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9 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
10 COUNTY OF ALAMEDA

11 PRECILA BALABBO,

12 Plaintiff,

13 vs.

14 THE MICHAELS COMPANIES, INC.,  
15 MICHAELS STORES PROCUREMENT  
16 COMPANY, INC.,

17 Defendants.

Case No. RG16840526

**[PROPOSED] CONSENT JUDGMENT**

Judge: Jo-Lynne Q. Lee

Dept.: 18

Hearing Date: April 11, 2017

Hearing Time: 3:00 PM

Reservation #: R-1825088

1     **1. INTRODUCTION**

2             **1.1 Parties**

3             This Consent Judgment is entered into by and between plaintiff Precila Balabbo,  
4     ("Balabbo") on the one hand, and Michaels Stores, Inc. ("Defendant") on the other hand, with  
5     Balabbo and Defendant individually referred to as a "Party" and collectively as the "Parties."

6             **1.2 Plaintiff**

7             Balabbo is an individual residing in California who seeks to promote awareness of  
8     exposures to chemicals.

9             **1.3 Defendant**

10            Defendant employs ten or more persons and is a person in the course of doing business for  
11     purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, Health and Safety  
12     Code Section 25249.6 *et seq.* ("Proposition 65").

13            **1.4 General Allegations**

14            Balabbo alleges that Defendant manufactures, imports, sells, or distributes for sale to  
15     consumers in the State of California photo albums containing Di(2-ethylhexyl)phthalate  
16     ("DEHP") without first providing the clear and reasonable exposure warning required by  
17     Proposition 65. DEHP is listed pursuant to Proposition 65 as a chemical that is known to the  
18     State of California to cause cancer and birth defects and other reproductive harm.

19            **1.5 Product Description**

20            The products covered by this Consent Judgment are photo albums containing DEHP that  
21     are manufactured, sold, and/or distributed for authorized sale to consumers in California by  
22     Defendant, including, but not limited to the Recollections Photo Album, UPC # 886946270567  
23     ("Products").

24            **1.6 Notice of Violation**

25            On or about May 16, 2016, Balabbo served Defendant and certain requisite public  
26     enforcement agencies with a "60-Day Notice of Violation" ("Notice"), a document that informed  
27     the recipients of Balabbo's allegation that Defendant violated Proposition 65 by failing to warn its  
28     customers and consumers in California that the Products expose users to DEHP.

1           **1.7 Complaint**

2           After the 60-day notice period was exhausted without an authorized public prosecutor of  
3 Proposition 65 having asserted such claims, Balabbo filed the instant action against Defendant  
4 (“Complaint”) for the alleged violations of Health & Safety Code § 25249.6 that are the subjects  
5 of the Notice.

6           **1.8 No Admission**

7           Defendant denies the material, factual, and legal allegations contained in the Notice and  
8 maintains that all of the products it has manufactured, sold, or distributed for authorized sale in  
9 California, including the Products, have been, and are, in compliance with all laws, including  
10 Proposition 65. Nothing in this Consent Judgment shall be construed as an admission by  
11 Defendant of any fact, finding, conclusion of law, issue of law, or violation of law; nor shall  
12 compliance with this Consent Judgment constitute or be construed as an admission by Defendant  
13 of any fact, finding, conclusion of law, issue of law, or violation of law, the same being  
14 specifically denied by Defendant. This section shall not, however, diminish or otherwise affect  
15 Defendant’s obligations, responsibilities, and duties under this Consent Judgment.

16           **1.9 Consent to Jurisdiction**

17           For purposes of this Consent Judgment only, the Parties stipulate that this Court has  
18 jurisdiction over Defendant as to the allegations in the Complaint, that venue is proper in  
19 Alameda County, and that this Court has jurisdiction to enter, enforce, and modify the provisions  
20 of this Consent Judgment.

21           **1.10 Effective Date**

22           For purposes of this Consent Judgment, the term “Effective Date” shall mean the date on  
23 which Balabbo serves notice on the Defendant and the Office of the California Attorney General  
24 that the Court has approved and entered this Consent Judgement.

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

26           By no later than the Compliance Date, and continuing thereafter, Defendant shall only  
27 manufacture or import for potential sale in California, Products that meet the Reformulation  
28

1 Standard set forth in Section 2.1 below (“Reformulated Products”) or which meet the warning  
2 requirements set forth in Section 2.2 below.<sup>1</sup>

3 **2.1 Reformulation Standard**

4 For purposes of this Consent Judgment, Reformulated Products are defined as Products  
5 that contain no more than 1,000 parts per million (0.1%) each of any of the following chemicals:  
6 DEHP, Di-isodecyl phthalate (DIDP); Diisononyl Phthalate (DINP); Butyl benzyl phthalate  
7 (BBP), Di-n-hexyl Phthalate (DnHP) and Di-n-butyl Phthalate (DBP) (“Listed Phthalates”). For  
8 purposes of determining compliance with this Consent Judgment, the content of Listed Phthalates  
9 shall be analyzed pursuant to EPA testing methodologies 3580A and 8270C or equivalent  
10 methodologies utilized by state or federal agencies for the purpose of determining Listed  
11 Phthalate content in a solid substance.

12 **2.2 Product Warnings**

13 For all Products that contain a Listed Phthalate in an amount exceeding the Reformulation  
14 Standard set forth in Section 2.1 above, and which are manufactured, sold or packaged for  
15 shipment to California following the Compliance Date, Defendant shall provide the following  
16 Proposition 65 warning:

17 **WARNING:** This product contains chemicals known to the State of California to  
18 cause cancer, and birth defects or other reproductive harm.<sup>2</sup>

19 The above warning statement shall be placed or affixed on the Product or its package so as to be  
20 able to be read and understood by an ordinary individual prior to purchase or use or it may be  
21 displayed at the point of purchase prior to final consummation of the sales transaction by which  
22 the product is acquired by someone in California.

23  
24  
25 \_\_\_\_\_  
26 <sup>1</sup> The “Compliance Date” shall mean August 31, 2017 or six months following the Effective Date, whichever arises  
27 earlier. Products manufactured for and imported by the Defendant prior to the Compliance Date are exempted from  
28 the requirements set forth in Sections 2.1 and 2.2 above and may be offered for sale in California and sold through as  
is.

<sup>2</sup> Where only one Listed Phthalate exceeds the Reformulation Standard, Defendant may elect to have this warning  
statement refer to the word “chemical” in the singular.

1     **3.     STATUTORY PENALTY PAYMENTS**

2             **3.1     Civil Penalty**

3             Defendant shall pay \$3,000.00 in civil penalties pursuant to California Health & Safety  
4 Code § 25249.7(b) in accordance with this Section. This penalty payment shall be allocated in  
5 accordance with California Health & Safety Code § 25249.12(c)(l) and (d), with 75% of the  
6 funds remitted to the California Office of Environmental Health Hazard Assessment  
7 (“OEHHA”) and the remaining 25% of the penalty remitted to Balabbo. More specifically,  
8 within fifteen (15) business days of the Effective Date, Defendant shall issue two separate  
9 checks for the civil penalty payment to (a) “OEHHA” in the amount of \$2,250.00 and with the  
10 memo line on the check indicating “Prop 65 Penalties—Balabbo v. Michaels” (Defendant may  
11 reference OEHHA’s Tax Identification Number of 68-0284486 for this check); and (b)  
12 “Brodsky and Smith, LLC Trust Account” in the amount of \$750.00 (for which Balabbo shall  
13 provide Defendant a completed IRS Form W-9 with a tax identification number within two days  
14 following the Effective Date, if not beforehand). These checks shall be delivered to the  
15 addresses listed in Section 3.3 below.

16             **3.2     Payment Delivery**

17             (a)     Payment to Balabbo shall be delivered to the following address:

18             Jordan Schatz, Esq.  
19             Brodsky & Smith, LLC  
20             2 Bala Plaza, Suite 510  
21             Bala Cynwyd, PA 19004

22             (b)     Payment to OEHHA shall be delivered to one of the following addresses:

23             For United States Postal Service Delivery:

24             Mike Gyurics  
25             Fiscal Operations Branch Chief  
26             Office of Environmental Health Hazard Assessment  
27             P.O. Box 4010  
28             Sacramento, CA 95812-4010

              Or

              For Non-United States Postal Service Delivery:

              Mike Gyurics  
              Fiscal Operations Branch Chief

1 Office of Environmental Health Hazard Assessment  
2 1001 I Street  
3 Sacramento, CA 95814

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

5 Defendant shall pay Balabbo \$27,000.00 for fees and costs incurred as a result of  
6 investigating, bringing this matter to Defendant's attention, and negotiating a settlement in the  
7 public interest. Defendant shall make its checks payable to Brodsky & Smith, LLC and shall  
8 deliver payment to the address listed in Section 3(a) above within fifteen (15) business days of the  
9 Effective Date. To facilitate timely payment, Balabbo shall provide Defendant with a completed  
10 IRS Form W-9 with Brodsky & Smith, LLC's tax identification number within two days  
11 following the Effective Date if not beforehand.

12 **5. CLAIMS COVERED AND RELEASED**

13 **5.1 Balabbo's Public Release of Proposition 65 Claims**

14 Balabbo, acting on her own behalf and in the public interest, releases Defendant, and its  
15 affiliated entities, directors, officers, employees, and attorneys, as well as each entity from whom  
16 they acquire the Products or the Products' components, and each entity to whom they directly or  
17 indirectly distribute or sell Products, including, but not limited to, distributors, wholesalers,  
18 dealers, customers, retailers, franchisees, cooperative members, licensors, and licensees, from all  
19 claims for violations of Proposition 65 based on exposures to DEHP from Products manufactured,  
20 sold, or packaged by Defendant prior to the Effective Date.<sup>3</sup>

21 **5.2 Balabbo's Private Releases of Claims**

22 Balabbo, in her individual capacity only, also provides a release herein which shall be  
23 effective as a full and final accord and satisfaction, as a bar to all actions, causes of action,  
24 obligations, costs, expenses, attorneys' fees, damages, losses, claims, liabilities and demands of  
25 any nature, character, or kind, whether known or unknown, suspected or unsuspected, arising out  
26 of alleged or actual exposures to any of the chemicals listed under Proposition 65 (including but  
27 not limited to the Listed Phthalates) in the Products. In this regard, Balabbo hereby

28 <sup>3</sup> Following the Effective Date, compliance with the terms of this Consent Judgment shall be deemed compliance with Proposition 65 with respect to exposures to DEHP from the Products.

1 acknowledges that she is familiar with Section 1542 of the California Civil Code, which provides  
2 as follows:

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

7 **5.3 Defendant's Release of Balabbo**

8 Defendant, on its own behalf and on behalf of its past and current agents, representatives,  
9 attorneys, successors, and assignees, hereby waives any and all claims that it may have against  
10 Balabbo and her attorneys and other representatives for any and all actions taken or statements  
11 made (or those that could have been taken or made) by Balabbo and her attorneys and other  
12 representatives, whether in the course of investigating claims, otherwise seeking to enforce  
13 Proposition 65 against Defendant in this matter, or with respect to the Products.

14 **6. COURT APPROVAL**

15 This Consent Judgment is not effective until it is approved and entered by the Court and  
16 shall be null and void if, for any reason, it is not approved and entered by the Court within one  
17 year after it has been fully executed by all Parties unless the Parties mutually agree to extend that  
18 time period due to what they mutually agree are reasonably unforeseeable circumstances.

19 **7. SEVERABILITY**

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

23 **8. GOVERNING LAW**

24 The terms of this Consent Judgment shall be governed by the laws of the State of  
25 California and apply within the State of California. In the event that Proposition 65 is repealed or  
26 is otherwise rendered inapplicable by reason of law generally, or as to the Products, then  
27 Defendant may provide written notice to Balabbo of any asserted change in the law and have no  
28

1 further obligations pursuant to this Consent Judgment, with respect to, and to the extent that, the  
2 Products are so affected.

3 9. **NOTICES**

4 Unless specified herein, all correspondence and notices required to be provided pursuant  
5 to this Settlement Agreement shall be in writing and personally delivered or sent by: (i) first-class  
6 (registered or certified mail) return receipt requested; or (ii) overnight or two-day courier on any  
7 Party by the other Party to the following addresses:

8 For Defendant Michaels Stores, Inc.:

9 Navin Rao  
10 Vice President, Assistant General Counsel and Chief Compliance Officer  
11 Michaels Stores, Inc.  
12 8000 Bent Branch Drive  
13 Irving, TX 75063

14 *With a copy to:*

15 Robert Falk  
16 RFalk@mofocom  
17 Morrison & Foerster LLP  
18 425 Market Street, 32nd Floor  
19 San Francisco, CA 94105

20 For Balabbo:

21 Jordan Schatz, Esq.  
22 Jschatz@brodskysmith.com  
23 Brodsky & Smith, LLC  
24 2 Bala Plaza, Suite 510  
25 Bala Cynwyd, PA 19004

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

28 10. **COUNTERPARTS; FACSIMILE 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.



1 11. **POST EXECUTION ACTIVITIES**

2 Balabbo agrees to comply with the reporting form requirements referenced in Health &  
3 Safety Code § 25249.7(f). The Parties further acknowledge that, pursuant to Health & Safety  
4 Code § 25249.7(f), a noticed motion is required to obtain judicial approval of the settlement  
5 manifested in this Consent Judgment. In furtherance of obtaining such approval, Balabbo shall  
6 file and serve a noticed motion for approval of this Consent Judgment within sixty (60) days of its  
7 execution by all Parties and assure that the Office of the California Attorney General is served  
8 with said motion and all supporting papers at least forty-five (45) days prior to the scheduled  
9 hearing thereon. Defendant agrees to support the entry of this Consent Judgment once such  
10 motion has been filed.

11 12. **ENFORCEMENT**

12 The Court shall retain jurisdiction to oversee, enforce and/or modify the terms of this  
13 Consent Judgment. Any Party may, after meeting and conferring, by motion or application for an  
14 order to show cause before this Court, enforce the terms and conditions contained in this Consent  
15 Judgment. However, before filing such a motion or an application for an order to show cause,  
16 Balabbo shall provide Defendant with 30 (thirty) days written notice of any alleged violations of  
17 the terms of Injunctive Relief contained in Section 2 herein. As long as Defendant cures any such  
18 alleged violations within 30 (thirty) days of receipt of the written notice by ceasing the sale of the  
19 Covered Product in California until such time as warnings are provided for it pursuant to Section  
20 2.2 above or testing reveals that the reformulation standard has been met for it pursuant to Section  
21 2.1 above, then there shall be deemed no good cause for enforcement or actionable violation.

22 13. **INTEGRATION**

23 This Consent Judgment contains the sole and entire agreement of the Parties and any and  
24 all prior negotiations and understandings related hereto shall be deemed to have been merged  
25 within it. No representations or terms of agreement other than those contained herein exist or  
26 have been made by any Party with respect to the other Party or the subject matter hereof.

1 14. MODIFICATION

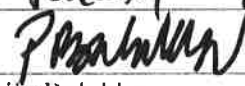
2 This Consent Judgment may be modified only by: (i) a written agreement of the Parties  
3 and upon entry, following at least twenty-one (21) days' notice to the Office of the Attorney  
4 General, of a modified consent judgment by the Court thereon; or (ii) upon a successful motion or  
5 application of any Party, which shall also be served on the Office of the California Attorney  
6 General with at least twenty-one (21) days' notice, and the entry of a modified consent judgment  
7 by the Court. Any Party seeking to modify this Consent Judgment shall attempt in good faith to  
8 meet and confer with all affected Parties prior to filing a motion to modify the Consent Judgment.

9 15. AUTHORIZATION

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

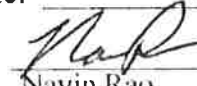
13 **AGREED TO:**

14 Date: February 23, 2017

15 By:   
16 Precila Balabbo

**AGREED TO:**

14 Date: January 24, 2017

15 By:   
16 Navin Rao  
17 Vice President, Assistant General  
18 Counsel, and Chief Compliance Officer  
19 Michaels Stores, Inc.

20 **IT IS SO ORDERED, ADJUDGED AND DECREED:**

21  
22  
23 Dated: \_\_\_\_\_

\_\_\_\_\_  
24 Judge of Superior Court