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9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 COUNTY OF MARIN
11 UNLIMITED CIVIL JURISDICTION
12
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15 MARK MOORBERG,

16 Plaintiff,

17 v.

18 BENTEX GROUP, INC.; *et al.*,

19 Defendants.
20

Case No. CIV1503939

[PROPOSED] CONSENT JUDGMENT

(Health & Safety Code § 25249.6 *et seq.*)

1 **1. INTRODUCTION**

2 **1.1 Parties**

3 This Consent Judgment is entered into by and between Mark Moorberg (“Moorberg”) and
4 Bentex Group, Inc. (“Bentex”), with Moorberg and Bentex collectively referred to as the “Parties.”

5 **1.2 Plaintiff**

6 Moorberg is an individual residing in California who seeks to promote awareness of
7 exposures to toxic chemicals and improve human health by reducing or eliminating hazardous
8 substances contained in consumer products.

9 **1.3 Defendant**

10 Bentex employs ten or more persons and is a person in the course of doing business for
11 purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, California Health & Safety
12 Code §§ 25249.5 *et seq.* (“Proposition 65”).

13 **1.4 General Allegations**

14 Moorberg alleges that Bentex manufactures, imports, distributes and/or sells in California,
15 tumblers with exterior designs containing lead without first providing the exposure warning required
16 by Proposition 65. Lead is listed pursuant to Proposition 65 as a chemical known to the State of
17 California to cause birth defects and other reproductive harm.

18 **1.5 Product Description**

19 The Bentex products that are covered by this Consent Judgment are defined as tumblers with
20 exterior designs containing lead including, but not limited to, *INdecor Home Design Four Piece*
21 *Decorative Ceramic Set (Tumbler)*, RN # 19109, UPC #0 24054 21418 3, which are manufactured,
22 imported, distributed, sold and/or offered for sale by Bentex in the State of California, hereinafter the
23 “Products.”

24 **1.6 Notice of Violation**

25 On or about June 26, 2015, Moorberg served Bentex, others, and certain requisite public
26 enforcement agencies with a 60-Day Notice of Violation (“Notice”) alleging that Bentex was in
27
28

1 violation of Proposition 65 for failing to warn its customers and consumers in California that the
2 Products expose users to lead.

3 **1.7 Complaint**

4 On or about October 28, 2015, Moorberg filed the instant action (“Complaint”), naming
5 Bentex as a defendant for the alleged violations of Health and Safety Code section 25249.6 that are
6 the subject of the Notice.

7 **1.8 No Admission**

8 Bentex denies the material, factual, and legal allegations contained in the Notice and
9 Complaint, and maintains that all of the products that it has sold and distributed for sale in California,
10 including the Products, have been, and are, in compliance with all laws. Nothing in this Consent
11 Judgment shall be construed as an admission of any fact, finding, conclusion of law, issue of law, or
12 violation of law, nor shall compliance with this Consent Judgment constitute or be construed as an
13 admission of any fact, finding, conclusion of law, issue of law, or violation of law. This Section shall
14 not, however, diminish or otherwise affect Bentex’s obligations, responsibilities, and duties under
15 this Consent Judgment.

16 **1.9 Jurisdiction**

17 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
18 jurisdiction over Bentex as to the allegations in the Complaint, that venue is proper in the County of
19 Marin, and that this Court has jurisdiction to enter and enforce the provisions of this Consent
20 Judgment.

21 **1.10 Effective Date**

22 For purposes of this Consent Judgment, the term “Effective Date” means the date that the
23 Court approves this Consent Judgment, including any unopposed tentative rulings.

24 **2. INJUNCTIVE RELIEF: REFORMULATION AND WARNINGS**

25 **2.1 Reformulated Products**

26 Commencing on the Effective Date, and continuing thereafter, Bentex shall only purchase for
27 sale, manufacture for sale, import, sell, or distribute for sale in California “Reformulated Products,”
28

1 or Products that are sold with a clear and reasonable warning pursuant to Section 2.2 below. For
2 purposes of this Consent Judgment, “Reformulated Products” are products that contain a maximum
3 of 100 parts per million of lead by weight in any accessible component (i.e. any component that can
4 be handled or touched during the reasonably foreseeable use) when analyzed pursuant to U.S.
5 Environmental Protection Agency testing methodologies 3050B and/or 6010B, *and* that yield a result
6 of less than 1.0 micrograms of lead when analyzed pursuant to the NIOSH 9100 testing protocol.

7 **2.2 Product Warnings**

8 Commencing on the Effective Date, Bentex shall provide clear and reasonable warnings for
9 all Products as set forth in subsections 2.2(a) and (b) for all products that do not currently have
10 warnings and that do not qualify as Reformulated Products. Each warning shall be prominently
11 placed with such conspicuousness as compared with other words, statements, designs, or devices as
12 to render it likely to be read and understood by an ordinary individual under customary conditions
13 before purchase or use. Each warning shall be provided in a manner such that the consumer or user
14 understands to which *specific* Product the warning applies, so as to minimize the risk of consumer
15 confusion.

16 **(a) Retail Store Sales.**

17 **(i) Product Labeling.** Bentex shall affix a warning to the packaging, labeling,
18 or directly on each Product provided for sale in retail outlets in California that states:

19 WARNING: This product contains lead, a chemical
20 known to the State of California to cause
birth defects and other reproductive harm.

21 **(ii) Point-of-Sale Warnings.** Alternatively, Bentex may provide warning signs in
22 the form below to its customers in California with instructions to post the warnings in close proximity
23 to the point of display of the Products. Such instruction sent to Bentex customers shall be sent by
24 certified mail, return receipt requested.

25 WARNING: This product contains lead, a chemical
26 known to the State of California to cause
birth defects and other reproductive harm.

1 Where more than one Product is sold in proximity to other like items or to those that do not
2 require a warning (*e.g.*, Reformulated Products as defined in Section 2.1), the following statement
3 shall be used:¹

4 **WARNING:** The following products contain lead, a chemical
5 known to the State of California to cause birth defects
6 and other reproductive harm:

7 [*list products for which warning is required*]

8 **(b) Mail Order Catalog and Internet Sales.** In the event that Bentex sells Products via
9 mail order catalog and/or the internet, to customers located in California, after the Effective Date, that
10 are not Reformulated Products, Bentex shall provide warnings for such Products sold via mail order
11 catalog or the internet to California residents. Warnings given in the mail order catalog or on the
12 internet shall identify the *specific* Product to which the warning applies as further specified in
13 Sections 2.2(b)(i) and (ii).

14 **(i) Mail Order Catalog Warning.** Any warning provided in a mail order catalog
15 shall be in the same type size or larger than the Product description text within the catalog. The
16 following warning shall be provided on the same page and in the same location as the display and/or
17 description of the Product:

18 **WARNING:** This product contains lead, a chemical
19 known to the State of California to cause
 birth defects and other reproductive harm.

20 Where it is impracticable to provide the warning on the same page and in the same location as
21 the display and/or description of the Product, Bentex may utilize a designated symbol to cross
22 reference the applicable warning and shall define the term “designated symbol” with the following
23 language on the inside of the front cover of the catalog or on the same page as any order form for the
24 Product(s):

25 _____
26

27 ¹For purposes of the Settlement Agreement, “sold in proximity” shall mean that the Product and another similar product
28 are offered for sale close enough to each other that the consumer, under customary conditions of purchase, could not
reasonably determine which of the two products is subject to the warning sign.

1
2 WARNING: Certain products identified with this symbol ▼
3 and offered for sale in this catalog contain lead,
4 a chemical known to the State of California to cause
5 birth defects and other reproductive harm.

6 The designated symbol must appear on the same page and in close proximity to the display
7 and/or description of the Product. On each page where the designated symbol appears, Bentex must
8 provide a header or footer directing the consumer to the warning language and definition of the
9 designated symbol.

10 (ii) **Internet Website Warning.** A warning shall be given in conjunction with the
11 sale of the Products via the internet, which warning shall appear either: (a) on the same web page on
12 which a Product is displayed; (b) on the same web page as the order form for a Product; (c) on the
13 same page as the price for any Product; or (d) on one or more web pages displayed to a purchaser
14 during the checkout process. The following warning statement shall be used and shall appear in any
15 of the above instances adjacent to or immediately following the display, description, or price of the
16 Product for which it is given in the same type size or larger than the Product description text:

17 WARNING: This product contains lead, a chemical
18 known to the State of California to cause
19 birth defects and other reproductive harm.

20 Alternatively, the designated symbol may appear adjacent to or immediately following the
21 display, description, or price of the Product for which a warning is being given, provided that the
22 following warning statement also appears elsewhere on the same web page, as follows:

23 WARNING: This product contains lead, a chemical
24 known to the State of California to cause
25 birth defects and other reproductive harm.

26 **3. MONETARY SETTLEMENT TERMS**

27 **3.1 Civil Penalty Payments**

28 Pursuant to Health and Safety Code section 25249.7(b), in settlement of all the claims referred
to in this Consent Judgment, Bentex shall pay \$14,000 in civil penalties, as set forth in sections 3.1.1
and 3.1.2 below. Each civil penalty payment shall be allocated according to Health and Safety Code

1 section 25249.12(c)(1) and (d) with seventy-five percent (75%) of the funds paid to the California
2 Office of Environmental Health Hazard Assessment (“OEHHA”) and twenty-five percent (25%) of
3 the funds remitted to Moorberg.

4 **3.1.1 Initial Civil Penalty**

5 Bentex shall issue a check for its initial civil penalty payment in the amount of \$5,000
6 to “Mark Moorberg, Client Trust Account” pursuant to the payment procedures in section 3.3 below,
7 and to the address found in Section 3.3.1 below. Moorberg and his counsel will ensure 75% of this
8 initial penalty is paid to OEHHA.

9 **3.1.2 Final Civil Penalty**

10 On or before November 30, 2016, Bentex shall make a final civil penalty payment of
11 \$9,000. Pursuant to title 11 California Code of Regulations, section 3203(c), Moorberg agrees that
12 the final civil penalty payment shall be waived in its entirety if, no later than November 15, 2016, an
13 officer of Bentex provides Moorberg with written certification that all of the Products purchased for
14 sale or manufactured for sale in California as of the date of such certification are Reformulated
15 Products as defined by Section 2.1, and that Bentex will continue to offer only Reformulated
16 Products in California in the future. The option to certify reformulation in lieu of making the final
17 civil penalty payment required by this Section is a material term and time is of the essence. If
18 payment is not timely, Moorberg shall alert Bentex pursuant to section 8 below, and shall not pursue
19 enforcement of this term for a period of ten (10) business days thereafter.

20 **3.2 Reimbursement of Fees and Costs**

21 The parties acknowledge that Moorberg and his counsel offered to resolve this dispute
22 without reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving the
23 issue to be resolved after the material terms of this Consent Judgment had been settled. Shortly after
24 the other settlement terms had been finalized, Bentex expressed a desire to resolve Moorberg’s fees
25 and costs. The Parties then attempted to (and did) reach an accord on the compensation due to
26 Moorberg and his counsel under general contract principles and the private attorney general doctrine
27 codified at California Code of Civil Procedure section 1021.5 for all work performed through the
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1 mutual execution of this Consent Judgment. Bentex shall issue a check to “The Chanler Group” in
2 the amount of \$31,000, pursuant to the payment procedures in section 3.3 below, and to the address
3 found in Section 3.3.1 below.

4 **3.3 Payment Procedures**

5 Except for the final civil penalty payment required by Section 3.1.2, all payments due under
6 this Consent Judgment are to be delivered within ten (10) days of the mutual execution of this
7 Consent Judgment to “Wachtel Missry LLP c/o Michael Hassan, Esq.”, and released to The Chanler
8 Group and Moorberg within one week of the Court approving this Consent Judgment according to
9 the following subsections.

10 **3.3.1 Payment Addresses**

11 (a) All payments and tax documentation for Moorberg and his counsel shall be
12 delivered to:

13 The Chanler Group
14 Attn: Proposition 65 Controller
15 2560 Ninth Street
16 Parker Plaza, Suite 214
17 Berkeley, CA 94710

18 **4. CLAIMS COVERED AND RELEASED**

19 **4.1 Moorberg’s Public Release of Proposition 65 Claims**

20 This Consent Judgment is a full, final and binding resolution between Moorberg, on behalf
21 of himself and the public, and Bentex, of any violation of Proposition 65 that was or could have
22 been asserted by Moorberg against Bentex, its parents, subsidiaries, affiliated entities that are under
23 common ownership, including without limitation, Indecor, LLC (and their respective owners,
24 shareholders, members, officers, directors, attorneys, representatives and employees), (the
25 “Releasees”) as well as each entity to whom each Releasee directly or indirectly distributes or sells
26 the Products, including but not limited to its downstream distributors, wholesalers, customers,
27 retailers, franchisers, cooperative members, licensors, and licensees, (“Downstream Releasees”)
28 based on their failure to warn about alleged exposure to lead contained in the Products that were
sold by Bentex, prior to the Effective Date.

1 Moorberg, acting on his own behalf and in the public interest, releases Bentex, all Releasees
2 and all Downstream Releasees for violations arising under Proposition 65 for unwarned exposures
3 to lead from the Products sold by Bentex prior to the Effective Date, as set forth in the Notice.

4 **4.2 Moorberg’s Individual Release of Claims**

5 Moorberg, in his individual capacity only and *not* in his representative capacity, also provides
6 a release to Bentex, Releasees, and Downstream Releasees which shall be effective as a full and final
7 accord and satisfaction, as a bar to all actions, causes of action, obligations, costs, expenses,
8 attorneys’ fees, damages, losses, claims, liabilities and demands of Moorberg of any nature, character
9 or kind, whether known or unknown, suspected or unsuspected, arising out of alleged or actual
10 exposures to lead from the Products sold or distributed for sale by Bentex before the Effective Date.

11 **4.3 Bentex Release of Moorberg**

12 Bentex, on its own behalf, and on behalf of its past and current agents, representatives,
13 attorneys, successors, and assignees, hereby waives any and all claims against Moorberg and his
14 attorneys and other representatives, for any and all actions taken or statements made by Moorberg
15 and his attorneys and other representatives, whether in the course of investigating claims, otherwise
16 seeking to enforce Proposition 65 against it in this matter, or with respect to the Products.

17 **5. COURT APPROVAL**

18 This Consent Judgment is not effective until it is approved and entered by the Court and shall
19 be null and void if, for any reason, it is not approved and entered by the Court within one year after it
20 has been fully executed by the Parties.

21 **6. SEVERABILITY**

22 If, subsequent to the Court’s approval and entry of this Consent Judgment as a judgment, any
23 provision is held by a court to be unenforceable, the validity of the remaining provisions shall not be
24 adversely affected.

25 **7. GOVERNING LAW**

26 The terms of this Consent Judgment shall be governed by the laws of the state of California
27 and apply within the state of California. In the event that Proposition 65 is repealed, preempted, or is
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1 otherwise rendered inapplicable by reason of law generally, or if any of the provisions of this
2 Consent Judgment are rendered inapplicable or no longer required as a result of any such repeal or
3 preemption or rendered inapplicable by reason of law generally as to the Products, then Bentex may
4 provide written notice to Moorberg of any asserted change in the law, and shall have no further
5 obligations pursuant to this Consent Judgment with respect to, and to the extent that, the Products are
6 so affected. Nothing in this Consent Judgment shall be interpreted to relieve Bentex from any
7 obligation to comply with any pertinent state or federal toxics control laws.

8 **8. NOTICE**

9 Unless specified herein, all correspondence and notice required by this Consent Judgment
10 shall be in writing and sent by: (i) personal delivery; (ii) first-class, registered, or certified mail,
11 return receipt requested; or (iii) a recognized overnight courier to the following addresses:

12 For Bentex:

13 Morris Dweck
14 Bentex Group, Inc.
15 34 West 33rd Street, 2nd Floor
New York, New York 10001

16 With a copy to:

17 Michael Hassan, Esq.
18 Wachtel Missry, LLP
19 One Dag Hammarskjold Plaza
885 Second Ave.
New York, New York 10017

20 For Moorberg:

21 The Chanler Group
22 Attn: Proposition 65 Coordinator
23 2560 Ninth Street
Parker Plaza, Suite 214
Berkeley, CA 94710

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

26 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

27 This Consent Judgment may be executed in counterparts and by facsimile or portable
28 document format (PDF) signature, each of which shall be deemed an original, and all of which, when

1 taken together, shall constitute one and the same document.

2 **10. POST EXECUTION ACTIVITIES**

3 Moorberg agrees to comply with the reporting form requirements referenced in Health and
4 Safety Code section 25249.7(f). The Parties further acknowledge that, pursuant to Health and Safety
5 Code section 25249.7(f), a noticed motion is required to obtain judicial approval of the settlement. In
6 furtherance of obtaining such approval, Moorberg and Bentex agree to mutually employ their best
7 efforts, and that of their counsel, to support the entry of this agreement as judgment, and to obtain
8 judicial approval of their settlement in a timely manner. For purposes of this Section, "best efforts"
9 shall include, at a minimum, cooperating with the drafting and filing of the necessary moving papers,
10 and supporting the motion for judicial approval.

11 **11. MODIFICATION**

12 This Consent Judgment may be modified only by: (i) a written agreement of the Parties and
13 entry of a modified consent judgment by the Court; or (ii) a successful motion or application of any
14 Party, and the entry of a modified consent judgment by the Court.

15 **12. AUTHORIZATION**

16 The undersigned are authorized to execute this Consent Judgment and have read, understood,
17 and agree to all of the terms and conditions contained herein.

18
19 **AGREED TO:**

20 Date: _____

21
22 By: _____
23 MARK MOORBERG

AGREED TO:

20 Date: _____ 11/24/15

21
22 By: _____
23 Morris Dweck, President
24 BENTEX GROUP, INC.

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18 **AGREED TO:**

AGREED TO:

19 Date: 11/24/2015

Date: _____

20 By:  _____

21 By: _____

22 **MARK MOORBERG**

23 **Morris Dweck, President**
24 **BENTEX GROUP, INC.**