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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 GIANT INTERNATIONAL (USA) LTD.;
17 TARGET CORPORATION; and DOES 1
-100, inclusive,

18 Defendant.

Case No. CGC 14-541895

**[PROPOSED] CONSENT JUDGMENT AS
TO DEFENDANT GIANT
INTERNATIONAL (USA) LTD.**

(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 defendant Giant International (USA) Ltd. (“Defendant”), with Plaintiff and Defendant each
5 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 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 and
13 Safety Code section 25249.5 *et seq.* (“Proposition 65”).

14 **1.4 General Allegations**

15 **1.4.1** Plaintiff alleges that Defendant manufactures, distributes, imports, sells
16 and/or offers for sale in California, cases for electronics with vinyl/PVC handles containing Di(2-
17 ethylhexyl)phthalate (“DEHP”) at levels that require a warning under Proposition 65 without
18 providing the clear and reasonable health hazard warnings required by 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 cases for electronics with vinyl/PVC handles.

21 **1.5 Product Description**

22 The category of products covered by this Consent Judgment is cases for electronics with
23 vinyl/PVC handles including, but not limited to, Motorola Talkabout 2-Way Radios, MR350RPP,
24 GU7174A, UPC #8 43677 00190 7 (hereinafter “Products”).

25 **1.6 Notice of Violation**

26 On May 21, 2014, Plaintiff served Defendant and certain requisite public enforcement
27 agencies with a 60-Day Notice of Violation (“Notice”) alleging that Defendant violated Proposition
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1 65 when it failed to warn customers, consumers, and workers in California that the Products expose
2 users to DEHP. To the best of the Parties' knowledge, no public enforcer has commenced and is
3 diligently prosecuting the allegations set forth in the Notice.

4 **1.7 Complaint**

5 On September 29, 2014, Plaintiff commenced the instant action ("Complaint"), the
6 operative pleading in this action, naming Defendant as a defendant, and asserting a cause of action
7 for the alleged violations of Proposition 65 that are the subject of the Notice.

8 **1.8 No Admission**

9 Defendant denies the material, factual, and legal allegations contained in the Notice and
10 Complaint and maintains that all of the products that it has sold or distributed for sale in California,
11 including the Products, have been and are in compliance with all laws. Nothing in this Consent
12 Judgment shall be construed as an admission by Defendant of any fact, finding, conclusion of law,
13 issue of law, or violation of law, nor shall compliance with this Consent Judgment constitute or be
14 construed as an admission by Defendant of any fact, finding, conclusion of law, issue of law, or
15 violation of law, such being specifically denied by Defendant. This Section shall not, however,
16 diminish or otherwise affect Defendant's obligations, responsibilities, and duties under this Consent
17 Judgment.

18 **1.9 Consent to Jurisdiction**

19 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
20 jurisdiction over Defendant as to the allegations contained in the Complaint, that venue is proper in
21 the County of San Francisco, and that the Court has jurisdiction to enter and enforce the provisions
22 of this Consent Judgment pursuant to Proposition 65 and California Code of Civil Procedure section
23 664.6.

24 **2. DEFINITIONS**

25 **2.1 California Customer**

26 "California Customer" shall mean any customers of Defendant that Defendant reasonably
27 understands are located in California, have a California warehouse or distribution center, maintain a
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1 retail outlet in California, or have distributed Products for sale in California, online via the internet
2 or by any other means.

3 **2.2 Reformulated Products**

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

15 **2.3 Effective Date**

16 “Effective Date” means the date this Consent Judgment is approved by the Court.

17 **3. INJUNCTIVE RELIEF: REFORMULATION**

18 **3.1 Reformulation Commitment**

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

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24 **4. MONETARY PAYMENTS**

25 **4.1 Civil Penalties Pursuant to Health & Safety Code § 25249.7(b)**

26 In settlement of all the claims referred to in this Consent Judgment, Defendant shall pay the
27 sum of \$8,500 as civil penalties. The civil penalty payment will be allocated in accordance with
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1 California Health & Safety Code section 25249.12(c)(1) with 75% of the funds remitted to the
2 California Office of Environmental Health Hazard Assessment (“OEHHA”) and 25% of the penalty
3 remitted to “Mark Moorberg, Client Trust Account.” The civil penalty payment shall be delivered
4 on the date due as set forth below at the addresses provided below. Defendant shall be liable for
5 payment of simple interest at a rate of 10% for all amounts due and owing that are not received
6 within ten days of the date they are due, if any.

7 **4.1.1 Initial Civil Penalty**

8 Within ten days of the date this Consent Judgment is entered by the Court, Defendant shall
9 make an initial civil penalty payment of \$2,500.

10 **4.1.2 Second Civil Penalty**

11 Within one year of the date this Consent Judgment is entered by the Court, Defendant shall
12 make a second civil penalty payment of \$6,000. The amount of the second penalty may be reduced
13 according to the penalty waiver below.

14 **4.1.3 Reductions to Civil Penalty Payment Amounts**

15 The second civil penalty payment will be waived if Defendant provides Plaintiff with
16 certification that commencing April 30, 2015 and continuing thereafter, Defendant will not sell to
17 California Customers for sale in California, any Products that are not Reformulated Products. An
18 officer or other authorized representative shall provide Plaintiff with a written certification
19 confirming compliance with this condition no later than April 30, 2015. The option to provide a
20 written certification in lieu of making the second civil penalty payment constitutes a material term
21 of this Consent Judgment, and with regard to such term, time is of the essence.

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23 **4.2 Reimbursement of Fees and Costs**

24 Under general contract principles and the private attorney general doctrine codified at
25 California Code of Civil Procedure section 1021.5, for all work performed through the mutual
26 execution of this agreement, including the fees and costs incurred as a result of investigating,
27 bringing this matter to Defendant’ attention, negotiating a settlement in the public interest, and
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1 seeking court approval of the same, Defendant agrees to pay Plaintiff, within ten days of the Court's
2 approval and entry of this Consent Judgment, fees and costs in the amount of \$30,000.

3 **4.4 Payment Procedures**

4 **4.4.1 Payment Addresses.**

5 (a) All payments owed to Plaintiff and his counsel, pursuant to Sections
6 4.1 and 4.2 shall be delivered to the following address:

7 Moscone Emblidge Sater & Otis LLP
8 Attn: Proposition 65 Coordinator
 220 Montgomery Street, Suite 2100
 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
 Office of Environmental Health Hazard Assessment
 P.O. Box 4010
 Sacramento, CA 95812-4010

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

16 Mike Gyurics
17 Fiscal Operations Branch Chief
18 Office of Environmental Health Hazard Assessment
 1001 I Street
 Sacramento, CA 95814

19 **4.4.2 Proof of Payment to OEHHA.** A copy of each check payable to OEHHA
20 shall be mailed, simultaneous with payment, to Moscone Emblidge Sater & Otis at the address set
21 forth in Section 4.3.1(a) above.
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23 **4.4.3 Tax Documentation.** Defendant shall provide a separate 1099 form for each
24 payment required by this Consent Judgment to: (a) Plaintiff, whose address and tax identification
25 number shall be furnished upon request after this Consent Judgment has been fully executed by the
26 Parties; (b) "California Office of Environmental Health Hazard Assessment"; and (c) Moscone
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1 Emblidge Sater & Otis LLP, and deliver such form to the payee at the payment addresses provided
2 in Section 4.4.1, above.

3 **5. CLAIMS COVERED AND RELEASED**

4 **5.1 Plaintiff's Release of Proposition 65 Claims**

5 Plaintiff, acting on his own behalf and in the public interest, releases Defendant, its parents,
6 subsidiaries, affiliated entities under common ownership, directors, officers, agents employees,
7 attorneys, and each entity to whom Defendant directly or indirectly distributes or sells the Products,
8 including, but not limited to, Target Corporation, downstream distributors, wholesalers, customers,
9 retailers, franchisees, cooperative members, and licensees (collectively, "Releasees"), from all
10 claims alleging violations of Proposition 65 related to Products manufactured, imported, distributed,
11 or sold by Defendant through the Effective Date based on unwarned exposures to DEHP in the
12 Products. Compliance with the terms of this Consent Judgment constitutes compliance with
13 Proposition 65 with respect to exposures to DEHP from the Products.

14 **5.2 Plaintiff's Individual Releases of Claims**

15 Plaintiff, in his individual capacity only and *not* in any representative capacity, provides a
16 release herein which shall be effective as a full and final accord and satisfaction, as a bar to all
17 actions, causes of action, obligations, costs, expenses, attorneys' fees, damages, losses, claims,
18 liabilities, and demands of any nature, character, or kind, whether known or unknown, suspected or
19 unsuspected, limited to and arising out of alleged or actual exposures to phthalates, including, but
20 not limited to, DEHP in Products manufactured, imported, distributed, or sold by Defendant prior to
21 the Effective Date.

22 **5.3 Defendant's Release of Plaintiff**

23 Defendant, on its own behalf, and on behalf of its past and current agents, representatives,
24 attorneys, successors, and assignees, as well as Target Corporation, hereby waives any and all
25 claims against Plaintiff and his attorneys and other representatives, through the Effective Date, for
26 any and all actions taken or statements made (or those that could have been taken or made) by
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1 Plaintiff and his attorneys and other representatives, whether in the course of investigating claims,
2 otherwise seeking to enforce Proposition 65 against it in this matter, or with respect to the Products.

3 **6. COURT APPROVAL**

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

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

24 **7. GOVERNING LAW**

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

5 **8. NOTICE**

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

10 To Defendant:

11 Barbara M. McAndrews, Esq.
12 2603 Main Street, Suite 210
13 Irvine, CA 82614

To Plaintiff:

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

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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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12. AUTHORIZATION

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

AGREED TO:

AGREED TO:

Plaintiff MARK MOORBERG

Defendant GIANT INTERNATIONAL
(USA) LTD.

Dated: 1.29.15

Dated: _____

1 **12. AUTHORIZATION**

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

5 **AGREED TO:**

AGREED TO:

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8 _____
Plaintiff MARK MOORBERG


9 _____
Defendant GIANT INTERNATIONAL
(USA) LTD.

9 Dated: _____

Dated: 02/17/2015

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