affected.

12 **8. NOTICES**

13 8.1 Unless specified herein, all correspondence and notices required to be provided
14 pursuant to this Consent Judgment shall be in writing and personally delivered or sent by: (i) first-
15 class, (registered or certified mail) return receipt requested; or (ii) overnight courier on any party by
16 the other party at the following addresses:

17 For Defendant:

18 Jean-Paul P. Cart
19 Venable LLP
20 101 California St., Ste. 3800
San Francisco, CA 94111

21 And

22 For Balabbo:

23 Evan Smith
24 Brodsky Smith
25 9595 Wilshire Blvd., Ste. 900
Beverly Hills, CA 90212

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

28 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

1 9.1 This Consent Judgment may be executed in counterparts and by facsimile, each of
2 which shall be deemed an original, and all of which, when taken together, shall constitute one and
3 the same document.

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

6 10.1 Balabbo agrees to comply with the requirements set forth in California Health &
7 Safety Code § 25249.7(f) and to promptly bring a Motion for Approval of this Consent Judgment.
8 Defendant agrees it shall support approval of such Motion.

9 10.2 This Consent Judgment shall not be effective until it is approved and entered by the
10 Court and shall be null and void if, for any reason, it is not approved by the Court. In such case, the
11 Parties agree to meet and confer on how to proceed and if such agreement is not reached within 30
12 days, the case shall proceed on its normal course. If the Consent Judgment is approved, Balabbo
13 shall file a dismissal of this entire action with prejudice within three (3) business days of when the
14 Court approves the Consent Judgment.

15 10.3 If the Court approves this Consent Judgment and is reversed or vacated by an
16 appellate court, the Parties shall meet and confer as to whether to modify the terms of this Consent
17 Judgment. If the Parties do not jointly agree on a course of action to take, the case shall proceed on
18 its normal course on the trial court's calendar.

19 **11. MODIFICATION**

20 11.1 This Consent Judgment may be modified only by further stipulation of the Parties and
21 the approval of the Court or upon the granting of a motion brought to the Court by either Party.

22 **12. ATTORNEY'S FEES**

23 12.1 A Party who unsuccessfully brings or contests an action arising out of this Consent
24 Judgment shall be required to pay the prevailing party's reasonable attorney's fees and costs,
25 provided that any Party initiating legal action against another Party with respect to the Covered
26 Products or the contents/terms of this agreement must provide 60-days' notice prior to initiating such
27 action. During such 60-day period, the Party that receives such notice shall be permitted to cure any
28 alleged defect or lack of compliance, and the Parties agree that any such cure, if it resolves the

1 alleged defect or lack of compliance, shall serve as the full remedy for any prior alleged defects or
2 lack of compliance.

3 **13. RETENTION OF JURISDICTION**

4 13.1 This Court shall retain jurisdiction of this matter to implement or modify the Consent
5 Judgment.

6 **14. AUTHORIZATION**

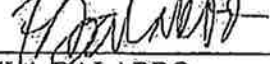
7 The undersigned are authorized to execute this Consent Judgment on behalf of their
8 respective Parties and have read, understood and agree to all of the terms and conditions of this
9 document and certify that he or she is fully authorized by the Party he or she represents to execute
10 the Consent Judgment on behalf of the Party represented and legally bind that Party. Except as
11 explicitly provided herein each Party is to bear its own fees and costs.

12
13 **AGREED TO:**

AGREED TO:

14 Date: 6/18/23

Date: _____

15 By: 
16 PRECILA BALABBO

By: _____
PACIFIC CYCLE, INC.

17
18
19 **IT IS SO ORDERED, ADJUDGED AND DECREED:**

20
21 Dated: _____


Judge of Superior Court

1 alleged defect or lack of compliance, shall serve as the full remedy for any prior alleged defects or
2 lack of compliance.

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5 Judgment.

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7 The undersigned are authorized to execute this Consent Judgment on behalf of their
8 respective Parties and have read, understood and agree to all of the terms and conditions of this
9 document and certify that he or she is fully authorized by the Party he or she represents to execute
10 the Consent Judgment on behalf of the Party represented and legally bind that Party. Except as
11 explicitly provided herein each Party is to bear its own fees and costs.

12
13 **AGREED TO:**

AGREED TO:

14
15 Date: _____

Date: 11/28/22

16 By: _____
17 PRECILA BALABBO

By: Charrise Fraccascia
PACIFIC CYCLE, INC.

18
19 **IT IS SO ORDERED, ADJUDGED AND DECREED:**

20
21 Dated: 7/27/23

Uen
Judge of Superior Court

RICHARD B. ULMER