

1 Evan Smith (Bar No. SBN 242352)
2 BRODSKY & SMITH, LLC.
3 9595 Wilshire Blvd., Ste. 900
4 Beverly Hills, CA 90212
5 Tel: (877) 534-2590
6 Fax: (310) 247-0160

7 *Attorneys for Plaintiff*

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

11 ANTHONY FERREIRO,

12 Plaintiff,

13 v.

14 SIERRA TRADING POST, INC., CERF
15 PRODUCTS, INC.,

16 Defendant.

Case No.: HG19030006

CONSENT JUDGMENT

Judge: Jeffrey Brand

Dept.: 22

Hearing Date: August 23, 2020

Hearing Time: 3:00 PM

Reservation #: R-2183643

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 Cerf Products, Inc.
4 (“Cerf Products”) with Ferreiro and Cerf Products collectively referred to as the “Parties” and each
5 of them as a “Party.” Ferreiro is an individual residing in California that seeks to promote awareness
6 of exposures to toxic chemicals and improve human health by reducing or eliminating hazardous
7 substances contained in consumer products. Cerf Products is alleged to be a person in the course of
8 doing business for purposes of Proposition 65, Cal. Health & Safety Code §§ 25249.6 et seq.

9 1.2 **Allegations and Representations.** Ferreiro alleges that Cerf Products has exposed
10 individuals to di(2-ethylhexyl) phthalate (DEHP) from its sales of WayPoint dry paks/bags without
11 providing a clear and reasonable exposure warning pursuant to Proposition 65. DEHP is listed
12 under Proposition 65 as a chemical known to the State of California to cause cancer and
13 reproductive toxicity.

14 1.3 **Notice of Violation/Complaint.** On or about October 11, 2018, Ferreiro served
15 AmeriBag, Inc. (“AmeriBag”), Sierra Trading Post, Inc. (“Sierra Trading”) and various public
16 enforcement agencies with documents entitled “60-Day Notice of Violation” pursuant to Health &
17 Safety Code §25249.7(d) (the “Notice”), alleging that AmeriBag and Sierra Trading violated
18 Proposition 65 for failing to warn consumers and customers that use of WayPoint dry paks/bags
19 expose users in California to DEHP. No public enforcer has brought, or is diligently prosecuting,
20 the claims alleged in the Notice. On August 5, 2019, Ferreiro filed a complaint (the “Complaint”)
21 in the matter against defendant Sierra Trading. Cerf Products, a sister company sharing common
22 ownership with Ameribag, was subsequently identified as the supplier of the Products identified in
23 the Notice and entered into negotiations with Ferreiro to resolve claims concerning the Products in
24 the Notice and Complaint. On May 11, 2020, Plaintiff filed a first amended complaint in order to
25 name Cerf Products as a defendant (the “Amended Complaint”). The Complaint and Amended
26 Complaint are collectively referred to herein as, the “Action.”

27 1.4 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
28

1 jurisdiction over Cerf Products as to the allegations contained in the Action, that venue is proper in
2 the County of Alameda, and that this Court has jurisdiction to approve, enter, and oversee the
3 enforcement of this Consent Judgment as a full and final binding resolution of all claims which
4 were or could have been raised in the Action based on the facts alleged therein and/or in the Notice.

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

12 **2. DEFINITIONS**

13 2.1 **Covered Products.** The term “Covered Products” means WayPoint dry paks/bags
14 that are manufactured, distributed and/or offered for sale in California by Cerf Products.

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

25 3.2 **Reformulation Standard.** “Reformulated Products” shall mean Covered Products
26 that contain concentrations less than or equal to 0.1% (1,000 parts per million (ppm)) of DEHP
27 when analyzed pursuant to U.S. Environmental Protection Agency testing methodologies 3580A
28

1 and 8270C or other methodology utilized by federal or state government agencies for the purpose
2 of determining the phthalate content in a solid substance.

3 3.3 **Clear and Reasonable Warning.** As of the date this Consent Judgment is signed
4 by both Parties, and continuing thereafter, a clear and reasonable exposure warning as set forth in
5 this §§ 3.3 and 3.4 must be provided for all Covered Products that Cerf Products manufacturers,
6 imports, distributes, sells, or offers for sale in California that is not a Reformulated Product. There
7 shall be no obligation for Cerf Products to provide a warning for Covered Products that enter the
8 stream of commerce prior to the date this Consent Judgment is signed by both Parties. The warning
9 shall consist of either the **Warning** or **Alternative Warning** described in §§ 3.3(a) or (b),
10 respectively:

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

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

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

17 ▲ **WARNING:** Cancer and Reproductive Harm - www.P65Warnings.ca.gov.

18 3.4 A **Warning** or **Alternative Warning** provided pursuant to § 3.3 must print the word
19 “**WARNING:**” in all capital letters and in bold font, followed by a colon. The warning symbol to
20 the left of the word “**WARNING:**” must be a black exclamation point in a yellow equilateral
21 triangle with a black outline, except that if the sign or label for the Covered Product does not use
22 the color yellow, the symbol may be in black and white. The symbol must be in a size no smaller
23 than the height of the word “**WARNING:**”. The warning shall be affixed to or printed on the
24 Covered Product’s packaging or labeling, or on a placard, shelf tag, sign or electronic device or
25 automatic process, providing that the warning is displayed with such conspicuousness, as compared
26 with other words, statements, or designs as to render it likely to be read and understood by an
27 ordinary individual under customary conditions of purchase or use. A warning may be contained
28 in the same section of the packaging, labeling, or instruction booklet that states other safety

1 warnings, if any, concerning the use of the Covered Product and shall be at least the same size as
2 those other safety warnings.

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

12 3.5 **Compliance with Warning Regulations.** Cerf Products shall be deemed to be in
13 compliance with this Consent Judgment by either adhering to §§ 3.3 and 3.4 of this Consent
14 Judgment or by complying with warning requirements adopted by the State of California's Office
15 of Environmental Health Hazard Assessment ("OEHHA") after the Effective Date.

16 **4. MONETARY TERMS**

17 4.1 **Civil Penalty.** Cerf Products shall pay a total of \$1,500.00 as a Civil Penalty
18 pursuant to Health and Safety Code section 25249.7(b), to be apportioned as stated in the following
19 paragraphs and in accordance with California Health & Safety Code § 25192, with 75% of these
20 funds remitted to OEHHA and the remaining 25% of the Civil Penalty remitted to Ferreiro, as
21 provided by California Health & Safety Code § 25249.12(d).

22 4.1.1 Within ten (10) days of the Effective Date, Cerf Products shall issue two
23 separate checks for the Civil Penalty payment as follows: (a) one check made payable to
24 "OEHHA" in the amount of \$1,125.00; and (b) one check made payable to "Brodsky & Smith,
25 LLC in Trust for Ferreiro" in the amount of \$375.00. Payment owed to Ferreiro pursuant to this
26 Section shall be delivered to the following payment address:

27 Evan J. Smith, Esquire
28 Brodsky & Smith, LLC

1 Two Bala Plaza, Suite 510
2 Bala Cynwyd, PA 19004

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

5 For United States Postal Service Delivery:

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

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

11 4.2 **Attorneys' Fees.** Within ten (10) days of the Effective Date, Cerf Products shall
12 pay \$15,000.00 to Brodsky & Smith, LLC ("Brodsky Smith") as complete reimbursement for
13 Ferreiro's attorneys' fees and costs incurred as a result of investigating, bringing this matter to Cerf
14 Products attention, litigating and negotiating and obtaining judicial approval of a settlement in the
15 public interest, pursuant to Code of Civil Procedure § 1021.5.

16 **5. RELEASE OF ALL CLAIMS**

17 5.1 This Consent Judgment is a full, final, and binding resolution between Ferreiro
18 acting on his own behalf, and on behalf of the public interest, and Cerf Products, and its parents,
19 shareholders, members, directors, officers, managers, employees, representatives, agents,
20 attorneys, divisions, subdivisions, subsidiaries, partners, sister companies (including AmeriBag),
21 and affiliates, and their predecessors, successors and assigns ("Cerf Products Releasees"), and all
22 entities from whom they obtain and to whom they directly or indirectly distribute or sell Covered
23 Products, including but not limited to manufacturers, suppliers, distributors, wholesalers, customers
24 (including Sierra Trading), licensors, licensees retailers, franchisees, and cooperative members
25 ("Downstream Releasees"), of all claims for violations of Proposition 65 regarding the Covered
26 Products as set forth in the Notice, with respect to any Covered Products manufactured, distributed,
27 or sold by Cerf Products, Cerf Products Releasees and/or Downstream Releasees prior to the
28

1 Effective Date. This Consent Judgment shall have preclusive effect such that no other person or
2 entity, whether purporting to act in his, her, or its interests or the public interest shall be permitted
3 to pursue and/or take any action with respect to any violation of Proposition 65 that was alleged in
4 the Action, or that could have been brought pursuant to the Notice against Cerf Products, Cerf
5 Products Releasees, and/or the Downstream Releasees of the Covered Products (“Proposition 65
6 Claims”). Compliance with the terms of this Consent Judgment constitutes compliance with
7 Proposition 65 with regard to the Covered Products.

8 5.2 In addition to the foregoing, Ferreiro, on behalf of himself, his past and current
9 agents, representatives, attorneys, and successors and/or assignees, and not in his representative
10 capacity, hereby waives all rights to institute or participate in, directly or indirectly, any form of
11 legal action and releases Cerf Products, Cerf Products Releasees, and Downstream Releasees from
12 any and all manner of actions, causes of action, claims, demands, rights, suits, obligations, debts,
13 contracts, agreements, promises, liabilities, damages, charges, losses, costs, expenses, and
14 attorneys’ fees, of any nature whatsoever, known or unknown, in law or equity, fixed or contingent,
15 now or in the future, with respect to any alleged violations of Proposition 65 related to or arising
16 from Covered Products manufactured, distributed, or sold by Cerf Products, Cerf Products
17 Releasees and/or Downstream Releasees. With respect to the foregoing waivers and releases in this
18 paragraph, Ferreiro hereby specifically waives any and all rights and benefits which he now has, or
19 in the future may have, conferred by virtue of the provisions of § 1542 of the California Civil Code,
20 which provides as follows:

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

25 5.3 Cerf Products waives any and all claims against Ferreiro, his attorneys and other
26 representatives, for any and all actions taken or statements made (or those that could have been
27 taken or made) by Ferreiro and his attorneys and other representatives, whether in the course of
28

1 investigating claims or otherwise seeking enforcement of Proposition 65 against it in this matter,
2 and/or with respect to Covered Products.

3 **6. INTEGRATION**

4 6.1 This Consent Judgment contains the sole and entire agreement of the Parties and
5 any and all prior negotiations and understandings related hereto shall be deemed to have been
6 merged within it. No representations or terms of agreement other than those contained herein exist
7 or have been made by any Party with respect to the other Party or the subject matter hereof.

8 **7. GOVERNING LAW**

9 7.1 The terms of this Consent Judgment shall be governed by the laws of the State of
10 California and apply within the State of California. In the event that Proposition 65 is repealed or
11 is otherwise rendered inapplicable by reason of law generally, or as to Covered Products, then Cerf
12 Products shall have no further obligations pursuant to this Consent Judgment with respect to, and
13 to the extent that, Covered Products are so affected.

14 **8. NOTICES**

15 8.1 Unless specified herein, all correspondence and notices required to be provided
16 pursuant to this Consent Judgment shall be in writing and personally delivered or sent by: (i) first-
17 class, (registered or certified mail) return receipt requested; or (ii) overnight courier on any party
18 by the other party at the following addresses:

19 For Cerf Products:

20 Geoffrey M. Thorne
21 Higgs Fletcher & Mack LLP
22 401 West A Street, Suite 2600
San Diego, CA 92101

23 And

24 For Ferreiro:

25 Evan Smith
26 Brodsky & Smith, LLC
27 9595 Wilshire Blvd., Ste. 900
Beverly Hills, CA 90212

28 Any party, from time to time, may specify in writing to the other party a change of address to

1 which all notices and other communications shall be sent.

2 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

3 9.1 This Consent Judgment may be executed in counterparts and by facsimile, each of
4 which shall be deemed an original, and all of which, when taken together, shall constitute one and
5 the same document.

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

8 10.1 Ferreiro agrees to comply with the requirements set forth in California Health &
9 Safety Code § 25249.7(f) and to promptly bring a Motion for Approval of this Consent Judgment.
10 Cerf Products agrees it will not oppose the Motion unless the relief being sought deviates from that
11 specified herein.

12 10.2 This Consent Judgment shall not be effective until it is approved and entered by the
13 Court and shall be null and void if, for any reason, it is not approved by the Court. In such case, the
14 Parties agree to meet and confer on how to proceed and if such agreement is not reached within 30
15 days, the case shall proceed on its normal course.

16 10.3 If the Court approves this Consent Judgment and is reversed or vacated by an
17 appellate court, the Parties shall meet and confer as to whether to modify the terms of this Consent
18 Judgment. If the Parties do not jointly agree on a course of action to take, the case shall proceed on
19 its normal course on the trial court's calendar.

20 **11. MODIFICATION**

21 11.1 This Consent Judgment may be modified only by further stipulation of the Parties
22 and the approval of the Court or upon the granting of a motion brought to the Court by either Party.

23 **12. ATTORNEY'S FEES**

24 12.1 A Party who unsuccessfully brings or contests an action arising out of this Consent
25 Judgment shall be required to pay the prevailing party's reasonable attorney's fees and costs.

26 12.2 Nothing in this Section shall preclude a Party from seeking an award of sanctions
27 pursuant to law.

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

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 or she is fully authorized by the Party he or she 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 fees and costs.


AGREED TO:

AGREED TO:

Date: _____

Date: 3/19/2020

By: _____
ANTHONY FERREIRO

By: 
Todd Ravinett
CERF PRODUCTS, INC.

IT IS SO ORDERED, ADJUDGED AND DECREED:

Dated: _____

Judge of Superior Court

1 **13. RETENTION OF JURISDICTION**

2 13.1 This Court shall retain jurisdiction of this matter to implement or modify the
3 Consent Judgment.

4 **14. AUTHORIZATION**

5 14.1 The undersigned are authorized to execute this Consent Judgment on behalf of their
6 respective Parties and have read, understood and agree to all of the terms and conditions of this
7 document and certify that he or she is fully authorized by the Party he or she represents to execute
8 the Consent Judgment on behalf of the Party represented and legally bind that Party. Except as
9 explicitly provided herein each Party is to bear its own fees and costs.

10 **AGREED TO:**

AGREED TO:

11 Date: March 18, 2020

Date: _____

12 By: Anthony Ferreiro
13 ANTHONY FERREIRO

14 By: _____

15 Todd Ravinett
16 CERF PRODUCTS, INC.

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

18 Dated: _____

19 _____
20 Judge of Superior Court