

## SETTLEMENT AGREEMENT

### 1. INTRODUCTION

**1.1 The Parties.** This Settlement Agreement is entered into by and between Gabriel Espinoza (“Espinoza”) and Land ‘N’ Sea Distributing, Inc. (“Land ‘N’ Sea”). Together, Espinoza and Land ‘N’ Sea are collectively referred to as the “Parties.” Espinoza is an individual who resides in the State of California, and seeks to promote awareness of exposures to toxic chemicals and to improve human health by reducing or eliminating hazardous substances contained in consumer products. Espinoza alleges that Land ‘N’ Sea is a person in the course of doing business for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, Health & Safety Code § 25249.6, et seq. (“Proposition 65”).

**1.2 General Allegations.** Espinoza alleges that Land ‘N’ Sea has exposed individuals to di(2-ethylhexyl) phthalate (DEHP) from its sales of *Seachoice Watersports*® wake board ropes, UPC # 7 19249 86724 3 without first providing users and consumers of the product with a clear and reasonable health hazard exposure warning as required pursuant to Proposition 65. DEHP is listed pursuant to Proposition 65 as a chemical known to the State of California to cause cancer and birth defects or other reproductive harm.

**1.3 Product Description.** The products covered by this Settlement Agreement are wake board rope products manufactured by or for Land ‘N’ Sea, imported by or for Land ‘N’ Sea, or distributed or sold by or for Land ‘N’ Sea to others, including, but not limited to Seachoice brand wake board ropes(the “Covered Products”) that have been imported, distributed, offered for sale and/or sold in California by Land ‘N’ Sea.

**1.4 Notice of Violation.** On March 26, 2023, Espinoza served Land ‘N’ Sea and various public enforcement agencies with a document entitled “Notice of Violation of California Health & Safety Code § 25249.6, et seq.” (the “Notice”). The Notice provided Land ‘N’ Sea and such others, including public enforcers, with notice that alleged that Land ‘N’ Sea was in violation of California Health & Safety Code § 25249.6, for failing to warn California consumers and customers that use of the Covered Products will expose them to DEHP. No public enforcer has diligently prosecuted the

allegations set forth in the Notice. To the best of the Parties' knowledge, no public enforcer has commenced and is diligently prosecuting the same allegations against Land 'N' Sea. Espinoza represents that, other than the current Notice, Espinoza has no suits, claims, charges, complaints or demands of any kind whatsoever currently pending against the Land 'N' Sea with any local, state, or federal court or any governmental, administrative, investigative, civil rights or other agency or board. Espinoza represents and warrants that it is not aware of any potential plaintiff who intends to make demands or bring litigation based on the Covered Products. Espinoza further represents and warrants that they have not been notified or otherwise informed of any such intention or consideration thereof.

**1.5 No Admission.** Land 'N' Sea denies the material factual and legal allegations contained in the Notice and maintains that, to the best of its knowledge, all products that are or have been sold and distributed in California, including the Covered Products, have been and are in compliance with all laws. Nothing in this Settlement Agreement shall be construed as an admission by Land 'N' Sea of any fact, finding, issue of law, or violation of law; nor shall compliance with this Settlement Agreement constitute or be construed as an admission by Land 'N' Sea of any fact, finding, conclusion, issue of law or violation of law, such being specifically denied by Land 'N' Sea. However, this § 1.5 shall not diminish or otherwise affect the obligations, responsibilities and duties under this Settlement Agreement. Notwithstanding the allegations in the Notice, Land 'N' Sea maintains that it has not knowingly manufactured, or caused to be manufactured, the Covered Products for sale in California in violation of Proposition 65.

**1.6 Effective Date.** For purposes of this Settlement Agreement, the term "Effective Date" shall mean the date this Agreement is last executed by the Parties.

## **2. INJUNCTIVE RELIEF: REFORMULATION AND/OR WARNINGS**


**2.1 Reformulation of Products.** Commencing within sixty (60) days after the Effective Date, and continuing thereafter, the Covered Products that Land 'N' Sea directly manufactures, imports, distributes, sells, or offers for sale in California shall either be: (a) reformulated Covered Products pursuant to § 2.2, below; or (b) labeled with a clear and reasonable exposure warning pursuant to §§ 2.3 and 2.4, below. For purposes of this Settlement Agreement, a "Reformulated

Covered Product” is a Covered Product that is in compliance with the standard set forth in § 2.2, below. The warning requirement set forth in §§ 2.3 and 2.4 shall not apply to any Reformulated Product.

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

**2.3 Clear and Reasonable Warning.** Commencing within 60 days after the Effective Date, and continuing thereafter, a clear and reasonable exposure warning as set forth in this §§ 2.3 and 2.4 must be provided for all Covered Products that Land ‘N’ Sea manufacturers, imports, distributes, sells, or offers for sale in California that is not a Reformulated Covered Product. There shall be no obligation for Land ‘N’ Sea to provide an exposure warning for Covered Products that entered the stream of commerce within 60 days after the Effective Date. The warning shall consist of either the **Warning** or **Alternative Warning** described in §§ 2.3(a) or (b), respectively:

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

 **WARNING:** This product can expose you to chemicals including di(2-ethylhexyl) phthalate (DEHP), which is known to the State of California to cause cancer and birth defects or other reproductive harm. For more information go to [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov).

(b) **Alternative Warning:** Land ‘N’ Sea may, but is not required to, use the alternative short-form warning as set forth in this § 2.3(b) (“**Alternative Warning**”) as follows:

 **WARNING:** Cancer and Reproductive Harm - [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov).

**2.4** A **Warning** or **Alternative Warning** provided pursuant to § 2.3 must print the word “**WARNING:**” in all capital letters and in bold font, followed by a colon. The warning symbol to the left of the word “**WARNING:**” must be a black exclamation point in a yellow equilateral triangle with a black outline, except that if the sign or label for the Covered Products does not use the color yellow, the symbol may be in black and white. The symbol must be in a size no smaller than the height of the word “**WARNING:**”. The **Warning** or **Alternative Warning** shall be affixed to or printed on

the Covered Products' packaging or labeling, or on a placard, shelf tag, sign or electronic device or automatic process, provided that the **Warning** or **Alternative Warning** is displayed with such conspicuousness, as compared with other words, statements, or designs as to render it likely to be read and understood by an ordinary individual under customary conditions of purchase or use. The **Warning** or **Alternative Warning** may be contained in the same section of the packaging, labeling, or instruction booklet that states other safety warnings, if any, concerning the use of the Covered Product and shall be at least the same size as those other safety warnings. If "consumer information," as that term is defined in Title 27, California Code of Regulations, Section 25600.1(c) as it may be amended from time to time, is provided in a foreign language, Land 'N' Sea shall provide the **Warning** or **Alternative Warning** in the foreign language in accordance with applicable warning regulations adopted by the State of California's Office of Environmental Health Hazard Assessment ("OEHHA").

In addition to affixing the **Warning** or **Alternative Warning** to the Product's packaging or labeling, the **Warning** or **Alternative Warning** shall be posted on websites where Land 'N' Sea offers Products for sale to consumers in California. The requirements of this Section shall be satisfied if the **Warning** or **Alternative Warning**, or a clearly marked hyperlink using the word "WARNING," appears on the product display page, or by otherwise prominently displaying the warning to the purchaser prior to completing the purchase. To comply with this Section, Land 'N' Sea shall (a) post the **Warning** or **Alternative Warning** on its own website and, if it has the ability to do so, on the websites of its third-party internet sellers; and (b) if it does not have the ability to post the **Warning** or **Alternative Warning** on the websites of its third-party internet sellers, provide such sellers with written notice in accordance with Title 27, California Code of Regulations, Section 25600.2. Third-party internet sellers of the Product that have been provided with written notice in accordance with Title 27, California Code of Regulations, Section 25600.2 are not released in Section 5 of this Agreement if they fail to meet the warning requirements of this Section.

**2.5 Compliance with Warning Regulations.** The Parties agree that Land 'N' Sea shall be deemed to be in compliance with this Settlement Agreement by either adhering to § 2 of this Settlement Agreement or by complying with warning regulations adopted by the State of California's OEHHA applicable to the Covered Products and the exposures at issue within 60 days after the Effective Date.

**3. PENALTIES PURSUANT TO HEALTH & SAFETY CODE § 25249.7(b) AND REIMBURSEMENT OF FEES AND COSTS**

In settlement of all the claims referred to in this Settlement Agreement, Land 'N' Sea shall pay \$12,000.00, comprised of \$500.00 as a Civil Penalty in accordance with Section 3.1 and reimbursement of fees and costs as set forth in Section 3.2 below, with payment to be made in accordance with Section 3.3.

**3.1 Civil Penalty.** The Civil Penalty payment shall be allocated in accordance with California Health & Safety Code §§ 25249.12(c)(1) and (d), with 75% of the Penalty remitted to OEHHA in the amount of \$375.00 and the remaining 25% of the Penalty remitted to Espinoza in the amount of \$125.00. For all amounts due and owing that are not received within the payment times set forth below, Land 'N' Sea shall pay a late civil penalty payment fee equal to \$100/day to be allocated in accordance with California Health & Safety Code § 25249.12(c)(1) and (d).

**3.2 Fees and Costs.** The Parties acknowledge that Espinoza and his counsel offered to reach preliminary agreement on the material terms of this dispute before reaching terms on the amount of fees and costs to be reimbursed to them. The Parties thereafter reached an accord on the compensation due to Espinoza and his counsel under general contract principles and the private attorney general doctrine and principles codified at California Code of Civil Procedure § 1021.5, for all work performed through the mutual execution of this agreement. Under these legal principles, Land 'N' Sea shall reimburse Espinoza's counsel for fees and costs incurred as a result of investigating and bringing this matter to the attention of Land 'N' Sea, and negotiating a settlement in the public interest, in the amount of \$11,500.00.

**3.3 Payment Procedures.**

(a) **Issuance of Payments.** Land 'N' Sea, within twenty one (21) days of the Effective Date, shall make payment of \$12,000.00 by check made out to "Brodsky Smith" to the following address:

Evan J. Smith, Esquire  
Brodsky Smith  
Two Bala Plaza, Suite 805  
Bala Cynwyd, PA 19004

(b) **Payments to OEHHA and Espinoza.** Within thirty (30) business days after receiving payment from Land 'N' Sea, Espinoza's counsel shall send the respective civil penalty payments set forth above in Section 3.1 to OEHHA and Espinoza.

(c) **Tax Documentation.** Land 'N' Sea agrees to provide a completed IRS 1099 for its payments to, and Espinoza agrees to provide IRS W-9 forms for, the following payee under this Settlement Agreement:

(i) "Brodsky Smith" (EIN: 23-2971061) at the address provided in Section 3.3(a)

#### 4. **RELEASE OF ALL CLAIMS**

4.1 **Release of Land 'N' Sea and Downstream Customers and Entities.** This Settlement Agreement is a full, final and binding resolution between Espinoza, acting on his own behalf, and Land 'N' Sea, of any violation of Proposition 65 that was or could have been asserted by any known California consumer, including Espinoza or on behalf of Espinoza's past and current agents, representatives, attorneys, successors, and/or assigns ("Releasers") for failure to provide warnings for alleged exposures to DEHP from use of the Covered Products, and Releasers hereby release any such claims against Land 'N' Sea and its parents, subsidiaries, affiliated entities, shareholders, marketplaces, directors, officers, agents, employees, attorneys, successors and assignees, and each entity to whom Land 'N' Sea directly or indirectly distributes or sells the Covered Products, including but not limited to, downstream distributors, wholesalers, customers, retailers, including but not limited to Land 'N' Sea, and its respective subsidiaries, affiliates and parents, franchisees, cooperative members and licensees (collectively, the "Releasees"), from all claims for violations of Proposition

65 through 60 days after the Effective Date based on exposure to DEHP from use of the Covered Products.

In further consideration of the promises and agreements herein contained, and for the payments to be made pursuant to Section 3 above, Espinoza, on behalf of himself, his past and current agents, representatives, attorneys, successors and/or assignees, hereby covenants not to sue and waives any right to institute, participate in, directly or indirectly, any form of legal action and releases all claims that he may have, including without limitation, all actions and causes of action in law and in equity, all obligations, expenses (including without limitation all attorneys' fees, expert fees, and investigation fees, and costs), damages, losses, liabilities and demands against any of the Releasees of any nature, character, or kind, whether known or unknown, suspected or unsuspected, limited to and arising out of the alleged or actual exposure to DEHP from use of the Covered Products.

**4.2 Land 'N' Sea's Release of Espinoza.** Land 'N' Sea, on behalf of itself, its past and current agents, representatives, attorneys, successors and/or assignees, hereby waives any and all claims against Espinoza, his attorneys and other representatives, for any and all actions taken or statements made (or those that could have been taken or made) by Espinoza and/or his attorneys and other representatives, whether in the course of investigating claims or otherwise seeking to enforce Proposition 65 against it in this matter or with respect to exposure to DEHP from use of the Covered Products.

**4.3 California Civil Code § 1542.** It is possible that other claims not known to the Parties arising out of the facts alleged in the Notice and relating to the Covered Products will develop or be discovered. Espinoza on behalf of himself, on one hand, and Land 'N' Sea, on the other hand, acknowledge that this Agreement is expressly intended to cover and include all such claims up through 60 days after the Effective Date, including all rights of action therefor. The Parties acknowledge that the claims released in §§ 4.1 and 4.2, above, may include unknown claims, and nevertheless waive California Civil Code § 1542 as to any such unknown claims. California Civil Code § 1542 reads as follows:

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

Espinoza and Land 'N' Sea each acknowledge and understand the significance and consequences of this specific waiver of California Civil Code § 1542.

**4.4 Deemed Compliance with Proposition 65.** The Parties agree that compliance by Land 'N' Sea with this Settlement Agreement constitutes compliance by Land 'N' Sea with Proposition 65 with respect to exposure to DEHP from use of the Covered Products.

**4.5 Public Benefit.** It is Land 'N' Sea's understanding that the commitments it has agreed to herein, and actions to be taken by Land 'N' Sea under this Settlement Agreement, would confer a significant benefit to the general public, as set forth in Code of Civil Procedure § 1021.5 and Cal. Admin. Code tit. 11, § 3201. As such, it is the intent of Land 'N' Sea that to the extent any other private party initiates an action alleging a violation of Proposition 65 with respect to Land 'N' Sea's failure to provide a warning concerning exposure to DEHP prior to use of the Covered Products it has manufactured, distributed, sold, or offered for sale in California, or will manufacture, distribute, sell, or offer for sale in California, such private party action would not confer a significant benefit on the general public as to those Covered Products addressed in this Settlement Agreement, provided that Land 'N' Sea is in material compliance with this Settlement Agreement.

## **5. SEVERABILITY**

If, subsequent to the execution of this Settlement Agreement, any of the provisions of this Settlement Agreement are deemed by a court to be unenforceable, the validity of the enforceable provisions remaining shall not be adversely affected but only to the extent the deletion of the provision deemed unenforceable does not materially affect, or otherwise result in the effect of the Settlement Agreement being contrary to the intent of the Parties in entering into this Settlement Agreement.

## **6. GOVERNING LAW**

The terms of this Settlement Agreement shall be governed by the law of the State of California and apply within the State of California. In the event that Proposition 65 is repealed or is otherwise



rendered inapplicable or limited by reason of law generally, or as to the Covered Products, Land 'N' Sea shall have no further obligations pursuant to this Settlement Agreement with respect to, and to the extent that, any Covered Product that are so affected.

**7. NOTICES**

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

For Land 'N' Sea:

Rita M. Holbach  
Mercury Marine  
W6250 Pioneer Rd., P.O. Box 1939  
Fond du Lac, WI 54935

For Espinoza:

Evan J. Smith  
Brodsky Smith  
Two Bala Plaza, Suite 805  
Bala Cynwyd, PA 19004

Either 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.

**8. COUNTERPARTS: SIGNATURES**

This Settlement Agreement may be executed in counterparts and by facsimile or .pdf signature, each of which shall be deemed an original, and all of which, when taken together, shall constitute one and the same document.

**9. COMPLIANCE WITH HEALTH & SAFETY CODE § 25249.7(f)**

Espinoza agrees to comply with the reporting requirements referenced in Health & Safety Code § 25249.7(f).

**10. MODIFICATION**

This Settlement Agreement may be modified only by a written agreement of the Parties.

**11. ENTIRE AGREEMENT**

This Settlement Agreement contains the sole and entire agreement of the Parties and any 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.

**12. AUTHORIZATION**

The undersigned are authorized to execute this Settlement Agreement and have read, understood and agree to all of the terms and conditions contained of this Settlement Agreement.


**AGREED TO:**

**AGREED TO:**

Date: 7 | 12 | 24

Date: \_\_\_\_\_

By:  \_\_\_\_\_  
Gabriel Espinoza

By:  \_\_\_\_\_  
Michael F Conners (Jul 8, 2024 12:43 EDT)  
Land 'N' Sea Distributing, Inc.