

DEC 18 2015

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Mateel Environmental Law Foundation

11 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
12 **COUNTY OF SAN FRANCISCO**

13
14 MATEEL ENVIRONMENTAL JUSTICE
FOUNDATION,

15 Plaintiff,

16 v.

17 24 HOUR FITNESS USA, INC., and
18 EQUINOX HOLDINGS, INC.,

19 Defendants.

CASE NO. CGC-15-546994

CONSENT JUDGMENT AS TO 24
HOUR FITNESS USA, INC.

ENDORSED
FILED
San Francisco County Superior Court
DEC 23 2015
CLERK OF THE COURT
BY: KAREN LIU
Deputy Clerk

20
21 **1. INTRODUCTION**

22 1.1 **The Parties.** This Consent Judgment is entered into by and between plaintiff
23 Mateel Environmental Justice Foundation acting on behalf of the public interest (“Mateel”), on
24 the one hand, and defendant 24 HOUR FITNESS USA, INC., (“24 Hour Fitness”), on the other
25 hand, with Mateel and 24 Hour Fitness collectively referred to as the “Parties” and each of them
26 as a “Party.” Mateel is a non-profit organization, based in Eureka, California, and incorporated
27 under the laws of the State of California. 24 Hour Fitness is a person doing business within the
28 meaning of the Safe Drinking Water and Toxic Enforcement Act of 1986, Cal. Health & Safety

1 Code §§ 25249.5 et seq. (“Proposition 65”).

2 1.2 **General Allegations.** Mateel alleges that 24 Hour Fitness operates fitness
3 facilities in the State of California, some of which include swimming pools, spas and other wet
4 areas (the “Pool Areas”), and that 24 Hour Fitness uses water treated with chlorine in these Pool
5 Areas. Mateel further alleges that, as a result of chlorine being added to the water in the Pool
6 Areas, chloroform and bromodichloromethane were created in those areas and that, for a period
7 of time, the patrons and workers of 24 Hour Fitness were exposed to chloroform,
8 bromodichloromethane and/or bromochloromethane without a clear and reasonable Proposition
9 65 warning being posted in the Pool Area. Chloroform, bromodichloromethane and/or
10 bromochloromethane are chemicals listed by the State of California as known to cause cancer,
11 and birth defects or other reproductive harm.

12 1.3 **Notices of Violation/Complaint.** On or about August 14, 2014, Mateel served 24
13 Hour Fitness and various public enforcement agencies with a document, pursuant to Cal. Health
14 & Safety Code § 25249.7(d), alleging that 24 Hour Fitness was and is in violation of Proposition
15 65 for failing to warn consumers in California that use of 24 Hour Fitness’s Pool Areas of the
16 alleged exposure to chloroform, bromodichloromethane and/or bromochloromethane (the
17 “Notice”). No public enforcer diligently prosecuted the claims threatened in the Notice within
18 sixty days plus service time. Therefore, Mateel initiated this action by filing a complaint (the
19 “Complaint”).

20 1.4 For purposes of this Consent Judgment only, the Parties stipulate that this Court
21 has jurisdiction over 24 Hour Fitness as to the allegations contained in the Complaint, that venue
22 is proper in the County of San Francisco, and that this Court has jurisdiction to approve, enter,
23 and enforce this Consent Judgment as a full and final binding resolution of all claims which were
24 or could have been asserted in the Complaint based on the facts or conduct alleged in the Notice
25 and Complaint.

26 1.5 Mateel and 24 Hour Fitness enter into this Consent Judgment as a full and final
27 settlement of all claims which were or could have been asserted in the Complaint arising out of
28 the facts or conduct alleged therein and/or in the Notice. 24 Hour Fitness denies the material

1 allegations contained in the Notice and Complaint and maintains that it has not violated
2 Proposition 65. Nothing in this Consent Judgment shall be construed as an admission by 24 Hour
3 Fitness. However, this section shall not diminish or otherwise affect the obligations,
4 responsibilities, and duties of 24 Hour Fitness under this Consent Judgment. Except as provided
5 in Section 6 below, including but not limited to the Releases in that section, and as provided by
6 law, nothing in this Consent Judgment shall prejudice, waive or impair any right, remedy,
7 argument or defense the Parties may have in any other pending or future legal proceedings. This
8 Consent Judgment is the product of negotiation and compromise and is accepted by the Parties
9 solely for purposes of settling, compromising, and resolving issues disputed in the Complaint.
10 This Consent Judgment shall not be used for any other purpose or in any other manner.

11 **2. DEFINITIONS**

12 2.1 "Complaint" shall have the meaning given in Section 1.3.

13 2.2 "Covered Environmental Exposure(s)" means exposures to chloroform,
14 bromodichloromethane and/or bromochloromethane occurring in the Pool Areas operated by 24
15 Hour Fitness in fitness facilities located in California.

16 2.3 "Effective Date" means the date this Consent Judgment is entered as a Judgment
17 of the Court.

18 2.4 "Listed Chemicals" means chloroform, bromodichloromethane and/or
19 bromochloromethane .

20 2.5 "Notice" shall have the meaning giving in Section 1.3.

21 **3. INJUNCTIVE RELIEF: PROVIDE WARNINGS**

22 3.1 A warning as set forth in Section 3.2, shall be posted in each 24 Hour Fitness
23 facility in California that has a swimming pool or spa on or after the Effective Date.

24 3.2.1 The warning shall use the following language:

25 PROPOSITION 65 WARNING

26 This area contains a chemical known to the State of
27 California to cause cancer, and birth defects or other
28 reproductive harm

1
2 3.2.2 The warning shall be placed on a sign, no smaller than nine (9) inches (9") by nine
3 (9) inches (9"), using a font size of no smaller than one-half inch (1/2") tall letters, the word
4 WARNING shall be in all capital letters. The sign shall be placed within or at the entrance to the
5 Pool Areas, mounted at eye level or in an equally conspicuous location, as close to the Pool Area
6 as reasonably possible. If the Pool Area is located in a room separated from the remainder of the
7 fitness facility, the warning shall be placed either on the doorway leading to the Pool Area or in
8 the same room as Pool Area. If there are multiple Pool Areas located in distinct areas or rooms,
9 then a warning sign shall be placed in each separate location.

10 3.2.3 The Parties recognize that these are not the exclusive methods of providing a
11 warning under Proposition 65 and its implementing regulations and that they may or may not be
12 appropriate in other circumstances.

13 3.3 If Proposition 65 warnings for chloroform, bromodichloromethane and/or
14 bromochloromethane should no longer be required, either by statutory or regulatory amendments
15 or court order, 24 Hour Fitness shall have no further warning obligations pursuant to this Consent
16 Judgment. If the safe harbor warnings language for environmental exposure, as currently
17 specified in Title 27 CCR 25601, should change in the future, 24 Hour Fitness may adjust the
18 language to comply with an alternative safe harbor language. In the event that 24 Hour Fitness
19 ceases to implement or substantively modifies the warnings required under this Consent
20 Judgment, 24 Hour Fitness shall provide written notice to Mateel (through counsel) of its intent to
21 do so, and of the basis for its intent, no less than thirty (30) days in advance.

22 **4. MONETARY TERMS**

23 4.1 **Civil Penalty.** 24 Hour Fitness shall pay a civil penalty of two-thousand dollars
24 and zero cents (\$2,000.00) pursuant to Cal. Health and Safety Code § 25249.7(b), with 100% of
25 these funds to be forwarded by Mateel to OEHHA, as provided by Cal. Health & Safety Code §§
26 25249.12(c) and 25249.12(d).

27 4.2 **Attorney Fees and Costs.** 24 Hour Fitness agrees to pay and will not oppose an
28 application made by Mateel's counsel for an award of attorney fees, inclusive of all expenses and

1 costs incurred as a result of investigating, bringing this matter to 24 Hour Fitness's attention,
2 litigating, negotiating and obtaining judicial approval of a settlement in the public interest,
3 pursuant to Cal. Code of Civil Procedure § 1021.5, in an amount of thirty-thousand dollars and
4 zero cents (\$30,000.00). Other than the payment required hereunder, each side is to bear its own
5 attorney's fees and costs (including but not limited to expert and consultant fees, if any).

6 **4.3 Payments to 501(c)3 Public Benefit Entity In Lieu of Attorney Fees and Costs.**

7 24 Hour Fitness agrees to pay and will not oppose an application by Mateel's counsel for
8 approval of a payment to Ecological Rights Foundation, a 501(c)3 Public Benefit Entity, in an
9 amount of eight-thousand dollars and zero cents (\$8,000.00), in lieu of seeking a larger portion of
10 the attorney's fees and costs incurred in bringing the action .

11 4.4 24 Hour Fitness shall pay the entire settlement amount within seven (7) business
12 days following the approval of this settlement by the Court. The payments required by this
13 Consent Judgment shall be made through the delivery of a check made payable to Mateel
14 Environmental Justice Foundation and delivered to: William Verick, Klamath Environmental
15 Law Center, 424 First Street, Eureka, CA 95501. On or before the date of the hearing of the
16 motion for approval, Mateel shall provide counsel for 24 Hour Fitness with a completed Internal
17 Revenue Service W-9 Form.

18 **5. ENFORCEMENT OF JUDGMENT**

19 5.1 In the event that, at any time following ninety (90) days after the Effective Date,
20 Mateel and/or its attorneys, agents, assigns, or any other person acting in the public interest under
21 Cal. Health & Safety Code § 25249.7(d) identifies one or more 24 Hour Fitness locations in the
22 State of California for which the warnings for Covered Environmental Exposures required under
23 Section 3 are not being or were not given (hereinafter the "Alleged Default(s)"), Mateel or such
24 person shall notify 24 Hour Fitness in writing of such alleged default(s) (the "Probationary Notice
25 of Default"). The Probationary Notice of Default shall be sent by first class mail, with proof of
26 service, to the person(s) identified in Section 14 to receive notices for 24 Hour Fitness, and must
27 be served with fifteen (15) days of the date the Alleged Default(s) was or were observed. The
28 Probationary Notice of Default shall, at a minimum, set forth the date(s) the Alleged Default(s)

1 was observed, and shall include both a description of the Alleged Default(s) with sufficient detail
2 to allow 24 Hour Fitness to determine the basis of the claim being asserted.

3 5.2 In the event 24 Hour Fitness corrects the Alleged Default(s) within fifteen (15)
4 days of receiving the Probationary Notice of Default by sending evidence of the necessary
5 warning in writing to Mateel or the notifying person, Mateel or the notifying person shall take no
6 further enforcement action with respect to such default(s).

7 5.3 In the event that 24 Hour Fitness wishes to contest the allegations contained in any
8 Probationary Notice of Default, it shall notify Mateel or the notifying person of such within
9 fifteen (15) days of its receipt of the Notice of Default. 24 Hour Fitness may provide any
10 documentary evidence to Mateel or the notifying person in support of its position. In the event
11 that, upon a good faith review of the evidence, Mateel or the notifying person agrees with 24
12 Hour Fitness's position, it shall take no further action. In the event that 24 Hour Fitness provides
13 documentary evidence, and Mateel or the notifying person disagrees with 24 Hour Fitness's
14 position, it shall, within thirty (30) days, notify 24 Hour Fitness of such and provide 24 Hour
15 Fitness, in writing, with the reasons for its disagreement. Thereafter, the parties shall meet and
16 confer to attempt to resolve their dispute on mutually acceptable terms; if no such resolution
17 results (a) Mateel may by motion or order to show cause before the Superior Court of San
18 Francisco, seek to enforce the terms and conditions contained in this Consent Judgment, or (b)
19 Mateel or the notifying person may initiate an enforcement action for new violations pursuant to
20 Cal. Health & Safety Code § 25249.7(d) without regard to the stipulated penalties provided for
21 herein.

22 5.5 The terms and conditions of Sections 5.1 through 5.4 above shall remain in effect
23 for five (5) years after the Effective Date. 24 Hour Fitness shall have the option to extend the
24 period of time Sections 5.1 through 5.4 are in effect for five (5) year periods, provided 24 Hour
25 Fitness gives notice to Mateel as required by Section 14 at least thirty (30) days prior to the end of
26 each such period.

27 5.6 The terms of this Consent Judgment are enforceable by and among the parties
28 hereto or, with respect to the injunctive relief provided for herein, by the California Attorney

1 General. Enforcement of the injunctive relief provided for in Section 3 shall be exclusively
2 pursuant to the terms of this Section 5.

3 **6. BINDING EFFECT, CLAIMS COVERED AND RELEASED**

4 6.1 This Consent Judgment is a full, final, and binding resolution between Mateel
5 acting in the public interest, and 24 Hour Fitness, USA, Inc., and its respective parent companies,
6 officers, directors, shareholders, divisions, subdivisions, subsidiaries, partners, sister companies,
7 affiliates, employees, agents, and their respective successors and assigns (“Defendant
8 Releasees”), of all claims against Defendant Releasees for alleged violation of Proposition 65 that
9 have been or could have been asserted pursuant to the Notice, regarding any alleged exposure to
10 the Listed Chemicals identified in the Notice occurring before the Effective Date (hereinafter, the
11 “Released Claims”). Mateel, acting in the public interest, releases, waives and forever discharges
12 Defendant Releasees from the Released Claims. Compliance with the terms of this Consent
13 Judgment constitutes compliance with Proposition 65 with regard to the Covered Environmental
14 Exposure.

15 6.2 In addition to the foregoing, Mateel, on behalf of itself, its past and current agents,
16 representatives, attorneys, and successors and assigns, and *not* in its representative capacity,
17 hereby releases, waives and forever discharges Defendant Releasees from any and all manner of
18 actions, causes of action, claims, demands, rights, suits, obligations, debts, contracts, agreements,
19 promises, liabilities, damages, charges, losses, costs, expenses, and attorney’s fees, of any nature
20 whatsoever, known or unknown, in law or equity, fixed or contingent, now or in the future, with
21 respect to any alleged exposure to Listed Chemicals in any Covered Environmental Exposures
22 before the Effective Date. Mateel, on behalf of itself, its past and current agents, representatives,
23 attorneys, and successors and assigns, also shall not institute or participate in, directly or
24 indirectly, any form of legal action against Defendant Releasees with regard to the claims
25 released and waived in this Section 6.2, unless such action is pursuant to Section 5.3 of this
26 Consent Judgment. With respect to the foregoing waivers and releases in this Section 6.2, Mateel
27 hereby specifically waives any and all rights and benefits which it now has, or in the future may
28 have, conferred by virtue of the provisions of Cal. Civil Code § 1542, which provides as follows:

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

6 6.3 24 Hour Fitness hereby releases, waives and forever discharges Mateel, its
7 attorneys and other representatives from any and all manner of actions, causes of action, claims,
8 demands, rights, suits, obligations, debts, contracts, agreements, promises, liabilities, damages,
9 charges, losses, costs, expenses, and attorney's fees, of any nature whatsoever, known or
10 unknown, in law or equity, fixed or contingent, now or in the future, with respect to any and all
11 actions taken or statements made by Mateel and its attorneys and other representatives in the
12 course of investigating claims or otherwise seeking enforcement of Proposition 65 against it in
13 this matter, and/or with respect to Covered Environmental Exposure.

14 **7. INTEGRATION**

15 7.1 This Consent Judgment contains the sole and entire agreement of the Parties and
16 any and all prior negotiations and understandings related hereto shall be deemed to have been
17 merged within it. No representations or terms of agreement other than those contained herein
18 exist or have been made by any Party with respect to the other Party or the subject matter hereof.

19 **8. GOVERNING LAW**

20 8.1 The terms of this Consent Judgment shall be governed by the laws of the State of
21 California and apply within the State of California.

22 **9. COMPLIANCE WITH CAL. HEALTH & SAFETY CODE § 25249.7(f); COURT**
23 **APPROVAL**

24 9.1 Mateel shall comply with the requirements set forth in Cal. Health & Safety Code
25 § 25249.7(f) and promptly bring a Motion for Approval and Entry of this Consent Judgment. 24
26 Hour Fitness shall support approval of such Motion.

27 9.2 This Consent Judgment shall not be effective until it is approved and entered by
28 the Court and shall be null and void if, for any reason, it is not approved and entered by the Court.

1 9.3 Both Parties shall support fully entry of this Consent Judgment and shall waive
2 any right to appeal if entered. If the Court approves and enters this Consent Judgment, but such
3 order is reversed or vacated by an appellate court, the Parties shall meet and confer as to whether
4 to modify the terms of this Consent Judgment. If the Parties do not jointly agree on a course of
5 action to take, this action shall proceed on its normal course on the trial court's calendar.

6 **10. RETENTION OF JURISDICTION**

7 10.1 This Court shall retain jurisdiction of this matter to implement, modify and enforce
8 this Consent Judgment.

9 **11. MODIFICATION; CONSTRUCTION; SEVERABILITY**

10 11.1 This Consent Judgment may be modified only by further stipulation of the Parties
11 and the approval of the Court, or upon the granting of a motion brought to the Court by either
12 Party.

13 11.2 The terms and conditions of this Consent Judgment have been reviewed by the
14 Parties' respective counsel, and each Party has had the opportunity to fully discuss the terms and
15 conditions with its counsel. In any subsequent interpretation or construction of this Consent
16 Judgment, the terms and conditions shall not be construed against any Party based on any role it
17 or its counsel may have played in drafting this Consent Judgment.

18 **12. NOTICES**

19 12.1 Unless specified herein, all correspondence and notices required by this Consent
20 Judgment shall be in writing and personally delivered or sent by: (i) first-class, registered or
21 certified mail, return receipt requested; or (ii) overnight courier, to the following addresses:

22 For 24 Hour Fitness:

23 Candice Petty, Esq.
24 24 Hour Fitness USA, Inc.
 12647 Alcosta Blvd, Suite 500
 San Ramon, CA 94583

25 With a copy to:

26 Brent G. Cheney, Esq.
27 Parker, Milliken, Clark, O'Hara & Samuelian, a P.C.
 555 South Flower Street, 30th Floor
28 Los Angeles, CA 90071

1 For Mateel Environmental Justice Foundation:


2 William Verick, Esq.
3 Klamath Environmental Law Center
4 424 First Street
5 Eureka, CA 95501

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

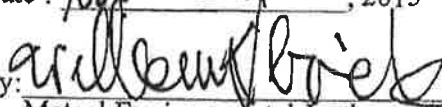
8 **13. COUNTERPARTS, ELECTRONIC SIGNATURES**

9 15.1 This Consent Judgment may be executed in counterparts and by electronic,
10 facsimile or portable document format (.pdf) signature, each of which shall be deemed an
11 original, and all of which, when taken together, shall constitute one and the same document.
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1 **APPROVED AS TO FORM:**

2 Date: <u>Nov. 2</u> , 2015	Date: _____, 2015
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4 By: 	By: _____
5	
6 On Behalf of Mateel Environmental Justice Foundation David Williams Law Offices of David Williams	On Behalf of 24 Hour Fitness Brent Cheney Parker, Milliken, Clark, O'Hara & Samuelian, a P.C.
7	
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9 **IT IS HEREBY SO STIPULATED:**

10 Date: <u>Nov. 2</u> , 2015	Date: _____, 2015
11	
12 By: 	By: _____
13 Mateel Environmental Justice Foundation	24 Hour Fitness, USA, Inc.
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16 **IT IS SO ORDERED:**

17 Date: _____

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19 By: _____

20 The Honorable

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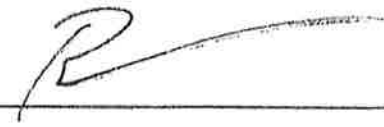
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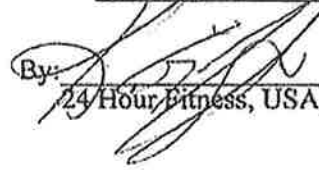
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APPROVED AS TO FORM:

Date : _____, 2015	Date: <u>December 17</u> , 2015
By: _____	By: 
On Behalf of Mateel Environmental Justice Foundation David Williams Law Offices of David Williams	On Behalf of 24 Hour Fitness Brent Cheney Parker, Milliken, Clark, O'Hara & Samuelian, a P.C.

IT IS HEREBY SO STIPULATED:

Date : _____, 2015	Date : <u>December 17</u> , 2015
By: _____ Mateel Environmental Justice Foundation	By:  24 Hour Fitness, USA, Inc.

IT IS SO ORDERED:

DEC 23 2015

Date: _____

By: **HAROLD KAHN**

The Honorable

JUDGE OF THE SUPERIOR COURT