

1 David R. Bush, State Bar No. 154511
Jennifer Henry, State Bar No. 208221
2 Bush & Henry, Attorneys at Law, PC
3270 Mendocino Ave. #2E
3 Santa Rosa, CA 95403
Telephone: (707) 541-6255
4 Facsimile: (707) 676-4301

5 Attorneys for Plaintiff
Michael DiPirro

7 SUPERIOR COURT OF THE STATE OF CALIFORNIA

8 COUNTY OF ALAMEDA

9 UNLIMITED CIVIL JURISDICTION

12 MICHAEL DIPIRRO,

13 Plaintiff,

14 v.

15 TOPS PRODUCTS; R.R. DONNELLEY &
16 SONS COMPANY; STAPLES, INC.; and
DOES 1-150, inclusive,

17 Defendants.
18

Case No. RG15787396

[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 plaintiff, Michael DiPirro (“DiPirro”),
4 and R.R. Donnelley & Sons Company and its successor and assignee LSC Communications
5 (hereafter collectively “R.R. Donnelley & Sons Company”) and Staples, Inc. (collectively,
6 “Defendants”), with DiPirro and Defendants each individually referred to as a “Party” and
7 collectively as the “Parties.”

8 **1.2 Plaintiff**

9 DiPirro represents that he is an individual residing in California who seeks to promote
10 awareness of exposures to toxic chemicals and improve human health by reducing or eliminating
11 hazardous substances contained in consumer products.

12 **1.3 Defendants**

13 Each Defendant employs ten or more persons and is a person in the course of doing
14 business for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, California
15 Health & Safety Code Section 25249.6 *et seq.* (“Proposition 65”).

16 **1.4 General Allegations**

17 DiPirro alleges that Defendants manufacture, import, sell, or distribute for sale in the State
18 of California, binders containing phthalates DIDP and DINP without first providing the requisite
19 Proposition 65 health hazard warnings. DIDP is listed pursuant to Proposition 65 as a chemical
20 that is known to the State of California to cause developmental toxicity. DINP is listed pursuant
21 to Proposition 65 as a chemical that is known to the State of California to cause cancer.

22 **1.5 Product Description**

23 The products covered by this Consent Judgment are binders containing DINP and/or
24 DIDP that are manufactured, sold, or distributed for sale in California by Tops Products and/or
25 R.R. Donnelley & Sons Company, including, but not limited to, the *Cardinal 1" 11X17 ClearVue*
26 *Slant-D Ring Binder, White (#22112) (UPC #083086221149)* (collectively, the “Products”).

27 **1.6 Notices of Violation**

28 DiPirro represents that, on or about April 21, 2015, DiPirro served Defendants and certain

1 requisite public enforcement agencies with a “60-Day Notice of Violation”, a document that
2 informed the recipients of DiPirro’s allegation that Defendants violated Proposition 65 by failing
3 to warn their customers and consumers in California that the Products expose users to phthalates
4 including DINP. To the best of the Parties’ knowledge, no public enforcement agency has
5 commenced and is diligently prosecuting the allegations set forth in the Notice.

6 On or about December 9, 2016, DiPirro served Defendants and certain requisite public
7 enforcement agencies with a “Supplemental 60-Day Notice of Violation”, a document that
8 informed the recipients of DiPirro’s allegation that Defendants violated Proposition 65 by failing
9 to warn its customers and consumers in California that the Products expose users to DINP and/or
10 DIDP. To the best of the Parties’ knowledge, no public enforcer has commenced and is diligently
11 prosecuting the allegations set forth in the Notice. The two Notices of Violation are collectively
12 referred to herein as “Notices.”

13 **1.7 Complaint**

14 On or about September 28, 2015, DiPirro filed the instant action against Defendants for
15 the alleged violations of Health & Safety Code § 25249.6 that are the subject of the Notices. On
16 or about February 13, 2017, DiPirro filed the First Amended Complaint to include the allegations
17 of violations of Health & Safety Code § 25249.6 that are the subject of the Supplemental 60-Day
18 Notice of Violation (“Complaint”).

19 **1.8 No Admission**

20 Defendants deny the material, factual, and legal allegations contained in the Notices and
21 maintain that all of the products they have manufactured, sold, or distributed for sale in
22 California, including the Products, have been, and are, in compliance with all laws. Nothing in
23 this Consent Judgment shall be construed as an admission by Defendants of any fact, finding,
24 conclusion of law, issue of law, or violation of law; nor shall compliance with this Consent
25 Judgment constitute or be construed as an admission by Defendants of any fact, finding,
26 conclusion of law, issue of law, or violation of law, the same being specifically denied by
27 Defendants. This section shall not, however, diminish or otherwise affect Defendants’
28 obligations, responsibilities, and duties under this Consent Judgment.

1 **1.9 Consent to Jurisdiction**

2 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
3 jurisdiction over Defendants as to the allegations in the Complaint, that venue is proper in
4 Alameda County, and that this Court has jurisdiction to enter and enforce the provisions of this
5 Consent Judgment.

6 **1.10 Effective Date**

7 For purposes of this Consent Judgment, the term “Effective Date” shall mean either
8 February 13, 2017, or the date the Court approves this Consent Judgment, whichever date is later.

9 **2. INJUNCTIVE RELIEF: REFORMULATION OR WARNINGS**

10 **2.1 Reformulation Commitment**

11 In order to waive the second civil penalty under Section 3.2 below, R.R. Donnelley & Sons
12 Company shall only manufacture for sale or distribution for sale in California, from and after the
13 Effective Date, Products that are reformulated (“Reformulated Products”). For purposes of this
14 Consent Judgment, Reformulated Products are Products that meet the Reformulation Standards of
15 Section 2.2 below.

16 **2.2 Reformulation Standard**

17 For purposes of this Consent Judgment, “Reformulated Products” are defined as Products
18 containing no more than 1,000 parts per million (0.1%) of DIDP and/or no more than 1,000 parts
19 per million (0.1%) DINP when analyzed pursuant to EPA testing methodologies 3580A and
20 8270C, or equivalent methodologies utilized by state or federal agencies for the purpose of
21 determining DIDP or DINP content in a solid substance.

22 **2.3 Product Warnings**

23 Commencing on the Effective Date, for all Products that are manufactured for sale or
24 distribution in California and that contain more than 1,000 parts per million (0.1%) DINP or
25 DIDP, R.R. Donnelley & Sons Company shall provide a clear and reasonable warning as set
26 forth below. Each warning shall be prominently placed with such conspicuousness as
27 compared with other words, statements, designs, or devices as to render it likely to be read and
28 understood by an ordinary individual under customary conditions before purchase or use. Each

1 warning shall be provided in a manner such that the consumer or user understands to which
2 specific Product the warning applies, so as to minimize the risk of consumer confusion. R.R.
3 Donnelley & Sons Company shall use one of the following warning language at their option, to
4 the extent required under this section. Either form of the warning statement may be expanded at
5 R.R. Donnelley & Sons' Company option to name additional chemicals that have been listed
6 under Proposition 65 if such chemicals are present:

7 OPTION 1:

8 **WARNING: This product contains one or more phthalate chemicals**
9 **known to the State of California to cause cancer and**
10 **developmental toxicity**

11 OPTION 2:

12 **WARNING: This product contains chemicals, including DINP, known**
13 **to the State of California to cause cancer and**
14 **developmental toxicity.**

15 **3. MONETARY PAYMENTS**

16 **3.1 Initial Civil Penalty.** Defendants shall pay an initial civil penalty in the amount
17 of \$10,000.00 within five (5) business days of notification to Defendants by Plaintiff by
18 electronic mail or other method of the Court Approval of this Consent Judgment. The penalty
19 payment will be allocated by DiPirro's counsel in accordance with California Health & Safety
20 Code § 25249.12(c)(1) & (d), with 75% of the funds remitted to the California Office of
21 Environmental Health Hazard Assessment ("OEHHA") and the remaining 25% of the funds
22 remitted to DiPirro. The initial penalty payment shall be delivered to the address listed in
23 Section 3.3 below.

24 **3.2 Final Civil Penalty.** Defendants shall pay a final civil penalty in the
25 amount of \$20,000.00 on or before August 1, 2017. The final civil penalty shall be waived
26 in its entirety, however, if, no later than August 1, 2017, an officer of Defendants provides
27 DiPirro with written certification that, as of the date of such certification and continuing
28 into the future, Defendants have met the reformulation standard specified in Section 2
above, such that all Products manufactured for sale or distribution in California by R.R.
Donnelley & Sons Company are Reformulated Products. The certification in lieu of a

1 final civil penalty payment provided by this Section is a material term, and time is of the essence.
2 The penalty payment, if any, will be allocated by DiPirro's counsel in accordance with
3 California Health & Safety Code § 25249.12(c)(1) & (d), with 75% of the funds remitted to
4 OEHHA and the remaining 25% of the funds remitted to DiPirro. The penalty payment or
5 certification shall be delivered to the address listed in Section 3.3 below.

6 **3.3 Payments Held in Trust.** Payments shall be delivered to the offices of Bush &
7 Henry, Attorneys at Law, PC, 3270 Mendocino Avenue, Suite 2E, Santa Rosa, CA 95403, and
8 shall be in the form of three checks made payable as follows to:

- 9 (a) "Office of Environmental Health Hazard Assessment" in the amount of
10 \$7,500.00 for payment to OEHHA, in the form of a certified or cashier's
11 check. Bush & Henry agrees to forward the check to OEHHA in a timely
12 manner.
- 13 (b) "Michael DiPirro" in the amount of \$2,500.00 as payment to Michael
14 DiPirro, in the form of a certified or cashier's check. Bush & Henry agrees
15 to forward such check to DiPirro in a timely manner; and
- 16 (c) "Bush & Henry, Attorneys at Law, PC" in the amount of \$40,000, in the
17 form of a certified or cashier's check, as payment for attorneys' fees and
18 costs pursuant to Section 4 below.

19 **3.3 Issuance of 1099 Forms.** Defendants shall provide DiPirro's counsel with a
20 separate 1099 form for each of their payments under this Agreement as follows:

- 21 (a) "Office of Environmental Health Hazard Assessment", P.O. Box 4010,
22 Sacramento, CA 95814 (EIN: 68-0284486) for its portion of the civil
23 penalties paid;
- 24 (b) "Michael DiPirro," whose address and tax identification number shall be
25 furnished upon request after this Agreement has been fully executed by the
26 Parties for his portion of the civil penalties paid; and
- 27 (c) "Bush & Henry, Attorneys at Law, PC" for fees and costs reimbursed
28 pursuant to Section 4.

1 **4. REIMBURSEMENT OF ATTORNEY FEES AND COSTS**

2 The parties acknowledge that DiPirro and his counsel offered to resolve this dispute
3 without reaching terms on the amount of attorney fees and costs to be reimbursed to them,
4 thereby leaving this fee and cost issue to be resolved after the material terms of the agreement had
5 been settled. The Parties then attempted to (and did) reach an accord on the compensation due to
6 OEHHA, DiPirro and his counsel under general contract principles and the private attorney
7 general doctrine codified at California Code of Civil Procedure § 1021.5, for all work performed
8 through the mutual execution of this agreement. Defendants shall pay \$40,000 for fees and costs
9 incurred as a result of investigating, bringing this matter to Defendants’ attention, and negotiating
10 a settlement in the public interest. Defendants shall issue a separate 1099 form for fees and costs
11 (EIN: 81-1257634), shall make the check payable to “Bush & Henry, Attorneys at Law, PC” and
12 shall deliver payment within three (3) business days of Court approval of this Consent Judgment,
13 to the address listed in Section 3.3 above.

14 **5. CLAIMS COVERED AND RELEASED**

15 **1.1 DiPirro’s Public Release of Proposition 65 Claims**

16 DiPirro, acting on his own behalf and in the public interest, releases Defendants and their
17 respective parents, subsidiaries, and affiliates, and their respective past and current officers,
18 directors, employees, agents, representatives, attorneys, successors, and assigns, and each entity
19 and individual to whom Defendants directly or indirectly distributed or sold the Products,
20 including without limitation, downstream distributors, wholesalers, dealers, customers, owners,
21 purchasers, users, auctioneers, retailers, franchisees, cooperative members, licensors, and
22 licensees (collectively, “Releasees”), from all claims for violations of Proposition 65 up through
23 the Effective Date based on exposures to DINP and DIDP from the Products, as set forth in the
24 Notices. Compliance with the terms of this Consent Judgment constitutes compliance with
25 Proposition 65 with respect to exposures to DINP and DIDP from the Products manufactured,
26 sold, or distributed by Defendants after the Effective Date, as set forth in the Notices.

27 **5.2 DiPirro’s Individual Release of Claims**

28 DiPirro, in his individual capacity only and *not* in his representative capacity, on his own

1 behalf and on behalf of his heirs, executors, administrators, agents, representatives, and attorneys
2 (collectively, the “DiPirro Releasers”) also provides a release herein to Releasees which shall be
3 effective as a full and final accord and satisfaction, as a bar to all claims, actions, causes of action,
4 suits, liabilities, demands, obligations, damages, fees (including investigation fees, expert fees,
5 and attorney fees), obligations, costs, expenses, fines, penalties, or losses of any nature, character
6 or kind, whether known or unknown, suspected or unsuspected, at law or in equity, that were or
7 could have been brought by the DiPirro Releasers against Releasees under Proposition 65 up
8 through the Effective Date based on, arising out of, or relating in any way to alleged or actual
9 exposures to phthalate chemicals, including, but not limited to, DIDP and DINP in the Products.

10 **5.3 Defendants’ Release of DiPirro**

11 Defendants, on their own behalf, on behalf of their respective parents, subsidiaries, and
12 affiliates, and on behalf of their respective past and current officers, directors, employees, agents,
13 representatives, attorneys, successors, and assigns, hereby waive any and all claims that they
14 may have against DiPirro and his heirs, executors, administrators, agents, representatives, and
15 attorneys for any and all actions taken or statements made (or those that could have been taken or
16 made) by DiPirro and his attorneys and other representatives, whether in the course of
17 investigating claims, otherwise seeking to enforce Proposition 65 against Defendants in this
18 matter, or with respect to the Products.

19 **6. COURT APPROVAL**

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

23 **7. SEVERABILITY**

24 If, subsequent to the execution of this Consent Judgment, any provision of this Consent
25 Judgment is held by a court to be unenforceable, the validity of the remaining provisions shall not
26 be adversely affected.

27 **8. GOVERNING LAW**

28 The terms of this Consent Judgment shall be governed by the laws of the State of

1 California and apply within the State of California. In the event that Proposition 65 is repealed, is
2 preempted, or is otherwise rendered inapplicable by reason of law generally, or as to the Products,
3 then Defendants may provide written notice to DiPirro of any asserted change in the law, and
4 shall have no further obligations pursuant to this Consent Judgment, with respect to, and to the
5 extent that, the Products are so affected.

6 **9. NOTICES**

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

11 For Defendants:

12 Michael P. Pulliam, Esq.
13 Drinker Biddle & Reath LLP
14 50 Fremont St., 20th Floor
San Francisco, CA 94105-2235

15 For DiPirro:

16 Bush & Henry, Attorneys at Law, PC
17 3270 Mendocino Avenue, Suite 2E
Santa Rosa, CA 95403

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

20 **10. COUNTERPARTS; FACSIMILE SIGNATURES**

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

24 **11. POST EXECUTION ACTIVITIES**

25 DiPirro agrees to comply with the reporting form requirements referenced in Health &
26 Safety Code § 25249.7(f). The Parties acknowledge that, pursuant to Health & Safety Code
27 § 25249.7(f), a noticed motion is required to obtain judicial approval of the settlement. In
28 furtherance of obtaining such approval, DiPirro and Defendants agree to mutually employ their

1 best efforts, and those of their respective counsel, to support the entry of this agreement as a
2 Consent Judgment, and to obtain judicial approval of the settlement in a timely manner.

3 **12. MODIFICATION**

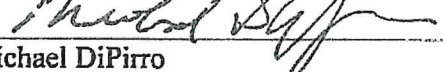
4 This Consent Judgment may be modified only: (i) by a written agreement of the Parties
5 and upon entry of a modified consent judgment by the Court thereon; or (ii) upon a successful
6 motion or application of any Party and the entry of a modified consent judgment by the Court.

7 **13. AUTHORIZATION**

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

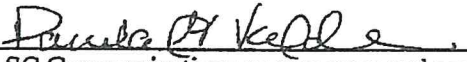
11
12 **AGREED TO:**

13
14 Date: 3-9-17

15
16 By: 
Michael DiPirro

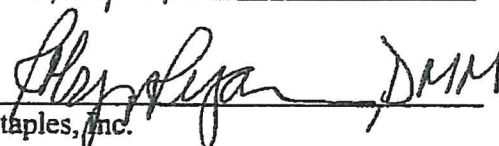
17 **AGREED TO:**

18
19 Date: 3/7/17

20
21 By: 
LSC Communications as successor and assignee
22 to R.R. Donnelley & Sons Company

23 **AGREED TO:**

24
25 Date: 3/6/17

26
27 By: 
Staples, Inc.