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MARK MOORBERG

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

13 MARK MOORBERG,

14 Plaintiff,

15 v.

16 E. MISHAN & SONS; RITE AID  
CORPORATION; and DOES 1 – 100,  
17 inclusive,

18 Defendants.

Case No. CGC-14-541132

**[PROPOSED] CONSENT JUDGMENT AS  
TO DEFENDANTS E. MISHAN & SONS,  
INC. AND RITE AID CORPORATION**

(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 E. Mishan & Sons, Inc. and Rite Aid Corporation (“Defendants”), with Plaintiff and  
5 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 Defendant E. Mishan & Sons, Inc., employs ten or more persons and each is a person in the  
12 course of doing business for purposes of the Safe Drinking Water and Toxic Enforcement Act of  
13 1986, California Health and 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, solar powered chargers containing Di(2-ethylhexyl)phthalate  
17 (“DEHP”) without providing the clear and reasonable health hazard warnings required by  
18 Proposition 65.

19 **1.4.2** Plaintiff alleges that exposure to DEHP occurs via ingestion from hand to  
20 mouth transfer and via dermal contact with solar powered chargers.

21 **1.5 Product Description**

22 The category of products covered by this Consent Judgment is vinyl/PVC solar chargers  
23 with key chains including, but not limited to, Bell+Howell Solar Charger with keychain, Item No.  
24 8791CD-6, UPC #0 80313 087912 (hereinafter “Products”).

25 **1.6 Notices of Violation**

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



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.  
28

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 pursuant to EPA testing methodologies 3580 and 8270C, or equivalent methodologies utilized by  
5 such Accredited Laboratory or federal or state agencies to determine the presence, or measure the  
6 amount, of DEHP in a solid substance (such methodologies referred to as “Approved  
7 Methodologies”).

8           **2.3 Effective Date**

9           “Effective Date” shall mean December 30, 2014.

10 **3. INJUNCTIVE RELIEF: REFORMULATION**

11           **3.1 Reformulation Commitment**

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

16 **4. MONETARY PAYMENTS**

17           **4.1 Civil Penalties Pursuant to Health & Safety Code § 25249.7(b)**

18           In settlement of all the claims referred to in this Consent Judgment, Defendants shall pay the  
19 sum of \$9,500 as civil penalties. The civil penalty payment will be allocated in accordance with  
20 California Health & Safety Code section 25249.12(c)(1) and (d), with 75% of the funds remitted to  
21 the California Office of Environmental Health Hazard Assessment (“OEHHA”), 25% of the penalty  
22 remitted to “Mark Moorberg, Client Trust Account.” The civil penalty payment shall be delivered  
23 on the date due as set forth below at the addresses provided below. Defendants shall be liable for  
24 payment of simple interest at a rate of 10% for all amounts due and owing that are not received  
25 within two business days of the date they are due, if any.

26           **4.1.1 Initial Civil Penalty**

27           Within five business days of the date this Consent Judgment is entered by the Court,  
28 Defendants shall make an initial civil penalty payment of \$5,500.

1                                    **4.1.2 Second Civil Penalty**

2                    Within six months of the date this Consent Judgment is entered by the Court, Defendants  
3 shall make a second civil penalty payment of \$4,000. The amount of the second penalty may be  
4 reduced according to the penalty waiver below.

5                    The second civil penalty payment will be waived if Defendants provide Plaintiff with  
6 certification that commencing six months after the Effective Date and continuing thereafter,  
7 Defendants will not sell to California Customers for sale in California, any Products that are not  
8 Reformulated Products. An officer or other authorized representative shall provide Plaintiff with a  
9 written certification confirming compliance with this condition no later than January 15, 2015. The  
10 option to provide a written certification in lieu of making the second civil penalty payment  
11 constitutes a material term of this Consent Judgment, and with regard to such term, time is of the  
12 essence.

13                                    **4.2 Representations and Warranties**

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

24                                    **4.3 Reimbursement of Fees and Costs**

25                    The Parties acknowledge that Plaintiff and his counsel offered to resolve this dispute  
26 without reaching terms on the amount of fees and costs to be reimbursed, thereby leaving the fee  
27 issue to be resolved after the material terms of the agreement had been settled. As the other  
28 settlement terms had been finalized, Defendants expressed a desire to resolve Plaintiff's outstanding

1 fees and costs as part of the settlement. Under general contract principles and the private attorney  
2 general doctrine codified at California Code of Civil Procedure section 1021.5 for all work  
3 performed through the mutual execution of this agreement, including the fees and costs incurred as  
4 a result of investigating, bringing this matter to Defendants' attention, negotiating a settlement in  
5 the public interest, and seeking court approval of the same. Defendants agree to pay Plaintiff,  
6 within five business days of the Court's approval and entry of this Consent Judgment, fees and  
7 costs in the amount of \$29,000, unless the Court sets a lower amount. If the Court sets a lower  
8 amount of fees, Plaintiff and his counsel will have the right to contest the fees, but the remaining  
9 part of this Consent Order will remain in effect. Defendants will not contest Plaintiff's showing  
10 regarding fees, but this Consent Order will be void if the Court imposes an award for fees and costs  
11 in excess of \$29,000.

12 **4.4 Payment Procedures**

13 **4.4.1 Payment Addresses.**

14 (a) All payments owed to Plaintiff and his counsel, pursuant to Sections  
15 4.1 and 4.3 shall be delivered to the following address:

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

18 (b) All payments owed to OEHHA, pursuant to Section 4.1, shall be  
19 delivered directly to OEHHA (Memo line "Prop 65 Penalties") at one of the following addresses, as  
20 appropriate:

21 For United States Postal Service Delivery:

22 Mike Gyurics  
23 Fiscal Operations Branch Chief  
Office of Environmental Health Hazard Assessment  
24 P.O. Box 4010  
Sacramento, CA 95812-4010

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

26 Mike Gyurics  
27 Fiscal Operations Branch Chief  
Office of Environmental Health Hazard Assessment  
28 1001 I Street  
Sacramento, CA 95814

1                   4.4.2 **Proof of Payment to OEHHA.** A copy of each check payable to OEHHA  
2 shall be mailed, simultaneous with payment, to Moscone Emblidge Sater & Otis at the address set  
3 forth in Section 4.3.1(a) above.

4                   4.4.3 **Tax Documentation.** Defendants shall provide a separate 1099 form for  
5 each payment required by this Consent Judgment to: (a) Plaintiff, whose address and tax  
6 identification number shall be furnished upon request after this Consent Judgment has been fully  
7 executed by the Parties; (b) “California Office of Environmental Health Hazard Assessment”; and  
8 (c) Moscone Emblidge Sater & Otis LLP, and deliver such form to the payee at the payment  
9 addresses provided in Section 4.4.1, above.

10 **5. CLAIMS COVERED AND RELEASED**

11 **5.1 Plaintiff’s Release of Proposition 65 Claims**

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

21 **5.2 Plaintiff’s Individual Releases of Claims**

22 Plaintiff, in his individual capacity only and *not* in any representative capacity, provides a  
23 release herein which shall be effective as a full and final accord and satisfaction, as a bar to all  
24 actions, causes of action, obligations, costs, expenses, attorneys’ fees, damages, losses, claims,  
25 liabilities, and demands of any nature, character, or kind, whether known or unknown, suspected or  
26 unsuspected, limited to and arising out of alleged or actual exposures to DEHP in Products  
27 manufactured, imported, distributed, or sold by Defendants prior to the Effective Date.

28 **5.3 Defendants’ Release of Plaintiff**

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

7 **6. COURT APPROVAL**

8 This Consent Judgment is not effective until it is approved in its entirety (except as  
9 expressly provided in 4.3 above) and entered by the Court and shall be null and void if, for any  
10 reason, it is not approved and entered by the Court within one year after it has been fully executed  
11 by all Parties. Plaintiff and Defendants agree to support the entry of this agreement as a Consent  
12 Judgment and to obtain approval of the Consent Judgment by the Court in a timely manner. The  
13 Parties acknowledge that, pursuant to California Health and Safety Code section 25249.7(f), a  
14 noticed motion is required for judicial approval of this Consent Judgment, which motion Plaintiff  
15 shall draft and file and Defendants shall support, appearing at the hearing if so requested. If any  
16 third-party objection to the motion is filed, Plaintiff and Defendants agree to work together to file a  
17 reply and appear at any hearing. This provision is a material component of the Consent Judgment  
18 and shall be treated as such in the event of a breach.

19 If the Court does not approve the Consent Judgment, the Parties shall meet and confer as to  
20 whether to modify the language or appeal the ruling. If the Parties do not jointly agree on a course  
21 of action to take, then the case shall proceed in its normal course on the Court's trial calendar. If  
22 the Court's approval is ultimately overturned by an appellate court, the Parties shall meet and  
23 confer as to whether to modify the terms of this Consent Judgment. If the Parties do not jointly  
24 agree on a course of action to take, then the case shall proceed in its normal course on the Court's  
25 trial calendar. In the event that this Consent Judgment is entered by the Court and subsequently  
26 overturned by any appellate court, any monies that have been provided to OEHHA, Plaintiff or his  
27 counsel pursuant to Section 4, above, shall be refunded within 15 days of the appellate decision  
28 becoming final.



1 **7. GOVERNING LAW**

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

9 **8. NOTICE**

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

|   |                                   |
|---|-----------------------------------|
| 14 To Defendants:                                   | To Plaintiff:                     |
| 15 Aton Arbisser                                    | Attn: Proposition 65 Coordinator  |
| 16 Kaye Scholer LLP                                 | Moscone Emblidge Sater & Otis LLP |
| 17 1999 Avenue of the Stars, 16 <sup>th</sup> Floor | 220 Montgomery Street, Suite 2100 |
| Los Angeles, California 90067                       | San Francisco, CA 94104           |

18  
19 Any Party, from time to time, may specify in writing to the other Party a change of address to  
20 which all notices and other communications shall be sent.

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

22 This Consent Judgment may be executed in counterparts and by facsimile or portable  
23 document format (pdf) signature, each of which shall be deemed, and as valid as, an original, and  
24 all of which, when taken together, shall constitute one and the same document.  
25  
26  
27  
28

1 **10. COMPLIANCE WITH REPORTING REQUIREMENTS**

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

4 **11. MODIFICATION**

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

8 **12. AUTHORIZATION**

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

12 **AGREED TO:**

**AGREED TO:**

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14  
15 Plaintiff Mark Moorberg  
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\_\_\_\_\_  
Aton Arbisser  
Attorney for Defendants E. Mishan & Sons,  
Inc. and Rite Aid Corporation

17 Dated: 11.19.14  
18 \_\_\_\_\_

Dated: \_\_\_\_\_

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14 \_\_\_\_\_  
15 Plaintiff Mark Moorberg

  
16 \_\_\_\_\_  
17 Aton Arbisser

18 Attorney for Defendants E. Mishan & Sons,  
19 Inc. and Rite Aid Corporation

20 Dated: \_\_\_\_\_

21 Dated: 21 NOV 2014

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