

1 Evan J. Smith, Esquire (SBN 242352)
Ryan P. Cardona, Esquire (SBN 302113)
2 BRODSKY & SMITH, LLC
9595 Wilshire Blvd., Ste. 900
3 Beverly Hills, CA 90212
Telephone: (877) 534-2590
4 Facsimile: (310) 247-0160

5 *Attorneys for Plaintiff*

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8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF ALAMEDA

10 GABRIEL ESPINOSA,
11 Plaintiff,
12 vs.
13 FERNCO, INC.,
14 Defendant.

CASE NO.: RG15784535

[PROPOSED] CONSENT JUDGMENT

Date: March 9, 2016
Time: 2:30 PM
Dept.: 522
Judge: Dennis Hayashi
Reservation #: R-1698667

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1 **1. Introduction**

2 1.1 On June 17, 2015, Gabriel Espinosa (“Espinosa”) served Fernco, Inc. (“Fernco”),
3 Ferguson Enterprises, Inc. (“Ferguson”), and various public enforcement agencies with a
4 document entitled “Notice of Violation of California Health & Safety Code § 25249.6, *et seq.*”
5 (the “Notice”). The Notice provided Fernco and such others, including public enforcers, with
6 notice that alleged that Fernco was in purported violation of California Health & Safety Code §
7 25249.6 (“Proposition 65”) for failing to warn consumers and customers that “Proflex®”
8 Couplings, including but not limited to UPC No. 018578015807 (the “Products”), exposed users
9 in California to the chemical Diisononyl phthalate (DINP). No public enforcer has diligently
10 prosecuted the allegations set forth in the Notice.

11 1.2 On September 3, 2015, Espinosa filed a Complaint for Civil Penalties and
12 Injunctive Relief (“Complaint”) in the Alameda County Superior Court (the “Court”), Case No.
13 RG15784535, against Fernco, alleging violations of Proposition 65 with respect to the Products
14 (the “Action”).

15 1.3 Fernco is a corporation that employs more than ten persons under California
16 Health and Safety Code §25249.6 and offered the Products for sale within the State of California.

17 1.4 Espinosa’s Complaint alleges, among other things, that Fernco sold the Products in
18 California and/or to California citizens, that the Products contain DINP, and that the resulting
19 exposure violated provisions of Proposition 65, by knowingly and intentionally exposing persons
20 to a chemical known to the State of California to cause cancer, without first providing a clear and
21 reasonable warning to such individuals.

22 1.5 For purposes of this Consent Judgment only, the parties stipulate that this Court
23 has jurisdiction over the allegations of violations contained in the Complaint and personal
24 jurisdiction over Fernco as to the acts alleged in the Complaint, that venue is proper in the County
25 of Alameda, and that this Court has jurisdiction to enter this Consent Judgment as a resolution of
26 the allegations contained in the Complaint.

27 1.6 The parties enter into this Consent Judgment pursuant to a full settlement and
28 release of disputed claims between the parties as alleged in the Complaint for the purpose of

PROPOSED CONSENT JUDGEMENT

1 avoiding prolonged litigation. By execution of this Consent Judgment, Fernco does not admit any
2 violation of Proposition 65 and specifically denies that it has committed any such violation.
3 Nothing in this Consent Judgment shall be construed as an admission by Fernco of any fact, issue
4 of law, or violation of law, nor shall compliance with the Consent Judgment constitute or be
5 construed as an admission by Fernco of any fact, issue of law, or violation of law. Nothing in this
6 Consent Judgment shall prejudice, waive, or impair any right, remedy or defense that Fernco may
7 have in any other future legal proceeding. However, this paragraph shall not diminish or
8 otherwise affect the obligations, responsibilities and duties of Fernco under this Consent
9 Judgment.

10 1.7 For purposes of this Consent Judgment, the term "Effective Date" shall mean
11 January 1, 2016.

12 2. **Injunctive Relief**

13 2.1 Commencing on the Effective Date, and continuing thereafter, Fernco shall only
14 ship, sell, or offer for sale in California, Reformulated Products pursuant to Section 2.2 of this
15 Consent Judgment. Fernco and its downstream retailers shall have no obligation to reformulate or
16 label Products that entered the stream of commerce prior to the Effective Date. For purposes of
17 this Consent Judgment, "Reformulated Products" are Products that are in compliance with the
18 standard set forth below in Section 2.2.

19 2.2 "Reformulated Products" shall mean Products that contain less than or equal to
20 1,000 parts per million ("ppm") of DINP when analyzed pursuant to CPSC-CH-C1001-09.3
21 Standard Operating Procedure for Determination of Phthalates method.

22 3. **Entry of Consent Judgment**

23 3.1 The parties hereby request that the Court promptly approve and enter this Consent
24 Judgment. Upon entry of this Consent Judgment, Espinosa and Fernco waive their respective
25 rights to a hearing or trial on the allegations of the Complaint and Notice which are at issue in the
26 Action.

27 3.2 In the event that the California Attorney General objects or otherwise comments
28 on one or more provisions of this Consent Judgment, Espinosa and Fernco agree to take

1 reasonable steps to satisfy such concerns or objections.

2 **4. Matters Covered By This Consent Judgment**

3 4.1 This Consent Judgment is a final and binding resolution between Espinosa, acting
4 on his own behalf, and on behalf of the public and in the public interest, and Fernco, and shall
5 have preclusive effect such that no other person or entity, whether purporting to act in his, her, or
6 its interests or the public interest shall be permitted to pursue and/or take any action with respect
7 to: (i) any violation of Proposition 65 that was alleged in the Complaint, or that could have been
8 brought pursuant to the Notice; or (ii) any other statutory or common law claim, to the fullest
9 extent that any of the foregoing described in (i) or (ii) were or could have been asserted by any
10 person or entity against Fernco based on its alleged exposure of persons to the Products, or its
11 alleged failure to provide a clear and reasonable warning of exposure to such individuals, or (iii)
12 as to alleged exposures to the Products, any other claim based on whole or in part on the facts
13 alleged in the Complaint and the Notice, whether or not based on actions committed by Fernco.
14 As to alleged exposures to the Products, compliance with the terms of this Consent Judgment
15 resolves any issue, now and in the future, and is deemed sufficient to satisfy all obligations
16 concerning, compliance by Fernco with the requirements of Proposition 65 with respect to the
17 Products, and any alleged resulting exposure.

18 4.2 As to alleged exposures to the Products, Espinosa waives all rights to institute any
19 form of legal action, and releases all claims against Fernco and Ferguson (including their parents,
20 subsidiaries or affiliates, and assigns of any of them, who may use, maintain, distribute or sell the
21 Product) (collectively, "Releasees"), whether under Proposition 65 or otherwise, arising out of or
22 resulting from, or related directly or indirectly to, in whole or in part, the Products or the Action,
23 including but not limited to any exposure to, or failure to warn with respect to, the Products
24 (referred to collectively in this Section as the "Claims"). In furtherance of the foregoing, as to
25 alleged exposures to the Products, Espinosa waives any and all rights and benefits which he now
26 has, or in the future may have, conferred upon him with respect to the Claims by virtue of the
27 provisions of § 1542 of the California Civil Code, which provides as follows:

28 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE

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

5 Espinosa understands and acknowledges that the significance and consequence of this waiver of
6 California Civil Code § 1542 is that even if Espinosa suffers future damages arising out of or
7 resulting from, or related directly or indirectly to, in whole or in part, the Products, including but
8 not limited to any exposure to, or failure to warn with respect to exposure to, the Products,
9 Espinosa will not be able to make any claim for those damages against Releasees.

10 **5. Enforcement of Judgment**

11 5.1 The terms of this Consent Judgment shall be enforced exclusively by the parties
12 hereto. The parties may, by noticed motion or order to show cause before the Court, giving the
13 notice required by law, enforce the terms and conditions contained herein. In any proceeding
14 brought by either party to enforce this Consent Judgment, such party may seek whatever fines,
15 costs, penalties or remedies as may be provided by law for any violation of Proposition 65 or this
16 Consent Judgment.

17 **6. Modification of Judgment**

18 6.1 This Consent Judgment may be modified only by written agreement of the parties
19 upon entry of a modified Consent Judgment by the Court thereon, or upon motion of any party as
20 provided by law and upon an entry of a modified Consent Judgment by the Court.

21 6.2 Should any court enter final judgment in a case brought by Espinosa or the People
22 involving the Products that sets forth standards defining when Proposition 65 warnings will or
23 will not be required ("Alternative Standards"), or if the California Attorney General otherwise
24 provides written endorsement (i.e., a writing that is circulated by the Attorney General that is not
25 intended for the purpose of soliciting further input or comments) of Alternative Standards
26 applicable to products that are of the same general type and function as the Products and
27 constructed from the same materials, Ferrico shall be entitled to seek a modification of this
28 Consent Judgment on forty-five (45) days' notice to Espinosa so as to be able to utilize and rely

1 on such Alternative Standards in lieu of those set forth in Section 7 of this Consent Judgment.
2 Espinosa shall not unreasonably contest any proposed application to effectuate such a
3 modification provided that the Products for which such a modification is sought are of the same
4 general type and function as those to which the Alternative Standards apply.

5 **7. Settlement Payment**

6 7.1 In settlement of all the claims referred to in this Consent Judgment, and without
7 any admission of liability therefore, Fernco shall make the following monetary payments:

8 7.1.1 Fernco shall pay a total of \$3,500.00 in civil penalties (the "Civil Penalty")
9 in accordance with this Section. The Civil Penalty will be allocated in accordance with California
10 Health & Safety Code §§ 25249.12(c)(1) and (d), with 75% of the funds remitted to the California
11 Office of Environmental Health Hazard Assessment ("OEHHA") and the remaining 25% of the
12 funds remitted to Espinosa. Each respective portion of the Civil Penalty shall be delivered to the
13 addresses listed in Section 2.1.3 below.

14 7.1.2 In addition to the Civil Penalty, Fernco shall pay \$35,000.00 to Brodsky &
15 Smith, LLC ("Brodsky Smith") as complete reimbursement for Espinosa's attorneys' fees and
16 costs, including all investigation and laboratory costs and expert fees, incurred in the course of
17 serving the Notice and bringing the Action, and in enforcing Proposition 65, including without
18 limitation, preparation of the Notice letter and discussions with the California Attorney General.
19 Payment shall be made within seven (7) days of the Effective Date.

20 7.1.3 Within seven (7) days of the Effective Date, Fernco shall issue two
21 separate checks for the Civil Penalty amounts to (a) "OEHHA" in the amount of \$2,625.00; and
22 (b) "Brodsky & Smith, LLC in Trust for Espinosa" in the amount of \$875.00. Payment owed to
23 Espinosa pursuant to this Section shall be delivered to the following payment address:

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

28 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):

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 **8. Notices**

16 8.1 Any and all notices between the parties provided for or permitted under this
17 Consent Judgment, or by law, shall be in writing and personally delivered or sent by: (i) first-
18 class (registered or certified mail) return receipt requested; or (ii) overnight or two-day courier on
19 any party by the other party to the following addresses:

20 For Fernco:

21 Kevin C. Mayer, Esq.
22 Crowell & Moring LLP
23 515 South Flower Street, 40th Floor
24 Los Angeles, CA 90071
25 T: 213.443.5544

26 For Espinosa:

27 Evan J. Smith, Esq.
28 BRODSKY & SMITH, LLC
Two Bala Plaza, Suite 510
Bala Cynwyd, PA 19004
T: 877.354.2590

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. Authority to Stipulate

2 9.1 Each signatory to this Consent Judgment certifies that he or she is fully authorized
3 by the party he or she represents to enter into this Consent Judgment and to execute it on behalf of
4 the party represented and legally to bind that party.

5 10. Counterparts

6 10.1 This Consent Judgment may be signed in counterparts and shall be binding upon
7 the parties hereto as if all said parties executed the original hereof.

8 11. Retention of Jurisdiction

9 11.1 This Court shall retain jurisdiction of this matter to implement the Consent
10 Judgment.

11 12. Service on the California Attorney General

12 12.1 Espinosa shall serve a copy of this Consent Judgment, signed by both parties, on
13 the California Attorney General on behalf of the parties so that the Attorney General may review
14 this Consent Judgment prior to its submittal to the Court for Approval. No sooner than forty-five
15 (45) days after the Attorney General has received the aforementioned copy of this Consent
16 Judgment, and in the absence of any written objection by the Attorney General to the terms of this
17 Consent Judgment, the parties may then submit it to the Court for Approval.

18 13. Entire Agreement

19 13.1 This Consent Judgment contains the sole and entire agreement and understanding
20 of the parties with respect to the entire subject matter hereof, and any and all discussions,
21 negotiations, commitments and understandings related thereto. No representations, oral or
22 otherwise, express or implied, other than those contained herein have been made by any party
23 hereto. No other agreements not specifically referred to herein, oral or otherwise, shall be deemed
24 to exist or to bind any of the parties.

25 14. Governing Law and Construction

26 14.1 The validity, construction and performance of this Consent Judgment shall be
27 governed by the laws of the State of California, without reference to any conflicts of law
28 provisions under California law.

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15. Court Approval

15.1 If this Consent Judgment is not approved by the Court, it shall be of no force or effect, and cannot be used in any proceeding for any purpose.

15.2 The Effective Date of this Consent Judgment shall be January 1, 2016.

IT IS SO STIPULATED:

Dated: 9/16/15

Dated: 9-17-15

By: 
Gabriel Espinosa

By: 
Femco

IT IS SO ORDERED, ADJUDGED AND DECREED:

Dated: _____

Judge of the Superior Court