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Attorneys for Plaintiff

FILED
ALAMEDA COUNTY

DEC 06 2018

CLERK OF THE SUPERIOR COURT
By [Signature] Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ALAMEDA

GABRIEL ESPINOSA,
Plaintiff,
v.
DO-ALL TRAPS, LLC, et al.,
Defendant.

Case No.: RG17885033
CONSENT JUDGMENT
Judge: Sandra Bean
Dept.: 301
Hearing Date: July 30, 2018
Hearing Time: 3:00 PM
Reservation #: R-1969357

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

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

14 **1.3 Notice of Violation/Complaint.** On or about August 9, 2017, Espinosa served Do-
15 All Traps, Big 5. Corp. and various public enforcement agencies with documents entitled “60-Day
16 Notice of Violation” pursuant to Health & Safety Code §25249.7(d) (the “Notice”), alleging that
17 Defendant was in violation of Proposition 65 for failing to warn consumers and customers that
18 Youth Passive Muffs exposed users in California to DEHP. No public enforcer has brought and is
19 diligently prosecuting the claims alleged in the Notice. On December 7, 2017, Espinosa filed a
20 complaint (the “Complaint”) in the matter¹.

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 On May 11, 2018, defendant Big 5. Corp. was dismissed from the action.

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 Youth Passive Muffs that
10 are manufactured, distributed and/or offered for sale in California by Do-All Traps.

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

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

24 (b) (1) A symbol consisting of a black exclamation point in a yellow equilateral triangle
25 with a bold black outline to the left of the word “warning” in bold all capital letters, followed
26 by the statement “This product can expose you to chemicals including Di(2-
27 ethylhexyl)phthalate (DEHP), which is known to the State of California to cause cancer and
28

1 birth defects or other reproductive harm. For more information, go to
2 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.”²

6 For Covered Products manufactured on and after August 30, 2018, the warning set forth in Section
7 3.1(b) shall be used.

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

16 **4. MONETARY TERMS**

17 4.1 **Civil Penalty.** Do-All Traps shall pay a Civil Penalty of \$3,000.00 pursuant to
18 Health and Safety Code section 25249.7(b), to be apportioned in accordance with California Health
19 & Safety Code § 25192, with 75% of these funds remitted to the State of California’s Office of
20 Environmental Health Hazard Assessment (“OEHHA”) and the remaining 25% of the Civil Penalty
21 remitted to Espinosa, as provided by California Health & Safety Code § 25249.12(d).

22 4.1.1 Within ten (10) days of the Effective Date, Do-All Traps shall issue two
23 separate checks for the Civil Penalty payment to (a) “OEHHA” in the amount of \$2,250.00; and
24 (b) “Brodsky & Smith, LLC in Trust for Espinosa” in the amount of \$750.00. Payment owed to
25 Espinosa pursuant to this Section shall be delivered to the following payment address:
26

27 ² 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 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 **Attorneys' Fees.** Within ten (10) days of the Effective Date, Do-All Traps shall pay
22 \$33,000.00 to Brodsky & Smith, LLC ("Brodsky Smith") as complete reimbursement for Plaintiff
23 Espinosa's attorneys' fees and costs incurred as a result of investigating, bringing this matter to
24 Do-All Traps' attention, litigating and negotiating and obtaining judicial approval of a settlement
25 in the public interest, pursuant to Code of Civil Procedure section 1021.5.

26 **5. RELEASE OF ALL CLAIMS**

27 5.1 This Consent Judgment is a full, final, and binding resolution between Espinosa
28 acting on his own behalf, and on behalf of the public interest, and Do-All Traps, and its parents,
shareholders, members, directors, officers, managers, 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 Covered Products, including but
not limited to manufacturers, suppliers, distributors, wholesalers, customers, donees, licensors,

1 licensees retailers, franchisees, and cooperative members, including but not limited to Big 5 Corp.
2 and its parents, shareholders, members, directors, officers, managers, employees, representatives,
3 agents, attorneys, divisions, subdivisions, subsidiaries, partners, sister companies, and affiliates,
4 and their predecessors, successors and assigns (“Downstream Releasees”), of all claims for
5 violations of Proposition 65 based on exposure to DEHP from Covered Products as set forth in the
6 Notice, with respect to any Covered Products manufactured, distributed, or sold by Do-All Traps
7 prior to the Effective Date. This Consent Judgment shall have preclusive effect such that no other
8 person or entity, whether purporting to act in his, her, or its interests or the public interest shall be
9 permitted to pursue and/or take any action with respect to any violation of Proposition 65 that was
10 alleged in the Complaint, or that could have been brought pursuant to the Notice against Do-All
11 Traps or its Downstream Releasees of the Product including but not limited to (“Proposition 65
12 Claims”). Compliance with the terms of this Consent Judgment constitutes compliance with
13 Proposition 65 with regard to the Covered Products.

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

27 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE
28 CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER

1 FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF
2 KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS
3 SETTLEMENT WITH THE DEBTOR.

4 5.3 Do-All Traps waives any and all claims against Espinosa, his attorneys and other
5 representatives, for any and all actions taken or statements made (or those that could have been
6 taken or made) by Espinosa and his attorneys and other representatives, whether in the course of
7 investigating claims or otherwise seeking enforcement of Proposition 65 against it in this matter,
8 and/or with respect to Covered Products.

9 **6. INTEGRATION**

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

14 **7. GOVERNING LAW**

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

20 **8. NOTICES**

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

25 For Defendant:

26 Bruce Nye, Attorney of Counsel
27 Scali Rasmussen
28 1901 Harrison Street, 14th Floor
Oakland, CA 94612

1 And

2 For Espinosa:

3 Evan Smith
4 Brodsky & Smith, LLC
5 9595 Wilshire Blvd., Ste. 900
6 Beverly Hills, CA 90212

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

9 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

10 9.1 This Consent Judgment may be executed in counterparts and by facsimile, each of
11 which shall be deemed an original, and all of which, when taken together, shall constitute one and
12 the same document.

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

15 10.1 Espinosa agrees to comply with the requirements set forth in California Health &
16 Safety Code §25249.7(f) and to promptly bring a Motion for Approval of this Consent Judgment.
17 Defendant agrees it shall support approval of such Motion.

18 10.2 This Consent Judgment shall not be effective until it is approved and entered by the
19 Court and shall be null and void if, for any reason, it is not approved by the Court. In such case,
20 the Parties agree to meet and confer on how to proceed and if such agreement is not reached within
21 30 days, the case shall proceed on its normal course.

22 10.3 If the Court approves this Consent Judgment and is reversed or vacated by an
23 appellate court, the Parties shall meet and confer as to whether to modify the terms of this Consent
24 Judgment. If the Parties do not jointly agree on a course of action to take, the case shall proceed on
25 its normal course on the trial court's calendar.

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.

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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.

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

13. RETENTION OF JURISDICTION

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

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:

5/11/18

Date:

By:

GABRIEL ESPINOSA

By:

DO-ALL TRAPS, LLC

IT IS SO ORDERED, ADJUDGED AND DECREED:

Dated:

Judge of Superior Court

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AGREED TO:

AGREED TO:

Date: _____

Date: 5-29-2018

By: _____
GABRIEL ESPINOSA

By:  Steve Curnutte, CRO
DO-ALL TRAPS, LLC

IT IS SO ORDERED, ADJUDGED AND DECREED:

Dated: 12-0-18



Judge of Superior Court