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

11 DONATUS MCCOY,

12 Plaintiff,

13 vs.

14 WEST MARINE PRODUCTS, INC.,

15 Defendant.

Case No.: CGC-22-602902

CONSENT JUDGMENT

Judge: Richard B. Ulmer

Dept.: 302

Hearing Date: March 4, 2024

Hearing Time: 9:30 AM

Complaint Filed: November 14, 2022

1 **1. INTRODUCTION**

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

10 **1.2 Allegations and Representations.** McCoy alleges that Defendant has exposed
11 individuals to diisononyl phthalate (DINP) from its sales of (a) Chartube waterproof cases, UPC #
12 740399932000, and (b) West Marine mesh bags, UPC # 025282070534, without providing a clear
13 and reasonable exposure warning pursuant to Proposition 65. DINP is listed under Proposition 65
14 as a chemical known to the State of California to cause cancer.

15 **1.3 Notice of Violation.** On or about November 17, 2021, McCoy served West Marine,
16 West Marine Products-Florida, Inc., Waterproof Charts, LLC, Landry Holdings, LLC, and various
17 public enforcement agencies with documents entitled “60-Day Notice of Violation of California
18 Safe Drinking Water and Toxic Enforcement Act” pursuant to Health & Safety Code §25249.7(d),
19 alleging that Defendant violated Proposition 65 by failing to warn consumers and customers that
20 use of Chartube waterproof cases, UPC # 740399932000, expose users in California to DINP. No
21 public enforcer has brought and is diligently prosecuting the claims alleged in the notice.

22 **1.4 Notice of Violation.** On or about November 19, 2021, McCoy served West Marine,
23 West Marine Products-Florida, Inc., and various public enforcement agencies with documents
24 entitled “60-Day Notice of Violation of California Safe Drinking Water and Toxic Enforcement
25 Act” pursuant to Health & Safety Code §25249.7(d), alleging that Defendant violated Proposition
26 65 by failing to warn consumers and customers that use of West Marine mesh bags, UPC #
27
28

1 025282070534 expose users in California to DINP. No public enforcer has brought and is diligently
2 prosecuting the claims alleged in the notice.

3 1.5 The “60-Day Notices of Violation of California Safe Drinking Water and Toxic
4 Enforcement Act” dated November 17, 2021 and November 19, 2021 are herein collectively
5 referred to as the “Notices.”

6 1.6 **Action.** On November 14, 2022, McCoy filed a complaint (the “Complaint”).

7 1.7 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
8 jurisdiction over Defendant as to the allegations contained in the Action filed in this matter, that
9 venue is proper in the County of San Francisco, and that this Court has jurisdiction to approve,
10 enter, and oversee the enforcement of this Consent Judgment as a full and final binding resolution
11 of all claims which were or could have been raised in the Action based on the facts alleged therein
12 and in the Notices.

13 1.8 Defendant denies the material allegations contained in McCoy’s Notices and
14 Complaint and maintains that it has not violated Proposition 65. Nothing in this Consent Judgment
15 shall be construed as an admission by Defendant of any fact, finding, issue of law, or violation of
16 law; nor shall compliance with this Consent Judgment constitute or be construed as an admission
17 by Defendant of any fact, finding, conclusion, issue of law, or violation of law, such being
18 specifically denied by Defendant. However, this section shall not diminish or otherwise affect the
19 obligations, responsibilities, and duties of Defendant under this Consent Judgment.

20 **2. DEFINITIONS**

21 2.1 **Covered Products.** The term “Covered Products” means (a) Chartube waterproof
22 cases, UPC # 740399932000, and (b) West Marine mesh bags, UPC # 025282070534, that are
23 manufactured, distributed, shipped into California and offered for sale in California by West
24 Marine.

25 2.2 **Effective Date.** The term “Effective Date” means the date this Consent Judgment is
26 entered as a Judgment of the Court.

1 **3. INJUNCTIVE RELIEF: REFORMULATION AND/OR WARNINGS**

2 **3.1 Reformulation of Covered Products.** As of the Effective Date and continuing
3 thereafter, Covered Products that West Marine directly manufactures, imports, distributes, sells, or
4 offers for sale in California shall either be: (a) Reformulated Products pursuant to § 3.2, below; or
5 (b) labeled with a clear and reasonable exposure warning pursuant to §§ 3.3 and 3.4, below. For
6 purposes of this Consent Judgment, a “Reformulated Product” is a Covered Product that is in
7 compliance with the standard set forth in § 3.2 below. The warning requirement set forth in §§ 3.3
8 and 3.4 shall not apply to any Reformulated Product.

9 **3.2 Reformulation Standard.** “Reformulated Products” shall mean Covered Products
10 that contain concentrations less than or equal to 0.1% (1,000 parts per million (ppm)) of DINP on
11 any component to which consumers are exposed when analyzed pursuant to U.S. Environmental
12 Protection Agency testing methodologies 3580A and 8270C or other methodology utilized by
13 federal or state government agencies for the purpose of determining the phthalate content in a solid
14 substance.

15 **3.3 Clear and Reasonable Warning.** As of the Effective Date and continuing
16 thereafter, a clear and reasonable exposure warning as set forth in this §§ 3.3 and 3.4 must be
17 provided for all Covered Products that Defendant manufactures, imports, distributes, sells, or
18 offers for sale in California that is not a Reformulated Product. There shall be no obligation for
19 Defendant to provide a warning for Covered Products that enter the stream of commerce prior to
20 the Effective Date, and the Section 5 release applies to all such Covered Products. The warning
21 shall consist of either the **Warning** or **Alternative Warning** described in §§ 3.3(a) or (b),
22 respectively:

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

24 ⚠ **WARNING:** This product can expose you to chemicals including diisononyl
25 phthalate (DINP), which is known to the State of California to cause cancer. For
more information go to www.P65Warnings.ca.gov.

26 (b) **Alternative Warning:** West Marine may, but is not required to, use the alternative
27 short-form warning as set forth in this § 3.3(b) (“**Alternative Warning**”) as follows:
28

⚠ WARNING: Cancer - www.P65Warnings.ca.gov.

3.4 A **Warning** or **Alternative Warning** provided pursuant to § 3.3 must print the word “**WARNING:**” in all capital letters and in bold font, followed by a colon. The warning symbol to the left of the word “**WARNING:**” must be a black exclamation point in a yellow equilateral triangle with a black outline, except that if the sign or label for the Covered Product does not use the color yellow, the symbol may be in black and white. The symbol must be in a size no smaller than the height of the word “**WARNING:**”. The **Warning** or **Alternative Warning** shall be affixed to or printed on the Covered Product’s packaging or labeling, or on a placard, shelf tag, sign or electronic device or automatic process, provided that the **Warning** or **Alternative Warning** is displayed with such conspicuousness, as compared with other words, statements, or designs as to render it likely to be read and understood by an ordinary individual under customary conditions of purchase or use. The **Warning** or **Alternative Warning** may be contained in the same section of the packaging, labeling, or instruction booklet that states other safety warnings, if any, concerning the use of the Covered Product and shall be at least the same size as those other safety warnings.

In addition to affixing the **Warning** or **Alternative Warning** to the Covered Product's packaging or labeling, the **Warning** or **Alternative Warning** shall be posted on websites where West Marine offers Covered Products for sale to consumers in California. The requirements of this Section shall be satisfied if the **Warning** or **Alternative Warning**, or a clearly marked hyperlink using the word "**WARNING**," appears on the product display page, or by otherwise prominently displaying the warning to the purchaser prior to completing the purchase. To comply with this Section, West Marine shall (a) post the **Warning** or **Alternative Warning** on its own website and, if it has the ability to do so, on the websites of its third-party internet sellers; and (b) if it does not have the ability to post the **Warning** or **Alternative Warning** on the websites of its third-party internet sellers, provide such sellers with written notice in accordance with Title 27, California Code of Regulations, § 25600.2. Third-party internet sellers of the Covered Product that have been

1 provided with written notice in accordance with Title 27, California Code of Regulations, § 25600.2
2 are not released in Section 5 of this Agreement if they fail to meet the warning requirements herein.

3 **3.5 Compliance with Warning Regulations.** Defendant shall be deemed to be in
4 compliance with Proposition 65 and this Consent Judgment by either adhering to §§ 3.3 and 3.4 of
5 this Consent Judgment or by complying with warning requirements adopted by OEHHA applicable
6 to the Covered Product and exposures at issue after the Effective Date. The Parties agree that after
7 the Effective Date, should compliance with Proposition 65 with respect to exposure to phthalates
8 from use of the Covered Products be governed by operation of law, West Marine may choose to
9 comply with such operation of law and such action would not be a breach or violation of this
10 Consent Judgment. If “consumer information,” as that term is defined in Title 27, California Code
11 of Regulations, Section 25600.1(c) as it may be amended from time to time, is provided in a
12 language other than English, West Marine shall provide the **Warning** or **Alternative Warning** in
13 that language in accordance with applicable warning regulations adopted by OEHHA.

14 **4. MONETARY TERMS**

15 **4.1 Civil Penalty.** West Marine shall pay \$1,000.00 as a Civil Penalty pursuant to
16 Health and Safety Code section 25249.7(b), to be apportioned in accordance with California Health
17 & Safety Code § 25192, with 75% of these funds remitted to OEHHA and the remaining 25% of
18 the Civil Penalty remitted to McCoy, as provided by California Health & Safety Code
19 § 25249.12(d).

20 **4.1.1** Within ten (10) days of the Effective Date, West Marine shall issue two
21 separate checks for the Civil Penalty payment to (a) “OEHHA” in the amount of \$750.00; and to
22 (b) “Donatus McCoy” in the amount of \$250.00. Payment owed to McCoy pursuant to this
23 Section shall be delivered to the following payment address:

24 Evan J. Smith, Esquire
25 Brodsky Smith
26 Two Bala Plaza, Suite 805
27 Bala Cynwyd, PA 19004

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

1 For United States Postal Service Delivery:

2 Mike Gyurics
3 Fiscal Operations Branch Chief
4 Office of Environmental Health Hazard Assessment
5 P.O. Box 4010
6 Sacramento, CA 95812-4010

7 For Non-United States Postal Service Delivery:

8 Mike Gyurics
9 Fiscal Operations Branch Chief
10 Office of Environmental Health Hazard Assessment
11 1001 I Street
12 Sacramento, CA 95814

13 A copy of the check payable to OEHHA shall be mailed to Brodsky Smith at the address set forth
14 above as proof of payment to OEHHA.

15 4.2 **Attorneys' Fees.** Within ten (10) days of the Effective Date, West Marine shall pay
16 \$16,500.00 to Brodsky Smith as complete reimbursement for McCoy's attorneys' fees and costs
17 incurred as a result of investigating, bringing this matter to the attention of West Marine, litigating
18 and negotiating and obtaining judicial approval of a settlement in the public interest, pursuant to
19 Code of Civil Procedure § 1021.5.

20 **5. RELEASE OF ALL CLAIMS**

21 5.1 This Consent Judgment is a full, final, and binding resolution between McCoy
22 acting on his own behalf, and on behalf of the public interest, and West Marine, and its parents,
23 shareholders, members, directors, officers, managers, employees, representatives, agents,
24 attorneys, divisions, subdivisions, subsidiaries, partners, sister companies, and affiliates, and their
25 predecessors, successors and assigns ("Defendant Releasees"), and all entities from whom they
26 obtain and to whom they directly or indirectly distribute or sell Covered Products, including but
27 not limited to manufacturers, suppliers, distributors, wholesalers, customers, licensors, licensees
28 retailers, including but not limited to, West Marine, and its parents, subsidiaries, and affiliates,
franchisees, and cooperative members ("Downstream Releasees"), of all claims for violations of
Proposition 65 based on exposure to DINP from use of the Covered Products manufactured,
distributed, or sold by West Marine prior to the Effective Date as set forth in the Notices. It is the

1 Parties' intention that this Consent Judgment shall have preclusive effect such that no other person
2 or entity, whether purporting to act in his, her, or its interests or the public interest shall be permitted
3 to pursue and take any action with respect to any violation of Proposition 65 based on exposure to
4 DINP from use of the Covered Products that was alleged in the Complaint, or that could have been
5 brought pursuant to the Notices against West Marine and the Downstream Releasees ("Proposition
6 65 Claims"). West Marine's compliance with the terms of this Consent Judgment constitutes
7 compliance with Proposition 65 by West Marine with regard to exposure to DINP from use of the
8 Covered Products.

9 5.2 In addition to the foregoing, McCoy, on behalf of himself, his past and current
10 agents, representatives, attorneys, and successors and assignees, and not in his representative
11 capacity, hereby waives all rights to institute or participate in, directly or indirectly, any form of
12 legal action and releases West Marine, Defendant Releasees, and Downstream Releasees from any
13 and all manner of actions, causes of action, claims, demands, rights, suits, obligations, debts,
14 contracts, agreements, promises, liabilities, damages, charges, losses, costs, expenses, and
15 attorneys' fees, of any nature whatsoever, known or unknown, in law or equity, fixed or contingent,
16 now or in the future, with respect to any alleged violations of Proposition 65 related to or arising
17 from Covered Products manufactured, distributed, or sold by West Marine, Defendant Releasees
18 or Downstream Releasees. With respect to the foregoing waivers and releases in this paragraph,
19 McCoy hereby specifically waives any and all rights and benefits which he now has, or in the future
20 may have, conferred by virtue of the provisions of § 1542 of the California Civil Code, which
21 provides as follows:

22 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS THAT THE
23 CREDITOR OR RELEASING PARTY DOES NOT KNOW OR SUSPECT TO
24 EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE
25 RELEASE AND THAT, IF KNOWN BY HIM OR HER, WOULD HAVE
MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE
DEBTOR OR RELEASED PARTY.

26 5.3 West Marine waives any and all claims against McCoy, his attorneys and other
27 representatives, for any and all actions taken, or statements made (or those that could have been
28 taken or made) by McCoy and his attorneys and other representatives, whether in the course of

1 investigating claims or otherwise seeking enforcement of Proposition 65 against it in this matter,
2 and with respect to Covered Products.

3 **6. INTEGRATION**

4 6.1 This Consent Judgment contains the sole and entire agreement of the Parties and
5 any and all prior negotiations and understandings related hereto shall be deemed to have been
6 merged within it. No representations or terms of agreement other than those contained herein exist
7 or have been made by any Party with respect to the other Party or the subject matter hereof.

8 **7. GOVERNING LAW**

9 7.1 The terms of this Consent Judgment shall be governed by the laws of the State of
10 California and apply within the State of California. In the event that Proposition 65 is repealed or
11 is otherwise rendered inapplicable by reason of law generally, or as to Covered Products, then
12 Defendant shall have no further obligations pursuant to this Consent Judgment with respect to, and
13 to the extent that, Covered Products are so affected.

14 **8. NOTICES**

15 8.1 Unless specified herein, all correspondence and notices required to be provided
16 pursuant to this Consent Judgment shall be in writing and personally delivered or sent by: (i) first-
17 class, (registered or certified mail) return receipt requested; or (ii) overnight courier on any party
18 by the other party at the following addresses:

19 For Defendant:

20 Paulee Day
21 Chief Legal and Human Resources Officer
22 West Marine
23 1 East Broward Boulevard
24 Fort Lauderdale, Florida 33301

25 And

26 For McCoy:

27 Evan Smith
28 Brodsky Smith
9595 Wilshire Blvd., Ste. 900
Beverly Hills, CA 90212

Any party, from time to time, may specify in writing to the other party a change of address to

1 which all notices and other communications shall be sent.

2 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

3 9.1 This Consent Judgment may be executed in counterparts and by facsimile, each of
4 which shall be deemed an original, and all of which, when taken together, shall constitute one and
5 the same document.

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

8 10.1 McCoy agrees to comply with the requirements set forth in California Health &
9 Safety Code § 25249.7(f) and to promptly bring a Motion for Approval of this Consent Judgment.
10 Defendant agrees it shall support approval of such Motion.

11 10.2 This Consent Judgment shall not be effective until it is approved and entered by the
12 Court and shall be null and void if, for any reason, it is not approved by the Court. In such case, the
13 Parties agree to meet and confer on how to proceed and if such agreement is not reached within 30
14 days, the case shall proceed on its normal course.

15 10.3 If the Court approves this Consent Judgment and is reversed or vacated by an
16 appellate court, the Parties shall meet and confer as to whether to modify the terms of this Consent
17 Judgment. If the Parties do not jointly agree on a course of action to take, the case shall proceed on
18 its normal course on the trial court's calendar.

19 **11. MODIFICATION**

20 11.1 This Consent Judgment may be modified only by further stipulation of the Parties
21 and the approval of the Court or upon the granting of a motion brought to the Court by either Party.

22 **12. ATTORNEY'S FEES**

23 12.1 A Party who unsuccessfully brings or contests an action arising out of this Consent
24 Judgment shall be required to pay the prevailing party's reasonable attorney's fees and costs.

25 12.2 Nothing in this Section shall preclude a Party from seeking an award of sanctions
26 pursuant to law.

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13. RETENTION OF JURISDICTION

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

14. AUTHORIZATION

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

AGREED TO:

AGREED TO:

Date: _____

Date: 11 / 9 / 23

By: _____
DONATUS MCCOY

By: Paula Day
WEST MARINE PRODUCTS, INC.

IT IS SO ORDERED, ADJUDGED AND DECREED:

Dated: _____

Judge of Superior Court

1 **13. RETENTION OF JURISDICTION**

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3 Consent Judgment.

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7 document and certify that he or she is fully authorized by the Party he or she represents to execute
8 the Consent Judgment on behalf of the Party represented and legally bind that Party. Except as
9 explicitly provided herein each Party is to bear its own fees and costs.

10 **AGREED TO:**

AGREED TO:

11
12 Date:

11/9/23

Date:

13 By:

DONATUS MCCOY

14 By:

WEST MARINE PRODUCTS, INC.

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

21
22 Dated:

23 Judge of Superior Court