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17 Attorneys for Defendant
18 COLART AMERICAS INC.

19 SUPERIOR COURT OF THE STATE OF CALIFORNIA
20 COUNTY OF SANTA CLARA
21 UNLIMITED CIVIL JURISDICTION

22 MARK MOORBERG

23 Plaintiff,

24 v.

25 COLART AMERICAS INC.; and DOES
26 1-150, inclusive,

27 Defendants.

Case No. 115CV288486

[PROPOSED] 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 Moorberg
4 (“Moorberg”) and defendant ColArt Americas Inc. (“ColArt”), with Moorberg and ColArt each
5 referred to individually as a “Party” and collectively as the “Parties.”

6 **1.2 Plaintiff**

7 Moorberg 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 ColArt 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 § 25249.5 *et seq.* (“Proposition 65”).

14 **1.4 General Allegations**

15 Moorberg alleges that ColArt manufactures, imports, sells and/or distributes for sale in
16 California, vinyl/PVC art cases containing di(2-ethylhexyl)phthalate (“DEHP”), and that it does so
17 without providing the health hazard warning that Moorberg alleges is required by Proposition 65.

18 **1.5 Product Description**

19 The products covered by this Consent Judgment are vinyl/PVC art cases containing DEHP
20 including, but not limited to, Letraset *UPC # 8 01199 01446 1* (collectively, “Products”).

21 **1.6 Notice of Violation**

22 On July 31, 2015, Moorberg served ColArt and the requisite public enforcement agencies
23 with a 60-Day Notice of Violation (“Notice”), alleging that ColArt violated Proposition 65 when it
24 failed to warn its customers and consumers in California that the Products expose users to DEHP.
25 To the best of the Parties’ knowledge, no public enforcer has commenced and is diligently
26 prosecuting an action to enforce the allegations set forth in the Notice.

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1.7 Complaint

On November 25, 2015, Moorberg commenced the instant action, naming ColArt as a defendant for the alleged violations of Proposition 65 that are the subject of the Notice.

1.8 No Admission

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

1.9 Jurisdiction

For purposes of this Consent Judgment only, the Parties stipulate that this Court has jurisdiction over ColArt as to the allegations contained in the Complaint, that venue is proper in the County of Alameda, and that the Court has jurisdiction to enter and enforce the provisions of this Consent Judgment pursuant to Proposition 65 and Code of Civil Procedure § 664.6.

1.10 Effective Date

For purposes of this Consent Judgment, the term “Effective Date” shall mean the date that the Court grants the motion for approval of this Consent Judgment, including any tentative rulings not opposed by the Parties.

2. INJUNCTIVE SETTLEMENT TERMS

Commencing ninety-days after the Effective Date, and continuing thereafter, ColArt shall only manufacture for sale in California, or purchase for sale in California, Reformulated Products or Products with Proposition 65 warnings as described below. For purposes of this Consent Judgment, “Reformulated Products” are defined as Products with a maximum DEHP concentration 0.1 percent (1,000 parts per million) when analyzed pursuant to U.S. Environmental Protection Agency testing

1 methodologies 3580A and 8270C, or other methodologies utilized by state or federal agencies for
2 the purpose of determining DEHP content in a solid substance.

3 For Products manufactured for sale in California or purchased for sale in California, which
4 are not Reformulated Products, ColArt shall provide the following warning:

5
6 **WARNING:** This product contains chemicals, including
7 DEHP, known to the State of California to
8 cause cancer and birth defects (or other
9 reproductive harm).

10 The warning shall be prominently placed upon the Product's label or other labeling or displayed at
11 the retail outlets in California with instructions to post the signs in immediate proximity to the point
12 of display of any and all such Products, (or if sold by ColArt on its website, on the Product display
13 page or other page such that the warning is displayed to the purchaser prior to finalizing the
14 purchase adjacent to or immediately following the display, description, or price of the Product),
15 with such conspicuousness, as compared with other words, statements, designs, or devices in the
16 label, labeling or display as to render it likely to be read and understood by an ordinary individual
17 under customary conditions of purchase or use.

18 **3. MONETARY SETTLEMENT TERMS**

19 **3.1 Payments Pursuant to Health and Safety Code § 25249.7(b)(2)**

20 Pursuant to Health and Safety Code § 25249.7(b)(2), and in settlement of all the claims
21 referred to in this Consent Judgment, ColArt shall pay \$4,200 in civil penalties in accordance with
22 this Section. The penalty payment will be allocated in accordance with Health & Safety Code §
23 25249.12(c)(1) & (d), with 75% of the funds remitted to the California Office of Environmental
24 Health Hazard Assessment (“OEHHA”) and the remaining 25% of the penalty remitted to
25 Moorberg. Moorberg’s counsel shall be responsible for remitting ColArt’s penalty payment(s)
26 under this Consent Judgment to OEHHA.

27 **3.2 Reimbursement of Attorneys’ Fees and Costs**

28 The Parties acknowledge that Moorberg and his counsel offered to resolve this dispute
without reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving

1 the issue to be resolved after the material terms of the agreement had been settled. Shortly after
2 the other settlement terms had been finalized, ColArt expressed a desire to resolve Moorberg’s fees
3 and costs. The Parties then negotiated a resolution of the compensation due to Moorberg and his
4 counsel under general contract principles and the private attorney general doctrine codified at Code
5 of Civil Procedure § 1021.5. For all work performed through the mutual execution of this
6 agreement and the Court’s approval of the same, but exclusive of fees and costs on appeal, if any,
7 ColArt shall reimburse Moorberg and his counsel \$24,800. ColArt’s payment shall be made
8 within five (5) days after the Effective Date, and be delivered to the address in Section 3.4 in the
9 form of a check payable to “The Chanler Group.” The reimbursement shall cover all fees and
10 costs incurred by Moorberg investigating, bringing this matter to ColArt’s attention, litigating, and
11 negotiating a settlement of the matter in the public interest.

12 **3.3 Payment Timing; Payments Held In Trust**

13 ColArt shall deliver all payments required by this Consent Judgment to its counsel within
14 one week of the date that this agreement is fully executed by the Parties. ColArt’s counsel shall
15 confirm receipt of settlement funds in writing to Moorberg’s counsel and, thereafter, hold the
16 amounts paid in trust until such time as the Court grants the motion for approval of the Parties’
17 settlement contemplated by Section 5. Within five (5) days of the Effective Date, ColArt’s counsel
18 shall deliver all settlement payments it has held in trust to Moorberg’s counsel at the address
19 provided in Section 3.4.

20 **3.4 Payment Address**

21 All payments required by this Consent Judgment shall be delivered to the following
22 address: The Chanler Group
23 Attn: Proposition 65 Controller
24 2560 Ninth Street
Parker Plaza, Suite 214
Berkeley, CA 94710

25 **4. CLAIMS COVERED AND RELEASED**

26 **4.1 Moorberg’s Release of Proposition 65 Claims**

27 Moorberg, acting on his own behalf and in the public interest, releases ColArt and its
28 parents, subsidiaries, affiliated entities under common ownership, directors, officers, employees,

1 and attorneys (“Releasees”) and each entity to whom ColArt directly or indirectly distributes or
2 sells the Products including, but not limited to, its downstream distributors, wholesalers, customers,
3 retailers, franchisers, cooperative members, licensors, licensees and product endorsers
4 (“Downstream Releasees”) for any violations arising under Proposition 65 for unwarned exposures
5 to DEHP from the Products manufactured, imported, distributed or sold by ColArt prior to the
6 Effective Date, as set forth in the Notice, even if such Products are sold by Downstream Releasees
7 after the Effective Date. Compliance with the terms of this Consent Judgment constitutes
8 compliance with Proposition 65 by ColArt with respect to the alleged or actual failure to warn about
9 exposures to DEHP from Products manufactured, sold or distributed for sale by ColArt after the
10 Effective Date. This Consent Judgment is a full, final and binding resolution of all claims that were
11 or could have been asserted in this action based on the Notice and Complaint.

12 **4.2 Moorberg’s Individual Release of Claims**

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

20 **4.3 ColArt’s Release of Moorberg**

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

26 **4.4 Waiver of Unknown Claims**

27 It is possible that other claims not known to the Parties arising out of the facts alleged in
28 the Notice or the Complaint and relating to the Products will develop or be discovered. Moorberg,

1 in his individual capacity only and *not* in his representative capacity, on one hand, and ColArt, on
2 the other hand, acknowledge that this Consent Judgment is expressly intended to cover and
3 include all such claims up through the Effective Date, including all rights of action therefor.
4 Moorberg and ColArt acknowledge that the claims released in Sections 4.2 and 4.3 above may
5 include unknown claims, and nevertheless waive California Civil Code section 1542 as to any
6 such unknown claims. California Civil Code section 1542 reads as follows:

7 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE
8 CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER
9 FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN
BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS OR HER
SETTLEMENT WITH THE DEBTOR.

10 Moorberg, in his individual capacity only and *not* in his representative capacity, on the one hand,
11 and ColArt, on the other hand, acknowledge and understand the significance and consequences of
12 this specific waiver of California Civil Code section 1542.

13 **5. COURT APPROVAL**

14 This Consent Judgment is not effective until it is approved and entered by the Court and
15 shall be null and void if, for any reason, it is not approved and entered by the Court within one year
16 after it has been fully executed by all Parties. In such circumstances, ColArt shall have no
17 obligation to make the payments required under Section 3. Moorberg and ColArt agree to support
18 the entry of this agreement as a judgment, and to obtain the Court's approval of their settlement in a
19 timely manner. The Parties acknowledge that, pursuant to Health and Safety Code § 25249.7(f), a
20 noticed motion is required for judicial approval of this Consent Judgment, which motion Moorberg
21 shall draft and file and ColArt shall support, appearing at the hearing if so requested. If any third-
22 party objection to the motion is filed, Moorberg and ColArt agree to work together to file a reply
23 and appear at any hearing. This provision is a material component of the Consent Judgment and
24 shall be treated as such in the event of a breach.

25 **6. SEVERABILITY**

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

1 **7. GOVERNING LAW**

2 The terms of this Consent Judgment shall be governed by the laws of the State of California
3 and apply within the State of California. In the event that Proposition 65 is repealed, preempted, or
4 is otherwise rendered inapplicable by reason of law generally, or as to the Products, then ColArt
5 may provide Moorberg with written notice of any asserted change in the law, and shall have no
6 further obligations pursuant to this Consent Judgment, with respect to, and to the extent that, the
7 Products are so affected. Nothing in this Consent Judgment shall be interpreted to relieve ColArt
8 from its obligation to comply with any pertinent state or federal law or regulation.

9 **8. NOTICE**

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

14
15 To ColArt:

16 Doug Johnston, President
17 ColArt Americas Inc.
18 11 Constitution Ave.
19 Piscataway, NJ 08854

20 To Moorberg:

21 Attn: Proposition 65 Coordinator
22 The Chanler Group
23 2560 Ninth Street
24 Parker Plaza, Suite 214
25 Berkeley, CA 94710-2565

26 With copy to:

27 Ann Grimaldi, Esq.
28 Grimaldi Law Offices
 50 California Street, Suite 1500
 San Francisco, CA 94111

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

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9. COUNTERPARTS, FACSIMILE AND PDF SIGNATURES

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

10. COMPLIANCE WITH REPORTING REQUIREMENTS

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

11. MODIFICATION

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

12. AUTHORIZATION

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

AGREED TO:

AGREED TO:



MARK MOORBERG

COLART AMERICAS INC.

Dated: 1/6/2016

By: _____
(Print Name)

Its: _____
(Title)

Dated: _____

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AGREED TO:

AGREED TO:

MARK MOORBERG



COLART AMERICAS INC.

Dated: _____

By: MARIE HOUBSTERN
(Print Name)

Its: V.P. of Finance
(Title)

Dated: 1/13/2016