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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 APEX TOOL GROUP, LLC, ANAWALT
15 LUMBER CO., INC.,

16 Defendants.

Case No.: CGC-23-610516

CONSENT JUDGMENT

Judge: Richard B. Ulmer

Dept.: 302

Hearing Date: June 13, 2024

Hearing Time: 9:30 AM

Complaint Filed: November 17, 2023

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 Apex Tool Group,
4 LLC (“Apex” or “Defendant”) with Espinoza and Defendant collectively referred to as the “Parties”
5 and 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. Apex is alleged to be a person in the course
8 of doing business for purposes of Proposition 65, Cal. Health & Safety Code §§ 25249.6 et seq.

9 1.2 **Allegations and Representations.** Espinoza alleges that Defendant has exposed
10 individuals to bisphenol A (BPA) from its sales of Crescent *Apex*® tool cases, UPC #
11 697099340003 without providing a clear and reasonable exposure warning pursuant to Proposition
12 65. BPA is listed pursuant to Proposition 65 as a chemical known to the State of California to cause
13 birth defects or other reproductive harm.

14 1.3 **Notice of Violation/Action.** On or about December 1, 2022, Espinoza served Apex
15 and various public enforcement agencies with documents entitled “60-Day Notice of Violation”
16 pursuant to Health & Safety Code §25249.7(d) (the “Notice”), alleging that Defendant violated
17 Proposition 65 for failing to warn consumers and customers that use of Crescent *Apex*® tool cases,
18 UPC # 697099340003 expose users in California to BPA. No public enforcer has brought and is
19 diligently prosecuting the claims alleged in the Notice. On November 17, 2023, Espinoza filed a
20 complaint (the “Complaint”).

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 Action filed in this matter, that
23 venue is proper in the County of San Francisco, and that this Court has jurisdiction to approve,
24 enter, and oversee the enforcement of this Consent Judgment as a full and final binding resolution
25 of all claims which were or could have been raised in the Action based on the facts alleged therein
26 and in the Notice.

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 Crescent *Apex*® tool
10 cases, UPC # 697099340003 that are manufactured, distributed, shipped into California and offered
11 for sale in California by Apex.

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: WARNINGS**

15 3.1 **Clear and Reasonable Warning.** Within ninety (90) days of the date this Consent
16 Judgment is signed by both Parties, and continuing thereafter, Defendant shall begin labeling all
17 Covered Products that Defendant manufactures, imports, distributes, sells, or offers for sale in
18 California with a clear and reasonable exposure warning as set forth in this §§ 3.1 and 3.2. There
19 shall be no obligation for Defendant to provide a warning for Covered Products that enter the stream
20 of commerce (including but not limited to Covered Products in warehouse inventory or offered for
21 sale in stores or online) prior to the date this Consent Judgment is signed by both Parties. The
22 warning shall consist of either the **Warning** or **Alternative Warning** described in §§ 3.1(a) or (b),
23 respectively:

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

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

27 (b) **Alternative Warning:** Apex may, but is not required to, use the alternative short-
28 form warning as set forth in this § 3.1(b) ("**Alternative Warning**") as follows:

1  **WARNING:** Reproductive Harm - www.P65Warnings.ca.gov.

2 3.2 A **Warning** or **Alternative Warning** provided pursuant to § 3.1 must print the word
3 “**WARNING:**” in all capital letters and in bold font, followed by a colon. The warning symbol to
4 the left of the word “**WARNING:**” must be a black exclamation point in a yellow equilateral
5 triangle with a black outline, except that if the sign or label for the Covered Product does not use
6 the color yellow, the symbol may be in black and white. The symbol must be in a size no smaller
7 than the height of the word “**WARNING:**”. The **Warning** or **Alternative Warning** shall be affixed
8 to or printed on the Covered Product’s packaging or labeling, or on a placard, shelf tag, sign or
9 electronic device or automatic process, providing that the **Warning** or **Alternative Warning** is
10 displayed with such conspicuousness, as compared with other words, statements, or designs as to
11 render it likely to be read and understood by an ordinary individual under customary conditions of
12 purchase or use. The **Warning** or **Alternative Warning** may be contained in the same section of
13 the packaging, labeling, or instruction booklet that states other safety warnings, if any, concerning
14 the use of the Covered Product and shall be at least the same size as those other safety warnings. If
15 “consumer information,” as that term is defined in Title 27, California Code of Regulations, Section
16 25600.1(c) as it may be amended from time to time, is provided in a foreign language, Apex shall
17 provide the **Warning** or **Alternative Warning** in the foreign language in accordance with
18 applicable warning regulations adopted by OEHHA.

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

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

5 **3.3 Compliance with Warning Regulations.** Defendant shall be deemed to be in
6 compliance with this Consent Judgment by either adhering to §§ 3.1 and 3.2 of this Consent
7 Judgment or by complying with warning regulations adopted by OEHHA applicable to the Covered
8 Product and exposures at issue after the Effective Date, or within ninety (90) days of the Effective
9 Date.

10 **4. MONETARY TERMS**

11 **4.1 Civil Penalty.** Apex shall pay \$2,000.00 as a Civil Penalty pursuant to Health and
12 Safety Code section 25249.7(b), to be apportioned in accordance with California Health & Safety
13 Code § 25192, with 75% of these funds remitted to OEHHA and the remaining 25% of the Civil
14 Penalty remitted to Espinoza, as provided by California Health & Safety Code § 25249.12(d), as
15 follows: within ten (10) days of the Effective Date, Apex shall issue two separate checks for the
16 Civil Penalty payment to (a) "OEHHA" in the amount of \$1,500.00; and to (b) "Gabriel Espinoza"
17 in the amount of \$500.00. Payment owed to Espinoza pursuant to this Section shall be delivered to
18 the following payment address:

19 Evan J. Smith, Esquire
20 Brodsky Smith
21 Two Bala Plaza, Suite 805
22 Bala Cynwyd, PA 19004

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

25 For United States Postal Service Delivery:

26 Mike Gyurics
27 Fiscal Operations Branch Chief
28 Office of Environmental Health Hazard Assessment
P.O. Box 4010
Sacramento, CA 95812-4010

For Non-United States Postal Service Delivery:

1 Mike Gyurics
2 Fiscal Operations Branch Chief
3 Office of Environmental Health Hazard Assessment
4 1001 I Street
5 Sacramento, CA 95814

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

8 4.2 **Attorneys' Fees.** Within ten (10) days of the Effective Date, Apex shall pay
9 \$18,000.00 to Brodsky Smith as complete reimbursement for Espinoza's attorneys' fees and costs
10 incurred as a result of investigating, bringing this matter to the attention of Apex, litigating and
11 negotiating and obtaining judicial approval of a settlement in the public interest, pursuant to Code
12 of Civil Procedure § 1021.5.

13 **5. RELEASE OF ALL CLAIMS**

14 5.1 This Consent Judgment is a full, final, and binding resolution between Espinoza
15 acting on his own behalf, and on behalf of the public interest, and Apex, and its parents,
16 shareholders, members, directors, officers, managers, employees, representatives, agents,
17 attorneys, divisions, subdivisions, subsidiaries, partners, sister companies, and affiliates, and their
18 predecessors, successors and assigns ("Defendant Releasees"), and all entities from whom they
19 obtain and to whom they directly or indirectly distribute or sell Covered Products, including but
20 not limited to manufacturers, suppliers, distributors, wholesalers, customers, licensors, licensees
21 retailers, including but not limited to Anawalt Lumber Co., Inc., and its parents, subsidiaries, and
22 affiliates, franchisees, and cooperative members ("Downstream Releasees"), of all claims for
23 violations of Proposition 65 based on exposure to BPA from use of the Covered Products
24 manufactured, distributed, or sold by Apex prior to the Effective Date, or within 90 days of the
25 Effective Date, as set forth in the Notice. It is the Parties' intention that this Consent Judgment shall
26 have preclusive effect such that no other actions by private enforcers, whether purporting to act in
27 his, her, or its interests or the public interest shall be permitted to pursue and take any action with
28 respect to any violation of Proposition 65 based on exposure to BPA from use of the Covered
Products that was alleged in the Complaint, or that could have been brought pursuant to the Notice

1 against Apex and the Downstream Releasees (“Proposition 65 Claims”). Apex’s compliance with
2 the terms of this Consent Judgment constitutes compliance with Proposition 65 by Apex with regard
3 to exposure to BPA from use of the Covered Products.

4 5.2 In addition to the foregoing, Espinoza, on behalf of himself, his past and current
5 agents, representatives, attorneys, and successors and assignees, and not in his representative
6 capacity, hereby waives all rights to institute or participate in, directly or indirectly, any form of
7 legal action and releases Apex, Defendant Releasees, and Downstream Releasees from any and all
8 manner of actions, causes of action, claims, demands, rights, suits, obligations, debts, contracts,
9 agreements, promises, liabilities, damages, charges, losses, costs, expenses, and attorneys’ fees, of
10 any nature whatsoever, known or unknown, in law or equity, fixed or contingent, now or in the
11 future, with respect to any alleged violations of Proposition 65 related to or arising from Covered
12 Products manufactured, distributed, or sold by Apex, Defendant Releasees or Downstream
13 Releasees. With respect to the foregoing waivers and releases in this paragraph, Espinoza hereby
14 specifically waives any and all rights and benefits which he now has, or in the future may have,
15 conferred by virtue of the provisions of § 1542 of the California Civil Code, which provides as
16 follows:

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

21 5.3 Apex waives any and all claims against Espinoza, his attorneys and other
22 representatives, for any and all actions taken, or statements made (or those that could have been
23 taken or made) by Espinoza and his attorneys and other representatives, whether in the course of
24 investigating claims or otherwise seeking enforcement of Proposition 65 against it in this matter,
25 and with respect to Covered Products.

26 **6. INTEGRATION**

27 6.1 This Consent Judgment contains the sole and entire agreement of the Parties and
28 any and all prior negotiations and understandings related hereto shall be deemed to have been

1 merged within it. No representations or terms of agreement other than those contained herein exist
2 or have been made by any Party with respect to the other Party or the subject matter hereof.

3 **7. GOVERNING LAW**

4 7.1 The terms of this Consent Judgment shall be governed by the laws of the State of
5 California and apply within the State of California. In the event that Proposition 65 is repealed or
6 is otherwise rendered inapplicable by reason of law generally, or as to Covered Products, then
7 Defendant shall have no further obligations pursuant to this Consent Judgment with respect to, and
8 to the extent that, Covered Products are so affected.

9 **8. NOTICES**

10 8.1 Unless specified herein, all correspondence and notices required to be provided
11 pursuant to this Consent Judgment shall be in writing and personally delivered or sent by: (i) first-
12 class, (registered or certified mail) return receipt requested; or (ii) overnight courier on any party
13 by the other party at the following addresses:

14 For Defendant:

15 Jessie Gabriel
16 The Gabriel Firm P.C.
17 128 E. Broadway #1229
18 New York, NY 10002

18 And

19 For Espinoza:

20 Evan Smith
21 Brodsky Smith
22 9595 Wilshire Blvd., Ste. 900
23 Beverly Hills, CA 90212

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

26 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

27 9.1 This Consent Judgment may be executed in counterparts and by facsimile, each of
28 which shall be deemed an original, and all of which, when taken together, shall constitute one and
the same document.

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

3 10.1 Espinoza agrees to comply with the requirements set forth in California Health &
4 Safety Code § 25249.7(f) and to promptly bring a Motion for Approval of this Consent Judgment.
5 Defendant agrees it shall support approval of such Motion.

6 10.2 This Consent Judgment shall not be effective until it is approved and entered by the
7 Court and shall be null and void if, for any reason, it is not approved by the Court. In such case, the
8 Parties agree to meet and confer on how to proceed and if such agreement is not reached within 30
9 days, the case shall proceed on its normal course.

10 10.3 If the Court approves this Consent Judgment and is reversed or vacated by an
11 appellate court, the Parties shall meet and confer as to whether to modify the terms of this Consent
12 Judgment. If the Parties do not jointly agree on a course of action to take, the case shall proceed on
13 its normal course on the trial court's calendar.

14 **11. MODIFICATION**

15 11.1 This Consent Judgment may be modified only by further stipulation of the Parties
16 and the approval of the Court or upon the granting of a motion brought to the Court by either Party.

17 **12. ATTORNEY'S FEES**

18 12.1 A Party who unsuccessfully brings or contests an action arising out of this Consent
19 Judgment shall be required to pay the prevailing party's reasonable attorney's fees and costs.

20 12.2 Nothing in this Section shall preclude a Party from seeking an award of sanctions
21 pursuant to law.

22 **13. RETENTION OF JURISDICTION**

23 13.1 This Court shall retain jurisdiction of this matter to implement or modify the
24 Consent Judgment.

25 **14. AUTHORIZATION**

26 14.1 The undersigned are authorized to execute this Consent Judgment on behalf of their
27 respective Parties and have read, understood, and agree to all of the terms and conditions of this
28

1 document and certify that he or she is fully authorized by the Party he or she represents to execute
2 the Consent Judgment on behalf of the Party represented and legally bind that Party. Except as
3 explicitly provided herein each Party is to bear its own fees and costs.

4
5 **AGREED TO:**

AGREED TO:

6 Date: 4/25/24

Date: 3/19/2024

7 By: 

By: 

8 GABRIEL ESPINOZA

APEX TOOL GROUP, LLC

Name: Kyle Hoidal

Title: Deputy General Counsel

9
10
11 **IT IS SO ORDERED, ADJUDGED AND DECREED:**

12
13 Dated: _____

Judge of Superior Court