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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN FRANCISCO

MARK MOORBERG,
Plaintiff,
v.
THE HARTZ GROUP, INC.; THE HARTZ
MOUNTAIN CORPORATION; and DOES
1 – 100, inclusive,
Defendants.

Case No. CGC-14-543116

**[PROPOSED] CONSENT JUDGMENT AS
TO DEFENDANT 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 defendant The Hartz Mountain Corporation ("Hartz Mountain" or “Defendant”), with Plaintiff
5 and Defendant 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 Hartz Mountain and co-defendant The Hartz Group, Inc. (“Hartz Group”) (Hartz Mountain
12 and Hartz Group are, together, "Defendants") each employ ten or more persons and each is a person
13 in the course of doing business for purposes of the Safe Drinking Water and Toxic Enforcement Act
14 of 1986, California Health and Safety Code section 25249.5 *et seq.* (“Proposition 65”).

15 **1.4 General Allegations**

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

20 1.4.2 Plaintiff alleges that exposure to DEHP occurs via ingestion from hand to
21 mouth transfer and via dermal contact with pet tie-out cables.

22 **1.5 Product Description**

23 The category of products covered by this Consent Judgment are vinyl/PVC tie-out cables
24 including, but not limited to, Hartz Living Tie-Out Cable #503506, UPC #0 32700 91547 6
25 (hereinafter “Covered Products”), and pet toys including, but not limited to, small dog bones (UPC
26 # 0-02139896-1) (hereinafter "Additional Products").

27 **1.6 Notices of Violation**

28 On May 21, 2014, Plaintiff served Defendants and certain requisite public enforcement

1 agencies with 60-Day Notices of Violation (“Notice”) alleging that Defendants violated Proposition
2 65 when they failed to warn customers, consumers, and workers in California that the Covered
3 Products expose users to DEHP. To the best of the Parties’ knowledge, no public enforcer has
4 commenced and is diligently prosecuting the allegations set forth in the Notice.

5 **1.7 Complaint**

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

9 **1.8 No Admission**

10 Defendants deny the material, factual, and legal allegations contained in the Notice and
11 Complaint and maintain that all of the products they have sold or distributed for sale in California,
12 including the Covered Products and the Additional Products, have been and are in compliance with
13 all laws. Nothing in this Consent Judgment shall be construed as an admission by Defendants of
14 any fact, finding, conclusion of law, issue of law, or violation of law, nor shall compliance with this
15 Consent Judgment constitute or be construed as an admission by Defendants of any fact, finding,
16 conclusion of law, issue of law, or violation of law. This Section shall not, however, diminish or
17 otherwise affect Defendants’ obligations, responsibilities, and duties under this Consent 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 Defendants 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 customer of Defendants that Defendants reasonably
27 understand are located in California, have a California warehouse or distribution center, maintain a
28 retail outlet in California, or have distributed Covered Products and/or Additional Products for sale

1 in California, online via the internet or by any other means.

2 **2.2 Reformulated Products**

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

14 **2.3 Effective Date**

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

17 **3. INJUNCTIVE RELIEF: REFORMULATION**

18 **3.1 Reformulation Commitment**

19 Commencing six months from the Effective Date, and continuing thereafter, Hartz
20 Mountain shall not manufacture or import for distribution or sale to California Customers for sale in
21 California, or cause to be manufactured or imported for distribution or sale to California Customers
22 for sale in California, any Covered Products or Additional Products that are not Reformulated
23 Products. In addition, commencing six months from the Effective Date, Hartz Mountain shall
24 certify that Hartz Group is not manufacturing or importing for distribution or sale to California
25 Customers for sale in California, or causing to be manufactured or imported for distribution or
26 selling to California Customers for sale in California, any Covered Products or Additional Products
27 that are not Reformulated Products.

28 //

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, Hartz Mountain shall
4 pay the sum of \$14,000 as civil penalties. The civil penalty payment will be allocated in
5 accordance with California Health & Safety Code section 25249.12(c)(1) and (d), with 75% of the
6 funds remitted to the California Office of Environmental Health Hazard Assessment (“OEHHA”),
7 25% of the penalty remitted to “Mark Moorberg, Client Trust Account.” The civil penalty payment
8 shall be delivered on the date due as set forth below at the addresses provided below. Hartz
9 Mountain shall be liable for payment of simple interest at a rate of 10% for all amounts due and
10 owing that are not received 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, Hartz
13 Mountain 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, Hartz
16 Mountain shall make a second civil penalty payment of \$4,000. The amount of the second penalty
17 may be reduced according to the penalty waiver below.

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

26 **4.1.3 Third Civil Penalty**

27 Within nine months of the date this Consent Judgment is entered by the Court, Hartz
28 Mountain shall make a third civil penalty payment of \$4,000. The amount of the second penalty

1 may be reduced according to the penalty waiver below.

2 The third civil penalty payment will be waived if Hartz Mountain provides Plaintiff with
3 certification that commencing nine months from the Effective Date, Hartz Mountain has
4 commenced providing warnings on the remaining noticed items in its inventory as well as any
5 products in Hartz Group's inventory and has sent letters/notices to all known California retailers
6 that received non-reformulated products identifying the non-reformulated products and instructing
7 the retailers to either label, destroy or return the non-reformulated Covered Products to Hartz
8 Mountain to be destroyed.

9 **4.2 Representations and Warranties**

10 Hartz Mountain represents that the sales data and information concerning sales, knowledge
11 of DEHP presence, and prior reformulation and/or warning efforts, provided to Plaintiff were true
12 and accurate based on its knowledge. Hartz Mountain also represents that the Hartz Group, Inc. is
13 not currently affiliated with Hartz Mountain or the Covered Products. If, within six months of the
14 Effective Date, Plaintiff discovers and presents to Hartz Mountain, evidence demonstrating that the
15 preceding representation and warranty was materially inaccurate, then Hartz Mountain shall have
16 30 days to meet and confer regarding Plaintiff's contention. Should this 30 day period pass without
17 any resolution between Plaintiff and Hartz Mountain, Plaintiff reserves the right to file a formal
18 legal claim including, but not limited to, a claim for damages for breach of contract. Hartz
19 Mountain reserves all defenses respecting any such claim.

20 **4.3 Reimbursement of Fees and Costs**

21 The Parties acknowledge that Plaintiff and his counsel offered to resolve this dispute
22 without reaching terms on the amount of fees and costs to be reimbursed, thereby leaving the fee
23 issue to be resolved after the material terms of the agreement had been settled. Shortly after the
24 other settlement terms had been finalized, Defendants expressed a desire to resolve Plaintiff's
25 outstanding fees and costs. Under general contract principles and the private attorney general
26 doctrine codified at California Code of Civil Procedure section 1021.5 for all work performed
27 through the mutual execution of this agreement, including the fees and costs incurred as a result of
28 investigating, bringing this matter to Defendants' attention, negotiating a settlement in the public

1 interest, and seeking court approval of the same. Hartz Mountain agrees to pay Plaintiff, within
2 thirty (30) business days of the Court's approval and entry of this Consent Judgment, fees and costs
3 in the amount of \$33,500.

4 **4.4 Payment Procedures**

5 **4.4.1 Payment Addresses.**

6 (a) All payments owed to Plaintiff and his counsel, pursuant to Sections
7 4.1 and 4.3 shall be delivered to the following address:

8
9 Moscone Emblidge & Otis LLP
10 Attn: Proposition 65 Coordinator
11 220 Montgomery Street, Suite 2100
12 San Francisco, CA 94104

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

16 For United States Postal Service Delivery:

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

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

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

28 **4.4.2 Proof of Payment to OEHHA.** A copy of each check payable to OEHHA
shall be mailed, simultaneous with payment, to Moscone Emblidge Sater & Otis at the address set
forth in Section 4.3.1(a) above.

4.4.3 Tax Documentation. Hartz Mountain shall provide a separate 1099 form for
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

1 executed by the Parties; (b) “California Office of Environmental Health Hazard Assessment”; and
2 (c) Moscone Emblidge Sater & Otis LLP, and deliver such form to the payee at the payment
3 addresses provided in Section 4.4.1, above.

4 **5. CLAIMS COVERED AND RELEASED**

5 **5.1 Plaintiff’s Release of Proposition 65 Claims**

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

15 **5.2 Plaintiff’s Individual Releases of Claims**

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

23 **5.3 Hartz Mountain’s Release of Plaintiff**

24 Hartz Mountain, on its own behalf, and on behalf of its past and current agents,
25 representatives, attorneys, successors, and assignees, hereby waives 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
28 attorneys and other representatives, whether in the course of investigating claims, otherwise seeking

1 to enforce Proposition 65 against it in this matter, or with respect to the Covered Products and
2 Additional 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. The Parties agree to support the entry
7 of this agreement as a Consent Judgment and to obtain approval of the Consent Judgment by the
8 Court in a timely manner. The Parties acknowledge that, pursuant to California Health and Safety
9 Code section 25249.7(f), a noticed motion is required for judicial approval of this Consent
10 Judgment, which motion Plaintiff shall draft and file and Hartz Mountain shall support, appearing at
11 the hearing if so requested. If any third-party objection to the motion is filed, Plaintiff and Hartz
12 Mountain 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 Covered Products, then Hartz Mountain may provide Plaintiff
27 with notice of any asserted change in the law, and shall have no further obligations pursuant to this
28 Consent Judgment with respect to, and to the extent that, the Covered Products are so affected.

1 Nothing in this Consent Judgment shall be interpreted to relieve Defendants from their obligation to
2 comply with any pertinent state or federal law or regulation.

3 **8. NOTICE**

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

8 To Defendant:

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

To Plaintiff:

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

12 with a copy to:

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

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

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

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

23 **10. COMPLIANCE WITH REPORTING REQUIREMENTS**

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

26 **11. MODIFICATION**

27 This Consent Judgment may be modified only: (i) by written agreement of the Parties and
28 upon entry of a modified Consent Judgment by the Court thereon; or (ii) upon a successful motion


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

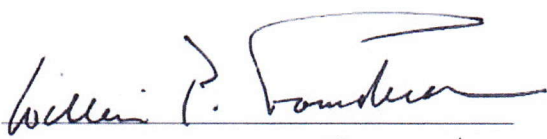
2 **12. AUTHORIZATION**

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

6 **AGREED TO:**

AGREED TO:

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10 
Plaintiff Mark Moorberg

11 
Name: William P. Fornshell
Title: SVP, Secretary & General Counsel
Defendant The Hartz Mountain Corporation
Dated: 4-17-2015

12 Dated: 4.20.15

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