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Josh Voorhees, State Bar No. 241436  
Troy C. Bailey, State Bar No. 277424  
THE CHANLER GROUP  
2560 Ninth Street  
Parker Plaza, Suite 214  
Berkeley, CA 94710-2565  
Telephone: (510) 848-8880  
Facsimile: (510) 848-8118

Attorneys for Plaintiff  
MARK MOORBERG

**FILED**  
ALAMEDA COUNTY

MAR 17 2015 *cl*

CLERK OF THE SUPERIOR COURT  
*Cliff*  
Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
COUNTY OF ALAMEDA  
UNLIMITED CIVIL JURISDICTION

MARK MOORBERG,  
Plaintiff,

v.

EAST BAY RESTAURANT SUPPLY, INC.,  
*et al.*,  
Defendants.

Case No. RG14745064

~~PROPOSED~~ JUDGMENT  
PURSUANT TO TERMS OF  
PROPOSITION 65 SETTLEMENT  
AND CONSENT JUDGMENT

Date: March 17, 2015  
Time: 3:45 p.m.  
Dept.: 24  
Judge: Hon. Frank Roesch

Reservation No.: R-1592335

1 In the above-entitled action, plaintiff Mark Moorberg, and defendant East Bay Restaurant  
2 Supply, Inc. having agreed through their respective counsel that Judgment be entered pursuant to the  
3 terms of their settlement agreement in the form of a [Proposed] Consent Judgment ("Consent  
4 Judgment"), and following this Court's issuance of an Order approving this Proposition 65 settlement  
5 and Consent Judgment on March 17, 2015.

6 IT IS HEREBY ORDERED, ADJUDGED AND DECREED that, pursuant to California  
7 Health & Safety Code § 25249.7(f)(4) and California Code of Civil Procedure § 664.6, Judgment is  
8 entered in accordance with the terms of the Consent Judgment attached hereto as **Exhibit A**. By  
9 stipulation of the parties, the Court will retain jurisdiction to enforce the settlement under Code of  
10 Civil Procedure § 664.6.

11  
12 **IT IS SO ORDERED.**

13  
14 Dated: March 17, 2015

  
\_\_\_\_\_  
JUDGE OF THE SUPERIOR COURT



1 Josh Voorhees, State Bar No. 241436  
Troy C. Bailey, State Bar No. 277424  
2 THE CHANLER GROUP  
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5 Attorneys for Plaintiff  
6 MARK MOORBERG

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SUPERIOR COURT OF THE STATE OF CALIFORNIA  
COUNTY OF ALAMEDA  
UNLIMITED CIVIL JURISDICTION

MARK MOORBERG,  
Plaintiff,  
v.  
EAST BAY RESTAURANT SUPPLY, INC.;  
*et al.*,  
Defendants.

Case No. RG14-745064  
[PROPOSED] CONSENT JUDGMENT  
(Health & Safety Code § 25249.6 *et seq.*)

1     **1. INTRODUCTION**

2             **1.1 Parties**

3             This Consent Judgment is entered into by and between Mark Moorberg (“Moorberg”) and  
4 East Bay Restaurant Supply, Inc. (“EBRS”), with Moorberg and EBRS each individually referred to  
5 as a “Party” and collectively as the “Parties.”

6             **1.2 Plaintiff**

7             Moorberg is an individual residing in California who seeks to promote awareness of  
8 exposures to toxic chemicals and improve human health by reducing or eliminating hazardous  
9 substances contained in consumer products.

10            **1.3 Defendant**

11            EBRS employs ten or more persons and is a “person in the course of doing business” for  
12 purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, Health and Safety Code  
13 section 25249.6 *et seq.* (“Proposition 65”).

14            **1.4 General Allegations**

15            Moorberg alleges that EBRS manufactures, imports, sells, or distributes for sale in California,  
16 Pedometers with vinyl/PVC ID holders containing di(2-ethylhexyl)phthalate (“DEHP”) without first  
17 providing the exposure warning required by Proposition 65. DEHP is listed pursuant to Proposition  
18 65 as a chemical known to the State of California to cause birth defects and other reproductive harm.

19            **1.5 Product Description**

20            The EBRS products that are covered by this Consent Judgment are defined as pedometers  
21 with vinyl/PVC ID holders containing DEHP including, but not limited to, *Jamba Juice Pedometer*  
22 *with Retractable ID Holder, #83765428406, UPC #8 37654 28406 3*, which were sold by EBRS in  
23 the State of California, hereinafter the “Products.”

24            **1.6 Notice of Violation**

25            On or about July 30, 2014, Moorberg served EBRS, others, and certain requisite public  
26 enforcement agencies with a Supplemental 60-Day Notice of Violation (“Notice”) alleging that  
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1 EBRS was in violation of Proposition 65 for failing to warn its customers and consumers in  
2 California that the Products expose users to DEHP.

3 **1.7 Complaint**

4 On October 20, 2014, Moorberg filed the instant action ("Complaint"), naming EBRS as a  
5 defendant for the alleged violations of Health and Safety Code section 25249.6 that are the subject of  
6 the Notice.

7 **1.8 No Admission**

8 EBRS denies the material, factual, and legal allegations contained in the Notice and  
9 Complaint, and maintains that all of the products that it has sold and distributed for sale in California,  
10 including the Products, have been, and are, in compliance with all laws. Nothing in this Consent  
11 Judgment shall be construed as an admission of any fact, finding, conclusion of law, issue of law, or  
12 violation of law, nor shall compliance with this Consent Judgment constitute or be construed as an  
13 admission of any fact, finding, conclusion of law, issue of law, or violation of law. This Section shall  
14 not, however, diminish or otherwise affect EBRS' obligations, responsibilities, and duties under this  
15 Consent Judgment.

16 **1.9 Jurisdiction**

17 For purposes of this Consent Judgment only, the Parties stipulate that this Court has  
18 jurisdiction over EBRS as to the allegations in the Complaint, that venue is proper in the County of  
19 Alameda, and that this Court has jurisdiction to enter and enforce the provisions of this Consent  
20 Judgment.

21 **1.10 Effective Date**

22 For purposes of this Consent Judgment, the term "Effective Date" means December 15, 2014.

23 **2. INJUNCTIVE RELIEF: REFORMULATION AND WARNINGS**

24 **2.1 Reformulated Products**

25 Commencing on the Effective Date, and continuing thereafter, EBRS shall only purchase for  
26 sale, manufacture for sale, import, sell, or distribute for sale in California "Reformulated Products,"  
27 or Products that are sold with a clear and reasonable warning pursuant to Section 2.2 below. For  
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1 purposes of this Consent Judgment, "Reformulated Products" are products that contain DEHP in  
2 concentrations of less than 0.1 percent (1,000 parts per million) when analyzed pursuant to U.S.  
3 Environmental Protection Agency testing methodologies 3580A and 8270C or any other  
4 methodology utilized by federal or state agencies for the purpose of determining the DEHP content in  
5 a solid substance. In addition to the EPA test methods authorized above, the Parties may utilize  
6 equivalent methodologies employed by state or federal agencies to determine DEHP content in a  
7 solid substance.

## 8 **2.2 Product Warnings**

9 Commencing on the Effective Date, EBRS shall provide clear and reasonable warnings for all  
10 Products that do not currently have warnings and that do not qualify as Reformulated Products and  
11 that will be sold in California. Each warning shall be prominently placed with such conspicuousness  
12 as compared with other words, statements, designs, or devices as to render it likely to be read and  
13 understood by an ordinary individual under customary conditions before purchase or use. Each  
14 warning shall be provided in a manner such that the consumer or user understands to which *specific*  
15 Product the warning applies, so as to minimize the risk of consumer confusion. EBRS has committed  
16 and certified that it will no longer sell the Products in California, however in the event that in the  
17 future EBRS intends to do so, for any Product sold in California that is not a Reformulated Product,  
18 after the Effective Date, EBRS shall affix a warning to the packaging, labeling, or directly on each  
19 Product provided for sale in retail outlets in California that states:

20 **WARNING:** This product contains DEHP, a chemical  
21 known to the State of California to cause  
22 birth defects and other reproductive harm.

## 23 **3. MONETARY SETTLEMENT TERMS**

### 24 **3.1 Civil Penalty Payments**

25 Pursuant to Health and Safety Code section 25249.7(b), in settlement of all the claims referred  
26 to in this Consent Judgment, EBRS shall pay \$22,000.00 in civil penalties. Each civil penalty  
27 payment shall be allocated according to Health and Safety Code section 25249.12(c)(1) and (d) with  
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1 seventy-five percent (75%) of the funds paid to the California Office of Environmental Health  
2 Hazard Assessment ("OEHHA") and twenty-five percent (25%) of the funds remitted to Moorberg.

3 **3.1.1 Initial Civil Penalty**

4 On or before the date the Court approves this Consent Judgment (including any  
5 tentative rulings that are unopposed), EBRS shall issue payment for its initial civil penalty payment  
6 in the amount of \$10,000.00 to "Dennis C. Birkhimer, APC" Dennis C. Birkhimer, APC shall  
7 provide The Chanler Group with written confirmation within five days of receipt that the funds have  
8 been deposited in a trust account. Within one week of the date that this Consent Judgment is  
9 approved by the Court, Dennis C. Birkhimer, APC shall issue two separate checks for the initial civil  
10 penalty payment to "OEHHA" in the amount of \$7,500 and "Mark Moorberg, Client Trust Account"  
11 in the amount of \$2,500.

12 **3.1.2 Final Civil Penalty**

13 On or before November 30, 2015, EBRS shall make a final civil penalty payment of  
14 \$12,000. Pursuant to title 11 California Code of Regulations, section 3203(c), Moorberg agrees that  
15 the final civil penalty payment shall be waived in its entirety if, no later than November 30, 2015, an  
16 officer of EBRS provides Moorberg with written certifications that all of the Products purchased for  
17 sale or manufactured for sale in California are (1) Reformulated Products as defined by Section 2.1,  
18 or (2) that EBRS will no longer sell Products that are not Reformulated Products and that there are no  
19 remaining Products in the custody, control or possession of EBRS or otherwise remaining in the  
20 possession of any retail store or warehouse controlled, owned or operated by EBRS in California, and  
21 that if EBRS does recommence sales at a later date that all products sold in California will be  
22 Reformulated Products. The option to certify reformulation or to not sell in California outstanding  
23 unreformulated Products in lieu of making the final civil penalty payment required by this Section is  
24 a material term and time is of the essence.

25 **3.2 Reimbursement of Fees and Costs**

26 The parties acknowledge that Moorberg and his counsel offered to resolve this dispute  
27 without reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving the  
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1 issue to be resolved after the material terms of this Consent Judgment had been settled. Shortly after  
2 the other settlement terms had been finalized, EBRS expressed a desire to resolve Moorberg's fees  
3 and costs. The Parties then attempted to (and did) reach an accord on the compensation due to  
4 Moorberg and his counsel under general contract principles and the private attorney general doctrine  
5 codified at California Code of Civil Procedure section 1021.5 for all work performed through the  
6 mutual execution of this Consent Judgment. EBRS shall, on or before the date this Court approves  
7 the Consent Judgment (including any tentative rulings that are unopposed), issue payment to "Dennis  
8 C. Birkhimer, APC" in the amount of fees and costs of \$29,500.00 to be held in trust by Dennis C.  
9 Birkhimer, APC for The Chanler Group. Dennis C. Birkhimer, APC shall provide The Chanler  
10 Group with written confirmation within five days of receipt that the funds have been deposited in a  
11 trust account. Within one week of the date this Consent Judgment is approved by the Court, Dennis  
12 C. Birkhimer, APC shall issue a check payable to "The Chanler Group" to the address found in  
13 Section 3.3.1 below. In the event additional work is required and additional fees and costs incurred,  
14 exclusive of the Motion to Approve this Consent Judgment, Moorberg reserves the right to seek  
15 additional reimbursement of attorneys' fees and costs incurred, pursuant to all applicable laws.

### 16 **3.3 Payment Procedures**

17 Except for the final civil penalty payment required by Section 3.1.2, all payments due under  
18 this Consent Judgment are to be delivered on or before the dates set out in sections 3.1.1 and 3.2 (the  
19 date this Court approves the Consent Judgment, including any tentative rulings that are  
20 unopposed) to Dennis C. Birkhimer, APC, and released to The Chanler Group and Moorberg within  
21 one week of the Court approving this Consent Judgment according to the following subsections.

#### 22 **3.3.1 Payment Addresses**

23 (a) All payments and tax documentation for Moorberg and his counsel shall be  
24 delivered to:

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

1 (b) All payments and tax documentation for OEHHA shall be delivered to  
2 OEHHA (Checks with memo line "Prop 65 Penalties") at one of the following addresses, as  
3 appropriate:  
4

5 For United States Postal Service Delivery:

6 Mike Gyurics  
7 Fiscal Operations Branch Chief  
8 Office of Environmental Health Hazard Assessment  
9 P.O. Box 4010  
10 Sacramento, CA 95812-4010

11 For Non-United States Postal Service Delivery or Courier:

12 Mike Gyurics  
13 Fiscal Operations Branch Chief  
14 Office of Environmental Health Hazard Assessment  
15 1001 I Street  
16 Sacramento, CA 95812-4010

17 **3.3.2 Proof of Payment to OEHHA**

18 EBRS shall provide Moorberg's counsel with a copy of the checks sent to OEHHA  
19 enclosed with the payments to Moorberg and his counsel sent to the address in Section 3.3.1(a).

20 **4. CLAIMS COVERED AND RELEASED**

21 **4.1 Moorberg's Public Release of Proposition 65 Claims**

22 Moorberg, acting on his own behalf and in the public interest, releases EBRS and its parents,  
23 subsidiaries, affiliated entities under common ownership, directors, officers, employees, and  
24 attorneys ("Releasees") and each entity to whom it directly or indirectly distributes or sells the  
25 Products, including but not limited to its downstream distributors, wholesalers, customers, retailers,  
26 franchisers, franchisees, cooperative members, licensors, and licensees, including, but not limited to  
27 Jamba, Inc., Jamba Juice Company and their respective subsidiaries, affiliates, franchisors, joint  
28 ventures, licensees and franchisees, for their respective sales of or promotions involving any of the  
Products, ("Downstream Releasees") for violations arising under Proposition 65 for unwarned  
exposures to DEHP from the Products sold by EBRS prior to the Effective Date, as set forth in the  
Notice. Compliance with the terms of this Consent Judgment constitutes compliance with

1 Proposition 65 with respect to exposures to DEHP from the Products sold by EBRS before the  
2 Effective Date.

#### 3 **4.2 Moorberg's Individual Release of Claims**

4 Moorberg, in his individual capacity only and *not* in his representative capacity, also provides  
5 a release to EBRS, Releasees, and Downstream Releasees which shall be effective as a full and final  
6 accord and satisfaction, as a bar to all actions, causes of action, obligations, costs, expenses,  
7 attorneys' fees, damages, losses, claims, liabilities and demands of Moorberg of any nature, character  
8 or kind, whether known or unknown, suspected or unsuspected, arising out of alleged or actual  
9 exposures to DEHP from the Products sold or distributed for sale by EBRS before the Effective Date.

10 Moorberg also expressly, voluntarily, knowingly and advisedly WAIVES any and all rights  
11 granted to him under California Civil Code Section 1542 with respect to any claims arising from or in  
12 any way related to alleged or actual exposures to DEHP from the Products sold or distributed for sale  
13 by EBRS before the Effective Date.

14 Section 1542: "A general release does not extend to claims which the creditor  
15 does not know or suspect to exist in his or her favor at the time of executing the  
16 release, which if known by him or her must have materially affected his or her  
17 settlement with the debtor."

#### 18 **4.3 EBRS Release of Moorberg**

19 EBRS, on its own behalf, and on behalf of its past and current agents, representatives,  
20 attorneys, successors, and assignees, hereby waives any and all claims against Moorberg and his  
21 attorneys and other representatives, for any and all actions taken or statements made by Moorberg  
22 and his attorneys and other representatives, whether in the course of investigating claims, otherwise  
23 seeking to enforce Proposition 65 against it in this matter, or with respect to the Products.

24 EBRS also expressly, voluntarily, knowingly and advisedly WAIVES any and all rights  
25 granted to it under California Civil Code Section 1542 with respect to any claims arising from or in  
26 any way related to alleged or actual exposures to DEHP from the Products sold or distributed for sale  
27 by EBRS before the Effective Date, and from all actions taken or statements made by Moorberg and  
28

1 his attorneys and other representatives, whether in the course of investigating claims, otherwise  
2 seeking to enforce Proposition 65 against it in this matter.

3 Section 1542: "A general release does not extend to claims which the creditor  
4 does not know or suspect to exist in his or her favor at the time of executing the  
5 release, which if known by him or her must have materially affected his or her  
6 settlement with the debtor."

7 **5. COURT APPROVAL**

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

11 **6. SEVERABILITY**

12 If, subsequent to the Court's approval and entry of this Consent Judgment as a judgment, any  
13 provision is held by a court to be unenforceable, the validity of the remaining provisions shall not be  
14 adversely affected.

15 **7. GOVERNING LAW**

16 The terms of this Consent Judgment shall be governed by the laws of the state of California  
17 and apply within the state of California. In the event that Proposition 65 is repealed, preempted, or is  
18 otherwise rendered inapplicable by reason of law generally, or as to the Products, then EBRs may  
19 provide written notice to Moorberg of any asserted change in the law, and shall have no further  
20 obligations pursuant to this Consent Judgment with respect to, and to the extent that, the Products are  
21 so affected. Nothing in this Consent Judgment shall be interpreted to relieve EBRs from any  
22 obligation to comply with any pertinent state or federal toxics control laws.

23 **8. NOTICE**

24 Unless specified herein, all correspondence and notice required by this Consent Judgment  
25 shall be in writing and sent by: (i) personal delivery; (ii) first-class, registered, or certified mail,  
26 return receipt requested; or (iii) a recognized overnight courier to the following addresses:  
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1 For EBRs:

2 Dennis C. Birkhimer, Esq.  
3 Dennis C. Birkhimer, APC  
4 P. O. Box 2790  
5 San Rafael, CA 94912

6 For Moorberg:

7 The Chanler Group  
8 Attn: Proposition 65 Coordinator  
9 2560 Ninth Street  
10 Parker Plaza, Suite 214  
11 Berkeley, CA 94710

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

14 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

15 This Consent Judgment may be executed in counterparts and by facsimile or portable  
16 document format (PDF) signature, each of which shall be deemed an original, and all of which, when  
17 taken together, shall constitute one and the same document.

18 **10. POST EXECUTION ACTIVITIES**

19 Moorberg agrees to comply with the reporting form requirements referenced in Health and  
20 Safety Code section 25249.7(f). The Parties further acknowledge that, pursuant to Health and Safety  
21 Code section 25249.7(f), a noticed motion is required to obtain judicial approval of the settlement. In  
22 furtherance of obtaining such approval, Moorberg and EBRs agree to mutually employ their best  
23 efforts, and that of their counsel, to support the entry of this agreement as judgment, and to obtain  
24 judicial approval of their settlement in a timely manner. For purposes of this Section, "best efforts"  
25 shall include, at a minimum, cooperating with the drafting and filing of the necessary moving papers,  
26 and supporting the motion for judicial approval.

27 **11. MODIFICATION**

28 This Consent Judgment may be modified only by: (i) a written agreement of the Parties and  
entry of a modified consent judgment by the Court; or (ii) a successful motion or application of any  
Party, and the entry of a modified consent judgment by the Court.

1 **12. AUTHORIZATION**

2 The undersigned are authorized to execute this Consent Judgment and have read, understood,  
3 and agree to all of the terms and conditions contained herein.

4  
5 **AGREED TO:**

**AGREED TO:**

6 Date: 10.9.14

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

7  
8 By:  \_\_\_\_\_  
9 **MARK MOORBERG**

By: \_\_\_\_\_  
**John Breznikar, President  
East Bay Restaurant Supply, Inc.**

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1 **12. AUTHORIZATION**

2 The undersigned are authorized to execute this Consent Judgment and have read, understood,  
3 and agree to all of the terms and conditions contained herein.

4 **AGREED TO:**

**AGREED TO:**

5  
6 Date: \_\_\_\_\_

Date: Dec 10 - 2014

7  
8 By: \_\_\_\_\_  
9 **MARK MOORBERG**

By:   
10 **John Breznikar, President**  
11 **East Bay Restaurant Supply, Inc.**

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