

F I L E D
Clerk of the Superior Court

MAR 11 2011

By: PATRICIA F LEGLER, Deputy

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Attorneys for Plaintiff, Maureen Parker

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN DIEGO
UNLIMITED CIVIL JURISDICTION

MAUREEN PARKER,)
)
)
Plaintiff)
)
and)
)
ALLSTAR MARKETING GROUP, LLC)
)
)
Defendant.)

CASE NO.:
37-2010-00106285-CU-TT-CTL
[PROPOSED]
JUDGMENT APPROVING
PROP 65 STIPULATION AND
CONSENT JUDGMENT
(Cal. Health & Safety Code § 25249.6 et seq.)
Date: March 4, 2011
Time: 10:30 AM
Dept. 68
Hon. Judith F. Hayes
Action Filed: December 17, 2010

1 In the above entitled action, Plaintiff, Maureen Parker and Defendant, Allstar
2 Marketing Group, LLC, having agreed through their respective counsel that judgment be
3 entered pursuant to the terms of the Proposition 65 settlement agreement in the form of a
4 [Proposed] Consent Judgment entered into by the parties, and following issuance of an order
5 approving this Proposition 65 settlement agreement and entering this Consent Judgment on -
6 _____, 2011.
7

8 **IT IS HEREBY ORDERED, ADJUDGED AND DECREED** that pursuant to
9 Code of Civil Procedure §664.6, judgment is entered in accordance with the Consent Judgment
10 attached hereto as Exhibit 1.
11

12
13 **IT IS SO ORDERED.**

14 Dated: MAR 11 2011

JUDITH F. HAYES
15 **JUDGE OF THE SUPERIOR COURT**
16 **JUDITH F. HAYES**
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MAR 10 2011

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7 Attorneys for Plaintiff MAUREEN PARKER

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF SAN DIEGO

10
11 MAUREEN PARKER,

12 Plaintiff,

13 v.

14 ALLSTAR MARKETING GROUP, LLC, et
15 al,

16 Defendants.

Case No. 37-2010-00106285-CU-TT-CTL

CONSENT JUDGMENT [PROPOSED]

17
18 **1. INTRODUCTION**

19 1.1 On December 17, 2010, Plaintiff Maureen Parker ("Parker") filed a complaint
20 ("Complaint") in San Diego County Superior Court, entitled *Maureen Parker v. Allstar*
21 *Marketing Group, LLC*, San Diego County Superior Court Case Number 37-2010-00106285-CU-
22 TT-CTL for civil penalties and injunctive relief pursuant to the provisions of California Health &
23 Safety Code §25249.5 *et seq.* ("Proposition 65").

24 1.2 The parties to this Consent Judgment ("Parties") are Parker and Defendant Allstar
25 Marketing Group, LLC ("Allstar"), a limited liability company that employs 10 or more persons.

26 1.3 On or about June 14, 2010, Parker served Allstar and the appropriate public
27 enforcement agencies with a pre-suit notice pursuant to Health and Safety Code Section
28

1 25249.7(d), alleging that Allstar was in violation of Proposition 65. Parker's notice and the
2 Complaint in this Action allege that Allstar exposes individuals who use or otherwise handle
3 tomato, strawberry, and pepper planters to lead, a chemical known to the State of California to
4 cause cancer, birth defects and other reproductive harm, without first providing clear and
5 reasonable warning to such persons. The notice and Complaint allege that Allstar's conduct
6 violates Health & Safety Code §25249.6, the warning provision of Proposition 65.

7 1.4 For purposes of this Consent Judgment only, the Parties stipulate that this Court
8 has jurisdiction over the subject matter of the violations alleged in the Complaint and personal
9 jurisdiction over Allstar as to the acts alleged in the Complaint, that venue is proper in the County
10 of San Diego, and that this Court has jurisdiction to enter this Consent Judgment as a full and
11 final resolution of all claims which were or could have been raised in the Complaint based on the
12 facts alleged therein.

13 1.5 The Parties enter into this Consent Judgment pursuant to a settlement of certain
14 disputed claims between the Parties as alleged in the Complaint. By executing this Consent
15 Judgment, the Parties do not admit any facts or conclusions of law. It is the Parties' intent that
16 nothing in this Consent Judgment shall be construed as an admission by the Parties of any fact,
17 conclusion of law, issue of law or violation of law, nor shall compliance with the Consent
18 Judgment constitute or be construed as an admission by the Parties of any fact, conclusion of law,
19 issue of law, or violation of law. Nothing in this Consent Judgment shall prejudice, waive or
20 impair any right, remedy, argument or defense the Parties may have in this or any other or future
21 legal proceedings.

22 **2. DEFINITIONS**

23 2.1 The term "Covered Products" means Topsy Turvy® planters that Allstar
24 distributes, markets and/or sells within the State of California, including but not limited to
25 Tomato Planter, Tomato Tree Planter, Tomato Herb Planter, Hot Pepper Planter, Strawberry
26 Planter, and Hummingbird Planter.

27 2.2 The term "Effective Date" means the date on which this Consent Judgment is
28 entered by the Court.

1 **3. INJUNCTIVE RELIEF**

2 3.1 A Covered Product that is manufactured on or after 60 days after the Effective
3 Date for sale in California shall either be reformulated pursuant to Section 3.2 or shall be labeled
4 with a warning as provided in Section 3.3.

5 3.2 **Reformulation.** A Covered Product does not require a warning if the total lead
6 content of its plastic components does not exceed 300 ppm.

7 3.3 **Product Labeling.** A Covered Product that does not meet the reformulation level
8 of Section 3.2 shall contain a warning affixed to or printed on the Covered Product's packaging or
9 labeling. The warning shall be displayed with such conspicuousness, as compared with other
10 words, statements, designs, or devices on the Covered Product, or its packaging or labeling, as to
11 render it likely to be read and understood by an ordinary individual under customary conditions of
12 purchase or use. The following warning statement shall be provided:

13 "WARNING: This product contains a chemical known to the State of California to
14 cause birth defects or other reproductive harm. Wash hands after handling."

15 3.4 **Direct to Consumer Sales.** Allstar Marketing shall not operate any internet
16 websites or catalogs in which any Covered Product is sold or offered for sale to a consumer in
17 California. At least ninety days before it operates any internet websites or catalogs in which any
18 Covered Product is sold or offered for sale to a consumer in California, Allstar Marketing shall
19 give written notice to Plaintiff of such intent, and shall meet and confer in order to determine the
20 scope of injunctive relief in addition to Section 3.1, if any, which may be entered upon a joint
21 application to the Court. If the Parties do not agree on additional injunctive relief, if any, Plaintiff
22 may apply by motion pursuant to this Consent Judgment for such relief, which shall be entered by
23 the Court upon a showing that such relief is appropriate based on the law and facts submitted in
24 the motion and any opposing materials submitted by Allstar Marketing.

25 **4. SETTLEMENT PAYMENTS**

26 4.1 Allstar Marketing shall pay a settlement amount of \$60,000 to Parker, to be
27 allocated by Parker as follows:
28

1 4.1.1 **Civil Penalty:** \$5,000 as a civil penalty pursuant to Health and Safety
2 Code Section 25249.7(b). Parker shall remit 75% of the civil penalty to the California
3 Office of Environmental Health Hazard Assessment (“OEHHA”), pursuant to Health and
4 Safety Code Section 25192.

5 4.1.2 **Attorneys’ Fees and Costs:** \$55,000 to reimburse Parker and her attorneys
6 for their reasonable investigation fees and costs, attorneys’ fees, and any other costs
7 incurred as a result of investigating, bringing this matter to Allstar’s attention, litigating
8 and negotiating a settlement in the public interest, pursuant to Code of Civil Procedure
9 Section 1021.5.

10 4.2 **Timing of payments.** Allstar shall deliver the payments required under this
11 section to the address set forth in Section 13 below within 10 days of the Effective Date.

12 **5. CLAIMS COVERED AND RELEASED**

13 5.1 This Consent Judgment is a full, final and binding resolution between Parker on
14 behalf of herself and the public interest and Allstar, and its parents, shareholders, divisions,
15 subdivisions, subsidiaries, partners, sister companies, and affiliates, and their successors and
16 assigns (“Defendant Releasees”), all entities to whom they directly or indirectly distribute or sell
17 Covered Products, including but not limited to distributors, wholesalers, customers, retailers,
18 franchisees, cooperative members, and Defendant Releasee’s licensors and licensees
19 (“Downstream Defendant Releasees”) of any violation of Proposition 65 that was or could have
20 been asserted in the Complaint against Allstar, Defendant Releasees, and Downstream Defendant
21 Releasees, based on failure to warn about alleged exposure to lead contained in Covered Products,
22 with respect to any Covered Products manufactured, shipped, or sold by Allstar prior to the
23 Effective Date. The Parties further understand and agree that this release shall not extend
24 upstream to any entities that manufactured the Covered Products for Allstar or any component
25 parts thereof or to any distributors or suppliers who sold the Covered Products or any component
26 parts thereof to Allstar.

27 5.2 In further consideration of the promises and agreements herein contained, the
28 injunctive relief commitments set forth in Section 3, and for the payments to be made pursuant to

1 Section 4, Parker, on behalf of herself, her past and current agents, representatives, attorneys,
2 successors, and/or assignees, and in the interest of the general public, hereby waives all rights to
3 institute or participate in, directly or indirectly, any form of legal action and release all claims,
4 including, without limitation, all actions, and causes of action, in law or in equity, suits, liabilities,
5 demands, obligations, damages, costs, fines, penalties, losses, or expenses (including, but not
6 limited to, investigation fees, expert fees, and attorneys' fees) of any nature whatsoever, whether
7 known or unknown, fixed, or contingent (collectively "claims"), against Allstar, Defendant
8 Releasees, and Downstream Defendant Releasees. This release is limited to those claims that
9 arise under Proposition 65 with respect to lead in the Covered Products, as such claims relate to
10 the alleged failure to warn under Health & Safety Code Section 25249.6.

11 5.3 On behalf of itself and Defendant Releasees, Allstar waives all rights to institute
12 any form of action against Parker, her attorneys, consultants, and representatives for all actions
13 taken or statements made in the course of this Action prior to the date of the execution of this
14 Consent Judgment.

15 5.4 Compliance with the terms of this Consent Judgment by Allstar shall constitute
16 compliance with Proposition 65 with respect to lead in any Covered Products that are
17 manufactured, shipped, or sold by Allstar following the Effective Date.

18 6. COURT APPROVAL

19 6.1 This Consent Judgment is not effective until it is approved and entered by the
20 Court and shall be null and void if, for any reason, it is not approved and entered by the Court
21 within one year after it has been fully executed by all Parties.

22 6.2 If the Court does not approve the Consent Judgment, the Parties shall meet and
23 confer as to whether to modify the terms of this Consent Judgment or appeal the ruling. If the
24 Parties do not jointly agree on a course of action to take, the case shall proceed on its normal
25 course on the trial court's calendar.

26 6.3 If the Court approves this Consent Judgment and is reversed or vacated by an
27 appellate court, the Parties shall meet and confer as to whether to modify the terms of this
28 Consent Judgment. If the Parties do not jointly agree on a course of action to take, any monies

1 that have been paid to Plaintiff pursuant to Section 4 shall be refunded within 15 days after
2 remittitur to the trial court, and the case shall proceed on its normal course on the trial court's
3 calendar.

4 **7. ENFORCEMENT**

5 7.1 Any Party may, by motion or application for an order to show cause before this
6 Court, enforce the terms and conditions contained in this Consent Judgment. A Party may
7 enforce any of the terms and conditions of this Consent Judgment only after that Party first
8 provides 30 days notice to the Party allegedly failing to comply with the terms and conditions of
9 this Consent Judgment and attempts to resolve such Party's failure to comply in an open and good
10 faith manner.

11 **8. MODIFICATION**

12 8.1 This Consent Judgment may be modified from time to time by express written
13 agreement of the Parties, with the approval of the Court, or by an order of this Court upon motion
14 and in accordance with law. A Party seeking to modify this Consent Judgment shall attempt in
15 good faith to meet and confer with all affected Parties prior to filing a motion to modify the
16 Consent Judgment.

17 **9. ACCURACY OF SALES DATA**

18 Allstar understands that the sales data provided to counsel for Parker by Allstar was a
19 material factor upon which Parker has relied to determine the amount of payments made pursuant
20 to Health and Safety Code §25249.7(b) under this Agreement. Allstar represents that the sales
21 data provided to plaintiff is true and accurate.

22 **10. ENTIRE AGREEMENT**

23 10.1 This Consent Judgment contains the sole and entire agreement and understanding
24 of the Parties with respect to the entire subject matter hereof, and any and all prior discussions,
25 negotiations, commitments, or understandings related thereto, if any, are hereby merged herein
26 and therein. No representations, oral or otherwise, express or implied, other than those
27 specifically referred to in this Consent Judgment have been made by any Party hereto. No
28 supplementation, modification, waiver, or termination of this Consent Judgment shall be binding

1 unless executed in writing by the Party to be bound thereby. No waiver of any of the provisions
2 of this Consent Judgment shall be deemed or shall constitute a waiver of any of the other
3 provisions hereof whether or not similar, nor shall such waiver constitute a continuing waiver.

4 **11. GOVERNING LAW AND APPLICATION**

5 11.1 The terms of this Consent Judgment shall be governed by the laws of the State of
6 California and shall apply only to Covered Products that are sold or offered for sale in the State of
7 California.

8 11.2 This Consent Judgment shall apply to and be binding upon Parker and Allstar and
9 its divisions, subdivisions, and subsidiaries, and the Parties' successors and assigns .

10 11.3 The Parties, including their counsel, have participated in the preparation of this
11 Consent Judgment and this Consent Judgment is the result of the joint efforts of the Parties. This
12 Consent Judgment was subject to revision and modification by the Parties and has been accepted
13 and approved as to its final form by all Parties and their counsel. Accordingly, any uncertainty or
14 ambiguity existing in this Consent Judgment shall not be interpreted against any Party as a result
15 of the manner of the preparation of this Consent Judgment.

16 **12. RETENTION OF JURISDICTION**

17 12.1 This Court shall retain jurisdiction of this matter to implement, modify, and
18 enforce the terms this Consent Judgment.

19 **13. PROVISION OF NOTICE**

20 13.1 All notices required pursuant to this Consent Judgment and correspondence shall
21 be sent to the following:

22
23 For Parker:

24 Law Offices of Stephen Ure, PC
25 1518 Sixth Avenue
26 San Diego, CA 92101
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For Allstar:

Jennifer De Marco
General Counsel
Allstar Marketing Group, LLC
2 Skyline Drive
Hawthorne, NY 10532

With a copy to:

Jeffrey B. Margulies, Esq.
Fulbright & Jaworski L.L.P.
555 South Flower Street, 41st Floor
Los Angeles, CA 90071

14. COURT APPROVAL

14.1 This Consent Judgment shall become effective upon entry by the Court. Parker shall prepare and file a Motion for Approval of this Consent Judgment pursuant to Health and Safety Code Section 25249.7(f).

14.2 If this Consent Judgment is not approved by the Court, it shall be of no further force or effect, and shall not be introduced into evidence or otherwise used in any proceeding for any purpose.

15. ATTORNEY'S FEES

15.1 A party who unsuccessfully brings or contests an action arising out of this Consent Judgment shall be required to pay the prevailing party's reasonable attorney's fees and costs unless the unsuccessful party has acted with substantial justification. For purposes of this Consent Judgment, the term substantial justification shall carry the same meaning as used in the Civil Discovery Act of 1986, Code of Civil Procedure Section 2016, et seq.

15.2 Nothing in this Section 15 shall preclude a Party from seeking an award of sanctions pursuant to law.

1 16. EXECUTION AND COUNTERPARTS

2 16.1 The stipulations to this Consent Judgment may be executed in counterparts and by
3 means of facsimile and/or portable document format (pdf), which taken together shall be deemed
4 to constitute one document.

5 17. AUTHORIZATION

6 17.1 Each signatory to this Consent Judgment certifies that he or she is fully authorized
7 by the party he or she represents to stipulate to this Consent Judgment and to enter into and
8 execute the Consent Judgment on behalf of the party represented and legally bind that party. The
9 undersigned have read, understand and agree to all of the terms and conditions of this Consent
10 Judgment. Except as explicitly provided herein, each party is to bear its own fees and costs.
11

12 AGREED TO:

13
14 Dated: 12/13/10

15
16  _____

17 Maureen Parker

18
19 Dated: 12-13-2010

20 ALLSTAR MARKETING GROUP, LLC.

21 By  _____

22 Name: Jennifer DeMareo

23 Title: General Counsel
24
25
26
27
28

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11
12 AGREED TO:

13
14 Dated: 12/13/10

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16 

17 Maureen Parker

18
19 Dated:

20 ALLSTAR MARKETING GROUP, LLC.

21 By _____

22 Name: _____

23 Title: _____