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

11 GABRIEL ESPINOSA,

12 Plaintiff,

13 v.

14 MARINE SPORTS MANUFACTURING, INC.,

15 Defendant.

Case No.: RG19013899

CONSENT JUDGMENT

Judge: Jo-Lynne Q. Lee

Dept.: 18

Hearing Date: July, 23, 2019

Hearing Time: 3:00 PM

Reservation #: R-2072157

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

10 **1.2 Allegations and Representations.** Espinosa alleges that Defendant has exposed
11 individuals to di(2-ethylhexyl) phthalate (DEHP) from its sales of Red & White Dive Flags, UPC
12 Nos. 806723467102, 4671 and 404808 without providing a clear and reasonable exposure warning
13 pursuant to Proposition 65. DEHP is listed under Proposition 65 as a chemical known to the State
14 of California to cause cancer and reproductive toxicity.

15 **1.3 Notice of Violation/Complaint.** On or about August 8, 2018, Espinosa served West
16 Marine, Inc., West Marine Products, Inc. (collectively, “West Marine”) and various public
17 enforcement agencies with documents entitled “60-Day Notice of Violation” pursuant to Health &
18 Safety Code §25249.7(d) (the “Notice”), alleging that West Marine violated Proposition 65 for
19 failing to warn consumers and customers that use of Red & White Dive Flags, UPC Nos.
20 806723467102, 4671 and 404808 expose users in California to DEHP. On November 29, 2018,
21 Espinosa served an amended “60-Day Notice of Violation” (the “Amended Notice”)¹ on Marine
22 Sports. No public enforcer has brought and is diligently prosecuting the claims alleged in the
23 Notices. On or about April 5, 2019, Espinosa filed a complaint (the “Complaint”) in the matter.

24 **1.4** For purposes of this Consent Judgment only, the Parties stipulate that this Court has
25 jurisdiction over Defendant as to the allegations contained in the Complaint filed in this matter, that
26 venue is proper in the County of Alameda, and that this Court has jurisdiction to approve, enter,
27

28 ¹ The Notice and the Amended Notice are collectively referred to herein as, the “Notices.”

1 and oversee the enforcement of this Consent Judgment as a full and final binding resolution of all
2 claims which were or could have been raised in the Complaint based on the facts alleged therein
3 and/or in the Notices.

4 1.5 Defendant denies the material allegations contained in the Notices and Complaint
5 and maintains that it has not violated Proposition 65. Nothing in this Consent Judgment shall be
6 construed as an admission by Defendant of any fact, finding, issue of law, or violation of law; nor
7 shall compliance with this Consent Judgment constitute or be construed as an admission by
8 Defendant of any fact, finding, conclusion, issue of law, or violation of law, such being specifically
9 denied by Defendant. However, this section shall not diminish or otherwise affect the obligations,
10 responsibilities, and duties of Defendant under this Consent Judgment.

11 **2. DEFINITIONS**

12 2.1 **Covered Products.** The term “Covered Products” means Red & White Dive Flags,
13 UPC Nos. 806723467102, 4671 and 404808 that are manufactured, distributed and/or offered for
14 sale in California by Marine Sports.

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

17 **3. INJUNCTIVE RELIEF: WARNINGS**


18 3.1 **Reformulation of Covered Products.** As of the date this Consent Judgment is
19 signed by the Parties, and continuing thereafter, Covered Products that Marine Sports directly
20 manufactures, imports, distributes, sells, or offers for sale in California shall either: (a) be
21 Reformulated Products pursuant to § 3.2, below; or (b) be labeled with a clear and reasonable
22 exposure warning pursuant to §§ 3.3 and 3.4, below. For purposes of this Consent Judgment, a
23 “Reformulated Product” is a Covered Product that is in compliance with the standard set forth in §
24 3.2 below. The warning requirement set forth in §§ 3.3 and 3.4 shall not apply to any Reformulated
25 Product.

26 3.2 **Reformulation Standard.** “Reformulated Products” shall mean Covered Products
27 that contain concentrations less than or equal to 0.1% (1,000 parts per million (ppm) of DEHP when
28

analyzed pursuant to U.S. Environmental Protection Agency testing methodologies 3580A and 8270C or other methodology utilized by federal or state government agencies for the purpose of determining the phthalate content in a solid substance.

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

(a) **Warning.** The “Warning” shall consist of the statement:

 **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.

(b) **Alternative Warning:** Marine Sports may, but is not required to, use the alternative short-form warning as set forth in this § 3.3(b) (“**Alternative Warning**”) as follows:

 **WARNING:** Cancer and Reproductive Harm - www.P65Warnings.ca.gov.

3.4 A **Warning** or **Alternative Warning** provided pursuant to § 3.3 must print the word “**WARNING:**” in all capital letters and in bold font, followed by a colon. The warning symbol to the left of the word “**WARNING:**” must be a black exclamation point in a yellow equilateral triangle with a black outline, except that if the sign or label for the Covered Product does not use the color yellow, the symbol may be in black and white. The symbol must be in a size no smaller than the height of the word “**WARNING:**”. The warning shall be affixed to or printed on the Covered Product’s packaging or labeling, or on a placard, shelf tag, sign or electronic device or automatic process, providing that the warning is 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

1 warnings, if any, concerning the use of the Covered Product and shall be at least the same size as
2 those other safety warnings.

3 3.5 If Marine Sports sells Covered Products via an internet website to customers located
4 in California, the warning requirements of this section shall be satisfied if the foregoing warning
5 appears either: (a) on the same web page on which a Covered Product is displayed and/or described;
6 (b) on the same page as the price for the Covered Product; or (c) on one or more web pages
7 displayed to a purchaser prior to purchase during the checkout process. Alternatively, a symbol
8 consisting of a black exclamation point in a yellow or white equilateral triangle may appear adjacent
9 to or immediately following the display, description, price, or checkout listing of the Covered
10 Product, if the warning statement appears elsewhere on the same web page in a manner that clearly
11 associates it with the product(s) to which the warning applies.

12 3.6 **Compliance with Warning Regulations.** Defendant shall be deemed to be in
13 compliance with this Consent Judgment by either adhering to §§ 3.3 and 3.4 of this Consent
14 Judgment or by complying with warning requirements adopted by the State of California's Office
15 of Environmental Health Hazard Assessment ("OEHHA") after the Effective Date.

16 4. **MONETARY TERMS**

17 4.1 **Civil Penalty.** Marine Sports shall cause to be paid \$2,500.00 as a Civil Penalty
18 pursuant to Health and Safety Code section 25249.7(b), to be apportioned in accordance with
19 California Health & Safety Code § 25192, with 75% of these funds remitted to OEHHA and the
20 remaining 25% of the Civil Penalty remitted to Espinosa, as provided by California Health & Safety
21 Code § 25249.12(d).

22 4.1.1 Within ten (10) days of the Effective Date and after being provided with
23 the proper W-9(s), Marine Sports shall cause to be issued two separate checks for the Civil
24 Penalty payment to (a) "OEHHA" in the amount of \$1,875.00; and to (b) "Brodsky & Smith,
25 LLC in Trust for Espinosa" in the amount of \$625.00. Payment owed to Espinosa pursuant to
26 this Section shall be delivered to the following payment address:

27 Evan J. Smith, Esquire
28 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

For Non-United States Postal Service Delivery:

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

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

4.2 **Attorneys' Fees.** Within ten (10) days of the Effective Date, Marine Sports shall cause to be paid \$21,250.00 to Brodsky & Smith, LLC ("Brodsky Smith") as complete reimbursement for Espinosa's attorneys' fees and costs incurred as a result of investigating, bringing this matter to Defendant's attention, litigating and negotiating and obtaining judicial approval of a settlement in the public interest, pursuant to Code of Civil Procedure § 1021.5.

5. RELEASE OF ALL CLAIMS

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 Marine Sports, and their parents, shareholders, members, directors, officers, managers, employees, representatives, agents, attorneys, divisions, subdivisions, subsidiaries, partners, sister companies, and affiliates, and their predecessors, successors and assigns ("Defendant Releasees"), and all entities from whom they obtain and to whom they directly or indirectly distribute or sell Covered Products, including but not limited to West Marine and any manufacturers, suppliers, distributors, wholesalers, customers, licensors, licensees retailers, franchisees, and cooperative members ("Downstream Releasees"), of

1 all claims for violations of Proposition 65 based on exposure to DEHP from Covered Products as
2 set forth in the Notices, with respect to any Covered Products manufactured, distributed, or sold by
3 Marine Sports prior to the Effective Date. This Consent Judgment shall have preclusive effect such
4 that no other person or entity, whether purporting to act in his, her, or its interests or the public
5 interest shall be permitted to pursue and/or take any action with respect to any violation of
6 Proposition 65 that was alleged in the Complaint, or that could have been brought pursuant to the
7 Notices against Marine Sports or its Downstream Releasees of the Product including but not limited
8 to ("Proposition 65 Claims"). Compliance with the terms of this Consent Judgment constitutes
9 compliance with Proposition 65 with regard to the Covered Products.

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

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

27 5.3 Marine Sports waives any and all claims against Espinosa, his attorneys and other
28 representatives, for any and all actions taken or statements made (or those that could have been

1 taken or made) by Espinosa and his attorneys and other representatives, whether in the course of
2 investigating claims or otherwise seeking enforcement of Proposition 65 against it in this matter,
3 and/or with respect to Covered Products.

4 **6. INTEGRATION**

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

9 **7. GOVERNING LAW**

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

15 **8. NOTICES**

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

20 For Marine Sports:

21 Tina I. Mangarpan
22 Ford, Walker, Haggerty & Behar
23 One World Trade Center, 27th Floor
Long Beach, CA 90831-2700

24 For Espinosa:

25 Evan Smith
26 Brodsky & Smith, LLC
27 9595 Wilshire Blvd., Ste. 900
Beverly Hills, CA 90212

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, each of
4 which shall be deemed an original, and all of which, when taken together, shall constitute one and
5 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 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.

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

1 **13. RETENTION OF JURISDICTION**

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

4 **14. AUTHORIZATION**

5 14.1 The undersigned are authorized to execute this Consent Judgment on behalf of their
6 respective Parties and have read, understood and agree to all of the terms and conditions of this
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 **AGREED TO:**

AGREED TO:

11
12 Date: 5/28/19

Date: 4-22-19

13
14 By: [Signature]

15 GABRIEL ESPINOSA

By: [Signature]

16 MARINE SPORTS MANUFACTURING
INC. MICHAEL REINMAN

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

18
19 Dated: _____

Judge of Superior Court