

COPY



1 Christopher C. Moscone, State Bar No. 170250
2 Laurence D. Haveson, State Bar No. 152631
3 MOSCONE EMBLIDGE & OTIS LLP
4 220 Montgomery Street, Suite 2100
San Francisco, CA 94104
Telephone: (415) 362-3599
Facsimile: (415) 362-2006

5 Attorneys for Plaintiff
6 MARK MOORBERG

RECEIVED

JUL 26 2016
Xian-Xii Bowie

By _____
ALAMEDA COUNTY SUPERIOR COURT

7
8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF ALAMEDA - UNLIMITED CIVIL JURISDICTION

FILED
ALAMEDA COUNTY

AUG 25 2016

CLERK OF THE SUPERIOR COURT

By _____ Deputy

11 MARK MOORBERG,

12 Plaintiff,

13 v.

14 CARAVAN CANOPY INT'L, INC.;
15 WALMART.COM USA LLC.; and DOES 1 -
100, inclusive,

16 Defendants.

Case No. RG15791461

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

Date: August 25, 2016
Time: 2:00 PM
Dept: 20
Judge: Hon. Robert B. Freedman

RESERVATION NUMBER: R-1757877


BY FAX

1 In the above-entitled action, Plaintiff Märk Moorberg and Defendant Caravan Canopy
2 Int'l, Inc., having agreed through their respective counsel that Judgment be entered pursuant to
3 the 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
5 settlement and Consent Judgment on August 25, 2016,

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
8 is entered in accordance with the terms of the Consent Judgment attached hereto as **Exhibit A**.
9 By stipulation of the parties, the Court will retain jurisdiction to enforce the settlement under
10 Code of Civil Procedure § 664.6.

11
12 **IT IS SO ORDERED.**

13
14
15 Dated: August 25, 2016



JUDGE OF THE SUPERIOR COURT

EXHIBIT A

EXHIBIT A

1 Christopher C. Moscone, State Bar No. 170250
2 Laurence D. Haveson, State Bar No. 152631
3 MOSCONE EMBLIDGE & OTIS LLP
4 220 Montgomery Street, Suite 2100
5 San Francisco, CA 94104
6 Telephone: (415) 362-3599
7 Facsimile: (415) 362-2006

8 Attorneys for Plaintiff
9 MARK MOORBERG

10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ALAMEDA - UNLIMITED CIVIL JURISDICTION

MARK MOORBERG,

Plaintiff,

v.

CARAVAN CANOPY INT'L, INC.;
WAL-MART STORES, INC.; and DOES
1 -100, inclusive,

Defendants.

Case No. RG15791461

[PROPOSED] CONSENT JUDGMENT

1 **1. INTRODUCTION**

2 1.1 **Parties**

3 The parties to this Consent Judgment (“Consent Judgment”) are Plaintiff Mark Moorberg
4 (“Moorberg”) on the one hand, and Defendant Caravan Canopy Int’l, Inc. (“Caravan”) on the
5 other hand (each a “Party” and collectively “Parties”).

6 1.2 **Plaintiff**

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

10 1.3 **Defendant**

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

14 1.4 **General Allegations**

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

20 1.5 **Product Description**

21 The products that are covered by this Consent Judgment are vinyl/PVC chairs containing
22 DEHP that are manufactured, sold, or distributed for sale in California by Caravan or any of
23 Caravan’s customers, including, but not limited to, the Infinity Zero Gravity Chair Blue, Item
24 No. 80009000020, UPC #6 89215 89002 8, (collectively, “Products”).

25 1.6 **Notice of Violation**

26 On June 26, 2015, Moorberg served Caravan and certain public prosecutors with a “60-
27 Day Notice of Violation” (“Notice”) alleging that Caravan was in violation of Proposition 65 for
28 failing to warn its customers and consumers in California that the Products expose users to

1 DEHP. To the best of the Parties' knowledge, no public enforcer has commenced and is
2 diligently prosecuting the allegations set forth in the Notice.

3 1.7 **Complaints**

4 On October 29, 2015, Moorberg filed the original complaint against Caravan in the
5 Alameda County Superior Court, alleging violations of Health & Safety Code § 25249.6 that are
6 the subject of the Notice.

7 On November 3, 2015, Moorberg filed a First Amended Complaint ("FAC"). No new
8 parties or products were alleged in the FAC. The FAC, as the operative complaint, in this action
9 will hereinafter be referred to as the "Complaint."

10 1.8 **No Admission**

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

19 1.9 **Consent to Jurisdiction**

20 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
21 jurisdiction over Defendants as to the allegations in the Complaint, that venue is proper in
22 Alameda County and that this Court has jurisdiction to enter and enforce the provisions of this
23 Consent Judgment pursuant to California Code of Civil Procedure § 664.6.

24 **2. DEFINITIONS**

25 2.1 "Effective Date" means the date this Consent Judgment is approved by the court.

26 2.2 "Reformulated Products" are defined as those Products that contain less than
27 1,000 ppm (0.1%) DEHP content when analyzed pursuant to U.S. Environmental Protection
28

1 Agency testing methodologies 3580A and 8270C, or equivalent methodologies used by state or
2 federal agencies for purposes of determining DEHP content in a solid substance.

3 **3. INJUNCTIVE RELIEF**

4 3.1 **Reformulation Standard.** As of the Effective Date, Caravan shall only
5 manufacture, import, distribute, sell and/or offer for sale in California Products that are:
6 (i) "Reformulated Products" or (ii) Products that contain the proper health hazard warnings
7 pursuant to Section 3.2 below.

8 3.2 All Products manufactured, imported, distributed, sold and/or offered for sale in
9 California after the Effective Date, that are not Reformulated Products, shall contain the clear
10 and reasonable warning appearing below. Each warning shall be printed and prominently
11 attached to the product using a tag sewn into the material of the Products, or a hang tag attached
12 to the Products such conspicuousness as compared with other words, statements, designs, or
13 devices as to render it likely to be read and understood by an ordinary individual under
14 customary conditions before purchase or use ("Conspicuousness Requirements"). For purposes
15 of this Settlement Agreement, a warning printed in a font size no smaller than 8 point and that
16 otherwise complies with the requirements referenced above in this paragraph, shall be deemed to
17 meet the Conspicuousness Requirements.

18 **WARNING:** This product contains a chemical known to the State of California to cause
19 cancer and birth defects and other reproductive harm.

20 **4. PAYMENTS**

21 4.1 **Payments Pursuant to Health and Safety Code § 25249.7(b)**

22 Pursuant to Health and Safety Code section 25249.7(b)(2), except as provided in Section
23 4.1.2, Caravan shall pay \$2,500 in civil penalties. Each penalty payment shall be allocated
24 according to Health and Safety Code section 25249.12(c)(1) and (d), with 75% of the penalty
25 amount remitted to the California Office of Environmental Health Hazard Assessment and the
26 remaining 25% of each penalty payment remitted to Moorberg, as follows: Within five (5) days
27 of the Effective Date, Caravan shall provide its civil penalty payment in two checks for the
28 following amounts made payable to: (a) "OEHHA" in the amount of \$1,875; and (b) "Mark
Moorberg" in the amount of \$625.

1 4.2 Reimbursement of Attorneys' Fees and Costs

2 The Parties acknowledge that Moorberg and his counsel offered to resolve this dispute
3 without reaching terms on the amount of fees and costs to be reimbursed to them, thereby
4 leaving the issue to be resolved after the material terms of the agreement had been settled.
5 Shortly after all other settlement terms had been finalized, the Parties negotiated the reasonable
6 attorneys' fees and costs to be reimbursed to Moorberg and his Counsel under general contract
7 principles and the private attorney general doctrine codified at Code of Civil Procedure § 1021.5
8 for all work performed in this matter through the mutual execution of this Consent Judgment,
9 and court approval of the same, exclusive of fees and costs incurred on appeal, if any. Under
10 these legal principles, within 10 days of the Effective Date, Caravan shall pay \$22,500 for the
11 reasonable attorneys' fees and costs incurred by Moorberg investigating, bringing this matter to
12 Caravan's attention, litigating and negotiating a settlement in the public interest, obtaining the
13 Court's approval of this Consent Judgment, and enforcing this matter.

14 4.3 Payment Procedures.

15 4.3.1 **Payment Timing / Enforcement of Payment Terms**

16 In the event that any payment required by this Consent Judgment is untimely, the Parties
17 agree and acknowledge that (a) Caravan shall be liable to Moorberg for 10% simple interest on
18 any unpaid amount(s); (b) after meeting and conferring to attempt to resolve informally,
19 Moorberg may seek to enforce Caravan's payment obligations under Code of Civil Procedure
20 § 664.6; and (c) Moorberg shall be entitled to recover the attorneys' fees incurred to recover any
21 unpaid amounts required by this Consent Judgment pursuant to general contract principles and
22 Code of Civil Procedure § 1021.5.

23 4.3.2 **Payees and Payment Addresses**

24 (a) **All payments to Moorberg and Moscone Emblidge & Otis LLP**
25 **shall be delivered to the following address:**

26 Moscone Emblidge & Otis LLP
27 Attn: Proposition 65 Coordinator
28 220 Montgomery Street, Suite 220
 San Francisco, CA 94104

1 Caravan shall provide payment of Moorberg's portion of the civil penalties by check made
2 payable to Mark Moorberg, with IRS form W-9 to be provided by Moorberg upon request.

3 Caravan shall provide payment of the attorneys' fees and costs by check made payable to
4 Moscone Emblidge & Otis LLP.

5
6 (b) All payments to OEHHA (EIN: 68-0284486) shall be delivered
7 directly to OEHHA (Memo line "Prop 65 Penalties") at the following address:

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

13 With a copy of the check(s) payable to OEHHA mailed to Moscone Emblidge & Otis LLP at the
14 payment address provided in section 4.3.2(a), as proof of payment to OEHHA.

15 **5. CLAIMS COVERED AND RELEASED**

16 **5.1 Public Release of Proposition 65 Claims**

17 In consideration of the promises and commitments herein contained, Moorberg, acting on
18 his own behalf and in the public interest, hereby waives and releases Caravan, its parents,
19 subsidiaries, affiliated entities under common ownership or control, directors, officers,
20 employees, and attorneys ("Releasees"); and each entity to whom it directly or indirectly
21 distributes or sells Products, and any distributors, wholesalers, customers, marketplace hosts,
22 retailers (including but not limited to Wal-Mart Stores, Inc. and Walmart.com USA LLC and
23 their respective parents, affiliates and subsidiaries), franchisees, cooperative members, licensors,
24 and licensees ("Downstream Defendant Releasees"), from all claims for violations of Proposition
25 65 based on exposures to DEHP from the Products sold by Caravan prior to the Effective Date.

26 This waiver and release is limited to those claims arising under Proposition 65 for unwarned
27 exposures to DEHP from Products sold by Defendants before the Effective Date. Defendants'
28 and Releasees' compliance with this Consent Judgment constitutes compliance with Proposition

1 65 with respect to exposures to DEHP and failures to warn of the presence of DEHP in and on
2 the Products sold by Caravan before the Effective Date.

3 **5.2 Private Release in Plaintiff's Individual, Non-representative Capacity**

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

11 **5.3 Caravan's Release of Moorberg**

12 Caravan waives any and all claims against Moorberg and 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 Moorberg and his attorneys and other representatives, whether in the course of
15 investigating claims, otherwise seeking enforcement of Proposition 65 against it in this matter, or
16 with respect to the Products.

17 **6. NOTICES**

18 When any Party is entitled to receive any notice under this Consent Judgment, the notice
19 shall be sent by: (a) first class, registered or certified mail; (b) personal delivery; or (c) a
20 recognized overnight courier on any one Party by the other Party at the following addresses:

21 For Moorberg:

22 Moscone Emblidge & Otis LLP
23 Attn: Proposition 65 Coordinator
24 220 Montgomery Street, Suite 220
San Francisco, CA 94104

25 For Caravan:

26 Lindy Park, President
27 Caravan Canopy Int'l, Inc.
28 14600 Alondra Boulevard
La Mirada, CA 90638

1 With a copy to:

2 Michael P. Newman, Esq.
3 14600 Alondra Blvd.
4 La Mirada, CA 90638

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

7 **7. POST SETTLEMENT ACTIVITIES AND COURT APPROVAL**

8 7.1 Moorberg agrees to comply with the reporting form requirements referenced in
9 Health and Safety Code section 25249.7(f).

10 7.2 The Parties further acknowledge that, pursuant to Health & Safety Code
11 § 25249.7(f)(4), a noticed motion is required to obtain judicial approval of the settlement, which
12 motion Moorberg shall draft and file, and Caravan shall join. Moorberg and Caravan agree to
13 mutually employ their best efforts to support the entry of this agreement as a Consent Judgment
14 and obtain approval of the Consent Judgment by the Court in a timely manner. If any third party
15 objection to the noticed motion is filed, Caravan shall work with Moorberg to file a joint reply,
16 or file a joinder in support of any reply filed by Moorberg, and appear at any hearing before the
17 Court. This provision is a material component of the Consent Judgment and shall be treated as
18 such in the event of a breach.

19 7.3 If this Consent Judgment is not approved by the Court, (a) this Consent Judgment
20 and any and all prior agreements between the Parties as to the Notices or Complaint referenced
21 herein shall terminate and become null and void, and the action shall revert to the status that
22 existed prior to the execution date of this Consent Judgment; (b) no term of this Consent
23 Judgment or any draft thereof, or of the negotiation, documentation, or other part or aspect of the
24 Parties' settlement discussions, shall have any effect, nor shall any such matter be admissible in
25 evidence for any purpose in this action, or in any other proceeding; and (c) the Parties agree to
26 meet and confer to determine whether to modify the terms of the Consent Judgment and to
27 resubmit it for approval.
28

1 **8. ENFORCEMENT**

2 Any Party may, by motion or application for an order to show cause before this Court,
3 enforce the terms and conditions contained in this Consent Judgment.

4 **9. SEVERABILITY**

5 If, subsequent to the execution of this Consent Judgment, any of the provisions of this
6 Consent Judgment are held by a court to be unenforceable, the validity of the enforceable
7 provisions remaining shall not be adversely affected.

8 **10. GOVERNING LAW**

9 The terms of this Consent Judgment shall be governed by the laws of the State of
10 California and apply within the State of California. In the event that Proposition 65 is repealed,
11 preempted or is otherwise rendered inapplicable by reason of law generally, or if any of the
12 provisions of this Consent Judgment are rendered inapplicable or no longer require as a result of
13 any such repeal or preemption or rendered inapplicable by reason of law generally as to the
14 Products, then Caravan shall provide written notice to Moorberg of any asserted change in law,
15 and, if Moorberg agrees, Caravan shall have no further obligations pursuant to this Consent
16 Judgment with respect to, and to the extent that, the Products are so affected. Nothing in this
17 Consent Judgment shall be interpreted to relieve Caravan from any obligation to comply with
18 any pertinent state or federal toxics control law.

19 **11. DRAFTING**

20 The Parties, including their counsel, have participated and cooperated in the drafting and
21 preparation of this Consent Judgment and this Consent Judgment is the result of the joint efforts
22 of the Parties. This Consent Judgment was subject to revision and modification by the Parties
23 and has been accepted and approved as to its final form by all Parties and their counsel.

24 Accordingly, any uncertainty or ambiguity existing in this Consent Judgment shall not be
25 interpreted against any Party as a result of the manner of the preparation of this Consent
26 Judgment. Each Party to this Consent Judgment agrees that any statute or rule of construction
27 providing that ambiguities are to be resolved against the drafting Party should not be employed
28

1 in the interpretation of this Consent Judgment and, in this regard, the Parties hereby waive
2 California Civil Code Section 1654.

3 **12. MODIFICATION**

4 This Consent Judgment may be modified only: (1) by written agreement of the Parties
5 and upon entry of a modified Consent Judgment by the Court thereon; or (2) upon a successful
6 motion of any Party and entry of a modified Consent Judgment by the Court.

7 **13. COUNTERPARTS**

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

11 **14. AUTHORIZATION**

12 Each signatory to this Consent Judgment certifies that he or she is fully authorized by the
13 Party he or she represents to agree to the terms and conditions of this Consent Judgment, to enter
14 into and execute the Consent Judgment on behalf of the Party represented, and to legally bind
15 that Party, and that he or she has read, understood, and agree to all of the terms and conditions of
16 this Consent Judgment.

17
18 AGREED TO:

AGREED TO:

19
20 Date: 5.26.16

Date: _____

21
22 By: 
Plaintiff Mark Moorberg

By: _____
Defendant Caravan Caravan Canopy Int'l, Inc.

1 in the interpretation of this Consent Judgment and, in this regard, the Parties hereby waive
2 California Civil Code Section 1654.

3 **12. MODIFICATION**

4 This Consent Judgment may be modified only: (1) by written agreement of the Parties
5 and upon entry of a modified Consent Judgment by the Court thereon; or (2) upon a successful
6 motion of any Party and entry of a modified Consent Judgment by the Court.

7 **13. COUNTERPARTS**

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

11 **14. AUTHORIZATION**

12 Each signatory to this Consent Judgment certifies that he or she is fully authorized by
13 the Party he or she represents to agree to the terms and conditions of this Consent Judgment, to
14 enter into and execute the Consent Judgment on behalf of the Party represented, and to legally
15 bind that Party, and that he or she has read, understood, and agree to all of the terms and
16 conditions of this Consent Judgment.

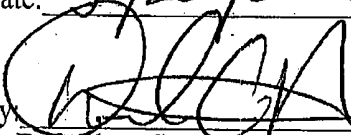
17
18 AGREED TO:

AGREED TO:

19
20 Date: _____

Date: 5/25/2016

21
22 By: _____
Plaintiff Mark Moorberg

23 By:  _____
Defendant Caravan Caravan Canopy Int'l, Inc.
DAVID C. HUARK - Pres.