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FILED
ALAMEDA COUNTY

AUG 31 2020

CLERK OF THE SUPERIOR COURT
By *[Signature]* Deputy

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

11 GABRIEL ESPINOSA,

12 Plaintiff,

13 v.

14 ORBEA USA, LLC, THE SPORTS
15 BASEMENT, INC.,

16 Defendants.

Case No.: HG19040437

CONSENT JUDGMENT

Judge: Delbert Gee

Dept.: 514

Hearing Date: August 4, 2020

Hearing Time: 3:00 PM

Reservation #: R- 2181363

1 **1. INTRODUCTION**

2 **1.1 The Parties.** This Consent Judgment is entered into by and between Plaintiff
3 Gabriel Espinosa acting on behalf of the public interest (hereinafter "Espinosa") and Defendant
4 Orbea USA, LLC (" Orbea" or "Defendant") with Espinosa and Defendant collectively referred
5 to as the "Parties" and each of them as a "Party." Espinosa is an individual residing in California
6 that seeks to promote awareness of exposures to toxic chemicals and improve human health by
7 reducing or eliminating hazardous substances contained in consumer products. Orbea is alleged to
8 be a person in the course of doing business for purposes of Proposition 65, Cal. Health & Safety
9 Code §§ 25249.6 et seq.

10 **1.2 Allegations and Representations.** Espinosa alleges that Defendant has exposed
11 California individuals to di(2-ethylhexyl) phthalate (DEHP) from its sales of Orbea safety buoys -
12 all colors, all sizes - without providing a clear and reasonable exposure warning pursuant to
13 Proposition 65. DEHP is listed under Proposition 65 as a chemical known to the State of
14 California to cause cancer and reproductive toxicity.

15 **1.3 Notice of Violation/Complaint.** On or about October 31, 2018, Espinosa served
16 Orbea, and various public enforcement agencies with documents entitled "60-Day Notice of
17 Violation" pursuant to Health & Safety Code §25249.7(d) (the "Notice"), alleging that Defendant
18 violated Proposition 65 for failing to warn consumers and customers that use of Orbea safety
19 buoys expose users in California to DEHP. No public enforcer has brought and is diligently
20 prosecuting the claims alleged in the Notice. On October 24, 2019, Espinosa filed a complaint
21 (the "Complaint") in the matter.

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

1 1.5 Defendant denies the material allegations contained in the Notice and Complaint
2 and maintains that it has not violated Proposition 65. Nothing in this Consent Judgment shall be
3 construed as an admission by Defendant of any fact, finding, issue of law, or violation of law; nor
4 shall compliance with this Consent Judgment constitute or be construed as an admission by
5 Defendant of any fact, finding, conclusion, issue of law, or violation of law, such being
6 specifically denied by Defendant. However, this section shall not diminish or otherwise affect the
7 obligations, responsibilities, and duties of Defendant under this Consent Judgment.

8 **2. DEFINITIONS**

9 2.1 **Covered Products.** The term "Covered Products" means Orbea safety buoys - all
10 colors, all sizes - that are manufactured, distributed, sold and/or offered for sale in California by
11 Orbea.

12 2.2 **Effective Date.** The term "Effective Date" means the date this Consent Judgment
13 is entered as a Judgment of the Court.

14 **3. INJUNCTIVE RELIEF: WARNINGS**

15 3.1 **Reformulation of Covered Products.** Commencing on the Effective Date, and
16 continuing thereafter, Covered Products that Orbea directly imports, distributes, sells, or offers
17 for sale in California shall either: (a) be Reformulated Products pursuant to § 3.2, below; or (b) be
18 labeled with a clear and reasonable exposure warning pursuant to §§ 3.3 and 3.4, below. For
19 purposes of this Consent Judgment, a "Reformulated Product" is a Covered Product that is in
20 compliance with the standard set forth in § 3.2 below. The warning requirement set forth in §§ 3.3
21 and 3.4 shall not apply to any Reformulated Product.

22 3.2 **Reformulation Standard.** "Reformulated Products" shall mean Covered Products
23 that contain concentrations less than or equal to 0.1% (1,000 parts per million (ppm)) of DEHP
24 when analyzed pursuant to U.S. Environmental Protection Agency testing methodologies 3580A
25 and 8270C or other methodology utilized by federal or state government agencies for the purpose
26 of determining the phthalate content in a solid substance.
27
28

1 **3.3 Clear and Reasonable Warning.** Commencing on the Effective Date, and
2 continuing thereafter, a clear and reasonable exposure warning as set forth in this §§ 3.3 and 3.4
3 must be provided for all Covered Products that Defendant imports, distributes, sells, or offers for
4 sale in California that is not a Reformulated Product. There shall be no obligation for Defendant
5 to provide a warning for Covered Products that enter the stream of commerce prior to the
6 Effective Date. The warning shall consist of either the **Warning** or **Alternative Warning**
7 described in §§ 3.3(a) or (b), respectively:

8 (a) **Warning.** The "Warning" shall consist of the statement:

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

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

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

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

15 **4. MONETARY TERMS**

16 **4.1 Civil Penalty.** Orbea shall pay \$1,500.00 as a Civil Penalty pursuant to Health and
17 Safety Code section 25249.7(b), to be apportioned in accordance with California Health & Safety
18 Code § 25192, with 75% of these funds remitted to OEHHA and the remaining 25% of the Civil
19 Penalty remitted to Espinosa, as provided by California Health & Safety Code § 25249.12(d).

20 **4.1.1** Within ten (10) days of the Effective Date, Orbea shall issue two separate
21 checks for the Civil Penalty payment to (a) "OEHHA" in the amount of \$1,125.00; and to (b)
22 "Brodsky & Smith, LLC in Trust for Espinosa" in the amount of \$375.00. Payment owed to
23 Espinosa pursuant to 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
27 Bala Cynwyd, PA 19004

28 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):

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, Orbea shall pay
16 \$16,000.00 to Brodsky & Smith, LLC ("Brodsky Smith") as complete reimbursement for
17 Espinosa's attorneys' fees and costs incurred as a result of investigating, bringing this matter to
18 Orbea attention, litigating and negotiating and obtaining judicial approval of a settlement in the
19 public interest, pursuant to Code of Civil Procedure § 1021.5.

20 4.3 **Tax Documentation.** Espinosa agrees to provide IRS W-9 forms for each of the
21 payees under this Consent Judgment within five (5) days of the Effective Date.

22 5. **RELEASE OF ALL CLAIMS**

23 5.1 This Consent Judgment is a full, final, and binding resolution between Espinosa
24 acting on his own behalf, and on behalf of the public interest, and Orbea, Orbea S. Coop, and its
25 parents, shareholders, members, directors, officers, managers, employees, representatives, agents,
26 attorneys, divisions, subdivisions, subsidiaries, partners, sister companies, and affiliates, and their
27 predecessors, successors and assigns ("Defendant Releasees"), and all entities from whom they
28 obtain and to whom they directly or indirectly distribute or sell Covered Products, including but
not limited to manufacturers, suppliers, distributors, wholesalers, customers, licensors, licensees
retailers, franchisees, and cooperative members, including but not limited to The Sports
Basement, Inc. ("Downstream Releasees"), of all claims for violations of Proposition 65 based on

1 exposure to DEHP from Covered Products as set forth in the Notice, with respect to any Covered
2 Products manufactured, distributed, or sold by Orbea prior to the Effective Date. This Consent
3 Judgment shall have preclusive effect such that no other person or entity, whether purporting to
4 act in his, her, or its interests or the public interest shall be permitted to pursue and/or take any
5 action with respect to any violation of Proposition 65 that was alleged in the Complaint, or that
6 could have been brought pursuant to the Notice against Orbea and/or the Downstream Releasees
7 of the Covered Products ("Proposition 65 Claims"). Compliance with the terms of this Consent
8 Judgment constitutes compliance with Proposition 65 with regard to the Covered Products.

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

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

26 5.3 Orbea waives any and all claims against Espinosa, his attorneys and other
27 representatives, for any and all actions taken or statements made (or those that could have been
28 taken or made) by Espinosa and his attorneys and other representatives, whether in the course of

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
7 exist 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,
13 and 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 John Conkle
21 Conkle, Kremer & Engel
22 Professional Law Corporation
23 3130 Wilshire Boulevard, Suite 500
Santa Monica, CA 90403-2351

24 And

25 For Espinosa:

26 Evan Smith
27 Brodsky & Smith, LLC
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
12 the Court and shall be null and void if, for any reason, it is not approved by the Court. In such
13 case, the Parties agree to meet and confer on how to proceed and if such agreement is not reached
14 within 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
17 Consent Judgment. If the Parties do not jointly agree on a course of action to take, the case shall
18 proceed on its normal course on the trial court's calendar.

19 **11. MODIFICATION**

20 11.1 Except as provided herein, this Consent Judgment may be modified only by further
21 stipulation of the Parties and the approval of the Court or upon the granting of a motion brought
22 to the Court by either Party. Grounds for modification include, but are not limited to, any
23 amendment to Proposition 65 and/or its regulations; the establishment or adoption of OEHHA of
24 safe harbor levels greater than that specified in Section 3.2 of this Consent Judgment for
25 Reformulated Products; and any consent judgment, court decision, or other relevant determination
26 or decision by a court, OEHHA or the California Attorney General's Office which occurs after
27 the Effective Date that would put Defendant at a disadvantage with respect to its competitors as a
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1 result of its continued compliance with Section 3 of this Agreement. In the event that Defendant
2 intends to trigger this provision, it shall do so by providing written notice to Espinosa's counsel.
3 If Espinosa does not agree with Defendant's invocation of this provision, the parties agree to meet
4 and confer for thirty (30) days to arrive at a mutually acceptable resolution of their differing
5 respective views.

6 **12. ATTORNEY'S FEES**

7 12.1 A Party who unsuccessfully brings or contests an action arising out of this Consent
8 Judgment shall be required to pay the prevailing party's reasonable attorney's fees and costs.

9 12.2 Nothing in this Section shall preclude a Party from seeking an award of sanctions
10 pursuant to law.

11 **13. RETENTION OF JURISDICTION**

12 13.1 This Court shall retain jurisdiction of this matter to implement or modify the
13 Consent Judgment.

14 **14. AUTHORIZATION**

15 14.1 The undersigned are authorized to execute this Consent Judgment on behalf of
16 their respective Parties and have read, understood and agree to all of the terms and conditions of
17 this document and certify that he or she is fully authorized by the Party he or she represents to
18 execute the Consent Judgment on behalf of the Party represented and legally bind that Party.
19 Except as explicitly provided herein each Party is to bear its own fees and costs.
20

21 **AGREED TO:**

AGREED TO:

22 Date: 3/30/2020

Date: 03/26/2020

23 By: [Signature]
24 GABRIEL ESPINOSA

25 By: GONZALO GARCIA DE SALAZAR
26 ORBEA USA, LLC

27 [Signature]
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IT IS SO ORDERED, ADJUDGED AND DECREED:

Delbert C. Gee

SB

Dated: AUG 31 2020

By: _____
Judge of Superior Court

JUDGE DELBERT C. GEE