

1 PARKER SMITH, ESQ. (SBN 290311)
2 SY AND SMITH, PC.
3 11622 El Camino Real, Suite 100
4 Del Mar, CA 92130
5 Telephone: (858) 746-9554
6 Facsimile: (858)746-5199
7
8 Attorneys for Plaintiff, Kingpun Cheng

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 COUNTY OF SAN DIEGO

11 KINGPUN CHENG,
12 Plaintiff,
13 vs.
14 PACIFIC CYCLE, INC.
15 Defendants.

Case No. 37-2018-00046020-CU-PO-CTL

UNLIMITED JURISDICTION
STIPULATION AND [PROPOSED]
ORDER RE ENTRY OF CONSENT
JUDGMENT AS TO PACIFIC
CYCLE, INC.

Complaint Filed: September 13, 2018

17
18 1. Introduction

19 1.1 Parties

20 This Consent Judgment is hereby entered into by and between Kingpun Cheng, as an
21 individual and acting in the interest of the public, (hereinafter "Cheng") and Pacific Cycle Inc.
22 (hereinafter "Pacific Cycle"). Pacific Cycle and Cheng shall be collectively referred to as the
23 "Parties" and each of them as a "Party." Cheng is an individual residing in California who seeks
24 to promote awareness of exposures to toxic chemicals and improve human health by reducing or
25 eliminating hazardous substances contained in consumer products. Pacific Cycle employs ten or
26 more persons as required for purposes of Cal. Health & Safety Code §§ 25249.5 *et seq.*
27 ("Proposition 65").
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

1.2 General Allegations

Cheng alleges that Pacific Cycle offered for sale and sold in the State of California Removable Bike Wallets, including but not limited to “Schwinn Removable Bike Wallet #SW79217” UPC038675146464, containing DEHP, a chemical listed under Proposition 65 as a chemical known to the State of California to cause cancer, birth defects, and/or other reproductive harm, and that they did so without providing the warning required by Proposition 65. Removable Bike Wallets, including Schwinn Removable Bike Wallet #SW79217, are referred to herein as “Covered Products”.

1.3 Notice of Violation

On or about June 11, 2018, Cheng issued a 60 Day Notice of Violation to Pacific Cycle, Target Corporation and various public enforcement agencies pursuant to Health & Safety Code §25249.7(d) alleging that Pacific Cycle, Inc. was in violation of Proposition 65 for failing to warn California consumers that the Covered Products exposed them to DEHP (hereinafter "Notice"). No public enforcer diligently prosecuted the claims threatened in the Notice within sixty days plus service time after service of the Notice to them by Cheng.

1.4 Complaint

On or about September 13, 2018 Cheng filed a Complaint against Pacific Cycle for civil penalties and injunctive relief (“Complaint”) in San Diego Superior Court, Case No. 37-2018-00046020-CU-PO-CTL. The Complaint alleges, among other things, that Pacific Cycle violated Proposition 65 by failing to give clear and reasonable warnings of exposure to DEHP from the Covered Products.

1.5 Consent to Jurisdiction

For purposes of this Consent Judgment, the Parties consent that this Court has jurisdiction over the allegations of violations contained in the Complaint and personal jurisdiction over the

1 named Defendant as to the acts alleged in the Complaint, that venue is proper in the County of
2 San Diego and that this Court has jurisdiction to enter this Consent Judgment as a full settlement
3 and resolution of the allegations contained in the Notices, Complaint, and of all claims which
4 were or could have been raised by any person or entity based in whole or in part, directly or
5 indirectly, on the prior conduct of the Parties or on the facts alleged in the Complaint or arising
6 therefrom or related thereto.
7

8 **1.6 No Admission**

9 Nothing in this Consent Judgment shall be construed as an admission by Pacific Cycle of
10 any fact, finding, conclusion of law, issue of law, or violation of law; nor shall compliance with
11 this Consent Judgment constitute or be construed as an admission by Pacific Cycle of any fact,
12 finding, conclusion of law, issue of law, or violation of law. However, this section shall not
13 diminish or otherwise affect the obligations, responsibilities and duties under this Consent
14 Judgment.
15

16 **1.7** For purposes of this Consent Judgment, the term "Effective Date" shall mean the
17 date that the Motion to Approve the Consent Judgment has been granted by the Court.

18 **2. Injunctive Relief**

19 Pacific Cycle shall not manufacture, distribute, sell or offer for sale in California any
20 Covered Products with a production date after the Effective Date except for Reformulated
21 Products, as that term is defined in ¶ 2.1 below.
22

23 **2.1 Reformulation**

24 The Covered Products shall be deemed to comply with Proposition 65 with regard to
25 DEHP, and be exempt from any Proposition 65 warning requirements for DEHP, if the Covered
26 Products have a DEHP content by weight of not more than 0.10% (1,000 ppm). Pacific Cycle
27 may comply with the above requirements by relying on information obtained from its suppliers
28

1 regarding the content of the materials from which the Covered Products are made, provided such
2 reliance is in good faith. Obtaining test results showing that the DEHP content is no more than
3 0.10% (1,000 ppm), using a method of sufficient sensitivity to establish a limit of quantification
4 (as distinguished from detection) of less than 1,000 ppm, shall be deemed to establish good faith
5 reliance. For purposes of this Consent Judgment, Covered Products in compliance with this
6 standard are "Reformulated Products".

7
8 **2.2 Warning Alternative.**

9 As an alternative to reformulating the Covered Products, commencing on the Effective
10 Date, Covered Products, with a production date after the Effective Date, that Pacific Cycle ships
11 for sale, sells or offers for sale in California that are not Reformulated Products as set forth in
12 Section 2.1 above shall be accompanied by a clear and reasonable warning as described in
13 Section 2.3 below.

14
15 **2.3 Clear and Reasonable Warnings.**

16 Where required under Section 2.2 above, Pacific Cycle shall provide Proposition 65
17 warnings substantially as follows:

18 **WARNING:** This product can expose you to chemicals including DEHP, which is known
19 to the State of California to cause cancer and birth defects or other reproductive harm. For more
20 information go to www.P65Warnings.ca.gov.

21
22 **OR**

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

25 2.3.1 Where utilized as an alternative to meeting the criteria set forth in Section 2.1,
26 Pacific Cycle shall provide the warning language set forth in Section 2.3 either on the package of
27 the Covered Products or affixed to the Covered Products. Such warning shall be prominently
28

1 affixed to or printed on each Product's label or package or the Product itself. If printed on the
2 label, the warning shall be contained in the same section that states other safety warnings, if any,
3 concerning the use of the Product. Pacific Cycle may continue to utilize, on an ongoing basis, unit
4 packaging containing substantively the same Proposition 65 warnings as those set forth in Section
5 2.3 above, but only to the extent such packaging materials were printed within ninety days after
6 the Effective Date.
7

8 2.3.2 The requirements for warnings, set forth in Section 2.3 above are imposed
9 pursuant to the terms of this Consent Judgment. The Parties recognize that these are not the
10 exclusive methods of providing a warning under Proposition 65 and its implementing regulations
11 and that they may or may not be appropriate in other circumstances.
12

13 2.4 Products Manufactured Prior to the Effective Date

14 Notwithstanding anything else in this Consent Judgment, Covered Products that were
15 manufactured prior to the Effective Date shall be subject to the release of liability pursuant to
16 Section 5 of this Consent Judgment, without regard to when such Covered Products were, or are
17 in the future, distributed or sold to customers. As a result, the obligations of Pacific Cycle as set
18 forth in this Consent Judgment, including but not limited to Section 2, do not apply to these
19 products manufactured prior to the Effective Date.
20

21 3. Entry of Consent Judgment

22 3.1 With regard to all claims that have been raised or which could be raised with
23 respect to failure to warn pursuant to Proposition 65 with regard to DEHP in the Covered
24 Products, Pacific Cycle shall pay a civil penalty of \$1,500 pursuant to Health and Safety Code
25 section 25249.7(b), to be apportioned in accordance with California Health & Safety Code §
26 25192, with 75% of these funds remitted to the State of California's Office of Environmental
27 Health Hazard Assessment ("OEHHA") and the remaining 25% of the penalty remitted to Cheng,
28

1 as provided by California Health & Safety Code § 25249.12(c)(1) and (d) and the instructions
2 directly below.

3 **3.2 Payment Procedures**

4 Pacific Cycle shall issue two separate checks for the penalty payment: (a) one check made
5 payable to "OEHHA" (tax identification number: 68-0284486) in an amount representing 75% of
6 the total penalty (i.e., \$1,125); and (b) one check in an amount representing 25% of the total
7 penalty (i.e., \$375) made payable directly to Cheng. Pacific Cycle shall mail these payments
8 within ten (10) days after the Effective Date at which time such payments shall be mailed to the
9 following addresses respectively:
10

11 Office of Environmental Health Hazard Assessment

12 Fiscal Operations

13 1001 "I" Street

14 Mail Stop 12-B

15 Sacramento, CA 95814

16 and

17 Mr. Kingpun Cheng

18 C/O Sy and Smith, PC

19 11622 El Camino Real, Suite 100

20 San Diego, CA 92130

21 **4. Reimbursement of Fees and Costs**

22 The Parties reached an accord on the compensation due to Cheng and his counsel under
23 the private attorney general doctrine and principles of contract law. Under these legal principles,
24 Pacific Cycle shall reimburse Cheng's counsel for fees and costs incurred as a result of
25 investigating, bringing this matter to Pacific Cycle's attention, and negotiating a settlement.
26
27
28

1 Pacific Cycle shall pay Cheng's counsel \$14,000 for all attorneys' fees, expert and investigation
2 fees, and related costs associated with this matter, the Notices and associated fees and costs
3 Pacific Cycle shall wire said monies or send a check payable to "Sy and Smith, PC" within ten
4 (10) days of the Effective Date. Sy and Smith, PC will provide Pacific Cycle with wire
5 instruction and tax identification information on or before the Effective Date if requested. Other
6 than the payment required hereunder, each side is to bear its own attorneys' fees and costs.

7
8 5. Release of all Claims

9 5.1 Release of Pacific Cycle and Downstream Customers, Retailers and Entities

10 Cheng, acting on behalf of himself and in the public interest, releases Pacific Cycle and
11 their respective officers, directors, attorneys, representatives, shareholders, agents, and
12 employees, sister and parent entities, successors, and assigns, and each entity to whom it directly
13 or indirectly distributed or distributes or sold or sells the Covered Products including, but not
14 limited to, their downstream distributors, wholesalers, licensors, licensees, auctioneers, retailers
15 (including, but not limited to Target Corporation, their parent and all affiliates and subsidiaries
16 thereof), their respective employees, agents and assigns, franchisees, dealers, customers, owners,
17 purchasers, users, parent companies, corporate affiliates, subsidiaries, (collectively "Releasees")
18 from all claims for violations of Proposition 65 up through the Effective Date, and consistent with
19 the provisions of Section 2.4, above, based on exposure to DEHP from the Covered Products as
20 set forth in the Notices. Compliance with the terms of this Consent Judgment constitutes
21 compliance with Proposition 65 with respect to exposures to DEHP from the Covered Products.

22
23
24 In addition to the foregoing, Cheng, on behalf of himself, his past and current agents,
25 representatives, attorneys, and successors and/or assignees, and not in his representative capacity,
26 hereby waives all rights to institute or participate in, directly or indirectly, any form of legal
27 action and releases any other claims, cause of action, obligation, costs, expenses, attorneys' fees,
28

1 damages, losses, liabilities, and demands that he could make against Pacific Cycle or the other
2 Releases with respect to violations of Proposition 65 based upon the Covered Products. The
3 Parties acknowledge that the claims released above may include unknown claims, and with
4 respect to the foregoing waivers and releases in this paragraph, Cheng hereby specifically waives
5 any and all rights and benefits which he now has, or in the future may have, conferred by virtue of
6 the provisions of Section 1542 of the California Civil Code, which provides as follows:
7

8 A. GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE
9 CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS FAVOR AT THE TIME OF
10 EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM MUST HAVE MATERIALLY
11 AFFECTED HIS SETTLEMENT WITH THE DEBTOR.
12

13 Cheng acknowledges and understands the significance and consequences of this specific
14 waiver of California Civil Code section 1542.

15 5.2 Pacific Cycle Release of Cheng

16 Pacific Cycle waives any and all claims against Cheng, his attorneys and other
17 representatives, for any and all actions taken or statements made (or those that could have been
18 taken or made) by Cheng and his attorneys and other representatives in the course of investigating
19 claims or otherwise seeking enforcement of Proposition 65 against it in this matter.
20

21 6. Non-Disparagement

22 The Parties agree to refrain from taking action or making statements, written, oral or
23 through any form of social media, which disparage or defame the goodwill or reputation of the
24 other Party.

25 7. Severability and Merger
26
27
28

1 If, subsequent to the execution of this Consent Judgment, any of the provisions of this
2 document are held by a court to be unenforceable, the validity of the enforceable provisions
3 remaining shall not be adversely affected.

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

9 **8. Governing Law**

10 The terms of this Consent Judgment shall be governed by the laws of the State of
11 California. In the event that Proposition 65 is repealed or is otherwise rendered inapplicable by
12 reason of law generally, or as to the Covered Products, then Pacific Cycle shall have no further
13 obligations pursuant to this Consent Judgment with respect to the Covered Products to the extent
14 the Covered Products are so affected.
15

16 **9. Notices**

17 9.1 Unless specified herein, all correspondence and notices required to be provided
18 pursuant to this Consent Judgment shall be in writing and personally delivered or sent by:
19 electronic mail and either (i) first-class, (registered or certified mail) return receipt requested; or
20 (ii) overnight courier on any Party by the other Party at the following addresses:
21

22 Pacific Cycle:

23 David P. Callet
24 Callet Law, LLC
25 5335 Wisconsin Avenue NW
26 Suite 440
27 Washington, DC 20015
28 Dcallet@Calletlaw.com

And

1 Reade Bramer
2 Schiff Hardin LLP
3 One Market, Spear Street Tower
4 Suite 3100
5 San Francisco, CA 94105
6 rbramer@schiffhardin.com

7 For Cheng:

8 Parker A. Smith
9 Sy and Smith, PC
10 11622 El Camino Real, Suite 100
11 San Diego, CA 92130
12 parker@sysmithlaw.com

13 Any Party, from time to time, may specify in writing by the means set forth above to the
14 other Party a change of address to which all notices and other communications shall be sent.

15 **10. Counterparts; Facsimile Signatures**

16 10.1 This Consent Judgment may be executed in counterparts and by facsimile or
17 exchange by electronic means, each of which shall be deemed an original, and all of which, when
18 taken together, shall constitute one and the same document.

19 **11. Modification**

20 This Consent Judgment may be modified only by further written agreement of the Parties
21 with court approval or by noticed motion.

22 **12. Attorney Fees**

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

25 **13. Authorization**

26 The undersigned are authorized to execute this Consent Judgment on behalf of their
27 respective Parties and have read, understood and agree to all of the terms and conditions of this
28 document and certifies that he or she is fully authorized by the Party he or she represents to
execute the Consent Judgment on behalf of the Party and legally bind that Party.

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

IT IS SO STIPULATED:

Dated: September 18, 2018

By: 

Parker A. Smith, Attorney for Plaintiff

Dated: 9-17-18

By: 

Kingpun Cheng

Dated: September 24, 2018

By: 

Reade Bramer, Attorney for Defendant

Dated: 9-24-18

By: 

On Behalf of: Pacific Cycle, Inc.

////

////

////

////

////

////

////

////

IT IS SO ORDERED, ADJUDGED AND DECREED:

Dated: _____

Judge of the Superior Court