

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

5 *Attorneys for Plaintiff*

6
7
8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF LOS ANGELES

10 ANTHONY FERREIRO,
11
12 Plaintiff,
13 vs.
14 WATER PIK, INC.,
15 Defendant.

Case No. BC605081

[PROPOSED] CONSENT JUDGMENT

Judge: Holly E. Kendig

Dept.: 42

Hearing Date: August 3, 2016

Hearing Time: 8:30 AM

Reservation ID: 160202101526

1 **1. Introduction**

2 1.1 On May 27, 2015, Anthony Ferreiro (“Ferreiro”) served Water Pik, Inc. (“Water
3 Pik”), Wal-Mart Stores, Inc. (“Wal-Mart”), UnbeatableSale.Com, Inc., and various public
4 enforcement agencies with a document entitled “Notice of Violation of California Health &
5 Safety Code § 25249.6, *et seq.*” (the “Notice”). The Notice provided Water Pik and such others,
6 including public enforcers, with notice that alleged that Water Pik was in purported violation of
7 California Health & Safety Code § 25249.6 (“Proposition 65”) for failing to warn consumers and
8 customers that shower massage cords associated with products distributed by Water Pik,
9 including but not limited to UPC Nos. 073950313483, 073950166379, and 073950170635 (the
10 “Products”), exposed users in California to the chemical Di(2-ethylhexyl) phthalate (DEHP). No
11 public enforcer has diligently prosecuted the allegations set forth in the Notice.

12 1.2 On December 22, 2015, Ferreiro filed a Complaint for Civil Penalties and
13 Injunctive Relief (“Complaint”) in Los Angeles County court (the “Court”), Case No. BC605081,
14 against Water Pik, alleging violations of Proposition 65 with respect to the Products (the
15 “Action”).

16 1.3 Water Pik is a corporation that employs more than ten persons under California
17 Health and Safety Code §25249.6 and offered the Products for sale within the State of California.

18 1.4 Ferreiro’s Complaint alleges, among other things, that Water Pik sold the Products
19 in California and/or to California citizens, that the Products contain DEHP, and that the resulting
20 exposure violated provisions of Proposition 65, by knowingly and intentionally exposing persons
21 to a chemical known to the State of California to cause cancer, without first providing a clear and
22 reasonable warning to such individuals.

23 1.5 For purposes of this Consent Judgment only, the parties stipulate that this Court
24 has jurisdiction over the allegations of violations contained in the Complaint and personal
25 jurisdiction over Water Pik as to the acts alleged in the Complaint, that venue is proper in the
26 County of Los Angeles, and that this Court has jurisdiction to enter this Consent Judgment as a
27 resolution of the allegations contained in the Complaint.

28

1 1.6 The parties enter into this Consent Judgment pursuant to a full settlement and
2 release of disputed claims between the parties as alleged in the Complaint for the purpose of
3 avoiding prolonged litigation. By execution of this Consent Judgment, Water Pik does not admit
4 any violation of Proposition 65 and specifically denies that it has committed any such violation.
5 Nothing in this Consent Judgment shall be construed as an admission by Water Pik of any fact,
6 issue of law, or violation of law, nor shall compliance with the Consent Judgment constitute or be
7 construed as an admission by Water Pik of any fact, issue of law, or violation of law. Nothing in
8 this Consent Judgment shall prejudice, waive, or impair any right, remedy or defense that Water
9 Pik may have in any other future legal proceeding. However, this paragraph shall not diminish or
10 otherwise affect the obligations, responsibilities and duties of Water Pik under this Consent
11 Judgment.

12 1.7 For purposes of this Consent Judgment, the term "Effective Date" shall mean June
13 16, 2016.

14 2. **Injunctive Relief**

15 By this Consent Judgment the parties agree that Water Pik may choose to comply with the
16 injunctive relief provisions in 2.1 to 2.2 below regarding reformulated products or provide a
17 Proposition 65 warning with respect to the Products in 2.3.

18 2.1 Commencing on the Effective Date, and continuing thereafter, Water Pik shall
19 only ship, sell, or offer for sale in California, reformulated Products pursuant to Section 2.2 or
20 Products that are labeled with a clear and reasonable warning pursuant to Section 2.3. For
21 purposes of this Settlement Agreement, "Reformulated Products" are Products that meet the
22 standard set forth in Section 2.2 below.

23 2.2 "Reformulated Products" shall mean Products that contains less than or equal to
24 1,000 parts per million ("ppm") of DEHP when analyzed pursuant to U.S. Environmental
25 Protection Agency testing methodologies 3580A and 8270C.

26 2.3 Commencing on the Effective Date, Water Pik shall provide a clear and reasonable
27 Proposition 65 warning for any Product that it ships, sells, or offers to ship or sell in California
28 that are not Reformulated Products. Water Pik shall provide the warning affixed to the packaging

1 or labeling with the following statement:

2 **CALIFORNIA PROPOSITION 65 WARNING:**

3 This product contains a chemical known to the State of California to cause cancer, and
4 birth defects or other reproductive harm.

5 The warning shall be prominently placed with such conspicuousness as compared with
6 other words, statements, designs, or devices as to render it likely to be read and understood by an
7 ordinary individual under customary conditions before purchase or use. Each warning shall be
8 provided in a manner such that the consumer or user is reasonably likely to understand to which
9 specific Products the warning applies, so as to minimize the risk of consumer confusion. Water
10 Pik may, but is not required, to use the plural "chemicals" in the above warning statement if it has
11 knowledge that the products will expose users to other chemicals.

12 In the event that the Office of Environmental Health Hazard Assessment promulgates one
13 or more regulations requiring or permitting warning text and/or methods of transmission different
14 than those set forth above, Water Pik shall be entitled to use, at its discretion, such other warning
15 text and/or method of transmission without being deemed in breach of this Consent Judgment.

16 **3. Entry of Consent Judgment**

17 3.1 The parties hereby request that the Court promptly approve and enter this Consent
18 Judgment. Upon entry of this Consent Judgment, Ferreiro and Water Pik waive their respective
19 rights to a hearing or trial on the allegations of the Complaint and Notice which are at issue in the
20 Action.

21 3.2 In the event that the California Attorney General objects or otherwise comments
22 on one or more provisions of this Consent Judgment, Ferreiro and Water Pik agree to take
23 reasonable steps to satisfy such concerns or objections.

24 **4. Matters Covered By This Consent Judgment**

25 4.1 **Plaintiff's Public Release of Proposition 65 Claims.** This Consent
26 Judgment is a final and binding resolution between Ferreiro, acting on his own behalf, and on
27 behalf of the public and in the public interest, and Water Pik, and shall have preclusive effect
28 such that no other person or entity, whether purporting to act in his, her, or its interests or the
public interest shall be permitted to pursue and/or take any action with respect to any violation of

1 Proposition 65 that was alleged in the Complaint, or that could have been brought pursuant to the
2 Notice.

3 **4.2 Plaintiff's Release of Additional Claims.** As to Ferreiro for and in his
4 individual capacity only, this Consent Judgment shall have preclusive effect such that he shall not
5 be permitted to pursue and/or take any action with respect to any other statutory or common law
6 claim, to the fullest extent that any of the foregoing were or could have been asserted by him
7 against Water Pik based on its alleged exposure of persons to DEHP in the Products, or its alleged
8 failure to provide a clear and reasonable warning of exposure to such individuals or, as to alleged
9 exposures to DEHP in the Products, any other claim based on whole or in part on the facts alleged
10 in the Complaint and the Notice, whether or not based on actions committed by Water Pik. As to
11 alleged exposures to DEHP in the Products, compliance with the terms of this Consent Judgment
12 is deemed sufficient to satisfy all obligations concerning, compliance by Water Pik with the
13 requirements of Proposition 65 with respect to the Products, and any alleged resulting exposure.

14 As to alleged exposures to DEHP in the Products, Ferreiro acting in his individual
15 capacity waives all rights to institute any form of legal action, and releases all claims against
16 Water Pik and each entity to whom Water Pik directly or indirectly has distributed or sold the
17 Product, including but not limited to, downstream distributors, wholesalers, customers, retailers
18 (including but not limited to Wal-Mart Stores, Inc. and its affiliates and subsidiaries), Wal-Mart
19 (including their respective parents, subsidiaries or affiliates, and assigns of any of them, who may
20 use, maintain, distribute or sell the Products) (collectively, "Releasees"), whether under
21 Proposition 65 or otherwise, arising out of or resulting from, or related directly or indirectly to, in
22 whole or in part, the Products or the Action, including but not limited to any exposure to, or
23 failure to warn with respect to, DEHP in the Products (referred to collectively in this Section as
24 the "Claims"). In furtherance of the foregoing, as to alleged exposures to DEHP in the Products,
25 Ferreiro waives any and all rights and benefits which he now has, or in the future may have,
26 conferred upon him with respect to the Claims by virtue of the provisions of § 1542 of the
27 California Civil Code, which provides as follows:

28 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE

1 CREDITOR DOES NOT KNOW OR SUSPECT EXIST IN HIS FAVOR AT
2 THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM
3 MUST HAVE MATERIALLY AFFECTED HIS SETTLEMENT WITH THE
4 DEBTOR.

5 Ferreiro understands and acknowledges that the significance and consequence of this
6 waiver of California Civil Code § 1542 is that even if Ferreiro suffers future damages arising out
7 of or resulting from, or related directly or indirectly to, in whole or in part, the Products, including
8 but not limited to any exposure to, or failure to warn with respect to exposure to, DEHP in the
9 Products, Ferreiro will not be able to make any claim for those damages against Releasees.

10 4.3 **Water Pik's Release of Plaintiff Ferreiro.** Water Pik, on behalf of itself, its past
11 and current agents, representatives, attorneys, successors and/or assignees, hereby waives any and
12 all claims against Ferreiro, his attorneys, and other representatives for any and all actions taken or
13 statements made (or those that could have been taken or made) by Ferreiro and his attorneys and
14 other representatives, whether in the course of investigating claims or otherwise seeking
15 enforcement of Proposition 65 against Water Pik in this matter.

16 **5. Enforcement of Judgment**

17 5.1 The terms of this Consent Judgment shall be enforced exclusively by the parties
18 hereto. The parties may, by noticed motion or order to show cause before the Court, giving the
19 notice required by law, enforce the terms and conditions contained herein. In any proceeding
20 brought by either party to enforce this Consent Judgment, such party may seek whatever fines,
21 costs, penalties or remedies as may be provided by law for any violation of Proposition 65 or this
22 Consent Judgment.

23 **6. Modification of Judgment**

24 6.1 This Consent Judgment may be modified only by written agreement of the parties
25 upon entry of a modified Consent Judgment by the Court thereon, or upon motion of any party as
26 provided by law and upon an entry of a modified Consent Judgment by the Court.

27 6.2 Should any court enter final judgment in a case brought by Ferreiro or the People
28 involving the Products that sets forth standards defining when Proposition 65 warnings will or

1 will not be required (“Alternative Standards”), or if the California Attorney General otherwise
2 provides written endorsement (i.e., a writing that is circulated by the Attorney General that is not
3 intended for the purpose of soliciting further input or comments) of Alternative Standards
4 applicable to products that are of the same general type and function as the Products and
5 constructed from the same materials, Water Pik shall be entitled to seek a modification of this
6 Consent Judgment on forty-five (45) days’ notice to Ferreiro so as to be able to utilize and rely on
7 such Alternative Standards in lieu of those set forth in Section 7 of this Consent Judgment.
8 Ferreiro shall not unreasonably contest any proposed application to effectuate such a modification
9 provided that the Products for which such a modification is sought are of the same general type
10 and function as those to which the Alternative Standards apply.

11 **7. Settlement Payment**

12 7.1 In settlement of all the claims referred to in this Consent Judgment, and without
13 any admission of liability therefore, Water Pik shall make the following monetary payments:

14 7.1.1 Water Pik shall pay a total of \$15,000.00 in civil penalties (the “Civil
15 Penalty”) in accordance with this Section. The Civil Penalty will be allocated in accordance with
16 California Health & Safety Code §§ 25249.12(c)(1) and (d), with 75% of the funds remitted to the
17 California Office of Environmental Health Hazard Assessment (“OEHHA”) and the remaining
18 25% of the funds remitted to Ferreiro. Each respective portion of the Civil Penalty shall be
19 delivered to the addresses listed in Section 7.1.3 below.

20 7.1.2 In addition to the Civil Penalty, Water Pik shall pay \$64,000.00 to Brodsky
21 & Smith, LLC (“Brodsky Smith”) as complete reimbursement for Ferreiro’s attorneys’ fees and
22 costs, including all investigation and laboratory costs and expert fees, incurred in the course of
23 serving the Notice and bringing the Action, and in enforcing Proposition 65, including without
24 limitation, preparation of the Notice letter and discussions with the California Attorney General.
25 Payment shall be made within seven (7) days of the Effective Date.

26 7.1.3 Within seven (7) days of the Effective Date, Water Pik shall issue two
27 separate checks for the Civil Penalty amounts to (a) “OEHHA” in the amount of \$11,250.00; and
28 (b) “Brodsky & Smith, LLC in Trust for Ferreiro” in the amount of \$3,750.00. Payment owed to

1 Ferreiro pursuant to this Section shall be delivered to the following payment address:

2 Evan J. Smith, Esq.
3 Brodsky & Smith, LLC
4 Two Bala Plaza, Suite 510
5 Bala Cynwyd, PA 19004

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

8 For United States Postal Service Delivery:

9 Mike Gyurics
10 Fiscal Operations Branch Chief
11 Office of Environmental Health Hazard Assessment
12 P.O. Box 4010
13 Sacramento, CA 95812-4010

14 For Non-United States Postal Service Delivery:

15 Mike Gyurics
16 Fiscal Operations Branch Chief
17 Office of Environmental Health Hazard Assessment
18 1001 I Street
19 Sacramento, CA 95814

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

22 **8. Notices**

23 8.1 Any and all notices between the parties provided for or permitted under this
24 Consent Judgment, or by law, shall be in writing and personally delivered or sent by: (i) first-
25 class (registered or certified mail) return receipt requested; or (ii) overnight or two-day courier on
26 any party by the other party to the following addresses:

27 For Water Pik:

28 Ryan Landis
Polsinelli PC, Polsinelli LLP
2049 Century Park East, Suite 2900
Los Angeles, CA 90067
T: 310.203.2313

For Ferreiro:

Evan J. Smith, Esq.
BRODSKY & SMITH, LLC
Two Bala Plaza, Suite 510

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. Authority to Stipulate

9.1 Each signatory to this Consent Judgment certifies that he or she is fully authorized by the party he or she represents to enter into this Consent Judgment and to execute it on behalf of the party represented and legally to bind that party.

10. Counterparts

10.1 This Consent Judgment may be signed in counterparts and shall be binding upon the parties hereto as if all said parties executed the original hereof.

11. Retention of Jurisdiction

11.1 This Court shall retain jurisdiction of this matter to implement the Consent Judgment.

12. Service on the California Attorney General

12.1 Ferreiro shall serve a copy of this Consent Judgment, signed by both parties, on the California Attorney General on behalf of the parties so that the Attorney General may review this Consent Judgment prior to its submittal to the Court for Approval. No sooner than forty-five (45) days after the Attorney General has received the aforementioned copy of this Consent Judgment, and in the absence of any written objection by the Attorney General to the terms of this Consent Judgment, the parties may then submit it to the Court for Approval.

13. Entire Agreement

13.1 This Consent Judgment contains the sole and entire agreement and understanding of the parties with respect to the entire subject matter hereof, and any and all discussions, negotiations, commitments and understandings related thereto. No representations, oral or otherwise, express or implied, other than those contained herein have been made by any party hereto. No other agreements not specifically referred to herein, oral or otherwise, shall be deemed to exist or to bind any of the parties.

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

14. Governing Law and Construction

14.1 The validity, construction and performance of this Consent Judgment shall be governed by the laws of the State of California, without reference to any conflicts of law provisions under California law.

15. Court Approval

15.1 If this Consent Judgment is not approved by the Court, it shall be of no force or effect, and cannot be used in any proceeding for any purpose.

IT IS SO STIPULATED:

Dated: June 13, 2016 Dated: _____

By: Anthony Ferreiro By: _____
Anthony Ferreiro Water Pik, Inc.

IT IS SO ORDERED, ADJUDGED AND DECREED:

Dated: _____ Judge of the Superior Court _____

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

14. Governing Law and Construction

14.1 The validity, construction and performance of this Consent Judgment shall be governed by the laws of the State of California, without reference to any conflicts of law provisions under California law.

15. Court Approval

15.1 If this Consent Judgment is not approved by the Court, it shall be of no force or effect, and cannot be used in any proceeding for any purpose.

IT IS SO STIPULATED:

Dated: _____

Dated: 6/13/2016

By: _____
Anthony Ferreiro

By: 
Water Pik, Inc.

IT IS SO ORDERED, ADJUDGED AND DECREED:

Dated: _____

Judge of the Superior Court