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

11 DONATUS MCCOY,

12 Plaintiff,

13 v.

14 KARTEK OFF ROAD, INC.,

15 Defendant.

Case No.: CGC-22-603631

CONSENT JUDGMENT

Judge: Richard B. Ulmer

Dept.: 302

Hearing Date: April 12, 2024

Hearing Time: 9:30 AM

Complaint Filed: December 22, 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 Kartek Off Road, Inc.
4 (“Kartek” or “Defendant”) with McCoy and Defendant collectively referred to as the “Parties” and
5 each of them as a “Party.” McCoy is an individual residing in California that seeks to promote
6 awareness of exposures to toxic chemicals and improve human health by reducing or eliminating
7 hazardous substances contained in consumer products. Kartek is alleged to be a person in the course
8 of doing business for purposes of Proposition 65, Cal. Health & Safety Code §§ 25249.6 et seq.

9 1.2 **Allegations and Representations.** McCoy alleges that Defendant has exposed
10 individuals to di(2-ethylhexyl) phthalate (DEHP) from its sales of *Mean Mother*® recovery
11 blankets, UPC # 93119021873, without providing a clear and reasonable exposure warning
12 pursuant to Proposition 65. DEHP is listed pursuant to Proposition 65 as a chemical known to the
13 State of California to cause cancer and birth defects or other reproductive harm.

14 1.3 **Notice of Violation/Action.** On or about January 7, 2022, McCoy served Kartek
15 and various public enforcement agencies with documents entitled “60-Day Notice of Violation”
16 pursuant to Health & Safety Code §25249.7(d) (the “Notice”), alleging that Defendant violated
17 Proposition 65 for failing to warn consumers and customers that use of *Mean Mother*® recovery
18 blankets, UPC # 93119021873, expose users in California to DEHP. No public enforcer has brought
19 and is diligently prosecuting the claims alleged in the Notice. On December 22, 2022, McCoy filed
20 a complaint (the “Complaint”).

21 1.4 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
22 jurisdiction over Defendant as to the allegations contained in the Action filed in this matter, that
23 venue is proper in the County of San Francisco, and that this Court has jurisdiction to approve,
24 enter, and oversee the enforcement of this Consent Judgment as a full and final binding resolution
25 of all claims which were or could have been raised in the Action based on the facts alleged therein
26 and in the Notice.

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

8 **2. DEFINITIONS**

9 2.1 **Covered Products.** The term “Covered Products” means *Mean Mother*® recovery
10 blankets, UPC # 93119021873, that are manufactured, distributed, shipped into California and
11 offered for sale in California by Kartek.

12 2.2 **Effective Date.** The term “Effective Date” means the date this Consent Judgment is
13 entered as a Judgment of the Court.

14 **3. INJUNCTIVE RELIEF: WARNINGS**

15 3.1 **Clear and Reasonable Warning.** As of the date this Consent Judgment is signed
16 by both Parties, and continuing thereafter, a clear and reasonable exposure warning as set forth in
17 this §§ 3.1 and 3.2 must be provided for all Covered Products that Defendant manufacturers,
18 imports, distributes, sells, or offers for sale in California. There shall be no obligation for Defendant
19 to provide a warning for Covered Products that enter the stream of commerce prior to the date this
20 Consent Judgment is signed by both Parties. The warning shall consist of either the **Warning** or
21 **Alternative Warning** described in §§ 3.1(a) or (b), respectively:

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

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

26 (b) **Alternative Warning:** Kartek may, but is not required to, use the alternative short-
27 form warning as set forth in this § 3.1(b) (“**Alternative Warning**”) as follows:

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

1 3.2 A **Warning** or **Alternative Warning** provided pursuant to § 3.1 must print the word
2 “**WARNING:**” in all capital letters and in bold font, followed by a colon. The warning symbol to
3 the left of the word “**WARNING:**” must be a black exclamation point in a yellow equilateral
4 triangle with a black outline, except that if the sign or label for the Covered Product does not use
5 the color yellow, the symbol may be in black and white. The symbol must be in a size no smaller
6 than the height of the word “**WARNING:**”. The **Warning** or **Alternative Warning** shall be affixed
7 to or printed on the Covered Product’s packaging or labeling, or on a placard, shelf tag, sign or
8 electronic device or automatic process, providing that the **Warning** or **Alternative Warning** is
9 displayed with such conspicuousness, as compared with other words, statements, or designs as to
10 render it likely to be read and understood by an ordinary individual under customary conditions of
11 purchase or use. The **Warning** or **Alternative Warning** may be contained in the same section of
12 the packaging, labeling, or instruction booklet that states other safety warnings, if any, concerning
13 the use of the Covered Product and shall be at least the same size as those other safety warnings.

14 In addition to affixing the **Warning** or **Alternative Warning** to the Covered Product’s
15 packaging or labeling, the **Warning** or **Alternative Warning** shall be posted on websites where
16 Kartek offers Products for sale to consumers in California. The requirements of this Section shall
17 be satisfied if the **Warning** or **Alternative Warning**, or a clearly marked hyperlink using the word
18 “**WARNING,**” appears on the product display page, or by otherwise prominently displaying the
19 warning to the purchaser prior to completing the purchase. To comply with this Section, Kartek
20 shall (a) post the **Warning** or **Alternative Warning** on its own website and, if it has the ability to
21 do so, on the websites of its third-party internet sellers; and (b) if it does not have the ability to post
22 the **Warning** or **Alternative Warning** on the websites of its third-party internet sellers, provide
23 such sellers with written notice in accordance with Title 27, California Code of Regulations, §
24 25600.2. Third-party internet sellers of the Covered Product that have been provided with written
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27
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1 notice in accordance with Title 27, California Code of Regulations, § 25600.2 are not released in
2 Section 5 of this Agreement if they fail to meet the warning requirements herein.

3 **3.3 Compliance with Warning Regulations.** Defendant shall be deemed to be in
4 compliance with this Consent Judgment by either adhering to §§ 3.1 and 3.2 of this Consent
5 Judgment or by complying with warning requirements adopted by OEHHA applicable to the
6 Covered Product and exposures at issue after the Effective Date. If “consumer information,” as that
7 term is defined in Title 27, California Code of Regulations, Section 25600.1(c) as it may be
8 amended from time to time, is provided in a foreign language, Kartek shall provide the **Warning**
9 or **Alternative Warning** in the foreign language in accordance with applicable warning regulations
10 adopted by OEHHA.

11 **4. MONETARY TERMS**

12 **4.1 Civil Penalty.** Kartek shall pay \$1,000.00 as a Civil Penalty pursuant to Health and
13 Safety Code section 25249.7(b), to be apportioned in accordance with California Health & Safety
14 Code § 25192, with 75% of these funds remitted to OEHHA and the remaining 25% of the Civil
15 Penalty remitted to McCoy, as provided by California Health & Safety Code § 25249.12(d).

16 **4.1.1** Within ten (10) days of the Effective Date, Kartek shall issue two separate
17 checks for the Civil Penalty payment to (a) “OEHHA” in the amount of \$750.00; and to (b)
18 “Donatus McCoy” in the amount of \$250.00. Payment owed to McCoy pursuant to this Section
19 shall be delivered to the following payment address:

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

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

26 For United States Postal Service Delivery:

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

1 For Non-United States Postal Service Delivery:

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

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

9 4.2 **Attorneys' Fees.** Within ten (10) days of the Effective Date, Kartek shall pay
10 \$16,000.00 to "Brodsky Smith" as complete reimbursement for McCoy's attorneys' fees and costs
11 incurred as a result of investigating, bringing this matter to the attention of Kartek, litigating and
12 negotiating and obtaining judicial approval of a settlement in the public interest, pursuant to Code
13 of Civil Procedure § 1021.5.

14 **5. RELEASE OF ALL CLAIMS**

15 5.1 This Consent Judgment is a full, final, and binding resolution between McCoy
16 acting on his own behalf, and on behalf of the public interest, and Kartek, and its parents,
17 shareholders, members, directors, officers, managers, employees, representatives, agents,
18 attorneys, divisions, subdivisions, subsidiaries, partners, sister companies, and affiliates, and their
19 predecessors, successors and assigns ("Defendant Releasees"), and all entities from whom they
20 obtain and to whom they directly or indirectly distribute or sell Covered Products, including but
21 not limited to manufacturers, suppliers, distributors, wholesalers, customers, licensors, licensees
22 retailers, including but not limited to, its parents, subsidiaries, and affiliates, franchisees, and
23 cooperative members ("Downstream Releasees"), of all claims for violations of Proposition 65
24 based on exposure to DEHP from use of the Covered Products manufactured, distributed, or sold
25 by Kartek prior to the Effective Date as set forth in the Notice. It is the Parties' intention that this
26 Consent Judgment shall have preclusive effect such that no other actions by private enforcers,
27 whether purporting to act in his, her, or its interests or the public interest shall be permitted to
28 pursue and take any action with respect to any violation of Proposition 65 based on exposure to
DEHP from use of the Covered Products that was alleged in the Complaint, or that could have been

1 brought pursuant to the Notice against Kartek and the Downstream Releasees (“Proposition 65
2 Claims”). Kartek’s compliance with the terms of this Consent Judgment constitutes compliance
3 with Proposition 65 by Kartek with regard to exposure to DEHP from use of the Covered Products.

4 5.2 In addition to the foregoing, McCoy, on behalf of himself, his past and current
5 agents, representatives, attorneys, and successors and assignees, and *not* in his representative
6 capacity, hereby waives all rights to institute or participate in, directly or indirectly, any form of
7 legal action and releases Kartek, Defendant Releasees, and Downstream Releasees from any and
8 all manner of actions, causes of action, claims, demands, rights, suits, obligations, debts, contracts,
9 agreements, promises, liabilities, damages, charges, losses, costs, expenses, and attorneys’ fees, of
10 any nature whatsoever, known or unknown, in law or equity, fixed or contingent, now or in the
11 future, with respect to any alleged violations of Proposition 65 related to or arising from Covered
12 Products manufactured, distributed, or sold by Kartek, Defendant Releasees or Downstream
13 Releasees. With respect to the foregoing waivers and releases in this paragraph, McCoy hereby
14 specifically waives any and all rights and benefits which he now has, or in the future may have,
15 conferred by virtue of the provisions of § 1542 of the California Civil Code, which provides as
16 follows:

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

23 5.3 Kartek waives any and all claims against McCoy, his attorneys and other
24 representatives, for any and all actions taken, or statements made (or those that could have been
25 taken or made) by McCoy and his attorneys and other representatives, whether in the course of
26 investigating claims or otherwise seeking enforcement of Proposition 65 against it in this matter,
27 and with respect to Covered Products.

28 **6. INTEGRATION**

 6.1 This Consent Judgment contains the sole and entire agreement of the Parties and
any and all prior negotiations and understandings related hereto shall be deemed to have been

1 merged within it. No representations or terms of agreement other than those contained herein exist
2 or have been made by any Party with respect to the other Party or the subject matter hereof.

3 **7. GOVERNING LAW**

4 7.1 The terms of this Consent Judgment shall be governed by the laws of the State of
5 California and apply within the State of California. In the event that Proposition 65 is repealed or
6 is otherwise rendered inapplicable by reason of law generally, or as to Covered Products, then
7 Defendant shall have no further obligations pursuant to this Consent Judgment with respect to, and
8 to the extent that, Covered Products are so affected.

9 **8. NOTICES**

10 8.1 Unless specified herein, all correspondence and notices required to be provided
11 pursuant to this Consent Judgment shall be in writing and personally delivered or sent by: (i) first-
12 class, (registered or certified mail) return receipt requested; or (ii) overnight courier on any party
13 by the other party at the following addresses:

14 For Defendant:

15 Eric Michael Papp
16 Law Offices of Eric Michael Papp
17 1101 California Ave., Ste. 100
Corona, CA 92881

18 And

19 For McCoy:

20 Evan Smith
21 Brodsky Smith
22 9595 Wilshire Blvd., Ste. 900
Beverly Hills, CA 90212

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

25 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

26 9.1 This Consent Judgment may be executed in counterparts and by facsimile, each of
27 which shall be deemed an original, and all of which, when taken together, shall constitute one and
28 the same document.

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

3 10.1 McCoy agrees to comply with the requirements set forth in California Health &
4 Safety Code § 25249.7(f) and to promptly bring a Motion for Approval of this Consent Judgment.
5 Defendant agrees it shall support approval of such Motion.

6 10.2 This Consent Judgment shall not be effective until it is approved and entered by the
7 Court and shall be null and void if, for any reason, it is not approved by the Court. In such case, the
8 Parties agree to meet and confer on how to proceed and if such agreement is not reached within 30
9 days, the case shall proceed on its normal course.

10 10.3 If the Court approves this Consent Judgment and is reversed or vacated by an
11 appellate court, the Parties shall meet and confer as to whether to modify the terms of this Consent
12 Judgment. If the Parties do not jointly agree on a course of action to take, the case shall proceed on
13 its normal course on the trial court's calendar.

14 **11. MODIFICATION**

15 11.1 This Consent Judgment may be modified only by further stipulation of the Parties
16 and the approval of the Court or upon the granting of a motion brought to the Court by either Party.

17 **12. ATTORNEY'S FEES**

18 12.1 A Party who unsuccessfully brings or contests an action arising out of this Consent
19 Judgment shall be required to pay the prevailing party's reasonable attorney's fees and costs.

20 12.2 Nothing in this Section shall preclude a Party from seeking an award of sanctions
21 pursuant to law.

22 **13. RETENTION OF JURISDICTION**

23 13.1 This Court shall retain jurisdiction of this matter to implement or modify the
24 Consent Judgment.

25 **14. AUTHORIZATION**

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

4
5 **AGREED TO:**

AGREED TO:

6 Date: 11/28/23

Date: 11/27/23

7 By: *Donatus Mccoey*
8 DONATUS MCCOY

By: *[Signature]*
KARTEK OFF ROAD, INC.

9
10 **IT IS SO ORDERED, ADJUDGED AND DECREED:**

11
12 Dated: _____

Judge of Superior Court