

1 Brian C. Johnson, State Bar No. 235965
Josh Voorhees, State Bar No. 241436
2 THE CHANLER GROUP
2560 Ninth Street
3 Parker Plaza, Suite 214
Berkeley, CA 94710-2565
4 Telephone: (510) 848-8880
Facsimile: (510) 848-8118

5 Attorneys for Plaintiff
6 MARK MOORBERG

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9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 COUNTY OF ALAMEDA
11 UNLIMITED CIVIL JURISDICTION
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15 MARK MOORBERG,

16 Plaintiff,

17 v.

18 OLYMPIC MOUNTAIN AND MARINE
19 PRODUCTS, INC.; and DOES 1-150,
inclusive,

20 Defendants.
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Case No. RG14735027

**[PROPOSED] CONSENT JUDGMENT
AS TO DEFENDANT OLYMPIC
MOUNTAIN AND MARINE
PRODUCTS, INC. dba OLYMPIC
MOUNTAIN PRODUCTS**

(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 Olympic Mountain and Marine Products, Inc., d/b/a Olympic Mountain Products (“Olympic”), with
5 Moorberg and Olympic each individually referred to as a “Party” and collectively as the “Parties.”

6 **1.1.1 Mark Moorberg**

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

10 **1.1.2 Olympic Mountain and Marine Products, Inc.**

11 Olympic 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, California Health & Safety
13 Code § 25249.6 et seq. (“Proposition 65”).

14 **1.2 General Allegations**

15 Moorberg alleges that Olympic manufactures, sells, and/or distributes for sale in California,
16 decorative glass containers for bath products, including bath salts, soaps, and lotions, with exterior
17 designs containing lead. Lead is listed pursuant to Proposition 65 as a chemical known to cause birth
18 defects or other reproductive harm. Moorberg alleges that Olympic failed to provide the health
19 hazard warning required by Proposition 65 for exposures to lead from those decorative glass bath
20 product containers.

21 **1.3 Product Description**

22 The products covered by this Consent Judgment are decorative glass containers for bath
23 products, including bath salts, soaps and lotions, with exterior designs containing lead including, but
24 not limited to, the Morgan Childs Premium Lavender Luxury Bath Salts with Pure Essential Oils,
25 #1332556 and Aroma Aria Lavender Glass Hand Soap, #894520, manufactured, sold and/or
26 distributed for sale in California by Olympic (collectively, “Products”).
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1 **1.4 Notice of Violation**

2 On April 16, 2014, Moorberg served Olympic and certain requisite public enforcement
3 agencies with a “60-Day Notice of Violation” (“Notice”) alleging that Olympic violated Proposition
4 65 when it failed to warn its customers and consumers in California that certain bath salt containers,
5 which are included in the broader “Product” definition of bath product containers established by this
6 Consent Judgment, expose users to lead. On August 28, 2014, Moorberg served Olympic and certain
7 requisite public enforcement agencies with a “Supplemental 60-Day Notice of Violation”
8 (“Supplemental Notice”) alleging that Olympic violated Proposition 65 when it failed to warn its
9 customers and consumers in California that the Products with respect to all decorative glass
10 containers for bath salts and other bath and lotion products with exterior designs expose users to lead.
11 The Initial Notice and Supplemental Notice together are referred to collectively as the “Notices.” To
12 the best of the Parties’ knowledge, no public enforcer has commenced and is diligently prosecuting
13 the allegations set forth in the Notices.

14 **1.5 Complaint**

15 On July 30, 2014, Moorberg filed the captioned action (“Complaint”), naming Olympic as a
16 defendant for the alleged violations of California Health & Safety Code § 25249.6 that are the subject
17 of the Notice. Upon the latter of the expiration of the sixty-day notice period following Moorberg’s
18 service of the Supplemental Notice, or the Court’s entry of this Consent Judgment, the Complaint
19 shall be deemed amended *nunc pro tunc* to include all Products and alleged violations that are the
20 subject of the Notices, provided that, as of the expiration of the sixty-day notice period following
21 Moorberg’s service of the Supplemental Notice, no public enforcer has commenced and is diligently
22 prosecuting the allegations set forth in the Supplemental Notice.

23 **1.6 No Admission**

24 Olympic denies the material, factual, and legal allegations contained in the Notices and
25 Complaint and maintains that all of the products that it has sold and distributed in California,
26 including the Products, have been, and are, in compliance with all laws. Nothing in this Consent
27 Judgment shall be construed as an admission by Olympic of any fact, finding, conclusion, issue of
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1 law, or violation of law, nor shall compliance with this Consent Judgment constitute or be construed
2 as an admission by Olympic of any fact, finding, conclusion, issue of law, or violation of law, such
3 being specifically denied by Olympic. This Section shall not, however, diminish or otherwise affect
4 Olympic’s obligations, responsibilities, and duties under this Consent Judgment.

5 **1.7 Consent to Jurisdiction**

6 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
7 jurisdiction over Olympic as to the allegations contained in the Complaint, that venue is proper in the
8 County of Alameda, and that this Court has jurisdiction to enter and enforce the provisions of this
9 Consent Judgment pursuant to Proposition 65 and California Code of Civil procedure § 664.6.

10 **1.8 Effective Date**

11 For purposes of this Consent Judgment, the term “Effective Date” shall mean the date upon
12 which the Court grants the motion for approval of the Consent Judgment contemplated by Section 5.

13 **2. INJUNCTIVE RELIEF: REFORMULATED PRODUCTS & WARNINGS**

14 **2.1 Reformulation Standard and Commitment**

15 Commencing on the Effective Date and continuing thereafter, Olympic shall only sell or
16 distribute for sale in California, “Reformulated Products,” or Products containing a clear and
17 reasonable warning in accordance with Section 2.2. For purposes of this Consent Judgment,
18 “Reformulated Products” are Products that contain a maximum of 90 parts per million content lead
19 by weight in any accessible component (i.e., any part, feature or aspect of a Product that is likely to
20 be touched during normal use) when analyzed pursuant to EPA testing methodologies 3050B and
21 6010B, or equivalent methodologies utilized by federal or state agencies for the purpose of
22 determining lead content in a solid substance, and suitable for the material being tested.

23 **2.2 Clear and Reasonable Warnings**

24 To the extent a warning is required for Products in accordance with Section 2.1 above,
25 Olympic agrees to provide a clear and reasonable consumer warning in accordance with this Section
26 2.2. Olympic further agrees that any warning utilized will be prominently placed with such
27 conspicuousness when compared with other words, statements, designs, or devices as to render it
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1 likely to be read and understood by an ordinary individual under customary conditions before
2 purchase or use. For purposes of this Consent Judgment, a clear and reasonable warning for lead in
3 Products shall consist of a warning affixed to the packaging, label, tag or directly to a Product sold in
4 California, and contain the following statement:

5 **WARNING:** This container's decoration contains lead,
6 a chemical known to the state of California
7 to cause birth defects or other reproductive
8 harm.

8 **3. MONETARY SETTLEMENT TERMS**

9 **3.1 Civil Penalty Payments.** Pursuant to Health and Safety Code section 25249.7(b)(2),
10 and in settlement of all claims alleged in the Notice or referred to in this Consent Judgment, Olympic
11 agrees to pay \$18,000 in civil penalties. Each penalty payment will be allocated in accordance with
12 California Health and Safety Code § 25249.12(c)(1) & (d), with 75% of the penalty amount remitted
13 to the California Office of Environmental Health Hazard Assessment ("OEHHA"), and the remaining
14 25% of the penalty amount paid to Moorberg. Moorberg's counsel shall be responsible for
15 remitting the 75% portion of any penalty payment(s) made to OEHHA.

16 **3.1.1 Initial Civil Penalty.** Within five (5) business days after the Court approves
17 the Consent Judgment, , Olympic shall pay an initial civil penalty of \$4,500. The civil penalty
18 payment shall be in the form of a single check made payable to "Mark Moorberg, Client Trust
19 Account."

20 **3.1.2 Final Civil Penalty.** No later than February 15, 2015, Olympic shall pay a
21 final civil penalty of \$13,500. The final civil penalty shall be waived in its entirety if, by January 31,
22 2015, an officer of Olympic provides Moorberg's counsel with written certification that, as of
23 December 31, 2014, all of the Products it will manufacture for sale or purchase for sale in California,
24 are Reformulated Products as defined by Section 2.1, and that it will continue to only offer
25 Reformulated Products in the future. The option to provide a written certification of reformulation in
26 lieu of making the final civil penalty payment otherwise required by this Consent Judgment is a
27 material term, and time is of the essence.

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1 **3.2 Reimbursement of Moorberg’s Attorneys’ Fees and Costs**

2 The Parties reached an accord on the compensation due to Moorberg and his counsel under
3 general contract principles and the private attorney general doctrine codified at Code of Civil
4 Procedure section 1021.5 for all work performed in this matter. Under these legal principles,
5 Olympic agrees to pay \$31,000, in the form of a check made out to “The Chanler Group,” for all fees
6 and costs incurred and yet to be incurred investigating this matter, bringing this matter to the attention
7 of Olympic’s management, and negotiating, drafting and obtaining the Court’s approval of this
8 Consent Judgment in the public interest. Payment under this Section 3.2 shall be made in five (5)
9 equal monthly installments of \$6,200, the first installment to be paid the first day of the month that
10 follows the first full month after the Court approves the Consent Judgment. For example, if the Court
11 approves the Consent Judgment on March 14, 2015, the first \$6,200 payment under this Section 3.2
12 shall be due no later than May 1, 2015. The four remaining payments shall be made on the first of
13 each successive month.

14 **3.3 Payment Address**

15 All payments under this Consent Judgment shall be delivered to the following address:

16 The Chanler Group
17 Attn: Proposition 65 Controller
18 2560 Ninth Street
19 Parker Plaza, Suite 214
20 Berkeley, CA 94710

21 **4. CLAIMS COVERED AND RELEASED**

22 **4.1 Full, Final and Binding Agreement**

23 This Consent Judgment is a full, final, and binding resolution between Moorberg and Olympic
24 of any violation of Proposition 65 that was or could have been asserted by Moorberg on behalf of
25 himself, his past and current agents, representatives, attorneys, successors, and/or assignees, against
26 Olympic, its parents, subsidiaries, affiliated entities under common ownership, directors, officers,
27 employees, attorneys, and each entity to whom Olympic directly or indirectly distributes or sells
28 Products, including but not limited to downstream distributors, wholesalers, customers, retailers,
including, without limitation, Tuesday Morning Corporation, Tuesday Morning, Inc., and their
present and former agents, attorneys, representatives, shareholders, directors, officers and employees,

1 and their respective predecessors, successors, parent, affiliates, and subsidiaries, franchisees,
2 cooperative members, licensors, and licensees (“Releasees”), based on the alleged failure to warn
3 about exposures to lead in Products sold or distributed for sale by Olympic prior to the Effective
4 Date.

5 **4.2 Moorberg’s Public Release of Proposition 65 Claims**

6 Moorberg acting on his own behalf and in the public interest releases each Releasee from all
7 claims for violations of Proposition 65 up through the Effective Date based on the alleged or actual
8 failure to warn about exposures to lead from Products sold by Olympic prior to the Effective Date as
9 set forth in the Notice. Compliance with the terms of this Consent Judgment constitutes compliance
10 with Proposition 65 with respect to the alleged or actual failure to warn about exposures to lead from
11 the Products sold by Olympic after the Effective Date.

12 **4.3 Moorberg’s Individual Release of Claims**

13 Moorberg, in his individual capacity only and not in his representative capacity, also provides
14 a release herein which shall be effective as a full and final accord and satisfaction, as a bar to all
15 actions, causes of action, obligations, costs, expenses, attorneys’ fees, damages, losses, claims,
16 liabilities and demands of Moorberg of any nature, character, or kind, whether known or unknown,
17 suspected or unsuspected, arising under Proposition 65 up through the Effective Date regarding the
18 failure to warn about exposures to lead from Products manufactured, imported, distributed, sold
19 and/or offered for sale by Olympic prior to the Effective Date.

20 **4.4 Olympic’s Release of Moorberg**

21 Olympic, on its own behalf, and on behalf of its past and current agents, representatives,
22 attorneys, successors, and/or assignees, hereby waives any and all claims against Moorberg and his
23 attorneys and other representatives, for any and all actions taken or statements made (or those that
24 could have been taken or made) by Moorberg and his attorneys and other representatives, whether in
25 the course of investigating claims, seeking to enforce Proposition 65 against it in this matter, or with
26 respect to the Products.

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1 **5. COURT APPROVAL**

2 The Parties acknowledge that, pursuant to California Health & Safety Code § 25249.7, a
3 noticed motion is required to obtain judicial approval of this Consent Judgment, which Moorberg
4 shall draft and file and which Olympic shall support. The Parties further agree to mutually employ
5 their best efforts, and those of their counsel, to support the entry of this agreement as a Consent
6 Judgment, and to obtain approval of the Consent Judgment by the Court in a timely manner. If this
7 Consent Judgment is not approved by the Court within one year of the last date of execution: (a) this
8 Consent Judgment and any and all prior agreements between the Parties merged herein shall
9 terminate and become null and void, and the action shall revert to the status that existed prior to the
10 execution date of this Consent Judgment; (b) no term of this Consent Judgment or any draft thereof,
11 or of the negotiation, documentation, or other part or aspect of the Parties' settlement discussions,
12 shall have any effect, nor shall any such matter be admissible in evidence for any purpose in this
13 action, or in any other proceeding; and (c) the Parties agree to meet and confer to determine whether
14 to modify the terms of the Consent Judgment and to resubmit it for approval.

15 **6. SEVERABILITY**

16 If, subsequent to the execution of this Consent Judgment, any provision of this Consent
17 Judgment is deemed by a court to be unenforceable, the validity of the remaining provisions shall not
18 be adversely affected, so long as the deletion of provisions deemed unenforceable does not materially
19 affect, or otherwise result in the effect of the Consent Judgment being contrary to, the intent of the
20 Parties in entering into this Consent Judgment.

21 **7. GOVERNING LAW**

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

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1 **8. NOTICE**

2 Unless specified herein, all correspondence and notice required by this Consent Judgment
3 shall be in writing and sent by: (a) personal delivery; (b) first-class, registered or certified mail, return
4 receipt requested; or (c) a recognized overnight courier on any Party by the other at the following
5 addresses:

6 For Olympic:

For Moorberg:

7 Jeffrey Stice, President
8 Olympic Mountain and Marine Products, Inc.
9 8655 South 208th Street
Kent, WA 98031

Proposition 65 Coordinator
The Chanler Group
2560 Ninth Street
Parker Plaza, Suite 214
Berkeley, CA 94710-2565

10 with copy to Olympic's counsel:

11 Joshua A. Bloom, Esq.
12 Barg Coffin Lewis & Trapp, LLP
13 350 California St., 22nd Floor
San Francisco, CA 94104

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

16 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

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

20 **10. COMPLIANCE WITH HEALTH & SAFETY CODE § 25249.7(f)**

21 Moorberg and his attorneys agree to comply with the reporting form requirements referenced
22 in California Health and Safety Code section 25249.7(f).

23 **11. MODIFICATION**

24 This Consent Judgment may be only modified only by: (a) written agreement of the Parties,
25 and entry of a modified consent judgment by the Court thereon; or (b) a motion or application by
26 either Party and the entry of a modified consent judgment by the Court thereon.

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1 **12. RETENTION OF JURISDICTION**

2 This Court shall retain jurisdiction of this matter to implement or modify the Consent
3 Judgment and shall retain jurisdiction to enforce this Consent Judgment, or any provision thereof,
4 under C.C.P. § 664.6.

5 **13. ENTIRE AGREEMENT**

6 This Consent Judgment contains the sole and entire agreement and understanding of the
7 Parties with respect to the entire subject matter hereof, and any and all prior discussions, negotiations,
8 commitments, and understandings related hereto. No representations, oral or otherwise, express or
9 implied, other than those contained herein have been made by any party hereto. No other agreements
10 not specifically referred to herein, oral or otherwise, shall be deemed to exist or to bind any of the
11 Parties.

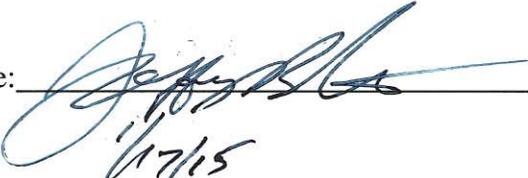
12 **14. AUTHORIZATION**

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

16 **AGREED TO:**

AGREED TO:

17 Date: January 20, 2015

17 Date: 

18 By: 
19 **MARK MOORBERG**

18 By: 1/17/15
19 **Jeffrey Stice, President**
20 **OLYMPIC MOUNTAIN & MARINE**
21 **PRODUCTS, INC.**