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Attorneys for Plaintiff
MARK MOORBERG

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

MARK MOORBERG,
Plaintiff,
v.
TFI, INC.; et al.,
Defendants.

Case No. 115CV288070

[PROPOSED] CONSENT JUDGMENT

(Health & Safety Code § 25249.6 *et seq.*, and
Cal. Code Civ. Proc. § 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 TFI, Inc. (“TFI”), with Moorberg and TFI 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 to improve human health by reducing or eliminating hazardous
9 substances contained in consumer products.

10 **1.3 Defendant**

11 TFI employs ten or more individuals 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 TFI manufactures, imports, sells, and distributes for sale in California,
16 planners with vinyl/PVC covers that contain di(2-ethylhexyl)phthalate (“DEHP”), and that it does so
17 without first providing the exposure warning required by Proposition 65. DEHP is listed pursuant to
18 Proposition 65 as a chemical known to the State of California to cause birth defects or other
19 reproductive harm.

20 **1.5 Product Description**

21 The products covered by this Consent Judgment are planners with vinyl/PVC covers
22 containing DEHP that are manufactured, imported, sold, or distributed for sale in California by TFI
23 including, but not limited to, the “*I’m not always right, but I’m never wrong*” *Garfield September*
24 *2014- December 2015 Planner, Item #15-9004, UPC #6 19344 28400 9*. All such planners with
25 vinyl/PVC covers containing DEHP are referred to collectively hereinafter as the “Products.”

26 **1.6 Notice of Violation**

27 On July 31, 2015, Moorberg served TFI, the California Attorney General, and all other
28 requisite public enforcement agencies with a 60-Day Notice of Violation (“Notice”), alleging that

1 TFI violated Proposition 65 when it failed to warn its customers and consumers in California of the
2 health hazards associated with exposures to DEHP from the Products. No public enforcer has
3 commenced and is diligently prosecuting an action to enforce the violations alleged in the Notice.

4 **1.7 Complaint**

5 On November 13, 2015, Moorberg filed the instant action (“Complaint”), for the violations of
6 Proposition 65 that are the subject of the Notice.

7 **1.8 No Admission**

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

16 **1.9 Jurisdiction**

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

21 **1.10 Effective Date**

22 For purposes of this Consent Judgment, the term “Effective Date” means the date on which
23 the motion for approval of the Consent Judgment contemplated by Section 5 is granted by the Court.

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

25 **2.1 Commitment to Reformulate or Warn**

26 Commencing on the Effective Date, and continuing thereafter, TFI agrees to only
27 manufacture, distribute or purchase for sale in California: (a) “Reformulated Products”, or (b)
28 Products that bear a clear and reasonable health hazard warning, pursuant to Section 2.2 below. For

1 purposes of this Consent Judgment, "Reformulated Products" are defined as Products with a
2 maximum concentration of 0.1 percent (1,000 parts per million) of DEHP when analyzed pursuant to
3 U.S. Environmental Protection Agency testing methodologies 3580A and 8270C, or other
4 methodologies utilized by state or federal agencies for the purpose of determining DEHP content in a
5 solid substance.

6 **2.2 Reformulation Commitment**

7 All Products manufactured, distributed, sold or offered for sale in the State of California by
8 TFI on or after the Effective Date, shall either qualify as Reformulated Products or otherwise shall be
9 accompanied by a Proposition 65 warning as set forth in Section 2.3 below.

10 **2.3 Clear and Reasonable Warnings**

11 TFI agrees that on or after the Effective Date, all Products it sells and/or distributes in
12 California which do not qualify as Reformulated Products, will bear a clear and reasonable warning
13 pursuant to this Section. For purposes of this section, "Products it sells and/or distributes in
14 California" shall mean Products that TFI ships: (i) to a California address with actual or constructive
15 knowledge that the purchaser is or is expected to re-sell to a California consumer or business; and (ii)
16 to an address out of California which TFI has reason to believe will re-sell to a California consumer
17 or business. Products in third party, California-based inventories prior to the Effective Date may
18 continue to be sold without warnings.

19 TFI further agrees that the warning will be prominently placed with such conspicuousness
20 when compared with other words, statements, designs, or devices as to render it likely to be read and
21 understood by an ordinary individual under customary conditions before purchase or use. For
22 purposes of this Consent Judgment, a clear and reasonable warning for the Products shall consist of a
23 warning affixed to the packaging, or, if no packaging exists, directly on, each non reformulated
24 Product sold in California, and shall contain one of the following statements:

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1 civil penalty payment otherwise required by this Consent Judgment is a material term, and time is of
2 the essence.

3 **3.2 Reimbursement of Attorney's Fees and Costs**

4 The parties acknowledge that Moorberg and his counsel offered to resolve this dispute
5 without reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving the
6 issue to be resolved after the material terms of this Consent Judgment had been settled. Shortly after
7 the other settlement terms had been finalized, TFI expressed a desire to resolve Moorberg's fees and
8 costs. The Parties then attempted to (and did) reach an accord on the compensation due to Moorberg
9 and his counsel under general contract principles and the private attorney general doctrine codified at
10 Code of Civil Procedure section 1021.5 for all work performed through the mutual execution of this
11 Consent Judgment. TFI shall pay \$44,500 for the fees and costs incurred by Moorberg investigating,
12 bringing this matter to the attention of TFI's management, litigating, and negotiating a settlement in
13 the public interest.

14 **3.3 Timing of Payments**

15 With the exception of the final civil penalty payment required by Section 3.1.2, all payments
16 due under this Consent Judgment shall be delivered within ten calendar days of the Effective Date.
17 In the event the final civil penalty payment becomes due prior to the Effective Date, the final civil
18 penalty payment shall be due within ten days of the Effective Date.

19 **3.4 Payment Address**

20 All payments required by this Consent Judgment shall be delivered to:

21 The Chanler Group
22 Attn: Proposition 65 Controller
23 2560 Ninth Street
Parker Plaza, Suite 214
Berkeley, CA 94710

24 **4. CLAIMS COVERED AND RELEASED**

25 **4.1 Moorberg's Public Release of Proposition 65 Claims**

26 Moorberg, acting on his own behalf and in the public interest, releases TFI and its parents,
27 subsidiaries, affiliated entities under common ownership, directors, officers, employees, and
28 attorneys ("Releasees") and each entity to whom it directly or indirectly distributes or sells the

1 Products including, but not limited to, it's downstream distributors, wholesalers, customers
2 (including, without limitation, Big Lots Stores, Inc.), retailers, franchisers, cooperative members,
3 licensors and licensees ("Downstream Releasees") for any violations arising under Proposition 65
4 for the failure to warn about exposures to DEHP from Products sold by TFI prior to the Effective
5 Date, as set forth in the Notice. Compliance with the terms of this Consent Judgment constitutes
6 compliance with Proposition 65 with respect to the failure to warn about exposures to DEHP in
7 Products sold by TFI after the Effective Date.

8 **4.2 Moorberg's Individual Release of Claims**

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

15 **4.3 TFI's Release of Moorberg**

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

21 **5. COURT APPROVAL**

22 This Consent Judgment is not effective until it is approved and entered by the Court and shall
23 be null and void if, for any reason, it is not approved and entered by the Court within one year after it
24 has been fully executed by the Parties, or by such additional time as the Parties may agree to in
25 writing.

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1 **6. SEVERABILITY**

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

5 **7. GOVERNING LAW**

6 The terms of this Consent Judgment shall be governed by the laws of the state of California
7 and apply within the state of California. In the event that Proposition 65 is repealed, preempted, or is
8 otherwise rendered inapplicable by reason of law generally, or as to the Products, then TFI may
9 provide written notice to Moorberg of any asserted change in the law, and shall have no further
10 injunctive obligations pursuant to this Consent Judgment with respect to, and to the extent that, the
11 Products are so affected.

12 **8. NOTICE**

13 All correspondence and notice required by this Consent Judgment shall be in writing and sent
14 by: (i) personal delivery; (ii) first-class, registered, or certified mail, return receipt requested; or (iii) a
15 recognized overnight courier to the following addresses:

16 For TFI:

17 James Purcell, President
18 TFI, Inc.
19 6355 Morenci Trail
 Indianapolis, IN 46268

20 with a copy to:

21 Carol Brophy, Esq.
22 Dennis Murphy, Esq.
23 Sedgwick LLP
 333 Bush Street
 30th Floor
 San Francisco, CA 94104-2834

24 For Moorberg:

25 Proposition 65 Coordinator
26 The Chanler Group
27 2560 Ninth Street
 Parker Plaza, Suite 214
28 Berkeley, CA 94710-2565

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

3 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

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

7 **10. POST EXECUTION ACTIVITIES**

8 Moorberg agrees to comply with the reporting form requirements referenced in Health and
9 Safety Code section 25249.7(f). The Parties further acknowledge that, pursuant to Health and Safety
10 Code section 25249.7(f), a noticed motion is required to obtain judicial approval of the settlement. In
11 furtherance of obtaining such approval, the Parties agree to mutually employ their best efforts, and
12 those of their counsel, to support the entry of this agreement as judgment, and to obtain judicial
13 approval of their settlement in a timely manner. For purposes of this Section, "best efforts" shall
14 include, at a minimum, cooperating on the drafting and filing of the necessary moving papers,
15 supporting the motion, and appearing at the hearing before the Court.

16 **11. DISMISSAL OF BIG LOTS STORES, INC.**

17 Moorberg agrees that, on the later of ten days following the Effective Date or within five days
18 of his receipt of the initial civil penalty and attorneys' fee reimbursement payments required by this
19 Consent Judgment from TFI, Moorberg will file a request for dismissal without prejudice as to
20 defendant Big Lots Stores, Inc.

21 **12. MODIFICATION**

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

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13. 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

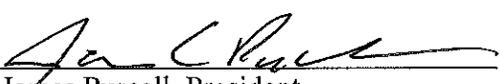
AGREED TO:

AGREED TO:

Date: 5/20/2016

Date: 5-24-16

By: 
MARK MOORBERG

By: 
James Purcell, President
IFI, INC.