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JOHN MOORE

7 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
8 COUNTY OF ALAMEDA  
9 UNLIMITED CIVIL JURISDICTION

10  
11 JOHN MOORE,  
12 Plaintiff,  
13 v.  
14 ORGILL, INC.; and DOES 1-150, inclusive,  
15 Defendants.

Case No. RG12652928

**[PROPOSED] CONSENT JUDGMENT**

1 **1. INTRODUCTION**

2 **1.1 John Moore and Orgill, Inc.**

3 This Consent Judgment is entered into by and between plaintiff John Moore (“Moore” or  
4 “Plaintiff”) and defendant Orgill, Inc. (“Orgill” or “Defendant”), with Plaintiff and Defendant  
5 collectively referred to as the “Parties” and each individually referred to as a “Party.”

6 **1.2 Plaintiff**

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

10 **1.3 Defendant**

11 Orgill 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, California Health &  
13 Safety Code § 25249.6 *et seq.* (“Proposition 65”).

14 **1.4 General Allegations**

15 Moore alleges that Orgill manufactured, imported, distributed, sold and/or offered for  
16 sale tools with grips containing di(2-ethylhexyl)phthalate (“DEHP”) and PVC/vinyl rainwear  
17 containing DEHP in the State of California without the requisite Proposition 65 health hazard  
18 warnings. DEHP is listed pursuant to Proposition 65 as known to the State of California to  
19 cause birth defects and other reproductive harm.

20 **1.5 Product Description**

21 The products that are covered by this Consent Judgment are defined as: (1) tools with  
22 grips bearing the TopMost, ToolBasix, Mintcraft or Mintcraft Pro brand label containing DEHP  
23 including, but not limited to, the *TopMost 10 in. Groove Joint Pliers, SKU# 546-6370 (#0*  
24 *45734 90782 9)*, sold or offered for sale or use by Orgill in the State of California, hereinafter  
25 referred to as the “Initial Noticed Products;” and (2) PVC/vinyl rainwear containing DEHP  
26 including, but not limited to, the *Diamondback 2 Piece Rain Suit, SKU No. 603-5547 (#0 45734*  
27 *90646 4)*, sold or offered for sale or use by Orgill in the State of California, hereinafter referred  
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1 to as the “Supplemental Noticed Products.” The Initial Noticed Products and the Supplemental  
2 Noticed Products are hereinafter referred to collectively as the “Covered Products.”

3 **1.6 Notices of Violation**

4 On April 5, 2012, Moore served Orgill and various public enforcement agencies with a  
5 document entitled “60-Day Notice of Violation” (“Initial Notice”) that provided the recipients  
6 with notice of alleged violations of Proposition 65 for failing to warn consumers that hand tool  
7 grips exposed users in California to DEHP. To the best of the Parties’ knowledge, no public  
8 enforcer has commenced and is diligently prosecuting the allegations set forth in the Initial  
9 Notice.

10 On April 10, 2013, Moore served Orgill and various public enforcement agencies with a  
11 document entitled “Supplemental 60-Day Notice of Violation” (“Supplemental Notice”) that  
12 provided the recipients with notice of alleged violations of Proposition 65 by Orgill for failing  
13 to warn consumers that hand tool grips and the Supplemental Noticed Products exposed users in  
14 California to DEHP. The Initial Notice and the Supplemental Notice are hereinafter collectively  
15 referred to as the “Notices.”

16 **1.7 Complaint**

17 On or about October 22, 2012, Moore, who was and is acting in the interest of the  
18 general public in California, filed a complaint (“Complaint” or “Action”) in the Superior Court  
19 in and for the County of Alameda against Orgill and Does 1 through 150, alleging, *inter alia*,  
20 violations of Proposition 65 based on the alleged exposures to DEHP contained in hand tool  
21 grips manufactured, imported, distributed, sold and/or offered for sale in California by Orgill.  
22 In the event that no public enforcer undertakes diligent prosecution of the allegations set forth in  
23 the Supplemental Notice, and upon entry of this Consent Judgment by the Court, the Complaint  
24 shall be deemed amended to include violations of Proposition 65 based on the alleged exposures  
25 to DEHP contained in the Supplemental Noticed Products.

1           **1.8 No Admission**

2           Orgill denies the material factual and legal allegations contained in Moore's Notices and  
3 Complaint and maintains that all Covered Products sold and distributed in California have been  
4 and are in compliance with all laws. Nothing in this Consent Judgment shall be construed as an  
5 admission by Orgill of any fact, finding, issue of law, or violation of law; nor shall compliance  
6 with this Consent Judgment constitute or be construed as an admission by Orgill of any fact,  
7 finding, conclusion, issue of law, or violation of law, such being specifically denied by Orgill.  
8 However, this section shall not diminish or otherwise affect Orgill's obligations,  
9 responsibilities, and duties under this Consent Judgment.

10           **1.9 Consent to Jurisdiction**

11           For purposes of this Consent Judgment only, the Parties stipulate that this Court has  
12 jurisdiction over Orgill as to the allegations contained in the Complaint, that venue is proper in  
13 the County of Alameda, and that this Court has jurisdiction to enter and enforce the provisions  
14 of this Consent Judgment.

15           **1.10 Effective Date**

16           For purposes of this Consent Judgment, the term "Effective Date" shall mean the date  
17 this Consent Judgment is approved by the Court.

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

19           **2.1 Reformulation Standard and Obligation**

20           On or before May 30, 2013, Orgill shall provide the reformulation standards for  
21 Reformulated Products to its then-current Vendors of the Covered Products that will be sold or  
22 offered for sale to California consumers and shall instruct each Vendor to use reasonable efforts  
23 to provide Reformulated Products expeditiously. As used herein the term "Vendor" means a  
24 person or entity that manufactures, imports, distributes, or otherwise supplies Covered Products  
25 to Orgill. Additionally, as used herein, the term "Reformulated Products" shall mean Covered  
26 Products containing components that, during their normal intended use, are handled, touched, or  
27 mouthed by a consumer, and which components yield less than 1,000 parts per million (0.1%)  
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1 of DEHP when analyzed pursuant to Environmental Protection Agency testing methodologies  
2 3580A and 8270C, or any method utilized by state or federal agencies for the purposes of  
3 determining DEHP content in a solid substance. In addressing the obligation set forth in this  
4 Section, Orgill shall not employ statements that will encourage a Vendor to delay compliance  
5 with the reformulation standards. Orgill shall provide Moore with copies of such Vendor  
6 notification. Neither Moore nor his counsel shall disclose such notification or any information  
7 derived from such notification to any person, nor shall either Moore or his counsel use such  
8 information for any purpose other than to enforce the provisions of this Consent Judgment.

9 Commencing on May 30, 2013, Orgill shall not purchase, import, and/or manufacture  
10 any Covered Product for distribution or sale in California unless it is a Reformulated Product,  
11 or, alternatively, unless the Covered Product contains clear and reasonable warnings as set forth  
12 herein.

13 **2.2 Warnings Commitment**

14 Orgill shall, for all Covered Products, other than Reformulated Products, purchased,  
15 imported, and/or manufactured, for distribution or sale in California on or after May 30, 2013,  
16 provide clear and reasonable warnings as set forth in subsections 2.2(a) and (b). Each warning  
17 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  
20 in a manner such that the consumer or user understands to which *specific* Covered Product the  
21 warning applies, so as to minimize the risk of consumer confusion. The bracketed language is  
22 required for all Supplemental Noticed Products and Initial Noticed Products bearing the  
23 TopMost brand label and optional for all other Covered Products.

24 (i) **Product Labeling.** Orgill shall affix a warning to the packaging,  
25 labeling, or directly on each Covered Product sold in retail outlets in California by Orgill or any  
26 person selling the Covered Products, that states:  
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1                   **WARNING:** This product contains chemicals[, including the  
2   phthalate chemical DEHP,] known to the State of  
3   California to cause birth defects and other  
4   reproductive harm.

4                   (ii)     **Point-of-Sale Warnings.** Alternatively, Orgill may provide  
5 warning signs in the form below to its customers in California with instructions to post the  
6 warnings in close proximity to the point of display of the Covered Products. Such instruction  
7 sent to Orgill’s customers shall be sent by certified mail, return receipt requested.

8                   **WARNING:** This product contains chemicals[, including the  
9   phthalate chemical DEHP,] known to the State of  
10    California to cause birth defects and other  
11    reproductive harm.

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

14                   **WARNING:** The following products contain chemicals[,  
15   including the phthalate chemical DEHP,] known  
16   to the State of California to cause birth defects  
17   and other reproductive harm:

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

18     **3.     PENALTIES PURSUANT TO HEALTH & SAFETY CODE § 25249.7(b)**

19                   In settlement of all the claims referred to in this Consent Judgment, Orgill shall pay a total  
20 of \$40,000 in civil penalties in accordance with this Section. Each penalty payment will be  
21 allocated in accordance with California Health & Safety Code § 25249.12(c)(1) & (d), with 75%  
22 of the funds remitted to the California Office of Environmental Health Hazard Assessment  
23 (“OEHHA”) and the remaining 25% of the penalty remitted to Moore as follows:

24  
25  
26 <sup>1</sup> For purposes of the Consent Judgment, “sold in proximity” shall mean that the Covered Product and another  
27 similar product are offered for sale close enough to each other that the consumer, under customary conditions of  
28 purchase, could not reasonably determine which of the two products is subject to the warning sign.

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**3.1 Initial Civil Penalty**

Orgill shall pay an initial civil penalty in the amount of \$10,000. Orgill shall issue two separate checks to: (a) “OEHHA” in the amount of \$7,500 on or before the Effective Date; and (b) “The Chanler Group in Trust for John Moore” in the amount of \$2,500 on or before the Effective Date. All penalty payments shall be delivered to the addresses listed in Section 3.4 below.

**3.2 Payment in Lieu of Civil Penalty**

On or before the Effective Date, Orgill shall pay the sum of \$5,000 to Silent Spring Institute (“Silent Spring”), a not-for-profit institution, in lieu of further civil fines pursuant to Health & Safety Code § 25249.7(b), and California Code of Regulations, Title 11, § 3202(b). Silent Spring will use such funds to continue its work identifying the links between exposure to environmental chemicals, including DEHP, and reproductive and developmental harm, as well as educating the public about such potential exposures. Silent Spring will conduct exposure- and risk-based prioritization of chemicals listed under Proposition 65, or chemicals OEHHA has identified as candidates for listing, in order to identify exposures of potential public health significance. Silent Spring may also use a portion of such funds to monitor compliance with the reformulation and warnings requirements of this and other similar consent judgments addressing Proposition 65-listed chemical exposures, as well as to conduct additional exposure measurements that evaluate the levels of chemical exposures to users of products that contain phthalate chemicals and lead. Orgill shall issue a check to “The Chanler Group in Trust for Silent Spring Institute” in the amount of \$5,000.

**3.3 Final Civil Penalty**

Orgill shall pay a final civil penalty of \$25,000 on or before December 31, 2013. The final civil penalty shall be waived in its entirety, however, if, no later than December 15, 2013, an officer of Orgill provides Moore with written certification that, as of the date of such certification and continuing into the future, Orgill has met the reformulation standard specified in Section 2.1 above, such that seventy-five percent (75%) or more of the Covered Products

1 manufactured, imported, distributed, sold and offered for sale in California by Orgill are  
2 Reformulated Products. The certification in lieu of a final civil penalty payment provided by this  
3 Section is a material term, and time is of the essence. Orgill shall issue two separate checks for  
4 its final civil penalty payments to: (a) "OEHHA" in the amount of \$18,750; and (b) "The  
5 Chanler Group in Trust for John Moore" in the amount of \$6,250.

6 **3.4 Payment Procedures**

7 **3.4.1 Issuance of Payments.** Payments shall be delivered as follows:

8 (a) All payments owed to Moore, pursuant to Sections 3.1 and 3.3, and the  
9 payment owed to Silent Spring, pursuant to Section 3.2, shall be  
10 delivered to the following payment address:

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

16 (b) All payments owed to OEHHA (EIN: 68-0284486), pursuant to  
17 Sections 3.1 and 3.3, shall be delivered directly to OEHHA (Memo  
18 line "Prop 65 Penalties") at the following addresses:

19 For United States Postal Service Delivery:

20 Mike Gyrics  
21 Fiscal Operations Branch Chief  
22 Office of Environmental Health Hazard Assessment  
23 P.O. Box 4010  
24 Sacramento, CA 95812-4010

25 For Non-United States Postal Service Delivery:

26 Mike Gyrics  
27 Fiscal Operations Branch Chief  
28 Office of Environmental Health Hazard Assessment  
1001 I Street  
Sacramento, CA 95814

With a copy of the checks payable to OEHHA mailed to The Chanler  
Group at the address set forth above in 3.4.1(a), as proof of payment to  
OEHHA.



1                   **3.4.2 Issuance of 1099 Forms.** After each penalty payment, Orgill shall issue  
2 separate 1099 forms for each payment to: (1) Moore, whose address and tax identification  
3 number shall be furnished upon request after this Consent Judgment has been fully executed by  
4 the Parties; (2) Silent Spring Institute, 29 Crafts Street, Newton, Massachusetts 02458, whose  
5 information shall be provided by email or other means within five (5) calendar day of final  
6 execution of this agreement; and (3) OEHHA at the addresses listed in Section 3.4.1 above.

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

8                   The Parties acknowledge that Moore and his counsel offered to resolve this dispute  
9 without reaching terms on the amount of fees and costs to be reimbursed to them, thereby  
10 leaving this fee issue to be resolved after the material terms of the agreement had been settled.  
11 Moore then expressed a desire to resolve the fee and cost issue shortly after the other settlement  
12 terms had been finalized. The Parties then attempted to (and did) reach an accord on the  
13 compensation due to Moore and his counsel under general contract principles and the private  
14 attorney general doctrine codified at California Code of Civil Procedure § 1021.5, for all work  
15 performed through the mutual execution of this agreement. Orgill shall pay \$65,000 for fees and  
16 costs incurred as a result of investigating, bringing this matter to Orgill’s attention, and  
17 negotiating a settlement in the public interest. Orgill shall issue a separate 1099 for fees and  
18 costs (EIN: 94-3171522), shall make the check payable to “The Chanler Group” and shall deliver  
19 payment on or before the Effective Date, to the address listed in Section 3.4.1 above.

20                   **5. CLAIMS COVERED AND RELEASED**

21                   **5.1 Moore’s Public Release of Proposition 65 Claims**

22                   In consideration of the promises and commitments herein contained, Moore on behalf of  
23 himself and his past and current agents, representatives, attorneys, successors, and/or assignees,  
24 and in the public interest, hereby waive and release Orgill, all of its parents, subsidiaries,  
25 affiliated entities that are under common ownership or control, directors, officers, employees,  
26 and attorneys (“Releasees”) and each entity to whom they directly or indirectly distribute or sell  
27 Covered Products and all distributors, wholesalers, customers, retailers, franchisees, cooperative  
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1 members, licensors, and licensees (“Downstream Releasees”), from all claims for violations of  
2 Proposition 65 based on exposure to DEHP from the Initial Noticed Products arising up through  
3 the date on which the Court enters this Consent Judgment. This waiver and release is limited to  
4 those claims that arise under Proposition 65 with respect to DEHP in the Initial Noticed  
5 Products associated with Orgill, as such claims relate to the alleged failure to warn under Health  
6 & Safety Code § 25249.6 and apply only as to DEHP. Compliance with the terms of this  
7 Consent Judgment constitutes compliance with Proposition 65 with respect to exposures to  
8 DEHP from the Initial Noticed Products.

9 In the event that the Complaint is deemed amended pursuant to Section 1.7 above to  
10 include the allegations found in the Supplemental Notice, Moore, on behalf of himself and in  
11 the public interest, hereby waives and releases Orgill, Releasees and Downstream Releasees  
12 from all claims for violations of Proposition 65 based on exposure to DEHP from the  
13 Supplemental Noticed Products arising up through the date on which the Court enters this  
14 Consent Judgment. This waiver and release is limited to those claims that arise under  
15 Proposition 65 with respect to DEHP in the Supplemental Noticed Products associated with  
16 Orgill, as such claims related to the alleged failure to warn under Health & Safety Code §  
17 25249.6 and apply only as to DEHP. Compliance with the terms of this Consent Judgment  
18 constitutes compliance with Proposition 65 with respect to exposures to DEHP from the  
19 Supplemental Noticed Products.

## 20 **5.2 Moore’s Individual Release of Claims**

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

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**5.3 Orgill’s Release of Moore**

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

**6. COURT APPROVAL**

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

**7. SEVERABILITY**

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

**8. GOVERNING LAW**

The terms of this Consent Judgment shall be governed by the laws of the State of California and apply within the State of California. In the event that Proposition 65 is repealed or is otherwise rendered inapplicable by reason of law generally, or as to the Covered Products, then Orgill shall provide written notice to Moore of any asserted change in the law, and shall have no further obligations pursuant to this Consent Judgment with respect to, and to the extent that, the Covered Products are so affected.

**9. NOTICES**

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

1 To Orgill:

2 Ron Beal, President  
3 Orgill, Inc.  
4 3742 Tyndale Drive  
5 Memphis, TN 38125

To Moore:

Proposition 65 Coordinator  
The Chanler Group  
2560 Ninth Street  
Parker Plaza, Suite 214  
Berkeley, CA 94710

6 With a copy to:

7 Michael Jacob Steel, Esq.  
8 Morrison & Foerster LLP  
9 425 Market Street, 31<sup>st</sup> Floor  
10 San Francisco, CA 94105

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

13 **10. COUNTERPARTS; FACSIMILE SIGNATURES**

14 This Consent Judgment may be executed in counterparts and by facsimile or portable  
15 document format (".pdf"), each of which shall be deemed an original, and all of which, when  
16 taken together, shall constitute one and the same document. A facsimile or .pdf signature shall  
17 be as valid as the original.

18 **11. COMPLIANCE WITH HEALTH & SAFETY CODE § 25249.7(f)**

19 Moore agrees to comply with the reporting form requirements referenced in California  
20 Health & Safety Code § 25249.7(f).

21 **12. ADDITIONAL POST EXECUTION ACTIVITIES**

22 The Parties agree to mutually employ their, and their counsel's, reasonable best efforts to  
23 support the entry of this agreement as a Consent Judgment and obtain approval of the Consent  
24 Judgment by the Court in a timely manner. The Parties acknowledge that, pursuant to  
25 California Health & Safety Code § 25249.7, a noticed motion is required to obtain judicial  
26 approval of this Consent Judgment, which Moore shall file, and which Orgill shall not oppose.  
27 If any third party objection to the noticed motion is filed, Moore and Orgill shall work together  
28 to file a joint reply and appear at any hearing before the Court. If the Court does not approve  
the motion to approve this Consent Judgment, and the Parties choose not to pursue a modified

1 Consent Judgment within 30 days of said denial, or in the event that the Court approve this  
2 Consent Judgment and any person successfully appeals that approval, all payments made  
3 pursuant to this Consent Judgment will be returned to Orgill.

4 **13. MODIFICATION**

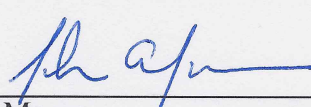
5 This Consent Judgment may be modified only: (1) by written agreement of the Parties  
6 and upon entry of a modified Consent Judgment by the Court thereon; or (2) upon a successful  
7 motion of any Party and entry of a modified Consent Judgment by the court.

8 **14. ENTIRE AGREEMENT**

9 This Consent Judgment contains the sole and entire agreement and understanding of the  
10 Parties with respect to the entire subject matter hereof, and any and all prior discussions,  
11 negotiations, commitments, and understandings related hereto. No representations, oral or  
12 otherwise, express or implied, other than those contained herein have been made by any party  
13 hereto. No other agreements not specifically referred to herein, oral or otherwise, shall be  
14 deemed to exist or to bind any of the Parties.

15 **15. AUTHORIZATION**

16 The undersigned are authorized to execute this Consent Judgment on behalf of their  
17 respective Parties and have read, understood, and agree to all of the terms and conditions of this  
18 Consent Judgment.

19 **AGREED TO:** **AGREED TO:**  
20 Date: APRIL 22, 2013 Date: \_\_\_\_\_  
21  
22 By:  By: \_\_\_\_\_  
23 John Moore Orgill, Inc.  
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1 Consent Judgment within 30 days of said denial, or in the event that the Court approve this  
2 Consent Judgment and any person successfully appeals that approval, all payments made  
3 pursuant to this Consent Judgment will be returned to Orgill.

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5 This Consent Judgment may be modified only: (1) by written agreement of the Parties  
6 and upon entry of a modified Consent Judgment by the Court thereon; or (2) upon a successful  
7 motion of any Party and entry of a modified Consent Judgment by the court.

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10 Parties with respect to the entire subject matter hereof, and any and all prior discussions,  
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12 otherwise, express or implied, other than those contained herein have been made by any party  
13 hereto. No other agreements not specifically referred to herein, oral or otherwise, shall be  
14 deemed to exist or to bind any of the Parties.

15 **15. AUTHORIZATION**

16 The undersigned are authorized to execute this Consent Judgment on behalf of their  
17 respective Parties and have read, understood, and agree to all of the terms and conditions of this  
18 Consent Judgment.

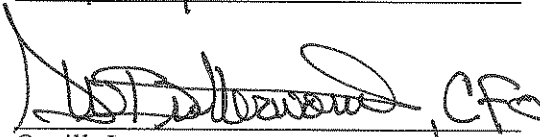
19 **AGREED TO:**

20 Date: \_\_\_\_\_

21  
22 By: \_\_\_\_\_  
23 John Moore

**AGREED TO:**

20 Date: 4/22/13

21  
22 By:  CFO  
23 Orgill, Inc.