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FILED
ALAMEDA COUNTY
AUG 16 2018

CLERK OF THE SUPERIOR COURT
By [Signature] Deputy

MAY 30 2018

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ALAMEDA

GABRIEL ESPINOSA,
Plaintiff,
v.
ANKIT, LLC, MARSHALLS OF MA, INC.,
Defendants.

Case No.: RG18896501
CONSENT JUDGMENT AND ORDER
Judge: Jo-Lynne Q. Lee
Dept.: 18
Hearing Date: July 17, 2018
Hearing Time: 3:00 PM
Reservation #: R-1968036

BY FAX

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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 Ankit, LLC (“Ankit” 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 who seeks to promote awareness of exposures to toxic chemicals and improve human health by reducing or eliminating hazardous substances contained in consumer products. Ankit 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 Di(2-ethylhexyl) phthalate (DEHP) from its sales of Ankit Noise Isolating Headphones without providing clear and reasonable warnings under Proposition 65. DEHP is listed under Proposition 65 as a chemical known to the State of California to cause cancer and reproductive toxicity.

1.3 **Notice of Violation/Complaint.** On or about October 26, 2017, Espinosa served Ankit, Marshalls of MA, Inc. (“Marshalls”) 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 Ankit Noise Isolating Headphones exposed users in California to DEHP. No public enforcer has brought and is diligently prosecuting the claims alleged in the Notices. On March 13, 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 Noise Isolating
10 headphones that are manufactured, distributed and/or offered for sale in California by Ankit.

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, Ankit shall not
15 manufacture or order from any supplier any Covered Products intended for retail sale in California
16 that contains DEHP 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 Ankit before the date this Consent Judgment is signed by both Parties may sell
20 through 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 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
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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.”¹

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.** Ankit shall pay a Civil Penalty of \$1,500.00 pursuant to Health and
18 Safety Code section 25249.7(b), to be apportioned in accordance with California Health & Safety
19 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 date this Agreement is entered as a Judgment
23 by the Court, Ankit shall issue two separate checks for the Civil Penalty payment to (a)
24 “OEHHA” in the amount of \$1,125.00; and (b) “Brodsky & Smith, LLC in Trust for Espinosa” in
25

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 the amount of \$375.00. Payment owed to Espinosa pursuant to this Section shall be delivered to
2 the following payment 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 OEHHA (EIN: 68-0284486) pursuant to this Section shall be delivered directly
8 to OEHHA (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 OEHHA shall be mailed to Brodsky & Smith, LLC at the
22 address set forth above as proof of payment to OEHHA.

23 4.2 **Attorneys' Fees.** Ankit shall pay \$23,000.00 to Brodsky & Smith, LLC ("Brodsky
24 Smith") as complete reimbursement for Plaintiff Espinosa's attorneys' fees and costs incurred as a
25 result of investigating, bringing this matter to Ankit's attention, litigating and negotiating and
26 obtaining judicial approval of a settlement in the public interest, pursuant to Code of Civil
27 Procedure section 1021.5. The \$23,000.00 shall be paid as follows: \$11,000.00 within ten (10) days
28 of the Effective Date; and \$12,000.00 within fifty-five (55) days of the Effective Date.

29 **5. RELEASE OF ALL CLAIMS**

30 5.1 This Consent Judgment is a full, final, and binding resolution between Espinosa
31 acting on his own behalf, and on behalf of the public interest, and Ankit, and its parents,
32 shareholders, members, directors, officers, managers, employees, representatives, agents,
33

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

15 5.2 In addition to the foregoing, Espinosa, on behalf of himself, his past and current
16 agents, representatives, attorneys, and successors and/or assignees, and not in his representative
17 capacity, hereby waives all rights to institute or participate in, directly or indirectly, any form of
18 legal action and releases Ankit, Defendant Releasees, and Downstream Releasees from any and all
19 manner of actions, causes of action, claims, demands, rights, suits, obligations, debts, contracts,
20 agreements, promises, liabilities, damages, charges, losses, costs, expenses, and attorneys' fees, of
21 any nature whatsoever, known or unknown, in law or equity, fixed or contingent, now or in the
22 future, with respect to any alleged violations of Proposition 65 related to or arising from Covered
23 Products manufactured, distributed, or sold by Ankit, Defendant Releasees or Downstream
24 Releasees. With respect to the foregoing waivers and releases in this paragraph, Espinosa hereby
25 specifically waives any and all rights and benefits which she now has, or in the future may have,
26 conferred by virtue of the provisions of Section 1542 of the California Civil Code, which provides
27 as follows:
28

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

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

11 **6. INTEGRATION**

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

16 **7. GOVERNING LAW**

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

22 **8. NOTICES**

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

27 For Defendant:

28 James Geocaris
Lewis Brisbois Bisgaard & Smith LLP
650 Town Center Drive, Suite 1400
Costa Mesa, CA 92626

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.

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11. MODIFICATION

11.1 This Consent Judgment may be modified only by further stipulation of the Parties 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.

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: 5/29/18
By: [Signature]
GABRIEL ESPINOSA

Date: 5/21/18
By: [Signature]
ANKIT, LLC

IT IS SO ORDERED, ADJUDGED AND DECREED:

Dated: 8/16/18

[Signature]
Judge of Superior Court
JO-LYNNE Q. LEE