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7 SUPERIOR COURT OF THE STATE OF CALIFORNIA
8 SANTA CLARA
9 UNLIMITED CIVIL JURISDICTION
10

12 MARK MOORBERG,
13 Plaintiff,
14 v.
15 IMPACT INNOVATIONS, INC.; and
16 DOES 1-150, inclusive,
17 Defendants.

Case No. 115CV289178

[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 Impact Innovations, Inc. (“Impact Innovations”), with Moorberg and
5 Impact Innovations each 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 Impact Innovations employs ten or more persons and is a person in the course of doing
12 business for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, California
13 Health and Safety Code section 25249.5 *et seq.* (“Proposition 65”).

14 **1.4 General Allegations**

15 Moorberg alleges that Impact Innovations manufactures, imports, sells and/or distributes for
16 sale in California products containing di(2-ethylhexyl)phthalate (“DEHP”), and products containing
17 lead, without providing the health hazard warnings that Moorberg alleges are required by
18 Proposition 65.

19 **1.5 Product Description**

20 The products covered by this Consent Judgment are: (i) vinyl/PVC holiday door decorations
21 containing DEHP including, but not limited to, *Impact Innovations Sleigh Bells, #3918B, UPC #0*
22 *29083 13055 8* (“DEHP Products”) and (ii) glass and ceramic drinking vessels with exterior
23 decorations containing lead including, but not limited to, *“This Is What The World’s Coolest Dad*
24 *Looks Like,” #053 24 0013, UPC #7 27223 90714 4* and *“Cheers For Dad Beers For Dad,” #053*
25 *24 0010, UPC #7 27223 90729 8* (“Lead Glassware/Ceramicware Products”). DEHP Products and
26 Lead Glassware/Ceramicware Products shall be referred to collectively as “Products.”

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1 **1.6 Notices of Violation**

2 On July 31, 2015, Moorberg served Impact Innovations and the requisite public enforcement
3 agencies with a 60-Day Notice of Violation (the “Notice”), alleging that Impact Innovations
4 violated Proposition 65 when it failed to warn its customers and consumers in California that
5 vinyl/PVC holiday door decorations it manufactured and/or distributed exposed users to DEHP. On
6 January 29, 2016, plaintiff shall serve a Supplemental 60-Day Notice of Violation on Impact
7 Innovations and the requisite public enforcement agencies (the “Supplemental Notice”), alleging
8 that Impact Innovations violated Proposition 65 when it failed to warn its customers and consumers
9 in California that glass and ceramic drinking vessels with exterior decorations manufactured and/or
10 distributed by Impact Innovations exposed users to lead. The Notice is hereby considered to be
11 amended *nunc pro tunc* by the Supplemental Notice. To the best of the Parties’ knowledge, no
12 public enforcer has commenced and is diligently prosecuting an action to enforce the allegations set
13 forth in the Notice and Supplemental Notice (collectively “Notices”).

14 **1.7 Complaint**

15 On December 17, 2015, Moorberg commenced the instant action, naming Impact
16 Innovations as a defendant for the alleged violations of Proposition 65 that are the subject of the
17 Notice.

18 **1.8 No Admission**

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

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1 **1.9 Jurisdiction**

2 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
3 jurisdiction over Impact Innovations as to the allegations contained in the Complaint, that venue is
4 proper in the County of Santa Clara, and that the Court has jurisdiction to enter and enforce the
5 provisions of this Consent Judgment pursuant to Proposition 65 and Code of Civil Procedure
6 section 664.6.

7 **1.10 Effective Date**

8 For purposes of this Consent Judgment, the term “Effective Date” shall mean the date that
9 this Settlement is approved by the Court.

10 **2. INJUNCTIVE SETTLEMENT TERMS**

11 **2.1 Reformulation Standards**

12 **2.1.1 DEHP Reformulation Standards**

13 With respect to DEHP Products, “Reformulated Products” are defined as those Products
14 containing DEHP in concentrations less than 0.1 percent (1,000 parts per million) when analyzed
15 pursuant to U.S. Environmental Protection Agency testing methodologies 3580A and 8270C or
16 other methodology utilized by federal or state government agencies for the purpose of determining
17 DEHP content in a solid substance.

18 **2.1.2 Lead Reformulation Standards**

19 With respect to Glassware/Ceramicware Products, “Reformulated Products” are defined as
20 those Products containing a maximum of 90 parts per million of lead by weight in any accessible
21 component (i.e., any component that can be touched or handled during reasonably a foreseeable
22 use, such as exterior decorations) when analyzed pursuant to Environmental Protection Agency
23 testing methodologies 3050B and/or 6010B, and that yield a result of less than 1.0 micrograms of
24 lead when analyzed pursuant to the NIOSH 9100 testing protocol as applied to exterior decorations
25 of glass and ceramic drinking vessels. In addition, Reformulated Products shall yield a result of no
26 detectable lead in the “Lip and Rim Area”, when analyzed according to any test methodology
27 authorized under Proposition 65. “Lip and Rim Area” is defined as the exterior top 20 millimeters
28 of a hollowware Glassware/Ceramicware Product.

1 **2.2 Reformulation Commitment**

2 As of the Effective Date all Products manufactured, imported, distributed, sold and/or
3 offered for sale in the State of California by Impact Innovations shall be Products that qualify as
4 Reformulated Products as defined in Section 2.1, or shall carry appropriate health hazard warnings
5 per section 2.3, below.

6 **2.3 Product Warnings**

7 Commencing on or before the Effective Date, Impact Innovations shall provide the
8 respective clear and reasonable warnings for all Products that do not qualify as Reformulated
9 Products, as set forth in subsections 2.3(a) and (b) below. Each warning shall be prominently placed
10 with such conspicuousness as compared with other words, statements, designs, or devices as to
11 render it likely to be read and understood by an ordinary individual under customary conditions
12 before purchase or use. Each warning shall be provided in a manner such that the consumer or user
13 understands to which *specific* Product the warning applies, so as to minimize the risk of consumer
14 confusion.

15 **(a) Retail Store Sales.**

16 **(i) Product Labeling.** Impact Innovations shall affix a warning to the
17 packaging, labeling, or directly on each Product provided for sale in retail outlets in California that
18 states:

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

21 OR

22 WARNING: This product contains lead, a
23 chemical known to the State of California
 to cause birth defects and other reproductive harm.

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25 **(ii) Point-of-Sale Warnings.** Alternatively, Impact Innovations may provide
26 warning signs in the form below to its customers in California with instructions to post the warnings
27 in close proximity to the point of display of the Products. Such instruction sent to Impact
28 Innovations’ customers shall be sent by certified mail, return receipt requested.

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

OR

WARNING: This product contains lead, a chemical known to the State of California to cause birth defects and other reproductive harm.

Where more than one Product is sold in proximity to other like items or to those that do not require a warning (*e.g.*, Reformulated Products as defined in Section 2.1), the following statement shall be used:¹

WARNING: The following products contain DEHP, a phthalate chemical, known to the State of California to cause birth defects and other reproductive harm:

[list products for which warning is required]

OR

WARNING: The following products contain lead, a chemical, known to the State of California to cause birth defects and other reproductive harm:

[list products for which warning is required]

(b) Mail Order Catalog and Internet Sales. In the event that Impact Innovations sells Products via mail order catalog and/or the internet, to customers located in California, after the Effective Date, that are not Reformulated Products, Impact Innovations shall provide warnings for such Products sold via mail order catalog or the internet to California residents. Warnings given in the mail order catalog or on the internet shall identify the *specific* Product to which the warning applies as further specified in Sections 2.3(b)(i) and (ii).

(i) Mail Order Catalog Warning. Any warning provided in a mail order catalog shall be in the same type size or larger than the Product description text within the catalog. The following warning shall be provided on the same page and in the same location as the display and/or description of the Product:

¹For purposes of the Settlement Agreement, “sold in proximity” shall mean that the Product and another similar product are offered for sale close enough to each other that the consumer, under customary conditions of purchase, could not reasonably determine which of the two products is subject to the warning sign.

1 WARNING: This product contains DEHP, a phthalate
2 chemical known to the State of California
 to cause birth defects and other reproductive harm.

3 OR

4 WARNING: This product contains lead, a
5 chemical known to the State of California
 to cause birth defects and other reproductive harm.

6 Where it is impracticable to provide the warning on the same page and in the same location
7 as the display and/or description of the Product, Impact Innovations may utilize a designated
8 symbol to cross reference the applicable warning and shall define the term “designated symbol”
9 with the following language on the inside of the front cover of the catalog or on the same page as
10 any order form for the Product(s):

11 WARNING: Certain products identified with this symbol ▼
12 and offered for sale in this catalog contain DEHP,
13 a phthalate chemical known to the State of California
 to cause birth defects and other reproductive harm.

14 OR

15 WARNING: Certain products identified with this symbol ▼
16 and offered for sale in this catalog contain lead,
17 a chemical known to the State of California
 to cause birth defects and other reproductive harm.

18 The designated symbol must appear on the same page and in close proximity to the display
19 and/or description of the Product. On each page where the designated symbol appears, Impact
20 Innovations must provide a header or footer directing the consumer to the warning language and
21 definition of the designated symbol.

22 **(ii) Internet Website Warning.** A warning shall be given in conjunction with
23 the sale of the Products via the internet, which warning shall appear either: (a) on the same web
24 page on which a Product is displayed; (b) on the same web page as the order form for a Product; (c)
25 on the same page as the price for any Product; or (d) on one or more web pages displayed to a
26 purchaser during the checkout process. The following warning statement shall be used and shall
27 appear in any of the above instances adjacent to or immediately following the display, description,
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1 or price of the Product for which it is given in the same type size or larger than the Product
2 description text:

3 WARNING: This product contains DEHP, a phthalate
4 chemical known to the State of California
5 to cause birth defects and other reproductive harm.

6 OR

7 WARNING: This product contains lead, a
8 chemical known to the State of California
9 to cause birth defects and other reproductive harm.

10 Alternatively, the designated symbol may appear adjacent to or immediately following the
11 display, description, or price of the Product for which a warning is being given, provided that the
12 following warning statement also appears elsewhere on the same web page, as follows:

13 WARNING: This product contains DEHP, a phthalate
14 chemical known to the State of California
15 to cause birth defects and other reproductive harm.

16 OR

17 WARNING: This product contains lead, a
18 chemical known to the State of California
19 to cause birth defects and other reproductive harm.

20 **2.4** Compliance with the terms of this Consent Judgment constitutes compliance with
21 Proposition 65 by Impact Innovations with respect to the alleged or actual failure to warn about
22 exposures to DEHP and lead from Products manufactured, sold or distributed for sale by Impact
23 Innovations after the Effective Date.

24 **3. MONETARY SETTLEMENT TERMS**

25 **3.1 Payments Pursuant to Health and Safety Code § 25249.7(b)(2)**

26 Pursuant to Health and Safety Code section 25249.7(b)(2), and in settlement of all the
27 claims referred to in this Consent Judgment, Impact Innovations shall pay \$40,000 in civil penalties
28 in accordance with this Section. Each penalty payment will be allocated in accordance with
29 California Health & Safety Code § 25249.12(c)(1) & (d), with 75% of the funds remitted to the
30 California Office of Environmental Health Hazard Assessment (“OEHHA”) by Moorberg.

1 Moorberg’s counsel shall be responsible for remitting Impact Innovations’ penalty payment(s)
2 under this Consent Judgment to OEHHA.

3 **3.1.1 Initial Civil Penalty.** Impact Innovations shall pay an initial civil penalty in
4 the amount of \$20,000 on or before the Effective Date. Impact Innovations shall issue a check
5 payable to “Mark Moorberg, Client Trust Account” in the amount of \$20,000. All penalty
6 payments shall be delivered to the address listed in Section 3.3, below.

7 **3.1.2 Final Civil Penalty.** On November 15, 2016, Impact Innovations shall make
8 a final civil penalty payment of \$20,000. Pursuant to title 11 California Code of Regulations,
9 section 3203(c), Moorberg agrees that the final civil penalty payment shall be waived in its entirety
10 if, no later than November 1, 2016, an officer of Impact Innovations provide Moorberg with a
11 signed declaration certifying that all of the Products it ships for sale or distributes for sale in
12 California as of the date of its declaration are Reformulated Products, and that Impact Innovations
13 will continue to offer only Reformulated Products in California in the future. The option to certify
14 reformulation in lieu of warning, and making the final civil penalty payment otherwise required by
15 this Section is a material term, and time is of the essence. To obtain a waiver of the final civil
16 penalty, Impact Innovations must deliver its declaration certifying reformulation to Moorberg’s
17 counsel at the address provided in Section 3.3, below. In the event that Impact Innovations does not
18 timely certify its compliance or make the final civil penalty payment required by this Section, the
19 Parties agree that Moorberg may file a motion or application seeking an order compelling Impact
20 Innovations’ compliance with this Section. If successful, the Parties further agree that Moorberg
21 shall be entitled to his reasonable attorneys’ fees and costs pursuant to general contract principles
22 and Code of Civil Procedure section 1021.5.

23 **3.2 Reimbursement of Attorneys’ Fees and Costs**

24 The Parties acknowledge that Moorberg and his counsel offered to resolve this dispute
25 without reaching terms on the amount of fees and costs to be reimbursed to them, thereby
26 leaving this fee issue to be resolved after the material terms of the agreement had been settled.
27 Moorberg then expressed a desire to resolve the fee and cost issue shortly after the other
28 settlement terms had been finalized. The parties then attempted to (and did) reach an accord

1 on the compensation due to Moorberg and his counsel under general contract principles and
2 the private attorney general doctrine codified at California Code of Civil Procedure § 1021.5,
3 for all work performed through the mutual execution of this agreement. Impact Innovations
4 shall pay \$47,700 for fees and costs incurred as a result of investigating, bringing this matter to
5 Defendant’s attention, and negotiating a settlement in the public interest. On or before the
6 Effective Date, Impact Innovations shall issue a check payable to “The Chanler Group” in the
7 amount of \$47,700 to the address found in Section 3.3 below.

8 **3.3 Payment Address**

9 All payments required by this Consent Judgment shall be delivered to the following
10 address:

11 The Chanler Group
12 Attn: Proposition 65 Controller
13 2560 Ninth Street
14 Parker Plaza, Suite 214
15 Berkeley, CA 94710

15 **4. CLAIMS COVERED AND RELEASED**

16 **4.1 Moorberg’s Release of Proposition 65 Claims**

17 Moorberg, acting on his own behalf and in the public interest, releases Impact Innovations
18 and its parents, subsidiaries, affiliated entities under common ownership, directors, officers,
19 employees, and attorneys (“Releasees”) and each entity to whom Impact Innovations directly or
20 indirectly distributes or sells the Products including, but not limited to, its downstream distributors,
21 wholesalers, customers, retailers, franchisers, cooperative members, licensors and licensees
22 (“Downstream Releasees”) for any violations arising under Proposition 65 for unwarned exposures
23 to DEHP and lead from the Products manufactured, imported, distributed or sold by Impact
24 Innovations prior to the Effective Date, as set forth in the Notices.

25 **4.2 Moorberg’s Individual Release of Claims**

26 Moorberg, in his individual capacity only and *not* in his representative capacity, also
27 provides a release to Impact Innovations, Releasees, and Downstream Releasees which shall be
28 effective as a full and final accord and satisfaction, as a bar to all actions, causes of action,

1 obligations, costs, expenses, attorneys' fees, damages, losses, claims, liabilities and demands of
2 Moorberg of any nature, character or kind, whether known or unknown, suspected or unsuspected,
3 arising out of alleged or actual exposures to DEHP and lead in Products manufactured, imported,
4 distributed or sold by Impact Innovations before the Effective Date.

5 **4.3 Impact Innovations' Release of Moorberg**

6 Impact Innovations, on its own behalf and on behalf of its past and current agents,
7 representatives, attorneys, successors and/or assignees, hereby waive any and all claims against
8 Moorberg and his attorneys and other representatives, for any and all actions taken or statements
9 made (or those that could have been taken or made) by Moorberg and his attorneys and other
10 representatives in the course of investigating claims, seeking to enforce Proposition 65 against it in
11 this matter, or with respect to the Products.

12 **5. COURT APPROVAL**

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

23 **6. SEVERABILITY**

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

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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 Impact
5 Innovations may provide Moorberg with written notice of any asserted change in the law, and shall
6 have no further obligations pursuant to this Consent Judgment, with respect to, and to the extent
7 that, the Products are so affected. Nothing in this Consent Judgment shall be interpreted to relieve
8 Impact Innovations from its obligation to comply with any pertinent state or federal law or
9 regulation.

10 **8. NOTICE**

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

15 To Impact Innovations:

16 Melissa A. Jones, Esq.
17 STOEL RIVES LLP
18 500 Capitol Mall, Suite 1600
19 Sacramento, CA 95814

To Moorberg:

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

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

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

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

26 **10. COMPLIANCE WITH REPORTING REQUIREMENTS**

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


1 **11. MODIFICATION**

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


5 **12. AUTHORIZATION**

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

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10 **AGREED TO:**

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13 _____
14 MARK MOORBERG
15 Dated: 3/3/2016

10 **AGREED TO:**

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12 _____
13 IMPACT INNOVATIONS, INC.
14 By: Ron Noyer
15 (Print Name)
16 Its: CFO
17 (Title)
18 Dated: 3/3/16

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