



20128005

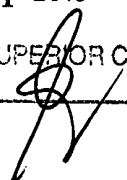
1 Evan J. Smith, Esquire (SBN 242352)  
 2 Ryan P. Cardona, Esquire (SBN 302113)  
 3 BRODSKY & SMITH, LLC  
 9595 Wilshire Blvd., Ste. 900  
 4 Beverly Hills, CA 90212  
 Telephone: (877) 534-2590  
 Facsimile: (310) 247-0160

5 *Attorneys for Plaintiff*

**FILED**  
 ALAMEDA COUNTY

JAN 11 2018

CLERK OF THE SUPERIOR COURT

By  Deputy

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

12 GABRIEL ESPINOSA,  
 13 Plaintiff,

14 v.

15 IMPLUS FOOTCARE, LLC,  
 16 Defendant.

Case No.: RG17878686

**CONSENT JUDGMENT**

Judge: Frank Roesch

Dept.: 24

Hearing Date: January 11, 2018

Hearing Time: 3:45 PM

Reservation #: R-1910298

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 Implus Footcare, LLC  
4 (“Implus” 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 who seeks to  
6 promote awareness of exposures to toxic chemicals and improve human health by reducing or  
7 eliminating hazardous substances contained in consumer products. Implus is a person in the course  
8 of doing business for purposes of Proposition 65, Cal. Health & Safety Code §§ 25249.6 et seq.

9           **1.2 Allegations and Representations.** Espinosa alleges that Defendant has exposed  
10 individuals to Di(2-ethylhexyl) phthalate (DEHP) from smartphone holders without providing clear  
11 and reasonable warnings under Proposition 65. DEHP is listed under Proposition 65 as a chemical  
12 known to the State of California to cause reproductive toxicity and cancer.

13           **1.3 Notices of Violation/Complaint.** On or about June 15, 2017, Espinosa served  
14 Implus and various public enforcement agencies with a document entitled “60-Day Notice of  
15 Violation” pursuant to Health & Safety Code §25249.7(d) (the “Notice”), alleging that Defendant  
16 was in violation of Proposition 65 for failing to warn consumers and customers that Perfect Fitness  
17 Hydration & Smartphone Holders exposed users in California to DEHP. No public enforcer has  
18 brought and is diligently prosecuting the claims alleged in the Notice. On October 13, 2017,  
19 Espinosa filed a complaint in the matter (the “Complaint”).

20           **1.4** For purposes of this Consent Judgment only, the Parties stipulate that this Court has  
21 jurisdiction over Defendant as to the allegations contained in the Complaint filed in this matter, that  
22 venue is proper in the County of Alameda, and that this Court has jurisdiction to approve, enter,  
23 and oversee the enforcement of this Consent Judgment as a full and final binding resolution of all  
24 claims which were or could have been raised in the Complaint based on the facts alleged therein  
25 and/or in the Notice.

26           **1.5** Defendant denies all of the material allegations contained in Espinosa’s Notice and  
27 Complaint and maintains that it has not violated Proposition 65. Nothing in this Consent Judgment  
28

1 shall be construed as an admission by Defendant of any fact, finding, issue of law, or violation of  
2 law; nor shall compliance with this Consent Judgment constitute or be construed as an admission  
3 by Defendant of any fact, finding, conclusion, issue of law, or violation of law, such being  
4 specifically denied by Defendant. However, this section shall not diminish or otherwise affect the  
5 obligations, responsibilities, and duties of Defendant under this Consent Judgment.

6 **2. DEFINITIONS**

7 2.1 **Covered Products.** The term "Covered Products" means mobile phone, music  
8 device, and hydration product holders, including but not limited Perfect Fitness Hydration &  
9 Smartphone Holders in all sizes and variations, that are manufactured, distributed and/or offered  
10 for sale in California by Implus, and that Espinosa alleges contain DEHP.

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, Implus shall not  
15 manufacture, import, or purchase for sale in California any Covered Product that contains more  
16 than 1,000 parts per million DEHP, unless the Covered Product is accompanied by one of the  
17 following warnings:

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

20 Or

21 WARNING: This product can expose you to chemicals including Di(2-ethylhexyl)  
22 phthalate (DEHP), which is known to the State of California to cause cancer, birth  
23 defects or other reproductive harm. For more information go to  
24 [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov).

25 3.2 The warning provided pursuant to Section 3.1 shall be affixed to or printed on the  
26 Covered Product's packaging or labeling. The warning shall be prominently affixed to or printed  
27 on the packaging or labeling and displayed with such conspicuousness, as compared with other  
28 words, statements, or designs as to render it likely to be read and understood by an ordinary  
individual under customary conditions of purchase or use. A warning may be contained in the same

1 section of the packaging, labeling, or instruction booklet that states other safety warnings, if any,  
2 concerning the use of the product and shall be at least the same size as those other safety warnings.

3 **4. MONETARY TERMS**

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

9 4.1.1 Within ten (10) business days of the Effective Date, Implus shall issue two  
10 separate checks for the Civil Penalty payment to (a) "OEHHA" in the amount of \$1,500.00; and  
11 (b) "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  
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  
Office of Environmental Health Hazard Assessment  
21 P.O. Box 4010  
Sacramento, CA 95812-4010

22 For Non-United States Postal Service Delivery:

23 Mike Gyurics  
24 Fiscal Operations Branch Chief  
Office of Environmental Health Hazard Assessment  
25 1001 I Street  
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

1           **4.2 Conditional Civil Penalty.** One Hundred Twenty (120) days after the Effective  
2 Date, Implus shall make a Conditional Civil Penalty payment of \$2,000.00 on the same terms as  
3 set forth in Section 4.1.1 pertaining to the Civil Penalty. Pursuant to Title 11 California Code of  
4 Regulations, Section 3203(c), Espinosa agrees that the Conditional Civil Penalty payment shall be  
5 waived in its entirety if, on or before the Conditional Civil Penalty payment is due, an officer of  
6 Implus provides Plaintiff with a signed declaration certifying that all Covered Products it ships for  
7 sale or distributes for sale in California as of the date of its certification are Reformulated Products<sup>1</sup>  
8 or are marked with the warnings required by this Consent Decree (hereinafter "Labeled Product")  
9 and that Implus will, to the best of its knowledge, continue to offer only Reformulated Products or  
10 Labeled Products in California in the future. The option to provide a declaration certifying its  
11 complete early reformulation or labeling of the Covered Products in lieu of making the Conditional  
12 Civil Penalty payment otherwise required by this Section is a material term, and time is of the  
13 essence.

14           **4.3 Attorney Fees.** Implus shall pay \$23,000.00 to Brodsky & Smith, LLC ("Brodsky  
15 Smith") as complete reimbursement for Plaintiff Espinosa's attorneys' fees and costs incurred as a  
16 result of investigating, bringing this matter to Implus' attention, litigating and negotiating and  
17 obtaining judicial approval of a settlement in the public interest, pursuant to Code of Civil  
18 Procedure section 1021.5. Payment shall be made within fourteen (14) business days of the  
19 Effective Date and sent to the address for Brodsky & Smith set forth in section 4.1.1, above, in full  
20 payment, satisfaction and accord of all fees and costs due and owing to Espinosa's counsel.

21           **5. RELEASE OF ALL CLAIMS**

22           5.1 This Consent Judgment is a full, complete, final, and binding resolution between  
23 Espinosa acting in the public interest, and Implus, and its parents, shareholders, divisions,  
24 subdivisions, subsidiaries, partners, sister companies, and affiliates, and their successors and  
25 assigns ("Defendant Releasees"), and all entities from whom they obtain and to whom they directly  
26

27           <sup>1</sup> "Reformulated Products" are defined as any Covered Product that contains more than  
28 1,000 parts per million DEHP.

1 or indirectly distribute or sell Covered Products, including but not limited to manufacturers,  
2 suppliers, distributors, wholesalers, customers, licensors, licensees, retailers, franchisees, and  
3 cooperative members ("Downstream Defendant Releasees"), of all claims for violations of  
4 Proposition 65 based on exposure to DEHP from Covered Products as set forth in the Notice, with  
5 respect to any Covered Products manufactured, distributed, or sold by Implus prior to one hundred  
6 twenty (120) days after the Effective Date. Compliance with the terms of this Consent Judgment  
7 constitutes compliance with Proposition 65 with regard to the Covered Products.

8         5.2 In addition to the foregoing, Espinosa, 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 any and all rights to institute or participate in, directly or indirectly, any  
11 form of legal action and releases Implus, Defendant Releasees, and Downstream Defendant  
12 Releasees from any and all manner of actions, causes of action, claims, demands, rights, suits,  
13 obligations, debts, contracts, agreements, promises, liabilities, damages, charges, losses, costs,  
14 expenses, and attorneys' fees, of any nature whatsoever, known or unknown, in law or equity, fixed  
15 or contingent, now or in the future, with respect to any alleged violations of Proposition 65 related  
16 to or arising from Covered Products manufactured distributed or sold by Implus or Defendant  
17 Releasees. With respect to the foregoing waivers and releases in this paragraph, Espinosa hereby  
18 specifically waives any and all rights and benefits which she now has, or in the future may have,  
19 conferred by virtue of the provisions of Section 1542 of the California Civil Code, which provides  
20 as follows:

21  
22         A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE  
23         CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS FAVOR  
24         AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY  
25         HIM MUST HAVE MATERIALLY AFFECTED HIS SETTLEMENT WITH  
26         THE DEBTOR.

27         5.3 Implus 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 Patrick D. Doran  
21 Buchanan Ingersoll Rooney PC  
22 Two Liberty Place  
23 50 S. 16th Street, Suite 3200  
Philadelphia, PA 19102-2555

24 And

25 For Espinosa:

26 Evan Smith  
27 Brodsky & Smith, LLC  
2 Bala Plaza, Suite 510  
Bala Cynwyd, PA 19004

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, or .pdf  
4 signature, each of which shall be deemed an original, and all of which, when taken together, shall  
5 constitute one and 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 and 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 unless  
25 the unsuccessful party has acted with substantial justification. For purposes of this Consent  
26 Judgment, the term substantial justification shall carry the same meaning as used in the Civil  
27 Discovery Act of 1986, Code of Civil Procedure Section 2016, et seq.  
28



1 12.2 Nothing in this Section shall preclude a Party from seeking an award of sanctions  
2 pursuant to law.

3 **13. RETENTION OF JURISDICTION**

4 13.1 This Court shall retain jurisdiction of this matter to implement or modify the  
5 Consent Judgment.

6 **14. AUTHORIZATION**

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

12  
13 **AGREED TO:**

**AGREED TO:**

14  
15 Date: 11/16/17

Date: 11/15/2017

16 By: [Signature]

GABRIEL ESPINOSA

By: [Signature]

IMPLUS FOOTCARE, LLC

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

20  
21 Dated: \_\_\_\_\_

[Signature]  
Judge of Superior Court