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FILED
ALAMEDA COUNTY

AUG 31 2018

CLERK OF THE SUPERIOR COURT

By J. M. 34 T Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ALAMEDA

GABRIEL ESPINOSA,
Plaintiff,

V..

BLACK BART INTERNATIONAL, LLC,
Defendant.

Case No.: RG18891576

CONSENT JUDGMENT

Judge: Michael M. Markman

Dept.: 16

Hearing Date: June 12, 2018

Hearing Time: 9:00 AM

Reservation #: R-1956473

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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 Black Bart International, LLC ("Black Bart" or "Defendant") with Espinosa and Defendant collectively referred to as the "Parties" and each of them as a "Party." Espinosa is an individual residing in California that seeks to promote awareness of exposures to toxic chemicals and improve human health by reducing or eliminating hazardous substances contained in consumer products. Black Bart is alleged to be 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 Defendant has exposed individuals to Diisononyl phthalate (DINP) from Black Bart lure bags 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 **Notice of Violation/Complaint.** On or about July 28, 2017, Espinosa served Black Bart, and various public enforcement agencies with documents entitled "60-Day Notice of Violation" pursuant to Health & Safety Code §25249.7(d) (the "Notice"), alleging that Defendant was in violation of Proposition 65 for failing to warn consumers and customers that Black Bart lure bags exposed users in California to DINP. No public enforcer has brought and is diligently prosecuting the claims alleged in the Notice. On January 26, 2018, Espinosa filed a complaint (the "Complaint") in the matter.

1.4 For purposes of this Consent Judgment only, the Parties stipulate that this Court has jurisdiction over Defendant 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 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 Black Bart lure bags in
10 all colors and sizes that are manufactured, distributed and/or offered for sale in California by Black
11 Bart.

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

23 (a) The statement: "WARNING: This product contains a chemical known to the State
24 of California to cause cancer [and birth defects or other reproductive harm].;" or

25 (b) (1) A symbol consisting of a black exclamation point in a yellow equilateral triangle
26 with a bold black outline to the left of the word "warning" in bold all capital letters, followed
27 by the statement "This product can expose you to chemicals including Diisononyl phthalate
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1 (DINP), which is known to the State of California to cause cancer. For more information,
2 go to www.P65Warnings.ca.gov;" or (2) a warning consisting of a symbol that is a black
3 exclamation point in a yellow equilateral triangle with a bold black outline to the left of the
4 word "warning" in bold all capital letters, followed by the statement "Cancer and
5 Reproductive Harm - www.P65Warnings.ca.gov."¹

6 For products manufactured on and after August 30, 2018, the warning set forth in Section 3.1(b)
7 shall be used. Any language that appears within the brackets [...] may, but is not required to, be
8 included in the warning.

9 3.2 The warning provided pursuant to Section 3.1 shall be affixed to or printed on the
10 Covered Product's packaging or labeling, or on a placard, shelf tag, sign or electronic device or
11 automatic process, providing that the warning is 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. A 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 4. MONETARY TERMS

18 4.1 **Civil Penalty.** Black Bart shall pay a Civil Penalty of \$1,000.00 pursuant to Health
19 and Safety Code section 25249.7(b), to be apportioned in accordance with California Health &
20 Safety Code § 25192, with 75% of these funds remitted to the State of California's Office of
21 Environmental Health Hazard Assessment and the remaining 25% of the Civil Penalty remitted to
22 Espinosa, as provided by California Health & Safety Code § 25249.12(d).

23 4.1.1 Within fourteen (14) business days of the Effective Date, Black Bart shall
24 issue two separate checks for the Civil Penalty payment to (a) "OEHHA" in the amount of
25 \$750.00; and (b) "Brodsky & Smith, LLC in Trust for Espinosa" in the amount of \$250.00.

26
27 ¹ 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 Espinosa pursuant to this Section shall be delivered to the following payment
2 address:

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

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

9 For United States Postal Service Delivery:

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

15 For Non-United States Postal Service Delivery:

16 Mike Gyurics
17 Fiscal Operations Branch Chief
18 Office of Environmental Health Hazard Assessment
19 1001 I Street
20 Sacramento, CA 95814

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

23 4.2 **Attorney Fees:** Black Bart shall pay \$16,500.00 to Brodsky & Smith, LLC
24 ("Brodsky Smith") as complete reimbursement for Plaintiff Espinosa's attorneys' fees and costs
25 incurred as a result of investigating, bringing this matter to Black Bart's attention, litigating and
26 negotiating and obtaining judicial approval of a settlement in the public interest, pursuant to Code
27 of Civil Procedure section 1021.5.

28 4.3 Black Bart shall pay the Civil Penalty and Attorney Fees identified in Sections 4.1
and 4.2 within fourteen (14) days of the Effective Date.

5. **RELEASE OF ALL CLAIMS**

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 Black Bart, and its parents,

1 shareholders, members, directors, officers, managers, employees, representatives, agents,
2 attorneys, divisions, subdivisions, subsidiaries, partners, sister companies, and affiliates, and their
3 predecessors, successors and assigns ("Defendant Releasees"), and all entities from whom they
4 obtain and to whom they directly or indirectly distribute or sell Covered Products; including but
5 not limited to manufacturers, suppliers, distributors, wholesalers, customers, licensors, licensees
6 retailers, franchisees, and cooperative members, including but not limited to Bass Pro, LLC,
7 Cabela's Inc., and its parents, shareholders, members, directors, officers, managers, employees,
8 representatives, agents, attorneys, divisions, subdivisions, subsidiaries, partners, sister companies,
9 and affiliates, and their predecessors, successors and assigns ("Downstream Releasees"), of all
10 claims for violations of Proposition 65 based on exposure to DINP from Covered Products as set
11 forth in the Notice, with respect to any Covered Products manufactured, distributed, or sold by
12 Black Bart prior to the Effective Date. This Consent Judgment shall have preclusive effect such
13 that no other person or entity, whether purporting to act in his, her, or its interests or the public
14 interest shall be permitted to pursue and/or take any action with respect to any violation of
15 Proposition 65 that was alleged in the Complaint, or that could have been brought pursuant to the
16 Notice against Black Bart or its Downstream Releasees of the Product including but not limited to
17 ("Proposition 65 Claims"). Compliance with the terms of this consent judgment constitutes
18 compliance with Proposition 65 with regard to the Covered Products.

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

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

10 5.3 Black Bart waives any and all claims against Espinosa, his attorneys and other
11 representatives, for any and all actions taken or statements made (or those that could have been
12 taken or made) by Espinosa and his attorneys and other representatives, whether in the course of
13 investigating claims or otherwise seeking enforcement of Proposition 65 against it in this matter,
14 and/or with respect to Covered Products.

15 6. INTEGRATION

16 6.1 This Consent Judgment contains the sole and entire agreement of the Parties and
17 any and all prior negotiations and understandings related hereto shall be deemed to have been
18 merged within it. No representations or terms of agreement other than those contained herein exist
19 or have been made by any Party with respect to the other Party or the subject matter hereof.

20 7. GOVERNING LAW

21 7.1 The terms of this Consent Judgment shall be governed by the laws of the State of
22 California and apply within the State of California. In the event that Proposition 65 is repealed or
23 is otherwise rendered inapplicable by reason of law generally, or as to Covered Products, then
24 Defendant shall have no further obligations pursuant to this Consent Judgment with respect to, and
25 to the extent that, Covered Products are so affected.

26 8. NOTICES

27 8.1 Unless specified herein, all correspondence and notices required to be provided
28 pursuant to this Consent Judgment shall be in writing and personally delivered or sent by: (i) first-

1 class, (registered or certified mail) return receipt requested; or (ii) overnight courier on any party
2 by the other party at the following addresses:

3 For Defendant:

4 Mark E. Elliott
5 Pillsbury Winthrop Shaw Pittman LLP
6 725 South Figueroa Street, Suite 2800
Los Angeles, CA 90017-5406

7 Rebecca M. Lee
8 Pillsbury Winthrop Shaw Pittman LLP
9 725 South Figueroa Street, Suite 2800
Los Angeles, CA 90017-5406

10 And

11 For Espinosa:

12 Evan Smith
13 Brodsky & Smith, LLC
9595 Wilshire Blvd., Ste. 900
Beverly Hills, CA 90212

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

16 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

17 9.1 This Consent Judgment may be executed in counterparts and by facsimile, each of
18 which shall be deemed an original, and all of which, when taken together, shall constitute one and
19 the same document.

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

22 10.1 Espinosa agrees to comply with the requirements set forth in California Health &
23 Safety Code §25249.7(f) and to promptly bring a Motion for Approval of this Consent Judgment.
24 Defendant agrees it shall support approval of such Motion.

25 10.2 This Consent Judgment shall not be effective until it is approved and entered by the
26 Court and shall be null and void if, for any reason, it is not approved by the Court. In such case,
27 the Parties agree to meet and confer on how to proceed and if such agreement is not reached within
28 30 days, the case shall proceed on its normal course.

1 10.3 If the Court approves this Consent Judgment and is reversed or vacated by an
2 appellate court, the Parties shall meet and confer as to whether to modify the terms of this Consent
3 Judgment. If the Parties do not jointly agree on a course of action to take, the case shall proceed on
4 its normal course on the trial court's calendar.

5 **11. MODIFICATION**

6 11.1 This Consent Judgment may be modified only by further stipulation of the Parties
7 and the approval of the Court or upon the granting of a motion brought to the Court by either Party.

8 **12. ATTORNEY'S FEES**

9 12.1 A party who unsuccessfully brings or contests an action arising out of this Consent
10 Judgment shall be required to pay the prevailing party's reasonable attorney's fees and costs.

11 12.2 Nothing in this Section shall preclude a Party from seeking an award of sanctions
12 pursuant to law.

13 **13. RETENTION OF JURISDICTION**

14 13.1 This Court shall retain jurisdiction of this matter to implement or modify the
15 Consent Judgment.

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14. AUTHORIZATION

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

AGREED TO:

AGREED TO:

Date:

Date:

By:

By:

GABRIEL ESPINOSA

BLACK BART INTERNATIONAL, LLC

Barry Tullins, VP.

IT IS SO ORDERED, ADJUDGED AND DECREED:

Dated:

AUG 31 2018

Judge of Superior Court