

Dept. 25

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Attorneys for Plaintiff

**ENDORSED
FILED
ALAMEDA COUNTY**

MAY 15 2019

CLERK OF THE SUPERIOR COURT
By [Signature] Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ALAMEDA

GABRIEL ESPINOSA,
Plaintiff,
v.
PETSMART HOME OFFICE, INC.,
Defendant.

Case No.: RG18929032

CONSENT JUDGMENT

Judge: Ronni MacLaren
Dept.: 25
Hearing Date: May 15, 2019
Hearing Time: 9:00 AM
Reservation #: R-2060961

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 PetSmart, Inc. and its
4 subsidiaries and affiliates (“PetSmart” or “Defendant”) with Espinosa and Defendant collectively
5 referred to as the “Parties” and each of them as a “Party.” Espinosa is an individual residing in
6 California that seeks to promote awareness of exposures to toxic chemicals and improve human
7 health by reducing or eliminating hazardous substances contained in consumer products. PetSmart
8 is alleged to be a person in the course of doing business for purposes of Proposition 65, Cal. Health
9 & Safety Code §§ 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 its sales of Top Paw backpacks without
12 providing a clear and reasonable exposure warning pursuant to Proposition 65. DEHP is listed
13 under Proposition 65 as a chemical known to the State of California to cause cancer and
14 reproductive toxicity.

15 1.3 **Notice of Violation/Complaint.** On or about July 17, 2018, Espinosa served
16 PetSmart, and various public enforcement agencies with documents entitled “60-Day Notice of
17 Violation” pursuant to Health & Safety Code §25249.7(d) (the “Notice”), alleging that Defendant
18 violated Proposition 65 for failing to warn consumers and customers that use of Top Paw backpacks
19 expose users in California to DEHP. No public enforcer has brought and is diligently prosecuting
20 the claims alleged in the Notice. On November 16, 2018, Espinosa filed a complaint (the
21 “Complaint”) in the matter.

22 1.4 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
23 jurisdiction over Defendant as to the allegations contained in the Complaint filed in this matter, that
24 venue is proper in the County of Alameda, and that this Court has jurisdiction to approve, enter,
25 and oversee the enforcement of this Consent Judgment as a full and final binding resolution of all
26 claims which were or could have been raised in the Complaint based on the facts alleged therein
27 and/or in the Notice.
28

1 1.5 Nothing in this Consent Judgment shall be construed as an admission by Defendant
2 of any fact, finding, issue of law, or violation of law; nor shall compliance with this Consent
3 Judgment constitute or be construed as an admission by Defendant of any fact, finding, conclusion,
4 issue of law, or violation of law, such being specifically denied by Defendant. However, this
5 section shall not diminish or otherwise affect the obligations, responsibilities, and duties of
6 Defendant under this Consent Judgment.

7 **2. DEFINITIONS**

8 2.1 **Covered Products.** The term “Covered Products” means PetSmart private label
9 mesh pet carriers that are manufactured, distributed and/or offered for sale in California by
10 PetSmart.

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 **Reformulation of Covered Products.** As of the Effective Date, and continuing
15 thereafter, Covered Products that PetSmart directly manufactures, imports, distributes, or purchases
16 for sale in California shall either: (a) be Reformulated Products pursuant to § 3.2, below; or (b) be
17 labeled with a clear and reasonable exposure warning pursuant to §§ 3.3 and 3.4, below. The
18 warning requirement set forth in §§ 3.3 and 3.4 shall not apply to any Reformulated Product.

19 3.2 **Reformulation Standard.** “Reformulated Products” shall mean Covered Products
20 that contain concentrations less than or equal to 0.1% (1,000 parts per million (ppm)) of DEHP
21 when analyzed pursuant to U.S. Environmental Protection Agency testing methodologies 3580A
22 and 8270C or other methodology utilized by federal or state government agencies for the purpose
23 of determining the phthalate content in a solid substance.

24 3.3 **Clear and Reasonable Warning.** As of the Effective Date, and continuing
25 thereafter, a clear and reasonable exposure warning as set forth in these §§ 3.3 and 3.4 must be
26 provided for all Covered Products that Defendant manufactures, imports, distributes, or purchases
27 for sale in California that is not a Reformulated Product. There shall be no obligation for Defendant
28

1 to provide a warning for Covered Products that enter the stream of commerce prior to the Effective
2 Date. The warning shall consist of either the **Warning** or **Alternative Warning** described in §§
3 3.3(a) or (b), respectively:

4 (a) **Warning.**

5 **⚠ WARNING:** This product can expose you to chemicals including di(2-
6 ethylhexyl) phthalate (DEHP), which is known to the State of California to cause
7 cancer and birth defects or other reproductive harm. For more information go to
www.P65Warnings.ca.gov.

8 (b) **Alternative Warning:**

9 **⚠ WARNING:** Cancer and Reproductive Harm - www.P65Warnings.ca.gov.

10 3.4 A **Warning** or **Alternative Warning** provided pursuant to § 3.3 must print the word
11 “**WARNING:**” in all capital letters and in bold font, followed by a colon. The warning symbol to
12 the left of the word “**WARNING:**” must be a black exclamation point in a yellow equilateral
13 triangle with a black outline, except that if the sign or label for the Covered Product does not use
14 the color yellow, the symbol may be in black and white. The symbol must be in a size no smaller
15 than the height of the word “**WARNING:**”. The warning shall be affixed to or printed on the
16 Covered Product’s packaging or labeling, or on a placard, shelf tag, sign or electronic device or
17 automatic process, providing that the warning is displayed with such conspicuousness, as compared
18 with other words, statements, or designs as to render it likely to be read and understood by an
19 ordinary individual under customary conditions of purchase or use. A warning may be contained
20 in the same section of the packaging, labeling, or instruction booklet that states other safety
21 warnings, if any, concerning the use of the Covered Product and shall be at least the same size as
22 those other safety warnings.

23 3.5 **Compliance with Warning Regulations.** Defendant shall be deemed to be in
24 compliance with this Consent Judgment by either adhering to §§ 3.3 and 3.4 of this Consent
25 Judgment or by complying with warning requirements adopted by the State of California’s Office
26 of Environmental Health Hazard Assessment (“**OEHHA**”) after the Effective Date.

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4. MONETARY TERMS

4.1 **Civil Penalty.** PetSmart shall pay \$3,000.00 as a Civil Penalty pursuant to Health and Safety Code section 25249.7(b), to be apportioned in accordance with California Health & Safety Code § 25192, with 75% of these funds remitted to OEHHA and the remaining 25% of the Civil Penalty remitted to Espinosa, as provided by California Health & Safety Code § 25249.12(d).

4.1.1 Within ten (10) business days of the Effective Date, PetSmart shall issue two separate checks for the Civil Penalty payment to (a) "OEHHA" in the amount of \$2,250.00; and to (b) "Brodsky & Smith, LLC in Trust for Espinosa" in the amount of \$750.00. Payment owed to Espinosa pursuant to this Section shall be delivered to the following payment address:

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

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

For United States Postal Service Delivery:

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

For Non-United States Postal Service Delivery:

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

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 ten (10) business days of the Effective Date, PetSmart shall pay \$30,000.00 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

1 PetSmart' attention, litigating and negotiating and obtaining judicial approval of a settlement in the
2 public interest, pursuant to Code of Civil Procedure section 1021.5.

3 **5. RELEASE OF ALL CLAIMS**

4 5.1 This Consent Judgment is a full, final, and binding resolution between Espinosa
5 acting on his own behalf, and on behalf of the public interest, and PetSmart, and its parents,
6 shareholders, members, directors, officers, managers, employees, representatives, agents,
7 attorneys, divisions, subdivisions, subsidiaries, partners, sister companies, and affiliates, and their
8 predecessors, successors and assigns ("Defendant Releasees"), and all entities from whom they
9 obtain and to whom they directly or indirectly distribute or sell Covered Products, including but
10 not limited to manufacturers, suppliers, distributors, wholesalers, customers, licensors, licensees
11 retailers, franchisees, and cooperative members, including but not limited to Pacific Coast
12 Distributing, Inc. ("Downstream Releasees"), of all claims for violations of Proposition 65 based
13 on exposure to DEHP from Covered Products as set forth in the Notice, with respect to any Covered
14 Products manufactured, distributed, or sold by PetSmart prior to the Effective Date. This Consent
15 Judgment shall have preclusive effect such that no other person or entity, whether purporting to act
16 in his, her, or its interests or the public interest shall be permitted to pursue and/or take any action
17 with respect to any violation of Proposition 65 that was alleged in the Complaint, or that could have
18 been brought pursuant to the Notice against PetSmart, Defendant Releasees, and/or the
19 Downstream Releasees of the Covered Products ("Proposition 65 Claims"). Compliance with the
20 terms of this Consent Judgment constitutes compliance with Proposition 65 with regard to the
21 Covered Products.

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

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

14 5.3 PetSmart waives any and all claims against Espinosa, his attorneys and other
15 representatives, for any and all actions taken or statements made by Espinosa and his attorneys and
16 other representatives, whether in the course of investigating claims or otherwise seeking
17 enforcement of Proposition 65 against it in this matter, and/or with respect to Covered Products.

18 **6. INTEGRATION**

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

23 **7. GOVERNING LAW**

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

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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:

General Counsel
PetSmart, Inc.
19601 N. 27th Avenue
Phoenix, AZ 85027

With copy to:

Will Troutman
Norton Rose Fulbright US LLP
555 South Flower Street
Forty-First Floor
Los Angeles, CA

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.

9. COUNTERPARTS; FACSIMILE SIGNATURES

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

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

10.1 Espinosa agrees to comply with the requirements set forth in California Health & Safety Code §25249.7(f) and to promptly bring a Motion for Approval of this Consent Judgment.

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

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

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.

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AGREED TO:

AGREED TO:

Date: 3/26/19
By: [Signature]
GABRIEL ESPINOSA

Date: 2/11/19
By: [Signature]
PETSMART, INC.

IT IS SO ORDERED, ADJUDGED AND DECREED:

Dated: May 15, 2019

[Signature]
Judge of Superior Court

CLERK'S CERTIFICATE OF SERVICE BY MAIL
CCP 1013a(3)

CASE NAME: **Espinosa vs PetSmart Home Office, Inc.**
ACTION NO.: **RG18929032**

I certify that, I am not a party to the within action. I served the foregoing **CONSENT JUDGEMENT** by depositing a true copy thereof in the United States mail in Oakland, California in a sealed envelope with postage fully prepaid thereon addressed to:

Brodsky & Smith, LLC
Attn: Evan J. Smith
9595 Wilshire Blvd.
Suite 900
Beverly Hills, CA 90212

Norton Rose Fulbright US LLP
Attn: Lauren A. Shoor
555 South Flower Street
41st Floor
Los Angeles, CA 90071

I declare under penalty of perjury that the following is true and correct.

Executed on May 16, 2019 in Oakland, California

Chad Finke,
Executive Officer/Clerk

by Pamela Greene
Deputy Clerk