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MARK MOORBERG

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

13 MARK MOORBERG,
14 Plaintiff,
15
16 v.
17 THE HARTZ GROUP, INC.; THE HARTZ
MOUNTAIN CORPORATION; and DOES
18 1 – 100, inclusive,
19 Defendants.

Case No. CGC-14-543116

**[PROPOSED] CONSENT JUDGMENT AS
TO DEFENDANTS THE HARTZ GROUP,
INC. AND THE HARTZ MOUNTAIN
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 The Hartz Group, Inc. and The Hartz Mountain Corporation (“Defendants”), with
5 Plaintiff 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, tie-out cables and pet toys 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 pet tie-out cables.

21 **1.5 Product Description**

22 The category of products covered by this Consent Judgment are vinyl/PVC tie-out cables
23 including, but not limited to, Hartz Living Tie-Out Cable #503506, UPC #0 32700 91547 6
24 (hereinafter “Products”), and pet toys including, but not limited to, small dog bones (UPC # 0-
25 02139896-1).

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1.6 Notices of Violation

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

1.7 Complaint

On December 9, 2014, Plaintiff commenced the instant action (“Complaint”), the operative pleading in this action, naming each of the Defendants as a defendant, and asserting a cause of action for the alleged violations of Proposition 65 that are the subject of the Notice.

1.8 No Admission

Defendants deny the material, factual, and legal allegations contained in the Notice and Complaint and maintain that all of the products they have sold or distributed for sale in California, including the Products, have been and are in compliance with all laws. Nothing in this Consent Judgment shall be construed as an admission by Defendants of any fact, finding, conclusion of law, issue of law, or violation of law, nor shall compliance with this Consent Judgment constitute or be construed as an admission by Defendants of any fact, finding, conclusion of law, issue of law, or violation of law. This Section shall not, however, diminish or otherwise affect Defendants’ obligations, responsibilities, and duties under this Consent Judgment.

1.9 Consent to Jurisdiction

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

1 **2. DEFINITIONS**

2 **2.1 California Customer**

3 “California Customer” shall mean any customer of Defendants that Defendants reasonably
4 understand are located in California, have a California warehouse or distribution center, maintain a
5 retail outlet in California, or have distributed Products for sale in California, online via the internet
6 or by any other means.

7 **2.2 Reformulated Products**

8 “Reformulated Products” shall mean Products that contain no more than 1000 parts per
9 million (“ppm”) (0.1%) of DEHP in any material, component, or constituent of a Product, when
10 analyzed by a laboratory accredited by NVLAP (National Volunteer Laboratory Accreditation
11 Program), American Association for Lab Accreditation (A2LA), ANSI-ASQ National
12 Accreditation Board (ANAB) – ACLASS brand (an ANAB company), International Accreditation
13 Service, Inc. (IAS), Laboratory Accreditation Bureau (L-A-B), Perry Johnson Laboratory
14 Accreditation, Inc. (PJLA), or International Laboratory Accreditation Cooperation (ILAC) (such
15 laboratory referred to as an “Accredited Lab”) pursuant to EPA testing methodologies 3580 and
16 8270C, or equivalent methodologies utilized by such Accredited Laboratory or federal or state
17 agencies to determine the presence, or measure the amount, of DEHP in a solid substance (such
18 methodologies referred to as “Approved Methodologies”).

19 **2.3 Effective Date**

20 “Effective Date” shall mean the date upon which this Consent Judgment is approved and
21 entered by the Court.

22 **3. INJUNCTIVE RELIEF: REFORMULATION**

23 **3.1 Reformulation Commitment**

24 Commencing six months from the Effective Date, and continuing thereafter, Defendants
25 shall not manufacture or import for distribution or sale to California Customers for sale in
26 California, or cause to be manufactured or imported for distribution or sale to California Customers
27 for sale in California, any Products that are not Reformulated Products.

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1 **4. MONETARY PAYMENTS**

2 **4.1 Civil Penalties Pursuant to Health & Safety Code § 25249.7(b)**

3 In settlement of all the claims referred to in this Consent Judgment, Defendants shall pay the
4 sum of \$10,000 as civil penalties. The civil penalty payment will be allocated in accordance with
5 California Health & Safety Code section 25249.12(c)(1) and (d), with 75% of the funds remitted to
6 the California Office of Environmental Health Hazard Assessment (“OEHHA”), 25% of the penalty
7 remitted to “Mark Moorberg, Client Trust Account.” The civil penalty payment shall be delivered
8 on the date due as set forth below at the addresses provided below. Defendants shall be liable for
9 payment of simple interest at a rate of 10% for all amounts due and owing that are not received
10 within seven business days of the date they are due, if any.

11 **4.1.1 Initial Civil Penalty**

12 Within thirty days of the date this Consent Judgment is entered by the Court, Defendants
13 shall make an initial civil penalty payment of \$6,000.

14 **4.1.2 Second Civil Penalty**

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

18 The second civil penalty payment will be waived if Defendants provide Plaintiff with
19 certification that commencing on Effective Date and continuing thereafter, Defendants will not sell
20 to California Customers for sale in California, any Products that are not Reformulated Products. An
21 officer or other authorized representative shall provide Plaintiff with a written certification
22 confirming compliance with this condition no later than 60 days from the Effective Date. The
23 option to provide a written certification in lieu of making the second civil penalty payment
24 constitutes a material term of this Consent Judgment, and with regard to such term, time is of the
25 essence.

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4.1.3 Third Civil Penalty

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

The third civil penalty payment will be waived if Defendants provide Plaintiff with certification that commencing nine months from the Effective Date, Defendants have commenced providing warnings on the remaining noticed items in its inventory and have sent letters/notices to all known California retailers that received non-reformulated products identifying the non-reformulated products and instructing the retailers to either label, destroy or return the non-reformulated products to Defendants to be destroyed.

4.2 Representations and Warranties

Defendants represent that the sales data and information concerning sales, knowledge of DEHP presence, and prior reformulation and/or warning efforts, provided to Plaintiff were true and accurate based on their knowledge. If, within six months of the Effective Date, Plaintiff discovers and presents to Defendants, evidence demonstrating that the preceding representation and warranty was materially inaccurate, then Defendants shall have 30 days to meet and confer regarding Plaintiff's contention. Should this 30 day period pass without any resolution between Plaintiff and Defendants, Plaintiff reserves the right to file a formal legal claim including, but not limited to, a claim for damages for breach of contract. Defendants reserve all defenses respecting any such claim.

4.3 Reimbursement of Fees and Costs

The Parties acknowledge that Plaintiff and his counsel offered to resolve this dispute without reaching terms on the amount of fees and costs to be reimbursed, thereby leaving the fee issue to be resolved after the material terms of the agreement had been settled. Shortly after the other settlement terms had been finalized, Defendants expressed a desire to resolve Plaintiff's outstanding fees and costs. Under general contract principles and the private attorney general doctrine codified at California Code of Civil Procedure section 1021.5 for all work performed

1 through the mutual execution of this agreement, including the fees and costs incurred as a result of
2 investigating, bringing this matter to Defendants' attention, negotiating a settlement in the public
3 interest, and seeking court approval of the same. Defendants agree to pay Plaintiff, within thirty
4 (30) business days of the Court's approval and entry of this Consent Judgment, fees and costs in the
5 amount of \$33,500.

6 **4.4 Payment Procedures**

7 **4.4.1 Payment Addresses.**

8 (a) All payments owed to Plaintiff and his counsel, pursuant to Sections
9 4.1 and 4.3 shall be delivered to the following address:

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

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

15 For United States Postal Service Delivery:

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

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

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

23 **4.4.2 Proof of Payment to OEHHA.** A copy of each check payable to OEHHA
24 shall be mailed, simultaneous with payment, to Moscone Emblidge Sater & Otis at the address set
25 forth in Section 4.3.1(a) above.

26 **4.4.3 Tax Documentation.** Defendants shall provide a separate 1099 form for
27 each payment required by this Consent Judgment to: (a) Plaintiff, whose address and tax
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1 identification number shall be furnished upon request after this Consent Judgment has been fully
2 executed by the Parties; (b) “California Office of Environmental Health Hazard Assessment”; and
3 (c) Moscone Emblidge Sater & Otis LLP, and deliver such form to the payee at the payment
4 addresses provided in Section 4.4.1, above.

5 **5. CLAIMS COVERED AND RELEASED**

6 **5.1 Plaintiff’s Release of Proposition 65 Claims**

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

16 **5.2 Plaintiff’s Individual Releases of Claims**

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

23 **5.3 Defendants’ Release of Plaintiff**

24 Defendants, on their own behalf, and on behalf of their past and current agents,
25 representatives, attorneys, successors, and assignees, hereby waive any and all claims against
26 Plaintiff and his attorneys and other representatives, through the Effective Date, for any and all
27 actions taken or statements made (or those that could have been taken or made) by Plaintiff and his
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1 attorneys and other representatives, whether in the course of investigating claims, otherwise seeking
2 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 Defendants 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 Defendants shall support,
11 appearing at the hearing if so requested. If any third-party objection to the motion is filed, Plaintiff
12 and Defendants 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. If the Court's approval is
17 ultimately overturned by an appellate court, the Parties shall meet and confer as to whether to
18 modify the terms of this Consent Judgment. If the Parties do not jointly agree on a course of action
19 to take, then the case shall proceed in its normal course. In the event that this Consent Judgment is
20 entered by the Court and subsequently overturned by any appellate court, any monies that have
21 been provided to OEHHA, Plaintiff or his counsel pursuant to Section 4, above, shall be refunded
22 within 15 days of the appellate decision becoming final.

23 **7. GOVERNING LAW**

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

4 **8. NOTICE**

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

9 To Defendants:

10 William P. Fornshell
11 Senior Vice President
12 The Hartz Mountain Corporation
13 400 Plaza Drive
14 Secaucus, New Jersey 07094

To Plaintiff:

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

14 with a copy to:

15 Anthony Cortez
16 James Mattesich
17 Greenberg Traurig, LLP
18 1201 K St. Suite 1100
19 Sacramento, CA 95814

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.

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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.

13 **AGREED TO:**

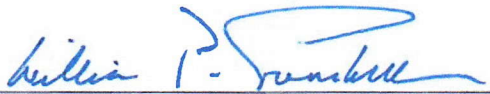
AGREED TO:

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Plaintiff Mark Moorberg

Dated: 1.6.15



Name: William P. Fornshell

Title: SVP, Secretary & General Counsel

Defendants The Hartz Group, Inc. and
The Hartz Mountain Corporation

Dated: Dec. 19, 2014