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Gabriel Espinosa

**FILED
ALAMEDA COUNTY**

APR 18 2017

CLERK OF THE SUPERIOR COURT

By 

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ALAMEDA

GABRIEL ESPINOSA,
Plaintiff,
v.
PILOT AUTOMOTIVE, INC.,
Defendant.

Case No.: RG16839767
CONSENT JUDGMENT
Judge: Victoria S. Kolakowski
Dept.: 23
Hearing Date: March 7, 2017
Hearing Time: 3:00 PM
Reservation #: R-1813724

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1. INTRODUCTION

1.1 **The Parties.** This Consent Judgment is entered into by and between Gabriel Espinosa acting on behalf of the public interest (hereinafter "Espinosa") and Pilot Automotive, Inc., (hereinafter "Pilot"), with Espinosa and Pilot collectively referred to as the "Parties" and each of them as a "Party." Espinosa is an individual residing in California who seeks to promote awareness of exposures to toxic chemicals and improve human health by reducing or eliminating hazardous substances contained in consumer products. Pilot employs ten or more persons and is a person in the course of doing business for purposes of Proposition 65, Cal. Health & Safety Code §§ 25249.6 et seq.

1.2 **Allegations and Representations.** Espinosa alleges that Pilot has exposed individuals to Diisononyl phthalate (DINP) from windshield visors without providing clear and reasonable warnings under Proposition 65. DINP is listed under Proposition 65 as a chemical known to the State of California to cause cancer.

1.3 **Notices of Violation/Complaint.** On or about August 15, 2016, Espinosa served Pilot and various public enforcement agencies with a document entitled "60-Day Notice of Violation" pursuant to Health & Safety Code §25249.7(d) (the "Notice"), alleging that Pilot was in violation of Proposition 65 for failing to warn consumers and customers that the windshield visors exposed users in California to DINP. No public enforcer has brought and is diligently prosecuting the claims alleged in the Notice. On November 22, 2016, Espinosa filed a complaint in the matter as captioned above ("Complaint").

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

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

8 2. **DEFINITIONS**

9 2.1 **Covered Products.** The term "Covered Products" means Automotive Decals,
10 Stickers and Windshield Visors including West Coast Customs Windshield Visors.

11 2.2 **Effective Date.** The term "Effective Date" means the date this Consent Judgment is
12 entered as a Judgment of the Court.

13 3. **INJUNCTIVE RELIEF: WARNINGS**

14 3.1 Commencing ninety (90) days after the Effective Date, Pilot shall not manufacture
15 for sale, or distribute in California any Covered Product that contains more than 1,000 parts per
16 million DINP, unless the Covered Product is accompanied by the following warning: "WARNING:
17 This product contains a chemical known to the State of California to cause cancer." Or, Δ
18 WARNING: This product can expose you to chemicals including Diisononyl phthalate (DINP)
19 which is known to the State of California to cause cancer. For more information go to
20 www.P65Warnings.ca.gov."

21 3.2 The warning provided pursuant to Section 3.1 shall be affixed to or printed on the
22 Covered Product's packaging or labeling. The warning shall be prominently affixed to or printed
23 on the packaging or labeling and displayed with such conspicuousness, as compared with other
24 words, statements, or designs as to render it likely to be read and understood by an ordinary
25 individual under customary conditions of purchase or use. A warning may be contained in the same
26 section of the packaging, labeling, or instruction booklet that states other safety warnings, if any,
27 concerning the use of the product and shall be at least the same size as those other safety warnings.
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1 **4. MONETARY TERMS**

2 4.1 **Civil Penalty.** Pilot shall pay a civil penalty of \$2,000.00 pursuant to Health and
3 Safety Code section 25249.7(b), to be apportioned in accordance with California Health & Safety
4 Code § 25192, with 75% of these funds remitted to the State of California's Office of
5 Environmental Health Hazard Assessment and the remaining 25% of the penalty remitted to
6 Espinosa, as provided by California Health & Safety Code § 25249.12(d).

7 4.1.1 Within ten (10) business days of the Effective Date, Pilot shall issue two
8 separate checks for the civil penalty payment to (a) "OEHHA" in the amount of \$1,500.00; and
9 (b) "Brodsky & Smith, LLC in Trust for Espinosa" in the amount of \$500.00. Payment owed to
10 Espinosa pursuant to this Section shall be delivered to the following payment address:

11 Evan J. Smith, Esquire
12 Brodsky & Smith, LLC
13 Two Bala Plaza, Suite 510
Bala Cynwyd, PA 19004

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

16 For United States Postal Service Delivery:

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

20 For Non-United States Postal Service Delivery:

21 Mike Gyurics
22 Fiscal Operations Branch Chief
Office of Environmental Health Hazard Assessment
23 1001 I Street
Sacramento, CA 95814

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

26 4.2 **Attorney Fees.** Pilot shall pay \$24,500.00 to Brodsky & Smith, LLC ("Brodsky
27 Smith") as complete reimbursement for Plaintiff Espinosa's attorneys' fees and costs incurred as a
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1 result of investigating, bringing this matter to Pilot's attention, litigating and negotiating and
2 obtaining judicial approval of a settlement in the public interest, pursuant to Code of Civil
3 Procedure section 1021.5. Payment shall be made within ten (10) business days of the Effective
4 Date and sent to the address for Brodsky & Smith set forth in section 4.1.1, above.

5 4.3 Pilot shall pay the civil penalty and attorney fees in Sections 4.1 and 4.2 within ten
6 (10) days of the Effective Date.

7 **5. RELEASE OF ALL CLAIMS**

8 5.1 This consent judgment is a full, final, and binding resolution between Espinosa
9 acting in the public interest, and Pilot and its parents, shareholders, divisions, subdivisions,
10 subsidiaries, partners, sister companies, and affiliates, and their successors and assigns ("Defendant
11 Releasees"), and all entities from whom they obtain and to whom they directly or indirectly
12 distribute or sell Covered Products, including but not limited to manufacturers, suppliers,
13 distributors, wholesalers, customers, licensors, licensees, retailers, including but not limited to The
14 Pep Boys Manny Moe & Jack of California, IEH Auto Parts LLC, The Pep Boys Manny Moe &
15 Jack, and their respective parents, affiliates and subsidiaries, franchisees, and cooperative members
16 ("Downstream Defendant Releasees"), of all claims for violations of Proposition 65 based on
17 exposure to DINP from Covered Products as set forth in the Notice, with respect to any Covered
18 Products manufactured, distributed, or sold by Pilot prior to the Effective Date. Compliance with
19 the terms of this consent judgment constitutes compliance with Proposition 65 with regard to the
20 Covered Products.

21 5.2 In addition to the foregoing, Espinosa, on behalf of himself, his past and current
22 agents, representatives, attorneys, and successors and/or assignees, and *not* in his representative
23 capacity, hereby waives all rights to institute or participate in, directly or indirectly, any form of
24 legal action and releases any Pilot, Defendant Releasees, and Downstream Defendant Releasees
25 from any and all manner of actions, causes of action, claims, demands, rights, suits, obligations,
26 debts, contracts, agreements, promises, liabilities, damages, charges, losses, costs, expenses, and
27 attorneys' fees, of any nature whatsoever, known or unknown, in law or equity, fixed or contingent,
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1 now or in the future, with respect to any alleged violations of Proposition 65 related to or arising
2 from Covered Products manufactured distributed or sold by Pilot or Defendant Releasees. With
3 respect to the foregoing waivers and releases in this paragraph, Espinosa hereby specifically waives
4 any and all rights and benefits which she now has, or in the future may have, conferred by virtue
5 of the provisions of Section 1542 of the California Civil Code, which provides as follows:
6

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

12 5.3 Pilot waives any and all claims against Espinosa, his attorneys and other
13 representatives, for any and all actions taken or statements made (or those that could have been
14 taken or made) by Espinosa and his attorneys and other representatives, whether in the course of
15 investigating claims or otherwise seeking enforcement of Proposition 65 against it in this matter,
16 and/or with respect to Covered Products.

17 **6. INTEGRATION**

18 6.1 This Consent Judgment contains the sole and entire agreement of the Parties and
19 any and all prior negotiations and understandings related hereto shall be deemed to have been
20 merged within it. No representations or terms of agreement other than those contained herein exist
21 or have been made by any Party with respect to the other Party or the subject matter hereof.

22 **7. GOVERNING LAW**

23 7.1 The terms of this Consent Judgment shall be governed by the laws of the State of
24 California and apply within the State of California. In the event that Proposition 65 is repealed or
25 is otherwise rendered inapplicable by reason of law generally, or as to Covered Products, then Pilot
26 shall have no further obligations pursuant to this Consent Judgment with respect to, and to the
27 extent that, Covered Products are so affected.
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1 **8. NOTICES**

2 8.1 Unless specified herein, all correspondence and notices required to be provided
3 pursuant to this Consent Judgment shall be in writing and personally delivered or sent by: (i) first-
4 class, (registered or certified mail) return receipt requested; or (ii) overnight courier on any party
5 by the other party at the following addresses:

6 For Pilot:

7 Ryan Landis
8 Polsinelli PC, Polsinelli LLP
9 2049 Century Park East, Suite 2900
10 Los Angeles, CA 90067

11 And

12 For Espinosa:

13 Evan Smith
14 Brodsky & Smith, LLC
15 2 Bala Plaza, Suite 510
16 Bala Cynwyd, PA 19004

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

19 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

20 9.1 This Consent Judgment may be executed in counterparts and by facsimile, each of
21 which shall be deemed an original, and all of which, when taken together, shall constitute one and
22 the same document.

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

24 **APPROVAL**

25 10.1 Espinosa agrees to comply with the requirements set forth in California Health &
26 Safety Code §25249.7(f) and to promptly bring a Motion for Approval of this Consent Judgment
27 and Pilot agrees it shall support approval of such Motion.

28 10.2 This Consent Judgment shall not be effective until it is approved and entered by the
Court and shall be null and void if, for any reason, it is not approved by the Court. In such case,

1 the Parties agree to meet and confer on how to proceed and if such agreement is not reached within
2 30-days, the case shall proceed on its normal course.

3 10.3 If the Court approves this Consent Judgment and is reversed or vacated by an
4 appellate court, the Parties shall meet and confer as to whether to modify the terms of this Consent
5 Judgment. If the Parties do not jointly agree on a course of action to take, the case shall proceed on
6 its normal course on the trial court's calendar.

7 **11. MODIFICATION**

8 11.1 This Consent Judgment may be modified only by further stipulation of the Parties
9 and the approval of the Court or upon the granting of a motion brought to the Court by either Party.

10 **12. ATTORNEY'S FEES**

11 12.1 A party who unsuccessfully brings or contests an action arising out of this Consent
12 Judgment shall be required to pay the prevailing party's reasonable attorney's fees and costs unless
13 the unsuccessful party has acted with substantial justification. For purposes of this Consent
14 Judgment, the term substantial justification shall carry the same meaning as used in the Civil
15 Discovery Act of 1986, Code of Civil Procedure Section 2016, et seq.

16 12.2 Nothing in this Section shall preclude a Party from seeking an award of sanctions
17 pursuant to law.

18 **13. RETENTION OF JURISDICTION**

19 13.1 This Court shall retain jurisdiction of this matter to implement or modify the
20 Consent Judgment.

21 **14. AUTHORIZATION**

22 14.1 The undersigned are authorized to execute this Consent Judgment on behalf of their
23 respective Parties and have read, understood and agree to all of the terms and conditions of this
24 document and certifies that he or she is fully authorized by the Party he or she represents to execute
25 the Consent Judgment on behalf of the Party represented and legally bind that Party. Except as
26 explicitly provided herein each Party is to bear its own fees and costs.

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AGREED TO:

AGREED TO:

Date: _____

Date: 13 Jan 2017

By: _____
GABRIEL ESPINOSA

By: _____
PILOT AUTOMOTIVE, INC.

IT IS SO ORDERED, ADJUDGED AND DECREED:

Dated: _____

Judge of Superior Court

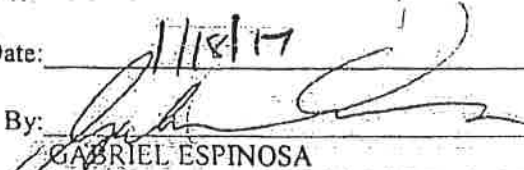
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AGREED TO:

AGREED TO:

Date: 1/18/17

Date: _____

By: 
GABRIEL ESPINOSA

By: _____
PILOT AUTOMOTIVE, INC.

IT IS SO ORDERED, ADJUDGED AND DECREED:

Dated: April 18, 2017


Judge of Superior Court