

1 Troy C. Bailey, State Bar No. 277424
2 Josh Voorhees, State Bar No. 241436
3 VOORHEES & BAILEY, LLP
4 535 Ramona Street; Suite 5
5 Palo Alto, CA 94301
6 Telephone: (650) 815-6022
7 Facsimile: (650) 618-1606
8 josh@voorheesbailey.com
9 troy@voorheesbailey.com

6 Attorneys for Plaintiff
7 AUDREY DONALDSON

8
9
10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 CITY AND COUNTY OF SANTA CLARA
12 UNLIMITED CIVIL JURISDICTION
13

14 AUDREY DONALDSON,
15 Plaintiff,

16 v.

17 HOME ESSENTIALS & BEYOND, INC.; and
18 DOES 1-150, inclusive,

19 Defendants.
20
21

Case No. 19-CV-359153

[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 Audrey Donaldson
4 (“Donaldson”) and defendant Home Essentials & Beyond, Inc., (“Home Essentials”), with
5 Donaldson and Home Essentials each referred to individually as a “Party” and collectively as the
6 “Parties.”

7 **1.2 Plaintiffs**

8 Donaldson is a resident of the State of California who seeks to promote awareness of
9 exposures to toxic chemicals, and to improve human health by reducing or eliminating harmful
10 substances contained in consumer and commercial products.

11 **1.3 Defendant**

12 Home Essentials employs ten or more persons and is a person in the course of doing
13 business for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, California
14 Health and Safety Code section 25249.6 *et seq.* (“Proposition 65”).

15 **1.4 General Allegations**

16 Donaldson alleges that Home Essentials manufactures, sells, and distributes for sale in
17 California the following: (1) canisters with PVC seals containing the phthalate chemicals di(2-
18 ethylhexyl) phthalate (“DEHP”) and di-n-butyl phthalate (“DBP”); (2) drink dispensers with
19 exterior decorations containing lead; and (3) glassware with exterior decorations containing lead.
20 DEHP and DBP are listed pursuant to Proposition 65 as chemicals known to cause birth defects and
21 other reproductive harm. Lead is listed pursuant to Proposition 65 as a chemical known to cause
22 birth defects and other reproductive harm. Donaldson alleges that Home Essentials failed to
23 provide the health hazard warnings required by Proposition 65 for exposures to DEHP, DBP and
24 lead.

25 **1.5 Product Description**

26 The products covered by this Consent Judgment are as follows: (i) canisters with PVC seals
27 containing DEHP and/or DBP that are manufactured, sold, or distributed for sale in California by
28 Home Essentials including, but not limited to, the “*Farmyard Collection Ceramic Canister*,” UPC:

1 7 86460 91215 1 (hereinafter “Phthalate Products”); (ii) drink dispensers with exterior decorations
2 containing lead that are manufactured, sold, or distributed for sale in California by Home Essentials
3 including, but not limited to “*Home Essentials Drink Dispenser*,” UPC: 7 86460 04358 9,
4 (hereinafter “Drink Dispenser Products”); (iii) glassware with exterior decorations containing lead,
5 specifically defined as and limited to the *Better Together His and Hers “4-Piece Gift Set*,” SKU:
6 *80-1187-917950-000999-03-2*, and the “*Beer Built This Body*” Pilsner Glass, UPC: 7 86460 00173
7 2, manufactured, sold, or distributed for sale in California by Home Essentials (hereinafter
8 “Glassware Products”). The Drink Dispenser Products and Glassware Products may hereinafter be
9 referred to collectively as “Lead Products.” The Phthalate Products and Lead Products may
10 hereinafter be collectively referred to as the “Products”.

11 **1.6 Notices of Violation**

12 On June 25, 2019, Donaldson served Home Essentials and the requisite public enforcement
13 agencies with a 60-Day Notice of Violation, alleging that Home Essentials violated Proposition 65
14 when it failed to warn its customers and consumers in California of the health hazards associated
15 with exposures to DEHP and DBP in the Phthalate Products.

16 On August 13, 2019, Donaldson served Home Essentials and the requisite public
17 enforcement agencies with a 60-Day Notice of Violation, alleging that Home Essentials violated
18 Proposition 65 when it failed to warn its customers and consumers in California of the health
19 hazards associated with exposures to lead in the Drink Dispenser Products.

20 On August 27, 2020, Donaldson served The TJX Companies and the requisite public
21 enforcement agencies with a 60-Day Notice of Violation, alleging that it violated Proposition 65
22 when it failed to warn its customers and consumers in California of the health hazards associated
23 with exposures to lead in the *Better Together His and Hers Giftware Set*. Home Essentials was
24 subsequently identified as the manufacturer/supplier of that product and indicated that it wanted to
25 resolve certain claims contained in the August 27, 2020 Notice.

26 Thereafter, on January 19, 2021, Donaldson served Home Essentials, the TJX Companies,
27 and the requisite public enforcement agencies with a 60-Day Notice of Violation, alleging that they
28 violated Proposition 65 when they failed to warn their customers and consumers in California of the

1 health hazards associated with exposures to lead in Glassware With Exterior Designs Containing
2 Lead.

3 The June 25, 2019, Notice of Violation, August 13, 2019 Notice of Violation, August 27,
4 2020 Notice of Violation and January 19, 2021 Notice of Violation shall hereinafter collectively be
5 referred to as the “Notices”. No public enforcer has commenced and is diligently prosecuting the
6 allegations set forth in the Notices.

7 **1.7 Complaint**

8 On November 25, 2019, Donaldson commenced the instant action, naming Home Essentials
9 as one of the defendants for the alleged violations of Proposition 65 related to the Phthalate
10 Products and Drink Dispenser Products (“Complaint”). Upon the Court’s approval of the Motion to
11 Approve this Consent Judgment, the Complaint shall be deemed amended, *nunc pro tunc*, to
12 include the allegations regarding unwarned exposures to lead in the Glassware Products.

13 **1.8 No Admission**

14 Home Essentials denies the material, factual, and legal allegations contained in the Notices
15 and maintains that all of the products that it has sold and distributed in California, including the
16 Products, have been, and are, in compliance with all laws. Nothing in this Consent Judgment shall
17 be construed as an admission by Home Essentials of any fact, finding, conclusion, issue of law, or
18 violation of law, nor shall compliance with this Consent Judgment constitute or be construed as an
19 admission by Home Essentials of any fact, finding, conclusion, issue of law, or violation of law,
20 such being specifically denied by Home Essentials. This Section shall not, however, diminish or
21 otherwise affect Home Essentials’ obligations, responsibilities, and duties under this Consent
22 Judgment.

23 **1.9 Jurisdiction**

24 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
25 jurisdiction over Home Essentials as to the allegations contained in the Complaint, that venue is
26 proper in the County of Santa Clara, and that the Court has jurisdiction to enter and enforce the
27 provisions of this Consent Judgment pursuant to Proposition 65 and Code of Civil Procedure
28 section 664.6.

1 **1.10 Effective Date**

2 For purposes of this Consent Judgment, the term “Effective Date” shall mean the date that
3 the Court grants the motion for approval of this Consent Judgment contemplated by Section 5,
4 including any unopposed Tentative Ruling approving this Consent Judgment.

5 **2. INJUNCTIVE RELIEF: REFORMULATION**

6 **2.1 Reformulation Standards**

7 “Reformulated Phthalate Products” are defined as those Phthalate Products containing
8 DEHP and DBP each in concentrations less than 0.1 percent (1,000 parts per million) when
9 analyzed pursuant to U.S. Environmental Protection Agency testing methodologies 3580A and
10 8270C, or any other methodologies utilized by federal or state agencies for the purpose of
11 determining the DEHP content in a solid substance.

12 “Reformulated Lead Products” are defined as those Lead Products that: (a) contain no more
13 than 90 parts per million (“ppm”) lead in any decoration, colored artwork, designs and/or marking
14 on the surface of the Products when analyzed pursuant to U.S. Environmental Protection Agency
15 testing methodologies 3050B or equivalent methodologies utilized by federal or state agencies for
16 the purpose of determining lead content in a solid substance, *and* (b) yield no more than 1.0
17 microgram of lead on any surface sampled and analyzed pursuant to the NIOSH 9100 testing
18 protocol. In addition, in order to qualify as Reformulated Products, the Glassware Products shall
19 also yield a result of non-detect (defined as no more than 25 ppm by weight of lead) for any
20 decorations located in the upper 20 millimeters of a Product, i.e., the “Lip-and-Rim” area when
21 analyzed pursuant to EPA testing methodologies 3050B and 6010B, or equivalent methodologies
22 used by state and federal agencies to determine lead content in a solid substance.

23 If the decoration is tested after it is affixed to the Lead Products, the percentage of the lead
24 by weight must related only to the decorating materials and must not include any quantity
25 attributable to non-decorating material (e.g., glass or ceramic substrate).

26 **2.2 Reformulation Commitment**

27 As of the Effective Date, Home Essentials shall not sell or offer the Products for sale in the
28 State of California unless they are Reformulated Phthalate Products and Reformulated Lead

1 Products. The Parties agree and intend that compliance with the terms of this Settlement
2 Agreement shall constitute compliance with Proposition 65 with respect to exposures to DEHP
3 and/or DBP in the Phthalate Products and lead from the Lead Products.

4 **3. MONETARY SETTLEMENT TERMS**

5 **3.1 Civil Penalty Payment**

6 Pursuant to Health and Safety Code section 25249.7(b)(2), and in settlement of all claims
7 alleged in the Notice or referred to in this Consent Judgment, Home Essentials agrees to pay \$3,000
8 in civil penalties within two (2) business days of the Effective Date. The penalty payment will be
9 allocated in accordance with California Health and Safety Code section 25249.12(c)(1) & (d), with
10 75% of the penalty amount remitted to the California Office of Environmental Health Hazard
11 Assessment (“OEHHA”) and the remaining 25% of the penalty amount paid to Donaldson and
12 delivered to the address in Section 3.3 herein. Home Essentials will provide its payment in two
13 checks as follows: (1) “OEHHA” in the amount of \$2,250; and (2) “Audrey Donaldson” in the
14 amount of \$750.

15 **3.2 Attorneys’ Fees and Costs**

16 The Parties acknowledge that Donaldson and her counsel offered to resolve this dispute
17 without reaching terms on the amount of attorney’s fees and costs to be reimbursed, thereby leaving
18 the issue to be resolved after the material terms of the agreement had been settled. Shortly after the
19 other settlement terms had been reached, Home Essentials expressed a desire to resolve the
20 attorney’s fees and costs. The Parties reached an accord on the compensation due to Donaldson’s
21 counsel under general contract principles and the private attorney general doctrine codified at Code
22 of Civil Procedure section 1021.5 for all work performed in this matter. Under these legal
23 principles, within two (2) business days of the Effective Date, Home Essentials agrees to pay
24 \$20,000, in the form of a check made payable to “Voorhees & Bailey, LLP,” for all fees and costs
25 incurred investigating, bringing this matter to the attention of Home Essentials’ management, and
26 negotiating a settlement in the public interest, but exclusive of fees and costs on appeal, if any.

1 **3.3 Payment Address**

2 All payments under this Consent Judgment shall be delivered to the following address:

3 Voorhees & Bailey, LLP
4 990 Amarillo Avenue
5 Palo Alto, CA 94303

6 **4. CLAIMS COVERED AND RELEASED**

7 **4.1 Donaldson’s Release of Proposition 65 Claims**

8 Donaldson, acting on her own behalf and in the public interest, releases Home Essentials
9 and its parents, subsidiaries, affiliated entities under common ownership, directors, officers,
10 employees, and attorneys (“Releasees”) and each entity to whom Home Essentials directly or
11 indirectly distributes or sells the Products including, but not limited to, its downstream distributors,
12 wholesalers, customers, retailers, franchisers, cooperative members, licensors and licensees,
13 (“Downstream Releasees”) for any violations arising under Proposition 65 for unwarned exposures
14 to DEHP and/or DBP from the Phthalate Products and from lead in the Lead Products,
15 manufactured, imported, distributed or sold by Home Essentials prior to the Effective Date, as set
16 forth in the Notices. The Parties further understand and agree that this Section 4.1 release shall not
17 extend upstream to any entities that manufactured the Products or any component parts thereof, or
18 any distributors or suppliers who sold the Products or any component parts thereof to Home
19 Essentials.

20 **4.2 Donaldson’s Individual Release of Claims**

21 Donaldson, in her individual capacity only and *not* in her representative capacity, also
22 provides a release to Home Essentials, Releasees, and Downstream Releasees 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 Donaldso of any nature, character or kind, whether known or unknown, suspected or unsuspected,
26 arising out of alleged or actual exposures to DEHP and/or DBP in the Phthalate Products and lead
27 in the Lead Products manufactured, imported, distributed or sold by Home Essentials before the
28 Effective Date. The Parties further understand and agree that this Section 4.2 release shall not
29 extend upstream to any entities that manufactured the Products, or any component parts thereof, or

1 any distributors or suppliers who sold the Products, or any component parts thereof to Home
2 Essentials. Nothing in this Section affects Donaldson’s right to commence or prosecute an action
3 under Proposition 65 against a Releasee that does not involve Home Essentials’ Products.

4 **4.3 Home Essentials’ Release of Donaldson**

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

11 **5. COURT APPROVAL**

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

22 **6. SEVERABILITY**

23 If, subsequent to the execution of this Consent Judgment, any provision of this Consent
24 Judgment is deemed by a court to be unenforceable, the validity of the remaining provisions shall
25 not be adversely affected.

26 **7. GOVERNING LAW**

27 The terms of this Consent Judgment shall be governed by the laws of the State of California
28 and apply within the State of California. In the event that Proposition 65 is repealed or is otherwise

1 rendered inapplicable by reason of law generally, or as to the Products, then Home Essentials may
2 provide written notice to Donaldson of any asserted change in the law and shall have no further
3 injunctive obligations pursuant to this Consent Judgment with respect to, and to the extent that, the
4 Products are so affected.

5 **8. NOTICE**

6 Unless specified herein, all correspondence and notice required to be provided pursuant to
7 this Consent Judgment shall be in writing and sent by: (a) personal delivery; (b) first-class,
8 registered or certified mail, return receipt requested; or (c) a recognized overnight courier on any
9 Party by the other at the following addresses:

10 For Home Essentials:

11 Avrom R. Vann, Esq.
12 Avrom R. Vann, P.C.
13 Attorney at Law
14 1211 Avenue of the Americas; 40th Floor
15 New York, NY 10036

For Donaldson:

Voorhees & Bailey, LLP
Proposition 65 Coordinator
535 Ramona Street; Suite 5
Palo Alto, CA 94301

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

18 **9. COUNTERPARTS; FACSIMILE AND PDF SIGNATURES**

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

22 **10. COMPLIANCE WITH HEALTH & SAFETY CODE § 25249.7(f)**

23 Donaldson and her attorneys agree to comply with the reporting form requirements
24 referenced in California Health and Safety Code section 25249.7(f).

25 **11. MODIFICATION**

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

1 **12. AUTHORIZATION**

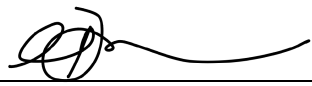
2 The undersigned are authorized to execute this Consent Judgment on behalf of their
3 respective Parties and have read, understand, and agreed to all of the terms and conditions of this
4 Consent Judgment.

5
6 **AGREED TO:**

AGREED TO:

7 Date: Jan 21, 2022

Date:

8
9 By:  _____
10 AUDREY DONALDSON

By: _____
_____, President/CEO
11 HOME ESSENTIALS

12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 **12. AUTHORIZATION**

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

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

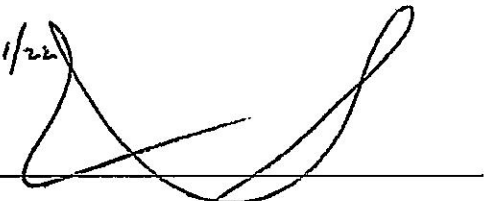
AGREED TO:

AGREED TO:

Date: Jan 21, 2022

Date: 2/1/22

By: 

By: 

AUDREY DONALDSON

ISIDORE GOUNGER, President/CEO

HOME ESSENTIALS