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

11 GABRIEL ESPINOZA and EMA BELL,

12 Plaintiffs,

13 v.

14 PLANO SYNERGY HOLDING, INC.,

15 Defendant.

Case No.: HG19047716

CONSENT JUDGMENT

Judge: Stephen Kaus

Dept.: 19

Hearing Date: April 29, 2020

Hearing Time: 3:00 PM

Reservation #: R-2167593

1 **1. INTRODUCTION**

2 1.1 **The Parties.** This Consent Judgment is entered into by and between Gabriel
3 Espinoza (“Espinoza”) and Ema Bell (“Bell”), each acting on behalf of the public interest
4 (hereinafter “Plaintiffs”) and Plano Synergy Holding, Inc. and its subsidiaries and affiliates
5 (“Plano” or “Defendant”) with Plaintiffs and Defendant collectively referred to as the “Parties” and
6 each of them as a “Party.” Espinoza and Bell are individuals who reside in California and who seek
7 to promote awareness of exposures to toxic chemicals and improve human health by reducing or
8 eliminating hazardous substances contained in consumer products. Plano is alleged to be a person
9 in the course of doing business for purposes of Proposition 65, Cal. Health & Safety Code §§
10 25249.6 et seq.

11 1.2 **Allegations and Representations.** Plaintiffs allege that Defendant has exposed
12 individuals to di(2-ethylhexyl) phthalate (DEHP) from its sales of fishing nets and blade bags
13 without providing a clear and reasonable exposure warning pursuant to Proposition 65. DEHP is
14 listed under Proposition 65 as a chemical known to the State of California to cause cancer and
15 reproductive toxicity.

16 1.3 **Notices of Violation/Complaint.** On or about April 3, 2019 (Bell) and July 29, 2019
17 (Espinoza), Plaintiffs served Plano, and various public enforcement agencies with documents
18 entitled “60-Day Notice of Violation” pursuant to Health & Safety Code §25249.7(d) (collectively,
19 the “Notices”), alleging that Defendant violated Proposition 65 for failing to warn consumers and
20 customers that use of blade bags (Bell) and fishing nets (Espinoza) expose users in California to
21 DEHP. No public enforcer has brought and is diligently prosecuting the claims alleged in the
22 Notices. On December 20, 2019, Plaintiffs filed a complaint (the “Complaint”) in the matter.

23 1.4 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
24 jurisdiction over Defendant as to the allegations contained in the Complaint filed in this matter, that
25 venue is proper in the County of Alameda, and that this Court has jurisdiction to approve, enter,
26 and oversee the enforcement of this Consent Judgment as a full and final binding resolution of all
27 claims which were or could have been raised in the Complaint based on the facts alleged therein
28

1 and/or in the Notices.

2 1.5 Defendant denies the material allegations contained in the Notices and Complaint
3 and maintains that it has not violated Proposition 65. Nothing in this Consent Judgment shall be
4 construed as an admission by Defendant of any fact, finding, issue of law, or violation of law; nor
5 shall compliance with this Consent Judgment constitute or be construed as an admission by
6 Defendant of any fact, finding, conclusion, issue of law, or violation of law, such being specifically
7 denied by Defendant. However, this section shall not diminish or otherwise affect the obligations,
8 responsibilities, and duties of Defendant under this Consent Judgment.

9 **2. DEFINITIONS**

10 2.1 **Covered Products.** The term “Covered Products” means: (a) Plano blade bags and
11 (b) Frabill fishing nets that are manufactured, distributed and/or offered for sale in California by
12 Plano.

13 2.2 **Effective Date.** The term “Effective Date” means the date this Consent Judgment is
14 entered as a Judgment of the Court.

15 **3. INJUNCTIVE RELIEF: WARNINGS**

16 3.1 **Reformulation of Covered Products.** Any Covered Products that Plano directly
17 manufactures or orders from third parties, after 120 days from the Effective Date and that Plano
18 distributes, sells, or offers for sale in California shall either: (a) be Reformulated Products pursuant
19 to § 3.2, below; or (b) be labeled with a clear and reasonable exposure warning pursuant to §§ 3.3
20 and 3.4, below. For purposes of this Consent Judgment, a “Reformulated Product” is a Covered
21 Product that is in compliance with the standard set forth in § 3.2 below. The warning requirement
22 set forth in §§ 3.3 and 3.4 shall not apply to any Reformulated Product.

23 3.2 **Reformulation Standard.** “Reformulated Products” shall mean Covered Products
24 that contain concentrations less than or equal to 0.1% (1,000 parts per million (ppm)) of DEHP
25 when analyzed pursuant to U.S. Environmental Protection Agency testing methodologies 3580A
26 and 8270C or other methodology utilized by federal or state government agencies for the purpose
27 of determining the phthalate content in a solid substance.

1 3.3 **Clear and Reasonable Warning.** Warnings specified in Section 3.3 and Section
2 3.4 must be given for all Covered Products that do not qualify as “Reformulated Products” (as that
3 term is defined in Section 3.2) that Plano directly manufactures or orders from third parties, after
4 120 days from the Effective Date and that Plano distributes, sells, or offers for sale in California.
5 The warning shall consist of either the **Warning** or **Alternative Warning** described in §§ 3.3(a)
6 or (b), respectively:

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

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

11 (b) **Alternative Warning:** For on product warnings, Plano may, but is not required to,
12 use the alternative short-form warning as set forth in this § 3.3(b) (“**Alternative Warning**”) as
13 follows:

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

15 3.4 A **Warning** or **Alternative Warning** provided pursuant to § 3.3 must print the word
16 “**WARNING:**” in all capital letters and in bold font, followed by a colon. The warning symbol to
17 the left of the word “**WARNING:**” must be a black exclamation point in a yellow equilateral
18 triangle with a black outline, except that if the sign or label for the Covered Product does not use
19 the color yellow, the symbol may be in black and white. The symbol must be in a size no smaller
20 than the height of the word “**WARNING:**”. The warning shall be affixed to or printed on the
21 Covered Product’s packaging or labeling, or on a placard, shelf tag, sign or electronic device or
22 automatic process, providing that the warning is displayed with such conspicuousness, as compared
23 with other words, statements, or designs as to render it likely to be read and understood by an
24 ordinary individual under customary conditions of purchase or use. A warning may be contained
25 in the same section of the packaging, labeling, or instruction booklet that states other safety
26 warnings, if any, concerning the use of the Covered Product and shall be at least the same size as
27 those other safety warnings.

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

10 3.5 **Compliance with Warning Regulations.** Defendant shall be deemed to be in
11 compliance with this Consent Judgment by either adhering to §§ 3.3 and 3.4 of this Consent
12 Judgment or by complying with warning requirements adopted by the State of California’s Office
13 of Environmental Health Hazard Assessment (“OEHHA”) after the Effective Date.

14 **4. MONETARY TERMS**

15 4.1 **Civil Penalty.** Plano shall pay \$3,000.00 as a Civil Penalty pursuant to Health and
16 Safety Code section 25249.7(b), to be apportioned in accordance with California Health & Safety
17 Code § 25192, with 75% of these funds remitted to OEHHA and the remaining 25% of the Civil
18 Penalty remitted to Plaintiffs, as provided by California Health & Safety Code § 25249.12(d).

19 4.1.1 Within ten (10) days of the Effective Date, Plano shall issue three (3)
20 separate checks for the Civil Penalty payment to (a) “OEHHA” in the amount of \$2,250.00; (b)
21 “Brodsky & Smith, LLC in Trust for Espinoza” in the amount of \$375.00; and to (c) “Brodsky &
22 Smith, LLC in Trust for Bell” in the amount of \$375.00. Payment owed to Plaintiffs pursuant to
23 this Section shall be delivered to the following payment address:

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

27 Payment owed to OEHHA (EIN: 68-0284486) pursuant to this Section shall be delivered directly
28 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 4.2 **Attorneys' Fees.** Within ten (10) days of the Effective Date, Plano shall pay
16 \$28,500.00 to Brodsky & Smith, LLC ("Brodsky Smith") as complete reimbursement for Plaintiffs'
17 attorneys' fees and costs incurred as a result of investigating, bringing this matter to Plano's
18 attention, litigating and negotiating and obtaining judicial approval of a settlement in the public
19 interest, pursuant to Code of Civil Procedure § 1021.5.

20 **5. RELEASE OF ALL CLAIMS**

21 5.1 This Consent Judgment is a full, final, and binding resolution between Plaintiffs,
22 each acting on their own behalf, and on behalf of the public interest, and Plano, and its parents,
23 shareholders, members, directors, officers, managers, employees, representatives, agents,
24 attorneys, divisions, subdivisions, subsidiaries, partners, sister companies, and affiliates, and their
25 predecessors, successors and assigns ("Defendant Releasees"), and all entities from whom they
26 obtain and to whom they directly or indirectly distribute or sell Covered Products, including but
27 not limited to manufacturers, suppliers, distributors, wholesalers, customers, licensors, licensees
28 retailers, franchisees, and cooperative members, including but not limited to Big 5 Corp., Overton's
Inc. and each of 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 ("Downstream Releasees"), of all

1 claims for violations of Proposition 65 based on exposure to DEHP from Covered Products as set
2 forth in the Notices, with respect to any Covered Products that were manufactured by Plano or
3 ordered by Plano dating back from 120 days after the Effective Date. This Consent Judgment shall
4 have preclusive effect such that no other person or entity, whether purporting to act in his, her, or
5 its interests or the public interest shall be permitted to pursue and/or take any action with respect to
6 any violation of Proposition 65 that was alleged in the Complaint, or that could have been brought
7 pursuant to the Notices against Plano and/or the Downstream Releasees of the Covered Products
8 (“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, Plaintiffs, on behalf of themselves, their past and
11 current agents, representatives, attorneys, and successors and/or assignees, and *not* in their
12 representative capacity, hereby waive all rights to institute or participate in, directly or indirectly,
13 any form of legal action and releases Plano, 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 Plano, Defendant Releasees or
19 Downstream Releasees. With respect to the foregoing waivers and releases in this paragraph,
20 Plaintiffs hereby specifically waives any and all rights and benefits which they now have, 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 OR HER SETTLEMENT WITH THE
DEBTOR OR RELEASED PARTY.

27 5.3 Plano waives any and all claims against Plaintiffs, their 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 Plaintiffs and their 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 Defendant:

21 Josephine Benkers
22 General Counsel, Plano Synergy
23 431 E South Street
Plano, IL 60545

24 And

25 For Plaintiffs:

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

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

3 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

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

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

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

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

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

20 **11. MODIFICATION**

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

23 **12. RETENTION OF JURISDICTION**

24 12.1 This Court shall retain jurisdiction of this matter to implement or modify the
25 Consent Judgment.

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13. AUTHORIZATION

13.1 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 the document and certify 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: 2/18/2020
By: [Signature]
GABRIEL ESPINOZA

Date: _____
By: _____
EMA BELL

AGREED TO:

Date: _____
By: _____
PLANO SYNERGY HOLDING, INC.

IT IS SO ORDERED, ADJUDGED AND DECREED:

Dated: _____ Judge of Superior Court

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AGREED TO:

AGREED TO:

Date: _____

Date: _____

By: _____
GABRIEL ESPINOZA

By: _____
EMA BELL

AGREED TO:

Date: February 21, 2020

By: Stephine K. Benkers
PLANO SYNERGY HOLDING, INC.

IT IS SO ORDERED, ADJUDGED AND DECREED:

Dated: _____

Judge of Superior Court

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AGREED TO:

AGREED TO:

Date: _____

Date: 3/10/2020

By: _____
GABRIEL ESPINOZA

By: 
EMA BELL

AGREED TO:

Date: _____

By: _____
PLANO SYNERGY HOLDING, INC.

IT IS SO ORDERED, ADJUDGED AND DECREED:

Dated: _____

Judge of Superior Court