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10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 COUNTY OF MARIN
12 UNLIMITED CIVIL JURISDICTION
13
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15 MARK MOORBERG,

16 Plaintiff,

17 v.

18 JOBAR INTERNATIONAL, INC.; *et al.*,

19 Defendants.
20

Case No. CIV1503228

[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 Jobar International, Inc. (“Jobar”), with Moorberg and Jobar each individually referred to as a “Party”
5 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 improve human health by reducing or eliminating hazardous
9 substances contained in consumer products.

10 **1.3 Defendant**

11 Jobar employs ten or more persons 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 Jobar manufactures, imports, sells, or distributes for sale in California,
16 vinyl/PVC back stretchers containing di(2-ethylhexyl)phthalate (“DEHP”), and vinyl/PVC toilet seat
17 cushions containing DEHP without first providing the exposure warning required by Proposition 65.
18 DEHP is listed pursuant to Proposition 65 as a chemical known to the State of California to cause
19 birth defects and other reproductive harm.

20 **1.5 Product Description**

21 The Jobar products that are covered by this Consent Judgment are defined as vinyl/PVC back
22 stretchers containing DEHP including, but not limited to, *North American Healthcare Back Stretcher*,
23 *ITEM JB4866, UPC #0 17874 14866 0*, and vinyl/PVC toilet seat cushions containing DEHP
24 including, but not limited to, *North American Health & Wellness Comfort Gel Toilet Cushion*,
25 *MODEL: JB6542, UPC #0 17874 00959 6*, which are manufactured, imported, distributed, sold
26 and/or offered for sale by Jobar in the State of California, hereinafter the “Products.”
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1.6 Notice of Violation

On or about June 26, 2015, Moorberg served Jobar, others, and certain requisite public enforcement agencies with a 60-Day Notice of Violation (“Notice”) alleging that Jobar was in violation of Proposition 65 for failing to warn its customers and consumers in California that the Products expose users to DEHP.

1.7 Complaint

On September 2, 2015, Moorberg filed the instant action (“Complaint”), naming Jobar as a defendant for the alleged violations of Health and Safety Code section 25249.6 that are the subject of the Notice.

1.8 No Admission

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

1.9 Jurisdiction

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

1.10 Effective Date

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

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

2 **2.1 Reformulated Products**

3 Commencing on the December 30, 2015, and continuing thereafter, Jobar shall only purchase
4 for sale, manufacture for sale, import, sell, or distribute for sale in California “Reformulated
5 Products,” or Products that are sold with a clear and reasonable warning pursuant to Section 2.2
6 below. For purposes of this Consent Judgment, “Reformulated Products” are products that contain
7 DEHP in concentrations of less than 0.1 percent (1,000 parts per million) when analyzed pursuant to
8 U.S. Environmental Protection Agency testing methodologies 3580A and 8270C or any other
9 methodology utilized by federal or state agencies for the purpose of determining the DEHP content in
10 a solid substance. In addition to the EPA test methods authorized above, the Parties may utilize
11 equivalent methodologies employed by state or federal agencies to determine DEHP content in a
12 solid substance.

13 **2.2 Product Warnings**

14 Commencing on the December 30, 2015, Jobar shall provide clear and reasonable warnings
15 for all Products as set forth in subsections 2.2(a) and (b) for all products that do not currently have
16 warnings and that do not qualify as Reformulated Products. Each warning shall be prominently
17 placed with such conspicuousness as compared with other words, statements, designs, or devices as
18 to render it likely to be read and understood by an ordinary individual under customary conditions
19 before purchase or use. Each warning shall be provided in a manner such that the consumer or user
20 understands to which *specific* Product the warning applies, so as to minimize the risk of consumer
21 confusion.

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

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

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

27 **(ii) Point-of-Sale Warnings.** Alternatively, Jobar may provide warning signs in
28 the form below to its customers in California with instructions to post the warnings in close proximity

1 to the point of display of the Products. Such instruction sent to Jobar customers shall be sent by
2 certified mail, return receipt requested.

3 WARNING: This product contains DEHP, a chemical
4 known to the State of California to cause cancer
 and birth defects and other reproductive harm.

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

8 WARNING: The following products contain DEHP, a chemical
9 known to the State of California to cause cancer
 and birth defects and other reproductive harm:
10 *[list products for which warning is required]*

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

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

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

22
23 Where it is impracticable to provide the warning on the same page and in the same location as
24 the display and/or description of the Product, Jobar may utilize a designated symbol to cross

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

1 reference the applicable warning and shall define the term “designated symbol” with the following
2 language on the inside of the front cover of the catalog or on the same page as any order form for the
3 Product(s):

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

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

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

20 WARNING: This product contains DEHP, a chemical
21 known to the State of California to cause cancer
22 and birth defects and other reproductive harm.

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

26 WARNING: This product contains DEHP, a chemical
27 known to the State of California to cause cancer
28 and birth defects and other reproductive harm.

1 **3. MONETARY SETTLEMENT TERMS**

2 **3.1 Civil Penalty Payments**

3 Pursuant to Health and Safety Code section 25249.7(b), in settlement of all the claims referred
4 to in this Consent Judgment, Jobar shall pay \$14,000 in civil penalties. Each civil penalty payment
5 shall be allocated according to Health and Safety Code section 25249.12(c)(1) and (d) with seventy-
6 five percent (75%) of the funds paid to the California Office of Environmental Health Hazard
7 Assessment (“OEHHA”) and twenty-five percent (25%) of the funds remitted to Moorberg.

8 **3.1.1 Initial Civil Penalty**

9 Jobar shall issue a check for its initial civil penalty payment in the amount of \$4,000 to
10 “Mark Moorberg, Client Trust Account,” and deliver this check to Lewis, Brisbois, Bisgaard & Smith
11 LLP (“LBBS”). LBBS shall provide The Chanler Group with written confirmation within five days
12 of its receipt that LBBS has received this check. Moorberg and his counsel will ensure that the
13 appropriate 75% is delivered to OEHHA.

14 **3.1.2 Final Civil Penalty**

15 On or before July 1, 2016, Jobar shall make a final civil penalty payment of \$10,000 to
16 “Mark Moorberg, Client Trust Account.” Pursuant to title 11 California Code of Regulations, section
17 3203(c), Moorberg agrees that the final civil penalty payment shall be waived in its entirety if, no
18 later than June 15, 2016, an officer of Jobar provides Moorberg with written certification that all of
19 the Products purchased for sale or manufactured for sale in California as of the date of such
20 certification are Reformulated Products as defined by Section 2.1, and that Jobar will continue to
21 offer only Reformulated Products in California in the future. The option to certify reformulation in
22 lieu of making the final civil penalty payment required by this Section is a material term and time is
23 of the essence.

24 **3.2 Reimbursement of Fees and Costs**

25 The parties acknowledge that Moorberg and his counsel offered to resolve this dispute
26 without reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving the
27 issue to be resolved after the material terms of this Consent Judgment had been settled. Shortly after
28 the other settlement terms had been finalized, Jobar expressed a desire to resolve Moorberg’s fees

1 and costs. The Parties then attempted to (and did) reach an accord on the compensation due to
2 Moorberg and his counsel under general contract principles and the private attorney general doctrine
3 codified at California Code of Civil Procedure section 1021.5 for all work performed through the
4 mutual execution of this Consent Judgment. Jobar shall issue a check payable to “The Chanler
5 Group” in the amount of fees and costs of \$28,750 and deliver this check to LBBS to be held in trust
6 by LBBS LLP for The Chanler Group. LBBS LLP shall provide The Chanler Group with written
7 confirmation within five days of receipt that LBBS has received this check.

8 **3.3 Payment Procedures**

9 Except for the final civil penalty payment required by Section 3.1.2, all payments due under
10 this Consent Judgment are to be delivered to LBBS within ten days of the date of the filing of the
11 motion to approve this Consent Judgment under Section 10 below, and released to The Chanler
12 Group and Moorberg within five (5) days of the Effective Date according to the following subsection.

13 **3.3.1 Payment Addresses**

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

16 The Chanler Group
17 Attn: Proposition 65 Controller
18 2560 Ninth Street
19 Parker Plaza, Suite 214
20 Berkeley, CA 94710

21 **4. CLAIMS COVERED AND RELEASED**

22 **4.1 Moorberg’s Public Release of Proposition 65 Claims**

23 Moorberg, acting on his own behalf and in the public interest, releases Jobar and its parents,
24 subsidiaries, affiliated entities under common ownership, directors, officers, employees, and
25 attorneys (“Releasees”) and each entity to whom it directly or indirectly distributes or sells the
26 Products, including but not limited to its downstream distributors, wholesalers, customers, retailers,
27 franchisers, cooperative members, licensors, and licensees, (“Downstream Releasees”) for violations
28 arising under Proposition 65 for unwarned exposures to DEHP from the Products sold by Jobar prior
to the Effective Date, as set forth in the Notice and Complaint.

1 **4.2 Moorberg’s Individual Release of Claims**

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

8 **4.3 Jobar’s Release of Moorberg**

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

14 **5. COURT APPROVAL**

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

18 **6. SEVERABILITY**

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

22 **7. GOVERNING LAW**

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

3 **8. NOTICE**

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

7 For Jobar:

8 James A. Geocaris, Esq.
9 Lewis, Brisbois, Bisgaard & Smith, LLP
650 Town Center Drive
Suite 1400
10 Costa Mesa, CA 92626

11 For Moorberg:

12 The Chanler Group
13 Attn: Proposition 65 Coordinator
2560 Ninth Street
14 Parker Plaza, Suite 214
Berkeley, CA 94710

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

17 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

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

21 **10. POST EXECUTION ACTIVITIES**

22 Moorberg agrees to comply with the reporting form requirements referenced in Health and
23 Safety Code section 25249.7(f). The Parties further acknowledge that, pursuant to Health and Safety
24 Code section 25249.7(f), a noticed motion is required to obtain judicial approval of the settlement.
25 Moorberg will prepare and file this motion. Also, in furtherance of obtaining such approval,
26 Moorberg and Jobar agree to mutually employ their best efforts, and that of their counsel, to support
27 the entry of this agreement as judgment, and to obtain judicial approval of their settlement in a timely
28 manner. For purposes of this Section, "best efforts" shall include, at a minimum, cooperating with

1 the drafting and filing of the necessary moving papers, and supporting the motion for judicial
2 approval.

3 **11. MODIFICATION**

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

7 **12. AUTHORIZATION**

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

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AGREED TO:

Date: _____

By: _____

MARK MOORBERG

AGREED TO:

Date: 12/14/2015

By: [Signature]
Mitch Sussman, Chief Executive Officer
Jobar International, Inc.

1 manner. For purposes of this Section, "best efforts" shall include, at a minimum, cooperating with
2 the drafting and filing of the necessary moving papers, and supporting the motion for judicial
3 approval.

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6 entry of a modified consent judgment by the Court; or (ii) a successful motion or application of any
7 Party, and the entry of a modified consent judgment by the Court.

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

11 **AGREED TO:**

AGREED TO:

12
13 Date: 12.14.15

Date: _____

14
15 By: 
16 MARK MOORBERG

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18 By: _____
19 Mitch Sussman, Chief Executive Officer
20 Jobar International, Inc.