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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 AQUA-LEISURE RECREATION, LLC,

15 Defendant.

Case No.: CGC-24-620265

CONSENT JUDGMENT

Judge: Joseph M. Quinn

Dept.: 302

Hearing Date: February 7, 2025

Hearing Time: 9:30 AM

Complaint Filed: December 4, 2024

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 Aqua-Leisure
4 Recreation, LLC (“Aqua-Leisure” or “Defendant”) with Espinoza and Defendant collectively
5 referred to as the “Parties” and each of them as a “Party.” Espinoza is an individual residing in
6 California that seeks to promote awareness of exposures to toxic chemicals and improve human
7 health by reducing or eliminating hazardous substances contained in consumer products. Aqua-
8 Leisure is alleged to be a person in the course of doing business for purposes of Proposition 65,
9 Cal. Health & Safety Code §§ 25249.6 et seq.

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

14 1.3 **Notice of Violation/Action.** On or about January 23, 2024, Espinoza served Aqua-
15 Leisure 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 Defendant’s snorkel
18 masks expose them in California to BPA. No public enforcer has brought and is diligently
19 prosecuting the claims alleged in the Notice. On December 4, 2024, Espinoza filed a complaint (the
20 “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 snorkel masks that are
10 manufactured, distributed, shipped into California and offered for sale in California by Aqua-
11 Leisure.

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: REFORMULATION AND/OR WARNINGS**

15 3.1 **Reformulation of Covered Products.** Commencing within sixty (60) days of the
16 Effective Date (the “Compliance Date”), and continuing thereafter, Covered Products that Aqua-
17 Leisure directly manufactures, imports, distributes, sells, or offers for sale in California shall either
18 be: (a) reformulated Products pursuant to § 3.2, below; or (b) labeled with a clear and reasonable
19 exposure warning pursuant to §§ 3.3 and 3.4, below. For purposes of this Consent Judgment, a
20 “Reformulated Product” is a Covered Product that is in compliance with the standard set forth in §
21 3.2 below. The warning requirement set forth in §§ 3.3 and 3.4 shall not apply to any Reformulated
22 Product.

23 3.2 **Reformulation Standard.** “Reformulated Products” shall mean any Covered
24 Products subject to this Consent Judgment that achieves a wipe test result equal to, or less than, 3
25 micrograms of BPA.

26 3.2.1 **Wipe Test Protocol.** The “Wipe Test Protocol” for determining if a Covered
27 Product is a Reformulated Product is as follows:
28

1 (a) Accessible sample surface of the Covered Product is rubbed by wipe
2 sample swabs/paper wetted with HPLC grade water heated to 98 °F sixty (60) times along
3 longitudinal, latitudinal and diagonal orientation.

4 (b) Wipe sample swabs/paper is extracted with methanol on wrist shaker
5 for one (1) hour and analyzed by LC/MS/MS.

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

- 13 (a) **Warning.** The “Warning” shall consist of the statement:
14 **⚠ WARNING:** This product can expose you to bisphenol A (BPA), which is
15 known to the State of California to cause birth defects or other reproductive
16 harm. For more information go to www.P65Warnings.ca.gov.
17 (b) **Alternative Warning:** Aqua-Leisure may, but is not required to, use the alternative
18 short-form warning as set forth in this § 3.3(b) (“**Alternative Warning**”) as follows:

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

19 **3.4 A Warning or Alternative Warning** provided pursuant to § 3.3 must print the word
20 “**WARNING:**” in all capital letters and in bold font, followed by a colon. The warning symbol to
21 the left of the word “**WARNING:**” must be a black exclamation point in a yellow equilateral
22 triangle with a black outline, except that if the sign or label for the Covered Product does not use
23 the color yellow, the symbol may be in black and white. The symbol must be in a size no smaller
24 than the height of the word “**WARNING:**”. The **Warning** or **Alternative Warning** shall be affixed
25 to or printed on the Covered Product’s packaging or labeling, or on a placard, shelf tag, sign or
26 electronic device or automatic process, or in a way that otherwise complies with Title 27, California
27 Code of Regulations, Section 25602 *et seq.*, providing that the **Warning** or **Alternative Warning**
28 is displayed with such conspicuousness, as compared with other words, statements, or designs as

1 to render it likely to be read and understood by an ordinary individual under customary conditions
2 of purchase or use. The **Warning** or **Alternative Warning** may be contained in the same section
3 of the packaging, labeling, or instruction booklet that states other safety warnings, if any,
4 concerning the use of the Covered Product and shall be at least the same size as those other safety
5 warnings. If “consumer information,” as that term is defined in Title 27, California Code of
6 Regulations, Section 25600.1(c) as it may be amended from time to time, is provided in a foreign
7 language, Aqua-Leisure shall provide the **Warning** or **Alternative Warning** in the foreign
8 language in accordance with applicable warning regulations adopted by OEHHA.

9 In addition, the **Warning** or **Alternative Warning** shall be posted on websites where Aqua-
10 Leisure offers Products for sale to consumers in California. The requirements of this Section shall
11 be satisfied if the **Warning** or **Alternative Warning**, or a clearly marked hyperlink using the word
12 “**WARNING**,” appears on the product display page, or by otherwise prominently displaying the
13 warning to the purchaser prior to completing the purchase. To comply with this Section, Aqua-
14 Leisure shall (a) post the **Warning** or **Alternative Warning** on its own website and, if it has the
15 ability to do so, on the websites of its third-party internet sellers; and (b) if it does not have the
16 ability to post the **Warning** or **Alternative Warning** on the websites of its third-party internet
17 sellers, provide such sellers with written notice in accordance with Title 27, California Code of
18 Regulations, § 25600.2. Third-party internet sellers of the Covered Product that have been provided
19 with written notice in accordance with Title 27, California Code of Regulations, § 25600.2 are not
20 released in Section 5 of this Agreement if they fail to meet the warning requirements herein.

21 **3.5 Compliance with Warning Regulations.** Defendant shall be deemed to be in
22 compliance with this Consent Judgment by either adhering to §§ 3.3 and 3.4 of this Consent
23 Judgment or by complying with warning regulations adopted by OEHHA applicable to the Covered
24 Product and exposures at issue.

25 **4. MONETARY TERMS**

26 **4.1 Civil Penalty.** Aqua-Leisure shall pay \$2,000.00 as a Civil Penalty pursuant to
27 Health 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
2 the Civil Penalty remitted to Espinoza, as provided by California Health & Safety Code
3 § 25249.12(d).

4 4.1.1 Within ten (10) days of the Effective Date, Aqua-Leisure shall issue two
5 separate checks for the Civil Penalty payment to (a) "OEHHA" in the amount of \$1,500.00; and
6 to (b) "Gabriel Espinoza" in the amount of \$500.00. Payment owed to Espinoza pursuant to this
7 Section shall be delivered to the following payment address:

8 Evan J. Smith, Esquire
9 Brodsky Smith
10 Two Bala Plaza, Suite 805
11 Bala Cynwyd, PA 19004

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

14 For United States Postal Service Delivery:

15 Mike Gyurics
16 Fiscal Operations Branch Chief
17 Office of Environmental Health Hazard Assessment
18 P.O. Box 4010
19 Sacramento, CA 95812-4010

20 For Non-United States Postal Service Delivery:

21 Mike Gyurics
22 Fiscal Operations Branch Chief
23 Office of Environmental Health Hazard Assessment
24 1001 I Street
25 Sacramento, CA 95814

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

28 4.2 **Attorneys' Fees.** Within ten (10) days of the Effective Date, Aqua-Leisure shall pay
\$23,000.00 to Brodsky Smith as complete reimbursement for Espinoza's attorneys' fees and costs
incurred as a result of investigating, bringing this matter to the attention of Aqua-Leisure, litigating
and negotiating and obtaining judicial approval of a settlement in the 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 Aqua-Leisure, 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 to whom they directly or
7 indirectly distribute or sell Covered Products, including but not limited to manufacturers,
8 distributors, wholesalers, customers, licensors, licensees retailers, including but not limited to Big
9 5 Corp., and its parents, subsidiaries, and affiliates, franchisees, and cooperative members
10 (“Downstream Releasees”), of all claims for violations of Proposition 65 based on exposure to BPA
11 from use of the Covered Products manufactured, distributed, or sold by Aqua-Leisure within 60
12 days of the Effective Date, as set forth in the Notice. It is the Parties’ intention that this Consent
13 Judgment shall have preclusive effect such that no other actions by private enforcers, whether
14 purporting to act in his, her, or its interests or the public interest shall be permitted to pursue and
15 take any action with respect to any violation of Proposition 65 based on exposure to BPA from use
16 of the Covered Products that was alleged in the Complaint, or that could have been brought pursuant
17 to the Notice against Aqua-Leisure and the Downstream Releasees (“Proposition 65 Claims”).
18 Aqua-Leisure’s compliance with the terms of this Consent Judgment constitutes compliance with
19 Proposition 65 by Aqua-Leisure with regard to exposure to BPA from use of the Covered Products.

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

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

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

17 **6. INTEGRATION**

18 6.1 This Consent Judgment contains the sole and entire agreement of the Parties and
19 any and all prior negotiations and understandings related hereto shall be deemed to have been
20 merged within it. No representations or terms of agreement other than those contained herein exist
21 or have been made by any Party with respect to the other Party or the subject matter hereof.

22 **7. NOTICES**

23 7.1 Unless specified herein, all correspondence and notices required to be provided
24 pursuant to this Consent Judgment shall be in writing and personally delivered or sent by: (i) first-
25 class, (registered or certified mail) return receipt requested; or (ii) overnight courier on any party
26 by the other party at the following addresses:

27 For Defendant:

28 George Gigounas
Sean Newland
DLA Piper LLP (US)
555 Mission St., Ste. 2400
San Francisco, CA 94105

1 And

2 For Espinoza:

3 Evan Smith
4 Brodsky Smith
5 9465 Wilshire Blvd., Ste. 300
6 Beverly Hills, CA 90212

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

9 **8. COUNTERPARTS; FACSIMILE SIGNATURES**

10 8.1 This Consent Judgment may be executed in counterparts and by facsimile, each of
11 which shall be deemed an original, and all of which, when taken together, shall constitute one and
12 the same document.

13 **9. COMPLIANCE WITH HEALTH & SAFETY CODE § 25249.7(f)/COURT**
14 **APPROVAL**

15 9.1 Espinoza agrees to comply with the requirements set forth in California Health &
16 Safety Code § 25249.7(f) and to promptly bring a Motion for Approval of this Consent Judgment.
17 Defendant agrees it shall support approval of such Motion.

18 9.2 This Consent Judgment shall not be effective until it is approved and entered by the
19 Court and shall be null and void if, for any reason, it is not approved by the Court. In such case, the
20 Parties agree to meet and confer on how to proceed and if such agreement is not reached within 30
21 days, the case shall proceed on its normal course.

22 9.3 If the Court approves this Consent Judgment and is reversed or vacated by an
23 appellate court, the Parties shall meet and confer as to whether to modify the terms of this Consent
24 Judgment. If the Parties do not jointly agree on a course of action to take, the case shall proceed on
25 its normal course on the trial court's calendar.

26 **10. MODIFICATION**

27 10.1 This Consent Judgment may be modified only by further stipulation of the Parties
28 and the approval of the Court or upon the granting of a motion brought to the Court by either Party.

1 **11. ATTORNEY'S FEES**

2 11.1 A Party who unsuccessfully brings or contests an action arising out of this Consent
3 Judgment shall be required to pay the prevailing party's reasonable attorney's fees and costs.

4 11.2 Nothing in this Section shall preclude a Party from seeking an award of sanctions
5 pursuant to law.

6 **12. RETENTION OF JURISDICTION**

7 12.1 This Court shall retain jurisdiction of this matter to implement or modify the
8 Consent Judgment.

9 **13. AUTHORIZATION**

10 13.1 The undersigned are authorized to execute this Consent Judgment on behalf of their
11 respective Parties and have read, understood, and agree to all of the terms and conditions of this
12 document and certify that he or she is fully authorized by the Party he or she represents to execute
13 the Consent Judgment on behalf of the Party represented and legally bind that Party. Except as
14 explicitly provided herein each Party is to bear its own fees and costs.

15 **AGREED TO:**

AGREED TO:

16
17 Date: _____

Date: 12/10/24

18 By: _____

By: 

19 GABRIEL ESPINOZA

AQUA-LEISURE RECREATION, LLC

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21 **IT IS SO ORDERED, ADJUDGED AND DECREED:**

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23 Dated: _____

24 Judge of Superior Court

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AGREED TO:

AGREED TO:

Date: 12/20/24

Date: _____

By: GABRIEL ESPINOZA

By: AQUA-LEISURE RECREATION, LLC

IT IS SO ORDERED, ADJUDGED AND DECREED:

Dated: _____

Judge of Superior Court