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8 *Attorneys for Plaintiff*

ENDORSED
FILED
ALAMEDA COUNTY
FEB - 5 2018
CLERK OF THE SUPERIOR COURT
By DIANNE HYATT
Deputy

DEC 14 2017

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

11 GABRIEL ESPINOSA,

12 Plaintiff,

13 v.

14 AAW PRODUCTS INC.,

15 Defendant.

Case No.: RG17880265

^{PT}
[PROPOSED] ORDER APPROVING
PROPOSITION 65 SETTLEMENT AND
CONSENT JUDGMENT

Judge: Dennis Hayashi

Dept.: 518

Hearing Date: February 1, 2018

Hearing Time: 2:30 PM

Reservation #: R-1906003

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18 Plaintiff Gabriel Espinosa and Defendant AAW Products Inc. have agreed to the terms of
19 the settlement memorialized in the [Proposed] Consent Judgment attached as Exhibit A to the
20 Declaration of Evan J. Smith in Support of Motion to Approve Proposition 65 Settlement and
21 Consent Judgment lodged herewith, and Plaintiff has moved this Court for an Order approving
22 the settlement.

23 After consideration of the papers submitted and the arguments presented, the Court finds
24 that the settlement agreement set forth in the Consent Judgment meets the criteria established by
25 California Health & Safety Code § 25249.7(f)(4), in that:

26 1. The injunctive relief required by the Consent Judgment complies with
27 Proposition 65;

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BV FAX

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- 2. The reimbursement of fees and costs provided by the Consent Judgment is reasonable under California law; and
- 3. The civil penalty amount to be paid pursuant to the Consent Judgment is reasonable.

Accordingly, the Motion for Approval of the Proposition 65 Settlement is GRANTED.

IT IS SO ORDERED.

Dated: 2/1/18



JUDGE OF THE SUPERIOR COURT

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
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BY FAX

1 **1. INTRODUCTION**

2 1.1 **The Parties.** This Consent Judgment is entered into by and between Gabriel
3 Espinosa acting on behalf of the public interest (hereinafter “Espinosa”) and Defendant AAW
4 Products Inc. doing business as MagnoGrip Inc. and MDG Tools Inc. (“AAW” or “Defendant”) with
5 Espinosa and Defendant collectively referred to as the “Parties” and each of them as a “Party.”
6 Espinosa is an individual residing in California who seeks to promote awareness of exposures to
7 toxic chemicals and improve human health by reducing or eliminating hazardous substances
8 contained in consumer products.

9 1.2 **Allegations and Representations.** Espinosa alleges that Defendant has exposed
10 individuals to Di(2-ethylhexyl) phthalate (DEHP) from MagnoGrip Magnetic Tool Pouches
11 without providing clear and reasonable exposure warnings under 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 May 2, 2017, Espinosa served AAW,
15 Wal-Mart Stores, Inc. and various public enforcement agencies, with a document entitled “60-
16 Day Notice of Violation” pursuant to Health & Safety Code §25249.7(d) (the “Notice”), alleging
17 that Defendant and Wal-Mart Stores, Inc. were violating Proposition 65 (Health & Safety Code
18 Section 25249.6 et. seq.) by failing to warn California consumers and customers that MagnoGrip
19 Magnetic Tool Pouches contained DEHP. No public enforcer has brought and is diligently
20 prosecuting the claims alleged in the Notice. On October 26, 2017, Espinosa filed a complaint (the
21 “Complaint”) in the matter.

22 1.4 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
23 jurisdiction over Defendant as to the allegations contained in the Complaint filed in this matter, that
24 venue is proper in the County of Alameda, and that this Court has jurisdiction to approve, enter,
25 and oversee the enforcement of this Consent Judgment as a full and final binding resolution of all
26 claims which were or could have been raised in the Complaint based on the facts alleged therein
27 and/or in the Notice.

28

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

8 **2. DEFINITIONS**

9 2.1 **Covered Products.** The term “Covered Products” means MagnoGrip Magnetic
10 Tool Pouches that are manufactured, distributed and/or offered for sale in California by AAW, and
11 that contain DEHP.

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

14 **3. INJUNCTIVE RELIEF; WARNINGS**

15 3.1 Commencing within ninety (90) days after the Effective Date, AAW shall not
16 manufacture, import, or distribute for sale in California any Covered Products with any accessible
17 component that contains DEHP in excess of 0.1% (1,000 ppm) (hereinafter “Reformulated
18 Products”) unless the Covered Product is accompanied by a warning that complies with the warning
19 regulations set forth in Title 27, California Code of Regulations, Section 25600 *et seq.* (either the
20 regulations that are currently in effect or as amended August 30, 2016 and effective August 2018),
21 including, but not limited to, any of the following:

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

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

26 c. **“WARNING:** This product can expose you to chemicals, including Di(2-
27 ethylhexyl) phthalate, which is known to the State of California to cause cancer and birth defects
28 or other reproductive harm. For more information go to www.P65Warnings.ca.gov.”

1 d. **“WARNING: Cancer and Reproductive Harm – www.P65Warnings.ca.gov.”**

2 If Defendant elects to use the warning statements identified in either Section 3.1(c) or
3 Section 3.1(d), it may also include a symbol consisting of a black exclamation point in a yellow
4 equilateral triangle with bold black outline. Where the label on the product or packaging is not
5 printed using the color yellow, the symbol may be printed in black and white. The symbol shall be
6 placed to the left of the text of the warning in a size no smaller than the height of the word
7 **“WARNING”**.

8 AAW may rely upon its suppliers’ test results in order to determine whether the Covered
9 Products qualify as Reformulated Products.

10 3.2 Any warning provided pursuant to Section 3.1 shall be affixed to or printed on the
11 Covered Product’s packaging or labeling and displayed with such conspicuousness, as compared
12 with other words, statements, or designs, as to render it likely to be read and understood by an
13 ordinary individual under customary conditions of purchase or use. The warning may be contained
14 in the same section of the packaging, labeling, or instruction booklet that states other safety
15 warnings, if any, concerning the use of the product and shall be at least the same size as those other
16 safety warnings.

17 3.3 Any Covered Products that have been distributed, shipped or sold by AAW prior to
18 the Effective Date, shall not be subject to the requirements of Section 3.1.

19 **4. MONETARY TERMS**

20 4.1 **Civil Penalty.** AAW shall pay a Civil Penalty of \$2,000.00 pursuant to California
21 Health and Safety Code § 25249.7(b), to be apportioned in accordance with California Health &
22 Safety Code § 25192, with 75% of these funds remitted to the State of California’s Office of
23 Environmental Health Hazard Assessment and the remaining 25% of the penalty remitted to
24 Espinosa, as provided by California Health & Safety Code § 25249.12(d).

25 4.1.1 Within fourteen (14) business days of the Effective Date, AAW shall issue
26 two separate checks for the Civil Penalty payment to (a) “OEHHA” in the amount of \$1,500.00;
27 and (b) “Brodsky & Smith, LLC in Trust for Espinosa” in the amount of \$500.00. Payment owed
28 to Espinosa pursuant to this Section shall be delivered to the following payment address:

1 Evan J. Smith, Esquire
2 Brodsky & Smith, LLC
3 Two Bala Plaza, Suite 510
4 Bala Cynwyd, PA 19004

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

7 For United States Postal Service Delivery:

8 Mike Gyurics
9 Fiscal Operations Branch Chief
10 Office of Environmental Health Hazard Assessment
11 P.O. Box 4010
12 Sacramento, CA 95812-4010

13 For Non-United States Postal Service Delivery:

14 Mike Gyurics
15 Fiscal Operations Branch Chief
16 Office of Environmental Health Hazard Assessment
17 1001 I Street
18 Sacramento, CA 95814

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

21 4.2 **Attorney Fees.** AAW shall pay \$23,000.00 to Brodsky & Smith, LLC ("Brodsky
22 Smith") as complete reimbursement for Plaintiff Espinosa's attorneys' fees and costs incurred as a
23 result of investigating, bringing this matter to AAW's attention, litigating and negotiating and
24 obtaining judicial approval of a settlement in the public interest, pursuant to California Civil
25 Procedure Code § 1021.5. Payment shall be made within fourteen (14) business days of the
26 Effective Date and sent to the address for Brodsky & Smith set forth in section 4.1.1, above.

27 **5. RELEASE OF ALL CLAIMS**

28 5.1 This Consent Judgment is a full, final, and binding resolution between Espinosa
acting on his own behalf, and on behalf of the public interest, and AAW, and its parents,
shareholders, directors, officers, employees, representatives, agents, attorneys, divisions,
subdivisions, 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 the Covered Products, including but not limited

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

12 5.2 In addition to the foregoing, Espinosa, on behalf of himself, his past and current
13 agents, representatives, attorneys, 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 AAW, Defendant Releasees, and Additional Releasees from any and all
16 manner of actions, causes of action, claims, demands, rights, suits, obligations, debts, contracts,
17 agreements, promises, liabilities, damages, charges, losses, costs, expenses, and attorneys' fees, of
18 any nature whatsoever, known or unknown, in law or equity, fixed or contingent, now or in the
19 future, with respect to any alleged violations of Proposition 65 related to or arising from the
20 Covered Products manufactured, distributed, or sold by AAW, Defendant Releasees or Additional
21 Releasees. With respect to the foregoing waivers and releases in this Section, Espinosa hereby
22 specifically waives any and all rights and benefits which he now has, or in the future may have,
23 conferred by virtue of the provisions of Section 1542 of the California Civil Code, which provides
24 as follows:

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

1 5.3 AAW waives any and all claims against Espinosa, 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 Espinosa and his attorneys and other representatives in the course of
4 investigating the claims in the Notice and Complaint or otherwise seeking enforcement of
5 Proposition 65 against AAW in this matter with respect to the Covered Products.

6 5.4 Espinosa represents and warrants that as of the date of his execution of this Consent
7 Judgment he is not aware of any other Proposition 65 violations by Defendant.

8 **6. INTEGRATION**

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

13 **7. GOVERNING LAW**

14 7.1 The terms of this Consent Judgment shall be governed by the laws of the State of
15 California and apply within the State of California. In the event that Proposition 65 is repealed or
16 is otherwise rendered inapplicable by reason of law generally, or as to the Covered Products, then
17 Defendant shall have no further obligations pursuant to this Consent Judgment with respect to, and
18 to the extent that, the Covered Products are so affected.

19 **8. NOTICES**

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

24 For Defendant:

25 Andre Woolery
26 President
27 AAW Products Inc.
28 825 Brickell Bay Drive Suite 246
 Miami, Florida 33131

1 With a copy to Defendant's attorney:

2 John E. Dittoe
3 Law Office of John E. Dittoe
4 70 Hazel Lane
5 Piedmont, CA 94611

6 For Espinosa:

7 Evan Smith
8 Brodsky & Smith, LLC
9 9595 Wilshire Blvd., Ste. 900
10 Beverly Hills, CA 90212

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

13 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

14 9.1 This Consent Judgment may be executed in counterparts and by facsimile, each of
15 which shall be deemed an original, and all of which, when taken together, shall constitute one and
16 the same document.

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

19 10.1 Espinosa agrees to comply with the requirements set forth in California Health &
20 Safety Code §25249.7(f) and to promptly bring a Motion for Approval of this Consent Judgment
21 and Defendant agrees it shall support such motion.

22 10.2 This Consent Judgment shall not be effective until it is approved and entered by the
23 Court and shall be null and void if, for any reason, it is not approved by the Court. In such case,
24 the Parties agree to meet and confer on how to proceed and if such agreement is not reached within
25 thirty (30) days, the case shall proceed on its normal course.

26 **11. MODIFICATION**

27 11.1 This Consent Judgment may be modified only by further stipulation of the Parties
28 and the approval of the Court or upon the granting of a motion brought to the Court by either Party.

12. ATTORNEY'S FEES

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

1 the unsuccessful party has acted with substantial justification. For purposes of this Consent
2 Judgment, the term substantial justification shall carry the same meaning as used in the Civil
3 Discovery Act of 1986, Code of Civil Procedure Section 2016.010, *et seq.*

4 **13. RETENTION OF JURISDICTION**

5 13.1 This Court shall retain jurisdiction of this matter to implement or modify the
6 Consent Judgment.

7 **14. AUTHORIZATION**

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

13 **AGREED TO:**

AGREED TO:

14
15 Date: 10/26/17

Date: _____

16 By: GABRIEL ESPINOSA

17 By: _____
AAW PRODUCTS INC.

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

20
21 Dated: 2/5/18

22 [Signature]
Judge of Superior Court

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1. The Court finds that the party has acted with substantial justification. For purposes of this Consent Judgment, the term substantial justification shall carry the same meaning as used in the California Code of Civil Procedure Section 2016.014, *et seq*.

13. SECTION OF JURISDICTION

The Court shall retain jurisdiction of this matter to implement or modify the terms of this Consent Judgment.

14. BY AUTHORIZATION

The undersigned are authorized to execute this Consent Judgment on behalf of their respective Party and have read, understood and agree to all of the terms and conditions of this Consent Judgment. I certify that he or she is fully authorized by the Party he or she represents to execute this Consent Judgment on behalf of the Party represented and legally bind that Party. I accept as true the fact that each Party is to bear its own fees and costs.

AGREED TO:

AGREED TO:

By: _____

Date: 10/23/2017

RIFE ESPINOSA

By: _____

AAW PRODUCTS INC.

15. BY THE COURT, ADJUDGED AND DECREED:

By: _____

Judge of Superior Court