

COPY



20642330

15

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

*Attorneys for Plaintiff*

**FILED**  
ALAMEDA COUNTY

SEP 20 2018

CLERK OF THE SUPERIOR COURT

By *Daneda K. Scott* Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
COUNTY OF ALAMEDA

GABRIEL ESPINOSA,

Plaintiff,

v.

GRUNDENS USA, LTD., WEST MARINE,  
INC.

Defendants.

Case No.: RG17880976

**CONSENT JUDGMENT**

Judge: Evelio Grillo

Dept.: 15

Hearing Date: August 10, 2018

Hearing Time: 10:00 AM

Reservation #: R-1967783

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

10           **1.2 Allegations and Representations.** Espinosa alleges that Defendant has exposed  
11 individuals to Di-isodecyl phthalate (DIDP) from Grundens rainwear without providing clear and  
12 reasonable warnings under Proposition 65. DIDP is listed under Proposition 65 as a chemical  
13 known to the State of California to cause reproductive toxicity.

14           **1.3 Notice of Violation/Complaint.** On or about June 1, 2017, Espinosa served  
15 Grundens, West Marine, Inc. and various public enforcement agencies with documents entitled  
16 “60-Day Notice of Violation” pursuant to Health & Safety Code §25249.7(d) (the “Notice”),  
17 alleging that Defendant was in violation of Proposition 65 for failing to warn consumers and  
18 customers that rainwear exposed users in California to DIDP. No public enforcer has brought and  
19 is diligently prosecuting the claims alleged in the Notice. On November 2, 2017, Espinosa filed a  
20 complaint (the “Complaint”) in the matter.

21           **1.4** For purposes of this Consent Judgment only, the Parties stipulate that this Court has  
22 jurisdiction over Defendant as to the allegations contained in the Complaint filed in this matter, that  
23 venue is proper in the County of Alameda, and that this Court has jurisdiction to approve, enter,  
24 and oversee the enforcement of this Consent Judgment as a full and final binding resolution of all  
25 claims which were or could have been raised in the Complaint based on the facts alleged therein  
26 and/or in the Notice.  
27  
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 Grundens rainwear  
10 manufactured, distributed and/or offered for sale in California by Grundens.

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 As of the date this Consent Judgment is signed by both Parties, Grundens shall not  
15 manufacture or order from any supplier any Covered Products intended for retail sale in California  
16 that contain DIDP on any component to which consumers are exposed in excess of 0.1% (1,000  
17 ppm) (hereinafter "Reformulated Products") unless the Covered Product is accompanied by a  
18 warning that complies with Article 6 of Title 27 of the California Code of Regulations. Covered  
19 Products sold by Grundens before the date this Consent Judgment is signed by both Parties may be  
20 sold without a warning even if not Reformulated Products. Until August 30, 2018, the warning  
21 shall consist of either:

- 22           (a) The statement: "WARNING: This product contains a chemical known to the State  
23 of California to cause birth defects or other reproductive harm."; or (b) (1) A symbol  
24 consisting of a black exclamation point in a yellow equilateral triangle with a bold black  
25 outline to the left of the word "warning" in bold all capital letters, followed by the statement  
26 "This product can expose you to chemicals including Di-isodecyl phthalate (DIDP), which  
27 is known to the State of California to cause birth defects or other reproductive harm. For  
28

1 more information, go to [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov).”; or (2) a warning consisting of a  
2 symbol that is a black exclamation point in a yellow equilateral triangle with a bold black  
3 outline to the left of the word “warning” in bold all capital letters, followed by the statement  
4 “Reproductive Harm - [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov).”<sup>1</sup>

5 For Covered Products manufactured on and after August 30, 2018, the warning set forth in Section  
6 3.1(b) shall be used.

7 3.2 The warning provided pursuant to Section 3.1 shall be affixed to or printed on the  
8 Product’s packaging or labeling, or on a placard, shelf tag, sign or electronic device or automatic  
9 process, provided that the warning is displayed with such conspicuousness, as compared with other  
10 words, statements, or designs as to render it likely to be read and understood by an ordinary  
11 individual under customary conditions of purchase or use. A warning may be contained in the same  
12 section of the packaging, labeling, or instruction booklet that states other safety warnings, if any,  
13 concerning the use of the product and shall be at least the same size as those other safety warnings.

#### 14 4. MONETARY TERMS

15 4.1 **Civil Penalty.** Grundens shall pay a Civil Penalty of \$2,000.00 pursuant to Health  
16 and Safety Code section 25249.7(b), to be apportioned in accordance with California Health &  
17 Safety Code § 25192, with 75% of these funds remitted to the State of California’s Office of  
18 Environmental Health Hazard Assessment and the remaining 25% of the Civil Penalty remitted to  
19 Espinosa, as provided by California Health & Safety Code § 25249.12(d).

20 4.1.1 Within ten (10) days of the Effective Date, Grundens shall issue two  
21 separate checks for the Civil Penalty payment to (a) “OEHHA” in the amount of \$1,500.00; and  
22 (b) “Brodsky & Smith, LLC in Trust for Espinosa” in the amount of \$500.00. Payment owed to  
23 Espinosa pursuant to this Section shall be delivered to the following payment address:

24 Evan J. Smith, Esquire  
25 Brodsky & Smith, LLC  
26 Two Bala Plaza, Suite 510  
Bala Cynwyd, PA 19004

27 <sup>1</sup> The triangular symbol need only be in yellow where the sign, label, shelf tag or other  
28 transmission format is being printed in color for purposes of other language, symbols or designs.

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

3 For United States Postal Service Delivery:

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

9 For Non-United States Postal Service Delivery:

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 mailed to Brodsky & Smith, LLC at the  
16 address set forth above as proof of payment to OEHHA.

17 4.2 **Attorneys' Fees.** Within ten (10) days of the Effective Date, Grundens shall pay  
18 \$28,000.00 to Brodsky & Smith, LLC ("Brodsky Smith") as complete reimbursement for  
19 Espinosa's attorneys' fees and costs incurred as a result of investigating, bringing this matter to  
20 Grundens's attention, litigating and negotiating and obtaining judicial approval of a settlement in  
21 the public interest, pursuant to Code of Civil Procedure section 1021.5.

## 22 5. **RELEASE OF ALL CLAIMS**

23 5.1 This Consent Judgment is a full, final, and binding resolution between Espinosa  
24 acting on his own behalf, and on behalf of the public interest, and Grundens, and its parents,  
25 shareholders, members, directors, officers, managers, employees, representatives, agents,  
26 attorneys, divisions, subdivisions, subsidiaries, partners, sister companies, and affiliates, and their  
27 predecessors, successors and assigns ("Defendant Releasees"), and all entities from whom they  
28 obtain and to whom they directly or indirectly distribute or sell Covered Products, including but  
not limited to manufacturers, suppliers, distributors, wholesalers, customers, licensors, licensees  
retailers, franchisees, and cooperative members, including but not limited to West Marine, Inc.  
("Downstream Releasees"), of all claims for violations of Proposition 65 based on exposure to

1 DIDP from Covered Products as set forth in the Notice, with respect to any Covered Products  
2 manufactured, distributed, or sold by Grundens prior to the Effective Date. This Consent Judgment  
3 shall have preclusive effect such that no other person or entity, whether purporting to act in his,  
4 her, or its interests or the public interest shall be permitted to pursue and/or take any action with  
5 respect to any violation of Proposition 65 that was alleged in the Complaint, or that could have  
6 been brought pursuant to the Notice against Grundens or its Downstream Releasees of the Product  
7 including but not limited to ("Proposition 65 Claims"). Compliance with the terms of this Consent  
8 Judgment constitutes compliance with Proposition 65 with regard to the Covered Products.

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

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

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

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  
12 Defendant 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 Defendant:

20 Julie Schwartz  
21 Perkins Coie LLP  
22 3150 Porter Drive  
Palo Alto, California 94304-1212

23 And

24 For Espinosa:

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 Espinosa 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 Defendant agrees it shall support approval of such Motion.

11 10.2 This Consent Judgment shall not be effective until it is approved and entered by the  
12 Court and shall be null and void if, for any reason, it is not approved by the Court. In such case,  
13 the Parties agree to meet and confer on how to proceed and if such agreement is not reached within  
14 30 days, the case shall proceed on its normal course.

15 10.3 If the Court approves this Consent Judgment and is reversed or vacated by an  
16 appellate court, the Parties shall meet and confer as to whether to modify the terms of this Consent  
17 Judgment. If the Parties do not jointly agree on a course of action to take, the case shall proceed on  
18 its normal course on the trial court's calendar.

19 **11. MODIFICATION**

20 11.1 This Consent Judgment may be modified only by further stipulation of the Parties  
21 and the approval of the Court or upon the granting of a motion brought to the Court by either Party.

22 **12. ATTORNEY'S FEES**

23 12.1 A Party who unsuccessfully brings or contests an action arising out of this Consent  
24 Judgment shall be required to pay the prevailing party's reasonable attorney's fees and costs.

25 12.2 Nothing in this Section shall preclude a Party from seeking an award of sanctions  
26 pursuant to law.



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  
11 **AGREED TO:**

**AGREED TO:**

12  
13 Date: 5/19/2018

Date: \_\_\_\_\_

14 By: [Signature]

GABRIEL ESPINOSA

By: \_\_\_\_\_

GRUNDENS USA, LTD.

15  
16  
17 **IT IS SO ORDERED, ADJUDGED AND DECREED:**

18  
19 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  
11 **AGREED TO:**

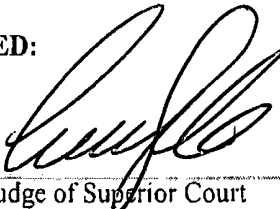
**AGREED TO:**

12 Date: \_\_\_\_\_ Date: 5-23-18

13 By: \_\_\_\_\_ By:   
14 GABRIEL ESPINOSA GRUNDENS USA, LTD.  
15 David Mellon, CEO

16  
17 **IT IS SO ORDERED, ADJUDGED AND DECREED:**

18  
19 Dated: **SEP 20 2018**

  
Judge of Superior Court

**EVELIO M. GRILLO  
JUDGE**

**Superior Court of California, County of Alameda  
Rene C. Davidson Alameda County Courthouse**

**CONSENT JUDGMENT**

Case Number: RG 17 880976

Case Name: Gabriel Espinosa v. Grundens USA, LTD, et al.

**DECLARATION OF SERVICE BY MAIL**

I certify that I am not a party to this cause and that a true and correct copy of the foregoing document was mailed first class, postage prepaid, in a sealed envelope, addressed as shown on the foregoing document or on the attached, and that the mailing of the foregoing and execution of this certificate occurred at 1225 Fallon Street, Oakland, California.

Executed on 9/21/2018

Chad Finke

Executive Officer, Clerk of the Superior Court

By: *Dameda Scott* Deputy Clerk  
*Dameda Scott*

Evan Smith Brodsky & Smith LLC 9595 Wilshire Blvd., Suite 900 Beverly Hills, CA 90212	
Julie Schwartz Perkins Coie LLP 3150 Porter Drive Palo Alto, Ca 94304	