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Attorneys for Plaintiff

FILED
ALAMEDA COUNTY

JUN 18 2020

FILED
ALAMEDA COUNTY

AUG 05 2020

CLERK OF THE SUPERIOR COURT
By [Signature] Deputy

CLERK OF THE SUPERIOR COURT

Deputy
Rm

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ALAMEDA

GABRIEL ESPINOSA,

Plaintiff,

v.

CWI, INC., JPC PRODUCTS, LLC,

Defendant.

Case No.: RG19042915

CONSENT JUDGMENT

Judge: Paul D. Herbert
Dept.: 20
Hearing Date: August 5, 2020
Hearing Time: 3:00 PM
Reservation #: R*- 2183455

JUN 16 2020

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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 CWI, INC. ("CWI" 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. CWI 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 its sales of Trash-Ease portable trash bag holders without providing a clear and reasonable exposure warning pursuant to 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 January 22, 2019, Espinosa served CWI, 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 violated Proposition 65 for failing to warn consumers and customers that use of Trash-Ease portable trash bag holders expose users in California to DINP. No public enforcer has brought and is diligently prosecuting the claims alleged in the Notice. On November 13, 2019, 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.

1.5 Defendant denies the material allegations contained in Espinosa's Notice and Complaint and maintains that it has not violated Proposition 65. Nothing in this Consent Judgment

1 shall be construed as an admission by Defendant of any fact, finding, issue of law, or violation of
2 law; nor shall compliance with this Consent Judgment constitute or be construed as an admission
3 by Defendant of any fact, finding, conclusion, issue of law, or violation of law, such being
4 specifically denied by Defendant. However, this section shall not diminish or otherwise affect the
5 obligations, responsibilities, and duties of Defendant under this Consent Judgment.

6 1.6 Defendant alleges that it ceased selling Trash-Ease portable trash bag holders to
7 California consumers in November, 2019.

8 **2. DEFINITIONS**

9 2.1 **Covered Products.** The term "Covered Products" means Trash-Ease portable trash
10 bag holders that CWI acquired from the defendant JPC PRODUCTS, LLC ,and that CWI sold,
11 distributed and/or offered for sale in California .

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 **Reformulation of Covered Products.** After the date this Consent Judgment is
16 approved by the Court, if CWI distributes, sells, or offers for sale in California any Covered
17 Products, they shall either: (a) be Reformulated Products pursuant to § 3.2, below; or (b) be labeled
18 with a clear and reasonable exposure warning pursuant to §§ 3.3 and 3.4, below. For purposes of
19 this Consent Judgment, a "Reformulated Product" is a Covered Product that is in compliance with
20 the standard set forth in § 3.2 below. The warning requirement set forth in §§ 3.3 and 3.4 shall not
21 apply to any Reformulated Product.

22 3.2 **Reformulation Standard.** "Reformulated Products" shall mean Covered Products
23 that contain concentrations less than or equal to 0.1% (1,000 parts per million (ppm)) of DINP
24 when analyzed pursuant to U.S. Environmental Protection Agency testing methodologies 3580A
25 and 8270C or other methodology utilized by federal or state government agencies for the purpose
26 of determining the phthalate content in a solid substance.
27
28

1 3.3 **Clear and Reasonable Warning.** As of the date this Consent Judgment is signed
2 by both Parties, and continuing thereafter, a clear and reasonable exposure warning as set forth in
3 this §§ 3.3 and 3.4 must be provided for all Covered Products that Defendant distributes, sells, or
4 offers for sale in California that is not a Reformulated Product. There shall be no obligation for
5 Defendant to provide a warning for Covered Products that enter the stream of commerce prior to
6 the date this Consent Judgment is signed by both Parties. The warning shall consist of either the
7 **Warning or Alternative Warning** described in §§ 3.3(a) or (b), respectively:

8 (a) **Warning.** The "Warning" shall consist of the statement:

9 ⚠ **WARNING:** This product can expose you to chemicals including diisononyl
10 phthalate (DINP), which is known to the State of California to cause cancer. For
11 more information go to www.P65Warnings.ca.gov.

12 (b) **Alternative Warning:** JPC may, but is not required to, use the alternative short-
13 form warning as set forth in this § 3.3(b) ("**Alternative Warning**") as follows:

14 ⚠ **WARNING:** Cancer - www.P65Warnings.ca.gov.

15 3.4 A **Warning or Alternative Warning** provided pursuant to § 3.3 must print the word
16 "**WARNING:**" in all capital letters and in bold font, followed by a colon. The warning symbol to
17 the left of the word "**WARNING:**" must be a black exclamation point in a yellow equilateral
18 triangle with a black outline, except that if the sign or label for the Covered Product does not use
19 the color yellow, the symbol may be in black and white. The symbol must be in a size no smaller
20 than the height of the word "**WARNING:**". The warning shall be affixed to or printed on the
21 Covered Product's packaging or labeling, or on a placard, shelf tag, sign or electronic device or
22 automatic process, providing that the warning is displayed with such conspicuousness, as compared
23 with other words, statements, or designs as to render it likely to be read and understood by an
24 ordinary individual under customary conditions of purchase or use. A warning may be contained
25 in the same section of the packaging, labeling, or instruction booklet that states other safety
26 warnings, if any, concerning the use of the Covered Product and shall be at least the same size as
27 those other safety warnings.
28

1 If CWI sells Covered Products via an internet website to customers located in California,
2 the warning requirements of this section shall be satisfied if the foregoing warning appears either:
3 (a) on the same web page on which a Covered Product is displayed and/or described; (b) on the
4 same page as the price for the Covered Product; or (c) on one or more web pages displayed to a
5 purchaser prior to purchase during the checkout process. Alternatively, a symbol consisting of a
6 black exclamation point in a yellow or white equilateral triangle may appear adjacent to or
7 immediately following the display, description, price, or checkout listing of the Covered Product,
8 if the warning statement appears elsewhere on the same web page in a manner that clearly associates
9 it with the product(s) to which the warning applies.

10 3.5 **Compliance with Warning Regulations.** Defendant shall be deemed to be in
11 compliance with this Consent Judgment by either adhering to §§ 3.3 and 3.4 of this Consent
12 Judgment or by complying with warning regulations adopted by the State of California's Office of
13 Environmental Health Hazard Assessment ("OEHHA"), or by the Federal Government or
14 California State Government.

15 **4. MONETARY TERMS**

16 4.1 **Civil Penalty.** CWI shall pay \$1,500.00 as a Civil Penalty pursuant to Health and
17 Safety Code section 25249.7(b), to be apportioned in accordance with California Health & Safety
18 Code § 25192, with 75% of these funds remitted to OEHHA and the remaining 25% of the Civil
19 Penalty remitted to Espinosa, as provided by California Health & Safety Code § 25249.12(d).

20 4.1.1 Within ten (10) days of the Effective Date, JPC shall issue two separate
21 checks for the Civil Penalty payment to (a) "OEHHA" in the amount of \$1,125.00; and to (b)
22 "Brodsky & Smith, LLC in Trust for Espinosa" in the amount of \$375.00. Payment owed to
23 Espinosa pursuant to this Section shall be delivered to the following payment address:

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

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

1 For United States Postal Service Delivery:

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

7 For Non-United States Postal Service Delivery:

8 Mike Gyurics
9 Fiscal Operations Branch Chief
10 Office of Environmental Health Hazard Assessment
11 1001 I Street
12 Sacramento, CA 95814

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

15 4.2 Attorneys' Fees. Within ten (10) days of the Effective Date, CWI shall pay
16 \$17,500.00 to Brodsky & Smith, LLC ("Brodsky Smith") as complete reimbursement for
17 Espinosa's attorneys' fees and costs incurred as a result of investigating, bringing this matter to
18 CWI's attention, litigating and negotiating and obtaining judicial approval of a settlement in the
19 public interest, pursuant to Code of Civil Procedure § 1021.5.

20 5. **RELEASE OF ALL CLAIMS**

21 5.1 This Consent Judgment is a full, final, and binding resolution between Espinosa
22 acting on his own behalf, and on behalf of the public interest, and CWI, and its parents,
23 shareholders, members, directors, officers, managers, employees, representatives, agents,
24 attorneys, divisions, subdivisions, subsidiaries, partners, sister companies, and affiliates, and their
25 predecessors, successors and assigns ("Defendant Releasees"), and all entities from whom they
26 obtain and to whom they directly or indirectly distribute or sell Covered Products, including but
27 not limited to manufacturers, suppliers, distributors, wholesalers, customers, licensors, licensees
28 retailers, franchisees, and cooperative members ("Releasees"), of all claims for violations of
Proposition 65 based on exposure to DINP from Covered Products as set forth in the Notice, with
respect to any Covered Products distributed, or sold by CWI prior to the Effective Date. This
Consent Judgment shall have preclusive effect such that no other person or entity, whether

1 purporting to act in his, her, or its interests or the public interest shall be permitted to pursue and/or
2 take any action with respect to any violation of Proposition 65 that was alleged in the Complaint,
3 or that could have been brought pursuant to the Notice against CWI and/or the Releasees of the
4 Covered Products ("Proposition 65 Claims"). Compliance with the terms of this Consent Judgment
5 constitutes compliance with Proposition 65 with regard to the Covered Products.

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

18 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS THAT THE
19 CREDITOR OR RELEASING PARTY DOES NOT KNOW OR SUSPECT TO
20 EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE
21 RELEASE AND THAT, IF KNOWN BY HIM OR HER, WOULD HAVE
22 MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE
23 DEBTOR OR RELEASED PARTY.

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

1 **6. INTEGRATION**

2 6.1 This Consent Judgment contains the sole and entire agreement of the Parties and
3 any and all prior negotiations and understandings related hereto shall be deemed to have been
4 merged within it. No representations or terms of agreement other than those contained herein exist
5 or have been made by any Party with respect to the other Party or the subject matter hereof.

6 **7. GOVERNING LAW**

7 7.1 The terms of this Consent Judgment shall be governed by the laws of the State of
8 California and apply within the State of California. In the event that Proposition 65 is repealed or
9 is otherwise rendered inapplicable by reason of law generally, or as to Covered Products, then
10 Defendant shall have no further obligations pursuant to this Consent Judgment with respect to, and
11 to the extent that, Covered Products are so affected.

12 **8. NOTICES**

13 8.1 Unless specified herein, all correspondence and notices required to be provided
14 pursuant to this Consent Judgment shall be in writing and personally delivered or sent by: (i) first-
15 class, (registered or certified mail) return receipt requested; or (ii) overnight courier on any party
16 by the other party at the following addresses:

17 For Defendant:

18 Bruce Nye
19 Scali Rasmussen PC
20 1901 Harrison Street, 14th Floor
21 Oakland, CA 94612

21 And

22 For Espinosa:

23 Evan Smith
24 Brodsky & Smith, LLC
25 9595 Wilshire Blvd., Ste. 900
26 Beverly Hills, CA 90212

27 Any party, from time to time, may specify in writing to the other party a change of address to
28 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(D)/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, the
12 Parties agree to meet and confer on how to proceed and if such agreement is not reached within 30
13 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. ATTORNEY'S FEES

22 12.1 A Party who unsuccessfully brings or contests an action arising out of this Consent
23 Judgment shall be required to pay the prevailing party's reasonable attorney's fees and costs.

24 12.2 Nothing in this Section shall preclude a Party from seeking an award of sanctions
25 pursuant to law.

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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: 3/18/2020

Date: _____

By: GABRIEL ESPINOSA

By: _____
CWI, INC.

IT IS SO ORDERED, ADJUDGED AND DECREED:

Dated: 03/05/2020

Paul D. Hahad
Judge of Superior Court

1 **13. RETENTION OF JURISDICTION**

2 13.1 This Court shall retain jurisdiction of this matter to implement or modify the
3 Consent Judgment.

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7 document and certify that he or she is fully authorized by the Party he or she represents to execute
8 the Consent Judgment on behalf of the Party represented and legally bind that Party. Except as
9 explicitly provided herein each Party is to bear its own fees and costs.

10
11 **AGREED TO:**

AGREED TO:

12
13 Date: _____

Date: 3/31/20

14 By: _____
15 GABRIEL ESPINOSA

By: Unday Choate, Assistant
CWI, INC. General Counsel

16
17 **IT IS SO ORDERED, ADJUDGED AND DECREED:**

18
19 Dated: 03/05/2020

Paul D. Habet
Judge of Superior Court