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16 MARK MOORBERG

17 SUPERIOR COURT OF THE STATE OF CALIFORNIA
18 COUNTY OF SAN FRANCISCO

19 MARK MOORBERG,

20 Plaintiff,

21 v.

22 ROCKING P, INC.; RIVER'S EDGE
23 PRODUCTS; BIG 5 SPORTING GOODS
24 CORPORATION; and DOES 1 – 100,
25 inclusive,

26 Defendants.

Case No. CGC-14-541137

**[PROPOSED] CONSENT JUDGMENT AS
TO DEFENDANT ROCKING P, INC., dba
RIVER'S EDGE PRODUCTS, INC.**

(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 Rocking P., Inc., dba River’s Edge Products, Inc. (“Defendant”), with Plaintiff and
5 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 Defendant employs 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 Defendant manufactured, imported, sold and/or
16 distributed for sale in California, back scratchers containing Di(2-ethylhexyl)phthalate (“DEHP”)
17 without providing the clear and reasonable health hazard warnings required by Proposition 65.

18 1.4.2 Plaintiff alleges that exposure to DEHP occurs via ingestion from hand to
19 mouth transfer and via dermal contact.

20 **1.5 Product Description**

21 The products covered by this Consent Judgment are back scratchers with vinyl/PVC grips
22 that contain DEHP including, but not limited to, Bear Back Scratcher, Stock No. 916, UPC #6
23 43323 91600 1 (hereinafter “Products”).

24 **1.6 Notices of Violation**

25 On May 21, 2014, Plaintiff served Defendant, one of its retailers and certain requisite public
26 enforcement agencies with 60-Day Notices of Violation (“Notice”) alleging that Defendant violated
27 Proposition 65 when it failed to warn customers, consumers, and workers in California that the
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1 Products expose users to DEHP. To the best of the Parties' knowledge, no public enforcer has
2 commenced 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 Defendant and others as defendants, and asserting a cause of action
6 for the alleged violations of Proposition 65 that are the subject of the Notice. The Consent
7 Judgment is intended to achieve a full and final resolution of all claims that were made or could
8 have been made in the Complaint or that arise from the Notice.

9 **1.8 No Admission**

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

20 **1.9 Consent to Jurisdiction**

21 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
22 jurisdiction over Defendant as to the allegations contained in the Complaint, that venue is proper in
23 the County of San Francisco, and that the Court has jurisdiction to enter and enforce the provisions
24 of this Consent Judgment pursuant to Proposition 65 and California Code of Civil Procedure section
25 664.6.

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1 **2. DEFINITIONS**

2 **2.1 California Customer**

3 “California Customer” shall mean any customer of Defendant that Defendant reasonably
4 understands 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 on which the Court enters an order approving this
21 Consent Judgment pursuant to Health and Safety Code section 25249.7(f) as contemplated by
22 Section 6 herein.

23 **3. INJUNCTIVE RELIEF: REFORMULATION**

24 **3.1 Reformulation Commitment**

25 Commencing on the Effective Date, and continuing thereafter, Defendant will only
26 manufacture or import for distribution or sale to California Customers for sale in California, or
27 cause to be manufactured or imported for distribution or sale to California Customers for sale in
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1 California, Products that are Reformulated Products or Products sold with a clear and reasonable
2 warning pursuant to Section 3.2.

3 **3.2 Clear and Reasonable Warning**

4 For all Products that are not Reformulated Products, Defendant agrees to provide a clear and
5 reasonable consumer warning in accordance with this Section. Defendant agrees that any warning
6 utilized will be prominently placed with such conspicuousness as compared with other words,
7 statements, designs, or devices as to render it likely to be read and understood by an ordinary
8 individual under customary conditions before purchase or use, consistent with 27 Cal. Code Regs. §
9 25603.1(c). For purposes of this Consent Judgment, a clear and reasonable warning for DEHP in
10 Products shall consist of a warning affixed to the packaging, label, display or tag of a Product or to
11 the Product itself sold in California containing the following language:

12 **WARNING: This product contains a chemical known to the State of California**
13 **to cause cancer, birth defects or other reproductive harm.**

14 **4. MONETARY PAYMENTS**

15 **4.1 Civil Penalties Pursuant to Health & Safety Code § 25249.7(b)**

16 In settlement of all the claims referred to in this Consent Judgment, Defendant shall pay the
17 sum of \$13,500 as civil penalties (comprised of the “Initial Civil Penalty” and “Second Civil
18 Penalty” below). The civil penalty payment will be allocated in accordance with California Health
19 & Safety Code section 25249.12(c)(1) and (d), with 75% of the funds remitted to the California
20 Office of Environmental Health Hazard Assessment (“OEHHA”), 25% of the penalty remitted to
21 “Mark Moorberg, Client Trust Account.” The civil penalty payment shall be delivered on the date
22 due as set forth below at the addresses provided below. Defendant shall be liable for payment of
23 simple interest at a rate of 10% for all amounts due and owing that are not received within two
24 business days of the date they are due, if any.

25 **4.1.1 Initial Civil Penalty**

26 Within ten (10) business days of the Effective Date, Defendant shall make an initial civil
27 penalty payment of \$3,500.

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1 **4.1.2 Second Civil Penalty**

2 Within six months of the Effective Date, Defendant shall make a second civil penalty
3 payment of \$10,000.

4 The second civil penalty payment will be waived in its entirety if, no later than thirty (30)
5 days after the Effective Date, Defendant provides Plaintiff with certification that, as of the date of
6 the certification and continuing thereafter, all of the Products Defendant is selling to California
7 Customers are either Reformulated Products or are labeled with a clear and reasonable warning as
8 defined by Section 3.2. An officer or other authorized representative shall provide Plaintiff with a
9 written certification confirming compliance with this condition. The option to provide a written
10 certification in lieu of making the second civil penalty payment constitutes a material term of this
11 Consent Judgment, and with regard to such term, time is of the essence.

12 **4.3 Reimbursement of Fees and Costs**

13 The Parties acknowledge that Plaintiff and his counsel offered to resolve this dispute
14 without reaching terms on the amount of fees and costs to be reimbursed, thereby leaving the fee
15 issue to be resolved after the material terms of the agreement had been settled. Shortly after the
16 other settlement terms had been finalized, Defendant expressed a desire to resolve Plaintiff's
17 outstanding fees and costs. The Parties then attempted to (and did) reach an accord on the
18 compensation due Plaintiff and his counsel under general contract principles and the private
19 attorney general doctrine codified at California Code of Civil Procedure section 1021.5. Defendant
20 agrees to pay Plaintiff \$29,000 for the fees and costs incurred by Plaintiff investigating, bringing
21 this matter to Defendant's attention, litigating, negotiating a settlement, obtaining the Court's
22 approval of this Consent Judgment and otherwise incurred (and yet to be incurred) relative to the
23 Notice, the Complaint and this Consent Judgment. One half of the fees & costs (i.e., \$14,500) will
24 be payable within ten (10) business days of the Effective Date. The other half of the fees & costs
25 will be payable within thirty (30) days of the Effective Date.

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1 **4.4 Payment Procedures**

2 **4.4.1 Payment Addresses.**

3 (a) All payments owed to Plaintiff and his counsel, pursuant to Sections
4 4.1 and 4.3 shall be delivered to the following address:

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

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

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

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

27 **4.4.3 Tax Documentation.** Defendant shall provide a separate 1099 form for each
28 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 executed by the
Parties; (b) “California Office of Environmental Health Hazard Assessment”; and (c) Moscone
Emblidge Sater & Otis LLP, and deliver such form to the payee at the payment addresses provided
in Section 4.4.1, above.

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1 **5. CLAIMS COVERED AND RELEASED**

2 **5.1 Plaintiff's Release of Proposition 65 Claims**

3 Plaintiff, acting on his own behalf and in the public interest, and on behalf of himself, his
4 heirs, spouses, offspring, executors, insurance companies, assigns, agents, servants, corporations,
5 companies, partnerships, partners, associates, attorneys, representatives, joint ventures, parents,
6 trustees, or anyone else claiming by and through him, hereby releases Defendant, its parents,
7 subsidiaries, predecessors, successors, assigns, insurance companies, affiliated entities under
8 common ownership, directors, officers, agents employees, members, corporations, partnerships,
9 partners, associates, representatives, principles, joint ventures, attorneys, trustees, shareholders past
10 and present and each entity to whom Defendant directly or indirectly distributes or sells the
11 Products, including, but not limited, to downstream distributors, wholesalers, customers, retailers
12 (including but not limited to Big 5 Corp. dba Big 5 Sporting Goods, erroneously identified in the
13 Complaint as "Big 5 Sporting Goods Corporation," as well as its parents, subsidiaries, predecessors,
14 successors, assigns, insurance companies, affiliated entities under common ownership, directors,
15 officers, employees, agents, members, corporations, partnerships, partners, associates,
16 representatives, principles, joint ventures, attorneys, trustees, and shareholders past and present),
17 franchisees, cooperative members, licensors and licensees (collectively, "Releasees"), from any and
18 all claims, demands or causes of action arising from alleged violations of Proposition 65 through
19 the Effective Date based on unwarned exposures to DEHP in the Products, as set forth in the
20 Notice. Compliance with the terms of this Consent Judgment constitutes compliance with
21 Proposition 65 with respect to exposures to and/or failures to warn about DEHP from the Products,
22 as set forth in the Notice.

23 **5.2 Plaintiff's Individual Releases of Claims**

24 Plaintiff, in his individual capacity only and *not* in any representative capacity, provides a
25 release to Defendant and Releasees which shall be effective as a full and final accord and
26 satisfaction, as a bar to all actions, causes of action, obligations, costs, expenses, attorneys' fees,
27 damages, losses, claims, liabilities, and demands of any nature, character, or kind, whether known
28 or unknown, suspected or unsuspected, limited to and arising out of alleged or actual exposures to

DEHP in Products manufactured, imported, distributed, or sold by Defendant prior to the Effective Date.

5.3 Defendant's Release of Plaintiff

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

5.4 No Other Known Claims or Violations

Plaintiff and his attorneys represent and warrant that they are not presently aware of any actual, threatened or alleged violations of Proposition 65 by Defendant other than those alleged violations that are fully resolved by this Consent Judgment.

6. COURT APPROVAL

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

If the Court does not approve the Consent Judgment, the Parties shall meet and confer as to whether to modify the language or appeal the ruling. If the Parties do not jointly agree on a course of action to take, then the case shall proceed in its normal course on the Court's trial calendar. If the Court's approval is ultimately overturned by an appellate court, the Parties shall meet and

1 confer as to whether to modify the terms of this Consent Judgment. If the Parties do not jointly
2 agree on a course of action to take, then the case shall proceed in its normal course on the Court's
3 trial calendar. In the event that this Consent Judgment is entered by the Court and subsequently
4 overturned by any appellate court, any monies that have been provided to OEHHA, Plaintiff or his
5 counsel pursuant to Section 4, above, shall be refunded within 15 days of the appellate decision
6 becoming final.

7 **7. DISMISSAL OF BIG 5 CORP.**

8 Within ten (10) days of the Court's entry of an order approving this Consent Judgment,
9 Plaintiff shall file a Request for Dismissal, with prejudice, as to the Complaint and all causes of
10 action against Big 5 Corp., dba Big 5 Sporting Goods, who was erroneously sued herein as Big 5
11 Sporting Goods Corporation.

12 **8. GOVERNING LAW**

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

20 **9. NOTICE**

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

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1 To Defendant:

To Plaintiff:

2 James C. Bastian, Jr.
3 Shulman Hodges & Bastian LLP
8105 Irvine Center Drive, Suite 600
4 Irvine, California 92618

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

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

8 **10. COUNTERPARTS, FACSIMILE AND PDF SIGNATURES**

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

12 **11. COMPLIANCE WITH REPORTING REQUIREMENTS**

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

15 **12. MODIFICATION**

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

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1 **13. 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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7 
8 Plaintiff Mark Moorberg


Defendants Rocking P. Inc., dba River's Edge
Products, Inc.

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10 Dated: 11.21.14

Dated: 11/24/14