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6 MARK MOORBERG

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9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 COUNTY OF ALAMEDA
11 UNLIMITED CIVIL JURISDICTION
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15 MARK MOORBERG,

16 Plaintiff,

17 v.

18 EAST BAY RESTAURANT SUPPLY, INC.;
et al.,

19 Defendants.
20

Case No. RG14-745064

[PROPOSED] CONSENT JUDGMENT

(Health & Safety Code § 25249.6 *et seq.*)

1 **1. INTRODUCTION**

2 **1.1 Parties**

3 This Consent Judgment is entered into by and between Mark Moorberg (“Moorberg”) and
4 East Bay Restaurant Supply, Inc. (“EBRS”), with Moorberg and EBRS each individually referred to
5 as a “Party” and collectively as the “Parties.”

6 **1.2 Plaintiff**

7 Moorberg is an individual residing in California who seeks to promote awareness of
8 exposures to toxic chemicals and improve human health by reducing or eliminating hazardous
9 substances contained in consumer products.

10 **1.3 Defendant**

11 EBRS 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, Health and Safety Code
13 section 25249.6 *et seq.* (“Proposition 65”).

14 **1.4 General Allegations**

15 Moorberg alleges that EBRS manufactures, imports, sells, or distributes for sale in California,
16 Pedometers with vinyl/PVC ID holders containing di(2-ethylhexyl)phthalate (“DEHP”) without first
17 providing the exposure warning required by Proposition 65. DEHP is listed pursuant to Proposition
18 65 as a chemical known to the State of California to cause birth defects and other reproductive harm.

19 **1.5 Product Description**

20 The EBRS products that are covered by this Consent Judgment are defined as pedometers
21 with vinyl/PVC ID holders containing DEHP including, but not limited to, *Jamba Juice Pedometer*
22 *with Retractable ID Holder, #83765428406, UPC #8 37654 28406 3*, which were sold by EBRS in
23 the State of California, hereinafter the “Products.”

24 **1.6 Notice of Violation**

25 On or about July 30, 2014, Moorberg served EBRS, others, and certain requisite public
26 enforcement agencies with a Supplemental 60-Day Notice of Violation (“Notice”) alleging that
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1 EBRS was in violation of Proposition 65 for failing to warn its customers and consumers in
2 California that the Products expose users to DEHP.

3 **1.7 Complaint**

4 On October 20, 2014, Moorberg filed the instant action (“Complaint”), naming EBRS as a
5 defendant for the alleged violations of Health and Safety Code section 25249.6 that are the subject of
6 the Notice.

7 **1.8 No Admission**

8 EBRS denies the material, factual, and legal allegations contained in the Notice and
9 Complaint, and maintains that all of the products that it has sold and 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 of any fact, finding, conclusion of law, issue of law, or
12 violation of law, nor shall compliance with this Consent Judgment constitute or be construed as an
13 admission of any fact, finding, conclusion of law, issue of law, or violation of law. This Section shall
14 not, however, diminish or otherwise affect EBRS’ obligations, responsibilities, and duties under this
15 Consent Judgment.

16 **1.9 Jurisdiction**

17 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
18 jurisdiction over EBRS as to the allegations in the Complaint, that venue is proper in the County of
19 Alameda, and that this Court has jurisdiction to enter and enforce the provisions of this Consent
20 Judgment.

21 **1.10 Effective Date**

22 For purposes of this Consent Judgment, the term “Effective Date” means December 15, 2014.

23 **2. INJUNCTIVE RELIEF: REFORMULATION AND WARNINGS**

24 **2.1 Reformulated Products**

25 Commencing on the Effective Date, and continuing thereafter, EBRS shall only purchase for
26 sale, manufacture for sale, import, sell, or distribute for sale in California “Reformulated Products,”
27 or Products that are sold with a clear and reasonable warning pursuant to Section 2.2 below. For
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1 purposes of this Consent Judgment, "Reformulated Products" are products that contain DEHP in
2 concentrations of less than 0.1 percent (1,000 parts per million) when analyzed pursuant to U.S.
3 Environmental Protection Agency testing methodologies 3580A and 8270C or any other
4 methodology utilized by federal or state agencies for the purpose of determining the DEHP content in
5 a solid substance. In addition to the EPA test methods authorized above, the Parties may utilize
6 equivalent methodologies employed by state or federal agencies to determine DEHP content in a
7 solid substance.

8 **2.2 Product Warnings**

9 Commencing on the Effective Date, EBRs shall provide clear and reasonable warnings for all
10 Products that do not currently have warnings and that do not qualify as Reformulated Products and
11 that will be sold in California. Each warning shall be prominently placed with such conspicuousness
12 as compared with other words, statements, designs, or devices as to render it likely to be read and
13 understood by an ordinary individual under customary conditions before purchase or use. Each
14 warning shall be provided in a manner such that the consumer or user understands to which *specific*
15 Product the warning applies, so as to minimize the risk of consumer confusion. EBRs has committed
16 and certified that it will no longer sell the Products in California, however in the event that in the
17 future EBRs intends to do so, for any Product sold in California that is not a Reformulated Product,
18 after the Effective Date, EBRs shall affix a warning to the packaging, labeling, or directly on each
19 Product provided for sale in retail outlets in California that states:

20 **WARNING:** This product contains DEHP, a chemical
21 known to the State of California to cause
22 birth defects and other reproductive harm.

23 **3. MONETARY SETTLEMENT TERMS**

24 **3.1 Civil Penalty Payments**

25 Pursuant to Health and Safety Code section 25249.7(b), in settlement of all the claims referred
26 to in this Consent Judgment, EBRs shall pay \$22,000.00 in civil penalties. Each civil penalty
27 payment shall be allocated according to Health and Safety Code section 25249.12(c)(1) and (d) with
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1 seventy-five percent (75%) of the funds paid to the California Office of Environmental Health
2 Hazard Assessment ("OEHHA") and twenty-five percent (25%) of the funds remitted to Moorberg.

3 **3.1.1 Initial Civil Penalty**

4 On or before the date the Court approves this Consent Judgment (including any
5 tentative rulings that are unopposed), EBRS shall issue payment for its initial civil penalty payment
6 in the amount of \$10,000.00 to "Dennis C. Birkhimer, APC" Dennis C. Birkhimer, APC shall
7 provide The Chanler Group with written confirmation within five days of receipt that the funds have
8 been deposited in a trust account. Within one week of the date that this Consent Judgment is
9 approved by the Court, Dennis C. Birkhimer, APC shall issue two separate checks for the initial civil
10 penalty payment to "OEHHA" in the amount of \$7,500 and "Mark Moorberg, Client Trust Account"
11 in the amount of \$2,500.

12 **3.1.2 Final Civil Penalty**

13 On or before November 30, 2015, EBRS shall make a final civil penalty payment of
14 \$12,000. Pursuant to title 11 California Code of Regulations, section 3203(c), Moorberg agrees that
15 the final civil penalty payment shall be waived in its entirety if, no later than November 30, 2015, an
16 officer of EBRS provides Moorberg with written certifications that all of the Products purchased for
17 sale or manufactured for sale in California are (1) Reformulated Products as defined by Section 2.1,
18 or (2) that EBRS will no longer sell Products that are not Reformulated Products and that there are no
19 remaining Products in the custody, control or possession of EBRS or otherwise remaining in the
20 possession of any retail store or warehouse controlled, owned or operated by EBRS in California, and
21 that if EBRS does recommence sales at a later date that all products sold in California will be
22 Reformulated Products. The option to certify reformulation or to not sell in California outstanding
23 unreformulated Products in lieu of making the final civil penalty payment required by this Section is
24 a material term and time is of the essence.

25 **3.2 Reimbursement of Fees and Costs**

26 The parties acknowledge that Moorberg and his counsel offered to resolve this dispute
27 without reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving the
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1 issue to be resolved after the material terms of this Consent Judgment had been settled. Shortly after
2 the other settlement terms had been finalized, EBRIS expressed a desire to resolve Moorberg's fees
3 and costs. The Parties then attempted to (and did) reach an accord on the compensation due to
4 Moorberg and his counsel under general contract principles and the private attorney general doctrine
5 codified at California Code of Civil Procedure section 1021.5 for all work performed through the
6 mutual execution of this Consent Judgment. EBRIS shall, on or before the date this Court approves
7 the Consent Judgment (including any tentative rulings that are unopposed), issue payment to "Dennis
8 C. Birkhimer, APC" in the amount of fees and costs of \$29,500.00 to be held in trust by Dennis C.
9 Birkhimer, APC for The Chanler Group. Dennis C. Birkhimer, APC shall provide The Chanler
10 Group with written confirmation within five days of receipt that the funds have been deposited in a
11 trust account. Within one week of the date this Consent Judgment is approved by the Court, Dennis
12 C. Birkhimer, APC shall issue a check payable to "The Chanler Group" to the address found in
13 Section 3.3.1 below. In the event additional work is required and additional fees and costs incurred,
14 exclusive of the Motion to Approve this Consent Judgment, Moorberg reserves the right to seek
15 additional reimbursement of attorneys' fees and costs incurred, pursuant to all applicable laws.

16 **3.3 Payment Procedures**

17 Except for the final civil penalty payment required by Section 3.1.2, all payments due under
18 this Consent Judgment are to be delivered on or before the dates set out in sections 3.1.1 and 3.2 (the
19 date this Court approves the Consent Judgment, including any tentative rulings that are
20 unopposed) to Dennis C. Birkhimer, APC, and released to The Chanler Group and Moorberg within
21 one week of the Court approving this Consent Judgment according to the following subsections.

22 **3.3.1 Payment Addresses**

23 (a) All payments and tax documentation for Moorberg and his counsel shall be
24 delivered to:

25 The Chanler Group
26 Attn: Proposition 65 Controller
27 2560 Ninth Street
28 Parker Plaza, Suite 214
Berkeley, CA 94710

1 (b) All payments and tax documentation for OEHHA shall be delivered to
2 OEHHA (Checks with memo line "Prop 65 Penalties") at one of the following addresses, as
3 appropriate:
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5 For United States Postal Service Delivery:

6 Mike Gyurics
7 Fiscal Operations Branch Chief
8 Office of Environmental Health Hazard Assessment
9 P.O. Box 4010
10 Sacramento, CA 95812-4010

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

12 Mike Gyurics
13 Fiscal Operations Branch Chief
14 Office of Environmental Health Hazard Assessment
15 1001 I Street
16 Sacramento, CA 95812-4010

17 **3.3.2 Proof of Payment to OEHHA**

18 EBRS shall provide Moorberg's counsel with a copy of the checks sent to OEHHA
19 enclosed with the payments to Moorberg and his counsel sent to the address in Section 3.3.1(a).

20 **4. CLAIMS COVERED AND RELEASED**

21 **4.1 Moorberg's Public Release of Proposition 65 Claims**

22 Moorberg, acting on his own behalf and in the public interest, releases EBRS and its parents,
23 subsidiaries, affiliated entities under common ownership, directors, officers, employees, and
24 attorneys ("Releasees") and each entity to whom it directly or indirectly distributes or sells the
25 Products, including but not limited to its downstream distributors, wholesalers, customers, retailers,
26 franchisers, franchisees, cooperative members, licensors, and licensees, including, but not limited to
27 Jamba, Inc., Jamba Juice Company and their respective subsidiaries, affiliates, franchisors, joint
28 ventures, licensees and franchisees, for their respective sales of or promotions involving any of the
Products, ("Downstream Releasees") for violations arising under Proposition 65 for unwarned
exposures to DEHP from the Products sold by EBRS prior to the Effective Date, as set forth in the
Notice. Compliance with the terms of this Consent Judgment constitutes compliance with

1 Proposition 65 with respect to exposures to DEHP from the Products sold by EBRS before the
2 Effective Date.

3 **4.2 Moorberg's Individual Release of Claims**

4 Moorberg, in his individual capacity only and *not* in his representative capacity, also provides
5 a release to EBRS, Releasees, and Downstream Releasees which shall be effective as a full and final
6 accord and satisfaction, as a bar to all actions, causes of action, obligations, costs, expenses,
7 attorneys' fees, damages, losses, claims, liabilities and demands of Moorberg of any nature, character
8 or kind, whether known or unknown, suspected or unsuspected, arising out of alleged or actual
9 exposures to DEHP from the Products sold or distributed for sale by EBRS before the Effective Date.

10 Moorberg also expressly, voluntarily, knowingly and advisedly WAIVES any and all rights
11 granted to him under California Civil Code Section 1542 with respect to any claims arising from or in
12 any way related to alleged or actual exposures to DEHP from the Products sold or distributed for sale
13 by EBRS before the Effective Date.

14 Section 1542: "A general release does not extend to claims which the creditor
15 does not know or suspect to exist in his or her favor at the time of executing the
16 release, which if known by him or her must have materially affected his or her
17 settlement with the debtor."

18 **4.3 EBRS Release of Moorberg**

19 EBRS, on its own behalf, and on behalf of its past and current agents, representatives,
20 attorneys, successors, and assignees, hereby waives any and all claims against Moorberg and his
21 attorneys and other representatives, for any and all actions taken or statements made by Moorberg
22 and his attorneys and other representatives, whether in the course of investigating claims, otherwise
23 seeking to enforce Proposition 65 against it in this matter, or with respect to the Products.

24 EBRS also expressly, voluntarily, knowingly and advisedly WAIVES any and all rights
25 granted to it under California Civil Code Section 1542 with respect to any claims arising from or in
26 any way related to alleged or actual exposures to DEHP from the Products sold or distributed for sale
27 by EBRS before the Effective Date, and from all actions taken or statements made by Moorberg and
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1 his attorneys and other representatives, whether in the course of investigating claims, otherwise
2 seeking to enforce Proposition 65 against it in this matter.

3 Section 1542: "A general release does not extend to claims which the creditor
4 does not know or suspect to exist in his or her favor at the time of executing the
5 release, which if known by him or her must have materially affected his or her
6 settlement with the debtor."

7 **5. COURT APPROVAL**

8 This Consent Judgment is not effective until it is approved and entered by the Court and shall
9 be null and void if, for any reason, it is not approved and entered by the Court within one year after it
10 has been fully executed by the Parties.

11 **6. SEVERABILITY**

12 If, subsequent to the Court's approval and entry of this Consent Judgment as a judgment, any
13 provision is held by a court to be unenforceable, the validity of the remaining provisions shall not be
14 adversely affected.

15 **7. GOVERNING LAW**

16 The terms of this Consent Judgment shall be governed by the laws of the state of California
17 and apply within the state of California. In the event that Proposition 65 is repealed, preempted, or is
18 otherwise rendered inapplicable by reason of law generally, or as to the Products, then EBRS may
19 provide written notice to Moorberg of any asserted change in the law, and shall have no further
20 obligations pursuant to this Consent Judgment with respect to, and to the extent that, the Products are
21 so affected. Nothing in this Consent Judgment shall be interpreted to relieve EBRS from any
22 obligation to comply with any pertinent state or federal toxics control laws.

23 **8. NOTICE**

24 Unless specified herein, all correspondence and notice required by this Consent Judgment
25 shall be in writing and sent by: (i) personal delivery; (ii) first-class, registered, or certified mail,
26 return receipt requested; or (iii) a recognized overnight courier to the following addresses:
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1 For EBRs:

2 Dennis C. Birkhimer, Esq.
3 Dennis C. Birkhimer, APC
4 P. O. Box 2790
San Rafael, CA 94912

5 For Moorberg:

6 The Chanler Group
7 Attn: Proposition 65 Coordinator
8 2560 Ninth Street
9 Parker Plaza, Suite 214
10 Berkeley, CA 94710

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

13 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

14 This Consent Judgment may be executed in counterparts and by facsimile or portable
15 document format (PDF) signature, each of which shall be deemed an original, and all of which, when
16 taken together, shall constitute one and the same document.

17 **10. POST EXECUTION ACTIVITIES**

18 Moorberg agrees to comply with the reporting form requirements referenced in Health and
19 Safety Code section 25249.7(f). The Parties further acknowledge that, pursuant to Health and Safety
20 Code section 25249.7(f), a noticed motion is required to obtain judicial approval of the settlement. In
21 furtherance of obtaining such approval, Moorberg and EBRs agree to mutually employ their best
22 efforts, and that of their counsel, to support the entry of this agreement as judgment, and to obtain
23 judicial approval of their settlement in a timely manner. For purposes of this Section, "best efforts"
24 shall include, at a minimum, cooperating with the drafting and filing of the necessary moving papers,
25 and supporting the motion for judicial approval.

26 **11. MODIFICATION**

27 This Consent Judgment may be modified only by: (i) a written agreement of the Parties and
28 entry of a modified consent judgment by the Court; or (ii) a successful motion or application of any
Party, and the entry of a modified consent judgment by the Court.

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12. AUTHORIZATION

The undersigned are authorized to execute this Consent Judgment and have read, understood, and agree to all of the terms and conditions contained herein.

AGREED TO:

AGREED TO:

Date: 10.9.14

Date: _____

By:  _____
MARK MOORBERG

By: _____
**John Breznikar, President
East Bay Restaurant Supply, Inc.**

1 **12. AUTHORIZATION**

2 The undersigned are authorized to execute this Consent Judgment and have read, understood,
3 and agree to all of the terms and conditions contained herein.

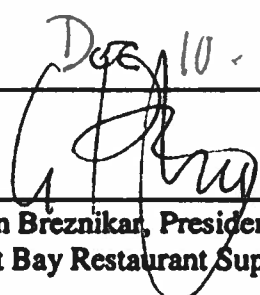
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5 **AGREED TO:**

6 Date: _____

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8 By: _____
9 **MARK MOORBERG**

AGREED TO:

6 Date: Dec 10 - 2014

7
8 By: 
9 **John Breznikar, President**
10 **East Bay Restaurant Supply, Inc.**

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