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

11 ANTHONY FERREIRO,

12 Plaintiff,

13 v.

14 LEMANS CORPORATION,

15 Defendant.

Case No.: RG18920592

**[PROPOSED] CONSENT  
JUDGMENT**

Judge: Evelio Grillo

Dept.: 15

Hearing Date: January 4, 2019

Hearing Time: 10:00 AM

Reservation #: R-2006385

1           **1. INTRODUCTION**

2           **1.1 The Parties.** This Consent Judgment is entered into by and between Anthony  
3 Ferreiro acting on behalf of himself and in the public interest (hereinafter “Ferreiro”) and LeMans  
4 Corporation (“LeMans” 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. LeMans is alleged to be a  
8 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) from its sales of Thor raincoats/jackets/rainwear  
12 without providing a clear and reasonable exposure warning pursuant to Proposition 65. DEHP is  
13 listed under Proposition 65 as a chemical known to the State of California to cause cancer and  
14 reproductive toxicity.

15           **1.3 Notice of Violation/Complaint.** On or about April 9, 2018, Ferreiro served  
16 LeMans, and various public enforcement agencies with documents entitled “60-Day Notice of  
17 Violation” pursuant to Health & Safety Code § 25249.7(d) (the “Notice”), alleging that Defendant  
18 violated Proposition 65 for failing to warn consumers and customers that use of Thor Excel Trench  
19 Rain Jackets expose users in California to DEHP. No public enforcer has brought and is diligently  
20 prosecuting the claims alleged in the Notice. On September 13, 2018, Ferreiro filed a complaint  
21 (the “Complaint”) in the matter.

22           **1.4** For purposes of this Consent Judgment only, the Parties stipulate that this Court has  
23 jurisdiction over Defendant as to the allegations contained in the Complaint filed in this matter, that  
24 venue is proper in the County of Alameda, and that this Court has jurisdiction to approve, enter,  
25 and oversee the enforcement of this Consent Judgment as a full and final binding resolution of all  
26 claims which were or could have been raised in the Complaint based on the facts alleged therein  
27 and/or in the Notice.  
28

1           1.5 Defendant denies the material allegations contained in Ferreiro's Notice and  
2 Complaint and maintains that it has not violated Proposition 65. Nothing in this Consent Judgment  
3 shall be construed as an admission by Defendant of any fact, finding, issue of law, or violation of  
4 law; nor shall compliance with this Consent Judgment constitute or be construed as an admission  
5 by Defendant of any fact, finding, conclusion, issue of law, or violation of law, such being  
6 specifically denied by Defendant. However, this section shall not diminish or otherwise affect the  
7 obligations, responsibilities, and duties of the Parties under this Consent Judgment.

8 **2. DEFINITIONS**

9           2.1 **Covered Products.** The term "Covered Products" means Thor  
10 raincoats/jackets/rainwear that are manufactured, produced, distributed, sold and/or offered for sale  
11 in California by LeMans.

12           2.2 **Effective Date.** The term "Effective Date" means the date this Consent Judgment is  
13 approved and entered as a Judgment of the Court.

14 **3. INJUNCTIVE RELIEF: WARNINGS**

15           3.1 As of one hundred eighty (180) calendar days after the Effective Date, LeMans shall  
16 not manufacture or order from any supplier any Covered Products intended for retail sale in  
17 California that contains DEHP on any component to which consumers are exposed in excess of  
18 0.1% (1,000 ppm) (hereinafter "Reformulated Products") unless the Covered Product is  
19 accompanied by a warning that complies with Article 6 of Title 27 of the California Code of  
20 Regulations. Covered Products sold by LeMans before the Effective Date may sell through without  
21 a warning even if not Reformulated Products. When required, LeMans shall use the following  
22 warning:

- 23           (a) A symbol consisting of a black exclamation point in a yellow equilateral triangle with  
24 a black outline to the left of the word "**WARNING:**" in bold all capital letters, followed by  
25 the statement "This product can expose you to chemicals including di(2-  
26 ethylhexyl)phthalate, which is known to the State of California to cause cancer and birth  
27  
28

defects or other reproductive harm. For more information, go to  
www.P65Warnings.ca.gov.”; or

(b) A warning consisting of a symbol that is a black exclamation point in a yellow equilateral triangle with a black outline to the left of the word “**WARNING:**” in bold all capital letters, followed by the statement “Cancer and Reproductive Harm -  
www.P65Warnings.ca.gov.”<sup>1</sup>

3.2 The warning provided pursuant to Section 3.1 shall be affixed to or printed on the Covered Product or its packaging or labeling, or on a placard, shelf tag, sign or electronic device or automatic process, providing that the warning is displayed with such conspicuousness, as compared with other words, statements, or designs, as to render it likely to be read and understood by an ordinary individual under customary conditions of purchase or use. A warning may be contained in the same section of the Covered Product or its packaging, labeling, or instruction booklet that states other safety warnings, if any, concerning the use of the product and shall be at least the same size as those other safety warnings.

#### 4. MONETARY TERMS

4.1 **Civil Penalty.** LeMans shall pay \$1,000.00 as a Civil Penalty pursuant to Health and Safety Code section 25249.7(b), to be apportioned in accordance with California Health & Safety Code § 25192, with 75% of these funds remitted to the State of California’s Office of Environmental Health Hazard Assessment (“OEHHA”) and the remaining 25% of the Civil Penalty remitted to Ferreiro, as provided by California Health & Safety Code § 25249.12(d).

4.1.1 Within ten (10) business days of the Effective Date, LeMans shall issue two separate checks for the Civil Penalty payment to (a) “OEHHA” in the amount of \$750.00; and to (b) “Brodsky & Smith, LLC in Trust for Ferreiro” in the amount of \$250.00. Payment owed to Ferreiro pursuant to this Section shall be delivered to the following payment address:

Evan J. Smith, Esquire  
Brodsky & Smith, LLC

<sup>1</sup> The triangular symbol need only be in yellow where the sign, label, shelf tag or other transmission format includes yellow print for purposes of other language, symbols or designs.

Two Bala Plaza, Suite 510  
Bala Cynwyd, PA 19004

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

For United States Postal Service Delivery:

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

For Non-United States Postal Service Delivery:

Mike Gyurics  
Fiscal Operations Branch Chief  
Office of Environmental Health Hazard Assessment  
1001 I Street  
Sacramento, CA 95814

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

4.2 **Attorneys' Fees.** Within ten (10) business days of the Effective Date, LeMans shall pay \$15,000.00 to Brodsky & Smith, LLC ("Brodsky Smith") as complete reimbursement for Ferreiro's attorneys' fees and costs incurred as a result of investigating, bringing this matter to LeMans' attention, litigating and negotiating and obtaining judicial approval of a settlement in the public interest, pursuant to Code of Civil Procedure § 1021.5.

## **5. RELEASE OF ALL CLAIMS**

5.1 This Consent Judgment is a full, final, and binding resolution between Ferreiro acting on his own behalf, and on behalf of the public interest, and LeMans, and its parents, shareholders, members, directors, officers, managers, employees, representatives, agents, attorneys, divisions, subdivisions, subsidiaries, partners, sister companies, and affiliates, and their predecessors, successors and assigns ("Defendant Releasees"), and all entities from whom they obtain and to whom they directly or indirectly distribute or sell Covered Products, including but not limited to manufacturers, suppliers, distributors, wholesalers, customers, licensors, licensees retailers, franchisees, and cooperative members, including but not limited to Cycle Gear, Inc.

1 (“Downstream Releasees”), of all claims for violations of Proposition 65 based on exposure to  
2 DEHP from Covered Products as set forth in the Notice and/or the Complaint, with respect to any  
3 Covered Products manufactured, distributed, or sold by LeMans prior to one hundred eighty (180)  
4 calendar days after the Effective Date. This Consent Judgment shall have preclusive effect such  
5 that no other person or entity, whether purporting to act in his, her, or its interests or the public  
6 interest shall be permitted to pursue and/or take any action with respect to any violation of  
7 Proposition 65 that was alleged in the Complaint, or that could have been brought pursuant to the  
8 Notice against LeMans or any of the Defendant Releasees or Downstream Releasees. Compliance  
9 with the terms of this Consent Judgment constitutes compliance with Proposition 65 with regard to  
10 the Covered Products.

11         5.2     In addition to the foregoing, Ferreiro, on behalf of himself, his past and current  
12 agents, representatives, attorneys, and successors and/or assignees, and not in his representative  
13 capacity, hereby waives all rights to institute or participate in, directly or indirectly, any form of  
14 legal action and releases LeMans, Defendant Releasees, and Downstream Releasees from any and  
15 all manner of actions, causes of action, claims, demands, rights, suits, obligations, debts, contracts,  
16 agreements, promises, liabilities, damages, charges, losses, costs, expenses, and attorneys’ fees, of  
17 any nature whatsoever, known or unknown, in law or equity, fixed or contingent, now or in the  
18 future, with respect to any alleged violations of Proposition 65 related to or arising from Covered  
19 Products. With respect to the foregoing waivers and releases in this paragraph, Ferreiro hereby  
20 specifically waives any and all rights and benefits which he now has, or in the future may have,  
21 conferred by virtue of the provisions of § 1542 of the California Civil Code, which provides as  
22 follows:

23                 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE  
24 CREDITOR DOES NOT KNOW OR SUSPECT TO 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         5.3     LeMans waives any and all claims against Ferreiro, his attorneys and other  
representatives, for any and all actions taken or statements made (or those that could have been

1 taken or made) by Ferreiro and his attorneys and other representatives, whether in the course of  
2 investigating claims or otherwise seeking enforcement of Proposition 65 against it in this matter,  
3 and/or with respect to Covered Products.

4 **6. INTEGRATION**

5 6.1 This Consent Judgment contains the sole and entire agreement of the Parties and  
6 any and all prior negotiations and understandings related hereto shall be deemed to have been  
7 merged within it. No representations or terms of agreement other than those contained herein exist  
8 or have been made by any Party with respect to the other Party or the subject matter hereof.

9 **7. GOVERNING LAW**

10 7.1 The terms of this Consent Judgment shall be governed by the laws of the State of  
11 California and apply within the State of California. In the event that Proposition 65 is repealed or  
12 is otherwise rendered inapplicable by reason of law generally, or as to Covered Products, then  
13 Defendant shall have no obligations pursuant to this Consent Judgment with respect to, and to the  
14 extent that, Covered Products are so affected.

15 **8. NOTICES**

16 8.1 Unless specified herein, all correspondence and notices required to be provided  
17 pursuant to this Consent Judgment shall be in writing and personally delivered or sent by: (i) first-  
18 class, (registered or certified mail) return receipt requested; or (ii) overnight courier on any Party  
19 by the other Party at the following addresses:

20 For Defendant:

21 General Counsel  
22 Attn: John Holzhuter  
23 LeMans Corporation  
24 3501 Kennedy Road  
25 P.O. Box 5222  
26 Janesville, WI 53547-5222

27 Chief Executive Officer  
28 LeMans Corporation  
3501 Kennedy Road  
P.O. Box 5222  
Janesville, WI 53547-5222

And

1 For Ferreiro:

2 Evan Smith  
3 Brodsky & Smith, LLC  
4 9595 Wilshire Blvd., Ste. 900  
5 Beverly Hills, CA 90212

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

8 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

9 9.1 This Consent Judgment may be executed in counterparts and by facsimile, each of  
10 which shall be deemed an original, and all of which, when taken together, shall constitute one and  
11 the same document.

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

13 10.1 Ferreiro agrees to comply with the requirements set forth in California Health &  
14 Safety Code §25249.7(f) and to promptly bring a Motion for Approval of this Consent Judgment.  
15 Defendant agrees it shall support approval of such Motion.

16 10.2 This Consent Judgment shall not be effective until it is approved and entered by the  
17 Court and shall be null and void if, for any reason, it is not approved by the Court. In such case,  
18 the Parties agree to meet and confer on how to proceed and if such agreement is not reached within  
19 30 days, the case shall proceed on its normal course.

20 10.3 If the Court approves this Consent Judgment and is reversed or vacated by an  
21 appellate court, the Parties shall meet and confer as to whether to modify the terms of this Consent  
22 Judgment. If the Parties do not jointly agree on a course of action to take, the case shall proceed on  
23 its normal course on the trial court's calendar.

24 **11. MODIFICATION**

25 11.1 This Consent Judgment may be modified only by further stipulation of the Parties  
26 and the approval of the Court or upon the granting of a motion brought to the Court by either Party.



1 **12. ATTORNEY'S FEES**

2 12.1 A Party who unsuccessfully brings or contests an action arising out of this Consent  
3 Judgment shall be required to pay the prevailing Party's reasonable attorney's fees and costs, unless  
4 the unsuccessful Party has acted with substantial justification. For purposes of this Consent  
5 Judgment, the term substantial justification shall carry the same meaning as used in the California  
6 Code of Civil Procedure, § 2016 et. seq.

7 12.2 Nothing in this Section shall preclude a Party from seeking an award of sanctions  
8 pursuant to law.

9 **13. AUTHORIZATION**

10 13.1 The undersigned are authorized to execute this Consent Judgment on behalf of their  
11 respective Parties and have read, understood and agree to all of the terms and conditions of this  
12 document and certify that he or she is fully authorized by the Party he or she represents to execute  
13 the Consent Judgment on behalf of the Party represented and legally bind that Party. Except as  
14 explicitly provided herein each Party is to bear its own fees and costs.

15  
16 **AGREED TO:**

**AGREED TO:**

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

18 By: \_\_\_\_\_ By: \_\_\_\_\_  
19 ANTHONY FERREIRO LEMANS CORPORATION

20  
21  
22 **IT IS SO ORDERED, ADJUDGED AND DECREED:**

23  
24 Dated: \_\_\_\_\_ Judge of Superior Court

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14 explicitly provided herein each Party is to bear its own fees and costs.

15  
16 **AGREED TO:**

**AGREED TO:**

17  
18 Date:

11/14/18

Date:

9-19-18

19 By:

Anthony Ferreiro  
ANTHONY FERREIRO

By:

Charles M. C. - President  
LEMANS CORPORATION

21  
22 **IT IS SO ORDERED, ADJUDGED AND DECREED:**

23  
24 Dated: \_\_\_\_\_

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