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

11 ANTHONY FERREIRO,

12 Plaintiff,

13 v.

14 WESTERN POWER SPORTS, INC., CYCLE  
15 GEAR, INC.,

16 Defendants.

Case No.: RG19013276

**CONSENT JUDGMENT**

Judge: Julia Spain

Dept.: 520

Hearing Date: November 19, 2020

Hearing Time: 2:00 PM

Reservation #: R-2207332

1           **1. INTRODUCTION**

2           1.1     **The Parties.** This Consent Judgment is entered into by and between Anthony  
3           Ferreiro acting on behalf of the public interest (hereinafter “Ferreiro”) and Western Power Sports,  
4           Inc. (“Western Power” or “Defendant”) with Ferreiro and Defendant collectively referred to as the  
5           “Parties” and each of them as a “Party.” Ferreiro is an individual residing in California that seeks  
6           to promote awareness of exposures to toxic chemicals and improve human health by reducing or  
7           eliminating hazardous substances contained in consumer products. Western Power is alleged to be  
8           a person in the course of doing business for purposes of Proposition 65, Cal. Health & Safety Code  
9           §§ 25249.6 et seq.

10           1.2     **Allegations and Representations.** Ferreiro alleges that Defendant has exposed  
11           individuals to di(2-ethylhexyl) phthalate (DEHP) and/or diisononyl phthalate (DINP) from its sales  
12           of (a) Fly Racing Clear Rain Jackets, (b) Fly Racing Helmet Garage Bags and (c) Fly Racing Street  
13           Mini Tank Bags without providing a clear and reasonable exposure warning pursuant to Proposition  
14           65. DEHP is listed under Proposition 65 as a chemical known to the State of California to cause  
15           cancer and reproductive toxicity. DINP is listed under Proposition 65 as a chemical known to the  
16           State of California to cause cancer.

17           1.3     **Notices of Violation/Complaint.** On or about April 6, 2018 (rain jackets), May 8,  
18           2018 (helmet bags) and February 13, 2019 (tank bags), Ferreiro served Western Power and various  
19           public enforcement agencies with documents entitled “60-Day Notice of Violation” pursuant to  
20           Health & Safety Code §25249.7(d) (collectively, the “Notices”), alleging that Defendant violated  
21           Proposition 65 for failing to warn consumers and customers that use of Fly Racing (a) rain jackets,  
22           (b) helmet bags and (c) tank bags expose users in California to DEHP and/or DINP. No public  
23           enforcer has brought and is diligently prosecuting the claims alleged in the Notice. On April 2,  
24           2019, Ferreiro filed a complaint (the “Complaint”) in the matter.

25           1.4     For purposes of this Consent Judgment only, the Parties stipulate that this Court has  
26           jurisdiction over Defendant as to the allegations contained in the Complaint filed in this matter, that  
27           venue is proper in the County of Alameda, and that this Court has jurisdiction to approve, enter,  
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1 and oversee the enforcement of this Consent Judgment as a full and final binding resolution of all  
2 claims which were or could have been raised in the Complaint based on the facts alleged therein  
3 and/or in the Notices.

4 1.5 Defendant denies the material allegations contained in the Notices and Complaint  
5 and maintains that it has not violated Proposition 65. Nothing in this Consent Judgment shall be  
6 construed as an admission by Defendant of any fact, finding, issue of law, or violation of law; nor  
7 shall compliance with this Consent Judgment constitute or be construed as an admission by  
8 Defendant of any fact, finding, conclusion, issue of law, or violation of law, such being specifically  
9 denied by Defendant. However, this section shall not diminish or otherwise affect the obligations,  
10 responsibilities, and duties of Defendant under this Consent Judgment.

11 **2. DEFINITIONS**

12 2.1 **Covered Products.** The term “Covered Products” means rain jackets, helmet bags  
13 and tank bags that are manufactured, distributed and/or offered for sale in California by Western  
14 Power.

15 2.2 **Effective Date.** The term “Effective Date” means the date this Consent Judgment is  
16 entered as a Judgment of the Court.

17 **3. INJUNCTIVE RELIEF: WARNINGS**

18 3.1 **Reformulation of Covered Products.** As of the date this Consent Judgment is  
19 signed by both Parties, and continuing thereafter, Covered Products that Western Power directly  
20 manufactures, imports, distributes, sells, or offers for sale in California shall either: (a) be  
21 Reformulated Products pursuant to § 3.2, below; or (b) be labeled with a clear and reasonable  
22 exposure warning pursuant to §§ 3.3 and 3.4, below. For purposes of this Consent Judgment, a  
23 “Reformulated Product” is a Covered Product that is in compliance with the standard set forth in §  
24 3.2 below. The warning requirement set forth in §§ 3.3 and 3.4 shall not apply to any Reformulated  
25 Product.

26 3.2 **Reformulation Standard.** “Reformulated Products” shall mean Covered Products  
27 that contain concentrations less than or equal to 0.1% (1,000 parts per million (ppm)) of DEHP  
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1 and/or DINP, as applicable per the Prop 65 Notices, when analyzed pursuant to U.S. Environmental  
2 Protection Agency testing methodologies 3580A and 8270C or other methodology utilized by  
3 federal or state government agencies for the purpose of determining the phthalate content in a solid  
4 substance.

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

12           (a) **Warning** where DEHP only or DEHP and DINP are at issue the “Warning” shall  
13 consist of the statement:

14           ⚠ **WARNING:** This product can expose you to chemicals including di(2-  
15 ethylhexyl) phthalate (DEHP), which is known to the State of California to cause  
16 cancer and birth defects or other reproductive harm. For more information go to  
[www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov).

17           (b) **Alternative Warning** where DEHP only or DEHP and DINP are at issue: Western  
18 Power may, but is not required to, use the alternative short-form warning as set forth in this § 3.3(b)  
19 (“**Alternative Warning**”) as follows:

20           ⚠ **WARNING:** Cancer and Reproductive Harm - [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov).

21           (c) **Warning** where only DINP is at issue the “Warning” shall consist of the statement:

22           ⚠ **WARNING:** This product can expose you to chemicals including diisononyl  
23 phthalate (DINP), which is known to the State of California to cause cancer. For  
more information go to [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov).

24           (d) **Alternative Warning** where only DINP is at issue, Western Power may, but is not  
25 required to, use the alternative short-form warning as set forth in this § 3.3(b) (“**Alternative**  
26 **Warning**”) as follows:

27           ⚠ **WARNING:** Cancer - [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov).

1           3.4     A **Warning or Alternative Warning** provided pursuant to § 3.3 must print the word  
2 “**WARNING:**” in all capital letters and in bold font, followed by a colon. The warning symbol to  
3 the left of the word “**WARNING:**” must be a black exclamation point in a yellow equilateral  
4 triangle with a black outline, except that if the sign or label for the Covered Product does not use  
5 the color yellow, the symbol may be in black and white. The symbol must be in a size no smaller  
6 than the height of the word “**WARNING:**”. The warning shall be affixed to or printed on the  
7 Covered Product’s packaging or labeling, or on a placard, shelf tag, sign or electronic device or  
8 automatic process, providing that the warning is displayed with such conspicuousness, as compared  
9 with other words, statements, or designs as to render it likely to be read and understood by an  
10 ordinary individual under customary conditions of purchase or use. A warning may be contained  
11 in the same section of the packaging, labeling, or instruction booklet that states other safety  
12 warnings, if any, concerning the use of the Covered Product and shall be at least the same size as  
13 those other safety warnings.

14           If Western Power sells Covered Products via an internet website to customers located in  
15 California, the warning requirements of this section shall be satisfied if the foregoing warning  
16 appears either: (a) on the same web page on which a Covered Product is displayed and/or described;  
17 (b) on the same page as the price for the Covered Product; or (c) on one or more web pages  
18 displayed to a purchaser prior to purchase during the checkout process. Alternatively, a symbol  
19 consisting of a black exclamation point in a yellow or white equilateral triangle may appear adjacent  
20 to or immediately following the display, description, price, or checkout listing of the Covered  
21 Product, if the warning statement appears elsewhere on the same web page in a manner that clearly  
22 associates it with the product(s) to which the warning applies.

23           3.5     **Compliance with Warning Regulations.** Defendant shall be deemed to be in  
24 compliance with this Consent Judgment by either adhering to §§ 3.3 and 3.4 of this Consent  
25 Judgment or by complying with warning requirements adopted by the State of California’s Office  
26 of Environmental Health Hazard Assessment (“OEHHA”) after the Effective Date.  
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1           **4.       MONETARY TERMS**

2           4.1       **Civil Penalty.** Western Power shall pay \$2,000.00 as a Civil Penalty pursuant to  
3 Health and Safety Code section 25249.7(b), to be apportioned in accordance with California Health  
4 & Safety Code § 25192, with 75% of these funds remitted to OEHHA and the remaining 25% of  
5 the Civil Penalty remitted to Ferreiro, as provided by California Health & Safety Code  
6 § 25249.12(d).

7                   4.1.1   Within ten (10) days of the Effective Date, Western Power shall issue two  
8 separate checks for the Civil Penalty payment to (a) “OEHHA” in the amount of \$1,500.00; and  
9 to (b) “Brodsky & Smith, LLC in Trust for Ferreiro” in the amount of \$500.00. Payment owed to  
10 Ferreiro pursuant to this Section shall be delivered to the following payment address:

11                   Evan J. Smith, Esquire  
12                   Brodsky & Smith, LLC  
13                   Two Bala Plaza, Suite 510  
14                   Bala Cynwyd, PA 19004

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

17                   For United States Postal Service Delivery:

18                   Mike Gyurics  
19                   Fiscal Operations Branch Chief  
20                   Office of Environmental Health Hazard Assessment  
21                   P.O. Box 4010  
22                   Sacramento, CA 95812-4010

23                   For Non-United States Postal Service Delivery:

24                   Mike Gyurics  
25                   Fiscal Operations Branch Chief  
26                   Office of Environmental Health Hazard Assessment  
27                   1001 I Street  
28                   Sacramento, CA 95814

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

4.2       **Attorneys’ Fees.** Within ten (10) days of the Effective Date, Western Power shall  
pay \$19,250.00 to Brodsky & Smith, LLC (“Brodsky Smith”) as complete reimbursement for

1 Ferreiro’s attorneys’ fees and costs incurred as a result of investigating, bringing this matter to  
2 Western Power attention, litigating and negotiating and obtaining judicial approval of a settlement  
3 in the public interest, pursuant to Code of Civil Procedure § 1021.5.

4 **5. RELEASE OF ALL CLAIMS**

5 5.1 This Consent Judgment is a full, final, and binding resolution between Ferreiro  
6 acting on his own behalf, and on behalf of the public interest, and Western Power and its parents,  
7 shareholders, members, directors, officers, managers, employees, representatives, agents,  
8 attorneys, divisions, subdivisions, subsidiaries, partners, sister companies, and affiliates, and their  
9 predecessors, successors and assigns (“Defendant Releasees”), and all entities from whom they  
10 obtain and to whom they directly or indirectly distribute or sell Covered Products, including but  
11 not limited to manufacturers, suppliers, distributors, wholesalers, customers, licensors, licensees  
12 retailers, franchisees, and cooperative members (“Downstream Releasees”), including, but not  
13 limited to, Revzilla Motorsports LLC and Cycle Gear Inc., of all claims for violations of Proposition  
14 65 based on exposure to DEHP/DINP from Covered Products as set forth in the Notices, with  
15 respect to any Covered Products manufactured, distributed, or sold by Western Power prior to the  
16 Effective Date. This Consent Judgment shall have preclusive effect such that no other person or  
17 entity, whether purporting to act in his, her, or its interests or the public interest shall be permitted  
18 to pursue and/or take any action with respect to any violation of Proposition 65 that was alleged in  
19 the Complaint, or that could have been brought pursuant to the Notices against Western Power  
20 and/or the Downstream Releasees of the Covered Products (“Proposition 65 Claims”). Compliance  
21 with the terms of this Consent Judgment constitutes compliance with Proposition 65 with regard to  
22 the Covered Products.

23 5.2 In addition to the foregoing, Ferreiro, on behalf of himself, his past and current  
24 agents, representatives, attorneys, and successors and/or assignees, and *not* in his representative  
25 capacity, hereby waives all rights to institute or participate in, directly or indirectly, any form of  
26 legal action and releases Western Power, Defendant Releasees, and Downstream Releasees  
27 including, but not limited to, Revzilla Motorsports LLC and Cycle Gear Inc., from any and all  
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1 manner of actions, causes of action, claims, demands, rights, suits, obligations, debts, contracts,  
2 agreements, promises, liabilities, damages, charges, losses, costs, expenses, and attorneys' fees, of  
3 any nature whatsoever, known or unknown, in law or equity, fixed or contingent, now or in the  
4 future, with respect to any alleged violations of Proposition 65 related to or arising from Covered  
5 Products manufactured, distributed, or sold by Western Power, Defendant Releasees or  
6 Downstream Releasees. With respect to the foregoing waivers and releases in this paragraph,  
7 Ferreiro hereby specifically waives any and all rights and benefits which he now has, or in the  
8 future may have, conferred by virtue of the provisions of § 1542 of the California Civil Code, which  
9 provides as follows:

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

14 5.3 Western Power waives any and all claims against Ferreiro, his attorneys and other  
15 representatives, for any and all actions taken or statements made (or those that could have been  
16 taken or made) by Ferreiro and his attorneys and other representatives, whether in the course of  
17 investigating claims or otherwise seeking enforcement of Proposition 65 against it in this matter,  
18 and/or with respect to Covered Products.

19 **6. INTEGRATION**

20 6.1 This Consent Judgment contains the sole and entire agreement of the Parties and  
21 any and all prior negotiations and understandings related hereto shall be deemed to have been  
22 merged within it. No representations or terms of agreement other than those contained herein exist  
23 or have been made by any Party with respect to the other Party or the subject matter hereof.

24 **7. GOVERNING LAW**

25 7.1 The terms of this Consent Judgment shall be governed by the laws of the State of  
26 California and apply within the State of California. In the event that Proposition 65 is repealed or  
27 is otherwise rendered inapplicable by reason of law generally, or as to Covered Products, then  
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1 Defendant shall have no further obligations pursuant to this Consent Judgment with respect to, and  
2 to the extent that, Covered Products are so affected.

3 **8. NOTICES**

4 8.1 Unless specified herein, all correspondence and notices required to be provided  
5 pursuant to this Consent Judgment shall be in writing and personally delivered or sent by: (i) first-  
6 class, (registered or certified mail) return receipt requested; or (ii) overnight courier on any party  
7 by the other party at the following addresses:

8 For Defendant:

9 Ryan S. Landis  
10 Polsinelli PC, Polsinelli LLP  
11 2049 Century Park East, Suite 2900  
12 Los Angeles, CA 90067

13 And

14 For Ferreiro:

15 Evan Smith  
16 Brodsky & Smith, LLC  
17 9595 Wilshire Blvd., Ste. 900  
18 Beverly Hills, CA 90212

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

21 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

22 9.1 This Consent Judgment may be executed in counterparts and by facsimile, each of  
23 which shall be deemed an original, and all of which, when taken together, shall constitute one and  
24 the same document.

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

27 10.1 Ferreiro agrees to comply with the requirements set forth in California Health &  
28 Safety Code § 25249.7(f) and to promptly bring a Motion for Approval of this Consent Judgment.  
Defendant agrees it shall support approval of such Motion.

1           10.2 This Consent Judgment shall not be effective until it is approved and entered by the  
2 Court and shall be null and void if, for any reason, it is not approved by the Court. In such case, the  
3 Parties agree to meet and confer on how to proceed and if such agreement is not reached within 30  
4 days, the case shall proceed on its normal course.

5           10.3 If the Court approves this Consent Judgment and is reversed or vacated by an  
6 appellate court, the Parties shall meet and confer as to whether to modify the terms of this Consent  
7 Judgment. If the Parties do not jointly agree on a course of action to take, the case shall proceed on  
8 its normal course on the trial court's calendar.

9 **11. MODIFICATION**

10           11.1 This Consent Judgment may be modified only by further stipulation of the Parties  
11 and the approval of the Court or upon the granting of a motion brought to the Court by either Party.

12 **12. ATTORNEY'S FEES**

13           12.1 A Party who unsuccessfully brings or contests an action arising out of this Consent  
14 Judgment shall be required to pay the prevailing party's reasonable attorney's fees and costs.

15           12.2 Nothing in this Section shall preclude a Party from seeking an award of sanctions  
16 pursuant to law.

17 **13. RETENTION OF JURISDICTION**

18           13.1 This Court shall retain jurisdiction of this matter to implement or modify the  
19 Consent Judgment.

20 **14. AUTHORIZATION**

21           14.1 The undersigned are authorized to execute this Consent Judgment on behalf of their  
22 respective Parties and have read, understood and agree to all of the terms and conditions of this  
23 document and certify that he or she is fully authorized by the Party he or she represents to execute  
24 the Consent Judgment on behalf of the Party represented and legally bind that Party. Except as  
25 explicitly provided herein each Party is to bear its own fees and costs.  
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**AGREED TO:**

**AGREED TO:**

Date: \_\_\_\_\_

Date: 9-22-20

By: \_\_\_\_\_

By: 

ANTHONY FERREIRO

WESTERN POWER SPORTS, INC.

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

Dated: \_\_\_\_\_

\_\_\_\_\_  
Judge of Superior Court

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**AGREED TO:**

**AGREED TO:**

Date: 10/11/2020

Date: \_\_\_\_\_

By: Anthony Ferreiro  
ANTHONY FERREIRO

By: \_\_\_\_\_  
WESTERN POWER SPORTS, INC.

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

Dated: \_\_\_\_\_

\_\_\_\_\_  
Judge of Superior Court