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8
9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 COUNTY OF SAN FRANCISCO

11 GABRIEL ESPINOZA,
12 Plaintiff,

13 v.

14 WATER GREMLIN COMPANY, BIG 5
15 CORP.,
16 Defendants.

Case No.: CGC-22-600480

CONSENT JUDGMENT

Judge: Richard B. Ulmer
Dept.: 302
Hearing Date: January 30, 2023
Hearing Time: 9:30 AM
Complaint Filed: June 30, 2022

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1. INTRODUCTION

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

1.2 **Allegations and Representations.** Espinoza alleges that Defendant has exposed individuals to Bisphenol A (BPA) from sales in California by Water Gremlin, Big 5 Corp. or others of Water Gremlin steel fishing sinkers, including but not limited to Gremlin Green unleaded fishing sinkers, UPC#038775036078, without providing a clear and reasonable exposure warning pursuant to Proposition 65. BPA is listed under Proposition 65 as a chemical known to the State of California to cause reproductive toxicity.

1.3 **Notice of Violation/Complaint.** On or about August 16, 2021, Espinoza served Water Gremlin, Big 5 Corp., and various public enforcement agencies with documents entitled “60-Day Notice of Violation” pursuant to Health & Safety Code §25249.7(d) (the “Notice”), alleging that Defendant violated Proposition 65 for failing to warn consumers and customers that use of Water Gremlin steel fishing sinkers expose users in California to BPA. No public enforcer has brought and is diligently prosecuting the claims alleged in the Notice. On June 30, 2022, Espinoza filed a complaint (the “Complaint”) in the matter.

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

1 therein and/or in the Notice.

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

9 **2. DEFINITIONS**

10 2.1 **Covered Products.** The term “Covered Products” means Water Gremlin steel
11 fishing sinkers that are manufactured, distributed and/or offered for sale in California by Water
12 Gremlin or Big 5 Corp.

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 **No Further Sale.** Defendant shall not distribute, offer for sale or sell any Product
17 unless the Product is labeled with a clear Proposition 65 exposure warning as provided in §§ 3.2
18 and 3.3 below.

19 3.2 **Clear and Reasonable Warning.** From May 31, 2023 and continuing thereafter, a
20 clear and reasonable exposure warning as set forth in this §§ 3.2 and 3.3 must be provided for all
21 Covered Products that Defendant manufactures, imports, distributes, sells, or offers for sale in
22 California. There shall be no obligation to provide a warning for Covered Products that are
23 distributed, marketed, sold or shipped to consumers by Defendant or any Downstream Releasees
24 prior to May 31, 2023. The warning shall consist of either the **Warning** or **Alternative Warning**
25 described in §§ 3.2(a) or (b), respectively:

26 (a) **Warning.** The “Warning” shall consist of the statement:
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28

1 **⚠ WARNING:** This product can expose you to chemicals including Bisphenol A
2 (BPA), which is known to the State of California to cause birth defects or other
3 reproductive harm. For more information go to www.P65Warnings.ca.gov.

4 (b) **Alternative Warning:** Water Gremlin may, but is not required to, use the alternative
5 short-form warning as set forth in this § 3.2(b) (“**Alternative Warning**”) as follows:

6 **⚠ WARNING:** Reproductive Harm - www.P65Warnings.ca.gov.

7 3.3 A **Warning** or **Alternative Warning** provided pursuant to § 3.2 must print the word
8 “**WARNING:**” in all capital letters and in bold font, followed by a colon. The warning symbol to
9 the left of the word “**WARNING:**” must be a black exclamation point in a yellow equilateral
10 triangle with a black outline, except that if the sign or label for the Covered Product does not use
11 the color yellow, the symbol may be in black and white. The symbol must be in a size no smaller
12 than the height of the word “**WARNING:**”. The warning shall be affixed to or printed on the
13 Covered Product’s packaging or labeling, or on a placard, shelf tag, sign or electronic device or
14 automatic process, providing that the warning is displayed with such conspicuousness, as compared
15 with other words, statements, or designs as to render it likely to be read and understood by an
16 ordinary individual under customary conditions of purchase or use. A warning may be contained
17 in the same section of the packaging, labeling, or instruction booklet that states other safety
18 warnings, if any, concerning the use of the Covered Product and shall be at least the same size as
19 those other safety warnings.

20 In addition to affixing the **Warning** or **Alternative Warning** to the Covered Product’s
21 packaging or labeling, the **Warning** or **Alternative Warning** shall be posted on websites where
22 Water Gremlin offers Covered Products for sale to consumers in California. The requirements of
23 this Section shall be satisfied if the **Warning** or **Alternative Warning**, or a clearly marked
24 hyperlink using the word “**WARNING,**” appears on the product display page, or by otherwise
25 prominently displaying the warning to the purchaser prior to completing the purchase. To comply
26 with this Section, Water Gremlin shall (a) post the **Warning** or **Alternative Warning** on its own
27 website and, if it has the ability to do so, on the websites of its third-party internet sellers; and (b)
28 if it does not have the ability to post the **Warning** or **Alternative Warning** on the websites of its

1 third-party internet sellers, provide such sellers with written notice in accordance with Title 27,
2 California Code of Regulations, Section 25600.2. Third-party internet sellers of the Product that
3 have been provided with written notice in accordance with Title 27, California Code of Regulations,
4 Section 25600.2 are not released in Section 5 of this Agreement if they fail to meet the warning
5 requirements of this Section.

6 **3.4 Compliance with Warning Regulations.** Defendant shall be deemed to be in
7 compliance with this Consent Judgment by either adhering to §§ 3.2 and 3.3 of this Consent
8 Judgment or by complying with warning requirements adopted by the State of California’s Office
9 of Environmental Health Hazard Assessment (“OEHHA”) applicable to the product and the
10 exposure at issue after the Effective Date.

11 **4. MONETARY TERMS**

12 **4.1 Civil Penalty.** Water Gremlin shall pay \$3,000.00 as a Civil Penalty pursuant to
13 Health and Safety Code section 25249.7(b), to be apportioned in accordance with California Health
14 & Safety Code § 25249.12(c)(1) and (d), with 75% of these funds remitted to OEHHA and the
15 remaining 25% of the Civil Penalty remitted to Espinoza, as provided by California Health & Safety
16 Code § 25249.12(d).

17 **4.1.1** Within ten (10) days of the Effective Date and Water Gremlin’s receipt of
18 W-9’s for Espinoza and Brodsky & Smith, Water Gremlin shall issue two separate checks for the
19 Civil Penalty payment to (a) “OEHHA” in the amount of \$2,250.00; and to (b) “Brodsky & Smith
20 in Trust for Espinoza” in the amount of \$750.00. Payment owed to Espinoza pursuant to this
21 Section shall be delivered to the following payment address:

22 Evan J. Smith, Esquire
23 Brodsky & Smith
24 Two Bala Plaza, Suite 805
25 Bala Cynwyd, PA 19004

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

28 For United States Postal Service Delivery:

 Mike Gyurics

1 Fiscal Operations Branch Chief
2 Office of Environmental Health Hazard Assessment
3 P.O. Box 4010
4 Sacramento, CA 95812-4010

5 For Non-United States Postal Service Delivery:

6 Mike Gyurics
7 Fiscal Operations Branch Chief
8 Office of Environmental Health Hazard Assessment
9 1001 I Street
10 Sacramento, CA 95814

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

13 4.2 **Attorneys' Fees.** Within ten (10) days of the Effective Date, Water Gremlin shall
14 pay \$27,000.00 to Brodsky & Smith ("Brodsky & Smith") as complete reimbursement for
15 Espinoza's attorneys' fees and costs incurred as a result of investigating, bringing this matter to
16 Water Gremlin attention, litigating and negotiating and obtaining judicial approval of a settlement
17 in the public interest, pursuant to Code of Civil Procedure § 1021.5.

18 **5. RELEASE OF ALL CLAIMS**

19 5.1 This Consent Judgment is a full, final, and binding resolution between Espinoza
20 acting on his own behalf, and on behalf of the public interest, and Water Gremlin, Big 5 Corp. and
21 their parents, shareholders, members, directors, officers, managers, employees, representatives,
22 agents, attorneys, divisions, subdivisions, subsidiaries, partners, sister companies, and affiliates,
23 and their predecessors, successors and assigns ("Defendant Releasees"), and all entities from whom
24 they obtain and to whom they directly or indirectly distribute or sell Covered Products, including
25 but not limited to manufacturers, suppliers, distributors, wholesalers, customers, licensors,
26 licensees retailers, franchisees, and cooperative members ("Downstream Releasees"), of all claims
27 for violations of Proposition 65 based on exposure to BPA from use of the Covered Products as set
28 forth in the Notice, with respect to any Covered Products manufactured, distributed, or sold by the
Defendant Releasees prior to the Effective Date or prior to May 31, 2023. It is the Parties' intention
that this Consent Judgment shall have preclusive effect such that no other actions by private
enforcers, whether purporting to act in his, her, or its interests or the public interest shall be

1 permitted to pursue and/or take any action with respect to any violation of Proposition 65 based on
2 exposure to BPA that was alleged in the Complaint, or that could have been brought pursuant to
3 the Notice against Water Gremlin and/or the Downstream Releasees of the Covered Products
4 (“Proposition 65 Claims”).

5 5.2 In addition to the foregoing, Espinoza, on behalf of himself, his past and current
6 agents, representatives, attorneys, and successors and/or assignees, and *not* in his representative
7 capacity, hereby waives all rights to institute or participate in, directly or indirectly, any form of
8 legal action and releases Water Gremlin, Defendant Releasees, and Downstream Releasees from
9 any and all manner of actions, causes of action, claims, demands, rights, suits, obligations, debts,
10 contracts, agreements, promises, liabilities, damages, charges, losses, costs, expenses, and
11 attorneys’ fees, of any nature whatsoever, known or unknown, in law or equity, fixed or contingent,
12 now or in the future, with respect to any alleged violations of Proposition 65 related to or arising
13 from exposure to BPA from Covered Products manufactured, distributed, or sold by Water
14 Gremlin, Defendant Releasees or Downstream Releasees. With respect to the foregoing waivers
15 and releases in this paragraph, Espinoza hereby specifically waives any and all rights and benefits
16 which he now has, or in the future may have, conferred by virtue of the provisions of § 1542 of the
17 California Civil Code, which provides as follows:

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

24 5.3 Water Gremlin waives any and all claims against Espinoza, his attorneys and other
25 representatives, for any and all actions taken, or statements made (or those that could have been
26 taken or made) by Espinoza and his attorneys and other representatives, whether in the course of
27 investigating claims or otherwise seeking enforcement of Proposition 65 against it in this matter,
28 and/or with respect to exposure to BPA from Covered Products.

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6. INTEGRATION

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

7. GOVERNING LAW

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

8. NOTICES

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

For Defendant:

John Stanis
Masuda, Funai, Eifert & Mitchell, LTD.
200 N. Martingale Road, Suite 800
Schaumburg, IL 60173-2033

And

For Espinoza:

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

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

1 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

2 9.1 This Consent Judgment may be executed in counterparts and by facsimile, each of
3 which shall be deemed an original, and all of which, when taken together, shall constitute one and
4 the same document.

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

7 10.1 Espinoza agrees to comply with the requirements set forth in California Health &
8 Safety Code § 25249.7(f) and to promptly bring a Motion for Approval of this Consent Judgment.
9 Defendant agrees it shall support approval of such Motion.

10 10.2 This Consent Judgment shall not be effective until it is approved and entered by the
11 Court and shall be null and void if, for any reason, it is not approved by the Court. In such case, the
12 Parties agree to meet and confer on how to proceed and if such agreement is not reached within 30
13 days, the case shall proceed on its normal course.

14 10.3 If the Court approves this Consent Judgment and is reversed or vacated by an
15 appellate court, the Parties shall meet and confer as to whether to modify the terms of this Consent
16 Judgment. If the Parties do not jointly agree on a course of action to take, the case shall proceed on
17 its normal course on the trial court's calendar.

18 **11. MODIFICATION**

19 11.1 This Consent Judgment may be modified only by further stipulation of the Parties
20 and the approval of the Court or upon the granting of a motion brought to the Court by either Party.

21 **12. ATTORNEY'S FEES**

22 12.1 A Party who unsuccessfully brings or contests an action arising out of this Consent
23 Judgment shall be required to pay the prevailing party's reasonable attorney's fees and costs.

24 12.2 Nothing in this Section shall preclude a Party from seeking an award of sanctions
25 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

11 **AGREED TO:**

AGREED TO:

12 Date: 12/13/22
13 _____

Date: *Nov. 21, 2022*

14 By: _____
15 GABRIEL ESPINOZA

By: *Brendley J. Chantrel*
_____ WATER GREMLIN COMPANY

16
17 **IT IS SO ORDERED, ADJUDGED AND DECREED:**

18
19 Dated: _____

Judge of Superior Court