



\*12115810\*

1 Evan J. Smith, Esquire (SBN 242352)  
2 Ryan P. Cardona, Esquire (SBN 302113)  
3 BRODSKY & SMITH, LLC  
4 9595 Wilshire Blvd., Ste. 900  
5 Beverly Hills, CA 90212  
6 Telephone: (877) 534-2590  
7 Facsimile: (310) 247-0160

8 *Attorneys for Plaintiff*

**FILED**  
**ALAMEDA COUNTY**

OCT 25 2016

CLERK OF THE SUPERIOR COURT

By 

Deputy

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

12 GABRIEL ESPINOSA,

13 Plaintiff,

14 vs.

15 K.N.M. INDUSTRIES, INC. d/b/a  
16 LEXCO CABLE,

17 Defendant.

Case No. RG16814893

~~PROPOSED~~ CONSENT JUDGMENT

Judge: Robert McGuiness

Dept.: 22

Hearing Date: October 11, 2016

Hearing Time: 3:00 PM

Reservation #: R-1772946

1           **1.     Introduction**

2           1.1     On February 24, 2016, Gabriel Espinosa ("Espinosa") served K.N.M. Industries,  
3     Inc. d/b/a Lexco Cable ("Lexco"), Anawalt Lumber Co., Inc. ("Anawalt") and various public  
4     enforcement agencies with a document entitled "Notice of Violation of California Health &  
5     Safety Code § 25249.6, *et seq.*" (the "Notice"). The Notice provided Lexco and such others,  
6     including public enforcers, with notice that alleged that Lexco was in violation of California  
7     Health & Safety Code § 25249.6 ("Proposition 65"), for failing to warn consumers and customers  
8     that Lexco Multi-Purpose Security Cables exposed users in California to the chemical Diisononyl  
9     phthalate (DINP). No public enforcer has diligently prosecuted the allegations set forth in the  
10    Notice.

11          1.2     On May 9, 2016, Espinosa filed a Complaint for Civil Penalties and Injunctive  
12    Relief ("Complaint") in Alameda County Superior Court, Case No. RG16814893, against Lexco  
13    alleging violations of Proposition 65.

14          1.3     Lexco is a corporation that employs more than ten persons under California Health  
15    and Safety Code §25249.6 and offered the Products for sale within the State of California.

16          1.4     The product or products covered by this Consent Judgment are Lexco Multi-  
17    Purpose Security Cables and their component parts including but not limited to UPC Nos.  
18    809029001779, and 6 09029 00178 6 (the "Product" or "Products").

19          1.5     Espinosa's Complaint alleges, among other things, that Lexco sold the Products in  
20    California and/or to California citizens, that the Products contains DINP, and that the resulting  
21    exposure violated provisions of Proposition 65, by knowingly and intentionally exposing persons  
22    to a chemical known to the State of California to cause both cancer and reproductive toxicity  
23    without first providing a clear and reasonable warning to such individuals.

24          1.6     For purposes of this Consent Judgment only, the parties stipulate that this Court  
25    has jurisdiction over the allegations of violations contained in the Complaint and personal  
26    jurisdiction over Lexco as to the acts alleged in the Complaint, that venue is proper in the County  
27    of Alameda, and that this Court has jurisdiction to enter this Consent Judgment as a resolution of  
28    the allegations contained in the Complaint.

1           1.7     The parties enter into this Consent Judgment pursuant to a full settlement of  
2     disputed claims between the parties as alleged in the Complaint for the purpose of avoiding  
3     prolonged litigation. By execution of this Consent Judgment, Lexco does not admit any violation  
4     of Proposition 65 and specifically denies that it has committed any such violation. Nothing in this  
5     Consent Judgment shall be construed as an admission by Lexco of any fact, issue of law or  
6     violation of law, nor shall compliance with the Consent Judgment constitute or be construed as an  
7     admission by Lexco of any fact, issue of law, or violation of law. Nothing in this Consent  
8     Judgment shall prejudice, waive, or impair any right, remedy or defense that Lexco may have in  
9     any other future legal proceeding. However, this paragraph shall not diminish or otherwise affect  
10    the obligations, responsibilities and duties of Lexco under this Consent Judgment.

11           1.8     For purposes of this Consent Judgment, the term "Effective Date" shall mean the  
12    date that the Consent Judgment is entered by the Court.

13           **2.     Injunctive Relief**

14           2.1     Commencing ninety (90) days after the Effective Date, and continuing thereafter,  
15    Lexco shall only ship, sell, or offer for sale in California, Reformulated Product pursuant to  
16    Section 2.2 or Product that is labeled with a clear and reasonable warning pursuant to Section 2.3.  
17    Lexco and its downstream retailers shall have no obligation to label Products that entered the  
18    stream of commerce prior to the Effective Date or within ninety (90) days after the Effective  
19    Date. For purposes of this Settlement Agreement, a "Reformulated Product" is Product that is in  
20    compliance with the standard set forth below in section 2.2.

21           2.2     "Reformulated Product" shall mean Product that contains less than or equal to  
22    1,000 parts per million ("ppm") of DINP when analyzed pursuant to CPSC-CH-C1001-09.3  
23    Standard Operating Procedure for Determination of Phthalates method.

24           2.3     Commencing on the Effective Date, Lexco shall, for all Products it sells or  
25    distributes and that is intended for sale in California and that is not a Reformulated Product,  
26    provide clear and reasonable warnings as set forth in subsections 2.3(a) and (b) below. The  
27    warning shall be prominently placed with such conspicuousness as compared with other words,  
28    statements, designs, or devices as to render it likely to be read and understood by an ordinary

1 individual under customary conditions before purchase or use. Each warning shall be provided in  
2 a manner such that the consumer or user understands to which specific Product the warning  
3 applies, so as to minimize the risk of consumer confusion.

4 **(a) Retail Store Sales**

5 **(i) Product Labeling.** Lexco shall affix a warning to the packaging,  
6 labeling or directly on each Product sold in retail outlets in California by Lexco or  
7 any person selling the Product that states:

8 **[PROPOSITION 65] WARNING:**

9 This product contains a chemical known to the State of California to cause cancer,  
birth defects or other reproductive harm.

10 The bracketed text may, but is not required to, be used.

11 **(ii) Point of Sale Warnings.** Alternatively to the Product  
12 Labeling set forth in Section 2.3(a)(i) above, Lexco may provide warning  
13 signs in the form below to its customers in California with instructions to  
14 post the warning signs in close proximity to the point of display of the  
15 Product. Such instruction sent to Lexco customers shall be sent by  
16 certified mail, return receipt requested.

17 **[PROPOSITION 65] WARNING:**

18 This product contains a chemical known to the State of California to cause cancer.  
19 birth defects or other reproductive harm.

20 The bracketed text may, but is not required to, be used.

21 **(b) Mail Order Catalog Warning.** In the event that Lexco directly sells  
22 Product via mail order catalog directly to consumers located in California after the Effective Date  
23 that is not a Reformulated Product, Lexco shall provide a warning for such Product sold via mail  
24 order catalog to such California residents. A warning that is given in a mail order catalog shall be  
25 in the same type size or larger than the Product description text within the catalog. The following  
26 warning shall be provided on the same page and in the same location as the display and/or  
27 description of the Product:

1           **[PROPOSITION 65] WARNING:**

2           This product contains a chemical known to the State of California to cause cancer,  
3           birth defects or other reproductive harm.

4           The bracketed text may, but is not required to, be used. Where it is impracticable to provide the  
5           warning on the same page and in the same location as the display and/or description of the  
6           Product, Lexco may utilize a designated symbol to cross reference the applicable warning and  
7           shall define the term "designated symbol" with the following language on the inside of the front  
8           cover of the catalog or on the same page as any order form for the Product:

9                   **[PROPOSITION 65] WARNING:** Certain products identified with this symbol  
10                  ▼and offered for sale in this catalog contain a chemical known to the State of  
                  California to cause cancer, birth defects or other reproductive harm.

11           The bracketed text may, but is not required to, be used. The designated symbol must appear on  
12           the same page and in close proximity to the display and/or description of the Product. On each  
13           page where the designated symbol appears, Lexco must provide a header or footer directing the  
14           consumer to the warning language and definition of the designated symbol.

15                   **(c) Internet Sales Warning.** In the event that Lexco sells Product via the  
16           internet directly to consumers located in California after the Effective Date that is not a  
17           Reformulated Product, Lexco shall provide a warning for such Product sold via the internet to  
18           such California residents. A warning that is given on the internet shall be in the same type size or  
19           larger than the Product description text and shall be given in conjunction with the direct sale of  
20           the Product. The warning shall appear either: (a) on the same web page on which the Product is  
21           displayed; (b) on the same web page as the order form for the Product; (c) on the same page as  
22           the price for the Product; or (d) on one or more web pages displayed to a purchaser during the  
23           checkout process. The following warning shall be provided:

24                   **[PROPOSITION 65] WARNING:**

25                   This product contains a chemical known to the State of California to cause cancer, birth  
26                   defects or other reproductive harm.

27           The bracketed text may, but is not required to, be used.

1           **3.     Entry of Consent Judgment**

2           3.1     The parties hereby request that the Court promptly enter this Consent Judgment.  
3     Upon entry of this Consent Judgment, Espinosa and Lexco waive their respective rights to a  
4     hearing or trial on the allegations of the Complaint and 60-Day Notice.

5           3.2     In the event that the Attorney General objects or otherwise comments on one or  
6     more provisions of this Consent Judgment, Espinosa and Lexco agree to take reasonable steps to  
7     satisfy such concerns or objections.

8           **4.     Matters Covered By This Consent Judgment**

9           4.1     **Plaintiff's Public Release of Proposition 65 Claims.**     This Consent  
10    Judgment is a final and binding resolution between Espinosa, acting on his own behalf, and on  
11    behalf of the public and in the public interest, and Defendant Lexco, and shall have preclusive  
12    effect such that no other person or entity, whether purporting to act in his, her, or its interests or  
13    the public interest shall be permitted to pursue and/or take any action with respect to any violation  
14    of Proposition 65 that was alleged in the Complaint, or that could have been brought pursuant to  
15    the Notice against Lexco or its downstream retailers of the Product including but not limited to  
16    Anawalt ("Proposition 65 Claims"). As to alleged exposures to DINP in the Product, compliance  
17    with the terms of this Consent Judgment by Lexco is deemed sufficient to satisfy all obligations  
18    concerning compliance by Lexco and its downstream retailers, including but not limited to  
19    Anawalt with the requirements of Proposition 65 with respect to the Products.

20          4.2     **Plaintiff's Release of Additional Claims.**     As to Espinosa for and in his  
21    individual capacity only, this Consent Judgment shall have preclusive effect such that he shall not  
22    be permitted to pursue and/or take any action with respect to any other statutory or common law  
23    claim, to the fullest extent that any such claim was or could have been asserted by him against  
24    Lexco or any and all downstream retailers of the Products, including but not limited to Anawalt,  
25    based on their exposure of Espinosa to DINP in the Products, or their failure to provide a clear  
26    and reasonable warning of exposure to Espinosa as well as any other claim based in whole or in  
27    part on the facts alleged in the Complaint and the Notice, whether based on actions committed by  
28    Lexco or its downstream retailers of the Products, including but not limited to Anawalt ("DINP

1 Exposure Claims”).

2           **4.3 Waiver of Rights Under Section 1542 of the California Civil Code.**       As to  
3 Espinosa’s public release of Proposition 65 Claims set forth in Section 4.1 (“Public Release”) and  
4 his individual release of DINP Exposure Claims set forth in Section 4.2 (“Individual Release”),  
5 Espinosa, acting on his own behalf and on behalf of the public with respect to the Public Release  
6 and acting in his individual capacity with respect to the Individual Release, waives all rights to  
7 institute any form of legal action, and releases all claims against Lexco and its downstream  
8 retailers, including but not limited to Anawalt (including their parents, subsidiaries, affiliates,  
9 assigns, and acquiring entities of any of them; who may use, maintain, distribute or sell the  
10 Products) for the Proposition 65 Claims and the DINP Exposure Claims (referred to collectively  
11 in this Section as “Claims”). In furtherance of the foregoing, Espinosa, acting on his own behalf  
12 and on behalf of the public with respect to the Public Release and acting in his individual capacity  
13 with respect to the Individual Release, waives any and all rights and benefits which he now has,  
14 or in the future may have, conferred upon him with respect to the Claims by virtue of the  
15 provisions of § 1542 of the California Civil Code, which provides as follows:

16           **A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE**  
17           **CREDITOR DOES NOT KNOW OR SUSPECT EXIST IN HIS OR HER**  
18           **FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF**  
19           **KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED**  
20           **HIS SETTLEMENT WITH THE DEBTOR.**

21           **4.4 Lexco’s Release of Plaintiff Espinosa.**       Lexco, on behalf of itself, its past and  
22 current agents, representatives, attorneys, successors and/or assignees, hereby waives any and all  
23 claims against Espinosa, his attorneys, and other representatives for any and all actions taken or  
24 statements made (or those that could have been taken or made) by Espinosa and his attorneys and  
25 other representatives, whether in the course of investigating claims or otherwise seeking  
26 enforcement of Proposition 65 against Lexco in this matter.

1           **5.     Enforcement of Judgment**

2           5.1     The terms of this Consent Judgment shall be enforced exclusively by the parties  
3 hereto. The parties may, by noticed motion or order to show cause before the Superior Court of  
4 Alameda County, giving the notice required by law, enforce the terms and conditions contained  
5 herein. In any proceeding brought by either party to enforce this Consent Judgment, such party  
6 may seek whatever fines, costs, penalties or remedies as may be provided by law for any violation  
7 of Proposition 65 or this Consent Judgment.

8           **6.     Modification of Judgment**

9           6.1     This Consent Judgment may be modified only by written agreement of the parties  
10 upon entry of a modified Consent Judgment by the Court thereon, or upon motion of any party as  
11 provided by law and upon an entry of a modified Consent Judgment by the Court.

12          6.2     Should any court enter final judgment in a case brought by Espinosa or the People  
13 involving the Products that sets forth standards defining when Proposition 65 warnings will or  
14 will not be required ("Alternative Standards"), or if the California Attorney General's office  
15 otherwise provides written endorsement (i.e., a writing that is circulated by the Attorney General  
16 that is not intended for the purpose of soliciting further input or comments) of Alternative  
17 Standards applicable to products that are of the same general type and function as the Products  
18 and constructed from the same materials. Lexco shall be entitled to seek a modification of this  
19 Consent Judgment on sixty (60) days' notice to Espinosa so as to be able to utilize and rely on  
20 such Alternative Standards in lieu of those set forth in Section 2 of this Consent Judgment.  
21 Espinosa shall not unreasonably contest any proposed application to effectuate such a  
22 modification provided that the Products for which such a modification is sought are of the same  
23 general type and function as those to which the Alternative Standards apply.



1           7.     Settlement Payment

2           7.1     In settlement of all the claims referred to in this Consent Judgment, and without  
3 any admission of liability therefore, Lexco shall make the following monetary payments:

4                 7.1.1   **Civil Penalty.** Within seven (7) business days of the Effective Date,  
5 Lexco shall pay a total of \$2000.00 in civil penalties in accordance with this Section. The Initial  
6 Civil Penalty payment will be allocated in accordance with California Health & Safety Code §§  
7 25249.12(c)(1) and (d), with 75% of the funds remitted to the California Office of Environmental  
8 Health Hazard Assessment ("OEHHA") and the remaining 25% of the civil penalty remitted to  
9 Espinosa. Within seven (7) business days of the Effective Date, Lexco shall issue two separate  
10 checks for the civil penalty payment to (a) "OEHHA" in the amount of 1,500.00; and (b)  
11 "Brodsky & Smith, LLC in Trust for Espinosa" in the amount of 500.00. Payment owed to  
12 Espinosa pursuant to this Section shall be delivered to the following payment address:

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

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

18                 For United States Postal Service Delivery:

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

22                 For Non-United States Postal Service Delivery:

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

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

28                 7.1.2   **Attorney Fees and Costs.** In addition to the payment above, Lexco shall

1 pay \$20,500.00 to Brodsky & Smith, LLC ("Brodsky Smith") as complete reimbursement for  
2 Plaintiff Espinosa's attorneys' fees and costs, including any investigation and laboratory costs or  
3 expert fees, incurred in the course of bringing the Espinosa action, and in enforcing Proposition  
4 65, including without limitation, preparation of the 60-Day Notice letter and discussions with the  
5 office of the Attorney General. The parties acknowledge that Espinosa and his counsel offered to  
6 resolve this dispute without reaching terms on the amount of fees and costs to be reimbursed to  
7 them, thereby leaving this fee issue to be resolved after the material terms of the agreement had  
8 been settled. Espinosa then expressed a desire to resolve the fee and cost issue shortly after the  
9 other settlement terms had been finalized. The Parties reached an accord on the compensation  
10 due to Espinosa and his counsel under general contract principles and the private attorney general  
11 doctrine and principles codified at California Code of Civil Procedure § 1021.5, for all work  
12 performed through the mutual execution of this agreement. As such, within seven (7) business  
13 days of the Effective Date, Lexco shall issue one check to "Brodsky & Smith, LLC" for  
14 \$12,500.00 delivered to the address listed in Section 7.1.1 above. Thereafter, Lexco shall make  
15 the following payments to "Brodsky & Smith, LLC" to be delivered to the address listed in  
16 Section 7.1.1 above until all monies owed to Brodsky & Smith have been paid:

17 (a) \$5,000.00 is due 30 days after the Effective Date; and

18 (b) \$5,000.00 is due 60 days after the Effective Date.

19 Lexco shall be liable for penalty payment equal to \$1,000.00, for all amounts due and  
20 owing that are not received within five (5) calendar days of the date they are due.

21 **8. Notices**

22 8.1 Any and all notices between the parties provided for or permitted under this  
23 Agreement, or by law, shall be in writing and personally delivered or sent by: (i) first-class  
24 (registered or certified mail) return receipt requested; or (ii) overnight or two-day courier on any  
25 party by the other party to the following addresses:

26 For Lexco:

27 Garth N. Ward, Esq.  
28 LEWIS BRISBOIS  
701 B Street, Suite 1900

1 San Diego, CA 92101

2 For Espinosa;

3 Evan J. Smith  
4 BRODSKY & SMITH, LLC  
5 9595 Wilshire Blvd., Suite 900  
6 Beverly Hills, CA 90212

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

9 **9. Authority to Stipulate**

10 9.1 Each signatory to this Consent Judgment certifies that he or she is fully authorized  
11 by the party he or she represents to enter into this Consent Judgment and to execute it on behalf of  
12 the party represented and legally to bind that party.

13 **10. Counterparts**

14 10.1 This Stipulation may be signed in counterparts and shall be binding upon the  
15 parties hereto as if all said parties executed the original hereof.

16 **11. Retention of Jurisdiction**

17 11.1 This Court shall retain jurisdiction of this matter to implement the Consent  
18 Judgment.

19 **12. Service on the Attorney General**

20 12.1 Espinosa shall serve a copy of this Consent Judgment, signed by both parties, on  
21 the California Attorney General on behalf of the parties so that the Attorney general may review  
22 this Consent Judgment prior to its submittal to the Court for Approval. No sooner than forty-five  
23 (45) days after the Attorney General has received the aforementioned copy of this Consent  
24 Judgment, and in the absence of any written objection by the Attorney General to the terms of this  
25 Consent Judgment, the parties may then submit it to the Court for Approval.

26 **13. Entire Agreement**

27 13.1 This Consent Judgment contains the sole and entire agreement and understanding  
28 of the parties with respect to the entire subject matter hereof, and any and all discussions,  
negotiations, commitment and understandings related thereto. No representations, oral or

1 otherwise, express or implied, other than those contained herein have been made by any party  
2 hereto. No other agreements not specifically referred to herein, oral or otherwise, shall be deemed  
3 to exist or to bind any of the parties.

4 **14. Governing Law and Construction**

5 14.1 The validity, construction and performance of this Consent Judgment shall be  
6 governed by the laws of the State of California, without reference to any conflicts of law  
7 provisions of California law.

8 **15. Court Approval**

9 15.1 If this Consent Judgment is not approved by the Court, it shall be of no force or  
10 effect, and cannot be used in any proceeding for any purpose.

11 **IT IS SO STIPULATED:**

12  
13 Dated: 8/23/16

14  
15 By: [Signature]  
16 Gabriel Espinosa

Dated: 8-12-16

By: [Signature]  
K.N.M. Industries, Inc.

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

19  
20 Dated: 10/25/16

[Signature]  
Judge of Superior Court

21  
22 Robert D. McGuinness  
23  
24  
25  
26  
27  
28