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9 *Attorneys for Plaintiff*

10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 COUNTY OF ALAMEDA

12 GABRIEL ESPINOSA,

13 Plaintiff,

14 v.

15 CASH 'N CARRY OFFICE PRODUCTS, INC.,

16 Defendant.

Case No.: RG17852407

CONSENT JUDGMENT

Judge: Frank Roesch

Dept.: 24

Hearing Date: September 12, 2017

Hearing Time: 3:45 PM

Reservation #: R-1873727

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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 Cash ‘N Carry Office Products, Inc. (“Cash ‘N Carry” 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. Espinosa alleges that Cash ‘N Carry is 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 Better Office Products professional bags and totes 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 **Notices of Violation/Complaint.** On or about October 19, 2016, Espinosa served Cash ‘N Carry and various public enforcement agencies with a document entitled “60-Day Notices of Violation” pursuant to Health & Safety Code §25249.7(d) (collectively, the “Notices”), alleging that Defendant was in violation of Proposition 65 for failing to warn consumers and customers that the Products exposed users in California to DEHP. No public enforcer has brought and is diligently prosecuting the claims alleged in the Notice. On March 10, 2017, Espinosa filed a complaint in the matter as captioned above (the “Complaint”).

1.4 **Consent to Jurisdiction.** 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 Notices.

1 1.5 **No Admission.** Defendant denies the factual, legal, and material allegations
2 contained in the Notices and Complaint and maintains that it has sold and distributed for sale in
3 California, including the Products, which have been, and are, in compliance with all laws. Cash
4 ‘N Carry specifically maintains that it has not violated Proposition 65 or that it is subject to
5 Proposition 65. Nothing in this Consent Judgment shall be construed as an admission by Defendant
6 of any fact, finding, issue of law, or violation of law; nor shall compliance with this Consent
7 Judgment constitute or be construed as an admission by Defendant of any fact, finding, conclusion,
8 issue of law, or violation of law, such being specifically denied by Defendant. However, this
9 section shall not diminish or otherwise affect the obligations, responsibilities, and duties of
10 Defendant under this Consent Judgment.

11 **2. DEFINITIONS**

12 2.1 **Covered Products.** The term “Covered Products” means Better Office Products
13 professional bags and totes that have been purchased for sale, imported, sold, and/or otherwise
14 distributed by Cash ‘N Carry for sale in California, and that contain DEHP (the “Products”).

15 2.2 **Effective Date.** The term “Effective Date” means the date this Consent Judgment is
16 entered as a Judgment of the Court.

17 **3. INJUNCTIVE RELIEF: WARNINGS**

18 3.1 Commencing ninety (90) days after the Effective Date, Cash ‘N Carry shall not
19 purchase for sale, import, sell or distribute in California any Covered Product that contains more
20 than 1,000 parts per million DEHP unless the Covered Product is accompanied by the following
21 warning: “WARNING: This product contains a chemical known to the State of California to cause
22 cancer, birth defects and other reproductive harm.”

23 3.2 The warning provided pursuant to Section 3.1 shall be affixed to or printed on the
24 Covered Product’s packaging or labeling. The warning shall be prominently affixed to or printed
25 on the packaging or labeling and displayed with such conspicuousness, as compared with other
26 words, statements, or designs as to render it likely to be read and understood by an ordinary
27 individual under customary conditions of purchase or use. A warning may be contained in the same
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1 section of the packaging, labeling, or instruction booklet that states other safety warnings, if any,
2 concerning the use of the product and shall be at least the same size as those other safety warnings.

3 **4. MONETARY TERMS**

4 4.1 **Civil Penalty.** The Cash 'N Carry shall pay a civil penalty of \$500.00 pursuant to
5 Health and Safety Code section 25249.7(b), to be apportioned in accordance with California Health
6 & Safety Code § 25192, with 75% of these funds remitted to the State of California's Office of
7 Environmental Health Hazard Assessment and the remaining 25% of the penalty remitted to
8 Espinosa, as provided by California Health & Safety Code § 25249.12(d).

9 4.1.1 Within ten (10) business days of the Effective Date, Cash 'N Carry shall
10 issue two separate checks for the civil penalty payment to (a) "OEHHA" in the amount of
11 \$375.00; and (b) "Brodsky & Smith, LLC in Trust for Espinosa" in the amount of \$125.00.

12 Payment owed to Espinosa pursuant to this Section shall be delivered to the following payment
13 address:

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

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

19 For United States Postal Service Delivery:

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

23 For Non-United States Postal Service Delivery:

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

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

3 4.2 **Attorney Fees.** Cash 'N Carry shall pay a total of \$9,500.00 to Brodsky & Smith,
4 LLC ("Brodsky Smith") as complete reimbursement for Plaintiff Espinosa's attorneys' fees and
5 costs incurred as a result of investigating, bringing this matter to Cash 'N Carry's attention,
6 litigating and negotiating and obtaining judicial approval of a settlement in the public interest,
7 pursuant to Code of Civil Procedure section 1021.5.

8 4.2.1 Within ten (10) business days of the Effective Date, Cash 'N Carry shall
9 issue a check payable to "Brodsky & Smith, LLC" in the amount of \$4,500.00 for delivery to the
10 address identified in Section 4.1.1, above; and

11 4.2.2 On or before December 1, 2017, Cash 'N Carry shall issue a check payable
12 to "Brodsky & Smith, LLC" in the amount of \$5,000.00 for delivery to the address identified in
13 Section 4.1.1, above.

14 4.3 The timing of payments required by this Section is a material term of the Settlement.
15 Cash 'N Carry shall be liable for a penalty payment equal to \$1,000.00, for all amounts due and
16 owing that are not received within five (5) calendar days of the date they are due.

17 **5. RELEASE OF ALL CLAIMS**

18 5.1 **Espinosa's Public Release of Proposition 65 Claims.** This consent judgment is a
19 full, final, and binding resolution between Espinosa acting on his own behalf and in the public
20 interest, and constitutes a full and binding release as to Cash 'N Carry, and its parents, shareholders,
21 divisions, subdivisions, subsidiaries, partners, sister companies, and affiliates, and their successors
22 and assigns ("Defendant Releasees"), and all entities from whom they obtain and to whom they
23 directly or indirectly distribute or sell Covered Products, including but not limited to manufacturers,
24 suppliers, distributors, wholesalers, customers, licensors, licensees retailers, franchisees, and
25 cooperative members ("Downstream Defendant Releasees"), of all claims for violations of
26 Proposition 65 based on exposure to DEHP from Covered Products as set forth in the Notices, with
27 respect to any Covered Products manufactured, distributed, or sold by Cash 'N Carry prior to the
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1 Effective Date. Compliance with the terms of this consent judgment constitutes compliance with
2 Proposition 65 with regard to the Covered Products.

3 5.2 **Espinosa's Individual Release of Claims.** Espinosa, in his individual capacity only
4 and not in his representative capacity, also provides a release to Cash 'N Carry, Defendant
5 Releasees, and Downstream Defendant Releasees. In addition to the foregoing, Espinosa, on behalf
6 of himself, his past and current agents, representatives, attorneys, and successors and/or assignees,
7 and *not* in his representative capacity, hereby waives all rights to institute or participate in, directly
8 or indirectly, any form of legal action and releases any Cash 'N Carry, Defendant Releasees, and
9 Downstream Defendant Releasees from any and all manner of actions, causes of action, claims,
10 demands, rights, suits, obligations, debts, contracts, agreements, promises, liabilities, damages,
11 charges, losses, costs, expenses, and attorneys' fees, of any nature whatsoever, known or unknown,
12 in law or equity, fixed or contingent, now or in the future, with respect to any alleged violations of
13 Proposition 65 related to or arising from Covered Products manufactured distributed or sold by
14 Cash 'N Carry or Defendant Releasees, Downstream Defendant Releasees. With respect to the
15 foregoing waivers and releases in this paragraph, Espinosa hereby specifically waives any and all
16 rights and benefits which he now has, or in the future may have, conferred by virtue of the
17 provisions of Section 1542 of the California Civil Code, which provides as follows:

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

23 5.3 By executing this Consent Judgment, Espinosa understands and acknowledges that
24 the significance and consequence of this waiver of California Civil Code Section 1542 is that even
25 if Espinosa suffers future damages arising out of or resulting from, or related directly or indirectly
26 to, in whole or in part, the Covered Products, including but not limited to any exposure to, or failure
27 to warn with respect to exposure to DEHP from the Covered Products, Espinosa will not be able to
28 make any claim for those damages against Cash 'N Carry, Defendant Releasees, and Downstream
Defendant Releasees, and the successors and assigns of any of them, who may manufacture, use,

1 maintain, distribute, retail or sell the Covered Products. Furthermore, Espinosa acknowledges that
2 it intends these consequences for any such claims and any other claims which may exist as of the
3 date of this release pertaining to the Covered Products listed in the Notices but which Espinosa
4 does not know exist, and which, if known, would materially affect its decision to enter into this
5 Consent Judgment, regardless of whether its lack of knowledge is the result of ignorance, oversight,
6 error, negligence, or any other cause.

7 5.4 Cash 'N Carry waives any and all claims against Espinosa, his attorneys and other
8 representatives, for any and all actions taken or statements made (or those that could have been
9 taken or made) by Espinosa and his attorneys and other representatives, whether in the course of
10 investigating claims or otherwise seeking enforcement of Proposition 65 against it in this matter,
11 and/or with respect to Covered Products.

12 **6. INTEGRATION/ENTIRE AGREEMENT**

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

17 **7. GOVERNING LAW**

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

23 **8. NOTICES**

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

2 Cash 'N Carry Office Products, Inc.
3 c/o Dan Israely
4 5680 Sawtelle Blvd.
5 Culver City, CA 90230

6 And

7 For Espinosa:

8 Evan Smith
9 Brodsky & Smith, LLC
10 2 Bala Plaza, Suite 510
11 Bala Cynwyd, PA 19004

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

14 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

15 9.1 This Consent Judgment may be executed in counterparts and by facsimile, each of
16 which shall be deemed an original, and all of which, when taken together, shall constitute one and
17 the same document.

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

20 10.1 Espinosa agrees to comply with the requirements set forth in California Health &
21 Safety Code §25249.7(f) and to promptly bring a Motion for Approval of this Consent Judgment
22 and Defendant agrees it shall support approval of such Motion.

23 10.2 This Consent Judgment shall not be effective until it is approved and entered by the
24 Court and shall be null and void if, for any reason, it is not approved by the Court. In such case,
25 the Parties agree to meet and confer on how to proceed and if such agreement is not reached within
26 30 days, the case shall proceed on its normal course.

27 10.3 If the Court approves this Consent Judgment and is reversed or vacated by an
28 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.

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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. SEVERABILITY

12.1 If, subsequent to the Court’s approval and entry of this Consent Judgment as a judgment, any provision is held to be unenforceable, the validity of the remaining provisions shall not be adversely affected.

13. ATTORNEY’S FEES

13.1 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 unless the unsuccessful party has acted with substantial justification. For purposes of this Consent Judgment, the term substantial justification shall carry the same meaning as used in the Civil Discovery Act of 1986, Code of Civil Procedure Section 2016, et seq.

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

14. RETENTION OF JURISDICTION

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

15. AUTHORIZATION

15.1 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 certifies 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.

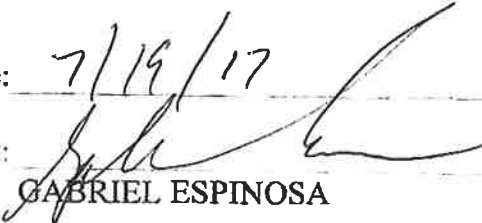
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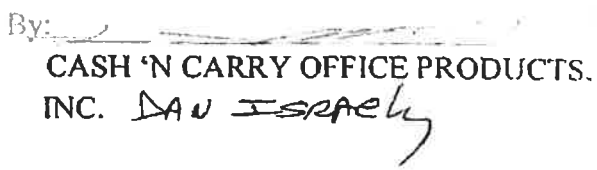
AGREED TO:

AGREED TO:

Date: 7/19/17

Date: 7/14/2017

By: 
GABRIEL ESPINOSA

By: 
CASH 'N CARRY OFFICE PRODUCTS,
INC. DAN ISRAELY

IT IS SO ORDERED, ADJUDGED AND DECREED:

Dated: _____

Judge of Superior Court