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11
12 SUPERIOR COURT OF THE STATE OF CALIFORNIA
13 COUNTY OF MARIN
14 UNLIMITED CIVIL JURISDICTION

15 MARK MOORBERG,
16 Plaintiff,

17 v.

18 HOME ESSENTIALS & BEYOND, INC.,
19 *et al.*,
20 Defendants.

Case No. CIV1600202

CONSENT JUDGMENT

(Health & Safety Code § 25249.6*et seq.* and
Code of Civil Procedure § 664.6)

1 **1. INTRODUCTION**

2 **1.1 Parties**

3 This Consent Judgment is entered into by and between plaintiff Mark
4 Moorberg, (“Moorberg”) and defendant Home Essentials & Beyond, Inc. (“Home Essentials”), with
5 Moorberg and Home Essentials each referred to individually as a “Party” and collectively as the
6 “Parties.”

7 **1.2 Plaintiff**

8 Moorberg is a resident of the State of California who seeks to promote awareness of
9 exposures to toxic chemicals, and to improve human health by reducing or eliminating harmful
10 substances contained in consumer and commercial products.

11 **1.3 Defendant**

12 Home Essentials employs ten or more persons and is a person in the course of doing
13 business for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, California
14 Health and Safety Code section 25249.5 *et seq.* (“Proposition 65”).

15 **1.4 General Allegations**

16 Moorberg alleges that Home Essentials manufactures, imports, sells and/or distributes for
17 sale in California, magnifying glasses with vinyl/PVC handles containing di(2-ethylhexyl)phthalate
18 (“DEHP”), and that it does so without providing the health hazard warning that Moorberg alleges is
19 required by Proposition 65.

20 **1.5 Product Description**

21 The products covered by this Consent Judgment are magnifying glasses with vinyl/PVC
22 handles containing DEHP, including, but not limited to, the 6 *Asst Magnifying Glass Assortment A*,
23 #69572, UPC #7 86460 69572 6 (collectively, “Products”).

24 **1.6 Notice of Violation**

25 On June 26, 2015, Moorberg served Home Essentials and the requisite public enforcement
26 agencies with a 60-Day Notice of Violation (“Notice”), alleging that Home Essentials violated
27 Proposition 65 when it failed to warn its customers and consumers in California that the Products
28

1 expose users to DEHP. To the best of the Parties' knowledge, no public enforcer has commenced
2 and is diligently prosecuting an action to enforce the allegations set forth in the Notice.

3 **1.7 Complaint**

4 On January 19, 2016, Moorberg commenced the instant action, naming Home Essentials,
5 among others, as a defendant for the alleged violations of Proposition 65 that are the subject of the
6 Notice.

7 **1.8 No Admission**

8 Home Essentials denies the material, factual, and legal allegations contained in the Notice
9 and Complaint, and maintains that all of the products that it has sold or distributed for sale in
10 California, including the Products, have been, and are, in compliance with all laws. Nothing in this
11 Consent Judgment shall be construed as an admission by Home Essentials of any fact, finding,
12 conclusion of law, issue of law, or violation of law, nor shall compliance with this Consent
13 Judgment constitute or be construed as an admission by Home Essentials of any fact, finding,
14 conclusion of law, issue of law, or violation of law. This Section shall not, however, diminish or
15 otherwise affect Home Essentials's obligations, responsibilities, and duties under this Consent
16 Judgment.

17 **1.9 Jurisdiction**

18 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
19 jurisdiction over Home Essentials as to the allegations contained in the Complaint, that venue is
20 proper in the County of Marin, and that the Court has jurisdiction to enter and enforce the
21 provisions of this Consent Judgment pursuant to Proposition 65 and Code of Civil Procedure
22 section 664.6.

23 **1.10 Effective Date**

24 For purposes of this Consent Judgment, the term "Effective Date" shall mean the date that
25 the Court grants the motion for approval of this Consent Judgment contemplated by Section 5.

26 **2. INJUNCTIVE RELIEF: REFORMULATED PRODUCTS**

27 Commencing on the Effective Date and continuing thereafter, Home Essentials
28 agrees to only manufacture for sale or purchase for sale in or into California, "Reformulated

1 Products.” For purposes of this Settlement Agreement, “Reformulated Products” shall mean
2 Products containing less than or equal to 1,000 parts per million (0.1%) DEHP in each component
3 when analyzed pursuant to Environmental Protection Agency testing methodologies 3580A and
4 8270C or equivalent methodologies utilized by federal or state agencies for the purpose of
5 determining DEHP content in a solid substance. As of the Effective Date, Home Essentials
6 represents that it is not currently offering the Products for sale in California, but agrees that if it
7 recommences sales, it will only offer Reformulated Products.

8 **3. MONETARY SETTLEMENT TERMS**

9 **3.1 Civil Penalty Payment Pursuant to Health and Safety Code § 25249.7(b)(2)**

10 Pursuant to Health and Safety Code section 25249.7(b)(2), and in settlement of all the
11 claims referred to in this Consent Judgment, Home Essentials shall pay \$3,000 in civil penalties in
12 accordance with this Section. This penalty payment will be allocated in accordance with California
13 Health & Safety Code § 25249.12(c)(1) & (d), with 75% of the funds remitted to the California
14 Office of Environmental Health Hazard Assessment (“OEHHA”) and the remaining 25% of the
15 penalty remitted to Moorberg. Moorberg’s counsel shall be responsible for remitting Home
16 Essentials’s penalty payment(s) under this Consent Judgment to OEHHA. Home Essentials shall
17 provide its payment in a single check made payable to “Mark Moorberg, Client Trust Account” to
18 be delivered to the address provided in Section 3.4, below.

19 **3.2 Reimbursement of Attorneys’ Fees and Costs**

20 The Parties acknowledge that Moorberg and his counsel offered to resolve this dispute
21 without reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving
22 the issue to be resolved after the material terms of the agreement had been settled. Shortly after the
23 other settlement terms had been finalized, Home Essentials expressed a desire to resolve
24 Moorberg’s fees and costs. The Parties then negotiated a resolution of the compensation due to
25 Moorberg and his counsel under general contract principles and the private attorney general
26 doctrine codified at California Code of Civil Procedure § 1021.5. For all work performed through
27 the mutual execution of this agreement and the Court’s approval of the same, but exclusive of fees
28 and costs on appeal, if any (other than fees and costs on a appeal taken directly or indirectly by

1 Moorberg), Home Essentials shall reimburse Moorberg and his counsel \$16,500. Home Essentials'
2 payment shall be delivered to the address in Section 3.4 in the form of a check payable to "The
3 Chanler Group." The reimbursement shall cover all fees and costs incurred by Moorberg
4 investigating, bringing this matter to Home Essentials' attention, litigating, and negotiating a
5 settlement of the matter in the public interest.

6 **3.3 Payment Timing; Payments Held in Trust**

7 Home Essentials shall deliver all payments required by this Consent Judgment to its
8 counsel within one week of the date that this agreement is fully executed by the Parties. Home
9 Essentials's counsel shall confirm receipt of settlement funds in writing to Moorberg's counsel
10 and, thereafter, hold the amounts paid in trust until such time as the Court grants the motion for
11 approval of the Parties' settlement contemplated by Section 5. Within five (5) days of the receipt
12 by Home Essentials counsel of notice of the Effective Date, Home Essentials's counsel shall mail
13 all settlement payments it has held in trust to Moorberg's counsel at the address provided in
14 Section 3.4.

15 **3.4 Payment Address**

16 All payments required by this Consent Judgment shall be delivered to the following
17 address:

18 The Chanler Group
19 Attn: Proposition 65 Controller
20 2560 Ninth Street
21 Parker Plaza, Suite 214
22 Berkeley, CA 94710

23 **4. CLAIMS COVERED AND RELEASED**

24 **4.1 Moorberg's Release of Proposition 65 Claims**

25 Moorberg, acting on his own behalf and in the public interest, releases Home Essentials and
26 their parents, subsidiaries, affiliated entities under common ownership, directors, officers,
27 employees, and attorneys ("Releasees") and each entity to whom they directly or indirectly
28 distribute or sell the Products including, but not limited to, their downstream distributors,
wholesalers, customers, retailers, franchisers, cooperative members, licensors and licensees

1 (“Downstream Releasees”) for any violations arising under Proposition 65 for unwarned exposures
2 to DEHP from the Products manufactured, imported, distributed or sold by Home Essentials prior to
3 the Effective Date, as set forth in the Notice. Compliance with the terms of this Consent Judgment
4 constitutes compliance with Proposition 65 by Home Essentials with respect to the alleged or actual
5 failure to warn about exposures to DEHP from Products manufactured, sold or distributed for sale
6 by Home Essentials after the Effective Date.

7 **4.2 Moorberg’s Individual Release of Claims**

8 Moorberg, in his individual capacity only and *not* in his representative capacity, also
9 provides a release to Defendants, Releasees, and Downstream Releasees which shall be effective as
10 a full and final accord and satisfaction, as a bar to all actions, causes of action, obligations, costs,
11 expenses, attorneys’ fees, damages, losses, claims, liabilities and demands of Moorberg of any
12 nature, character or kind, whether known or unknown, suspected or unsuspected, arising out of
13 alleged or actual exposures to DEHP in Products manufactured, imported, distributed or sold by
14 Home Essentials before the Effective Date.

15 **4.3 Home Essentials’s Release of Moorberg**

16 Home Essentials, on its own behalf and on behalf of its past and current agents,
17 representatives, attorneys, successors and/or assignees, hereby waives any and all claims against
18 Moorberg and his attorneys and other representatives, for any and all actions taken or statements
19 made (or those that could have been taken or made) by Moorberg and his attorneys and other
20 representatives in the course of investigating claims, seeking to enforce Proposition 65 against it in
21 this matter, or with respect to the Products.

22 **5. COURT APPROVAL**

23 This Consent Judgment is not effective until it is approved and entered by the Court and
24 shall be null and void if, for any reason, it is not approved and entered by the Court within one year
25 after it has been fully executed by the Parties. Moorberg and Home Essentials agree to support the
26 entry of this agreement as a judgment, and to obtain the Court’s approval of their settlement in a
27 timely manner. The Parties acknowledge that, pursuant to California Health and Safety Code
28 section 25249.7(f), a noticed motion is required for judicial approval of this Consent Judgment,

1 which motion Moorberg shall draft and file and Home Essentials shall support, including by
2 appearing at the hearing if so requested. If any third-party objection to the motion is filed,
3 Moorberg and Home Essentials agree to work together to file a reply and appear at any hearing.
4 This provision is a material component of the Consent Judgment and shall be treated as such in the
5 event of a breach.

6 **6. SEVERABILITY**

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

10 **7. GOVERNING LAW**

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

19 **8. NOTICE**

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

24 To Home Essentials:	To Moorberg:
25 Izidore Godinger, President	Attn: Proposition 65 Coordinator
26 Home Essentials & Beyond, Inc.	The Chanler Group
27 200 Theodore Conrad Drive	2560 Ninth Street
28 Jersey City, NJ 07305	Parker Plaza, Suite 214
	Berkeley, CA 94710-2565

1 A simultaneous copy of any notice to Home Essentials shall be sent to Avrom R. Vann,
2 Esquire, AVROM R. VANN, P.C., 1211 Avenue of the Americas, 40th Floor, New York, New
3 York 10036-8718.

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

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

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

10 **10. COMPLIANCE WITH REPORTING REQUIREMENTS**

11 Moorberg and his counsel agree to comply with the reporting form requirements referenced
12 in California Health and Safety Code section 25249.7(f).

13 **11. MODIFICATION**

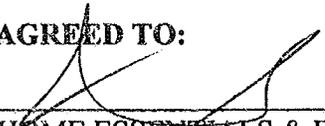
14 This Consent Judgment may be modified only by: (i) a written agreement of the Parties and
15 the entry of a modified Consent Judgment by the Court thereon; or (ii) upon a successful motion of
16 any party upon notice to the other party of a minimum of twenty five (25) days, and the entry of a
17 modified Consent Judgment by the Court thereon.

18 **12. AUTHORIZATION**

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

22 **AGREED TO:**
23 
24 _____
25 MARK MOORBERG

26 Dated: March 22, 2016

AGREED TO:


HOME ESSENTIALS & BEYOND, INC.
By: Isidore Godinger
Its: President
Dated: March 2, 2016