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

11 GABRIEL ESPINOSA,
12 Plaintiff,

13 v.

14 IMPLUS FOOTCARE, LLC,
15 Defendant.

Case No.: RG17878686

CONSENT JUDGMENT

Judge: Frank Roesch

Dept.: 24

Hearing Date: January 11, 2018

Hearing Time: 3:45 PM

Reservation #: R-1910298

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 Implus Footcare, LLC
4 (“Implus” or “Defendant”) with Espinosa and Defendant collectively referred to as the “Parties”
5 and each of them as a “Party.” Espinosa is an individual residing in California who seeks to
6 promote awareness of exposures to toxic chemicals and improve human health by reducing or
7 eliminating hazardous substances contained in consumer products. Implus is a person in the course
8 of doing business for purposes of Proposition 65, Cal. Health & Safety Code §§ 25249.6 et seq.

9 1.2 **Allegations and Representations.** Espinosa alleges that Defendant has exposed
10 individuals to Di(2-ethylhexyl) phthalate (DEHP) from smartphone holders without providing clear
11 and reasonable warnings under Proposition 65. DEHP is listed under Proposition 65 as a chemical
12 known to the State of California to cause reproductive toxicity and cancer.

13 1.3 **Notices of Violation/Complaint.** On or about June 15, 2017, Espinosa served
14 Implus and various public enforcement agencies with a document entitled “60-Day Notice of
15 Violation” pursuant to Health & Safety Code §25249.7(d) (the “Notice”), alleging that Defendant
16 was in violation of Proposition 65 for failing to warn consumers and customers that Perfect Fitness
17 Hydration & Smartphone Holders exposed users in California to DEHP. No public enforcer has
18 brought and is diligently prosecuting the claims alleged in the Notice. On October 13, 2017,
19 Espinosa filed a complaint in the matter (the “Complaint”).

20 1.4 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
21 jurisdiction over Defendant as to the allegations contained in the Complaint filed in this matter, that
22 venue is proper in the County of Alameda, and that this Court has jurisdiction to approve, enter,
23 and oversee the enforcement of this Consent Judgment as a full and final binding resolution of all
24 claims which were or could have been raised in the Complaint based on the facts alleged therein
25 and/or in the Notice.

26 1.5 Defendant denies all of the material allegations contained in Espinosa’s Notice and
27 Complaint and maintains that it has not violated Proposition 65. Nothing in this Consent Judgment
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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 **2. DEFINITIONS**

7 2.1 **Covered Products.** The term “Covered Products” means mobile phone, music
8 device, and hydration product holders, including but not limited Perfect Fitness Hydration &
9 Smartphone Holders in all sizes and variations, that are manufactured, distributed and/or offered
10 for sale in California by Implus, and that Espinosa alleges contain DEHP.

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 Commencing ninety (90) days after the Effective Date, Implus shall not
15 manufacture, import, or purchase for sale in California any Covered Product that contains more
16 than 1,000 parts per million DEHP, unless the Covered Product is accompanied by one of the
17 following warnings:

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

20 Or

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

25 3.2 The warning provided pursuant to Section 3.1 shall be affixed to or printed on the
26 Covered Product’s packaging or labeling. The warning shall be prominently affixed to or printed
27 on the packaging or labeling and displayed with such conspicuousness, as compared with other
28 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

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.** Implus shall pay a Civil Penalty of \$2,000.00 pursuant to Health and
5 Safety Code section 25249.7(b), to be apportioned in accordance with California Health & Safety
6 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, Implus shall issue two
10 separate checks for the Civil Penalty payment to (a) "OEHHA" in the amount of \$1,500.00; and
11 (b) "Brodsky & Smith, LLC in Trust for Espinosa" in the amount of \$500.00. Payment owed to
12 Espinosa pursuant to this Section shall be delivered to the following payment address:

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

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

18 For United States Postal Service Delivery:

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

22 For Non-United States Postal Service Delivery:

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

26 A copy of the check payable to OEHHA shall be mailed to Brodsky & Smith, LLC at the
27 address set forth above as proof of payment to OEHHA.
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1 4.2 **Conditional Civil Penalty.** One Hundred Twenty (120) days after the Effective
2 Date, Implus shall make a Conditional Civil Penalty payment of \$2,000.00 on the same terms as
3 set forth in Section 4.1.1 pertaining to the Civil Penalty. Pursuant to Title 11 California Code of
4 Regulations, Section 3203(c), Espinosa agrees that the Conditional Civil Penalty payment shall be
5 waived in its entirety if, on or before the Conditional Civil Penalty payment is due, an officer of
6 Implus provides Plaintiff with a signed declaration certifying that all Covered Products it ships for
7 sale or distributes for sale in California as of the date of its certification are Reformulated Products¹
8 or are marked with the warnings required by this Consent Decree (hereinafter “Labeled Product”)
9 and that Implus will, to the best of its knowledge, continue to offer only Reformulated Products or
10 Labeled Products in California in the future. The option to provide a declaration certifying its
11 complete early reformulation or labeling of the Covered Products in lieu of making the Conditional
12 Civil Penalty payment otherwise required by this Section is a material term, and time is of the
13 essence.

14 4.3 **Attorney Fees.** Implus shall pay \$23,000.00 to Brodsky & Smith, LLC (“Brodsky
15 Smith”) as complete reimbursement for Plaintiff Espinosa’s attorneys’ fees and costs incurred as a
16 result of investigating, bringing this matter to Implus’ attention, litigating and negotiating and
17 obtaining judicial approval of a settlement in the public interest, pursuant to Code of Civil
18 Procedure section 1021.5. Payment shall be made within fourteen (14) business days of the
19 Effective Date and sent to the address for Brodsky & Smith set forth in section 4.1.1, above, in full
20 payment, satisfaction and accord of all fees and costs due and owing to Espinosa’s counsel.

21 **5. RELEASE OF ALL CLAIMS**

22 5.1 This Consent Judgment is a full, complete, final, and binding resolution between
23 Espinosa acting in the public interest, and Implus, and its parents, shareholders, divisions,
24 subdivisions, subsidiaries, partners, sister companies, and affiliates, and their successors and
25 assigns (“Defendant Releasees”), and all entities from whom they obtain and to whom they directly
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27 ¹ “Reformulated Products” are defined as any Covered Product that contains more than
28 1,000 parts per million DEHP.

1 or indirectly distribute or sell Covered Products, including but not limited to manufacturers,
2 suppliers, distributors, wholesalers, customers, licensors, licensees, retailers, franchisees, and
3 cooperative members (“Downstream Defendant Releasees”), of all claims for violations of
4 Proposition 65 based on exposure to DEHP from Covered Products as set forth in the Notice, with
5 respect to any Covered Products manufactured, distributed, or sold by Implus prior to one hundred
6 twenty (120) days after the Effective Date. Compliance with the terms of this Consent Judgment
7 constitutes compliance with Proposition 65 with regard to the Covered Products.

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

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

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

3 **6. INTEGRATION**

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

8 **7. GOVERNING LAW**

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

14 **8. NOTICES**

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

19 For Defendant:

20 Patrick D. Doran
21 Buchanan Ingersoll Rooney PC
22 Two Liberty Place
23 50 S. 16th Street, Suite 3200
Philadelphia, PA 19102-2555

24 And

25 For Espinosa:

26 Evan Smith
27 Brodsky & Smith, LLC
2 Bala Plaza, Suite 510
Bala Cynwyd, PA 19004

28 Any party, from time to time, may specify in writing to the other party a change of address to

1 which all notices and other communications shall be sent.

2 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

3 9.1 This Consent Judgment may be executed in counterparts and by facsimile, or .pdf
4 signature, each of which shall be deemed an original, and all of which, when taken together, shall
5 constitute one and the same document.

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

8 10.1 Espinosa agrees to comply with the requirements set forth in California Health &
9 Safety Code §25249.7(f) and to promptly bring a Motion for Approval of this Consent Judgment
10 and Defendant agrees it shall support approval of such Motion.

11 10.2 This Consent Judgment shall not be effective until it is approved and entered by the
12 Court and shall be null and void if, for any reason, it is not approved by the Court. In such case,
13 the Parties agree to meet and confer on how to proceed and if such agreement is not reached within
14 30 days, the case shall proceed on its normal course.

15 10.3 If the Court approves this Consent Judgment and is reversed or vacated by an
16 appellate court, the Parties shall meet and confer as to whether to modify the terms of this Consent
17 Judgment. If the Parties do not jointly agree on a course of action to take, the case shall proceed on
18 its normal course on the trial court's calendar.

19 **11. MODIFICATION**

20 11.1 This Consent Judgment may be modified only by further stipulation of the Parties
21 and the approval of the Court or upon the granting of a motion brought to the Court by either Party.

22 **12. ATTORNEY'S FEES**

23 12.1 A party who unsuccessfully brings or contests an action arising out of this Consent
24 Judgment shall be required to pay the prevailing party's reasonable attorney's fees and costs unless
25 the unsuccessful party has acted with substantial justification. For purposes of this Consent
26 Judgment, the term substantial justification shall carry the same meaning as used in the Civil
27 Discovery Act of 1986, Code of Civil Procedure Section 2016, et seq.

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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 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: 11/16/17
By: [Signature]
GABRIEL ESPINOSA

Date: 11/15/2017
By: [Signature]
IMPLUS FOOTCARE, LLC

IT IS SO ORDERED, ADJUDGED AND DECREED:

Dated: _____

Judge of Superior Court