

1 Evan Smith (Bar No. SBN 242352)  
2 BRODSKY & SMITH, LLC.  
3 9595 Wilshire Blvd., Ste. 900  
4 Beverly Hills, CA 90212  
5 Tel: (877) 534-2590  
6 Fax: (310) 247-0160

7 *Attorneys for Plaintiff*

8  
9 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
10 COUNTY OF ALAMEDA

11 PRECILA BALABBO,

12 Plaintiff,

13 v.

14 THE MICHAELS COMPANIES, INC.,

15 Defendant.

Case No.: RG19018102

**CONSENT JUDGMENT**

Judge: Hon. Karin Schwartz

Dept.: 512

Hearing Date: August 7, 2019

Hearing Time: 1:30 PM

Reservation #: R-2086748

Complaint filed on May 8, 2019

1       **1. INTRODUCTION**

2           **1.1 The Parties.** This Consent Judgment is entered into by and between Precila  
3 Balabbo acting on behalf of the public interest (hereinafter “Balabbo”) and The Michaels  
4 Companies, Inc. (“Michaels” or “Defendant”) with Balabbo and Defendant collectively referred to  
5 as the “Parties” and each of them as a “Party.” Balabbo is an individual residing in California that  
6 seeks to promote awareness of exposures to toxic chemicals and improve human health by reducing  
7 or eliminating hazardous substances contained in consumer products. Michaels is alleged to be a  
8 person in the course of doing business for purposes of Proposition 65, Cal. Health & Safety Code  
9 §§ 25249.6 et seq.

10           **1.2 Allegations and Representations.** Balabbo alleges that Defendant has exposed  
11 individuals to di(2-ethylhexyl) phthalate (DEHP) from its sales of Loops & Threads yarn storage  
12 bags without providing a clear and reasonable exposure warning pursuant to Proposition 65. DEHP  
13 is listed under Proposition 65 as a chemical known to the State of California to cause cancer and  
14 reproductive toxicity.

15           **1.3 Notice of Violation/Complaint.** On or about February 27, 2019, Balabbo served  
16 Michaels, and various public enforcement agencies with documents entitled “60-Day Notice of  
17 Violation” pursuant to Health & Safety Code §25249.7(d) (the “Notice”), alleging that Defendant  
18 violated Proposition 65 for failing to warn consumers and customers that use of Loops & Threads  
19 yarn storage bags expose users in California to DEHP. No public enforcer has brought and is  
20 diligently prosecuting the claims alleged in the Notice. On May 8, 2019, Balabbo filed a complaint  
21 (the “Complaint”) in the matter.

22           **1.4** For purposes of this Consent Judgment only, the Parties stipulate that this Court has  
23 jurisdiction over Defendant as to the allegations contained in the Complaint filed in this matter, that  
24 venue is proper in the County of Alameda, and that this Court has jurisdiction to approve, enter,  
25 and oversee the enforcement of this Consent Judgment as a full and final binding resolution of all  
26 claims which were or could have been raised in the Complaint based on the facts alleged therein  
27 and/or in the Notice.  
28

1           1.5 Defendant denies the material allegations contained in the Notice and Complaint  
2 and maintains that it has not violated Proposition 65. Nothing in this Consent Judgment shall be  
3 construed as an admission by Defendant of any fact, finding, issue of law, or violation of law; nor  
4 shall compliance with this Consent Judgment constitute or be construed as an admission by  
5 Defendant of any fact, finding, conclusion, issue of law, or violation of law, such being specifically  
6 denied by Defendant. However, this section shall not diminish or otherwise affect the obligations,  
7 responsibilities, and duties of Defendant under this Consent Judgment.

8           **2. DEFINITIONS**

9           2.1 **Covered Products.** The term “Covered Products” means Loops & Threads yarn  
10 storage bags that are manufactured, distributed and/or offered for sale in California by Michaels.

11           2.2 **Listed Phthalates.** The term “Listed Phthalates” means DEHP, butyl benzyl  
12 phthalate (“BBP”), di-n-butyl phthalate (“DBP”), di-isodecyl phthalate (“DIDP”), Di-n-hexyl  
13 Phthalate (DnHP), and Diisononyl phthalate (DINP).

14           2.3 **Effective Date.** The term “Effective Date” means the date this Consent Judgment is  
15 entered as a Judgment of the Court.

16           **3. INJUNCTIVE RELIEF: WARNINGS**

17           3.1 **Reformulation of Covered Products.** As of the date this Consent Judgment is  
18 signed by both Parties, and continuing thereafter, Covered Products that Michaels directly  
19 manufactures, imports, distributes, sells, or offers for sale in California shall either: (a) be  
20 Reformulated Products pursuant to § 3.2, below; or (b) be labeled with a clear and reasonable  
21 exposure warning pursuant to §§ 3.3 and 3.4, below. For purposes of this Consent Judgment, a  
22 “Reformulated Product” is a Covered Product that is in compliance with the standard set forth in §  
23 3.2 below. The warning requirement set forth in §§ 3.3 and 3.4 shall not apply to any Reformulated  
24 Product.

25           3.2 **Reformulation Standard.** “Reformulated Products” shall mean Covered Products  
26 that contain in all flexible plastic/PVC components that may reasonably be touched or mouthed by  
27 consumers concentrations less than or equal to 0.1% (1,000 parts per million (ppm)) of each of the  
28

1 Listed Phthalates when analyzed pursuant to U.S. Environmental Protection Agency testing  
2 methodologies 3580A and 8270C or other methodology utilized by federal or state government  
3 agencies for the purpose of determining the phthalate content in a solid substance.

4       **3.3 Clear and Reasonable Warning.** As of the date this Consent Judgment is signed  
5 by both Parties, and continuing thereafter, a clear and reasonable exposure warning as set forth in  
6 this § 3.3 and § 3.4 must be provided for all Covered Products that Defendant manufacturers,  
7 imports, or otherwise acquires for sale in California that are not Reformulated Products. There  
8 shall be no obligation for Defendant to provide a warning for Covered Products that have entered  
9 the stream of commerce prior to the date this Consent Judgment is signed by both Parties and any  
10 such Covered Products may instead be sold through as previously packaged and labeled. Except  
11 as otherwise noted below, the warning statement shall consist of either the **Warning** or **Alternative**  
12 **Warning** described in §§ 3.3(a) or (b), respectively:

13       (a) **Warning.** The “Warning” shall consist of the statement:

14       ⚠ **WARNING:** This product can expose you to chemicals including di(2-  
15 ethylhexyl) phthalate (DEHP), which are known to the State of California to cause  
16 cancer and birth defects or other reproductive harm. For more information go to  
[www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov).

17       (b) **Alternative Warning:** Michaels may, but is not required to, use the alternative  
18 short-form warning statement as set forth in this § 3.3(b) (“**Alternative Warning**”) as follows:

19       ⚠ **WARNING:** Cancer and Reproductive Harm - [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov).<sup>1</sup>

20       **3.4 A Warning or Alternative Warning** provided pursuant to § 3.3 must have the word  
21 “**WARNING:**” appear in all capital letters and in bold font, followed by a colon. The warning  
22

---

23       <sup>1</sup> To the extent Michaels determines that the Covered Products for which a warning  
24 statement is required under § 3.3 above do not contain DEHP in concentrations in excess of 1,000  
25 ppm, if it chooses not to use an **Alternative Warning**, it shall substitute the name of at least one  
26 of the Listed Phthalates present in concentrations greater than 1,000 ppm in the Covered Products  
27 for DEHP in the **Warning** shown in § 3.3(a) above. In this event, if Michaels has determined that  
28 the concentration of DINP in the Covered Product is 1,000 ppm or less, it shall delete the term  
“cancer and” from the warning statement shown in either §§ 3.3(a) or 3.3(b) above.  
Alternatively, if the only Listed Phthalate present in concentrations greater than 1,000 ppm in the  
Covered Product is determined by Michaels to be DINP, then in addition to identifying it instead  
of DEHP, Michaels shall delete the reference to reproductive harm effects in using either of the  
warning statements shown in §§ 3.3(a) and 3.3(b) above.

1 symbol to the left of the word “**WARNING:**” must be a black exclamation point in a yellow  
2 equilateral triangle with a black outline, except that if the sign or label for the Covered Product  
3 does not use the color yellow, the symbol may be in black and white. The symbol must be in a size  
4 no smaller than the height of the word “**WARNING:**”. The warning statement shall be affixed to  
5 or printed on the Covered Product’s packaging or labeling, or on a placard, shelf tag, sign or  
6 electronic device or automatic process, providing that the warning is displayed with such  
7 conspicuousness, as compared with other words, statements, or designs as to render it likely to be  
8 read and understood by an ordinary individual under customary conditions of purchase or use. A  
9 warning may be contained in the same section of the packaging, labeling, or instruction booklet  
10 that states other safety warnings, if any, concerning the use of the Covered Product and shall be at  
11 least the same size as those other safety warnings or in at least 7 point font.

12 If Michaels sells Covered Products via an internet website to customers located in  
13 California, the warning requirements of this section shall be deemed fully satisfied if the foregoing  
14 warning, or a hyperlink denominated in whole or in part by the word “**WARNING**” that leads  
15 directly to it, appears either: (a) on the same web page on which a Covered Product is displayed  
16 and/or described; (b) on the same page as the price for the Covered Product; or (c) on one or more  
17 web pages displayed to a purchaser prior to purchase during the checkout process. Alternatively,  
18 a symbol consisting of a black exclamation point in a yellow or white equilateral triangle may  
19 appear adjacent to or immediately following the display, description, price, or checkout listing of  
20 the Covered Product, if the warning statement appears elsewhere on the same web page in a manner  
21 that clearly associates it with the product(s) to which the warning applies.

22 **3.5 Compliance with Warning Regulations.** Defendant shall be deemed to be in  
23 compliance with this Consent Judgment by either adhering to §§ 3.3 and 3.4 of this Consent  
24 Judgment or by complying with warning requirements adopted by the State of California’s Office  
25 of Environmental Health Hazard Assessment (“OEHHA”) after the Effective Date.  
26  
27  
28

1       **4. MONETARY TERMS**

2           **4.1 Civil Penalty.** Michaels shall pay \$1,500.00 as a Civil Penalty pursuant to Health  
3 and Safety Code section 25249.7(b), to be apportioned in accordance with California Health &  
4 Safety Code § 25192, with 75% of these funds remitted to OEHHA and the remaining 25% of the  
5 Civil Penalty remitted to Balabbo, as provided by California Health & Safety Code § 25249.12(d).

6           **4.1.1** Within ten (10) business days of the Effective Date, Michaels shall issue  
7 two separate checks for the Civil Penalty payment to (a) “OEHHA” in the amount of \$1,125.00;  
8 and to (b) “Brodsky & Smith, LLC in Trust for Balabbo” in the amount of \$375.00. Payment  
9 owed to Balabbo pursuant to this Section shall be delivered to the following payment address:

10           Evan J. Smith, Esquire  
11           Brodsky & Smith, LLC  
12           Two Bala Plaza, Suite 510  
13           Bala Cynwyd, PA 19004

14       Payment owed to OEHHA (EIN: 68-0284486) pursuant to this Section shall be delivered directly  
15 to OEHHA (Memo Line “Prop 65 Penalties”) at one of the following address(es):

16           For United States Postal Service Delivery:

17           Mike Gyurics  
18           Fiscal Operations Branch Chief  
19           Office of Environmental Health Hazard Assessment  
20           P.O. Box 4010  
21           Sacramento, CA 95812-4010

22           For Non-United States Postal Service Delivery:

23           Mike Gyurics  
24           Fiscal Operations Branch Chief  
25           Office of Environmental Health Hazard Assessment  
26           1001 I Street  
27           Sacramento, CA 95814

28       A copy of the check payable to OEHHA shall be mailed to Brodsky & Smith, LLC at the address  
set forth above as proof of payment to OEHHA.

**4.2 Attorneys’ Fees.** Within ten (10) business days of the Effective Date, Michaels shall  
pay \$16,000.00 to Brodsky & Smith, LLC (“Brodsky Smith”) as complete reimbursement for  
Balabbo’s attorneys’ fees and costs incurred as a result of investigating, bringing this matter to

1 Michaels's attention, litigating and negotiating and obtaining judicial approval of a settlement in  
2 the public interest, pursuant to Code of Civil Procedure § 1021.5.

3 **5. RELEASE OF ALL CLAIMS**

4 5.1 This Consent Judgment is a full, final, and binding resolution between Balabbo  
5 acting on her own behalf, and on behalf of the public interest, and Michaels, and its parents,  
6 shareholders, members, directors, officers, managers, employees, representatives, agents,  
7 attorneys, divisions, subdivisions, subsidiaries, partners, sister companies, and affiliates, and their  
8 predecessors, successors and assigns ("Defendant Releasees"), and all entities from whom they  
9 obtain and to whom they directly or indirectly distribute or sell Covered Products, including but  
10 not limited to manufacturers, suppliers, distributors, wholesalers, customers, licensors, licensees  
11 retailers, franchisees, and cooperative members ("Downstream Releasees"), of all claims for  
12 violations of Proposition 65 based on exposure to DEHP from Covered Products as set forth in the  
13 Notice, with respect to any Covered Products manufactured, distributed, or sold by Michaels prior  
14 to the Effective Date.<sup>2</sup> As of the Effective Date, compliance with the terms of this Consent  
15 Judgment shall be deemed to constitute compliance with Proposition 65 with regard to Listed  
16 Phthalates in the Covered Products.

17 5.2 In addition to the foregoing, Balabbo, on behalf of herself, her past and current  
18 agents, representatives, attorneys, and successors and/or assignees, and not in her representative  
19 capacity, hereby waives all rights to institute or participate in, directly or indirectly, any form of  
20 legal action and releases Michaels, Defendant Releasees, and Downstream Releasees from any and  
21 all manner of actions, causes of action, claims, demands, rights, suits, obligations, debts, contracts,  
22 agreements, promises, liabilities, damages, charges, losses, costs, expenses, and attorneys' fees, of  
23 any nature whatsoever, known or unknown, in law or equity, fixed or contingent, now or in the  
24

25 <sup>2</sup> Without prejudice to the rights public prosecutors authorized to represent the People  
26 pursuant to Health & Safety Code § 25249.7(c) may otherwise have, this Consent Judgment shall  
27 have preclusive effect such that no other potential plaintiff, whether purporting to act in his, her,  
28 or its interests or the public interest, shall be permitted to pursue and/or take any action against  
Michaels, Defendant Releasees, and/or the Downstream Releasees with respect to any violation  
of Proposition 65 that was alleged in the Complaint or that otherwise could have been brought  
pursuant to the allegations set forth in the Notice.

1 future, with respect to any alleged violations of Proposition 65 related to or arising from Covered  
2 Products manufactured, distributed, or sold by Michaels, Defendant Releasees or Downstream  
3 Releasees. With respect to the foregoing waivers and releases in this paragraph, Balabbo hereby  
4 specifically waives any and all rights and benefits which she now has, or in the future may have,  
5 conferred by virtue of the provisions of § 1542 of the California Civil Code, which provides as  
6 follows:

7  
8 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS THAT THE  
9 CREDITOR OR RELEASING PARTY DOES NOT KNOW OR SUSPECT TO  
10 EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE  
11 RELEASE AND THAT, IF KNOWN BY HIM OR HER, WOULD HAVE  
12 MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE  
13 DEBTOR OR RELEASED PARTY.

14 5.3 Michaels waives any and all claims against Balabbo, her attorneys and other  
15 representatives, for any and all actions taken or statements made (or those that could have been  
16 taken or made) by Balabbo and her attorneys and other representatives, whether in the course of  
17 investigating claims or otherwise seeking enforcement of Proposition 65 against it in this matter,  
18 and/or with respect to Covered Products.

## 19 6. INTEGRATION

20 6.1 This Consent Judgment contains the sole and entire agreement of the Parties and  
21 any and all prior negotiations and understandings related hereto shall be deemed to have been  
22 merged within it. No representations or terms of agreement other than those contained herein exist  
23 or have been made by any Party with respect to the other Party or the subject matter hereof.

## 24 7. GOVERNING LAW

25 7.1 The terms of this Consent Judgment shall be governed by the laws of the State of  
26 California and apply within the State of California. In the event that Proposition 65 is repealed or  
27 is otherwise rendered inapplicable by reason of law generally, or as to Covered Products, then  
28 Defendant shall have no further obligations pursuant to this Consent Judgment with respect to, and  
to the extent that, Covered Products are so affected.



1       **8.     NOTICES**

2           8.1     Unless specified herein, all correspondence and notices required to be provided  
3 pursuant to this Consent Judgment shall be in writing and personally delivered or sent by: (i) first-  
4 class, (registered or certified mail) return receipt requested; or (ii) overnight courier on any party  
5 by the other party at the following addresses:

6 For Defendant:

7                   General Counsel  
8                   Michaels Stores, Inc.  
9                   8000 Bent Branch Drive  
                  Irving, TX 75063

10                   And

11                   Robert L. Falk  
12                   Morrison & Foerster LLP  
13                   425 Market Street  
                  San Francisco, CA 94105-2482

14                   And

15 For Balabbo:

16                   Evan Smith  
17                   Brodsky & Smith, LLC  
                  9595 Wilshire Blvd., Ste. 900  
                  Beverly Hills, CA 90212

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

20       **9.     COUNTERPARTS; FACSIMILE SIGNATURES**

21           9.1     This Consent Judgment may be executed in counterparts and by facsimile, each of  
22 which shall be deemed an original, and all of which, when taken together, shall constitute one and  
23 the same document.

24       **10.    COMPLIANCE WITH HEALTH & SAFETY CODE § 25249.7(f)/COURT**  
25       **APPROVAL**

26           10.1    Balabbo agrees to comply with the requirements set forth in California Health &  
27 Safety Code § 25249.7(f) and to promptly bring a Motion for Approval of this Consent Judgment.  
28 Defendant agrees it shall support approval of such Motion.

1           10.2 This Consent Judgment shall not be effective until it is approved and entered by the  
2 Court and shall be null and void if, for any reason, it is not approved by the Court. In such case,  
3 the Parties agree to meet and confer on how to proceed and if such agreement is not reached within  
4 30 days, the case shall proceed on its normal course.

5           10.3 If the Court approves this Consent Judgment and is reversed or vacated by an  
6 appellate court, the Parties shall meet and confer as to whether to modify the terms of this Consent  
7 Judgment. If the Parties do not jointly agree on a course of action to take, the case shall proceed on  
8 its normal course on the trial court's calendar.

9 **11. MODIFICATION**

10           11.1 This Consent Judgment may be modified only by further stipulation of the Parties  
11 and the approval of the Court or upon the granting of a motion brought to the Court by either Party.

12 **12. ATTORNEY'S FEES**

13           12.1 A Party who unsuccessfully brings or contests an action arising out of this Consent  
14 Judgment shall be required to pay the prevailing party's reasonable attorney's fees and costs.

15           12.2 Nothing in this Section shall preclude a Party from seeking an award of sanctions  
16 pursuant to law.

17 **13. RETENTION OF JURISDICTION**

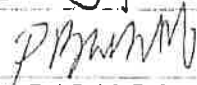
18           13.1 This Court shall retain jurisdiction of this matter to implement or modify the  
19 Consent Judgment.

20 **14. AUTHORIZATION**

21           14.1 The undersigned are authorized to execute this Consent Judgment on behalf of their  
22 respective Parties and have read, understood and agree to all of the terms and conditions of this  
23 document and certify that he or she is fully authorized by the Party he or she represents to execute  
24 the Consent Judgment on behalf of the Party represented and legally bind that Party. Except as  
25 explicitly provided herein each Party is to bear its own fees and costs.  
26  
27  
28

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**AGREED TO:**

Date: 5-21-2019  
By:   
PRECILA BALABBO

**AGREED TO:**

Date: 6/4/2019  
DocuSigned by:  
Navin Rao  
98DBA90D54D74C2  
THE MICHAELS COMPANIES, INC.  
Navin Rao

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

Dated: \_\_\_\_\_

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