

1 H. MICHAEL BRUCKER LAW CORPORATION
2 H. MICHAEL BRUCKER (#36297)
3 5855 Doyle Street — Suite 110
4 Emeryville, California 94608
5 Telephone: (510) 654-6200
6 Facsimile: (510) 654-6166

7 STEVEN M. KIPPERMAN LAW CORPORATION
8 STEVEN M. KIPPERMAN (#40895)
9 220 Montgomery Street — Suite 1077
10 San Francisco, California 94104
11 Telephone: (415) 397-8600
12 Facsimile: (415) 397-0792

13 Counsel for Defendant MCCAULOU'S, INC.

14 CHRIS TUTTLE (#264545)
15 JOSH VOORHEES (#241436)
16 THE CHANLER GROUP
17 2560 Ninth Street
18 Parker Plaza Suite 214
19 Berkeley, California 94710
20 Telephone: (510) 848-8880
21 Facsimile: (415) 848-8118

22 Counsel for Plaintiff MARK MOORBERG

23 SUPERIOR COURT OF CALIFORNIA

24 COUNTY OF ALAMEDA

25 MARK MOORBERG,

26 Plaintiff,

27 vs.

28 MCCAULOU'S, INC.;
and DOES 1-150, inclusive,

Defendants

Case No. RG14740993

*Assigned for All Purposes to Judge Wynne
Carvill, Department 21*

[PROPOSED] CONSENT JUDGMENT

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

I. INTRODUCTION

A. The Parties

The parties to this Consent Judgment are Plaintiff MARK MOORBERG (“Plaintiff”) and Defendant MCCAULOU’S, INC. (“Settling Defendant”). Plaintiff and Settling Defendant are referred to collectively as the “Parties.”

B. Settling Defendant

Settling Defendant is a corporation that employs ten (10) or more persons, and is a person in the course of doing business for purposes of Health and Safety Code section 25249.6 et seq. (“Proposition 65”).

C. General Allegations

Plaintiff alleges that Settling Defendant sells vinyl/PVC clutches containing di(2-ethylhexyl)phthalate (“DEHP”) and Lead, without first providing the exposure warning Plaintiff alleges and Settling Defendant denies is required by Proposition 65. While Plaintiff has alleged in his Complaint that Settling Defendant, among other activities, manufactures and imports its products, the Parties agree and understand that Settling Defendant is a retailer who does not directly or independently manufacture the products it sells. The Parties further understand and agree that this Consent Judgment applies to Settling Defendant’s sale and/or distribution for sale in California of vinyl/PVC clutches containing DEHP and Lead. DEHP and Lead are each listed pursuant to Proposition 65 as a chemical known to the State of California to cause birth defects or other reproductive harm.

D. Product Description

The products that are covered by this Consent Judgment are: (a) vinyl/PVC clutches containing DEHP and/or Lead that were supplied to Settling Defendant by Spectrum Imports, Inc., dba Picnic Plus, and sold or distributed for sale in California by Settling Defendant; and (b) Vinyl/PVC tote bags containing DEHP that are sold or distributed for sale in California by

1 Settling Defendant. Covered Products and Additional Products are specifically defined in
2 Sections II A and B, below. While Covered Products are covered by the allegations in the
3 Notice and subject to releases both in Plaintiff's individual capacity and on behalf of the
4 public in California, Additional Products are the subject of a private agreement between the
5 Parties to settle the matter. Plaintiff is providing a limited release in his individual capacity
6 only in exchange for Settling Defendant's commitment to offer only such products in
7 California if they comply with the Lead and DEHP content limits and other injunctive
8 obligations required by Sections III A-C, below.

10 **E. Notice**

11 On April 16, 2014, Plaintiff served Settling Defendant, the California Attorney General,
12 the district attorneys of every county in the State of California, and the city attorneys for every
13 city in the State of California with a population greater than 750,000 with a document entitled
14 "60-Day Notice of Violation" ("Notice").
15

16 The Notice alleges violations of Proposition 65 with respect to the presence of DEHP
17 and/or Lead in the Covered Products sold or distributed for sale in California by Settling
18 Defendant. To the best of the Parties knowledge, no public enforcer has commenced and is
19 diligently prosecuting an action to enforce the violations alleged in the Notice.
20

21 **F. The Action**

22 On September 17, 2014, Plaintiff filed the captioned action ("Complaint"), naming
23 Settling Defendant as a defendant for the alleged violations of Proposition 65 that are the
24 subject of the Notice.
25
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

G. Stipulated Matter Re the Action

For purposes of this Consent Judgment only, the Parties stipulate that: (i) this Court has subject matter jurisdiction over the allegations contained in the Complaint; (ii) the Court has personal jurisdiction over Settling Defendant as to the acts alleged in the Complaint; (iii) venue is proper in the County of Alameda; and (iv) this Court has jurisdiction to enter and enforce this Consent Judgment pursuant to Proposition 65, and Code of Civil Procedure section 664.6.

H. No Admission

Nothing in this Consent Judgment shall prejudice, waive, or impair any right, remedy, argument, or defense the Settling Defendant may have in any other legal proceeding, or any claim Settling Defendant may have against any person or entity not a party to this action. Settling Defendant denies the material, factual, and legal allegations contained in the Notice and Complaint, and maintains that all of the products that it has sold and distributed for sale in California, including the Products, have been, and are, in compliance with all laws. Settling Defendant further disputes the sufficiency of Plaintiff's Notice procedurally, and both in form and content and denies any violation or wrongdoing. Nothing in this Consent Judgment is or shall be construed as an admission by the Parties of any fact, conclusion of law, issue of law, or violation of law, nor shall compliance with the Consent Judgment constitute or be construed as an admission by the Parties of any fact, conclusion of law, issue of law, or violation of law.

This Consent Judgment is the product of negotiation and compromise and is accepted by the Parties for purposes of settling, compromising, and resolving issues disputed in this action.

1 **II. FURTHER DEFINITIONS**

2 **A. Covered Products**

3 “Covered Products” are defined as follows:

- 4 (1) Vinyl/PVC clutches containing Lead and/or DEHP that are manufactured by
5 or on behalf of Spectrum Imports, Inc. dba Picnic Plus, and sold in
6 California by Settling Defendant including, without limitation, the “Carlotta
7 Clutch” (PSM-112BC, UPC #8 07348 12068 7).

8 **B. Additional Products**

9 “Additional Products” are defined as follows:

- 10 (1) Vinyl/PVC tote bags containing DEHP, including without limitation, the
11 Clear MediumTote Bag, HBE100871B.

12 McCaulou’s is advised that the Covered Products contain Lead and/or DEHP, and that the
13 Additional Products contain DEHP.

14 **C. Effective Date**

15 “Effective Date” means the date that the Court grants the motion for approval of this
16 Consent Judgment contemplated by Section IX.

17 **III. INJUNCTIVE RELIEF**

18 **A. Reformulation of Covered and Additional Products**

19 As of the Effective Date, McCaulou’s represents that it is not currently offering
20 Covered Products or Additional Products for sale in California, but agrees that if it
21 recommences sales, it will only offer Reformulated Products. For the purposes of this Consent
22 Judgment, “Reformulated Products” are defined as (i) Covered Products or Additional Products
23 that contain no more than 1,000 parts per million (“ppm”) DEHP content in any component
24 analyzed pursuant to EPA testing methodologies 3580A and 8270C; and (ii) any Covered
25 Product that contains Lead in concentrations not exceeding 90 ppm in any component tested
26
27
28

1 pursuant to EPA testing methodologies 6020 and 3050B. In addition to the above test
2 methodologies, the Parties may employ equivalent methodologies used by state or federal
3 agencies to determine the amount of DEHP and/or Lead in a solid substance.

4 **B. Supplier Notification**

5 To the extent that it has not already done so, no more than 60 days after this Consent
6 Judgment is fully executed by the Parties, Settling Defendant shall issue notice(s) to its
7 supplier(s) of Covered Products and/or Additional Products, and thereafter to any newly-
8 engaged supplier of Covered Products or Additional Products, requiring that the Covered
9 Products and Additional Products such vendors provide comply with the reformulation
10 standards applicable to Lead and DEHP in Section III A, above.

11 **C. Certification**

12 Within 60 days of the Effective Date, Settling Defendant shall provide Plaintiff with
13 written certification confirming compliance with the requirements of this Section III. No
14 provision of this Consent Judgment requires or prohibits Settling Defendant's testing of any
15 Covered Products or Additional Product. Settling Defendant commits to take such steps as it
16 deems reasonable and prudent with its suppliers to assure that any Reformulated Products
17 comply with the DEHP and Lead content limits established by this Consent Judgment. Settling
18 Defendant further acknowledges and understands that if a Covered Product or Additional
19 Product fails to meet the definition for Reformulated Products set forth in Section III A, the
20 enforcement provisions of this Consent Judgment including, without limitation, Section IV
21 shall apply.
22
23
24
25
26
27
28

1 **IV. ENFORCEMENT**

2 **A. Notice of Violation or Alleged Breach of Consent Judgment**

3 Plaintiff may, by motion or application for an order to show cause before the Superior
4 Court for Alameda County, enforce the terms and conditions contained in this Consent
5 Judgment. Prior to bringing any motion or application to enforce the requirements of Section
6 III above, Plaintiff shall provide Settling Defendant with a draft "Notice of Violation" and a
7 copy of any test result(s) which purportedly support Plaintiff's "Notice of Violation." The
8 Parties shall then meet and confer regarding the basis for Plaintiff's anticipated motion or
9 application in an attempt to resolve it informally, including providing Settling Defendant a
10 reasonable opportunity of at least sixty days to cure any alleged violation to Plaintiff's
11 reasonable satisfaction. Should such attempts at informal resolution fail, Plaintiff may file his
12 enforcement motion or application unless within 60 days of receipt of such Notice Settling
13 Defendant ceases offering for sale the product described in said "Notice of Violation," in which
14 case no motion or application to enforce may be filed.

17 **B. Enforcement by Parties**

18 This Consent Judgment may only be enforced by the Parties.

19 **V. MONETARY SETTLEMENT TERMS**

20 **A. Settlement Payments**

21 Settling Defendant shall pay no more than \$40,000 under this Consent Judgment,
22 allocated as follows:

- 23
- 24 (1) \$3,000.00 in the form of a single check payable to "Mark Moorberg,
25 Client Trust Account" as an initial civil penalty pursuant to Health & Safety Code
26 § 25249.7(b), such money to be apportioned by Plaintiff in accordance with Health & Safety
27 Code § 25249.12(c)(1) and (d) with 25% of the penalty payment paid to Plaintiff and 75% of
28 the penalty amount paid to the State of California's Office of Environmental Health Hazard

1 Assessment (“OEHHA”). Plaintiff shall tender an amount equivalent to 75% of Settling
2 Defendant’s initial civil penalty payment to OEHHA. Delivery by Settling Defendant of said
3 funds to The Chanler Group shall constitute compliance with this Section V-A-(1), and
4 Plaintiff’s counsel shall deliver to OEHHA the office’s portion of the penalty payment.

5 (2) \$29,000 in the form of a single check made payable to “The Chanler
6 Group” as reimbursement of a portion of Plaintiff’s reasonable attorneys’ fees and costs. The
7 payment pursuant to this Section shall be made payable to “The Chanler Group.”

8 (3) A final civil penalty of \$8,000 shall be made within 60 days after the
9 Effective Date by the Settling Defendant and apportioned as in Section V-A-(1). The final civil
10 penalty payment shall be waived in its entirety if Settling Defendant complies with Section III-
11 B and provides Plaintiff’s counsel with a declaration certifying its compliance with the same
12 within 60 days of the Effective Date. The option to provide a declaration certifying compliance
13 with Section III-B is a material term of this Consent Judgment and time is of the essence.

14 (4) Settling Defendant shall deliver the payments required by Sections V-A-
15 (1) and V-A-(2), above, to its counsel within 30 days of the date that this Consent Judgment is
16 fully executed by the Parties. Settling Defendant’s counsel shall hold the settlement funds in
17 trust, and shall tender Settling Defendant’s payments to Plaintiff within five days of the
18 Effective Date.

19
20
21 **B. Payment Address**

22 All payments required by this Consent Judgment shall be delivered to the
23
24
25
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

following address:

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

VI. MODIFICATION

A. Written Consent

This Consent Judgment may be modified from time to time by express written agreement of the Parties with the approval of the Court, or by an order of this Court upon motion and in accordance with law.

B. Meet and Confer

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.

VII. CLAIMS COVERED AND RELEASED

A. Plaintiff's Release of Proposition 65 Claims

This Consent Judgment is a full, final, and binding resolution between Plaintiff on his own behalf and in the public interest, and (1) Settling Defendant and its parents, subsidiaries, affiliated entities that are under common ownership, directors, officers, employees, and attorneys, and (2) any downstream entity to whom Settling Defendant may have distributed or sold Covered Products, including but not limited to distributors, wholesalers, customers, retailers, and franchisees ("Downstream Releasees") of any violation of Proposition 65 that was or could have been asserted in the Complaint against Settling Defendant or Downstream Releasees based on the alleged failure to warn about exposures to DEHP and/or Lead contained in Covered Products sold by Settling Defendant prior to the Effective Date. Plaintiff in his individual capacity and in the public interest releases Settling Defendant and Downstream

1 Releasees from all claims for violations of Proposition 65 up through the Effective Date based
2 on the alleged or actual failure to warn about exposures to Lead and/or DEHP in Covered
3 Products sold or distributed for sale by Settling Defendant before the Effective Date, as alleged
4 in the Notice.

5 **B. Releases**

6 Compliance with the terms of this Consent Judgment by Settling Defendant and
7 Downstream Releasees shall constitute compliance with Proposition 65 with respect to any
8 alleged failure to warn about DEHP and/or Lead in Covered Products or Additional Products
9 sold or distributed for sale by Settling Defendant after the Effective Date.

10 **C. Plaintiff's Individual Release of Claims**

11 Plaintiff in his individual capacity only and *not* in his representative capacity, also
12 provides a release to Settling Defendant and Downstream Releasees which shall be effective as
13 a full and final accord and satisfaction, and as a bar to all actions, causes of action, obligations,
14 costs, expenses, attorneys' fees, damages, losses, claims, liabilities and demands of Plaintiff of
15 any nature, character or kind, whether known or unknown, suspected or unsuspected, arising
16 out of alleged or actual exposures to Lead and/or DEHP in Covered Products and DEHP in
17 Additional Products manufactured, imported, distributed or sold by Settling Defendant before
18 the Effective Date.

19 **D. Upstream Parties**

20 The Parties agree and understand that the releases provided under this Consent
21 Judgment are not intended, and shall not be construed, to extend upstream to release any entity
22 other than Settling Defendant and Downstream Releasees, or to any entity that manufactured
23 the Covered Products or Additional Products, or any component parts thereof, or to any
24
25
26
27
28

1 distributor or supplier who sold the Covered Products or Additional Products, or any
2 component parts thereof, to the Settling Defendant.

3 **E. Settling Defendant's Release of Plaintiff**

4 Settling Defendant, on its own behalf, and on behalf of its past and current agents,
5 representatives, attorneys, successors, and assignees, hereby waives any and all claims against
6 Plaintiff and his attorneys and representatives, for any and all actions taken or statements
7 made by Plaintiff and his attorneys and other representatives, whether in the course of
8 investigating claims, otherwise seeking to enforce Proposition 65 against it in this matter, or
9 with respect to the Products.
10

11 **F. Mutual California Limited Civil Code Section 1542 Waiver**

12 The Parties each acknowledge that he/it is familiar with Section 1542 of Civil Code,
13 which provides as follows:
14

15 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS
16 WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO
17 EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING
18 THE RELEASE, WHICH IF KNOWN BY HIM OR HER MUST
19 HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT
20 WITH THE DEBTOR.

21 The Parties, each on his/its own behalf, and on behalf of his/its past and current agents,
22 representatives, attorneys, successors, and/or assignees, expressly waives and relinquishes any
23 and all rights and benefits which he/it may have under, or which may be conferred on him/it by
24 the provisions of Civil Code § 1542 as well as under any other state or federal statute or
25 common law principle of similar effect, to the fullest extent that he/it may lawfully waive such
26 rights or benefits pertaining to the released matters, as specifically defined and limited by
27 Sections VII A-E, above.
28

1 **VIII. NOTICE**

2 **A. Notice to Plaintiff**

3 When Plaintiff is entitled to receive any notice under this Consent Judgment, the notice
4 shall be sent to:

5 The Chanler Group
6 Attn: Proposition 65 Coordinator
7 2560 Ninth Street
8 Parker Plaza, Suite 214
9 Berkeley, CA 94710-2565

10 **B. Notice to Settling Defendant**

11 When Settling Defendant is entitled to receive any notice under this Consent
12 Judgment, the notice shall be sent to:

13 Ken Stoddard
14 McCaulou's, Inc.
15 3512 Mount Diablo Boulevard
16 Lafayette, CA 94549

17 **C. Change in Persons to be Notified**

18 Any Party may modify the person and address to whom the notice is to be sent by
19 sending the other Party notice by first class and electronic mail.

20 **IX. COURT APPROVAL**

21 **A. Effective Date**

22 This Consent Judgment shall become effective upon entry by the Court.

23 **B. Application for Approval**

24 Plaintiff shall prepare and file a Motion for Approval of this Consent Judgment and
25 Settling Defendant shall support the Court's entry of this Consent Judgment.

26 **C. Effect if Not Approved**

27 If this Consent Judgment is not entered by the Court, it shall be of no force or effect and
28 shall never be introduced into evidence or otherwise used in any proceeding for any purpose.

1 **X. ATTORNEYS' FEES**

2 **A. Plaintiff Fees**

3 Should Plaintiff prevail on any motion, application for an order to show cause, or other
4 proceeding to enforce a violation of this Consent Judgment, Plaintiff shall be entitled to his
5 reasonable attorneys' fees and costs incurred as a result of such motion or application.
6

7 **B. McCaulou's Fees**

8 Should Settling Defendant prevail on any motion, application for an order to show
9 cause, or other proceeding brought within this action, Settling Defendant shall be entitled to its
10 reasonable attorneys' fees and costs as a result of such motion or application.

11 **C. Bear Own Fees and Costs**

12 Except as otherwise provided in this Consent Judgment, each Party shall bear its own
13 attorneys' fees and costs.
14

15
16 **XI. OTHER TERMS**

17 **A. California Law**

18 The terms of this Consent Judgment shall be governed by the Laws of the State of
19 California. In the event that Proposition 65 is repealed, preempted, or is otherwise rendered
20 inapplicable by reason of law generally, or as to the Products, then Settling Defendant may, but
21 is not required to, provide Plaintiff with written notice of any asserted change in the law, and
22 shall have no further obligations pursuant to this Consent Judgment, with respect to, and to the
23 extent that, the Covered Products or Additional Products are so affected. Nothing in this
24 Consent Judgment shall be interpreted to relieve Settling Defendant from its obligation to
25 comply with any pertinent state or federal law or regulation.
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

B. Successors and Assigns

This Consent Judgment shall apply to and be binding upon Plaintiff and Settling Defendant and its respective divisions, subdivisions, and subsidiaries, and its successors or assigns.

C. Complete Agreement

This Consent Judgment contains the sole and entire agreement and understanding of the Parties with respect to the entire subject matter hereto; and any and all prior discussions, negotiations, commitments, or understandings related thereto, if any, are hereby merged herein and therein. There are no warranties, representations, or other agreements between the Parties except as expressly set forth herein. No representations, oral or otherwise, express or implied, other than those specifically referred to in this Consent Judgment have been made by any Party hereto. No other agreements not specifically contained or referenced herein, oral or otherwise, shall be deemed to exist or to bind any of the Parties hereto. No supplementation, modification, waiver, or termination of this Consent Judgment shall be binding unless executed in writing by the Party to be bound thereby. No waiver of any of the provisions of this Consent Judgment shall be deemed or shall constitute a waiver of any of the other provisions hereof whether or not similar, nor shall such waiver constitute a continuing waiver.

D. No Release by McCaulou's of Third Parties

Nothing in this Consent Judgment shall release, or in any way affect any rights that Settling Defendant might have against any other party.

E. Jurisdiction Retained

This Court shall retain jurisdiction of this matter to implement or modify the Consent Judgment pursuant to Proposition 65 and Code of Civil Procedure section 664.6. Nothing herein is intended to or shall expand any obligation of Settling Defendant beyond those imposed by Health and Safety Code Section 25249.6 or any regulation properly adopted

1 pursuant hereto except with respect to Settling Defendant's commitments as set forth in
2 Sections III and V.

3 **F. Counterparts**

4 The stipulations to this Consent Judgment may be executed in counterparts and by
5 means of facsimile or portable document format (pdf), which taken together shall be deemed to
6 constitute one document.
7

8 **G. Jointly Drafted**

9 The Parties, including their counsel, have participated in the preparation of this Consent
10 Judgment and this Consent Judgment is the result of the joint efforts of the Parties.

11 **H. Modification**

12 This Consent Judgment was subject to revision and modification by the Parties and has
13 been accepted and approved as to its final form by all Parties and their counsel. Accordingly,
14 any uncertainty or ambiguity existing in this Consent Judgment shall not be interpreted against
15 any Party as a result of the manner of the preparation of this Consent Judgment. Each Party to
16 this Consent Judgment agrees that any statute or rule of construction providing that ambiguities
17 are to be resolved against the drafting Party should not be employed in the interpretation of this
18 Consent Judgment and, in this regard, the Parties hereby waive California Civil Code section
19 1654.
20

21 **I. Authority to Sign**

22 Each signatory to this Consent Judgment certifies that he or she is fully authorized by
23 the Party he or she represents to stipulate to this Consent Judgment and to enter into and
24
25
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

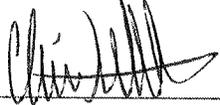
execute the Consent Judgment on behalf of the Party represented and legally to bind that Party.

APPROVED AS TO FORM:

APPROVED AS TO FORM:

Dated:

Dated:



Chris Tuttle
The Chanler Group
Counsel for Plaintiff

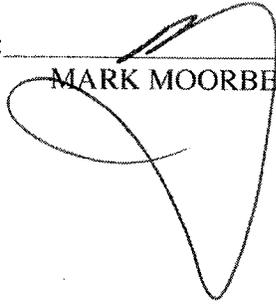
Steven M. Kipperman
H. Michael Brucker
Counsel for Defendant

AGREED TO:

AGREED TO:

Dated: 9.15.15

Dated: _____

By: 
MARK MOORBERG

By: _____
[name], [title]
MCCAULOU'S, INC.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

execute the Consent Judgment on behalf of the Party represented and legally to bind that Party.

APPROVED AS TO FORM:

APPROVED AS TO FORM:

Dated:

Dated:

Chris Tuttle
The Chanler Group
Counsel for Plaintiff

 for Steven M. Kipperman

Steven M. Kipperman
H. Michael Brucker
Counsel for Defendant

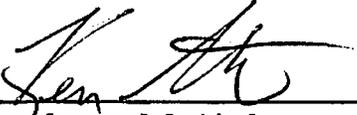
AGREED TO:

AGREED TO:

Dated: _____

Dated: 9-11-15

By: _____
MARK MOORBERG

By: 

[name], [title]
MCCAULOU'S, INC.

Ken Stoddard,
Director of
Finance