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10 MARK MOORBERG

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SANTA CLARA
UNLIMITED CIVIL JURISDICTION

MARK MOORBERG,

Plaintiff,

v.

GARTNER STUDIOS, INC.; and DOES 1 –
150, inclusive,

Defendants.

Case No. 115CV288686

[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 plaintiff Mark Moorberg
4 (“Moorberg”), and Gartner Studios, Inc. (“Gartner”) with Moorberg and Defendant each individually
5 referred to as a “Party” and collectively as the “Parties.”

6 **1.2 Plaintiff**

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

10 **1.3 Gartner**

11 Gartner employs ten or more individuals and is a “person in the course of doing business” for
12 purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, Health and Safety Code
13 section 25249.6 *et seq.* (“Proposition 65”).

14 **1.4 General Allegations**

15 Moorberg alleges that Gartner manufactures, imports, sells, or distributes for sale in
16 California, vinyl/PVC Notebook Covers that contain di(2-ethylhexyl)phthalate (“DEHP”) without
17 first providing the exposure warning required by Proposition 65. DEHP is listed pursuant to
18 Proposition 65 as a chemical known to the State of California to cause birth defects or other
19 reproductive harm.

20 **1.5 Product Description**

21 The products covered by this Consent Judgment are vinyl/PVC Notebook Covers containing
22 DEHP that are manufactured, imported, sold, or distributed for sale in California by Gartner
23 including, but not limited to, *Roobee by Mara-Mi Notebook, Item #15367*, hereinafter the “Products”.

24 **1.6 Notice of Violation**

25 On or about July 31, 2015, Moorberg served Gartner, and certain requisite public enforcement
26 agencies with a “60-Day Notice of Violation” (“Notice”) alleging that Gartner violated Proposition
27 65 by failing to warn its customers and consumers in California that the Products expose users to
28

1 DEHP. To the best of the Parties' knowledge, no public enforcer has commenced and is diligently
2 prosecuting the allegations set forth in the Notice.

3 **1.7 Complaint**

4 On December 3, 2015 Moorberg filed the instant action ("Complaint") naming Gartner as a
5 defendant for the alleged violations of Health and Safety Code section 25249.6 that are the subject of
6 the Notice.

7 **1.8 No Admission**

8 Gartner denies the material, factual, and legal allegations contained in the Notice and
9 Complaint, and maintains that all of the products 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 Gartner'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 Gartner as to the allegations contained in the Complaint, that venue is proper in the
19 County of Santa Clara, and that the Court has jurisdiction to enter and enforce the provisions of this
20 Consent Judgment pursuant to Proposition 65 and Code of Civil Procedure section 664.6.

21 **1.10 Effective Date**

22 For purposes of this Consent Judgment, the term "Effective Date" means the date on which
23 the Motion for Approval of the Consent Judgment is granted by the Court.

24 **2. INJUNCTIVE RELIEF: REFORMULATION**

25 **2.1 Reformulated Products**

26 Commencing on the Effective Date, and continuing thereafter, Gartner shall only
27 manufacture, sell, or distribute for sale in California, "Reformulated Products." For purposes of this
28 Consent Judgment, Reformulated Products are Products containing DEHP in concentrations less than

1 0.1 percent (1,000 parts per million) when analyzed pursuant to U.S. Environmental Protection
2 Agency testing methodologies 3580A and 8270C or other methodology utilized by federal or state
3 government agencies for the purpose of determining DEHP content in a solid substance.

4 **3. MONETARY SETTLEMENT TERMS**

5 **3.1 Civil Penalty Payments**

6 Pursuant to Health & Safety Code § 25249.7(b), in settlement of all the claims referred to in
7 this Consent Judgment, Gartner shall pay \$7,000 in civil penalties to “Mark Moorberg, Client Trust
8 Account.” The civil penalty payment shall be allocated according to Health and Safety Code section
9 25249.12(c)(1) and (d), with seventy-five percent (75%) of the funds paid to the California Office of
10 Environmental Health Hazard Assessment (“OEHHA”) by Moorberg, and twenty-five percent (25%)
11 of the funds remitted to Moorberg.

12 **3.2 Reimbursement of Attorney’s Fees and Costs**

13 The parties acknowledge that Moorberg and his counsel offered to resolve this dispute
14 without reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving the
15 issue to be resolved after the material terms of this Consent Judgment had been settled. Shortly after
16 the other settlement terms had been finalized, Gartner expressed a desire to resolve Moorberg’s fees
17 and costs. The Parties then attempted to (and did) reach an accord on the compensation due to
18 Moorberg and his counsel under general contract principles and the private attorney general doctrine
19 codified at California Code of Civil Procedure section 1021.5 for all work performed through the
20 mutual execution of this Consent Judgment. Within 10 days after the Effective Date, Gartner shall
21 pay \$32,000 for the fees and costs incurred by Moorberg investigating, bringing this matter to
22 Gartner’s attention, litigating and negotiating a settlement in the public interest.

23 **3.3 Payments Held in Trust**

24 All payments due under this Consent Judgment shall be held in trust until such time as the
25 Court approves the Parties’ settlement. Except the final civil penalty payment required by Section
26 3.1.2, all payments due under this agreement shall be delivered within five (5) days of the date that
27 this Consent Judgment is fully executed by the Parties, and held in trust by Gartner’s counsel until
28 the Court grants the motion for approval of this Consent Judgment contemplated by Section 5.

1 Within 10 business days of the Court’s approval of this Consent Judgment, Gartner’s counsel shall
2 tender the civil penalty payments and attorneys’ fee and costs reimbursements required by Sections
3 3.1 and 3.2.

4 **3.4 Payment Address**

5 All payments required by this Consent Judgment shall be delivered to the following
6 address:

7 The Chanler Group
8 Attn: Proposition 65 Controller
9 2560 Ninth Street
10 Parker Plaza, Suite 214
11 Berkeley, CA 94710

12 **4. CLAIMS COVERED AND RELEASED**

13 **4.1 Moorberg’s Public Release of Proposition 65 Claims**

14 Moorberg, acting on his own behalf and in the public interest, releases Gartner and its
15 parents, subsidiaries, affiliated entities under common ownership, directors, officers, employees,
16 and attorneys (“Releasees”) and each entity to whom it directly or indirectly distributes or sells the
17 Products including, but not limited to, its downstream distributors, wholesalers, customers, retailers,
18 franchisers, cooperative members, licensors and licensees (“Downstream Releasees”) for any
19 violations arising under Proposition 65 for unwarned exposures to DEHP from Products sold by
20 Gartner prior to the Effective Date, as set forth in the Notice. Compliance with the terms of this
21 Consent Judgment constitutes compliance with Proposition 65 with respect to exposures to failures
22 to warn about DEHP from the Products sold by Gartner before the Effective Date, as set forth in the
23 Notice.

24 **4.2 Moorberg’s Individual Release of Claims**

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

1 In furtherance of the foregoing, as to alleged exposures to DEHP from the Products, Moorberg
2 in his individual capacity only, hereby waives any and all rights and benefits which he now has, or in
3 the future may have, conferred upon him with respect to claims arising from a violation of Proposition
4 65 regarding the failure to warn about exposure to DEHP from the Products or any other statutory or
5 common law regarding the failure to warn about exposure to DEHP from the Products by virtue of the
6 provisions of section 1542 of the California Civil Code, which provides as follows:

7 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE
8 CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR
9 AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM OR
HER, MUST HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT
WITH THE DEBTOR.

10 Moorberg understands and acknowledges that the significance and consequence of this waiver of
11 California Civil Code section 1542 is that even if Moorberg suffers future damages arising out of or
12 resulting from, or related directly or indirectly to, in whole or in part, claims arising from a violation
13 of Proposition 65 regarding the failure to warn about exposure to DEHP from the Products or any other
14 statutory or common law regarding the failure to warn about exposure to DEHP from the Products and
15 Moorberg will not be able to make any claim for those damages against Releasees. Furthermore,
16 Moorberg acknowledges that he intends these consequences for any such claims arising from a
17 violation of Proposition 65 regarding the failure to warn about exposure to DEHP from the Products or
18 any other statutory or common law regarding the failure to warn about exposure to DEHP from
19 Products as may exist as of the date of this release but which Moorberg does not know exist, and which,
20 if known, would materially affect his decision to enter into this Consent Judgment, regardless of
21 whether his lack of knowledge is the result of ignorance, oversight, error, negligence, or any other
22 cause.

23 **4.3 Gartner's Release of Moorberg**

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

1 **5. COURT APPROVAL**

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

5 **6. SEVERABILITY**

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

9 **7. GOVERNING LAW**

10 The terms of this Consent Judgment shall be governed by the laws of the state of California
11 and apply within the state of California. In the event that Proposition 65 is repealed, preempted, or is
12 otherwise rendered inapplicable by reason of law generally, or as to the Products, then Gartner may
13 provide written notice to Moorberg of any asserted change in the law, and shall have no further
14 obligations pursuant to this Consent Judgment with respect to, and to the extent that, the Products are
15 so affected. Nothing in this Consent Judgment shall be interpreted to relieve Gartner from any
16 obligation to comply with any pertinent state or federal toxics control laws.

17 **8. NOTICE**

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

21 **Gartner**

22 Matthew D. Resch
23 General Counsel
24 Gartner Studios, Inc.
220 Myrtle Street East
Stillwater, MN 55082

Melissa Jones
Stoel Rives LLP
500 Capitol Mall
Suite 1600
Sacramento, CA 95814

25 **Moorberg**

26 Proposition 65 Coordinator
27 The Chanler Group
2560 Ninth Street
Parker Plaza, Suite 214
28 Berkeley, CA 94710-2565

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

3 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

4 This Consent Judgment may be executed in counterparts and by facsimile or portable
5 document format (PDF) signature, each of which shall be deemed an original, and all of which, when
6 taken together, shall constitute one and the same document.

7 **10. POST EXECUTION ACTIVITIES**

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

16 **11. MODIFICATION**

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

20 **12. AUTHORIZATION**

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

23 **AGREED TO:**

AGREED TO:

24 Date: 4/20/16

Date: 

25 By: 
26 MARK MOORBERG

27 By: 4/14/16
28 General Counsel, MATTHEW D. RESCH
GARTNER STUDIOS, INC.