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22 Counsel for Plaintiff MARK MOORBERG

23 SUPERIOR COURT OF CALIFORNIA

24 COUNTY OF ALAMEDA

25 MARK MOORBERG,)
26)
27 Plaintiff,)
28 vs.)
MCCAULOU’S, INC.;)
and DOES 1-150, inclusive,)
Defendants.)
_____)

Case No. RG14740993

*ASSIGNED FOR ALL PURPOSES TO
JUDGE STEPHEN KAUS.
DEPARTMENT 514*

**[PROPOSED]
CONSENT JUDGMENT**

1 **I. INTRODUCTION**

2 **A. The Parties**

3 The parties to this Consent Judgment are Plaintiff MARK MOORBERG (“Plaintiff”)
4 and Defendant MCCAULOU’S, INC. (“Settling Defendant”). Plaintiff and Settling Defendant
5 are referred to collectively as the “Parties.”
6

7 **B. Settling Defendant**

8 Settling Defendant is a corporation that employs ten (10) or more persons, and is a
9 person in the course of doing business for purposes of Health and Safety Code section 25249.6
10 et seq. (“Proposition 65”).

11 **C. General Allegations**

12 Plaintiff alleges that Settling Defendant sells vinyl/PVC clutches containing di(2-
13 ethylhexyl)phthalate (“DEHP”) and Lead, without first providing the exposure warning
14 Plaintiff alleges and Settling Defendant denies is required by Proposition 65. DEHP and Lead
15 are each listed pursuant to Proposition 65 as a chemical known to the State of California to
16 cause birth defects or other reproductive harm.
17

18 **D. Product Description**

19 The products that are covered by this Consent Judgment are vinyl/PVC clutches
20 containing DEHP and/or Lead that were supplied to Settling Defendant by Spectrum Imports,
21 Inc., dba Picnic Plus, and sold or distributed for sale in California by Settling Defendant,
22 including, but not exclusively, the “Carlotta Clutch” (PSM-112BC, UPC #8 07348 12068 7),
23 i.e., Covered Products as defined below.
24

25 **E. Notice**

26 On April 16, 2014, Plaintiff served Settling Defendant, the California Attorney General,
27 the district attorneys of every county in the State of California, and the city attorneys for every
28

1 city in the State of California with a population greater than 750,000 with a document entitled
2 “60-Day Notice of Violation” (“Notice”).

3 The Notice alleges violations of Proposition 65 with respect to the presence of DEHP
4 and/or Lead in the Covered Products manufactured, distributed, and/or sold in California by
5 Settling Defendant. To the best of the Parties knowledge, no public enforcer has commenced
6 and is diligently prosecuting an action to enforce the violations alleged in the Notice.
7

8 **F. The Action**

9 On September 17, 2014, Plaintiff filed the captioned action (“Complaint”), naming
10 Settling Defendant as a defendant for the alleged violations of Proposition 65 that are the
11 subject of the Notice.

12 **G. Stipulated Matter Re the Action**

13 For purposes of this Consent Judgment only, the Parties stipulate that: (i) this Court has
14 subject matter jurisdiction over the allegations contained in the Complaint; (ii) the court has
15 personal jurisdiction over Settling Defendant as to the acts alleged in the Complaint; (iii) venue
16 is proper in the County of Alameda; and (iv) this Court has jurisdiction to enter and enforce this
17 Consent Judgment pursuant to Proposition 65, and Code of Civil Procedure section 664.6.
18

19 **H. No Admission**

20 Settling Defendant denies the material, factual, and legal allegations contained in the
21 Notice and Complaint, and maintains that all of the products that it has sold and distributed for
22 sale in California, including the Products, have been, and are, in compliance with all laws.
23 Settling Defendant further disputes the sufficiency of Plaintiff’s Notice procedurally, and both
24 in form and content and denies any violation or wrongdoing. Nothing in this Consent
25 Judgment is or shall be construed as an admission by the Parties of any fact, conclusion of law,
26 issue of law, or violation of law, nor shall compliance with the Consent Judgment constitute or
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1 be construed as an admission by the Parties of any fact, conclusion of law, issue of law, or
2 violation of law.

3 Nothing in this Consent Judgment shall prejudice, waive, or impair any right, remedy,
4 argument, or defense the Parties may have in any other legal proceeding, or any claim either
5 Party may have against any person or entity not a party to this action. This Consent Judgment
6 is the product of negotiation and compromise and is accepted by the Parties for purposes of
7 settling, compromising, and resolving issues disputed in this action.
8

9 **II. FURTHER DEFINITIONS**

10 **A. Covered Products**

11 “Covered Products” are defined as follows:

- 12 (1) Vinyl/PVC clutches containing Lead and/or DEHP that are manufactured by
13 or on behalf of Spectrum Imports, Inc. dba Picnic Plus, and sold in
14 California by Settling Defendant, including, without limitation, the “Carlotta
15 Clutch” (PSM-112BC, UPC #8 07348 12068 7).
16

17 **B. Additional Products**

18 “Additional Products” are defined as follows:

- 19 (1) Vinyl/PVC tote bags containing DEHP, including without limitation, the
20 Clear MediumTote Bag, HBE100871B.
21

22 McCaulou’s is advised that the Covered Products contain Lead and/or DEHP, and that the
23 Additional Products contain DEHP,

24 **C. Effective Date**

25 “Effective Date” means the date that the Court grants the motion for approval of this
26 Consent Judgment contemplated by Section IX.
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1 **III. INJUNCTIVE RELIEF**

2 **A. Reformulation of Covered and Additional Products**

3 As of the Effective Date, McCaulou's represents that it is not currently offering
4 Covered Products or Additional Products for sale in California, but agrees that if it
5 recommences sales, it will only offer Reformulated Products. For the purposes of this Consent
6 Judgment, "Reformulated Products" are defined as (i) Covered Products or Additional Products
7 that contain no more than 1,000 parts per million ("ppm") DEHP content in any component
8 analyzed pursuant to EPA testing methodologies 3580A and 8270C; and (ii) any Covered
9 Product that contains Lead in concentrations not exceeding 90 ppm in any component tested
10 pursuant to EPA testing methodologies 6020 and 3050B. In addition to the above test
11 methodologies, the Parties may employ equivalent methodologies used by state or federal
12 agencies to determine the amount of DEHP and/or Lead in a solid substance.
13
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15 **B. Notice to Suppliers**

16 No more than 60 days after this Consent Judgment is fully executed by the Parties, to
17 the extent that it has not already done so, Settling Defendant shall issue notice(s) to its
18 supplier(s) of Covered Products requiring that the Covered Products comply with the
19 reformulation standards applicable to Lead and DEHP in Section III A, above.
20

21 **C. Certification**

22 Within 60 days of the Effective Date, Settling Defendant shall provide Plaintiff with
23 written certification confirming compliance with the requirements of this Section III.

24 **IV. ENFORCEMENT**

25 **A. Notice of Violation or Alleged Breach of Consent Judgment**

26 Plaintiff may, by motion or application for an order to show cause before the Superior
27 Court for Alameda County, enforce the terms and conditions contained in this Consent
28 Judgment. Prior to bringing any motion or application to enforce the requirements of Section

1 III above, Plaintiff shall provide Settling Defendant with a draft "Notice of Violation" and a
2 copy of any test result(s) which purportedly support Plaintiff's "Notice of Violation." The
3 Parties shall then meet and confer regarding the basis for Plaintiff's anticipated motion or
4 application in an attempt to resolve it informally, including providing Settling Defendant a
5 reasonable opportunity of at least sixty days to cure any alleged violation to Plaintiff's
6 reasonable satisfaction. Should such attempts at informal resolution fail, Plaintiff may file his
7 enforcement motion or application unless within 60 days of receipt of such Notice Settling
8 Defendant ceases offering for sale the product described in said "Notice of Violation", in which
9 case no motion or application to enforce may be filed.

11 **B. Enforcement by Parties**

12 This Consent Judgment may only be enforced by the Parties.

13
14 **V. MONETARY SETTLEMENT TERMS**

15 **A. Settlement Payments**

16 Settling Defendant shall pay no more than \$40,000 under this Consent Judgment,
17 allocated as follows:

18 (1) \$3,000.00 in the form of a single check payable to "Mark Moorberg,
19 Client Trust Account" as an initial civil penalty pursuant to Health & Safety Code
20 § 25249.7(b), such money to be apportioned by Plaintiff in accordance with Health & Safety
21 Code § 25249.12(c)(1) and (d) with 25% of the penalty payment paid to Plaintiff and 75% of
22 the penalty amount paid to the State of California's Office of Environmental Health Hazard
23 Assessment ("OEHHA"). Plaintiff shall tender an amount equivalent to 75% of Settling
24 Defendant's initial civil penalty payment to OEHHA. Delivery by Settling Defendant of said
25 funds to The Chanler Group shall constitute compliance with this Section V-A-(1), and
26 Plaintiff's counsel shall deliver to OEHHA the office's portion of the penalty payment.
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1 (2) \$29,000 in the form of a single check made payable to “The Chanler
2 Group” as reimbursement of a portion of Plaintiff’s reasonable attorneys’ fees and costs. The
3 payment pursuant to this Section shall be made payable to “The Chanler Group.”

4 (3) A final civil penalty of \$8,000 shall be made within 60 days after the
5 Effective Date by the Settling Defendant and apportioned as in Section V-A-(1). The final civil
6 penalty payment shall be waived in its entirety if, Settling Defendant complies with Section III-
7 B and provides Plaintiff’s counsel with a declaration certifying its compliance with the same
8 within 45 days of the Effective Date. The option to provide a declaration certifying compliance
9 with Section III-B is a material term of this Consent Judgment and time is of the essence.

10 (4) Settling Defendant shall deliver the payments required by Sections V-A-
11 (1) and V-A-(2), above, to its counsel within 30 days of the date that this Consent Judgment is
12 fully executed by the Parties. Settling Defendant’s counsel shall hold the settlement funds in
13 trust, and shall tender Settling Defendant’s payments to Plaintiff within five days of the
14 Effective Date.

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17 **B. Payment Address**

18 All payments required by this Consent Judgment shall be delivered to the
19 following address:

20 The Chanler Group
21 Attn: Proposition 65 Controller
22 2560 Ninth Street
23 Parker Plaza, Suite 214
24 Berkeley, CA 94710

1 **VI. MODIFICATION**

2 **A. Written Consent**

3 This Consent Judgment may be modified from time to time by express written
4 agreement of the Parties with the approval of the Court, or by an order of this Court upon
5 motion and in accordance with law.
6

7 **B. Meet and Confer**

8 Any Party seeking to modify this Consent Judgment shall attempt in good faith to meet
9 and confer with all affected Parties prior to filing a motion to modify the Consent Judgment.

10 **VII. CLAIMS COVERED AND RELEASED**

11 **A. Plaintiff's Release of Proposition 65 Claims**

12 This Consent Judgment is a full, final, and binding resolution between Plaintiff on his
13 own behalf and in the public interest, and Settling Defendant – and (1) its parents, subsidiaries,
14 affiliated entities that are under common ownership, directors, officers, employees, and
15 attorneys (“Defendant Releasees”); and (2) each entity to whom Settling Defendant directly or
16 indirectly distributes or sells Covered Products, including but not limited to distributors,
17 wholesalers, customers, retailers, franchisees, cooperative members, licensors, and licensees
18 (“Downstream Defendant Releasees”) – of any violation of Proposition 65 that was or could
19 have been asserted in the Complaint against Settling Defendant, Defendant Releasees, and/or
20 Downstream Defendant Releasees, based on the alleged failure to warn about exposures to
21 DEHP and/or Lead contained in Covered Products or Additional Products sold by Settling
22 Defendant prior to the Effective Date. Plaintiff in his individual capacity and in the public
23 interest releases Settling Defendant, Defendant Releasees, and Downstream Releasees from all
24 claims for violations of Proposition 65 up through the Effective Date based on exposures to
25 Lead and/or DEHP in Covered Products manufactured, imported, distributed or sold by Settling
26 Defendant before the Effective Date, as alleged in the 60-Day Notice.
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B. Releases

Compliance with the terms of this Consent Judgment by Settling Defendant and Defendant Releasees shall constitute compliance with Proposition 65 by Settling Defendant, Defendant Releasees, and Downstream Defendant Releasees with respect to any alleged failure to warn about DEHP and/or Lead in Covered Products manufactured, distributed, or sold by Settling Defendant after the Effective Date.

C. Plaintiff's Individual Release of Claims

Plaintiff in his individual capacity only and *not* in his representative capacity, also provides a release Settling Defendant, Defendant Releasees, and Downstream Releasees from which release shall be effective as a full and final accord and satisfaction, and as a bar to all actions, causes of action, obligations, costs, expenses, attorneys' fees, damages, losses, claims, liabilities and demands of Plaintiff of any nature, character or kind, whether known or unknown, suspected or unsuspected, arising out of alleged or actual exposures to Lead and/or DEHP in Covered Products and DEHP in Additional Products manufactured, imported, distributed or sold by Settling Defendant before the Effective Date.

D. Rights Reserved

Nothing in this Section VII affects Plaintiff's right to commence or prosecute an action under Proposition 65 against any person other than Settling Defendant, or, with respect to Covered Products and Additional Products sold or distributed for sale by Settling Defendant prior to the Effective Date, against Defendant Releasees, and/or Downstream Defendant Releasees.

E. Settling Defendant's Release of Plaintiff

Settling Defendant, on its own behalf, and on behalf of its past and current agents, representatives, attorneys, successors, and assignees, hereby waives any and all claims against Plaintiff and his attorneys and representatives, for any and all actions taken or statements

1 made by Plaintiff and his attorneys and other representatives, whether in the course of
2 investigating claims, otherwise seeking to enforce Proposition 65 against it in this matter, or
3 with respect to the Products.

4 **F. Mutual California Civil Code Section 1542 Waiver**

5
6 The Parties each acknowledge that he/she/it is familiar with Section 1542 of Civil Code,
7 which provides as follows:

8 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS
9 WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO
10 EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING
11 THE RELEASE, WHICH IF KNOWN BY HIM OR HER MUST
12 HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT
13 WITH THE DEBTOR.

14 The Parties, each on his/its own behalf, and on behalf of his/its past and current agents,
15 representatives, attorneys, successors, and/or assignees, expressly waives and relinquishes any
16 and all rights and benefits which he/it/they may have under, or which may be conferred on
17 him/her/them by the provisions of Civil Code § 1542 as well as under any other state or federal
18 statute or common law principle of similar effect, to the fullest extent that he/she/it/they may
19 lawfully waive such rights or benefits pertaining to the released matters, as more clearly
20 defined above.

21 **VIII. NOTICE**

22 **A. Notice to Plaintiff**

23 When Plaintiff is entitled to receive any notice under this Consent Judgment, the notice
24 shall be sent to:

25 The Chanler Group
26 Attn: Proposition 65 Coordinator
27 2560 Ninth Street
28 Parker Plaza, Suite 214
Berkeley, CA 94710-2565

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B. Notice to Settling Defendant

When Settling Defendant is entitled to receive any notice under this Consent Judgment, the notice shall be sent to:

Ken Stoddard
McCaulou's, Inc.
3512 Mount Diablo Boulevard
Lafayette, CA 94549

C. Change in Persons to be Notified

Any Party may modify the person and address to whom the notice is to be sent by sending the other Party notice by first class and electronic mail.

IX. COURT APPROVAL

A. Effective Date

This Consent Judgment shall become effective upon entry by the Court.

B. Application for Approval

Plaintiff shall prepare and file a Motion for Approval of this Consent Judgment and Settling Defendant shall support the Court's entry of this Consent Judgment.

C. Effect if Not Approved

If this Consent Judgment is not entered by the Court, it shall be of no force or effect and shall never be introduced into evidence or otherwise used in any proceeding for any purpose.

X. ATTORNEYS' FEES

A. Plaintiff Fees

Should Plaintiff prevail on any motion, application for an order to show cause, or other proceeding to enforce a violation of this Consent Judgment, Plaintiff shall be entitled to his reasonable attorneys' fees and costs incurred as a result of such motion or application.

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B. McCaulou's Fees

Should Settling Defendant prevail on any motion, application for an order to show cause, or other proceeding brought within this action, Settling Defendant shall be entitled to its reasonable attorneys' fees and costs as a result of such motion or application.

C. Bear Own Fees and Costs

Except as otherwise provided in this Consent Judgment, each Party shall bear its own attorneys' fees and costs.

XI. OTHER TERMS

A. California Law

The terms of this Consent Judgment shall be governed by the Laws of the State of California. In the event that Proposition 65 is repealed, preempted, or is otherwise rendered inapplicable by reason of law generally, or as to the Products, then Settling Defendant may, but is not required to, provide Plaintiff with written notice of any asserted change in the law, and shall have no further obligations pursuant to this Consent Judgment, with respect to, and to the extent that, the Covered Products or Additional Products are so affected. Nothing in this Consent Judgment shall be interpreted to relieve Settling Defendant from its obligation to comply with any pertinent state or federal law or regulation.

B. Successors and Assigns

This Consent Judgment shall apply to and be binding upon Plaintiff and Settling Defendant and its respective divisions, subdivisions, and subsidiaries, and its successors or assigns.

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C. Complete Agreement

This Consent Judgment contains the sole and entire agreement and understanding of the Parties with respect to the entire subject matter hereto; and any and all prior discussions, negotiations, commitments, or understandings related thereto, if any, are hereby merged herein and therein. There are no warranties, representations, or other agreements between the Parties except as expressly set forth herein. No representations, oral or otherwise, express or implied, other than those specifically referred to in this Consent Judgment have been made by any Party hereto. No other agreements not specifically contained or referenced herein, oral or otherwise, shall be deemed to exist or to bind any of the Parties hereto. No supplementation, modification, waiver, or termination of this Consent Judgment shall be binding unless executed in writing by the Party to be bound thereby. No waiver of any of the provisions of this Consent Judgment shall be deemed or shall constitute a waiver of any of the other provisions hereof whether or not similar, nor shall such waiver constitute a continuing waiver.

D. No Release by McCaulou’s of Third Parties

Nothing in this Consent Judgment shall release, or in any way affect any rights that Settling Defendant might have against any other party.

E. Jurisdiction Retained

This Court shall retain jurisdiction of this matter to implement or modify the Consent Judgment pursuant to Proposition 65 and Code of Civil Procedure section 664.6. Nothing herein is intended to or shall expand any obligation of Settling Defendant beyond those imposed by Health and Safety Code Section 25249.6 or any regulation properly adopted pursuant hereto except with respect to defendant’s commitments as set forth in Sections III and V.

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F. Counterparts

The stipulations to this Consent Judgment may be executed in counterparts and by means of facsimile or portable document format (pdf), which taken together shall be deemed to constitute one document.

G. Jointly Drafted

The Parties, including their counsel, have participated in the preparation of this Consent Judgment and this Consent Judgment is the result of the joint efforts of the Parties.

H. Modification

This Consent Judgment was subject to revision and modification by the Parties and has been accepted and approved as to its final form by all Parties and their counsel. Accordingly, any uncertainty or ambiguity existing in this Consent Judgment shall not be interpreted against any Party as a result of the manner of the preparation of this Consent Judgment. Each Party to this Consent Judgment agrees that any statute or rule of construction providing that ambiguities are to be resolved against the drafting Party should not be employed in the interpretation of this Consent Judgment and, in this regard, the Parties hereby waive California Civil Code Section 1654.

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I. Authority to Sign


Each signatory to this Consent Judgment certifies that he or she is fully authorized by the Party he or she represents to stipulate to this Consent Judgment and to enter into and execute the Consent Judgment on behalf of the Party represented and legally to bind that Party.

APPROVED AS TO FORM:

APPROVED AS TO FORM:

Dated: 6/5/15

Dated: 6/5/15





Chris Tuttle
The Chanler Group
Counsel for Plaintiff

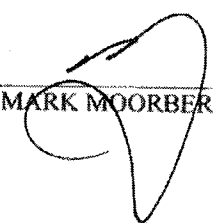
Steven M. Kipperman
H. Michael Brucker
Counsel for Defendant


AGREED TO:

AGREED TO:

Dated: 6.5.15

Dated: 6/4/2015

By: 
MARK MOORBERG

By:  Director of Finance
[name], [title]
MCCALOU'S, INC.