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

11 DONATUS MCCOY,
12 Plaintiff,
13 v.
14 MERCER TOOL CORP.,
15 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

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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 (“McCoy”) and Mercer Tool Corp. (“Mercer” or
4 “Defendant”) with McCoy and Defendant collectively referred to as the “Parties” and each of them
5 as a “Party.” McCoy is an individual residing in California that seeks to promote awareness of
6 exposures to toxic chemicals and improve human health by reducing or eliminating hazardous
7 substances contained in consumer products. Mercer is alleged to be a person in the course of doing
8 business for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, California
9 Health & Safety Code §§ 25249.6 et seq. (“Proposition 65”).

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

15 1.3 **Notice of Violation/Complaint.** On or about December 13, 2021, McCoy served
16 Mercer, Chefs’ Toys, LLC, and various public enforcement agencies with documents entitled “60-
17 Day Notice of Violation” pursuant to Health & Safety Code §25249.7(d) (the “Notice”), alleging
18 that Defendant violated Proposition 65 for failing to warn consumers and customers that use of
19 Mercer bags expose users in California to DEHP. No public enforcer has brought and is diligently
20 prosecuting the claims alleged in the Notice. On November 4, 2022, McCoy filed a complaint (the
21 “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 San Francisco, and that this Court has jurisdiction to approve,
25 enter, and oversee the enforcement of this Consent Judgment as a full and final binding resolution
26 of all allegations contained in the Complaint and of all claims which were or could have been raised
27 in the Complaint based on the facts alleged therein or arising therefrom or related thereto, and/or
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1 in the Notice.

2 1.5 Defendant denies the allegations contained in McCoy’s Notice and Complaint and
3 maintains that it has not violated Proposition 65. The Parties enter this Consent Judgment pursuant
4 to a full and final settlement of any and all claims between the Parties existing as of the Effective
5 Date (defined herein) for the purpose of avoiding prolonged litigation. Nothing in this Consent
6 Judgment shall be construed as an admission by Defendant of any allegation in the Complaint, of
7 any fact, finding, issue of law, conclusion of law, or violation of law, including without limitation,
8 any admission concerning any violation of Proposition 65 or any other statutory, regulatory,
9 common law, or equitable doctrine, or the meaning of the terms “knowingly and intentionally
10 expose” or “clear and reasonable warning” as used in Health and Safety Code section 25249.6.
11 Nothing in this Consent Judgment, nor shall compliance with its terms, constitute or be construed
12 as an admission by Defendant of any fact, finding, conclusion of law, issue of law, or violation of
13 law, such being specifically denied by Defendant, or of fault, wrongdoing, or liability by Defendant,
14 or any of its officers, directors, employees, or parent, subsidiary or affiliated corporations, or be
15 offered or admitted as evidence in any administrative or judicial proceeding or litigation in any
16 court, agency, or forum. Furthermore, nothing in this Consent Judgment shall prejudice, waive, or
17 impair any right, remedy, argument, or defense any of the Parties may have in any other or future
18 legal proceeding, except as expressly provided in this Consent Judgment. However, this Section
19 shall not diminish or otherwise affect the obligations, responsibilities, and duties of Defendant
20 under this Consent Judgment.

21 **2. DEFINITIONS**

22 2.1 **Covered Products.** The term “Covered Products” means Mercer Tool/Cutlery
23 Knife Bags/Rolls that are manufactured, distributed and/or offered for sale in California by Mercer.

24 2.2 **Effective Date.** The term “Effective Date” means the date this Consent Judgment is
25 entered as a Judgment of the Court.
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1 **3. INJUNCTIVE RELIEF: REFORMULATION AND/OR WARNINGS**

2 **3.1 Reformulation of Covered Products.** Commencing after the Effective Date, and
3 continuing thereafter, Covered Products that Mercer directly manufactures, imports, distributes,
4 sells, and which are offered for sale in California shall either: (a) be Reformulated Products
5 pursuant to § 3.2, below; or (b) be labeled with a clear and reasonable exposure warning pursuant
6 to §§ 3.3 and 3.4, below. For purposes of this Consent Judgment, a “Reformulated Product” is a
7 Covered Product that is in compliance with the standard set forth in § 3.2 below. The warning
8 requirement set forth in §§ 3.3 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 DEHP
11 when analyzed pursuant to U.S. Environmental Protection Agency testing method 8270C or other
12 methodology utilized by federal or state government agencies for the purpose of determining the
13 phthalate content in a substance comparable to Covered Products.

14 **3.3 Clear and Reasonable Warning.** As of the Effective Date, a clear and reasonable
15 exposure warning as set forth in this §§ 3.3 and 3.4 must be provided for all Covered Products that
16 Defendant directly manufactures, imports, distributes, sells, and which are offered for sale in
17 California that are not Reformulated Products. The warning shall consist of either the **Warning** or
18 **Alternative Warning** described in §§ 3.3(a) or (b), respectively:

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

20 **⚠ WARNING:** This product can expose you to chemicals including di(2-
21 ethylhexyl) phthalate (DEHP), which is known to the State of California to cause
22 cancer and birth defects or other reproductive harm. For more information go to
www.P65Warnings.ca.gov.

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

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

26 **3.4 A Warning or Alternative Warning** provided pursuant to § 3.3 must print the word
27 “**WARNING:**” in all capital letters and in bold font, followed by a colon. The warning symbol to
28 the left of the word “**WARNING:**” must be a black exclamation point in a yellow equilateral

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

11 In addition to affixing the **Warning** or **Alternative Warning** to the Covered Product’s
12 packaging or labeling, the **Warning** or **Alternative Warning** shall be posted on websites where
13 Mercer offers Covered Products for sale to consumers in California. The requirements of this
14 Section shall be satisfied if the **Warning** or **Alternative Warning**, or a clearly marked hyperlink
15 using the word “**WARNING,**” appears on the product display page, or by otherwise prominently
16 displaying the warning to the purchaser prior to completing the purchase. To comply with this
17 Section, Mercer shall post the **Warning** or **Alternative Warning** on its own website and, if it has
18 the ability to do so, on the websites of its third-party internet sellers. If Mercer has actual knowledge
19 a third-party internet website is offering Covered Products for sale to California consumers that are
20 not Reformulated Products, Mercer shall provide such sellers with written notice in accordance
21 with Title 27, California Code of Regulations, § 25600.2.

22 3.5 **Sell Through Provision.** The requirements set forth in this § 3, including any
23 requirement to reformulate or provide clear and reasonable warnings, apply only to Covered
24 Products manufactured by Mercer after the Effective Date. Any Covered Products that have been
25 manufactured, distributed, shipped, or sold by Mercer on or prior to the Effective Date shall not be
26 subject to the Proposition 65 warning requirements of this § 3.

1 3.6 **Compliance with Warning Regulations.** Defendant shall be deemed to be in
2 compliance with this Consent Judgment either by adhering to the Reformulation Standard set forth
3 in § 3.2, the warning requirements in §§ 3.3 and 3.4 of this Consent Judgment, or by complying
4 with warning requirements adopted by the State of California’s Office of Environmental Health
5 Hazard Assessment (“OEHHA”) applicable to the Covered Product and the exposures at issue after
6 the Effective Date.

7 **4. MONETARY TERMS**

8 4.1 **Civil Penalty.** Mercer shall pay \$4,000.00 as a Civil Penalty pursuant to Health and
9 Safety Code section 25249.7(b), to be apportioned in accordance with California Health & Safety
10 Code § 25249.12(c)(1) and (d), with 75% of these funds remitted to OEHHA and the remaining
11 25% of the Civil Penalty remitted to McCoy, as provided by California Health & Safety Code
12 § 25249.12(d). Separate 1099s shall be issued for each of the above payments. Mercer will issue a
13 1099 to OEHHA to the address provided below. Within two (2) business days of the Effective Date,
14 Brodsky & Smith will provide Mercer with the employer identification number (“EIN”) or social
15 security number for McCoy and the EIN for Brodsky & Smith so that Mercer can issue a 1099 to
16 McCoy, which will be sent to Brodsky & Smith as the address provided below.

17 4.1.1 Within ten (10) business days of the Effective Date, Mercer shall issue two
18 separate checks for the Civil Penalty payment to (a) “OEHHA” in the amount of \$3,000.00; and
19 to (b) “Donatus McCoy” in the amount of \$1,000.00. Payment owed to McCoy pursuant to this
20 Section shall be delivered to the following payment address:

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

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

27 For United States Postal Service Delivery:

28 Mike Gyurics
 Fiscal Operations Branch Chief
 Office of Environmental Health Hazard Assessment

1 P.O. Box 4010
2 Sacramento, CA 95812-4010

3 For Non-United States Postal Service Delivery:

4 Mike Gyurics
5 Fiscal Operations Branch Chief
6 Office of Environmental Health Hazard Assessment
7 1001 I Street
8 Sacramento, CA 95814

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

11 4.2 **Attorneys' Fees.** Within ten (10) business days of the Effective Date, Mercer shall
12 pay \$36,000.00 to Brodsky & Smith ("Brodsky & Smith") as complete reimbursement for McCoy's
13 attorneys' fees and any and all costs incurred as a result of investigating, bringing this matter to
14 Mercer's attention, litigating and negotiating and obtaining judicial approval of a settlement in the
15 public interest, pursuant to Code of Civil Procedure § 1021.5.

16 **5. RELEASE OF ALL CLAIMS**

17 5.1 This Consent Judgment is a full, final, and binding resolution between McCoy
18 acting on his own behalf, and on behalf of the public interest, and Mercer, and its parents,
19 shareholders, members, directors, officers, managers, employees, representatives, agents,
20 attorneys, divisions, subdivisions, subsidiaries, partners, sister companies, manufacturers,
21 suppliers, and affiliates, and each of their predecessors, successors and assigns (collectively,
22 "Defendant Releasees"), and each entity to whom any Defendant Releasee directly or indirectly
23 exports, distributes or sells Covered Products, including, but not limited to, manufacturers,
24 suppliers, distributors, wholesalers, customers, licensors, licensees retailers, franchisees, and
25 cooperative members, and each of their owners, purchasers, officers, directors, attorneys,
26 representatives, shareholders, agents, employees, and sister and parent entities, including, but not
27 limited to, Chefs' Toys, LLC (collectively, "Downstream Releasees"), for all claims that have been
28 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 DEHP from Covered
Products prior to and including up to the Effective Date. Mercer, Defendant Releasees and

1 Downstream Releasees are hereby collectively referred to as the “Released Parties.” McCoy, on
2 behalf of himself and in the public interest, hereby discharges and releases Released Parties from
3 any and all claims, including, without limitation, all actions, and causes of action, in law or in
4 equity, suits, liabilities, demands, obligations, damages, costs, fines, penalties, losses, or expenses
5 (including, but not limited to, fees of attorneys, experts, and others) for all claims that have been
6 asserted for, could have been asserted for, or that arise out of alleged or actual violations of
7 Proposition 65 or its implementing regulations for alleged exposures to DEHP from Covered
8 Products sold, manufactured or distributed by any Released Party in California up to the Effective
9 Date due to the failure of any Released Party to provide clear, accurate and reasonable warnings
10 under Proposition 65, Business and Professions Code §17200, et seq., or any other applicable law
11 about exposure to DEHP, predicated or based on a violation of Proposition 65, arising from the
12 sale, distribution, or use of any Covered Products sold, manufactured or distributed by any Released
13 Party in California up to the Effective Date (collectively “Claims”). McCoy agrees that any and all
14 Claims are resolved with prejudice by this Consent Judgment, provided, however, if any entity to
15 whom Defendant provided actual notice prior to the Effective Date, in accordance with Title 27,
16 California Code of Regulations, § 25600.2, that a Covered Product contains DEHP in excess of the
17 Reformulation Standard, and such entity did not provide the **Warning** or **Alternative Warning**,
18 then only such entity is not released in this Section 5.1 and the release in this Section 5.1 remains
19 as to all other Released Parties. The release in this Section 5.1 applies to all Covered Products that
20 Mercer manufactured, distributed, or sold on or prior to the Effective Date, regardless of the date
21 any other Released Party may distribute or sell the Covered Products that Mercer manufactured,
22 distributed, or sold on or prior to the Effective Date.

23 5.2 In addition to the foregoing, McCoy, on behalf of himself, his past and current
24 agents, representatives, attorneys, and successors and/or assignees, and not in his representative
25 capacity, hereby waives all rights to institute or participate in, directly or indirectly, any form of
26 legal action and discharges and releases Mercer, Defendant Releasees, and Downstream Releasees
27 from any and all Claims (as that term is defined herein) arising under Proposition 65 related to or
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1 arising from either or both of DEHP and/or diisononyl phthalate ("DINP") exposure from Covered
2 Products manufactured, distributed, or sold by Mercer, Defendant Releasees or Downstream
3 Releasees. It is possible that other claims not known to the Parties arising out of the facts contained
4 in the Notice, or alleged in the Complaint, relating to the Covered Products, will hereafter be
5 discovered or developed. McCoy, on behalf of himself only, acknowledges that this Consent
6 Judgment is expressly intended to cover and include all such claims through and including the
7 Effective Date, including all rights of action therefor. McCoy acknowledges that the Claims
8 released in Sections 5.1 and 5.2 may include unknown claims, and nevertheless McCoy intends to
9 release such claims, and in doing so waives California Civil Code § 1542 (and any other state,
10 federal, or international law of similar import), which reads as follows:

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

15 McCoy understands and acknowledges that the significance and consequence of this waiver of
16 California Civil Code section 1542 is that even if McCoy suffers future damages arising out of or
17 resulting from, or related directly or indirectly to, in whole or in part, Claims arising from any
18 violation of Proposition 65 or any other statutory or common law regarding the failure to warn
19 about exposure to DEHP from the Covered Products, including but not limited to, any exposure to,
20 or failure to warn with respect to exposure to either or both of DEHP and/or DINP from the Covered
21 Products, McCoy will not be able to make any claim for those damages against Released Parties.
22 Furthermore, McCoy acknowledges that he intends these consequences for any such Claims arising
23 from any violation of Proposition 65 or any other statutory or common law regarding the failure to
24 warn about exposure to either or both of DEHP and/or DINP from Covered Products as may exist
25 as of the date of this release but which McCoy does not know exist, and which, if known, would
26 materially affect his decision to enter into this Consent Judgment, regardless of whether his lack of
27 knowledge is the result of ignorance, oversight, error, negligence, or any other cause.
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1 5.3 Mercer waives any and all claims against McCoy, his attorneys and other
2 representatives, for any and all actions taken, or statements made (or those that could have been
3 taken or made) by McCoy and his attorneys and other representatives, whether in the course of
4 investigating claims or otherwise seeking enforcement of Proposition 65 against it in this matter,
5 and/or with respect to exposure to DEHP from Covered Products.

6 **6. INTEGRATION**

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

11 **7. GOVERNING LAW**

12 7.1 The terms of this Consent Judgment shall be governed by the laws of the State of
13 California and apply within the State of California. If Proposition 65 is repealed, preempted, or is
14 otherwise rendered inapplicable by reason of law generally, or if any of the provisions of this
15 Consent Judgment are rendered inapplicable or are no longer required as a result of any such repeal
16 or preemption, or rendered inapplicable by reason of law generally as to Covered Products, then
17 Defendant shall have no further obligations pursuant to this Consent Judgment with respect to, and
18 to the extent that, Covered Products are so affected.

19 7.2 The Parties, including their counsel, have participated in the preparation of this
20 Consent Judgment and this Consent Judgment is the result of the joint efforts of the Parties. This
21 Consent Judgment was subject to revision and modification by the Parties and has been accepted
22 and approved as to its final form by all Parties and their counsel. Accordingly, any uncertainty or
23 ambiguity existing in this Consent Judgment shall not be interpreted against any Party as a result
24 of the manner of the preparation of this Consent Judgment. Each Party to this Consent Judgment
25 agrees that any statute or rule of construction providing that ambiguities are to be resolved against
26 the drafting Party should not be employed in the interpretation of this Consent Judgment and, in
27 this regard, the Parties hereby waive California Civil Code § 1654.
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1 **8. NOTICES**

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

6 For Defendant:

7 Jonathan D. Baker
8 Dickinson Wright RLLP
9 615 National Ave., Suite 220
10 Mountain View, CA 94043
11 Email: JDBaker@dickinson-wright.com
12 Tel.: 408-701-6180

13 Mark Rogge
14 Dickinson Wright RLLP
15 615 National Ave., Suite 220
16 Mountain View, CA 94043
17 Email: MRogge@dickinsonwright.com
18 Tel.: 408-701-6146

19 Ann Marie Sanford
20 Dickinson Wright PLLC
21 2600 W. Big Beaver Rd., Suite 300
22 Troy MI 48084
23 Email: ASanford@dickinsonwright.com
24 Tel.: 248-205-3246

25 For McCoy:

26 Evan Smith
27 Brodsky & Smith
28 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.

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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.

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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:

AGREED TO:

Date: _____

Date: JANUARY 17, 2023

By: _____
DONATUS MCCOY

By: Lawrence Wallick

Name: LAWRENCE WALLICK

Title: CFO
MERCER TOOL CORP.

IT IS SO ORDERED, ADJUDGED AND DECREED:

Dated: _____

Judge of Superior Court

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AGREED TO:

AGREED TO:

Date: 3/28/23
By: [Signature]
DONATUS MCCOY

Date: _____
By: _____
Name: _____
Title: _____
MERCER TOOL CORP.

IT IS SO ORDERED, ADJUDGED AND DECREED:

Dated: _____
Judge of Superior Court