

1 Christopher C. Moscone, SBN 170250
Jordan M. Otis. SBN 276274
2 MOSCONE EMBLIDGE & OTIS LLP
220 Montgomery Street, Suite 2100
3 San Francisco, CA 94104
Tel. (415) 362-3599
4 Fax: (415) 362-2006

5 Clifford A. Chanler, SBN 135534
THE CHANLER GROUP
6 2560 Ninth Street
Parker Plaza, Suite 214
7 Berkeley, CA 94710
Tel. (510) 848-8880
8 Fax: (510) 848-8118

9 Attorneys for Plaintiff
MARK MOORBERG

10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 COUNTY OF SAN FRANCISCO
12

13 MARK MOORBERG,

14 Plaintiff,

15 v.

16 1-800-FLOWERS.COM, INC.,
17 DESIGNPAC GIFTS, LLC; and DOES 1 –
100, inclusive,

18 Defendants.

Case No. CGC-14-541129

**[PROPOSED] CONSENT JUDGMENT AS
TO DEFENDANTS 1-800-FLOWERS.COM
AND DESIGNPAC GIFTS, LLC**

(Health & Safety Code § 25249.5 *et seq.*)

1 **1. INTRODUCTION**

2 **1.1 Parties**

3 This Consent Judgment is entered into by and between plaintiff Mark Moorberg (“Plaintiff”)
4 and defendants 1-800-Flowers.com, Inc. and DesignPac Gifts, LLC (“Defendants”), with Plaintiff
5 and Defendants each referred to individually as a “Party” and collectively as the “Parties.”

6 **1.2 Plaintiff**

7 Plaintiff is a resident of the State of California who seeks to promote awareness of
8 exposures to toxic chemicals, and to improve human health by reducing or eliminating harmful
9 substances contained in consumer and commercial products.

10 **1.3 Defendant**

11 Defendants employ ten or more persons and each is a person in the course of doing business
12 for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, California Health and
13 Safety Code section 25249.5 *et seq.* (“Proposition 65”).

14 **1.4 General Allegations**

15 1.4.1 Plaintiff alleges that Defendants manufactured, imported, sold and/or
16 distributed for sale in California, sampler hampers containing Di(2-ethylhexyl)phthalate (“DEHP”)
17 without providing the clear and reasonable health hazard warnings required by Proposition 65.

18 1.4.2 Plaintiff alleges that exposure to DEHP occurs via ingestion from hand to
19 mouth transfer and via dermal contact with sampler hampers.

20 **1.5 Product Description**

21 The category of products covered by this Consent Judgment are baskets with vinyl/PVC
22 handles including, but not limited to, DesignPac Decadent Sampler Hamper Small, Style F132523-
23 BC, UPC # 7 31427 42523 6 (hereinafter “Products”).

24 **1.6 Notices of Violation**

25 On May 21, 2014, Plaintiff served Defendants and certain requisite public enforcement
26 agencies with 60-Day Notices of Violation (“Notice”) alleging that Defendants violated Proposition
27 65 when they failed to warn customers, consumers, and workers in California that the Products
28

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

3 **1.7 Complaint**

4 On August 14, 2014, Plaintiff commenced the instant action (“Complaint”), the operative
5 pleading in this action, naming each of the Defendants as a defendant, and asserting a cause of
6 action for the alleged violations of Proposition 65 that are the subject of the Notice.

7 **1.8 No Admission**

8 Defendants deny the material, factual, and legal allegations contained in the Notice and
9 Complaint and maintain that all of the products they have sold or 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 by Defendants of any fact, finding, conclusion of law,
12 issue of law, or violation of law, nor shall compliance with this Consent Judgment constitute or be
13 construed as an admission by Defendants of any fact, finding, conclusion of law, issue of law, or
14 violation of law. This Section shall not, however, diminish or otherwise affect Defendants’
15 obligations, responsibilities, and duties under this Consent Judgment.

16 **1.9 Consent to Jurisdiction**

17 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
18 jurisdiction over Defendants as to the allegations contained in the Complaint, that venue is proper in
19 the County of San Francisco, and that the Court has jurisdiction to enter and enforce the provisions
20 of this Consent Judgment pursuant to Proposition 65 and California Code of Civil Procedure section
21 664.6.

22 **2. DEFINITIONS**

23 **2.1 California Customer**

24 “California Customer” shall mean any customer of Defendants that Defendants reasonably
25 understand are located in California, have a California warehouse or distribution center, maintain a
26 retail outlet in California, or have distributed Products for sale in California, online via the internet
27 or by any other means.
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1 **2.2 Reformulated Products**

2 “Reformulated Products” shall mean Products that contain no more than 1000 parts per
3 million (“ppm”) (0.1%) of DEHP in any material, component, or constituent of a Product, when
4 analyzed by a laboratory accredited by NVLAP (National Volunteer Laboratory Accreditation
5 Program), American Association for Lab Accreditation (A2LA), ANSI-ASQ National
6 Accreditation Board (ANAB) – ACLASS brand (an ANAB company), International Accreditation
7 Service, Inc. (IAS), Laboratory Accreditation Bureau (L-A-B), Perry Johnson Laboratory
8 Accreditation, Inc. (PJLA), or International Laboratory Accreditation Cooperation (ILAC) (such
9 laboratory referred to as an “Accredited Lab”) pursuant to EPA testing methodologies 3580 and
10 8270C, or equivalent methodologies utilized by such Accredited Laboratory or federal or state
11 agencies to determine the presence, or measure the amount, of DEHP in a solid substance (such
12 methodologies referred to as “Approved Methodologies”).

13 **2.3 Effective Date**

14 “Effective Date” shall mean the date on which the Court enters an order approving this
15 Consent Judgment.

16 **3. INJUNCTIVE RELIEF: REFORMULATION**

17 **3.1 Reformulation Commitment**

18 Commencing on the Effective Date, and continuing thereafter, Defendants shall not
19 manufacture or import for distribution or sale to California Customers for sale in California, or
20 cause to be manufactured or imported for distribution or sale to California Customers for sale in
21 California, any Products that are not Reformulated Products.

22 **4. MONETARY PAYMENTS**

23 **4.1 Civil Penalties Pursuant to Health & Safety Code § 25249.7(b)**

24 In settlement of all the claims referred to in this Consent Judgment, Defendants shall pay the
25 sum of \$14,000.00 as civil penalties. The civil penalty payment will be allocated in accordance
26 with California Health & Safety Code section 25249.12(c)(1) and (d), with 75% of the funds
27 remitted to the California Office of Environmental Health Hazard Assessment (“OEHHA”), 25% of
28 the penalty remitted to “Mark Moorberg, Client Trust Account.” The civil penalty payment shall be

1 delivered on the date due as set forth below at the addresses provided below. Defendants shall be
2 liable for payment of simple interest at a rate of 10% for all amounts due and owing that are not
3 received within two business days of the date they are due, if any.

4 **4.1.1 Initial Civil Penalty**

5 Within ten (10) business days of the Effective Date, Defendants shall make an initial civil
6 penalty payment of \$8,000.00.

7 **4.1.2 Second Civil Penalty**

8 Within six months of the Effective Date, Defendants shall make a second civil penalty
9 payment of \$3,000.00. The amount of the second penalty may be reduced according to the penalty
10 waiver below.

11 The second civil penalty payment will be waived in its entirety if Defendants provide
12 Plaintiff with certification that commencing no later than thirty (30) days after the Effective Date
13 and continuing thereafter, Defendants will not sell to California Customers for sale in California,
14 any Products that are not Reformulated Products. An officer or other authorized representative
15 shall provide Plaintiff with a written certification confirming compliance with this condition no
16 later than thirty (30) days after the Effective Date. The option to provide a written certification in
17 lieu of making the second civil penalty payment constitutes a material term of this Consent
18 Judgment, and with regard to such term, time is of the essence.

19 **4.1.3 Third Civil Penalty**

20 Within six months of the Effective Date, Defendants shall make a third civil penalty
21 payment of \$3,000.00. The amount of the second penalty may be reduced according to the penalty
22 waiver below.

23 The third civil penalty payment will be waived in its entirety if Defendants provide Plaintiff
24 with certification that commencing six months from the Effective Date, Defendants have destroyed
25 any remaining noticed items in its inventory and have sent letters/notices to all known California
26 retailers that received non-reformulated products identifying the non-reformulated products and
27 instructing the retailers to either label, destroy or return the non-reformulated products to
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1 Defendants to be destroyed to the extent the known California retailers have any non-reformulated
2 product remaining in their inventory.

3 4.2 **Representations and Warranties**

4 Defendants represent that the sales data and information concerning sales, knowledge of
5 DEHP presence, and prior reformulation and/or warning efforts, provided to Plaintiff were true and
6 accurate based on their knowledge and are material factors upon which Plaintiff relied to determine
7 the amount of civil penalties assessed pursuant to Health and Safety Code section 25249.7(b). If,
8 within nine months of the Effective Date, Plaintiff discovers and presents to Defendants, evidence
9 demonstrating that the preceding representation and warranty was materially inaccurate, then
10 Defendants shall have thirty (30) days to meet and confer regarding Plaintiff's contention. Should
11 this 30 day period pass without any resolution between Plaintiff and Defendants, Plaintiff shall be
12 entitled to file a formal legal claim including, but not limited to, a claim for damages for breach of
13 contract; Defendants reserve all defenses respecting any such claim.

14 4.3 **Reimbursement of Fees and Costs**

15 The Parties acknowledge that Plaintiff and his counsel offered to resolve this dispute
16 without reaching terms on the amount of fees and costs to be reimbursed, thereby leaving the fee
17 issue to be resolved after the material terms of the agreement had been settled. Shortly after the
18 other settlement terms had been finalized, Defendants expressed a desire to resolve Plaintiff's
19 outstanding fees and costs. Under general contract principles and the private attorney general
20 doctrine codified at California Code of Civil Procedure section 1021.5 for all work performed
21 through the mutual execution of this agreement, including the fees and costs incurred as a result of
22 investigating, bringing this matter to Defendants' attention, negotiating a settlement in the public
23 interest, and seeking court approval of the same. Defendants agree to pay Plaintiff fees and costs in
24 the amount of \$37,000.00 within ten (10) business days of the Court's approval and entry of this
25 Consent Judgment.

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1 4.4 **Payment Procedures**

2 4.4.1 **Payment Addresses.**

3 (a) All payments owed to Plaintiff and his counsel, pursuant to Sections
4 4.1 and 4.3 shall be delivered to the following address:

5 Moscone Emblidge Sater & Otis LLP
6 Attn: Proposition 65 Coordinator
7 220 Montgomery Street, Suite 2100
8 San Francisco, CA 94104

9 (b) All payments owed to OEHHA, pursuant to Section 4.1, shall be
10 delivered directly to OEHHA (Memo line “Prop 65 Penalties”) at one of the following addresses, as
11 appropriate:

12 For United States Postal Service Delivery:

13 Mike Gyurics
14 Fiscal Operations Branch Chief
15 Office of Environmental Health Hazard Assessment
16 P.O. Box 4010
17 Sacramento, CA 95812-4010

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

19 Mike Gyurics
20 Fiscal Operations Branch Chief
21 Office of Environmental Health Hazard Assessment
22 1001 I Street
23 Sacramento, CA 95814

24 4.4.2 **Proof of Payment to OEHHA.** A copy of each check payable to OEHHA
25 shall be mailed, simultaneous with payment, to Moscone Emblidge & Otis at the address set forth in
26 Section 4.3.1(a) above.

27 4.4.3 **Tax Documentation.** Defendants shall provide a separate 1099 form for
28 each payment required by this Consent Judgment to: (a) Plaintiff, whose address and tax
identification number shall be furnished upon request after this Consent Judgment has been fully
executed by the Parties; (b) “California Office of Environmental Health Hazard Assessment”; and
(c) Moscone Emblidge Sater & Otis LLP, and deliver such form to the payee at the payment
addresses provided in Section 4.4.1, above.

1 **5. CLAIMS COVERED AND RELEASED**

2 **5.1 Plaintiff’s Release of Proposition 65 Claims**

3 Plaintiff, acting on his own behalf and in the public interest, releases Defendants, their
4 parents, subsidiaries, affiliated entities under common ownership, directors, officers, agents
5 employees, attorneys, and each entity to whom Defendants directly or indirectly distribute or sell
6 the Products, including, but not limited, to downstream distributors, wholesalers, customers,
7 retailers, franchisees, cooperative members, and licensees (collectively, “Releasees”), from all
8 claims alleging violations of Proposition 65 through the Effective Date based on unwarned
9 exposures to DEHP in the Products, as set forth in the Notice. Compliance with the terms of this
10 Consent Judgment constitutes compliance with Proposition 65 with respect to exposures to DEHP
11 from the Products, as set forth in the Notice.

12 **5.2 Plaintiff’s Individual Releases of Claims**

13 Plaintiff, in his individual capacity only and *not* in any representative capacity, provides a
14 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 any nature, character, or kind, whether known or unknown, suspected or
17 unsuspected, limited to and arising out of alleged or actual exposures to DEHP in Products
18 manufactured, imported, distributed, or sold by Defendants prior to the Effective Date.

19 **5.3 Defendants’ Release of Plaintiff**

20 Defendants, on their own behalf, and on behalf of their past and current agents,
21 representatives, attorneys, successors, and assignees, hereby waive any and all claims against
22 Plaintiff and his attorneys and other representatives, through the Effective Date, for any and all
23 actions taken or statements made (or those that could have been taken or made) by Plaintiff and his
24 attorneys and other representatives, whether in the course of investigating claims, otherwise seeking
25 to enforce Proposition 65 against it in this matter, or with respect to the Products.

26 **6. COURT APPROVAL**

27 This Consent Judgment is not effective until it is approved in its entirety and entered by the
28 Court and shall be null and void if, for any reason, it is not approved and entered by the Court

1 within one year after it has been fully executed by all Parties. Plaintiff and Defendants agree to
2 support the entry of this agreement as a Consent Judgment and to obtain approval of the Consent
3 Judgment by the Court in a timely manner. The Parties acknowledge that, pursuant to California
4 Health and Safety Code section 25249.7(f), a noticed motion is required for judicial approval of this
5 Consent Judgment, which motion Plaintiff shall draft and file and Defendants shall support,
6 appearing at the hearing if so requested. If any third-party objection to the motion is filed, Plaintiff
7 and Defendants agree to work together to file a reply and appear at any hearing. This provision is a
8 material component of the Consent Judgment and shall be treated as such in the event of a breach.

9 If the Court does not approve the Consent Judgment, the Parties shall meet and confer as to
10 whether to modify the language or appeal the ruling. If the Parties do not jointly agree on a course
11 of action to take, then the case shall proceed in its normal course on the Court's trial calendar. If
12 the Court's approval is ultimately overturned by an appellate court, the Parties shall meet and
13 confer as to whether to modify the terms of this Consent Judgment. If the Parties do not jointly
14 agree on a course of action to take, then the case shall proceed in its normal course on the Court's
15 trial calendar. In the event that this Consent Judgment is entered by the Court and subsequently
16 overturned by any appellate court, any monies that have been provided to OEHHA, Plaintiff or his
17 counsel pursuant to Section 4, above, shall be refunded within fifteen (15) days of the appellate
18 decision becoming final.

19 **7. GOVERNING LAW**

20 The terms of this Consent Judgment shall be governed by the laws of the State of California.
21 In the event that Proposition 65 is repealed, preempted, or is otherwise rendered inapplicable by
22 reason of law generally, or as to the Products, then Defendants may provide Plaintiff with notice of
23 any asserted change in the law, and shall have no further obligations pursuant to this Consent
24 Judgment with respect to, and to the extent that, the Products are so affected. Nothing in this
25 Consent Judgment shall be interpreted to relieve Defendants from their obligation to comply with
26 any pertinent state or federal law or regulation.

1 **8. NOTICE**

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

6 To Defendants:

7 Thomas E. Plastaras, Esq.
8 1-800-Flowers.com
9 One Old Country Road,
10 Suite 500
11 Carle Place, NY 11514

To Plaintiff:

Attn: Proposition 65 Coordinator
Moscone Emblidge Sater & Otis LLP
220 Montgomery Street, Suite 2100
San Francisco, CA 94104

11 With a copy to:

12 Holly Gaudreau, Esq.
13 Kilpatrick Townsend and Stockton, LLP
14 Two Embarcadero Center, 8th Floor
San Francisco, CA 94111

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

17 **9. COUNTERPARTS, FACSIMILE AND PDF SIGNATURES**

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

21 **10. COMPLIANCE WITH REPORTING REQUIREMENTS**

22 Plaintiff and his counsel agree to comply with the reporting form requirements referenced in
23 California Health and Safety Code section 25249.7(f).

24 **11. MODIFICATION**

25 This Consent Judgment may be modified only: (i) by written agreement of the Parties and
26 upon entry of a modified Consent Judgment by the Court thereon; or (ii) upon a successful motion
27 of any party and entry of a modified Consent Judgment by the Court.
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1 One Old Country Road,
Suite 500
2 Carle Place, NY 11514

220 Montgomery Street, Suite 2100
San Francisco, CA 94104

3 With a copy to:

4 Holly Gaudreau, Esq.
5 Kilpatrick Townsend and Stockton, LLP
6 Two Embarcadero Center, 8th Floor
San Francisco, CA 94111

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20 of any party and entry of a modified Consent Judgment by the Court.

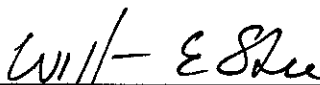
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22 **12. AUTHORIZATION**

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

26 **AGREED TO:**

AGREED TO:

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28 
Plaintiff Mark Moorberg


Defendants 1-800-Flowers.com, and
DesignPac Gifts, LLC

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Dated: 4.30.15

Dated: 5/4/15