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ALAMEDA COUNTY

JUN 30 2020

CLERK OF THE SUPERIOR COURT
By: Chana K. Deputy

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

11 GABRIEL ESPINOZA,

12 Plaintiff,

13 v.

14 SUN BUM, LLC,

15 Defendant.

Case No.: RG19044576

CONSENT JUDGMENT

Judge: Jeffrey Brand

Dept.: 22

Hearing Date: April 30, 2020

Hearing Time: 3:00 PM

Reservation #: R-2169293

Received
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1 **1. INTRODUCTION**

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

10 **1.2 Allegations and Representations.** Espinoza alleges that Defendant has exposed
11 individuals to diethanolamine (DEA) from its sales of Sun Bum sun lotions without providing a
12 clear and reasonable exposure warning pursuant to Proposition 65. DEA is listed under Proposition
13 65 as a chemical known to the State of California to cause cancer.

14 **1.3 Notice of Violation/Complaint.** On or about May 10, 2019, Espinoza served Sun
15 Bum, and various public enforcement agencies with documents entitled "60-Day Notice of
16 Violation" pursuant to Health & Safety Code §25249.7(d) (the "Notice"), alleging that Defendant
17 violated Proposition 65 for failing to warn consumers and customers that use of Sun Bum sun
18 lotions expose users in California to DEA. No public enforcer has brought and is diligently
19 prosecuting the claims alleged in the Notice. On November 22, 2019, Espinoza filed a complaint
20 (the "Complaint") in the matter.

21 **1.4** For purposes of this Consent Judgment only, the Parties stipulate that this Court has
22 jurisdiction over Defendant as to the allegations contained in the Complaint filed in this matter, that
23 venue is proper in the County of Alameda, and that this Court has jurisdiction to approve, enter,
24 and oversee the enforcement of this Consent Judgment as a full and final binding resolution of all
25 claims which were or could have been raised in the Complaint based on the facts alleged therein
26 and/or in the Notice.
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1 1.5 Defendant denies the material allegations contained in Espinoza's Notice and
2 Complaint and maintains that it has not violated Proposition 65. Nothing in this Consent Judgment
3 shall be construed as an admission by Defendant of any fact, finding, issue of law, or violation of
4 law; nor shall compliance with this Consent Judgment constitute or be construed as an admission
5 by 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 Sun Bum sun lotions,
10 including but not limited to *Sun Bum Cool Down After Sun* lotions, that are manufactured,
11 distributed and/or offered for sale in California by Sun Bum, and that expose users to DEA.

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

14 **3. INJUNCTIVE RELIEF: COMMITMENT TO REFORMULATE OR WARN**

15 3.1 **Reformulation or Labeling of Products.** Commencing within one year (365 days)
16 after the Effective Date as defined in Section 3.2, and continuing thereafter, Sun Bum shall only
17 ship, sell, or offer for sale in California, reformulated Product pursuant to Section 3.2 or Product
18 that is labeled with a clear and reasonable warning pursuant to Section 3.3. For purposes of this
19 Consent Judgment, "Reformulated Product" includes *Sun Bum Cool Down After Sun* lotions, as set
20 forth in Section 2.1, that meet the Reformulation Standard set forth in Section 3.2.

21 3.2 **Reformulation Standard.** Reformulated Product shall meet or exceed the standards
22 outlined in this section. Acceptable formulated and Reformulated Product is defined as Product
23 which does not contain DEA in any accessible component (*i.e.*, any component that may be touched
24 during a reasonably foreseeable use), when analyzed pursuant to any acceptable methodology used
25 by any state or federal agency for determining DEA content in a substance.

1 **3.3 Clear and Reasonable Warning.** Within one year (365 days) of the Effective Date
2 of this Consent Judgment, and continuing thereafter, a clear and reasonable exposure warning as
3 set forth in this §§ 3.3 and 3.4 must be provided for all Covered Products that Defendant
4 manufacturers, imports, distributes, sells, or offers for sale in California that are not a Reformulated
5 Product. There shall be no obligation for Defendant to provide a warning for Covered Products that
6 enter the stream of commerce prior to one year (365 days) after the Effective Date of this Consent
7 Judgment. The warning, if required, shall consist of either the **Warning** or **Alternative Warning**
8 described in §§ 3.3(a) or (b), respectively:

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

10 ⚠ **WARNING:** This product can expose you to chemicals including
11 diethanolamine (DEA), which is known to the State of California to cause cancer.
12 For more information go to www.P65Warnings.ca.gov.

13 (b) **Alternative Warning:** Sun Bum may, but is not required to, use the alternative
14 short-form warning as set forth in this § 3.4(b) ("**Alternative Warning**") as follows:

15 ⚠ **WARNING:** Cancer - www.P65Warnings.ca.gov.

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

1 If Sun Bum sells Covered Products that are not a Reformulated Product via an internet
2 website to customers located in California, the warning requirements of this section shall be
3 satisfied if the foregoing warning appears either: (a) on the same web page on which a Covered
4 Product is displayed and/or described; (b) on the same page as the price for the Covered Product;
5 or (c) on one or more web pages displayed to a purchaser prior to purchase during the checkout
6 process. Alternatively, a symbol consisting of a black exclamation point in a yellow or white
7 equilateral triangle may appear adjacent to or immediately following the display, description, price,
8 or checkout listing of the Covered Product, if the warning statement appears elsewhere on the same
9 web page in a manner that clearly associates 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 (1) adhering to §§ 3.3 and 3.4 of this Consent Judgment;
12 (2) complying with warning requirements adopted by the State of California's Office of
13 Environmental Health Hazard Assessment ("OEHHA") after the Effective Date; or (3) refraining
14 from manufacturing, distributing, and/or offering for sale in California products that expose users
15 to DEA, *i.e.*, by only shipping, selling, or offering for sale in California, Reformulated Product.
16 Nothing in this Consent Judgment requires Sun Bum to include any Proposition 65 warnings on
17 Reformulated Products, or any products that do not contain chemicals listed under Proposition 65,
18 or on any products which contain such chemicals in concentrations at or below Proposition 65 "No
19 Significant Risk Levels" and/or "Maximum Allowable Dose Levels."

20 **3.6 Formulated/Reformulation Commitment.** As of one year (365 days) after the
21 Effective Date, Sun Bum shall not knowingly manufacture, import, distribute, sell, or offer the
22 Covered Products in the State of California unless it is a Reformulated Product pursuant to Section
23 3.2 or unless it contains a clear and reasonable warning pursuant to Sections 3.3 and 3.4.

24 **4. MONETARY TERMS**

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

3 4.1.1 Within ten (10) days of the Effective Date, Sun Bum shall issue two separate
4 checks for the Civil Penalty payment to (a) "OEHHA" in the amount of \$2,250.00; and to (b)
5 "Brodsky & Smith, LLC in Trust for Espinoza" in the amount of \$750.00. Payment owed to
6 Espinoza pursuant to this Section shall be delivered to the following payment address:

7 Evan J. Smith, Esquire
8 Brodsky & Smith, LLC
9 Two Bala Plaza, Suite 510
Bala Cynwyd, PA 19004

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

12 For United States Postal Service Delivery:

13 Mike Gyurics
14 Fiscal Operations Branch Chief
Office of Environmental Health Hazard Assessment
15 P.O. Box 4010
Sacramento, CA 95812-4010

16 For Non-United States Postal Service Delivery:

17 Mike Gyurics
18 Fiscal Operations Branch Chief
Office of Environmental Health Hazard Assessment
19 1001 I Street
Sacramento, CA 95814

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

22 4.2 **Attorneys' Fees.** Within ten (10) days of the Effective Date, Sun Bum shall pay
23 \$27,000.00 to Brodsky & Smith, LLC ("Brodsky Smith") as complete reimbursement for
24 Espinoza's attorneys' fees and costs incurred as a result of investigating, bringing this matter to
25 Sun Bum attention, litigating and negotiating and obtaining judicial approval of a settlement in the
26 public interest, pursuant to Code of Civil Procedure § 1021.5.

1 **5. RELEASE OF ALL CLAIMS**

2 5.1 This Consent Judgment is a full, final, and binding resolution between Espinoza
3 acting on his own behalf, and on behalf of the public interest, and Sun Bum, and its parents,
4 shareholders, members, directors, officers, managers, employees, representatives, agents,
5 attorneys, divisions, subdivisions, subsidiaries, partners, sister companies, and affiliates, and their
6 predecessors, successors and assigns ("Defendant Releasees"), and all entities from whom they
7 obtain and to whom they directly or indirectly distribute or sell Covered Products, including but
8 not limited to manufacturers, suppliers, distributors, wholesalers, customers, licensors, licensees
9 retailers, franchisees, and cooperative members ("Downstream Releasees"), of all claims for
10 violations of Proposition 65 based on exposure to DEA from Covered Products as set forth in the
11 Notice, with respect to any Covered Products manufactured, distributed, or sold by Sun Bum prior
12 to the Effective Date. This Consent Judgment shall have preclusive effect such that no other person
13 or entity, whether purporting to act in his, her, or its interests or the public interest shall be permitted
14 to pursue and/or take any action with respect to any violation of Proposition 65 that was alleged in
15 the Complaint, or that could have been brought pursuant to the Notice against Sun Bum and/or the
16 Downstream Releasees of the Covered Products ("Proposition 65 Claims"). Compliance with the
17 terms of this Consent Judgment constitutes compliance with Proposition 65 with regard to the
18 Covered Products.

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

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

9 5.3 Sun Bum waives any and all claims against Espinoza, his attorneys and other
10 representatives, for any and all actions taken or statements made (or those that could have been
11 taken or made) by Espinoza and his attorneys and other representatives, whether in the course of
12 investigating claims or otherwise seeking enforcement of Proposition 65 against it in this matter,
13 and/or with respect to Covered Products.

14 **6. INTEGRATION**

15 6.1 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 exist
18 or have been made by any Party with respect to the other Party or the subject matter hereof.

19 **7. GOVERNING LAW**

20 7.1 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. In the event that Proposition 65 is repealed or
22 is otherwise rendered inapplicable by reason of law generally, or as to Covered Products, then
23 Defendant shall have no further obligations pursuant to this Consent Judgment with respect to, and
24 to the extent that, Covered Products are so affected.

25 **8. NOTICES**

26 8.1 Unless specified herein, all correspondence and notices required to be provided
27 pursuant to this Consent Judgment shall be in writing and personally delivered or sent by: (i) first-
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1 class, (registered or certified mail) return receipt requested; or (ii) overnight courier on any party
2 by the other party at the following addresses:

3 For Defendant:

4 Caitlin C. Blanche
5 K&L Gates LLP
6 1 Park Plaza
7 Twelfth Floor
Irvine, CA 92614

8 And

9 For Espinoza:

10 Evan Smith
11 Brodsky & Smith, LLC
9595 Wilshire Blvd., Ste. 900
Beverly Hills, CA 90212

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

14 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

15 9.1 This Consent Judgment may be executed in counterparts and by facsimile, each of
16 which shall be deemed an original, and all of which, when taken together, shall constitute one and
17 the same document.

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

20 10.1 Espinoza agrees to comply with the requirements set forth in California Health &
21 Safety Code § 25249.7(f) and to promptly bring a Motion for Approval of this Consent Judgment.
22 Defendant agrees it shall support approval of such Motion.

23 10.2 This Consent Judgment shall not be effective until it is approved and entered by the
24 Court and shall be null and void if, for any reason, it is not approved by the Court. In such case, the
25 Parties agree to meet and confer on how to proceed and if such agreement is not reached within 30
26 days, the case shall proceed on its normal course.

27 10.3 If the Court approves this Consent Judgment and is reversed or vacated by an
28 appellate court, the Parties shall meet and confer as to whether to modify the terms of this Consent

Judgment. If the Parties do not jointly agree on a course of action to take, the case shall proceed on its normal course on the trial court's calendar.

11. MODIFICATION

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

12. ATTORNEY'S FEES

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

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 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:

2/24/2020

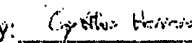
Date:

01/21/2020

By:


GABRIEL ESPINOZA

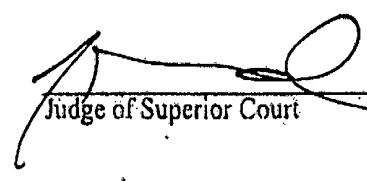
By:


CRYSTAL HANSEN
SUN BUM, LLC

IT IS SO ORDERED, ADJUDGED AND DECREED:

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Dated: 6/30/2020



Judge of Superior Court