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

10 ANTHONY FERREIRO,
11
12 Plaintiff,
vs.
13 BATTENFELD TECHNOLOGIES,
INC.,
14
15 Defendant.

Case No. RG16823135

[PROPOSED] CONSENT JUDGMENT

Judge: Ioana Petrou

Dept.: 15

Hearing Date: September 22, 2016

Hearing Time: 9:00 AM

Reservation #: R-1763716

1 **1. Introduction**

2 1.1 On October 16, 2015, Anthony Ferreiro (“Ferreiro”) served Battenfeld
3 Technologies, Inc. (“Battenfeld”), Bass Pro Outdoor World, LLC, Bass Pro, LLC, Bass Pro
4 Intellectual Property, LLC, BPS Direct, LLC, American Sportsman Holdings Co. (collectively,
5 “Bass Pro”), and various public enforcement agencies with a document entitled “Notice of
6 Violation of California Health & Safety Code § 25249.6, *et seq.*” (the “Notice”). The Notice
7 provided Battenfeld and such others, including public enforcers, with notice that alleged that
8 Battenfeld was in violation of California Health & Safety Code § 25249.6 (“Proposition 65”), for
9 failing to warn consumers and customers that *Caldwell/E-Max Electronic Stereo Hearing*
10 *Protection, UPC No. 661120977001* (the “Product”) devices exposed users in California to the
11 chemical Di(2-ethylhexyl) phthalate (DEHP). No public enforcer has diligently prosecuted the
12 allegations set forth in the Notice.

13 1.2 On July 13, 2016, Ferreiro filed a Complaint for Civil Penalties and Injunctive
14 Relief (“Complaint”) in Alameda County Superior Court, Case No. RG16823135, against
15 Battenfeld alleging violations of Proposition 65.

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

18 1.4 Ferreiro’s Complaint alleges, among other things, that Battenfeld sold the Product
19 in California and/or to California citizens, that the Product contains DEHP, and that the resulting
20 exposure violated provisions of Proposition 65, by knowingly and intentionally exposing persons
21 to chemicals known to the State of California to cause both cancer and reproductive toxicity
22 without first providing a clear and 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 Battenfeld as to the acts alleged in the Complaint, that venue is proper in the
26 County of Alameda, and that this Court has jurisdiction to enter this Consent Judgment as a
27 resolution of the allegations contained in the Complaint.

28 1.6 The parties enter into this Consent Judgment pursuant to a full settlement of

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

11 1.7 For purposes of this Consent Judgment, the term "Effective Date" shall mean the
12 date that the Consent Judgment is entered by the Court.

13 **2. Injunctive Relief**

14 2.1 Commencing sixty (60) days after the Effective Date, and continuing thereafter,
15 Battenfeld shall manufacture or acquire for sale in California, only Reformulated Product
16 pursuant to Section 2.2 or Product that is labeled with a clear and reasonable warning pursuant to
17 Section 2.3. Battenfeld and its downstream retailers shall have no obligation to label Product that
18 Battenfeld manufactured or acquired before 60 days after the Effective Date. For purposes of this
19 Settlement Agreement, a "Reformulated Product" is Product that is in compliance with the
20 standard set forth below in section 2.2.

21 2.2 "Reformulated Product" shall mean Product that contains less than or equal to
22 1,000 parts per million ("ppm") of DEHP when analyzed pursuant to CPSC-CH-C1001-09.3
23 Standard Operating Procedure for Determination of Phthalates method.

24 2.3 Commencing sixty (60) days after the Effective Date, Battenfeld shall, for all
25 Product it manufactures or acquires, which is intended for sale in California and which is not a
26 Reformulated Product, provide clear and reasonable warnings as set forth in subsections 2.3(a)
27 and (b) below. The warning shall be prominently placed with such conspicuousness as compared
28 with other words, statements, designs, or devices as to render it likely to be read and understood

1 by an ordinary individual under customary conditions before purchase or use. Each warning shall
2 be provided in a manner such that the consumer or user understands to which specific Product the
3 warning applies, so as to minimize the risk of consumer confusion.

4 **(a) Retail Store Sales**

5 **(i) Product Labeling.** Battenfeld shall affix a warning to the
6 packaging, labeling or directly on each Product sold in retail outlets in California
7 by Battenfeld or any person selling the Product that states:

8 **[PROPOSITION 65] WARNING:**

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

11 The bracketed text may, but is not required to, be used.

12 **(ii) Point of Sale Warnings.** Alternatively, Battenfeld may

13 provide warning signs in the form below to its customers in California with
14 instructions to post the warnings in close proximity to the point of display
15 of the Product. Such instruction sent to Battenfeld customers shall be sent
16 by certified mail, return receipt requested.

17 **[PROPOSITION 65] WARNING:**

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

20 The bracketed text may, but is not required to, be used.

21 **(b) Mail Order Catalog Warning.** In the event that Battenfeld directly

22 sells Product via mail order catalog directly to consumers located in California that is not a
23 Reformulated Product, Battenfeld shall provide a warning for such Product sold via mail order
24 catalog to such California residents. A warning that is given in a mail order catalog shall be in
25 the same type size or larger than the Product description text within the catalog. The following
26 warning shall be provided on the same page and in the same location as the display and/or
27 description of the Product:

28 **[PROPOSITION 65] WARNING:**

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

1 Where it is impracticable to provide the warning on the same page and in the same location as the
2 display and/or description of the Product, Battenfeld may utilize a designated symbol to cross
3 reference the applicable warning and shall define the term “designated symbol” with the
4 following language on the inside of the front cover of the catalog or on the same page as any
5 order form for the Product:
6

7 **[PROPOSITION 65] WARNING:** Certain products identified with this symbol
8 ▼ and offered for sale in this catalog may contain a chemical known to the State
of California to cause cancer, birth defects or other reproductive harm.

9 The designated symbol must appear on the same page and in close proximity to the
10 display and/or description of the Product. On each page where the designated symbol appears,
11 Battenfeld must provide a header or footer directing the consumer to the warning language and
12 definition of the designated symbol.

13 **(c) Internet Sales Warning.** In the event that Battenfeld sells Product via
14 the internet directly to consumers located in California that is not a Reformulated Product,
15 Battenfeld shall provide a warning for such Product sold via the internet to such California
16 residents. A warning that is given on the internet shall be in the same type size or larger than the
17 Product description text and shall be given in conjunction with the direct sale of the Product. The
18 warning shall appear either: (a) on the same web page on which the Product is displayed; (b) on
19 the same web page as the order form for the Product; (c) on the same page as the price for the
20 Product; or (d) on one or more web pages displayed to a purchaser during the checkout process.

21 The following warning shall be provided:

22 **[PROPOSITION 65] WARNING:**

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

25 2.4 The warning requirements set forth in Section 2.3 shall not apply to any
26 Reformulated Product.

27 **3. Entry of Consent Judgment**

28 3.1 The parties hereby request that the Court promptly enter this Consent Judgment.

1 Upon entry of this Consent Judgment, Ferreiro and Battenfeld waive their respective rights to a
2 hearing or trial on the allegations of the Ferreiro Complaint and 60-Day Notice.

3 3.2 In the event that the Attorney General objects or otherwise comments on one or
4 more provisions of this Consent Judgment, Ferreiro and Battenfeld agree to take reasonable steps
5 to satisfy such concerns or objections.

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

7 4.1 **Plaintiff's Public Release of Proposition 65 Claims.** This Consent
8 Judgment is a final and binding resolution between Plaintiff Ferreiro, acting on his own behalf,
9 and on behalf of the public and in the public interest, and Defendant Battenfeld, its parent,
10 subsidiaries, and affiliates, and its downstream distributors and retailers, including but Not limited
11 to Bass Pro LLC, its subsidiaries and affiliates, and shall have preclusive effect such that no other
12 person or entity, whether purporting to act in his, her, or its interests or the public interest shall be
13 permitted to pursue and/or take any action against Battenfeld, its parent, subsidiaries, and
14 affiliates, or its downstream distributors or retailers, including but Not limited to Bass Pro LLC,
15 its subsidiaries and affiliates, with respect to any violation of Proposition 65 that was alleged in
16 the Complaint, or that could have been brought pursuant to the Notice ("Proposition 65 Claims").
17 As to alleged exposures to DEHP in the Product, compliance with the terms of this Consent
18 Judgment by Battenfeld is deemed sufficient to satisfy all obligations concerning compliance by
19 Battenfeld and its downstream retailers, including but not limited to Bass Pro LLC, its
20 subsidiaries and affiliates, with the requirements of Proposition 65 with respect to the Product.

21 4.2 **Plaintiff's Release of Additional Claims.** As to Plaintiff Ferreiro for and in his
22 individual capacity only, this Consent Judgment shall have preclusive effect such that he shall not
23 be permitted to pursue and/or take any action with respect to any other statutory or common law
24 claim, to the fullest extent that any of the foregoing were or could have been asserted by him
25 against Battenfeld, its parent, subsidiaries, and affiliates, including any and all downstream
26 distributors and retailers of the Product, including but NOT limited to Bass Pro LLC, its
27 subsidiaries and affiliates, based on their exposure of persons to DEHP in the Product, or their
28 failure to provide a clear and reasonable warning of exposure to such individuals or, as to alleged

1 exposures to DEHP in the Product, any other claim based on whole or in part on the facts alleged
2 in the Complaint and the Notice, whether based on actions committed by Battenfeld or its
3 downstream distributors or retailers of the Product, including but NOT limited to Bass Pro LLC,
4 its subsidiaries and affiliates. As to alleged exposures to DEHP in the Product, compliance with
5 the terms of this Consent Judgment is deemed sufficient to satisfy all obligations concerning
6 compliance by Battenfeld, its parent, subsidiaries, and affiliates, Bass Pro LLC, its subsidiaries
7 and affiliates, and any other downstream distributors or retailers with the requirements of
8 Proposition 65 with respect to the Product, and any alleged resulting exposure (“DEHP Exposure
9 Claims”).

10 **4.3 Waiver of Rights Under Section 1542 of the California Civil Code.** As to
11 Ferreiro’s public release of Proposition 65 Claims set forth in Section 4.1 (“Public Release”) and
12 his individual release of DEHP Exposure Claims set forth in Section 4.2 (“Individual Release”),
13 Ferreiro acting in his individual capacity with respect to the Public Release and acting in his
14 individual capacity with respect to the Individual Release, waives all rights to institute any form
15 of legal action, and releases all claims against Battenfeld, its parent, subsidiaries, and affiliates,
16 Bass Pro LLC, its subsidiaries and affiliates, and any other downstream distributors or retailers
17 (including their parents, subsidiaries or affiliates, and assigns of any of them, who may use,
18 maintain, distribute or sell the Product) for the Proposition 65 Claims and the DEHP Exposure
19 Claims (referred to collectively in this Section as the “Claims”). In furtherance of the foregoing,
20 as to alleged exposures to DEHP in the Product, Ferreiro waives any and all rights and benefits
21 which he now has, or in the future may have, conferred upon him with respect to the Claims by
22 virtue of the provisions of § 1542 of the California Civil Code, which provides as follows:

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

28 Ferreiro understands and acknowledges that the significance and consequence of this waiver of

1 California Civil Code § 1542 is that even if Ferreiro suffers future damages arising out of or
2 resulting from, or related directly or indirectly to, in whole or in part, the Product, including but
3 not limited to any exposure to, or failure to warn with respect to exposure to, DEHP in the
4 Product, Ferreiro will not be able to make any claim for those damages against Battenfeld.

5 4.3 **Battenfeld’s Release of Plaintiff Ferreiro.** Battenfeld, on behalf of itself, its past
6 and current agents, representatives, attorneys, successors and/or assignees, hereby waives any and
7 all claims against Ferreiro, his attorneys, and other representatives for any and all actions taken or
8 statements made (or those that could have been taken or made) by Ferreiro and his attorneys and
9 other representatives, whether in the course of investigating claims or otherwise seeking
10 enforcement of Proposition 65 against Battenfeld in this matter.

11 **5. Enforcement of Judgment**

12 5.1 The terms of this Consent Judgment shall be enforced exclusively by the parties
13 hereto. The parties may, by noticed motion or order to show cause before the Superior Court of
14 Alameda County, giving the notice required by law, enforce the terms and conditions contained
15 herein. In any proceeding brought by either party to enforce this Consent Judgment, such party
16 may seek whatever fines, costs, penalties or remedies as may be provided by law for any violation
17 of Proposition 65 or this Consent Judgment.

18 **6. Modification of Judgment**

19 6.1 This Consent Judgment may be modified only by written agreement of the parties
20 upon entry of a modified Consent Judgment by the Court thereon, or upon motion of any party as
21 provided by law and upon an entry of a modified Consent Judgment by the Court.

22 6.2 Should any court enter final judgment in a case brought by Ferreiro or the People
23 involving the Product that sets forth standards defining when Proposition 65 warnings will or will
24 not be required (“Alternative Standards”), or if the California Attorney General’s office otherwise
25 provides written endorsement (i.e., a writing that is circulated by the Attorney General that is not
26 intended for the purpose of soliciting further input or comments) of Alternative Standards
27 applicable to the products that are of the same general type and function as the Product and
28 constructed from the same materials, Battenfeld shall be entitled to seek a modification of this

1 Consent Judgment on sixty (60) days' notice to Ferreiro so as to be able to utilize and rely on such
2 Alternative Standards in lieu of those set forth in Section 2 of this Consent Judgment. Ferreiro
3 shall not unreasonably contest any proposed application to effectuate such a modification
4 provided that the Product for which such a modification is sought are of the same general type
5 and function as those to which the Alternative Standards apply.

6 **7. Settlement Payment**

7 7.1 In settlement of all the claims referred to in this Consent Judgment, and without
8 any admission of liability therefore, Battenfeld shall make the following monetary payments:

9 7.1.1 Battenfeld shall pay a total of \$3,000.00 in civil penalties in accordance
10 with this Section. The civil penalty payment will be allocated in accordance with California
11 Health & Safety Code §§ 25249.12(c)(1) and (d), with 75% of the funds remitted to the California
12 Office of Environmental Health Hazard Assessment ("OEHHA") and the remaining 25% of the
13 civil penalty remitted to Ferreiro.

14 7.1.2 Within seven (7) business days of the Effective Date, Battenfeld shall issue
15 two separate checks for the initial civil penalty payment to (a) "OEHHA" in the amount of
16 \$2,250.00; and (b) "Brodsky & Smith, LLC in Trust for Ferreiro" in the amount of \$750.00.
17 Payment owed to Ferreiro pursuant to this Section shall be delivered to the following payment
18 address:

19 Evan J. Smith, Esquire
20 Brodsky & Smith, LLC
21 Two Bala Plaza, Suite 510
22 Bala Cynwyd, PA 19004

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

25 For United States Postal Service Delivery:

26 Mike Gyurics
27 Fiscal Operations Branch Chief
28 Office of Environmental Health Hazard Assessment
P.O. Box 4010
Sacramento, CA 95812-4010

For Non-United States Postal Service Delivery:

1
2 Mike Gyurics
3 Fiscal Operations Branch Chief
4 Office of Environmental Health Hazard Assessment
5 1001 I Street
6 Sacramento, CA 95814

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

9 7.1.3 In addition to the payment above, Battenfeld shall pay \$27,000.00 to
10 Brodsky & Smith, LLC ("Brodsky Smith") as complete reimbursement for Plaintiff Ferreiro's
11 attorneys' fees and costs, including any investigation and laboratory costs or expert fees, incurred
12 in the course of bringing the Ferreiro action, and in enforcing Proposition 65, including without
13 limitation, preparation of the 60-Day Notice letter and discussions with the office of the Attorney
14 General. Payment shall be made within seven (7) business days of the Effective Date and sent to
15 the address for Brodsky & Smith set forth in section 7.1.2, above.

16 7.1.4 Battenfeld's obligation to pay set forth above is conditioned upon
17 Battenfeld's prior receipt from Ferreiro or Brodsky Smith of W-9 forms for all payees.

18 **8. Notices**

19 8.1 Any and all notices between the parties provided for or permitted under this
20 Agreement, or by law, shall be in writing and personally delivered or sent by: (i) first-class
21 (registered or certified mail) return receipt requested; or (ii) overnight or two-day courier on any
22 party by the other party to the following addresses:

23 For Battenfeld:

24 Gary J. Smith
25 BEVERIDGE & DIAMOND, PC
26 456 Montgomery St # 1800
27 San Francisco, CA 94104
28 T: 415-262-4045

For Ferreiro:

Evan J. Smith
BRODSKY & SMITH, LLC
9595 Wilshire Blvd., Suite 900
Beverly Hills, CA 90212
T: 877.354.2590

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

3 **9. Authority to Stipulate**

4 9.1 Each signatory to this Consent Judgment certifies that he or she is fully authorized
5 by the party he or she represents to enter into this Consent Judgment and to execute it on behalf of
6 the party represented and legally to bind that party.

7 **10. Counterparts**

8 10.1 This Stipulation may be signed in counterparts and shall be binding upon the
9 parties hereto as if all said parties executed the original hereof.

10 **11. Retention of Jurisdiction**

11 11.1 This Court shall retain jurisdiction of this matter to implement the Consent
12 Judgment.

13 **12. Service on the Attorney General**

14 12.1 Ferreiro shall serve a copy of this Consent Judgment, signed by both parties, on the
15 California Attorney General on behalf of the parties so that the Attorney General may review this
16 Consent Judgment prior to its submittal to the Court for Approval. No sooner than forty-five (45)
17 days after the Attorney General has received the aforementioned copy of this Consent Judgment,
18 and in the absence of any written objection by the Attorney General to the terms of this Consent
19 Judgment, the parties may then submit it to the Court for Approval.

20 **13. Entire Agreement**

21 13.1 This Consent Judgment contains the sole and entire agreement and understanding
22 of the parties with respect to the entire subject matter hereof, and any and all discussions,
23 negotiations, commitment and understandings related thereto. No representations, oral or
24 otherwise, express or implied, other than those contained herein have been made by any party
25 hereto. No other agreements not specifically referred to herein, oral or otherwise, shall be deemed
26 to exist or to bind any of the parties.

27 **14. Governing Law and Construction**

28 14.1 The validity, construction and performance of this Consent Judgment shall be

1 governed by the laws of the State of California, without reference to any conflicts of law
2 provisions of California law.

3 **15. Court Approval**

4 15.1 If this Consent Judgment is not approved by the Court, it shall be of no force or
5 effect, and cannot be used in any proceeding for any purpose.

6 **IT IS SO STIPULATED:**

7
8 Dated: July 14, 2016 Dated: _____

9
10 By: Anthony Ferreira By: _____
11 Anthony Ferreira Battenfeld Technologies, Inc.

12 **IT IS SO ORDERED, ADJUDGED AND DECREED:**

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14 Dated: _____ Judge of Superior Court
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2 provisions of California law.

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4 15.1 If this Consent Judgment is not approved by the Court, it shall be of no force or
5 effect, and cannot be used in any proceeding for any purpose.

6 **IT IS SO STIPULATED:**

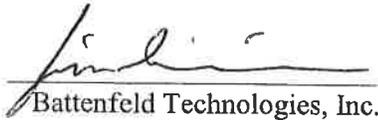
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8 Dated: _____

Dated: 7/21/16

9

10 By: _____

By: 
Battenfeld Technologies, Inc.

11

Anthony Ferreiro

12

13 **IT IS SO ORDERED, ADJUDGED AND DECREED:**

14

15 Dated: _____

Judge of Superior Court

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