

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 ALAMEDA

10 ANTHONY FERREIRO,
11
12 Plaintiff,
13 vs.
14 ACCESSORIES MARKETING, INC.,
15 Defendant.

Case No. RG16821245

[PROPOSED] CONSENT JUDGMENT

Judge: Ioana Petrou

Dept.: 15

Hearing Date: September 14, 2016

Hearing Time: 9:00 AM

Reservation #: R-1762626

1 **1. Introduction**

2 1.1 On February 10, 2016, Anthony Ferreiro (“Ferreiro”) served Illinois Tool Works,
3 Inc. (“ITW”), Accessories Marketing, Inc. (“AMI”), Accessories Marketing Holding Corp., Wal-
4 Mart Stores, Inc. (“Wal-Mart”) and various public enforcement agencies with a document entitled
5 “Notice of Violation of California Health & Safety Code § 25249.6, *et seq.*” (the “Notice”). The
6 Notice provided AMI and such others, including public enforcers, with notice that alleged that
7 AMI was in violation of California Health & Safety Code § 25249.6 (“Proposition 65”), for
8 failing to warn consumers and customers that tire inflators, including, but not limited to, *Top Off*
9 *Tire Inflators, UPC No. 716281507021* (“Covered Products”) exposed users in California to the
10 chemical Diisononyl phthalate (DINP). No public enforcer has diligently prosecuted the
11 allegations set forth in the Notice.

12 1.2 On June 28, 2016, Ferreiro filed a Complaint for Civil Penalties and Injunctive
13 Relief (“Complaint”) in Alameda County Superior Court, Case No. RG16821245, against AMI
14 alleging violations of Proposition 65.

15 1.3 AMI is a corporation that employs more than ten persons under California Health
16 and Safety Code §25249.6 and offered the Covered Products for sale within the State of
17 California.

18 1.4 AMI is referred to herein as, “Defendant.” Defendant and Ferreiro and/or Plaintiff
19 are collectively referred to herein as, the “Parties.”

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

25 1.5 For purposes of this Consent Judgment only, the Parties stipulate that this Court
26 has jurisdiction over the allegations of violations contained in the Complaint and personal
27 jurisdiction over Defendant as to the acts alleged in the Complaint, that venue is proper in the
28 County of Alameda, and that this Court has jurisdiction to enter this Consent Judgment as a

1 resolution of the allegations contained in the Complaint.

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

13 1.7 For purposes of this Consent Judgment, the term "Effective Date" shall mean the
14 date that the Consent Judgment is entered by the Court.

15 **2. Injunctive Relief**

16 2.1 Commencing ninety (90) days after the Effective Date, and continuing thereafter,
17 Defendant shall only ship, sell, or offer for sale in California, Reformulated Covered Products
18 pursuant to Section 2.3 or Covered Products that are labeled with a clear and reasonable warning
19 pursuant to Section 2.4.

20 2.2 Notwithstanding the above or anything else in this Consent Judgment, Defendant
21 and their downstream retailers shall have no obligation to reformulate or label Covered Products
22 that were manufactured prior to the Effective Date or within ninety (90) days after the Effective
23 Date. For purposes of this Settlement Agreement, a "Reformulated Covered Products" are
24 Covered Products that are in compliance with the standard set forth below in section 2.3.

25 2.3 "Reformulated Covered Products" shall mean Covered Products that contains less
26 than or equal to 1,000 parts per million ("ppm") of DINP when analyzed pursuant to CPSC-CH-
27 C1001-09.3 Standard Operating Procedure for Determination of Phthalates method.

28

1
2 2.4 Commencing on the Effective Date, Defendant shall, for all Covered Products they
3 sell or distribute and that are intended for sale in California and that is not Reformulated Covered
4 Products, provide clear and reasonable warnings as set forth in subsections 2.4(a) and (b) below.
5 The warning shall be prominently placed with such conspicuousness as compared with other
6 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 understands to which specific Covered
9 Products the warning applies, so as to minimize the risk of consumer confusion.

10 **(a) Retail Store Sales**

11 **(i) Covered Products Labeling.** Defendant shall affix a
12 warning to the packaging, labeling or directly on each Covered Product sold in
13 retail outlets in California by Defendant or any person selling the Covered
14 Products that states:

15 **[PROPOSITION 65] WARNING:**

16 This product contains a chemical known to the State of California to cause cancer.

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

18 **(ii) Point of Sale Warnings.** Alternatively to the Covered
19 Products Labeling set forth in Section 2.4(a)(i) above, Defendant may
20 provide warning signs in the form below to its customers in California with
21 instructions to post the warning signs in close proximity to the point of
22 display of the Covered Products. Such instruction sent to Defendant'
23 customers shall be sent by certified mail, return receipt requested.

24 **[PROPOSITION 65] WARNING:**

25 This product contains a chemical known to the State of California to cause cancer.

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

27 **(b) Mail Order Catalog Warning.** In the event that Defendant directly
28 sell Covered Products via mail order catalog directly to consumers located in California after the

1 Effective Date that is not a Reformulated Covered Product, Defendant shall provide a warning for
2 Covered Products sold via mail order catalog to such California residents. A warning that is
3 given in a mail order catalog shall be in the same type size or larger than the Covered Products'
4 description text within the catalog. The following warning shall be provided on the same page
5 and in the same location as the display and/or description of the Covered Products:

6 **[PROPOSITION 65] WARNING:**

7 This product contains a chemical known to the State of California to cause cancer.

8 The bracketed text may, but is not required to, be used. Where it is impracticable to provide the
9 warning on the same page and in the same location as the display and/or description of the
10 Covered Product, Defendant may utilize a designated symbol to cross reference the applicable
11 warning and shall define the term "designated symbol" with the following language on the inside
12 of the front cover of the catalog or on the same page as any order form for the Covered Products:

13 **[PROPOSITION 65] WARNING:** Certain products identified with this symbol
14 ▼ and offered for sale in this catalog contain a chemical known to the State of
15 California to cause cancer.

16 The bracketed text may, but is not required to, be used. The designated symbol must appear on
17 the same page and in close proximity to the display and/or description of the Covered Products.
18 On each page where the designated symbol appears, Defendant must provide a header or footer
19 directing the consumer to the warning language and definition of the designated symbol.

20 **(c) Internet Sales Warning.** In the event that Defendant sells Covered
21 Products via the internet directly to consumers located in California after the Effective Date that
22 is not a Reformulated Covered Product, Defendant shall provide a warning for such Covered
23 Products sold via the internet to such California residents. A warning that is given on the internet
24 shall be in the same type size or larger than the Covered Products' description text and shall be
25 given in conjunction with the direct sale of the Covered Products. The warning shall appear
26 either: (a) on the same web page on which the Covered Products are displayed; (b) on the same
27 web page as the order form for the Covered Products; (c) on the same page as the price for the
28 Covered Products; or (d) on one or more web pages displayed to a purchaser during the checkout

1 process. The following warning shall be provided:

2 **[PROPOSITION 65] WARNING:**

3 This product contains a chemical known to the State of California to cause cancer.

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

5 **3. Entry of Consent Judgment**

6 3.1 The Parties hereby request that the Court promptly enter this Consent Judgment.

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

9 3.2 In the event that the Attorney General objects or otherwise comments on one or
10 more provisions of this Consent Judgment, Ferreiro and Defendant agree to take reasonable steps
11 to satisfy such concerns or objections.

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

13 4.1 **Plaintiff's Public Release of Proposition 65 Claims.** This Consent

14 Judgment is a final and binding resolution between Ferreiro, acting on his own behalf, and on
15 behalf of the public and in the public interest, and Defendant, and shall have preclusive effect
16 such that no other person or entity, whether purporting to act in his, her, or its interests or the
17 public interest shall be permitted to pursue and/or take any action with respect to any violation of
18 Proposition 65 that was alleged in the Complaint, or that could have been brought pursuant to the
19 Notice against ITW, Defendant or its downstream retailers of the Covered Product including but
20 not limited to Wal-Mart, and each of their respective affiliates and subsidiaries, parents, directors,
21 officers, agents, employees, attorneys, representatives, shareholders, successors, and assigns and
22 each entity to whom ITW, AMI, and/or Wal-Mart directly or indirectly distributes or sells the
23 Covered Products, including but not limited to, downstream distributors, wholesalers, customers,
24 retailers, marketplace retailers, franchisees, cooperative members and licensees (collectively, the
25 "Releasees") ("Proposition 65 Claims"). As to alleged exposures to DINP in the Covered
26 Product, compliance with the terms of this Consent Judgment by Defendant is deemed sufficient
27 to satisfy all obligations concerning compliance by ITW and Defendant and its downstream
28

1 retailers, including but not limited to Wal-Mart with the requirements of Proposition 65 with
2 respect to the Covered Products.

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 such claim was or could have been asserted by him against
7 ITW or Defendant or any and all downstream retailers of the Covered Products, including but not
8 limited to Wal-Mart, and the Releasees based on their exposure of Ferreiro to DINP in the
9 Covered Product, or their failure to provide a clear and reasonable warning of exposure to
10 Ferreiro as well as any other claim based in whole or in part on the facts alleged in the Complaint
11 and the Notice, whether based on actions committed by Defendant or their downstream retailers
12 of the Covered Product, including but not limited to Wal-Mart ("DINP Exposure Claims").

13 **4.3 Waiver of Rights Under Section 1542 of the California Civil Code.** As to
14 Ferreiro's public release of Proposition 65 Claims set forth in Section 4.1 ("Public Release") and
15 his individual release of DINP Exposure Claims set forth in Section 4.2 ("Individual Release"),
16 Ferreiro, acting on his own behalf and on behalf of the public with respect to the Public Release
17 and acting in his individual capacity with respect to the Individual Release, waives all rights to
18 institute any form of legal action, and releases all claims against ITW or Defendant, the
19 Releasees, and their downstream retailers, including but not limited to Wal-Mart (including their
20 parents, subsidiaries, affiliates, assigns, and acquiring entities of any of them, who may use,
21 maintain, distribute or sell the Covered Products) for the Proposition 65 Claims and the DINP
22 Exposure Claims (referred to collectively in this Section as "Claims"). In furtherance of the
23 foregoing, Ferreiro, acting on his own behalf and on behalf of the public with respect to the
24 Public Release and acting in his individual capacity with respect to the Individual Release, waives
25 any and all rights and benefits which he now has, or in the future may have, conferred upon him
26 with respect to the Claims by virtue of the provisions of § 1542 of the California Civil Code,
27 which provides as follows:
28

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

6 4.4 **Defendant's Release of Plaintiff Ferreiro.** Defendant, on behalf of itself, its past
7 and current agents, representatives, attorneys, successors and/or assignees, hereby waives any and
8 all claims against Ferreiro, his attorneys, and other representatives for any and all actions taken or
9 statements made (or those that could have been taken or made) by Ferreiro and his attorneys and
10 other representatives, whether in the course of investigating claims or otherwise seeking
11 enforcement of Proposition 65 against Defendant in this matter.

12 **5. Enforcement of Judgment**

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

19 **6. Modification of Judgment**

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

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

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

7 **7. Settlement Payment**

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

10 7.1.1 **Civil Penalty.** Within seven (7) business days of the Effective Date, AMI
11 shall pay a total of \$4,000.00 in civil penalties in accordance with this Section. The Initial Civil
12 Penalty payment will be allocated in accordance with California Health & Safety Code §§
13 25249.12(c)(1) and (d), with 75% of the funds remitted to the California Office of Environmental
14 Health Hazard Assessment ("OEHHA") and the remaining 25% of the civil penalty remitted to
15 Ferreiro. Within seven (7) business days of the Effective Date, AMI shall issue two separate
16 checks for the civil penalty payment to (a) "OEHHA" in the amount of three-thousand U.S.
17 dollars (\$3,000.00); and (b) "Brodsky & Smith, LLC in Trust for Ferreiro" in the amount of one-
18 thousand U.S. dollars (\$1,000.00). Payment owed to Ferreiro pursuant to this Section shall be
19 delivered to the following payment address:

20 Evan J. Smith, Esquire
21 Brodsky & Smith, LLC
22 Two Bala Plaza, Suite 510
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
Office of Environmental Health Hazard Assessment
28 P.O. Box 4010
Sacramento, CA 95812-4010

1 For Non-United States Postal Service Delivery:

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

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

10 7.1.3 **Attorney Fees and Costs.** In addition to the payment above, AMI shall
11 pay \$36,000.00 to Brodsky & Smith, LLC (“Brodsky & Smith”) as complete reimbursement for
12 Ferreiro’s attorneys’ fees and costs, including any investigation and laboratory costs or expert
13 fees, incurred in the course of bringing the Complaint and in enforcing Proposition 65, including
14 without limitation, preparation of the 60-Day Notice letter and discussions with the office of the
15 Attorney General. Payment shall be made within seven (7) business days of the Effective Date
16 and sent to the address for Brodsky & Smith set forth in Section 7.1.1, above.

17 **8. Notices**

18 8.1 Any and all notices between the Parties provided for or permitted under this
19 Agreement, or by law, shall be in writing and personally delivered or sent by: (i) first-class
20 (registered or certified mail) return receipt requested; or (ii) overnight or two-day courier on any
21 party by the other party to the following addresses:

22 For Defendant:

23 George Gigounas
24 Shelby Miller
25 DLA Piper LLP (US)
26 555 Mission Street, Suite 2400
27 San Francisco, California 94105

28 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
15 the California Attorney General on behalf of the Parties so that the Attorney general may review
16 this Consent Judgment prior to its submittal to the Court for Approval. No sooner than forty-five
17 (45) days after the Attorney General has received the aforementioned copy of this Consent
18 Judgment, and in the absence of any written objection by the Attorney General to the terms of this
19 Consent 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

28

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 of 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: July 13, 2016

By: Anthony Ferreiro
Anthony Ferreiro

Dated: _____

By: _____
Accessories Marketing, Inc.

IT IS SO ORDERED, ADJUDGED AND DECREED:

Dated: _____

Judge of 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 of California law.

15. Court Approval

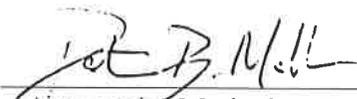
15.1 If this Consent Judgment is not approved by the Court, it shall be of no force or effect, and cannot be used in any proceeding for any purpose.

IT IS SO STIPULATED:

Dated: _____

By: _____
Anthony Ferreiro

Dated: 7/13/2016

By:  _____
Accessories Marketing, Inc.

IT IS SO ORDERED, ADJUDGED AND DECREED:

Dated: _____ Judge of Superior Court