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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ALAMEDA

ANTHONY FERREIRO,
Plaintiff,
vs.
ZAGG, INC.,
Defendant.

Case No. RG16841439
[PROPOSED] CONSENT JUDGMENT
Judge: Ronni B. MacLaren
Dept.: 25
Hearing Date: April 6, 2017
Hearing Time: 9:00 AM
Reservation #: R-1824689

1 **1. Introduction**

2 1.1 On May 23, 2016, Anthony Ferreiro (“Ferreiro”) served Zagg, Inc. t/a ifrogz, Zagg
3 Intellectual Property Holding Co., Inc. t/a ifrogz (collectively, “Zagg”), Wal-Mart Stores, Inc.
4 (“Walmart”) and various public enforcement agencies with a document entitled “Notice of
5 Violation of California Health & Safety Code § 25249.6, *et seq.*” (the “Notice”). The Notice
6 provided Zagg and such others, including public enforcers, with notice that alleged that Zagg was
7 in violation of California Health & Safety Code § 25249.6 (“Proposition 65”), for failing to warn
8 consumers and customers that ifrogz Ear Pollution Stereo Headphones, UPC No. 811275011512
9 exposed users in California to the chemicals Di(2-ethylhexyl) phthalate (DEHP) and Diisononyl
10 phthalate (DINP). No public enforcer has diligently prosecuted the allegations set forth in the
11 Notice.

12 1.2 On December 7, 2016, Ferreiro filed a Complaint for Civil Penalties and
13 Injunctive Relief (“Complaint”) in Alameda County Superior Court, Case No. RG16841439,
14 against Zagg alleging violations of Proposition 65.

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

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

23 1.5 The term “Products” as referred to in this agreement means ifrogz headphones and
24 earbuds in all colors and styles that contain DEHP and/or DINP, including, but not limited to,
25 UPC No. 811275011512, manufactured, imported, sold, or distributed for sale in California by
26 Zagg.

27 1.6 For purposes of this Consent Judgment only, the parties stipulate that this Court
28 has jurisdiction over the allegations of violations contained in the Complaint and personal

1 jurisdiction over Zagg as to the acts alleged in the Complaint, that venue is proper in the County
2 of Alameda, and that this Court has jurisdiction to enter this Consent Judgment as a resolution of
3 the allegations contained in the Complaint.

4 1.7 The parties enter into this Consent Judgment pursuant to a full settlement of
5 disputed claims between the parties as alleged in the Complaint for the purpose of avoiding
6 prolonged litigation. By execution of this Consent Judgment, Zagg does not admit any violation
7 of Proposition 65 or any other wrongdoing and specifically denies that it has committed any such
8 violation. Nothing in this Consent Judgment shall be construed as an admission by Zagg of any
9 fact, issue of law or violation of law, nor shall compliance with the Consent Judgment constitute
10 or be construed as an admission by Zagg of any fact, issue of law, or violation of law. Nothing in
11 this Consent Judgment shall prejudice, waive, or impair any right, remedy or defense that Zagg
12 may have in any other future legal proceeding. However, this paragraph shall not diminish or
13 otherwise affect the obligations, responsibilities and duties of Zagg under this Consent Judgment.

14 1.8 For purposes of this Consent Judgment, the term "Effective Date" shall mean the
15 date that the Consent Judgment is entered by the Court.

16 **2. Injunctive Relief**

17 2.1 Commencing one hundred twenty (120) days after the Effective Date, and
18 continuing thereafter, Zagg shall only ship, sell, or offer for sale in California, Reformulated
19 Product pursuant to Section 2.2 or Product that is labeled with a clear and reasonable warning
20 pursuant to Section 2.3. Zagg and its downstream retailers shall have no obligation to label
21 Products that entered the stream of commerce prior to the Effective Date or within one hundred
22 twenty (120) days after the Effective Date. For purposes of this Settlement Agreement, a
23 "Reformulated Product" is Product that is in compliance with the standard set forth below in
24 section 2.2.

25 2.2 "Reformulated Product" shall mean Product that contains less than or equal to
26 1,000 parts per million ("ppm") of each of DEHP and DINP when analyzed pursuant to CPSC-
27 CII-C1001-09.3 Standard Operating Procedure for Determination of Phthalates method.

28 2.3 Commencing on the Effective Date, Zagg shall, for all Products it sells or

1 distributes and that is intended for sale in California and that is not a Reformulated Product,
2 provide clear and reasonable warnings as set forth in subsections 2.3(a) and (b) below. The
3 warning shall be prominently placed with such conspicuousness as compared with other words,
4 statements, designs, or devices as to render it likely to be read and understood by an ordinary
5 individual under customary conditions before purchase or use. Each warning shall be provided in
6 a manner such that the consumer or user understands to which specific Product the warning
7 applies, so as to minimize the risk of consumer confusion. Alternatively, Zagg may use warnings
8 that comply with the amended Clear and Reasonable Warnings regulations, 27 California Code of
9 Regulations Section 25600 et seq., issued on August 30, 2016.

10 **(a) Retail Store Sales**

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

14 **[PROPOSITION 65] WARNING:**

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

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

18 **(ii) Point of Sale Warnings.** Alternatively to the Product Labeling
19 set forth in Section 2.3(a)(i) above, Zagg may provide warning signs in the form
20 below to its customers in California with instructions to post the warning signs in
21 close proximity to the point of display of the Product. Such instruction sent to
22 Zagg customers shall be sent by certified mail, return receipt requested.

23 **[PROPOSITION 65] WARNING:**

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

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

27 **(b) Internet Sales Warning.** In the event that Zagg sells Product via the
28 internet directly to consumers located in California after the Effective Date that is not a
Reformulated Product, Zagg shall provide a warning for such Product sold via the internet to such
California residents. A warning that is given on the internet shall be in the same type size or

1 larger than the Product description text and shall be given in conjunction with the direct sale of
2 the Product. The warning shall appear either: (a) on the same web page on which the Product is
3 displayed; (b) on the same web page as the order form for the Product; (c) on the same page as
4 the price for the Product; or (d) on one or more web pages displayed to a purchaser during the
5 checkout process. The following warning shall be provided:

6 **[PROPOSITION 65] WARNING:**

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

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

10 **3. Entry of Consent Judgment**

11 3.1 The parties hereby request that the Court promptly enter this Consent Judgment.
12 Upon entry of this Consent Judgment, Ferreiro and Zagg waive their respective rights to a hearing
13 or trial on the allegations of the Complaint and 60-Day Notice.

14 3.2 In the event that the Attorney General objects or otherwise comments on one or
15 more provisions of this Consent Judgment, Ferreiro and Zagg agree to take reasonable steps to
16 satisfy such concerns or objections.

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

18 4.1 **Plaintiff's Public Release of Proposition 65 Claims.** This Consent
19 Judgment is a final and binding resolution between Ferreiro, acting on his own behalf, and on
20 behalf of the public and in the public interest, and Zagg, and shall have preclusive effect such that
21 no other person or entity, whether purporting to act in his, her, or its interests or the public interest
22 shall be permitted to pursue and/or take any action with respect to any violation of Proposition 65
23 that was alleged in the Complaint, or that could have been brought pursuant to the Notice against
24 Zagg or its downstream retailers of the Product including but not limited to Wal-Mart Stores, Inc.
25 and its affiliates and subsidiaries ("Proposition 65 Claims"). As to alleged exposures to DEHP
26 and DINP in the Product, compliance with the terms of this Consent Judgment by Zagg is deemed
27 sufficient to satisfy all obligations concerning compliance by Zagg and its downstream retailers,
28 including but not limited to Walmart, with the requirements of Proposition 65 with respect to the

1 Products.

2 **4.2 Plaintiff's Release of Additional Claims.** As to Ferreiro for and in his
3 individual capacity only, this Consent Judgment shall have preclusive effect such that he shall not
4 be permitted to pursue and/or take any action with respect to any other statutory or common law
5 claim, to the fullest extent that any such claim was or could have been asserted by him against
6 Zagg or any and all downstream retailers of the Products, including but not limited to Wal-Mart
7 Stores, Inc. and its affiliates and subsidiaries , based on their exposure of Ferreiro to DEHP and
8 DINP in the Products, or their failure to provide a clear and reasonable warning of exposure as
9 well as any other claim based in whole or in part on the facts alleged in the Complaint and the
10 Notice, whether based on actions committed by Zagg or its downstream retailers of the Products,
11 including but not limited to Wal-Mart Stores, Inc. and its affiliates and subsidiaries ("DEHP and
12 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 DEHP and DINP Exposure Claims set forth in Section 4.2 ("Individual
16 Release"), Ferreiro, acting on his own behalf and on behalf of the public with respect to the
17 Public Release and acting in his individual capacity with respect to the Individual Release, waives
18 all rights to institute any form of legal action, and releases all claims against Zagg and its
19 downstream retailers, including but not limited to Wa-Mmart (including their respective parents,
20 subsidiaries, affiliates, assigns, and acquiring entities of any of them, who may use, maintain,
21 distribute or sell the Products) for the Proposition 65 Claims and the DEHP and DINP Exposure
22 Claims (referred to collectively in this Section as "Claims"). In furtherance of the foregoing,
23 Ferreiro, acting on his own behalf and on behalf of the public with respect to the Public Release
24 and acting in his individual capacity with respect to the Individual Release, waives any and all
25 rights and benefits which he now has, or in the future may have, conferred upon him with respect
26 to the Claims by virtue of the provisions of § 1542 of the California Civil Code, which provides
27 as follows:

28

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

6 4.4 **Zagg’s Release of Plaintiff Ferreiro.** Zagg, on behalf of itself, its past and
7 current agents, representatives, attorneys, successors and/or assignees, hereby waives any and all
8 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 Zagg 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 Products that sets forth standards defining when Proposition 65 warnings will or
25 will not be required (“Alternative Standards”), or if the California Attorney General’s office
26 otherwise provides written endorsement (i.e., a writing that is circulated by the Attorney General
27 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 Products
 and constructed from the same materials, Zagg 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 Products for which such a modification is sought are of the same general type
5 and function as those to which the Alternative Standards apply. In the event that changes to
6 statutory or regulatory language conflict with the requirements of this Consent Judgment,
7 compliance with the revised statutory or regulatory language shall constitute compliance with
8 Proposition 65 and no modification of this Consent Judgment shall be necessary.

9 **7. Settlement Payment**

10 7.1 In settlement of all the claims referred to in this Consent Judgment, and without
11 any admission of liability therefore, Zagg shall make the following monetary payments:

12 7.1.1 **Initial Civil Penalty.** Within seven (7) business days of the Effective Date,
13 Zagg shall pay a total of \$7,000.00 in civil penalties in accordance with this Section. The Initial
14 Civil Penalty payment will be allocated in accordance with California Health & Safety Code §§
15 25249.12(c)(1) and (d), with 75% of the funds remitted to the California Office of Environmental
16 Health Hazard Assessment ("OEHHA") and the remaining 25% of the civil penalty remitted to
17 Ferreiro. Within seven (7) business days of the Effective Date, Zagg shall issue two separate
18 checks for the civil penalty payment to (a) "OEHHA" in the amount of \$5,250.00; and (b)
19 "Brodsky & Smith, LLC in Trust for Ferreiro" in the amount of \$1,750.00. Payment owed to
20 Ferreiro pursuant to this section shall be delivered to the following payment address:

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

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

27 For United States Postal Service Delivery:

28 Mike Gyurics
Fiscal Operations Branch Chief
Office of Environmental Health Hazard Assessment

1 P.O. Box 4010
2 Sacramento, CA 95812-4010

3 For Non-United States Postal Service Delivery:

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

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

11 **7.1.2 Final Civil Penalty.** One hundred and twenty (120) days after the
12 Effective Date, Zagg shall make a final civil penalty payment of \$7,000.00 on the same terms as
13 set forth in Section 7.1.1 pertaining to the Initial Civil Penalty. Pursuant to Title 11 California
14 Code of Regulations, Section 3203(c), Ferreiro agrees that the Final Civil Penalty payment shall
15 be waived in its entirety if, on or before the Final Civil Penalty payment is due, an officer of Zagg
16 provides Ferreiro with a signed declaration certifying that all Products it ships for sale or
17 distributes for sale in California as of the date of its certification are Reformulated Products or are
18 marked with the warnings required by this Consent Decree, including the internet sales warning
19 in Section 2.3(b), if applicable (hereinafter "Labeled Product") and that Zagg will continue to
20 offer only Reformulated Products or Labeled Products in California in the future. The option to
21 provide a declaration certifying its complete early reformulation or labeling of the Products in
22 lieu of making the Final Civil Penalty payment otherwise required by this Section is a material
23 term, and time is of the essence.

24 **7.1.3 Attorney Fees and Costs.** In addition to the payment above, Zagg shall
25 pay \$50,000.00 to Brodsky & Smith, LLC ("Brodsky & Smith") as complete reimbursement for
26 Ferreiro's attorneys' fees and costs, including any investigation and laboratory costs or expert
27 fees, incurred in the course of bringing the Complaint and in enforcing Proposition 65, including
28 without limitation, preparation of the 60-Day Notice letter and discussions with the office of the
Attorney General. Payment shall be made within seven (7) business days of the Effective Date
and sent to the address for Brodsky & Smith set forth in Section 7.1.1, above.

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8. Notices

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

For Zagg:

John Epperson
COOPER, WHITE & COOPER LLP
201 California Street, 17th Floor
San Francisco, CA 94111

For Ferreiro:

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

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

9. 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 Stipulation 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 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)

1 days after the Attorney General has received the aforementioned copy of this Consent Judgment,
2 and in the absence of any written objection by the Attorney General to the terms of this Consent
3 Judgment, the Plaintiff shall submit it to the Court for Approval within ten (10) days of the
4 expiration of the forty-five (45) day review period.

5 **13. Entire Agreement**

6 13.1 This Consent Judgment contains the sole and entire agreement and understanding
7 of the parties with respect to the entire subject matter hereof, and any and all discussions,
8 negotiations, commitment and understandings related thereto. No representations, oral or
9 otherwise, express or implied, other than those contained herein have been made by any party
10 hereto. No other agreements not specifically referred to herein, oral or otherwise, shall be deemed
11 to exist or to bind any of the parties.

12 **14. Governing Law and Construction**

13 14.1 The validity, construction and performance of this Consent Judgment shall be
14 governed by the laws of the State of California, without reference to any conflicts of law
15 provisions of California law.

16 **15. Court Approval**

17 15.1 If this Consent Judgment is not approved by the Court, it shall be of no force or
18 effect, and cannot be used in any proceeding for any purpose.

19 **IT IS SO STIPULATED:**

20
21 Dated: _____

Dated: January 31, 2017

22
23 By: _____
24 Anthony Ferreiro

By: 
Zagg, Inc.

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

26
27 Dated: _____

Judge of Superior Court

1 days after the Attorney General has received the aforementioned copy of this Consent Judgment,
2 and in the absence of any written objection by the Attorney General to the terms of this Consent
3 Judgment, the Plaintiff shall submit it to the Court for Approval within ten (10) days of the
4 expiration of the forty-five (45) day review period.

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15 provisions of California law.

16 **15. Court Approval**

17 15.1 If this Consent Judgment is not approved by the Court, it shall be of no force or
18 effect, and cannot be used in any proceeding for any purpose.

19 **IT IS SO STIPULATED:**

20
21 Dated: 2/19/17 Dated: _____

22
23 By: Anthony Ferrero By: _____
24 Anthony Ferrero Zagg, Inc.

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

26
27 Dated: _____ Judge of Superior Court
28