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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

DONATUS MCCOY, Plaintiff, v. MERCER TOOL CORP., Defendant.	Case No.: CGC-22-602790 **CONSENT JUDGMENT** Judge: Richard B. Ulmer Dept.: 302 Hearing Date: May 16, 2023 Hearing Time: 9:30 AM Complaint Filed: November 4, 2022

1. INTRODUCTION

1.1 **The Parties.** This Consent Judgment is entered into by and between Donatus McCoy acting on behalf of the public interest ("McCoy") and Mercer Tool Corp. ("Mercer" or "Defendant") with McCoy and Defendant collectively referred to as the "Parties" and each of them as a "Party." McCoy is an individual residing in California that seeks to promote awareness of exposures to toxic chemicals and improve human health by reducing or eliminating hazardous substances contained in consumer products. Mercer is alleged to be a person in the course of doing business for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, California Health & Safety Code §§ 25249.6 et seq. ("Proposition 65").

1.2 **Allegations and Representations.** McCoy alleges that Defendant has exposed individuals to di(2-ethylhexyl) phthalate (DEHP) from its sales of Mercer bags without providing a clear and reasonable exposure warning pursuant to Proposition 65. DEHP is listed under Proposition 65 as a chemical known to the State of California to cause cancer and reproductive toxicity.

1.3 **Notice of Violation/Complaint.** On or about December 13, 2021, McCoy served Mercer, Chefs' Toys, LLC, and various public enforcement agencies with documents entitled "60-Day Notice of Violation" pursuant to Health & Safety Code §25249.7(d) (the "Notice"), alleging that Defendant violated Proposition 65 for failing to warn consumers and customers that use of Mercer bags expose users in California to DEHP. No public enforcer has brought and is diligently prosecuting the claims alleged in the Notice. On November 4, 2022, McCoy filed a complaint (the "Complaint") in the matter.

1.4 For purposes of this Consent Judgment only, the Parties stipulate that this Court has jurisdiction over Defendant as to the allegations contained in the Complaint filed in this matter, that venue is proper in the County of San Francisco, and that this Court has jurisdiction to approve, enter, and oversee the enforcement of this Consent Judgment as a full and final binding resolution of all allegations contained in the Complaint and of all claims which were or could have been raised in the Complaint based on the facts alleged therein or arising therefrom or related thereto, and/or

in the Notice.

1.5 Defendant denies the allegations contained in McCoy's Notice and Complaint and maintains that it has not violated Proposition 65. The Parties enter this Consent Judgment pursuant to a full and final settlement of any and all claims between the Parties existing as of the Effective Date (defined herein) for the purpose of avoiding prolonged litigation. Nothing in this Consent Judgment shall be construed as an admission by Defendant of any allegation in the Complaint, of any fact, finding, issue of law, conclusion of law, or violation of law, including without limitation, any admission concerning any violation of Proposition 65 or any other statutory, regulatory, common law, or equitable doctrine, or the meaning of the terms "knowingly and intentionally expose" or "clear and reasonable warning" as used in Health and Safety Code section 25249.6. Nothing in this Consent Judgment, nor shall compliance with its terms, constitute or be construed as an admission by Defendant of any fact, finding, conclusion of law, issue of law, or violation of law, such being specifically denied by Defendant, or of fault, wrongdoing, or liability by Defendant, or any of its officers, directors, employees, or parent, subsidiary or affiliated corporations, or be offered or admitted as evidence in any administrative or judicial proceeding or litigation in any court, agency, or forum. Furthermore, nothing in this Consent Judgment shall prejudice, waive, or impair any right, remedy, argument, or defense any of the Parties may have in any other or future legal proceeding, except as expressly provided in this Consent Judgment. However, this Section shall not diminish or otherwise affect the obligations, responsibilities, and duties of Defendant under this Consent Judgment.

2. DEFINITIONS

2.1 **Covered Products.** The term "Covered Products" means Mercer Tool/Cutlery Knife Bags/Rolls that are manufactured, distributed and/or offered for sale in California by Mercer.

2.2 **Effective Date.** The term "Effective Date" means the date this Consent Judgment is entered as a Judgment of the Court.

3. INJUNCTIVE RELIEF: REFORMULATION AND/OR WARNINGS

3.1 **Reformulation of Covered Products.** Commencing after the Effective Date, and continuing thereafter, Covered Products that Mercer directly manufactures, imports, distributes, sells, and which are offered for sale in California shall either: (a) be Reformulated Products pursuant to § 3.2, below; or (b) be labeled with a clear and reasonable exposure warning pursuant to §§ 3.3 and 3.4, below. For purposes of this Consent Judgment, a "Reformulated Product" is a Covered Product that is in compliance with the standard set forth in § 3.2 below. The warning requirement set forth in §§ 3.3 and 3.4 shall not apply to any Reformulated Product.

3.2 **Reformulation Standard.** "Reformulated Products" shall mean Covered Products that contain concentrations less than or equal to 0.1% (1,000 parts per million (ppm)) of DEHP when analyzed pursuant to U.S. Environmental Protection Agency testing method 8270C or other methodology utilized by federal or state government agencies for the purpose of determining the phthalate content in a substance comparable to Covered Products.

3.3 **Clear and Reasonable Warning**. As of the Effective Date, a clear and reasonable exposure warning as set forth in this §§ 3.3 and 3.4 must be provided for all Covered Products that Defendant directly manufacturers, imports, distributes, sells, and which are offered for sale in California that are not Reformulated Products. The warning shall consist of either the **Warning** or **Alternative Warning** described in §§ 3.3(a) or (b), respectively:

(a) **Warning**[1]. The "Warning" shall consist of the statement:

⚠ **WARNING**: This product can expose you to chemicals including di(2-ethylhexyl) phthalate (DEHP), which is known to the State of California to cause

[1] If Mercer has testing indicating that use of the Covered Product will expose persons above the safe harbor level to diisononyl phthalate ("DINP") only, Mercer shall use either the **Warning** provided in this footnote 1 or the **Warning** provided in footnote 2: "⚠ **WARNING**: This product can expose you to chemicals including diisononyl phthalate (DINP), which is known to the State of California to cause cancer. For more information go to www.P65Warnings.ca.gov." If Mercer has testing indicating that use of Covered Products will expose persons above the safe harbor level to DINP ***and*** DEHP is present in a concentration above the Reformulation Standard, Mercer shall provide the **Warning** set forth in § 3.3(a), §(b) or the following: "⚠ **WARNING**: This product can expose you to chemicals including diisononyl Phthalate (DINP), which is known to the State of California to cause cancer and di(2-ethylhexyl) phthalate (DEHP), which is known to the State of California to cause cancer and birth defects or other reproductive harm. For more information go to www.P65Warnings.ca.gov."

cancer and birth defects or other reproductive harm. For more information go to www.P65Warnings.ca.gov.

(b) **Alternative Warning**[2]: Mercer may, but is not required to, use the alternative short-form warning as set forth in this § 3.3(b) ("**Alternative Warning**") as follows:

⚠ **WARNING**: Cancer and Reproductive Harm - 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 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, providing that the 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. A 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 Mercer 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, Mercer shall post the **Warning** or **Alternative Warning** on its own website and, if it has

[2] If Mercer has testing indicating that use of the Covered Product will expose persons above the safe harbor level to DINP only, if using the **Alternative Warning**, the language shall be as follows, "⚠**WARNING**: Cancer - www.P65Warnings.ca.gov."

the ability to do so, on the websites of its third-party internet sellers. If Mercer has actual knowledge a third-party internet website is offering Covered Products for sale to California consumers that are not Reformulated Products, Mercer shall provide such sellers with written notice in accordance with Title 27, California Code of Regulations, § 25600.2.

3.5 **Sell Through Provision.** The requirements set forth in this § 3, including any requirement to reformulate or provide clear and reasonable warnings, apply only to Covered Products manufactured by Mercer after the Effective Date. Any Covered Products that have been manufactured, distributed, shipped, or sold by Mercer on or prior to the Effective Date shall not be subject to the Proposition 65 warning requirements of this § 3.

3.6 **Compliance with Warning Regulations.** Defendant shall be deemed to be in compliance with this Consent Judgment either by adhering to the Reformulation Standard set forth in § 3.2, the warning requirements in §§ 3.3 and 3.4 of this Consent Judgment, or by complying with warning requirements adopted by the State of California's Office of Environmental Health Hazard Assessment ("OEHHA") applicable to the Covered Product and the exposures at issue after the Effective Date.

4. MONETARY TERMS

4.1 **Civil Penalty.** Mercer shall pay $4,000.00 as a Civil Penalty pursuant to Health and Safety Code section 25249.7(b), to be apportioned in accordance with California Health & Safety Code § 25249.12(c)(1) and (d), with 75% of these funds remitted to OEHHA and the remaining 25% of the Civil Penalty remitted to McCoy, as provided by California Health & Safety Code § 25249.12(d). Separate 1099s shall be issued for each of the above payments. Mercer will issue a 1099 to OEHHA to the address provided below. Within two (2) business days of the Effective Date, Brodsky & Smith will provide Mercer with the employer identification number ("EIN") or social security number for McCoy and the EIN for Brodsky & Smith so that Mercer can issue a 1099 to McCoy, which will be sent to Brodsky & Smith as the address provided below.

4.1.1 Within ten (10) business days of the Effective Date, Mercer shall issue two separate checks for the Civil Penalty payment to (a) "OEHHA" in the amount of $3,000.00; and

to (b) "Donatus McCoy" in the amount of $1,000.00. Payment owed to McCoy pursuant to this Section shall be delivered to the following payment address:

Evan J. Smith, Esquire
Brodsky & Smith
Two Bala Plaza, Suite 805
Bala Cynwyd, PA 19004

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):

For United States Postal Service Delivery:

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

For Non-United States Postal Service Delivery:

Mike Gyurics
Fiscal Operations Branch Chief
Office of Environmental Health Hazard Assessment
1001 I Street
Sacramento, CA 95814

A copy of the check payable to OEHHA shall be mailed to Brodsky & Smith 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, Mercer shall pay $36,000.00 to Brodsky & Smith ("Brodsky & Smith") as complete reimbursement for McCoy's attorneys' fees and any and all costs incurred as a result of investigating, bringing this matter to Mercer's attention, litigating and negotiating and obtaining judicial approval of a settlement in the public interest, pursuant to Code of Civil Procedure § 1021.5.

5. RELEASE OF ALL CLAIMS

5.1 This Consent Judgment is a full, final, and binding resolution between McCoy acting on his own behalf, and on behalf of the public interest, and Mercer, and its parents, shareholders, members, directors, officers, managers, employees, representatives, agents, attorneys, divisions, subdivisions, subsidiaries, partners, sister companies, manufacturers,

suppliers, and affiliates, and each of their predecessors, successors and assigns (collectively, "Defendant Releasees"), and each entity to whom any Defendant Releasee directly or indirectly exports, distributes or sells Covered Products, including, but not limited to, manufacturers, suppliers, distributors, wholesalers, customers, licensors, licensees retailers, franchisees, and cooperative members, and each of their owners, purchasers, officers, directors, attorneys, representatives, shareholders, agents, employees, and sister and parent entities, including, but not limited to, Chefs' Toys, LLC (collectively, "Downstream Releasees"), for all claims that have been asserted for, could have been asserted for, or that arise out of alleged or actual violations of Proposition 65 or its implementing regulations for alleged exposures to either or both of DEHP and/or DINP from Covered Products prior to and including up to the Effective Date. Mercer, Defendant Releasees and Downstream Releasees are hereby collectively referred to as the "Released Parties." McCoy, on behalf of himself and in the public interest, hereby discharges and releases Released Parties from any and all claims, including, without limitation, all actions, and causes of action, in law or in equity, suits, liabilities, demands, obligations, damages, costs, fines, penalties, losses, or expenses (including, but not limited to, fees of attorneys, experts, and others) of any nature whatsoever, whether known or unknown, fixed or contingent, asserted for, that could have been asserted for, that arise out of alleged exposures to either or both of DEHP and/or DINP from Covered Products sold, manufactured or distributed by any Released Party in California up to the Effective Date, or the failure of any Released Party to provide clear, accurate and reasonable warnings under Proposition 65, Business and Professions Code §17200, et seq., or any other applicable law about exposure to either or both of DEHP and/or DINP, predicated or based on a violation of Proposition 65, arising from the sale, distribution, or use of any Covered Products sold, manufactured or distributed by any Released Party in California up to the Effective Date (collectively "Claims"). Compliance with the Consent Judgment by any Released Party shall constitute compliance with Proposition 65 by all Released Parties with respect to the presence of either or both of DEHP and/or DINP in the Covered Products on and after the Effective Date. McCoy agrees that any and all Claims are resolved with prejudice by this Consent Judgment. The

release in this Section 5.1 applies to all Covered Products that Mercer manufactured, distributed, or sold on or prior to the Effective Date, regardless of the date any other Released Party may distribute or sell the Covered Products that Mercer manufactured, distributed, or sold on or prior to the Effective Date.

5.2 In addition to the foregoing, McCoy, on behalf of himself, his past and current agents, representatives, attorneys, and successors and/or assignees, and *not* in his representative capacity, hereby waives all rights to institute or participate in, directly or indirectly, any form of legal action and discharges and releases Mercer, Defendant Releasees, and Downstream Releasees from any and all Claims (as that term is defined herein) arising under Proposition 65 related to or arising from either or both of DEHP and/or DINP exposure from Covered Products manufactured, distributed, or sold by Mercer, Defendant Releasees or Downstream Releasees. It is possible that other claims not known to the Parties arising out of the facts contained in the Notice, or alleged in the Complaint, relating to the Covered Products, will hereafter be discovered or developed. McCoy, on behalf of himself only, acknowledges that this Consent Judgment is expressly intended to cover and include all such claims through and including the Effective Date, including all rights of action therefor. McCoy acknowledges that the Claims released in Sections 5.1 and 5.2 may include unknown claims, and nevertheless McCoy intends to release such claims, and in doing so waives California Civil Code § 1542 (and any other state, federal, or international law of similar import), which reads as follows:

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

McCoy understands and acknowledges that the significance and consequence of this waiver of California Civil Code section 1542 is that even if McCoy suffers future damages arising out of or resulting from, or related directly or indirectly to, in whole or in part, Claims arising from any violation of Proposition 65 or any other statutory or common law regarding the failure to warn

about exposure to either or both of DEHP and/or DINP from the Covered Products, including but not limited to, any exposure to, or failure to warn with respect to exposure to either or both of DEHP and/or DINP from the Covered Products, McCoy will not be able to make any claim for those damages against Released Parties. Furthermore, McCoy acknowledges that he intends these consequences for any such Claims arising from any violation of Proposition 65 or any other statutory or common law regarding the failure to warn about exposure to either or both of DEHP and/or DINP from Covered Products as may exist as of the date of this release but which McCoy does not know exist, and which, if known, would materially affect his decision to enter into this Consent Judgment, regardless of whether his lack of knowledge is the result of ignorance, oversight, error, negligence, or any other cause.

5.3 Mercer waives any and all claims against McCoy, his attorneys and other representatives, for any and all actions taken, or statements made (or those that could have been taken or made) by McCoy and his attorneys and other representatives, whether in the course of investigating claims or otherwise seeking enforcement of Proposition 65 against it in this matter, and/or with respect to exposure to either or both of DEHP and/or DINP from Covered Products.

6. INTEGRATION

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

7. GOVERNING LAW

7.1 The terms of this Consent Judgment shall be governed by the laws of the State of California and apply within the State of California. If Proposition 65 is repealed, preempted, or is otherwise rendered inapplicable by reason of law generally, or if any of the provisions of this Consent Judgment are rendered inapplicable or are no longer required as a result of any such repeal or preemption, or rendered inapplicable by reason of law generally as to Covered Products, then

Defendant shall have no further obligations pursuant to this Consent Judgment with respect to, and to the extent that, Covered Products are so affected.

7.2 The Parties, including their counsel, have participated in the preparation of this Consent Judgment and this Consent Judgment is the result of the joint efforts of the Parties. This Consent Judgment was subject to revision and modification by the Parties and has been accepted and approved as to its final form by all Parties and their counsel. Accordingly, any uncertainty or ambiguity existing in this Consent Judgment shall not be interpreted against any Party as a result of the manner of the preparation of this Consent Judgment. Each Party to this Consent Judgment agrees that any statute or rule of construction providing that ambiguities are to be resolved against the drafting Party should not be employed in the interpretation of this Consent Judgment and, in this regard, the Parties hereby waive California Civil Code § 1654.

8. NOTICES

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

For Defendant:

Jonathan D. Baker
Dickinson Wright RLLP
615 National Ave., Suite 220
Mountain View, CA 94043
Email: JDBaker@dickinson-wright.com
Tel.: 408-701-6180

Mark Rogge
Dickinson Wright RLLP
615 National Ave., Suite 220
Mountain View, CA 94043
Email: MRogge@dickinsonwright.com
Tel.: 408-701-6146

Ann Marie Sanford
Dickinson Wright PLLC
2600 W. Big Beaver Rd., Suite 300
Troy MI 48084
Email: ASanford@dickinsonwright.com
Tel.: 248-205-3246

For McCoy:

Evan Smith
Brodsky & Smith
9595 Wilshire Blvd., Ste. 900
Beverly Hills, CA 90212
Email: esmith@brodsky-smith.com
Tel.: 877-534-2590

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

9. COUNTERPARTS; SIGNATURES

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

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

10.1 McCoy agrees to comply with the requirements set forth in California Health & Safety Code § 25249.7(f) and to promptly bring a Motion for Approval of this Consent Judgment. Defendant agrees it shall support approval of such Motion. Upon entry of the Consent Judgment, McCoy and Mercer waive their respective rights to a hearing or trial on the allegations of the Complaint.

10.2 This Consent Judgment shall not be effective until it is approved and entered by the Court. If it is not approved in full by the Court, this Consent Judgment shall be null and void and shall not be admissible in evidence for any purpose in this Action, or in any other proceeding, and the Parties agree to meet and confer on how to proceed and if such agreement is not reached within thirty (30) days, the case shall proceed on its normal course.

11. MODIFICATION

11.1 This Consent Judgment may be modified only by written agreement of the Parties and upon entry of such modified Consent Judgment by the Court.

12. ATTORNEY'S FEES

12.1 Except as provided in § 4.2, each Party shall bear its own costs and attorney fees in connection with this Action.

13. RETENTION OF JURISDICTION

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

13.2 In any proceeding brought by either Party to enforce this Consent Judgment, the prevailing party shall be entitled to recover its reasonable attorney's fees and costs. In the event McCoy files an action against Mercer that is prohibited by the releases contained in § 5 of this Consent Judgment, Mercer shall be entitled to recover its reasonable attorney fees and costs to defend against such action.

14. AUTHORIZATION

14.1 Each signatory to this Consent Judgment certifies that he or she is fully authorized by the party he or she represents to enter into this Consent Judgment and to execute it on behalf of the party represented and legally to bind that party.

AGREED TO:

Date:_____

By:_____
DONATUS MCCOY

AGREED TO:

Date: JANUARY 17, 2023

By: Lawrence Wallick

Name: LAWRENCE WALLICK

Title: CFO
MERCER TOOL CORP.

IT IS SO ORDERED, ADJUDGED AND DECREED:

Dated:_____

_____
Judge of Superior Court

12. ATTORNEY'S FEES

12.1 Except as provided in § 4.2, each Party shall bear its own costs and attorney fees in connection with this Action.

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14.1 Each signatory to this Consent Judgment certifies that he or she is fully authorized by the party he or she represents to enter into this Consent Judgment and to execute it on behalf of the party represented and legally to bind that party.

AGREED TO:

Date: 3/28/23

By: _____
DONATUS MCCOY

AGREED TO:

Date: _____

By: _____

Name: _____

Title: _____
MERCER TOOL CORP.

IT IS SO ORDERED, ADJUDGED AND DECREED:

Dated: _____

_____
Judge of Superior Court