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Attorneys for Plaintiff

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

11 GABRIEL ESPINOSA,

12 Plaintiff,

13 v.

14 O. MUSTAD & SON AMERICAS, INC.,

15 Defendant.

Case No.: RG18891885

CONSENT JUDGMENT

Judge: Dennis Hayashi

Dept.: 518

Hearing Date: May 30, 2018

Hearing Time: 2:30 PM

Reservation #: R-1940013

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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 O. Mustad & Son Americas, Inc. (“O. Mustad” 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. O. Mustad 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 dry gear bags 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 December 29, 2016 Espinosa served O. Mustad, and various public enforcement agencies with a document entitled “60-Day Notice of Violation” pursuant to Health & Safety Code §25249.7(d) (the “Notice”), alleging that Defendant was in violation of Proposition 65 for failing to warn consumers and customers that dry gear bags exposed users in California to DEHP. No public enforcer has brought and is diligently prosecuting the claims alleged in the Notice. On February 2, 2018, 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.

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

2. DEFINITIONS

2.1 **Covered Products.** The term “Covered Products” means Mustad Dry Goods Duffle Bags that are manufactured, distributed and/or offered for sale in California by O. Mustad and that contain DEHP.

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

3. INJUNCTIVE RELIEF: WARNINGS

3.1 Commencing within ninety (90) days after the Effective Date, O. Mustad shall not distribute, sell, or offer for sale any Covered Products intended for retail sale in California with any component that contains DEHP in excess of 0.1% (1,000 ppm) (hereinafter “Reformulated Products”) unless the Covered Product is accompanied by one of the following warnings:

“WARNING: This product contains a chemical known to the State of California to cause cancer, birth defects and other reproductive harm.” or

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

3.2 The warning provided pursuant to Section 3.1 shall be affixed to or printed on the Covered Product’s packaging or labeling. The warning shall be prominently affixed to or printed

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on the packaging or labeling and displayed with such conspicuousness, as compared with other words, statements, or designs as to render it likely to be read and understood by an ordinary individual under customary conditions of purchase or use. A warning may be contained in the same section of the packaging, labeling, or instruction booklet that states other safety warnings, if any, concerning the use of the product and shall be at least the same size as those other safety warnings.

3.3 O. Mustad, its parents, subsidiaries, affiliated entities and its downstream retailers shall have no obligation to reformulate or label Product that entered the stream of commerce prior to the Effective Date.

4. MONETARY TERMS

4.1 **Civil Penalty.** O. Mustad shall pay a Civil Penalty of \$2,000.00 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 the State of California's Office of Environmental Health Hazard Assessment and the remaining 25% of the penalty remitted to Espinosa, as provided by California Health & Safety Code § 25249.12(d).

4.1.1 Within fourteen (14) business days of the Effective Date, O. Mustad shall issue two separate checks for the Civil Penalty payment to (a) "OEHHA" in the amount of \$1,500.00; and (b) "Brodsky & Smith, LLC in Trust for Espinosa" in the amount of \$500.00. 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

1 For Non-United States Postal Service Delivery:

2 Mike Gyurics
3 Fiscal Operations Branch Chief
4 Office of Environmental Health Hazard Assessment
5 1001 I Street
6 Sacramento, CA 95814

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

9 4.2 **Conditional Civil Penalty.** One hundred eighty (180) days after the Effective Date,
10 O. Mustad shall make a Conditional Civil Penalty payment of \$1,000.00 on the same terms as set
11 forth in Section 4.1.1 pertaining to the Initial Civil Penalty. Pursuant to Title 11 California Code
12 of Regulations, Section 3203(c), Espinosa agrees that the Conditional Civil Penalty payment shall
13 be waived in its entirety if, on or before the Conditional Civil Penalty payment is due, an officer of
14 O. Mustad provides Espinosa with a signed declaration certifying that all Covered Products it ships
15 for sale or distributes for sale in California as of the date of its certification are Reformulated
16 Products or are marked with the warnings required by this Consent Judgment (hereinafter "Labeled
17 Products") and that O. Mustad will continue to offer only Reformulated Products or Labeled
18 Products in California in the future. The option to provide a declaration certifying its complete
19 early reformulation of the Covered Products in lieu of making the Conditional Civil Penalty
20 payment otherwise required by this Section is a material term, and time is of the essence.

21 4.3 **Attorney Fees.** O. Mustad shall pay \$28,000.00 to Brodsky & Smith, LLC
22 ("Brodsky Smith") as complete reimbursement for Plaintiff Espinosa's attorneys' fees and costs
23 incurred as a result of investigating, bringing this matter to O. Mustad's attention, litigating and
24 negotiating and obtaining judicial approval of a settlement in the public interest, pursuant to Code
25 of Civil Procedure section 1021.5. Payment shall be made within fourteen (14) business days of
26 the Effective Date and sent to the address for Brodsky & Smith set forth in section 4.1.1, above.

27 **5. RELEASE OF ALL CLAIMS**

28 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 O. Mustad, and its parents,

1 shareholders, directors, officers, employees, representatives, agents, attorneys, divisions,
2 subdivisions, subsidiaries, partners, sister companies, and affiliates, and their predecessors,
3 successors and assigns ("Defendant Releasees"), and all entities from whom they obtain and to
4 whom they directly or indirectly distribute or sell Covered Products, including but not limited to
5 manufacturers, suppliers, distributors, wholesalers, customers, licensors, licensees retailers,
6 franchisees, and cooperative members, including but not limited to Turner's Outdoors, Inc. and its
7 respective subsidiaries, affiliates and parents, franchisees, cooperative members and licensees,
8 ("Downstream Releasees"), of all claims for violations of Proposition 65 based on exposure to
9 DEHP from Covered Products as set forth in the Notice, with respect to any Covered Products
10 manufactured, distributed, or sold by O. Mustad prior to the Effective Date. This consent judgment
11 shall have preclusive effect such that no other person or entity, whether purporting to act in his,
12 her, or its interests or the public interest shall be permitted to pursue and/or take any action with
13 respect to any violation of Proposition 65 that was alleged in the Complaint, or that could have
14 been brought pursuant to the Notice against O. Mustad or its Downstream Releasees of the Product
15 ("Proposition 65 Claims"). Compliance with the terms of this consent judgment constitutes
16 compliance with Proposition 65 with regard to the Covered Products.

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

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

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

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:

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Michael E. Delehunt
Foley & Lardner LLP
555 California Street, Suite 1700
San Francisco, CA 94104-1520

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 and Defendant agrees it shall support approval of such Motion.

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.

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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. 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 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.*

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.

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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 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.

AGREED TO:

AGREED TO:

Date: _____

Date: 2-2-2018

By: _____
GABRIEL ESPINOSA

By: 
O. MUSTAD & SON AMERICAS, INC.

IT IS SO ORDERED, ADJUDGED AND DECREED:

Dated: _____

Judge of Superior Court

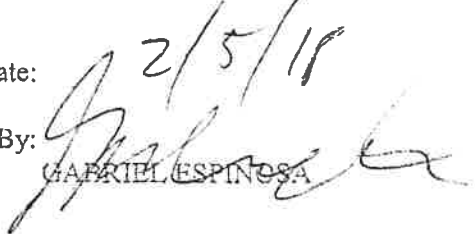
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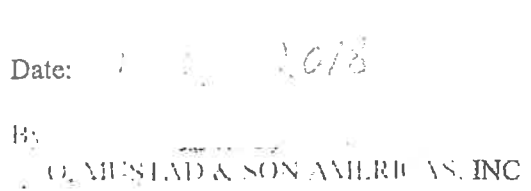
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14.1 The undersigned are authorized to execute this Consent Judgment on behalf of their respective Parties and have read, understood and agree to all of the terms and conditions of this document and certifies that he or she is fully authorized by the 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.

AGREED TO:

AGREED TO:

Date: 2/5/18
By: 
GABRIEL ESPINOSA

Date: 2/5/18
By: 
OLMSTEAD & SON AMERICAS, INC

IT IS SO ORDERED, ADJUDGED AND DECREED:

Date: _____
Judge of Superior Court