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9 MARK MOORBERG

10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 COUNTY OF SAN FRANCISCO - UNLIMITED CIVIL JURISDICTION

12 MARK MOORBERG,

13 Plaintiff,

14 v.

15 BENSUSSEN DEUTSCH &
16 ASSOCIATES, INC.; and DOES 1 -100,
17 inclusive,

18 Defendants.

19 Case No. CGC-14-541130

20 **[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 Bensussen Deutsch & Associates, LLC, formerly
5 known as Bensussen Deutsch & Associates, Inc. (“Bensussen”) on the other hand (each a “Party”
6 and collectively “Parties”).

7 **1.2 Plaintiff**

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

11 **1.3 Defendant**

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

15 **1.4 General Allegations**

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

21 **1.5 Product Description**

22 The products that are covered by this Consent Judgment are vinyl/PVC stylus toppers
23 containing DEHP that are sold or offered for sale in California by Bensussen, including, but not
24 limited to: (i) Nintendo 3DS Mario Kart 7 Stylus Kit, #000346, LOT11020C0201, UPC #6
25 17885 96335 3; (ii) Nintendo 3DS Triple Play Stylus Kit, Pokemon, #110611, UPC #6 17885
26 00407 0; (iii) Nintendo 3DS Character Bobblehead Stylus, Princess, #071112, UPC #6 17885
27 96200 4; (iv) Nintendo 3DS Super Mario Starter Kit, Mario, #000208, UPC #6 17885 96341 4;
28 (v) Nintendo 3DS Super Mario Starter Kit, Mario and Friends, #000208, UPC #6 17885

1 96341 4; (vi) Nintendo 3DS Super Mario Starter Kit, Princess, #000208, UPC #6 17885
2 96341 4; and (vii) Nintendo 3DS Super Mario Starter Kit, Yoshi, #000208, UPC #6 17885
3 96341 4. All vinyl/PVC stylus toppers containing DEHP that are sold or offered for sale in
4 California by Bensussen, including, but not limited to the seven products identified in this
5 paragraph, are hereinafter referred to as the “Products.”

6 **1.6 Notice of Violation**

7 On May 21, 2014, Moorberg served Bensussen and certain public prosecutors with a “60-
8 Day Notice of Violation” (“Notice”) alleging that Bensussen was in violation of Proposition 65
9 for failing to warn its customers and consumers in California that the Products expose users to
10 DEHP. To the best of the Parties’ knowledge, no public enforcer has commenced and is
11 diligently prosecuting the allegations set forth in the Notice.

12 **1.7 Complaint**

13 On August 14, 2014, Moorberg filed the instant action against Bensussen for the alleged
14 violations of Health and Safety Code section 25249.6 that are the subject of the Notice.

15 **1.8 No Admission**

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

24 **1.9 Consent to Jurisdiction**

25 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
26 jurisdiction over Bensussen as to the allegations in the Complaint, that venue is proper in San
27 Francisco County and that this Court has jurisdiction to enter and enforce the provisions of this
28 Consent Judgment.

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2. DEFINITIONS

2.1 “Covered Products” means and is limited to Products containing DEHP sold or distributed for sale in California by Defendants.

2.2 “Effective Date” means the date this Consent Judgment is approved by the court.

2.3 “Reformulation Standard” means the level of DEHP required under Section 3.1.

3. INJUNCTIVE RELIEF: REFORMULATION

3.1 Reformulation Standard

Commencing no later than the Effective Date, Bensussen shall not manufacture, distribute, purchase or import for sale, sell, and/or offer for sale in California any Covered Product that contains DEHP in concentrations exceeding 0.1 percent (1,000 parts per million (“ppm”)) when analyzed pursuant to any methodology utilized by federal or California state agencies for the purpose of determining DEHP content in a solid substance.

4. PAYMENTS

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

Pursuant to Health and Safety Code section 25249.7(b)(2), except as provided in Section 4.1.2, Bensussen shall pay \$20,000 in civil penalties. Each penalty payment shall be allocated according to Health and Safety Code section 25249.12(c)(1) and (d), with 75% of the penalty amount remitted to the California Office of Environmental Health Hazard Assessment and the remaining 25% of each penalty payment remitted to Moorberg.

4.1.1 Initial Civil Penalty

Bensussen shall pay an initial civil penalty of \$10,000 within five (5) days of the Effective Date.

4.1.2 Final Civil Penalty; Waiver on Certification of Compliance with

Section 3.1

On or before October 1, 2015, Bensussen shall pay a final civil penalty of \$10,000, except that, the final civil penalty will be waived, in its entirety, if no later than October 1, 2015,

1 Bensussen provides Moorberg's counsel with written certification that as of the date of its
2 certification, all Covered Products that Bensussen manufactured, distributed, purchased,
3 imported, and sold, and/or offered for sale in California meet the Reformulation Standard, and
4 that it will continue to only manufacture, distribute, purchase, import, and sell, and/or offer for
5 sale Covered Products meeting the Reformulation Standard in California in the future.

6 4.2 **Reimbursement of Attorneys' Fees and Costs**

7 The Parties acknowledge that Moorberg and his counsel offered to resolve this dispute
8 without reaching terms on the amount of fees and costs to be reimbursed to them, thereby
9 leaving the issue to be resolved after the material terms of the agreement had been settled.
10 Shortly after all other settlement terms had been finalized, Bensussen expressed a desire to
11 resolve the fees and costs. The Parties then attempted to (and did) reach an accord on the
12 compensation due Moorberg and his counsel under general contract principles and the private
13 attorney general doctrine codified at Code of Civil Procedure section 1021.5 for all work
14 performed in this matter exclusive of fees and costs incurred on appeal, if any. Under these legal
15 principles, within 30 days of the Effective Date, Bensussen shall pay \$15,000 for the fees and
16 costs incurred investigating, litigating, and enforcing this matter, including the fees and costs
17 incurred (and to be incurred) drafting, negotiating, and obtaining the Court's approval of this
18 Consent Judgment in the public interest.

19 4.3 **Payment Procedures.**

20 4.3.1 **Payment Addresses**

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

23 Moscone Emblidge & Otis LLP
24 Attn: Proposition 65 Coordinator
25 220 Montgomery Street, Suite 220
26 San Francisco, CA 94104

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

Mike Gyurics
Fiscal Operations Branch Chief

Office of Environmental Health Hazard Assessment
P.O. Box 4010
Sacramento, CA 95812-4010

With a copy of the check(s) payable to OEHHA mailed to Moscone Emblidge & Otis LLP at the payment address provided in section 4.3.1(a), as proof of payment to OEHHA.

5. CLAIMS COVERED AND RELEASED

5.1 Public Release of Proposition 65 Claims

In consideration of the promises and commitments herein contained, Moorberg, on his own behalf and on behalf of his past and current agents, representatives, attorneys, successors, and/or assignees, and in the public interest, hereby waives and releases Bensussen, its parents, subsidiaries, affiliated entities under common ownership or control, directors, officers, employees, and attorneys (“Releasees”); and each entity to whom it directly or indirectly distributes or sells Covered Products, and any distributors, wholesalers, customers, retailers, franchisees, cooperative members, licensors, and licensees (“Downstream Defendant Releasees”), from all claims for violations of Proposition 65 based on exposures to DEHP from the Covered Products through the Effective Date. This waiver and release is limited to those claims arising under Proposition 65 for alleged unwarned exposures to DEHP from Covered Products sold by Bensussen before the Effective Date. Bensussen’s and Releasees’ compliance with this Consent Judgment constitutes compliance with Proposition 65.

5.2 Private Release in Plaintiff’s Individual, Non-representative Capacity

Moorberg, in his individual capacity only and not in his representative capacity, also provides a release to Bensussen, Releasees, and Downstream Defendant Releasees which shall be effective as a full and final accord and satisfaction, as a bar to all actions, causes of action, obligations, costs, expenses, attorneys’ fees, damages, losses, claims, liabilities and demands of Moorberg of any nature, character or kind, whether known or unknown, suspected or unsuspected, arising out of alleged or actual unwarned exposures to DEHP, Butyl benzyl phthalate (“BBP”), Di-n-butyl phthalate (“DBP”), Di-isodecyl phthalate (“DIDP”), Diisononyl phthalate (“DINP”), and/or Di-n-hexyl phthalate (“DnHP”) from the following product categories/types:

1 (a) the Covered Products, and

2 (b) earphone cords, gamepacks, bags with vinyl/PVC components, headsets, game
3 controller cables, and controller cases containing DEHP, BBP, DBP, DIDP, DINP, and/or
4 DnHP that are sold or offered for sale in California by Bensussen, including, but not
5 limited to the following six products: (i) Nintendo 3DS Universal Accessory Kit,
6 #000916, UPC #6 17885 00626 5; (ii) Skylanders Giants Mini Gamepack, #100385, UPC
7 #6 17885 00138 3; (iii) Skylanders Swap Force Show & Go Case, #000918, UPC #6
8 17885 00590 9; (iv) Nintendo 3DS Stereo & Chat Headset, #075257, UPC #6 17885
9 96181 6; (v) ProEx Wired Cable PS3 Controller, #051082, UPC #6 17885 95932 5; and
10 (vi) MOGA Mobile Gaming System for Android Phone or Tablet with MOGA Soft Case,
11 #000253, UPC #6 17885 00065 2.

12 **5.3 Bensussen's Release of Moorberg**

13 Bensussen waives any and all claims against Moorberg and his attorneys and other
14 representatives, for any and all actions taken or statements made (or those that could have been
15 taken or made) by Moorberg and his attorneys and other representatives, whether in the course of
16 investigating claims, otherwise seeking enforcement of Proposition 65 against it in this matter, or
17 with respect to the Covered Products.

18 **6. NOTICES**

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

22 For Moorberg:

23 Moscone Emblidge & Otis LLP
24 Attn: Proposition 65 Coordinator
25 220 Montgomery Street, Suite 220
San Francisco, CA 94104

26 For Bensussen:

27 Eric Bensussen, President
28 Bensussen Deutsch & Associates, Inc.
15525 Woodinville Redmond Road NE

1 Woodinville, WA 98072

2 With a copy to:

3 David I. Kornbluh
4 Stephanie M. Rocha
5 Miller, Morton, Caillat & Nevis, LLP
6 50 West San Fernando Street, Suite 1300
7 San Jose, CA 95113

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

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

11 7.1 Moorberg agrees to comply with the reporting form requirements referenced in
12 Health and Safety Code section 25249.7(f).

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

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

1 parties agree to meet and confer to determine whether to modify the terms of the Consent
2 Judgment and to resubmit it for approval.

3 **8. ENFORCEMENT**

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

6 **9. SEVERABILITY**

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

10 **10. GOVERNING LAW**

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

21 **11. DRAFTING**

22 The Parties, including their counsel, have participated and cooperated in the drafting and
23 preparation of this Consent Judgment and this Consent Judgment is the result of the joint efforts
24 of the Parties. This Consent Judgment was subject to revision and modification by the Parties
25 and has been accepted and approved as to its final form by all Parties and their counsel.
26 Accordingly, any uncertainty or ambiguity existing in this Consent Judgment shall not be
27 interpreted against any Party as a result of the manner of the preparation of this Consent
28 Judgment. Each Party to this Consent Judgment agrees that any statute or rule of construction

1 providing that ambiguities are to be resolved against the drafting Party should not be employed
2 in the interpretation of this Consent Judgment and, in this regard, the Parties hereby waive
3 California Civil Code Section 1654.

4 **12. MODIFICATION**

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

8 **13. COUNTERPARTS**

9 13.1 This Consent Judgment may be executed in counterparts and by facsimile or
10 portable document format (PDF) signature, each of which shall be deemed an original, and all
11 of which, when taken together, shall constitute one and the same document.

12 **14. AUTHORIZATION**

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


18 AGREED TO:

AGREED TO:

19
20 Date: 8.3.15

Date: 7/30/15

21
22 By: 
Plaintiff Mark Moorberg

21
22 By: 
Eric Bensussen, President
Defendant Bensussen Deutsch & Associates,
Inc.