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7 JOHN MOORE

8
9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 COUNTY OF ALAMEDA
11 UNLIMITED CIVIL JURISDICTION
12

13 JOHN MOORE,

14 Plaintiff,

15 v.

16 ACE BAYOU CORP.; and DOES 1-150,
17 inclusive,

18 Defendants.

Case No. RG10553319

**[PROPOSED] CONSENT
JUDGMENT**

Health & Safety Code § 25249.6

1 **1. INTRODUCTION**

2 **1.1 John Moore and Ace Bayou Corp.**

3 This Consent Judgment is entered into by and between John Moore (hereinafter “Moore”)
4 and Ace Bayou Corp. (hereinafter “Ace Bayou”), with Moore and Ace Bayou collectively referred
5 to as the “Parties.”

6 **1.2 Plaintiff**

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

10 **1.3 Defendant**

11 Moore alleges that Ace Bayou employs ten or more persons and is a person in the course of
12 doing business for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986,
13 California Health & Safety Code §§ 25249.6 *et seq.* (“Proposition 65”).

14 **1.4 General Allegations**

15 Moore alleges that Ace Bayou has manufactured, distributed, and/or offered for sale in
16 California floor chairs containing di(2-ethylhexyl)phthalate (“DEHP”) without the requisite
17 Proposition 65 warnings. DEHP is listed pursuant to Proposition 65 as a chemical known to the
18 State of California to cause birth defects and other reproductive harm.

19 **1.5 Product Description**

20 The products that are covered by this Consent Judgment are floor chairs containing DEHP,
21 including but not limited to: *Video Rocker (#0 94338 51055 3)*, manufactured, distributed, or sold
22 by Ace Bayou in California (“Products”).

23 **1.6 Notice of Violation**

24 On July 1, 2010, Moore served Ace Bayou and various public enforcement agencies with a
25 document entitled 60-Day Notice of Violation (“Notice”) that provided Ace Bayou and such public
26 enforcers with notice that alleged that Ace Bayou was in violation of Proposition 65 for failing to
27 warn consumers and customers that its Products exposed users in California to DEHP.

1 **1.7 Complaint**

2 On December 28, 2010, Moore filed a complaint in the Alameda County Superior Court (the
3 “Complaint”), naming Ace Bayou as a defendant and alleging violations of Proposition 65 based on
4 the allegations in the Notice.

5 **1.8 No Admission**

6 Ace Bayou denies the factual and legal allegations contained in the Notice and Complaint,
7 and maintains that all products that it has sold in California have been and are in compliance with
8 all laws, including, without limitation, Proposition 65. Nothing in this Consent Judgment shall be
9 construed as an admission by Defendant of any fact, finding, conclusion, issue of law, or violation
10 of law, nor shall compliance with this Consent Judgment constitute or be construed as an admission
11 by Defendant of any fact, finding, conclusion, issue of law, or violation of law, such being
12 specifically denied by Defendant. However, this Section shall not diminish or otherwise affect
13 Defendant’s obligations, responsibilities and duties under this Consent Judgment.

14 **1.9 Consent to Jurisdiction**

15 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
16 jurisdiction over Defendant as to the allegations contained in the Complaint, that venue is proper in
17 the County of Alameda, and that this Court has jurisdiction to enter and enforce the provisions of
18 this Consent Judgment, pursuant to California Code of Civil Procedure §664.6, as a full and binding
19 resolution of all claims which were or could have been raised in the Complaint against Defendant
20 based on the facts alleged therein and in the Notice.

21 **1.10 Effective Date**

22 For purposes of this Consent Judgment, the term “Effective Date” shall mean July 20, 2011.

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1 **2. INJUNCTIVE RELIEF**

2 **2.1 Reformulation Standards**

3 As of the Effective Date, Ace Bayou shall not ship, sell, or offer to be shipped for sale in
4 California any Product unless it is a “Reformulated Product,” which is a Product containing DEHP
5 in concentrations less than 1,000 parts per million (the “DEHP Standard”) in each accessible
6 component when analyzed pursuant to U.S. Environmental Protection Agency testing
7 methodologies 3580A and 8270C or any other methodology utilized by federal or state agencies for
8 the purpose of determining DEHP content in a solid substance. However Ace Bayou may ship, sell,
9 or offer to be shipped for sale, until November 15, 2011 and not after, in California, a Product that
10 does not meet the DEHP Standard if Ace Bayou complies with the warning requirements set forth
11 in Section 2.2 below. After November 15, 2011 Ace Bayou shall not ship, sell, or offer to be
12 shipped for sale in California any Product unless it is a Reformulated Product.

13 **2.2 Product Warnings**

14 Commencing on the Effective Date and continuing only until November 15, 2011, Ace Bayou
15 shall, for all Products sold in California that do not meet the DEHP Standard, provide clear and
16 reasonable warnings as set forth in California Code of Regulations, title 27 section 25603.2 . Each
17 warning shall be prominently placed with such conspicuousness as compared with other words,
18 statements, designs, or devices as to render it likely to be read and understood by an ordinary
19 individual under customary conditions before purchase or use. Each warning shall be provided in a
20 manner such that the consumer or user understands to which specific Product the warning applies, so
21 as to minimize the risk of consumer confusion.

22
23 **3. MONETARY PAYMENTS**

24 In settlement of all the claims referred to in this Consent Judgment against it, Ace Bayou
25 shall make payments as follows:

26 **3.1 Initial Penalty**

27 Ace Bayou shall make an initial payment of \$3,000.00 to be apportioned in accordance with
28 Health & Safety Code § 25249.12 (c)(1) and (d), with 75% of these funds remitted to the State of

1 California's Office of Environmental Health Hazard Assessment ("OEHHA") and the remaining
2 25% of these penalty monies remitted to Moore as provided by Health & Safety Code
3 § 25249.12(d). Ace Bayou shall issue two separate checks for the penalty payment: (a) one check
4 made payable to "The Chanler Group in Trust for OEHHA" in the amount of \$2,250.00,
5 representing 75% of the total penalty, and (b) one check to "The Chanler Group in Trust for John
6 Moore" in the amount of \$750.00, representing 25% of the total penalty. Two separate 1099s shall
7 be issued for the above payments. The first 1099 shall be issued to the Office of Environmental
8 Health Hazard Assessment, P.O. Box 4010, Sacramento, CA 95814 (EIN: 68-0284486) in the
9 amount of \$2,250.00. The second 1099 shall be issued to Moore in the amount of \$750, whose
10 address and tax identification number shall be furnished upon request. The payments shall be
11 delivered on or before August 1, 2011, at the address set forth in Section 3.3.

12 **3.2 Second Penalty**

13 Ace Bayou shall pay a second civil penalty of \$10,000.00, on or before December 1, 2011, to
14 be apportioned in accordance with Health & Safety Code § 25249.12(c)(1) and (d) as described
15 above, which penalty shall be waived in its entirety, if, by November 15, 2011, an officer of Ace
16 Bayou certifies in writing that all Products in its inventory and the inventory of its downstream
17 customers meet the DEHP Standard, and that all Products manufactured, distributed, and/or offered
18 for sale in California by Ace Bayou from November 15, 2011 forward shall also meet the DEHP
19 Standard.

20 **3.3 Payment Address**

21 All payments, unless waived, shall be delivered to the following address:

22 The Chanler Group
23 Attn: Proposition 65 Controller
24 2560 Ninth Street
25 Parker Plaza, Suite 214
26 Berkeley, CA 94710

25 **4. REIMBURSEMENT OF FEES AND COSTS**

26 The Parties acknowledge that Moore and his counsel offered to resolve this dispute without
27 reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving this fee
28 issue to be resolved after the material terms of the agreement had been settled. Ace Bayou then

1 expressed a desire to resolve the fee and cost issue shortly after the other settlement terms had been
2 finalized. The Parties then attempted to (and did) reach an accord on the compensation due to
3 Moore and his counsel under general contract principles and the private attorney general doctrine
4 codified at California Code of Civil Procedure (CCP) §1021.5, for all work performed in this
5 matter, except fees that may be incurred on appeal. Under these legal principles, Ace Bayou shall
6 pay the amount of \$25,500.00 for fees and costs incurred as a result of investigating, bringing this
7 matter to Ace Bayou's attention, and negotiating a settlement in the public interest. Ace Bayou
8 shall issue a separate 1099 for fees and costs (EIN: 94-3171522) and shall make the check payable
9 to "The Chanler Group." Payment shall be made in two parts. The first payment of \$11,000.00
10 shall be delivered on or before August 1, 2011, and the second payment of \$14,500.00 shall be
11 delivered on or before October 1, 2011. All payments of attorney fees and costs shall be delivered
12 to the Payment Address in Section 3.3, above.

1 **5. CLAIMS COVERED AND RELEASED**

2 **5.1 Full, Final and Binding Resolution of Proposition 65 Allegations**

3 This Consent Judgment is a full, final and binding resolution between Plaintiff, on behalf of
4 himself and the public, and Defendant, of any violation of Proposition 65 that was or could have been
5 asserted by Plaintiff against Defendant, its parents, subsidiaries, affiliated entities that are under
6 common ownership, directors, officers, employees, attorneys, and each entity to whom Defendant
7 directly or indirectly distributes or sells Products, including but not limited to downstream
8 distributors, wholesalers, customers, retailers, franchisees, cooperative members, licensors, and
9 licensees (“Releasees”), based on their failure to warn about alleged exposures to DEHP contained in
10 the Products that were sold by Defendant.

11 **5.2 Plaintiff’s Public Release of Proposition 65 Claims**

12 In further consideration of the promises and agreements herein contained, Plaintiff on behalf
13 of himself, his past and current agents, representatives, attorneys, successors, and/or assignees, and in
14 the interest of the general public, hereby waives all rights to institute or participate in, directly or
15 indirectly, any form of legal action and releases all claims, including, without limitation, all actions,
16 and causes of action, in law or in equity, suits, liabilities, demands, obligations, damages, costs, fines,
17 penalties, losses, or expenses--including, but not limited to, investigation fees, expert fees, and
18 attorneys’ fees, but exclusive of fees and costs on appeal--limited to and arising under Proposition 65
19 with respect to DEHP in the Products sold by Defendant (collectively “claims”), against Defendant
20 and Releasees.

21 **5.3 Plaintiff’s Individual Release of Claims**

22 Plaintiff also, in his individual capacity only and not in his representative capacity, provides a
23 release herein which shall be effective as a full and final accord and satisfaction, as a bar to all
24 actions, causes of action, obligations, costs, expenses, attorneys’ fees, damages, losses, claims,
25 liabilities and demands of Plaintiff of any nature, character or kind, whether known or unknown,
26 suspected or unsuspected, limited to and arising out of alleged or actual exposures to DEHP in the
27 Products manufactured, distributed or sold by Defendant.

1 **5.4 Defendant's Release of Plaintiff**

2 Defendant on behalf of itself, its past and current agents, representatives, attorneys,
3 successors, and/or assignees, hereby waives any and all claims against Plaintiff, his attorneys and
4 other representatives, for any and all actions taken or statements made (or those that could have been
5 taken or made) by Plaintiff and his attorneys and other representatives, whether in the course of
6 investigating claims or otherwise seeking to enforce Proposition 65 against it in this matter with
7 respect to the Products.

8 **6. COURT APPROVAL**

9 This Consent Judgment is not effective until it is approved and entered by the Court and
10 shall be null and void if, for any reason, it is not approved and entered by the Court within one year
11 after it has been fully executed by all Parties, in which event any monies that have been provided to
12 Moore or his counsel pursuant to Section 3 and/or Section 4 above shall be refunded within fifteen
13 (15) days after receiving written notice from Ace Bayou that the one-year period has expired.

14 **7. SEVERABILITY**

15 If, subsequent to the execution of this Consent Judgment, any of the provisions of this
16 Consent Judgment are held by a court to be unenforceable, the validity of the enforceable provisions
17 remaining shall not be adversely affected.

18 **8. GOVERNING LAW**

19 The terms of this Consent Judgment shall be governed by the laws of the State of California
20 and apply within the State of California. In the event that Proposition 65 is repealed, preempted, or
21 is otherwise rendered inapplicable by reason of law generally, or as to the Products, then Ace Bayou
22 shall have no further obligations pursuant to this Consent Judgment with respect to, and to the
23 extent that, the Products are so affected.

24 **9. NOTICES**

25 Unless specified herein, all correspondence and notices required to be provided pursuant to
26 this Consent Judgment shall be in writing and sent by (i) personal delivery, (ii) first-class,
27 registered or certified mail, return receipt requested, or (iii) overnight courier on any party by the
28 other party at the following addresses:

1 For Ace Bayou:

2 Richard Davis, Vice President
3 Ace Bayou Corp.
4 3700 Desire Parkway
5 New Orleans, LA 70126

6 For Moore:

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

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

14 **10. COUNTERPARTS; FACSIMILE SIGNATURES**

15 This Consent Judgment may be executed in counterparts and by facsimile or .pdf signature,
16 each of which shall be deemed an original, and all of which, when taken together, shall constitute
17 one and the same document.

18 **11. POST EXECUTION ACTIVITIES**

19 Moore agrees to comply with the reporting form requirements referenced in California
20 Health & Safety Code § 25249.7(f). In addition, the Parties acknowledge that, pursuant to
21 California Health & Safety Code § 25249.7, a noticed motion is required to obtain judicial approval
22 of this Consent Judgment. In furtherance of obtaining such approval, Moore and Ace Bayou and
23 their respective counsel agree to mutually employ their best efforts to support the entry of this
24 agreement as a Consent Judgment and obtain approval of the Consent Judgment by the Court in a
25 timely manner. For purposes of this section, best efforts shall include, at a minimum, cooperating
26 on the drafting and filing of any papers in support of the required motion for judicial approval.

27 **12. MODIFICATION**

28 This Consent Judgment may be modified only: (1) by written agreement of the Parties and
upon entry of a modified consent judgment by the Court thereon; or (2) upon a successful motion of
any party and entry of a modified consent judgment by the Court. The Attorney General shall be

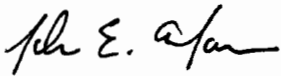
1 served with notice of any proposed modification to this Consent Judgment at least fifteen (15) days
2 in advance of its consideration by the Court.

3 **13. AUTHORIZATION**

4 The undersigned are authorized to execute this Consent Judgment and have read,
5 understood, and agree to all of the terms and conditions of this Consent Judgment.

6
7 **AGREED TO:**

AGREED TO:

8
9 By: 
10 JOHN MOORE

By: _____
RICHARD DAVIS, VICE PRESIDENT
ACE BAYOU CORP.

11 Date: July 22, 2011

Date: _____

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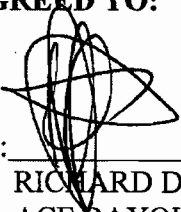
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AGREED TO:

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9 By: _____
10 JOHN MOORE

By:  _____
RICHARD DAVIS, VICE PRESIDENT
ACE BAYOU CORP.

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12 Date: _____

Date: 7-20-11 _____

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