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ALAMEDA COUNTY

SEP 21 2018

CLERK OF THE SUPERIOR COURT

By *Damele K. Gresh* Deputy

JUL 20 2018

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Attorneys for Plaintiff

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA

10 COUNTY OF ALAMEDA

11 GABRIEL ESPINOSA,

12 Plaintiff,

13 v.

14 THE BURTON CORP.,

15 Defendant.

Case No.: RG18890692

CONSENT JUDGMENT

Judge: Evelio Grillo

Dept.: 15

Hearing Date: September 7, 2018

Hearing Time: 10:00 AM

Reservation #: R-1977908

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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 The Burton Corporation. ("Burton" 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 and alleges that he seeks to promote awareness of exposures to toxic chemicals and improve human health by reducing or eliminating hazardous substances contained in consumer products. Burton 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 (a) Di(2-ethylhexyl) phthalate (DEHP) in Channel Islands Fin Wallets, and to (b) Diisononyl phthalate (DINP) in Channel Island Dry Packs and/or Sacks 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. DINP is listed under Proposition 65 as a chemical known to the State of California to cause cancer.

1.3 **Notices of Violation/Complaint.** On or about January 26, 2017, Espinosa served Burton and various public enforcement agencies with documents entitled "60-Day Notice of Violation" pursuant to Health & Safety Code §25249.7(d) (the "January Notice"), alleging that Defendant was in violation of Proposition 65 for failing to warn consumers and customers that Channel Island Dry Packs and/or Sacks exposed users in California to DINP. On or about October 30, 2017, Espinosa served Burton and various public enforcement agencies with a second "60-Day Notice of Violation" pursuant to Health & Safety Code §25249.7(d) (the "October Notice")¹, alleging that Defendant was in violation of Proposition 65 for failing to warn consumers and customers that Channel Islands Fin Wallets exposed users in California to DEHP. No public

¹ The January Notice and the October Notice are collectively referred to herein as, the "Notices."

1 enforcer has brought and is diligently prosecuting the claims alleged in the Notices. On January
2 25, 2018, Espinosa filed a complaint (the "Complaint") in the matter.

3
4 1.4 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
5 jurisdiction over Defendant as to the allegations contained in the Complaint filed in this matter, that
6 venue is proper in the County of Alameda, and that this Court has jurisdiction to approve, enter,
7 and oversee the enforcement of this Consent Judgment as a full and final binding resolution of all
8 claims which were or could have been raised in the Complaint based on the facts alleged therein
9 and/or in the Notice.

10 1.5 Defendant denies the material allegations contained in Espinosa's Notices and
11 Complaint and denies that it violated Proposition 65. Nothing in this Consent Judgment shall be
12 construed as an admission by Defendant of any fact, finding, issue of law, or violation of law; nor
13 shall compliance with this Consent Judgment constitute or be construed as an admission by
14 Defendant of any fact, finding, conclusion, issue of law, or violation of law, such being specifically
15 denied by Defendant. However, this section shall not diminish or otherwise affect the obligations,
16 responsibilities, and duties of Defendant under this Consent Judgment.

17 **2. DEFINITIONS**

18 2.1 **Covered Products.** The term "Covered Products" means Channel Island dry
19 packs/bags/sacks and wallets made with or containing polyvinyl chloride (PVC) that are
20 manufactured, distributed, sold and/or offered for sale in California.

21 2.2 **Effective Date.** The term "Effective Date" means the date this Consent Judgment is
22 entered as a Judgment of the Court.

23 **3. INJUNCTIVE RELIEF: WARNINGS**

24 3.1 As of the date this Consent Judgment is signed by both Parties, Burton shall not
25 manufacture or order from any supplier any Covered Products intended for retail sale in California
26 that contains DEHP and/or DINP in excess of 0.1% (1,000 ppm) on any component to which
27 consumers are exposed (hereinafter "Reformulated Products") unless the Covered Products are
28 accompanied by a warning that complies with Article 6 of Title 27 of the California Code of

1 Regulations. Covered Products sold or distributed by Burton before the date this Consent Judgment
2 is signed by both Parties may sell through without a warning even if not Reformulated Products.

3 Until August 30, 2018, the warning shall consist of either:

4 (a) A symbol consisting of a black exclamation point in a yellow equilateral triangle
5 with a bold black outline to the left of the word "WARNING" in bold capital letters,
6 followed by the statement: "This product can expose you to chemicals, including
7 Di(2-ethylhexyl)phthalate (DEHP), which is known to the State of California to
8 cause cancer. For more information go to www.P65Warnings.ca.gov."; or

9 (b) (1) A symbol consisting of a black exclamation point in a yellow equilateral triangle
10 with a bold black outline to the left of the word "warning" in bold all capital letters,
11 followed by the statement "This product can expose you to chemicals including
12 Di(2-ethylhexyl) phthalate (DEHP), which is known to the State of California to
13 cause cancer and birth defects or other reproductive harm. For more information,
14 go to www.P65Warnings.ca.gov."; or (2) a warning consisting of a symbol that is a
15 black exclamation point in a yellow equilateral triangle with a bold black outline to
16 the left of the word "warning" in bold all capital letters, followed by the statement
17 "Cancer and Reproductive Harm - www.P65Warnings.ca.gov."

18 The triangular symbol need only be in yellow where the sign, label, shelf tag or other
19 transmission format is not printed using the color yellow.

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

22 3.2 The warning provided pursuant to Section 3.1 shall be affixed to or printed on the
23 Covered Product's packaging or labeling, or on a placard, shelf tag, or sign and displayed with such
24 conspicuousness, as compared with other words, statements, or designs as to render it likely to be
25 read and understood by an ordinary individual under customary conditions of purchase or use, or
26 provided via any electronic device or automatic process that automatically provides the warning to
27 the purchaser prior to or during the purchase of the Covered Product.. A warning may be contained
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1 in the same section of the packaging, labeling, or instruction booklet that states other safety
2 warnings, if any, concerning the use of the product and shall be at least the same size as those other
3 safety warnings.

4 **4. MONETARY TERMS**

5 4.1 **Civil Penalty.** Burton shall pay a \$3,000.00 Civil Penalty pursuant to Health and
6 Safety Code section 25249.7(b), to be apportioned in accordance with California Health & Safety
7 Code § 25192, with 75% of these funds remitted to the State of California's Office of
8 Environmental Health Hazard Assessment and the remaining 25% of the Civil Penalty remitted to
9 Espinosa, as provided by California Health & Safety Code § 25249.12(d).

10 4.1.1 Within fourteen (14) days of receipt by Burton of copies of the order
11 approving entry of this Consent Judgment and the entered Consent Judgment, Burton shall issue
12 two separate checks for the Civil Penalty payment to (a) "OEHHA" in the amount of \$2,250.00;
13 and (b) "Brodsky & Smith, LLC in Trust for Espinosa" in the amount of 750.00. Payment owed
14 to Espinosa pursuant to this Section shall be delivered to the following payment address:

15 Evan J. Smith, Esquire
16 Brodsky & Smith, LLC
17 Two Bala Plaza, Suite 510
Bala Cynwyd, PA 19004

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

20 For United States Postal Service Delivery:

21 Mike Gyurics
22 Fiscal Operations Branch Chief
23 Office of Environmental Health Hazard Assessment
P.O. Box 4010
Sacramento, CA 95812-4010

24 For Non-United States Postal Service Delivery:

25 Mike Gyurics
26 Fiscal Operations Branch Chief
27 Office of Environmental Health Hazard Assessment
1001 I Street
28 Sacramento, CA 95814

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

4.2 **Attorneys' Fees.** Within fourteen (14) days of receipt by Burton of copies of the order approving entry of this Consent Judgment and the entered Consent Judgment, Burton shall pay \$28,500.00 to Brodsky & Smith, LLC ("Brodsky Smith") as complete reimbursement for Espinosa's attorneys' fees and costs incurred as a result of investigating, bringing this matter to Burton's attention, litigating and negotiating and obtaining judicial approval of a settlement in the public interest, pursuant to Code of Civil Procedure section 1021.5.

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 Burton, 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, licensors, licensees, retailers, franchisees, and cooperative members, including but not limited to Rip Curl, Inc., Rip Curl International Pty Ltd., Rip Curl USA, Rip Curl Surf Center, Burton Flagship, and each of their parents, shareholders, members, directors, officers, managers, employees, representatives, agents, attorneys, divisions, subdivisions, subsidiaries, partners, sister companies, and affiliates, and their predecessors, successors and assigns ("Downstream Releasees"), of all claims for violations of Proposition 65 based on exposure to DEHP and/or DINP from Covered Products as set forth in the Notices, with respect to any Covered Products manufactured, distributed, or sold by Burton, Defendant Releasees, or Downstream Releasees prior to the Effective Date. This Consent Judgment shall have preclusive effect such that no other person or entity, whether purporting to act in his, her, or its interests or the public interest shall be permitted to pursue and/or take any action with respect to any violation of Proposition 65 that was alleged in the Complaint, or that could have

1 been brought pursuant to the Notices against Burton or its Downstream Releasees of the Covered
2 Product including but not limited to any claim under Proposition 65. Compliance with the terms
3 of this Consent Judgment constitutes compliance with Proposition 65 with regard to the Covered
4 Products.

5 5.2 In addition to the foregoing, Espinosa, on behalf of himself, his past and current
6 agents, representatives, attorneys, and successors and/or assignees, and not in his representative
7 capacity, hereby waives all rights to institute or participate in, directly or indirectly, any form of
8 legal action and releases Burton, Defendant Releasees, and Downstream Releasees from any and
9 all manner of actions, causes of action, claims, demands, rights, suits, obligations, debts, contracts,
10 agreements, promises, liabilities, damages, charges, losses, costs, expenses, and attorneys' fees, of
11 any nature whatsoever, known or unknown, in law or equity, fixed or contingent, now or in the
12 future, with respect to any alleged violations of Proposition 65 related to or arising from Covered
13 Products manufactured, distributed, or sold by Burton, Defendant Releasees or Downstream
14 Releasees. With respect to the foregoing waivers and releases in this paragraph, Espinosa hereby
15 specifically waives any and all rights and benefits which she now has, or in the future may have,
16 conferred by virtue of the provisions of Section 1542 of the California Civil Code, which provides
17 as follows:

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

22 5.3 Burton waives any and all claims against Espinosa, his attorneys and other
23 representatives, for any and all actions taken or statements made (or those that could have been
24 taken or made) by Espinosa and his attorneys and other representatives, whether in the course of
25 investigating claims or otherwise seeking enforcement of Proposition 65 against it in this matter,
26 and/or with respect to Covered Products.
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6. **INTEGRATION**

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

7. **GOVERNING LAW**

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

8. **NOTICES**

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

For Defendant:

Jay W. Connolly
Seyfarth Shaw LLP
560 Mission Street, Suite 3100
San Francisco, California 94105-2930

And

For Espinosa:

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

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

1 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

2 9.1 This Consent Judgment may be executed in counterparts and by facsimile, each of
3 which shall be deemed an original, and all of which, when taken together, shall constitute one and
4 the same document.

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

7 10.1 Espinosa agrees to comply with the requirements set forth in California Health &
8 Safety Code §25249.7(f) and to promptly bring a Motion for Approval of this Consent Judgment.
9 Defendant agrees it shall support approval of such Motion.

10 10.2 This Consent Judgment shall not be effective until it is approved and entered by the
11 Court and shall be null and void if, for any reason, it is not approved by the Court. In such case,
12 the Parties agree to meet and confer on how to proceed and if such agreement is not reached within
13 30 days, the case shall proceed on its normal course.

14 10.3 If the Court approves this Consent Judgment and is reversed or vacated by an
15 appellate court, the Parties shall meet and confer as to whether to modify the terms of this Consent
16 Judgment. If the Parties do not jointly agree on a course of action to take, the case shall proceed on
17 its normal course on the trial court's calendar.

18 **11. MODIFICATION**

19 11.1 This Consent Judgment may be modified only by further stipulation of the Parties
20 and the approval of the Court or upon the granting of a motion brought to the Court by either Party.

21 **12. ENFORCEMENT AND ATTORNEY'S FEES**

22 12.1 The terms of this Consent Judgment shall be enforced exclusively by the Parties
23 hereto. The Parties may, by noticed motion or order to show cause before the Superior Court of
24 California for the County of Alameda, giving the notice required by law, enforce the terms and
25 conditions contained herein.

26 12.2 Before bringing any noticed motion or order to show cause, a Party seeking to enforce
27 the terms and conditions of this Consent Judgment shall provide the other Party thirty (30) days
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1 advance written notice of the alleged violation(s). The Parties shall meet and confer in good faith
2 during such thirty (30) days in an effort to reach an agreement on an appropriate cure for the alleged
3 violation(s). If the Party alleged to be in violation corrects the purported violation(s) within thirty
4 (30) days of receiving written notice, the Party seeking to enforce this Consent Judgment shall take
5 no further enforcement action with respect to such violation(s) under either this Consent Judgment,
6 or any other law.

7 12.3 In any proceeding brought by either party to enforce this Consent Judgment, such
8 party may seek whatever fines, costs, penalties or remedies as may be provided by law for any
9 violation of this Consent Judgment.

10 12.4 A Party who unsuccessfully brings or contests an action arising out of this Consent
11 Judgment shall be required to pay the prevailing party's reasonable attorney's fees and costs.

12 12.5 Except as otherwise specifically provided herein, each Party shall bear its own costs
13 and attorney's fees in connection with the Notice.

14 12.6 Nothing in this Section shall preclude a Party from seeking an award of sanctions
15 pursuant to law.

16 **13. RETENTION OF JURISDICTION**

17 13.1 This Court shall retain jurisdiction of this matter to implement or modify the
18 Consent Judgment.

19 **14. AUTHORIZATION**

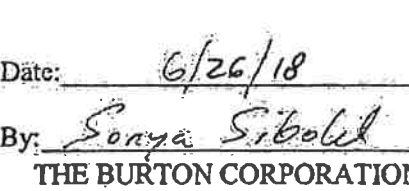
20 14.1 The undersigned are authorized to execute this Consent Judgment on behalf of their
21 respective Parties and have read, understood and agree to all of the terms and conditions of this
22 document and certify that he or she is fully authorized by the Party he or she represents to execute
23 the Consent Judgment on behalf of the Party represented and legally bind that Party. Except as
24 explicitly provided herein each Party is to bear its own fees and costs.
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AGREED TO:

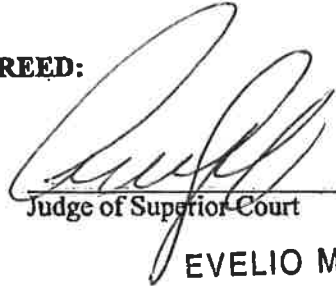
Date: 6/26/18
By: 
GABRIEL ESPINOSA

AGREED TO:

Date: 6/26/18
By: 
THE BURTON CORPORATION.

IT IS SO ORDERED, ADJUDGED AND DECREED:

Dated: SEP 21 2018


Judge of Superior Court
EVELIO M. GRILLO
JUDGE