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FILED
ALAMEDA COUNTY

MAY - 3 2017

Attorneys for Plaintiff

CLERK OF THE SUPERIOR COURT
By Debbie Sheets
Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ALAMEDA

10 PRECILA BALABBO,

11 Plaintiff,

12 vs.

13 THE MICHAELS COMPANIES, INC.,
14 MICHAELS STORES PROCUREMENT
15 COMPANY, INC.,

16 Defendants.

Case No. RG16840526

[PROPOSED] CONSENT JUDGMENT

Judge: Jo-Lynne Q. Lee

Dept.: 18

Hearing Date: April 11, 2017

Hearing Time: 3:00 PM

Reservation #: R-1825088

1 **1. INTRODUCTION**

2 **1.1 Parties**

3 This Consent Judgment is entered into by and between plaintiff Precila Balabbo,
4 ("Balabbo") on the one hand, and Michaels Stores, Inc. ("Defendant") on the other hand, with
5 Balabbo and Defendant individually referred to as a "Party" and collectively as the "Parties."

6 **1.2 Plaintiff**

7 Balabbo is an individual residing in California who seeks to promote awareness of
8 exposures to chemicals.

9 **1.3 Defendant**

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

13 **1.4 General Allegations**

14 Balabbo alleges that Defendant manufactures, imports, sells, or distributes for sale to
15 consumers in the State of California photo albums containing Di(2-ethylhexyl)phthalate
16 ("DEHP") without first providing the clear and reasonable exposure warning required by
17 Proposition 65. DEHP is listed pursuant to Proposition 65 as a chemical that is known to the
18 State of California to cause cancer and birth defects and other reproductive harm.

19 **1.5 Product Description**

20 The products covered by this Consent Judgment are photo albums containing DEHP that
21 are manufactured, sold, and/or distributed for authorized sale to consumers in California by
22 Defendant, including, but not limited to the Recollections Photo Album, UPC # 886946270567
23 ("Products").

24 **1.6 Notice of Violation**

25 On or about May 16, 2016, Balabbo served Defendant and certain requisite public
26 enforcement agencies with a "60-Day Notice of Violation" ("Notice"), a document that informed
27 the recipients of Balabbo's allegation that Defendant violated Proposition 65 by failing to warn its
28 customers and consumers in California that the Products expose users to DEHP.

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1.7 Complaint

After the 60-day notice period was exhausted without an authorized public prosecutor of Proposition 65 having asserted such claims, Balabbo filed the instant action against Defendant (“Complaint”) for the alleged violations of Health & Safety Code § 25249.6 that are the subjects of the Notice.

1.8 No Admission

Defendant denies the material, factual, and legal allegations contained in the Notice and maintains that all of the products it has manufactured, sold, or distributed for authorized sale in California, including the Products, have been, and are, in compliance with all laws, including Proposition 65. Nothing in this Consent Judgment shall be construed as an admission by Defendant of any fact, finding, conclusion of law, issue of law, or violation of law; nor shall compliance with this Consent Judgment constitute or be construed as an admission by Defendant of any fact, finding, conclusion of law, issue of law, or violation of law, the same being specifically denied by Defendant. This section shall not, however, diminish or otherwise affect Defendant’s obligations, responsibilities, and duties under this Consent Judgment.

1.9 Consent to Jurisdiction

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

1.10 Effective Date

For purposes of this Consent Judgment, the term “Effective Date” shall mean the date on which Balabbo serves notice on the Defendant and the Office of the California Attorney General that the Court has approved and entered this Consent Judgment.

2. INJUNCTIVE RELIEF: REFORMULATION AND WARNINGS

By no later than the Compliance Date, and continuing thereafter, Defendant shall only manufacture or import for potential sale in California, Products that meet the Reformulation

1 Standard set forth in Section 2.1 below (“Reformulated Products”) or which meet the warning
2 requirements set forth in Section 2.2 below.¹

3 **2.1 Reformulation Standard**

4 For purposes of this Consent Judgment, Reformulated Products are defined as Products
5 that contain no more than 1,000 parts per million (0.1%) each of any of the following chemicals:
6 DEHP, Di-isodecyl phthalate (DIDP); Diisononyl Phthalate (DINP); Butyl benzyl phthalate
7 (BBP), Di-n-hexyl Phthalate (DnHP) and Di-n-butyl Phthalate (DBP) (“Listed Phthalates”). For
8 purposes of determining compliance with this Consent Judgment, the content of Listed Phthalates
9 shall be analyzed pursuant to EPA testing methodologies 3580A and 8270C or equivalent
10 methodologies utilized by state or federal agencies for the purpose of determining Listed
11 Phthalate content in a solid substance.

12 **2.2 Product Warnings**

13 For all Products that contain a Listed Phthalate in an amount exceeding the Reformulation
14 Standard set forth in Section 2.1 above, and which are manufactured, sold or packaged for
15 shipment to California following the Compliance Date, Defendant shall provide the following
16 Proposition 65 warning:

17 **WARNING:** This product contains chemicals known to the State of California to
18 cause cancer, and birth defects or other reproductive harm.²

19 The above warning statement shall be placed or affixed on the Product or its package so as to be
20 able to be read and understood by an ordinary individual prior to purchase or use or it may be
21 displayed at the point of purchase prior to final consummation of the sales transaction by which
22 the product is acquired by someone in California.

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26 ¹ The “Compliance Date” shall mean August 31, 2017 or six months following the Effective Date, whichever arises
27 earlier. Products manufactured for and imported by the Defendant prior to the Compliance Date are exempted from
the requirements set forth in Sections 2.1 and 2.2 above and may be offered for sale in California and sold through as
is.

28 ² Where only one Listed Phthalate exceeds the Reformulation Standard, Defendant may elect to have this warning
statement refer to the word “chemical” in the singular.

1 **3. STATUTORY PENALTY PAYMENTS**

2 **3.1 Civil Penalty**

3 Defendant shall pay \$3,000.00 in civil penalties pursuant to California Health & Safety
4 Code § 25249.7(b) in accordance with this Section. This penalty payment shall be allocated in
5 accordance with California Health & Safety Code § 25249.12(c)(l) and (d), with 75% of the
6 funds remitted to the California Office of Environmental Health Hazard Assessment
7 (“OEHHA”) and the remaining 25% of the penalty remitted to Balabbo. More specifically,
8 within fifteen (15) business days of the Effective Date, Defendant shall issue two separate
9 checks for the civil penalty payment to (a) “OEHHA” in the amount of \$2,250.00 and with the
10 memo line on the check indicating “Prop 65 Penalties—Balabbo v. Michaels” (Defendant may
11 reference OEHHA’s Tax Identification Number of 68-0284486 for this check); and (b)
12 “Brodsky and Smith, LLC Trust Account” in the amount of \$750.00 (for which Balabbo shall
13 provide Defendant a completed IRS Form W-9 with a tax identification number within two days
14 following the Effective Date, if not beforehand). These checks shall be delivered to the
15 addresses listed in Section 3.3 below.

16 **3.2 Payment Delivery**

17 (a) Payment to Balabbo shall be delivered to the following address:

18 Jordan Schatz, Esq.
19 Brodsky & Smith, LLC
20 2 Bala Plaza, Suite 510
21 Bala Cynwyd, PA 19004

22 (b) Payment to OEHHA shall be delivered to one of the following addresses:

23 For United States Postal Service Delivery:

24 Mike Gyurics
25 Fiscal Operations Branch Chief
26 Office of Environmental Health Hazard Assessment
27 P.O. Box 4010
28 Sacramento, CA 95812-4010

 Or

 For Non-United States Postal Service Delivery:

 Mike Gyurics
 Fiscal Operations Branch Chief

1 Office of Environmental Health Hazard Assessment
2 1001 I Street
3 Sacramento, CA 95814

4 **4. REIMBURSEMENT OF FEES AND COSTS**

5 Defendant shall pay Balabbo \$27,000.00 for fees and costs incurred as a result of
6 investigating, bringing this matter to Defendant's attention, and negotiating a settlement in the
7 public interest. Defendant shall make its checks payable to Brodsky & Smith, LLC and shall
8 deliver payment to the address listed in Section 3(a) above within fifteen (15) business days of the
9 Effective Date. To facilitate timely payment, Balabbo shall provide Defendant with a completed
10 IRS Form W-9 with Brodsky & Smith, LLC's tax identification number within two days
11 following the Effective Date if not beforehand.

12 **5. CLAIMS COVERED AND RELEASED**

13 **5.1 Balabbo's Public Release of Proposition 65 Claims**

14 Balabbo, acting on her own behalf and in the public interest, releases Defendant, and its
15 affiliated entities, directors, officers, employees, and attorneys, as well as each entity from whom
16 they acquire the Products or the Products' components, and each entity to whom they directly or
17 indirectly distribute or sell Products, including, but not limited to, distributors, wholesalers,
18 dealers, customers, retailers, franchisees, cooperative members, licensors, and licensees, from all
19 claims for violations of Proposition 65 based on exposures to DEHP from Products manufactured,
20 sold, or packaged by Defendant prior to the Effective Date.³

21 **5.2 Balabbo's Private Releases of Claims**

22 Balabbo, in her individual capacity only, also provides a release herein which shall be
23 effective as a full and final accord and satisfaction, as a bar to all actions, causes of action,
24 obligations, costs, expenses, attorneys' fees, damages, losses, claims, liabilities and demands of
25 any nature, character, or kind, whether known or unknown, suspected or unsuspected, arising out
26 of alleged or actual exposures to any of the chemicals listed under Proposition 65 (including but
27 not limited to the Listed Phthalates) in the Products. In this regard, Balabbo hereby

28 ³ Following the Effective Date, compliance with the terms of this Consent Judgment shall be deemed compliance with Proposition 65 with respect to exposures to DEHP from the Products.

1 acknowledges that she is familiar with Section 1542 of the California Civil Code, which provides
2 as follows:

3 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE
4 CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE
5 TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM OR HER MUST
6 HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR.

7 **5.3 Defendant's Release of Balabbo**

8 Defendant, on its own behalf and on behalf of its past and current agents, representatives,
9 attorneys, successors, and assignees, hereby waives any and all claims that it may have against
10 Balabbo and her attorneys and other representatives for any and all actions taken or statements
11 made (or those that could have been taken or made) by Balabbo and her attorneys and other
12 representatives, whether in the course of investigating claims, otherwise seeking to enforce
13 Proposition 65 against Defendant in this matter, or with respect to the Products.

14 **6. COURT APPROVAL**

15 This Consent Judgment is not effective until it is approved and entered by the Court and
16 shall be null and void if, for any reason, it is not approved and entered by the Court within one
17 year after it has been fully executed by all Parties unless the Parties mutually agree to extend that
18 time period due to what they mutually agree are reasonably unforeseeable circumstances.

19 **7. SEVERABILITY**

20 If, subsequent to the execution of this Consent Judgment, any provision of this Consent
21 Judgment is held by a court to be unenforceable, the validity of the remaining provisions shall not
22 be adversely affected.

23 **8. GOVERNING LAW**

24 The terms of this Consent Judgment shall be governed by the laws of the State of
25 California and apply within the State of California. In the event that Proposition 65 is repealed or
26 is otherwise rendered inapplicable by reason of law generally, or as to the Products, then
27 Defendant may provide written notice to Balabbo of any asserted change in the law and have no
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1 further obligations pursuant to this Consent Judgment, with respect to, and to the extent that, the
2 Products are so affected.

3 9. **NOTICES**

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

8 For Defendant Michaels Stores, Inc.:

9 Navin Rao
10 Vice President, Assistant General Counsel and Chief Compliance Officer
11 Michaels Stores, Inc.
12 8000 Bent Branch Drive
13 Irving, TX 75063

14 *With a copy to:*

15 Robert Falk
16 RFalk@mofocom
17 Morrison & Foerster LLP
18 425 Market Street, 32nd Floor
19 San Francisco, CA 94105

20 For Balabbo:

21 Jordan Schatz, Esq.
22 Jschatz@brodskysmith.com
23 Brodsky & Smith, LLC
24 2 Bala Plaza, Suite 510
25 Bala Cynwyd, PA 19004

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

28 10. **COUNTERPARTS; FACSIMILE SIGNATURES**

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

1 **11. POST EXECUTION ACTIVITIES**

2 Balabbo agrees to comply with the reporting form requirements referenced in Health &
3 Safety Code § 25249.7(f). The Parties further acknowledge that, pursuant to Health & Safety
4 Code § 25249.7(f), a noticed motion is required to obtain judicial approval of the settlement
5 manifested in this Consent Judgment. In furtherance of obtaining such approval, Balabbo shall
6 file and serve a noticed motion for approval of this Consent Judgment within sixty (60) days of its
7 execution by all Parties and assure that the Office of the California Attorney General is served
8 with said motion and all supporting papers at least forty-five (45) days prior to the scheduled
9 hearing thereon. Defendant agrees to support the entry of this Consent Judgment once such
10 motion has been filed.

11 **12. ENFORCEMENT**

12 The Court shall retain jurisdiction to oversee, enforce and/or modify the terms of this
13 Consent Judgment. Any Party may, after meeting and conferring, by motion or application for an
14 order to show cause before this Court, enforce the terms and conditions contained in this Consent
15 Judgment. However, before filing such a motion or an application for an order to show cause,
16 Balabbo shall provide Defendant with 30 (thirty) days written notice of any alleged violations of
17 the terms of Injunctive Relief contained in Section 2 herein. As long as Defendant cures any such
18 alleged violations within 30 (thirty) days of receipt of the written notice by ceasing the sale of the
19 Covered Product in California until such time as warnings are provided for it pursuant to Section
20 2.2 above or testing reveals that the reformulation standard has been met for it pursuant to Section
21 2.1 above, then there shall be deemed no good cause for enforcement or actionable violation.

22 **13. INTEGRATION**

23 This Consent Judgment contains the sole and entire agreement of the Parties and any and
24 all prior negotiations and understandings related hereto shall be deemed to have been merged
25 within it. No representations or terms of agreement other than those contained herein exist or
26 have been made by any Party with respect to the other Party or the subject matter hereof.

14. MODIFICATION

This Consent Judgment may be modified only by: (i) a written agreement of the Parties and upon entry, following at least twenty-one (21) days' notice to the Office of the Attorney General, of a modified consent judgment by the Court thereon; or (ii) upon a successful motion or application of any Party, which shall also be served on the Office of the California Attorney General with at least twenty-one (21) days' notice, and the entry of a modified consent judgment by the Court. Any Party seeking to modify this Consent Judgment shall attempt in good faith to meet and confer with all affected Parties prior to filing a motion to modify the Consent Judgment.

15. AUTHORIZATION

The undersigned are authorized to execute this Consent Judgment on behalf of their respective Parties and have read, understood and agreed to all of the terms and conditions of this Consent Judgment.

AGREED TO:

Date: February 23, 2017
By: Precilia Balabbo

AGREED TO:

Date: January 24, 2017
By: Navin Rao
Vice President, Assistant General Counsel, and Chief Compliance Officer
Michaels Stores, Inc.

IT IS SO ORDERED, ADJUDGED AND DECREED:

Dated: 5/3/2017

Judge of Superior Court

JO-LYNNE Q. LEE

