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8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
9 **COUNTY OF LOS ANGELES**
10 **GLENDALE COURTHOUSE**

11
12 **ANTHONY FERREIRO,**
13 Plaintiff,
14 v.
15 **ARKON RESOURCES, INC.,**
16 Defendant.

Case No.: 19GDCV00992
[PROPOSED]
CONSENT JUDGMENT
Judge: Ralph C. Hofer
Dept.: D
Hearing Date: November 1, 2019
Hearing Time: 8:30 AM
Reservation ID: 367252520658

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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 Arkon Resources, Inc.
4 (“Arkon Resources” or “Defendant”). Ferreiro and Defendant are collectively referred to as
5 “Parties” and each of them as “Party.” Ferreiro is an individual residing in California that seeks to
6 promote awareness of exposures to toxic chemicals and improve human health by reducing or
7 eliminating hazardous substances contained in consumer products. Defendant 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 Arkon Sports Armbands without
12 providing a clear and reasonable exposure warning pursuant to Proposition 65. DEHP is listed
13 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 August 22, 2018, Ferreiro served
16 Defendant, 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 in the course of doing business by knowingly and intentionally exposing
19 one or more individuals to a chemical known to the state to cause cancer or reproductive toxicity
20 without first giving clear and reasonable warning to such individual that use Arkon Sports
21 Armbands expose users in California to DEHP.

22 1.4 Defendant denies these allegations and contends that it did not violate Health &
23 Safety Code §25249.6 and that it is entering into this Consent Judgment as a settlement of a disputed
24 claim to avoid the costs of litigation and to buy its peace.

25 1.5 No governmental entity person acting on behalf of a governmental official has either
26 asserted the claims set forth in the Notice or has filed an action on such claims.

1 1.6 On February 13, 2019, Ferreiro filed a civil action against Defendant (the
2 “Complaint”) in th1 matter.

3 1.7 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
4 jurisdiction over Defendant as to the allegations contained in the Complaint in this matter, that
5 venue is proper in the County of Los Angeles, Glendale Courthouse, and that this Court has
6 jurisdiction to approve, enter, and oversee the enforcement of this Consent Judgment as a full and
7 final binding resolution of all claims which were or could have been raised in the Complaint and/or
8 in the Notice.

9 1.8 Defendant denies the material allegations contained in Ferreiro’s Notice and
10 Complaint and maintains that it has not violated Proposition 65. Nothing in this Consent Judgment
11 shall be construed as an admission by Defendant of any fact, finding, issue of law, or violation of
12 law; nor shall compliance with this Consent Judgment constitute or be construed as an admission
13 by Defendant of any fact, finding, conclusion, issue of law, or violation of law, such being
14 specifically denied by Defendant. However, this section shall not diminish or otherwise affect the
15 obligations, responsibilities, and duties of Defendant under this Consent Judgment.

16 **2. DEFINITIONS**

17 2.1 **Covered Products.** The term “Covered Products” means all sizes of Arkon Sports
18 Armbands and all parts thereof which are manufactured, distributed and/or offered for sale in
19 California.

20 2.2 **Effective Date.** The term “Effective Date” means the date Notice of Entry of this
21 Consent Judgment served on Defendant.

22 **3. INJUNCTIVE RELIEF: WARNINGS**

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

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

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

16 (a) **Warning.** The “Warning” shall consist of the statement:

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

20 (b) **Alternative Warning:** Defendant may, but is not required to, use the alternative
21 short-form warning as set forth in this § 3.3(b) (“**Alternative Warning**”) as follows:

22 ⚠ **WARNING:** Cancer and Reproductive Harm - www.P65Warnings.ca.gov.

23 **3.4 A Warning or Alternative Warning** provided pursuant to § 3.3 must print the word
24 “**WARNING:**” in all capital letters and in bold font, followed by a colon. The warning symbol to
25 the left of the word “**WARNING:**” must be a black exclamation point in a yellow equilateral
26 triangle with a black outline, except that if the sign or label for the Covered Product does not use
27 the color yellow, the symbol may be in black and white. The symbol must be in a size no smaller
28 than the height of the word “**WARNING:**”. The warning shall be affixed to or printed on the

1 Covered Product’s packaging or labeling, or on a placard, shelf tag, sign or electronic device or
2 automatic process, providing that the warning is displayed with such conspicuousness, as compared
3 with other words, statements, or designs as to render it likely to be read and understood by an
4 ordinary individual under customary conditions of purchase or use. A warning may be contained
5 in the same section of the packaging, labeling, or instruction booklet that states other safety
6 warnings, if any, concerning the use of the Covered Product and shall be at least the same size as
7 those other safety warnings.

8 If Defendant sells Covered Products via an Internet website to customers located in
9 California, the warning requirements of this section shall be satisfied if the foregoing warning
10 appears either a warning which complies with the content requirements of § 3(a) which also
11 provides by including either the warning or a clearly marked hyperlink using the word
12 “**WARNING**” on the product display page, or by otherwise prominently displaying the warning to
13 the purchaser prior to completing the purchase; or in the alternative, if the warning is provided
14 using the short-form warning label content pursuant to 3(b), the warning provided on the website
15 may use the same content. A warning is not prominently displayed if the purchaser must search
16 for it in the general content of the website.

17 3.5 **Compliance with Warning Regulations.** Defendant shall be deemed to be in
18 compliance with this Consent Judgment by either adhering to §§ 3.3 and 3.4 of this Consent
19 Judgment or by complying with warning requirements adopted by the State of California’s Office
20 of Environmental Health Hazard Assessment (“OEHHA”) after the Effective Date.

21 **4. MONETARY TERMS**

22 4.1 **Settlement of Disputed Civil Penalty.** Defendant shall pay \$3,500.00 as a
23 settlement of a disputed civil penalty, with seventy-five percent (75%) of these funds remitted to
24 OEHHA and the remaining twenty-five percent (25%) to Ferreiro as provided by California Health
25 & Safety Code § 25249.12(d).

26 4.1.1 Within ten (10) days of the Effective Date, Defendant shall issue two (2)
27 separate checks for the civil penalty payment to (a) “OEHHA” in the amount of \$2,625.00; and to
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1 (b) "Brodsky & Smith, LLC's Client Trust Account" in the amount of \$875.00 on behalf of
2 Ferreiro. Payment owed to Ferreiro pursuant to this Section shall be sent by overnight mail to the
3 following payment address:

4 Evan J. Smith, Esquire
5 Brodsky & Smith, LLC
6 Two Bala Plaza, Suite 510
7 Bala Cynwyd, PA 19004

8 Payment owed to OEHHA (EIN: 68-0284486) pursuant to this Section shall be sent by overnight
9 mail directly to OEHHA (Memo Line "Prop 65 Penalties") at one of the following address(es):

10 Mike Gyurics
11 Fiscal Operations Branch Chief
12 Office of Environmental Health Hazard Assessment
13 1001 I Street
14 Sacramento, CA 95814

15 A copy of the check payable to OEHHA shall be sent by United States Mail, overnight mail, or
16 electronic mail to Brodsky & Smith, LLC at the address set forth above as proof of payment to
17 OEHHA.

18 4.2 **Attorneys' Fees.** Within ten (10) days of the Effective Date, Defendant shall pay
19 \$31,500.00 to Brodsky & Smith, LLC ("Brodsky Smith") as complete reimbursement for Ferreiro's
20 attorneys' fees and costs incurred as a result of investigating, bringing this matter to Defendant's
21 attention, litigating and negotiating and obtaining judicial approval of a settlement in the public
22 interest, pursuant to Code of Civil Procedure § 1021.5.

23 **5. RELEASE OF ALL CLAIMS**

24 5.1 This Consent Judgment is a full, final, and binding resolution between Ferreiro
25 acting on his own behalf, and on behalf of the public interest, and Defendant, and upstream
26 suppliers, and contract manufacturers, and each of their parents, shareholders, members, directors,
27 officers, managers, employees, representatives, agents, attorneys, divisions, subdivisions,
28 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,

1 suppliers, distributors, wholesalers, customers, licensors, licensees retailers, franchisees, and
2 cooperative members, including but not limited to Walmart, Inc. (“Downstream Releasees”), of all
3 claims for violations of Proposition 65 based on exposure to DEHP from Covered Products as set
4 forth in the Notice, with respect to any Covered Products manufactured, distributed, or sold by
5 Defendant prior to the Effective Date. This Consent Judgment shall have preclusive effect such
6 that no other person or entity, whether purporting to act in his, her, or its interests or the public
7 interest shall be permitted to pursue and/or take any action with respect to any violation of
8 Proposition 65 that was alleged in the Complaint, or that could have been brought pursuant to the
9 Notice against Defendant Releasees and/or the Downstream Releasees of the Covered Products
10 (“Proposition 65 Claims”). Compliance with the terms of this Consent Judgment constitutes
11 compliance with Proposition 65 with regard to the Covered Products.

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

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

1 5.3 Defendant waives any and all claims against Ferreiro, his attorneys and other
2 representatives, for any and all actions taken or statements made (or those that could have been
3 taken or made) by Ferreiro and his attorneys and other representatives, whether in the course of
4 investigating claims or otherwise seeking enforcement of Proposition 65 against it in this matter,
5 and/or with respect to Covered Products.

6 **6. INTEGRATION**

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

11 **7. GOVERNING LAW**

12 7.1 The terms of this Consent Judgment shall be governed by the laws of the State of
13 California without regard to its or any other jurisdiction's choice of law principles. In the event
14 that Proposition 65 is repealed or is otherwise rendered inapplicable by reason of law generally, or
15 as to Covered Products, then Defendant shall have no further obligations pursuant to this Consent
16 Judgment with respect to, and to the extent that, Covered Products are so affected.

17 **8. NOTICES**

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

22 For Defendant:

23 Henry B. LaTorraca
24 Law Office of Henry B. LaTorraca
25 Union Bank Building
26 400 Oceangate, Suite 700
27 Long Beach, CA 90802-4306

28 and

For Ferreiro:

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

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

7 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

8 9.1 This Consent Judgment may be executed in counterparts, including by PDF, and by
9 facsimile, each of which shall be deemed an original, and all of which, when taken together, shall
10 constitute one and the same document.

11 **10. COMPLIANCE WITH HEALTH & SAFETY CODE § 25249.7(f)/COURT**
12 **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 pursuant to California Health & Safety Code § 25249.7(f)(4). Defendant agrees it shall not oppose
16 such Motion. Ferreiro agrees that all discovery shall be stayed from the time this Consent Judgment
17 is signed until sixty (60) days after Ferreiro's service of his Notice of Notice of Entry of this
18 Consent Judgment or one-hundred twenty (120) days before trial, whichever date is earlier.

19 10.2 This Consent Judgment shall not be effective until it is approved, entered by the
20 Court, and Notice of Entry of Judgment is filed and served on Defendant and shall be null and void
21 if, for any reason, it is not approved by the Court. In such case, the Parties agree to meet and confer
22 on how to proceed and if such agreement is not reached within sixty (60) days after filing and
23 service of the Notice of Ruling on Ferreiro's Motion for Approval of this Consent Judgment.

24 10.3 If the Court approves this Consent Judgment and is reversed or vacated by an
25 appellate court, other than by a writ or an appeal by Ferreiro or his attorneys, the Parties shall meet
26 and confer as to whether to modify the terms of this Consent Judgment. If the Parties do not jointly
27 agree on a course of action to take, the case shall proceed on its normal course on the trial court's
28 calendar.

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11. MODIFICATION

11.1 This Consent Judgment may be modified only by further stipulation of the Parties and the approval of the Court or upon the granting of a motion brought to the Court by either Party upon a showing of clear and convincing evidence of a basis for modification based on a manifest injustice, or surprise, inadvertence, mistake, or excusable neglect.

12. ATTORNEY'S FEES

12.1 In any action to contest this Consent Judgment, the prevailing party shall be entitled to reasonable attorney's fees and costs.

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

13. RETENTION OF JURISDICTION

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

14. AUTHORIZATION

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

AGREED TO:

AGREED TO:

Date: 9/13/19

Date: 8/21/19

Anthony Ferreiro
ANTHONY FERREIRO

ARKONRESOURCES, INC.
By: Paul Brassard
Paul Brassard

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On reading the Consent Judgment, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

- (A) The warning that is required by the settlement complies with Health & Safety Code §§ 25249.5 – 25249.14.
- (B) The award of attorney’s fees is reasonable under California law;
- (C) The penalty amount is reasonable based on the criteria set forth in Health & Safety Code § 25249.7(b)(2); and
- (D) The [Proposed] Consent Judgment is hereby entered as a Consent Judgment.

IT IS SO ORDERED:

RALPH C. HOFER
Judge of Superior Court