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7 JOHN MOORE

8
9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 COUNTY OF SAN FRANCISCO
11

12
13 JOHN MOORE,

14 Plaintiff,

15 v.

16 LA-LA IMPORTS LP; BED BATH &
BEYOND INC.; LIBERTY
17 PROCUREMENT CO. INC.; SOURCE 2
MARKET, LLC; and DOES 1-150,
18 inclusive,

19 Defendants.

Case No. CGC-18-569853

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 John Moore (“Plaintiff”)
4 and defendant Source 2 Market, LLC (“Defendant”), with Plaintiff and Defendant each referred to
5 individually as a “Party” and collectively as the “Parties.”

6 **1.2 Plaintiff**

7 Plaintiff 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 General Allegations**

11 Plaintiff alleges that Defendant manufactures, imports, sells, offers for sale and/or
12 distributes for sale in California, products containing di(2-ethylhexyl)phthalate (“DEHP”), and that
13 it did so without providing the health hazard warning that Plaintiff alleges is required by the Safe
14 Drinking Water and Toxic Enforcement Act of 1986, Health & Safety Code § 25249.6, et seq.
15 (“Proposition 65”).

16 **1.4 Product Description**

17 The products covered by this Consent Judgment are sponge caddies with vinyl suction cups
18 containing 1000 parts per million (ppm) or more DEHP, including, but not limited to *Dual Suction*
19 *Sponge Caddy, K10M0305-03B0B0, #131907, UPC #6 85673 13549 7 and UPC #4 44600 25846 9*,
20 that are manufactured, imported, distributed, sold and/or offered for sale in California by Defendant
21 (“Products”).

22 **1.5 Notice of Violation, Amended Notice of Violation and Third Notice of Violation**

23 On June 27, 2018, Plaintiff served Bed, Bath & Beyond Inc., La-La Imports LP, and public
24 enforcement agencies with a 60-Day Notice of Violation (the “Notice”), alleging that Bed, Bath &
25 Beyond Inc. and La-La Imports LP violated Proposition 65 by failing to warn customers and
26 consumers in California that the Products expose users to DEHP. On October 24, 2018, Plaintiff
27 amended the Notice to name Bed, Bath & Beyond Inc. and Source 2 Market, LLC as defendants
28 and remove La-La Imports LP (“Amended Notice”). On August 30, 2018, Mr. Kingpun Cheng

1 served a separate 60-Day Notice of Violation concerning the same Products on Liberty
2 Procurement, Liberty Procurement Company, Inc., BBBMEX S. DE R.L. DE C.V., and Bed, Bath
3 & Beyond Inc. (“Third Notice”) (the Notice, Amended Notice and Third Notice are collectively
4 referred to herein as the “Notices”). Counsel for Mr. Cheng confirmed on October 31, 2018, that
5 the Third Notice would be withdrawn. To the best of the Parties’ knowledge, no public enforcer
6 has commenced and is diligently prosecuting an action to enforce the allegations set forth in the
7 Notices.

8 **1.6 Complaint**

9 On September 18, 2018, Plaintiff commenced the instant action, naming La-La Imports LP,
10 Bed, Bath & Beyond Inc., Liberty Procurement Co. Inc. and Source 2 Market, LLC in a complaint
11 for the alleged violations of Proposition 65 that were the subject of the Notice (“Complaint”).
12 Plaintiff dismissed La-La Imports LP from the Complaint on October 22, 2018. Plaintiff agrees to
13 file a request for dismissal without prejudice as to defendants Bed, Bath & Beyond Inc. and Liberty
14 Procurement Co. Inc. within fifteen (15) calendar days of the Effective Date.

15 **1.7 No Admission**

16 Defendant denies the material, factual, and legal allegations contained in the Notices and
17 Complaint, and maintains that all of the products they have manufactured, imported, sold, offered
18 for sale and/or distributed for sale in California, including the Products, have been, and are, in
19 compliance with all laws. Nothing in this Consent Judgment shall be construed as, nor shall
20 compliance with this Consent Judgment constitute or be construed as, an admission by Defendant
21 of any fact, finding, conclusion of law, issue of law, or violation of law. This Section shall not,
22 however, diminish or otherwise affect the Parties’ obligations, responsibilities, and duties under this
23 Consent Judgment.

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1 **1.8 Jurisdiction**

2 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
3 jurisdiction over Source 2 Market, LLC as to the allegations contained in the Complaint, that venue
4 is proper in the County of San Francisco, 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 **1.9 Effective Date**

8 For purposes of this Consent Judgment, the term “Effective Date” shall mean five (5)
9 business days after the date the motion for approval of this Consent Judgment has been granted and
10 Judgment pursuant to the terms of the Consent Judgment entered by the Court.

11 **2. INJUNCTIVE SETTLEMENT TERMS**

12 **2.1 Reformulation Standards**

13 “Reformulated Products” are defined as those Products containing DEHP in concentrations
14 less than 0.1 percent (1,000 parts per million). For purposes of compliance with this reformulation
15 standard, testing samples shall be prepared and extracted using Consumer Product Safety
16 Commission (“CPSC”) methodology CPSC-CH-C1001.09.3 or U.S. Environmental Protection
17 Agency (“EPA”) methodology 3580A and analyzed using EPA methodology 8270C, or other
18 methodologies utilized by federal or state government agencies for the purpose of determining
19 DEHP content in a solid substance.

20 **2.2 Reformulation Commitment**

21 As of the Effective Date, with the exception of any Products already in the stream of
22 commerce, Defendant shall not directly manufacture, import, distribute, sell or offer the Products
23 for sale in the State of California unless they are Reformulated Products pursuant to Section 2.1
24 above or carry a clear and reasonable health hazard warning per section 2.3, below.


25 **2.3 Product Warnings**

26 Commencing on or before the Effective Date, Defendant shall provide clear and reasonable
27 warnings as set forth in subsections 2.3(a) or (b) for all Products that do not qualify as
28 Reformulated Products and are provided for sale to customers in California. There shall be no

1 obligation for Defendant to provide a warning for Products that enter the stream of commerce prior
2 to the Effective Date.

3 Defendant shall provide, or cause to be provided, a warning for each non-Reformulated
4 Product provided for sale in retail outlets in California. The warning shall consist of either the
5 Warning or Short-Form Warning described in subsection 2.3(a) and (b), respectively. Each
6 warning shall be prominently placed with such conspicuousness as compared with other words,
7 statements, designs, or devices as to render it likely to be read and understood by an ordinary
8 individual under customary conditions before use. Each warning shall be provided in a manner
9 such that it is clearly associated with the specific Product to which the warning applies, so as to
10 minimize the risk of consumer confusion.

11 (a) **Warning.** The Warning shall consist of the following statement:

12  **WARNING:** This product can expose you to di(2-ethylhexyl) phthalate
13 [*or other chemical*], which is known to the State of California to cause
14 cancer and birth defects or other reproductive harm. For more information
go to www.P65Warnings.ca.gov.

15 (b) **Short-Form Warning.** Defendant may, but is not required to, use the short-
16 form warning language as set forth in this subsection 2.3(b) (“Short-Form Warning”), as follows:

17  **WARNING:** Cancer and Reproductive Harm - www.P65Warnings.ca.gov.

18
19 **2.4** A warning provided pursuant to section 2.3(a) or (b) must print the word
20 “**WARNING:**” in all capital letters and in bold font. The warning symbol to the left of the word
21 “**WARNING:**” must be a black exclamation point in a yellow equilateral triangle with a black
22 outline, except that if the labeling does not use the color yellow, then the symbol may be in black
23 and white. The entire warning shall appear in a type size of at least 6-point type and no smaller
24 than the largest type size used for other consumer information on the product.

25 **2.5 Compliance with Warning Regulations.** Defendant shall be deemed to be in
26 compliance with this Consent Judgment by adhering to sections 2.2 through 2.4 of this Consent
27 Judgment, or by employing the Proposition 65 safe harbor warning methods and content adopted by
28 the California Office of Environmental Health Hazard Assessment (“OEHHA”), as may be

1 amended, and as are applicable to the Products. If, after the Effective Date, Defendant sells
2 Products that are not Reformulated Products via mail order catalog and/or the internet to customers
3 located in California, Defendant shall also provide warnings for such Products by identifying the
4 specific Product to which the warning applies as further specified in Sections 2.5(a) and (b).

5 **(a) Mail Order Catalog Warning.** Any warning Defendant provides in a mail
6 order catalog shall be in the same type size or larger than other consumer information provided for
7 the Product within the catalog. Except as stated below, a warning that meets the requirements of
8 Section 2.3, 2.4 or 2.5 shall be provided on the same page and in the same location as the display
9 and/or description of the Product. Where it is impracticable to provide the warning on the same
10 page and in the same location as the display and/or description of the Product, Defendant may
11 utilize a designated symbol of Defendant's choosing to cross reference the applicable warning and
12 shall define the meaning of the designated symbol with the following language on the inside of the
13 front cover of the catalog or on the same page as any order form for the Product(s):

14 **⚠ WARNING:** Certain products identified with this symbol [▼] and
15 offered for sale in this catalog can expose you to di(2-ethylhexyl)
16 phthalate [*or other chemical*], which is known to the State of California to
17 cause cancer and birth defects or other reproductive harm. For more
 information go to www.P65Warnings.ca.gov.

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, Defendant
20 must provide a header or footer directing the consumer to the warning language and definition of
21 the designated symbol. The warning provided in the catalog may use the short-form content
22 described in Section 2.3(b) if a warning is provided on the Product label using the short-form
23 warning content.

24 **(b) Internet Website Warning.** When required for non-Reformulated Products,
25 a warning shall be given in conjunction with Defendant's sale of such Product via the internet,
26 which warning shall appear either: (i) on the same web page on which a Product is displayed; (ii) on
27 the same web page as the order form for a Product; (iii) on the same page as the price for any
28 Product; or (iv) on one or more web pages displayed to a purchaser during the checkout process. A

1 warning as shown in Section 2.3(a) or (b) shall be used and shall appear in any of the above
2 instances adjacent to or immediately following the display, description, or price of the Product for
3 which it is given in the same type size or larger than other consumer information provided for the
4 Product. The warning provided on the website may use the short-form content described in Section
5 2.3(b) if a warning is provided on the Product label using the short-form warning content.

6 Where it is impracticable to provide the warning at one of the locations described in
7 subsections 2.5(b)(i) through (iv) above, Defendant may instead utilize a clearly marked hyperlink
8 to the warning using the word “**WARNING**” on the Product display page, or by otherwise
9 prominently displaying the warning to the purchaser prior to completing the purchase.

10 **3. MONETARY SETTLEMENT TERMS**

11 **3.1 Payments Pursuant to Health and Safety Code § 25249.7(b)(2)**

12 Pursuant to Health and Safety Code section 25249.7(b)(2), and in settlement of all the
13 claims referred to in the Notice, the Complaint and this Consent Judgment, Defendant shall pay a
14 total of \$1,500.00 in civil penalties in accordance with this Section 3.1. The penalty payment will
15 be allocated in accordance with California Health & Safety Code § 25249.12(c)(1) & (d), with 75%
16 of the funds to OEHHA and the remaining 25% of the penalty to Plaintiff. Defendant shall, within
17 ten (10) business days of the Effective Date, deliver two (2) checks to The Chanler Group payable
18 as follows: (1) to “John Moore, Client Trust Account” totaling \$375.00; and (2) to the “Office of
19 Environmental Health Hazard Assessment” totaling \$1,125.00. Upon receipt, Plaintiff’s counsel
20 will then ensure payment to OEHHA. All penalty payments shall be delivered to the address listed
21 in Section 3.3 below. Plaintiff agrees to provide completed IRS W-9 forms to Defendant by the
22 Effective Date for each of the payees and Defendant shall subsequently issue three separate IRS
23 1099 forms to OEHHA, Plaintiff, and The Chanler Group for the respective amount paid to each
24 under this agreement.

25 **3.2 Reimbursement of Attorneys’ Fees and Costs**

26 The Parties acknowledge that Plaintiff and his counsel offered to resolve this dispute
27 without reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving
28 the issue to be resolved after the material terms of the agreement had been settled. Shortly after

1 the other settlement terms had been finalized, the Parties negotiated a resolution of the
2 compensation due to Plaintiff and his counsel under general contract principles and the private
3 attorney general doctrine codified at California Code of Civil Procedure § 1021.5. For all work
4 performed concerning this matter, Defendant shall reimburse Plaintiff and his counsel a total of
5 \$22,000.00, paid to “The Chanler Group” in two (2) equal installment payments delivered to the
6 address listed in Section 3.3 below. Within five (5) calendar days of the Effective Date, Defendant
7 shall issue the first installment payment of \$11,000.00. Within forty-five (45) calendar days of the
8 Effective Date, Defendant shall issue the second installment payment of \$11,000.00. The
9 reimbursement shall cover all fees and costs incurred by Plaintiff and his counsel investigating,
10 bringing this matter to Defendant’s attention, litigating, negotiating a settlement and fully
11 resolving this matter in the public interest.

12 **3.3 Payment Address**

13 All payments required by this Consent Judgment shall be delivered to the following
14 address: The Chanler Group
15 Attn: Proposition 65 Controller
16 2560 Ninth Street
Parker Plaza, Suite 214
Berkeley, CA 94710

17 **4. CLAIMS COVERED AND RELEASED**

18 **4.1 Plaintiff’s Release of Proposition 65 Claims**

19 Plaintiff, acting on his own behalf and in the public interest, releases Defendant and its
20 parents, subsidiaries, affiliated entities under common ownership, shareholders, directors, members,
21 officers, employees, representatives, agents and attorneys, and their predecessors, successors and
22 assignees, including without limitation La-La Imports LP, (“Releasees”) and each entity to whom
23 Releasees directly or indirectly distribute or sell the Products including, but not limited to, their
24 downstream distributors, wholesalers, customers, retailers, franchisers, cooperative members,
25 licensors, licensees and any downstream party that distributes, offers for sale or sells the Products
26 including, without limitation, Bed, Bath & Beyond Inc., Liberty Procurement Co., Inc. and
27 BBBMEX S. DE R.L. DE C.V., and their respective parents, subsidiaries, affiliated entities under
28 common ownership, shareholders, directors, members, officers, employees, representatives, agents

1 and attorneys, and their predecessors, successors and assignees (“Downstream Releasees”) from
2 any claims or allegations of violation arising under Proposition 65 for unwarned exposures to
3 DEHP from the Products manufactured, imported, distributed, offered for sale or sold by
4 Defendant, as set forth in the Notices or Complaint. Compliance with the terms of this Consent
5 Judgment constitutes compliance with Proposition 65 with regard to the Products.

6 **4.2 Plaintiff’s Individual Release of Claims**

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

14 **4.3 Defendant’s Release of Plaintiff**

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

20 **4.4 Mutual Waiver of California Civil Code Section 1542**

21 The Parties each acknowledge that they are familiar with Section 1542 of the Civil Code,
22 which provides as follows:

23 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE
24 CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER
25 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.

26 The Parties, each on their own behalf, and on behalf of their past and current agents,
27 representatives, attorneys, successors, and/or assignees, expressly waive and relinquish any and all
28 rights and benefits which they may have under, or which may be conferred upon them by the

1 provisions of Civil Code section 1542 as well as under any other state or federal statute or common
2 law principle of similar effect, to the fullest extent they may lawfully waive such rights or benefits
3 pertaining to the released matters, as specifically defined by Sections 4.1 through 4.3, above.

4 **5. COURT APPROVAL**

5 This Consent Judgment is not effective until it is approved and entered by the Court and
6 shall be null and void if, for any reason, it is not approved and entered by the Court within one (1)
7 year after it has been fully executed by all Parties. Plaintiff and Defendant agree to support the
8 entry of this agreement as a judgment, and to obtain the Court's approval of their settlement in a
9 timely manner. The Parties acknowledge that, pursuant to California Health and Safety Code
10 section 25249.7(f), a noticed motion is required for judicial approval of this Consent Judgment,
11 which motion Plaintiff shall draft and file. If any third-party objection to the motion is filed,
12 Plaintiff and Defendant agree to work together to file a reply. This provision is a material
13 component of the Consent Judgment and shall be treated as such in the event of a breach.

14 **6. SEVERABILITY**

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

18 **7. GOVERNING LAW**

19 The terms of this Consent Judgment shall be governed by the laws of the State of California
20 and apply within the State of California. In the event that Proposition 65 is repealed, preempted, or
21 is otherwise rendered inapplicable by reason of law generally, or as to the Products, then Defendant
22 may provide Plaintiff with written notice of any asserted change in the law, and shall have no
23 further obligations pursuant to this Consent Judgment with respect to, and to the extent that, the
24 Products are so affected. Nothing in this Consent Judgment shall be interpreted to relieve the
25 Parties from their respective obligations to comply with any pertinent state or federal law or
26 regulation.

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1 **8. NOTICE**

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

6	To Defendant:	To Plaintiff:
7	Malcolm C. Weiss, Esq. and	Attn: Proposition 65 Coordinator
8	Shannon K. Oldenburg, Esq.	The Chanler Group
9	Hunton Andrews Kurth LLP	2560 Ninth Street
10	550 South Hope Street, Suite 2000	Parker Plaza, Suite 214
11	Los Angeles, CA 90071	Berkeley, CA 94710-2565
	mweiss@HuntonAK.com	
	soldenburg@HuntonAK.com	

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

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

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

18 **10. COMPLIANCE WITH REPORTING REQUIREMENTS**

19 Plaintiff and his counsel agree to comply with the reporting form requirements referenced in
20 California Health and Safety Code section 25249.7(f).

21 **11. MODIFICATION**

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

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1 **12. AUTHORIZATION**

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

6 **AGREED TO:**

7
8  _____
9 JOHN MOORE

10 Dated: 1/29/2019 _____

AGREED TO:

_____ SOURCE 2 MARKET, LLC

By: _____
(Print Name)

Its: _____
(Title)

Dated: _____

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5
6 **AGREED TO:**

7
8 _____
9 JOHN MOORE

10 Dated: _____

AGREED TO:

11 _____
12 SOURCE 2 MARKET, LLC

13 By: Lori Murphy
14 (Print Name)

15 Its: member
16 (Title)

17 Dated: 1/31/2019

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