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13 SUPERIOR COURT OF THE STATE OF CALIFORNIA
14 COUNTY OF SANTA CLARA
15 UNLIMITED CIVIL JURISDICTION
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18 MARK MOORBERG

19 Plaintiff,

20 v.

21 RGH ENTERPRISES, INC.; and DOES 1-
22 150, inclusive,

23 Defendants.

24 Case No. 115CV275597

25 **[PROPOSED] CONSENT JUDGMENT**

26 (Health & Safety Code § 25249.6 *et seq.* and
27 Code of Civil Procedure § 664.6)

1 **1. INTRODUCTION**

2 **1.1 Parties**

3 This Consent Judgment is entered into by and between Mark Moorberg (“Moorberg”) and
4 RGH Enterprises, Inc. d/b/a Independence Medical, successor by merger to Invacare Supply Group,
5 Inc. (“RGH”), with Moorberg and RGH each individually referred to as a “Party” and collectively
6 as the “Parties.”

7 **1.2 Plaintiff**

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

11 **1.3 Defendant**

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

15 **1.4 General Allegations**

16 Moorberg alleges that RGH manufactures, sells, and/or distributes for sale in California,
17 vinyl/PVC pants that contain di(2-ethylhexyl)phthalate (“DEHP”). DEHP is listed pursuant to
18 Proposition 65 as a chemical known to cause birth defects or other reproductive harm. Moorberg
19 alleges that RGH failed to provide the health hazard warning required by Proposition 65 for
20 exposures to DEHP from its vinyl/PVC pants.

21 **1.5 Product Description**

22 The products that are covered by this Consent Judgment are vinyl/PVC pants containing
23 DEHP manufactured, sold and/or distributed for sale in California by RGH, including, but not
24 limited to, the *Invacare Waterproof Vinyl Pull-On Pant, ISG-3024870, UPC #0 16167 97487 0*
25 (collectively, “Products”).

26 **1.6 Notice of Violation**

27 On September 30, 2014, Moorberg served RGH and the requisite public enforcement
28 agencies with a 60-Day Notice of Violation (“Notice”), alleging that RGH violated Proposition 65

1 by failing to warn its customers and consumers in California that the Products expose users to
2 DEHP. To the best of the Parties' knowledge, no public enforcer has commenced and is diligently
3 prosecuting the allegations set forth in the Notice.

4 **1.7 Complaint**

5 On January 14, 2015, Moorberg commenced the instant action, naming RGH as a defendant
6 for the alleged violations of Proposition 65 that are the subject of the Notice.

7 **1.8 No Admission**

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

16 **1.9 Consent to Jurisdiction**

17 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
18 jurisdiction over RGH as to the allegations contained in the Complaint, that venue is proper in the
19 County of Santa Clara, and that this Court has jurisdiction to enter and enforce the provisions of this
20 Consent Judgment pursuant to Proposition 65 and California Code of Civil Procedure section 664.6.

21 **1.10 Effective Date**

22 For purposes of this Consent Judgment, the term "Effective Date" shall mean the date that
23 the Court grants the motion for approval of this Consent Judgment contemplated by Section 5.

24 **2. INJUNCTIVE SETTLEMENT TERMS**

25 **2.1 Reformulated Standard**

26 For purposes of this Consent Judgment, "Reformulated Products" are defined as Products
27 that contain less than 1,000 ppm (0.1%) DEHP content when analyzed pursuant to Environmental
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1 Protection Agency testing methodologies 3580A and 8270C, or equivalent methodologies used by
2 state or federal agencies for purposes of determining DEHP content in a solid substance.

3 **2.2 Commitment to Reformulate or Warn**

4 Commencing on March 2, 2015 and continuing thereafter, RGH shall only purchase for sale
5 or manufacture for sale in California, Reformulated Products, or Products that are sold with a clear
6 and reasonable warning pursuant to Section 2.3.

7 **2.3 Health Hazard Warnings**

8 Commencing on March 2, 2015 and continuing thereafter, for all Products that are not
9 Reformulated Products (i.e. Products that contain more than 1,000 ppm DEHP), RGH agrees that it
10 will only ship, sell, or offer such Products for sale in California with a clear and reasonable warning
11 utilized pursuant to this Section. RGH further agrees that the warning will be prominently placed
12 with such conspicuousness as compared with other words, statements, designs, or devices as to
13 render it likely to be read and understood by an ordinary individual under customary conditions
14 before purchase or use. For purposes of this Consent Judgment, a clear and reasonable warning
15 shall consist of a warning affixed to the packaging, label, tag, or directly to a Product sold in
16 California containing the following statement:

17 **WARNING:** This product contains DEHP, a chemical
18 known to the State of California to cause birth
defects or other reproductive harm.¹

19 In the event that RGH conducts any sales of Products in or into California online via the internet,
20 the warning shall be made visible to the purchaser(s) of the Products prior to the time at which
21 the purchase is completed and shall meet the requirements specified above with regard to the
22 prominence, size and visibility of the warning message.

23 **3. MONETARY SETTLEMENT TERMS**

24 **3.1 Civil Penalty Payments**

25 Pursuant to Health and Safety Code section 25249.7(b)(2), and in settlement of all claims
26 alleged in the Notice and referred to in this Consent Judgment, RGH agrees to pay \$9,000 in civil
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28 ¹ The regulatory safe harbor warning language specified in tit. 27 Cal. Code Regs. §
25603.2(a)(2) may also be used if RGH employed it for Products prior to the Effective Date.

1 penalties. Each penalty payment will be allocated in accordance with California Health and Safety
2 Code section 25249.12(c)(1) and (d), with 75% of the penalty amount remitted to the California
3 Office of Environmental Health Hazard Assessment (“OEHHA”) and the remaining 25% of the
4 penalty amount paid to Moorberg. Moorberg’s counsel shall be responsible for delivering
5 OEHHA’s portion of any penalty payment(s) made under this Consent Judgment.

6 **3.1.1 Initial Civil Penalty.** Within ten (10) days of the Effective Date, RGH shall
7 pay an initial civil penalty in the amount of \$3,000. RGH will provide its payment in a single check
8 made payable to: “Mark Moorberg, Client Trust Account” in the amount of \$3,000.

9 **3.1.2 Final Civil Penalty.** On June 15, 2015, RGH shall pay a final civil penalty
10 of \$6,000 (the “Final Civil Penalty”). The Final Civil Penalty shall be waived in its entirety if, by
11 June 1, 2015, an officer of RGH provides Moorberg’s counsel with written certification that, as of
12 the date of such certification, all Products purchased for sale or distributed for sale in California are
13 Reformulated Products as defined by this Consent Judgment and that it will continue to only offer
14 Reformulated Products in the future. Alternatively, RGH may certify that it is no longer offering
15 the Products for sale in California and that, if it recommences sales in California, it will only offer
16 Reformulated Products. The option to provide a written certification of reformulation (or cessation
17 of sales) in lieu of making the Final Civil Penalty payment otherwise required by this Agreement is
18 a material term, and time is of the essence. If RGH, within one year of having provided a
19 certification pursuant to this Section, recommences sales of non-Reformulated Products in
20 California, it shall provide written notice to Moorberg, and tender the \$6,000 Final Civil Penalty
21 payment in a check made payable to “Mark Moorberg, Client Trust Account.” RGH agrees that it
22 will not recommence sales of non-Reformulated Products more than one year post-certification
23 unless it has previously paid the Final Civil Penalty.

24 **3.2 Reimbursement of Moorberg’s Attorneys’ 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
27 the issue to be resolved after the material terms of the agreement had been settled. Shortly after
28 the other settlement terms had been finalized, RGH expressed a desire to resolve Moorberg’s fees

1 and costs. The Parties then negotiated a resolution of the compensation due to Moorberg and his
2 counsel under general contract principles and the private attorney general doctrine codified at
3 California Code of Civil Procedure § 1021.5. For all work performed through the mutual
4 execution of this agreement and the Court's approval of the same, but exclusive of fees and costs
5 on appeal, if any, RGH shall pay \$28,500. RGH's payment shall be due within ten (10) days of the
6 Effective Date, and delivered to the address in Section 3.4 in the form of a check payable to "The
7 Chanler Group." The reimbursement shall cover all fees and costs incurred by Moorberg
8 investigating, bringing this matter to RGH's attention, litigating, and negotiating a settlement of
9 the matter in the public interest.

10 **3.3 Payments Held In Trust**

11 With the exception of the Final Civil Penalty payment required by Section 3.1.2, RGH shall
12 deliver all payments required by this Consent Judgment to its counsel within thirty (30) days of the
13 date that this agreement is fully executed by the Parties. RGH's counsel shall confirm receipt of
14 settlement funds in writing to Moorberg's counsel and, thereafter, hold the amounts paid in trust
15 until such time as the Court grants the motion for approval of the Parties' settlement contemplated
16 by Section 5. Within ten (10) days of the Effective Date, RGH's counsel shall deliver all
17 settlement payments it has held in trust to Moorberg's counsel at the address provided in Section
18 3.4. In the event the Final Civil Penalty payment required by Section 3.1.2 becomes due prior to
19 the Effective Date, then RGH shall deliver the Final Civil Penalty payment to its attorney to be
20 held in trust until, and disbursed within ten (10) days after, the Effective Date.

21 **3.4 Payment Address**

22 All payments required by this Consent Judgment shall be delivered to the following
23 address:

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

1 **4. CLAIMS COVERED AND RELEASED**

2 **4.1 Moorberg’s Release of RGH**

3 **4.1.1 Moorberg’s Release of Proposition 65 Claims**

4 This Consent Judgment is a full, final, and binding resolution between Moorberg and RGH,
5 of any violation of Proposition 65 that was or could have been asserted by Moorberg in the public
6 interest, on his own behalf, or on behalf of his past and current agents, representatives, attorneys,
7 successors, and/or assignees, as alleged in the Notice and as alleged or as could have been alleged
8 in the Complaint against: (a) RGH, its parents, subsidiaries, affiliates, directors, officers,
9 employees, attorneys, and assigns; and (b) RGH’s downstream distributors, wholesalers, retailers
10 and/or customers, including, without limitation, each entity to which RGH directly or indirectly
11 distributed, distributes, sold or sells the Products, and the successors and assigns of any of them,
12 who may have used, maintained, distributed or sold the Products (the “Released Parties”), based on
13 the alleged failure to warn, including, without limitation, pursuant to Health & Safety Code §
14 25249.6, about exposures to DEHP from Products manufactured, distributed, sold or offered for
15 sale by RGH in California before the Effective Date. Compliance with the terms of this Consent
16 Judgment constitutes compliance with Proposition 65. The Parties further agree and understand
17 that this release extends to those upstream entities that manufactured or supplied the Products to
18 RGH, or from which RGH directly or indirectly purchased the Products, but only to the extent said
19 upstream manufacturer(s) or supplier(s) Products were/are ultimately sold or distributed for sale by
20 RGH.

21 **4.1.2 Moorberg’s Individual Release of Claims**

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

1 **4.2 RGH's Release of Moorberg**

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

8 **4.3 Mutual California Civil Code Section 1542 Waiver**

9 The Parties, including Moorberg in his individual capacity only and *not* in any
10 representative capacity and RGH, each acknowledge that he/it is familiar with Section 1542 of Civil
11 Code, which provides as follows:

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

16 The Parties, each on his/its own behalf, and on behalf of his/its past and current agents,
17 representatives, attorneys, successors, and/or assignees, expressly waives and relinquishes any and
18 all rights and benefits which he/it may have under, or which may be conferred on him/it by the
19 provisions of Civil Code § 1542 as well as under any other state or federal statute or common law
20 principle of similar effect, to the fullest extent that he/it may lawfully waive such rights or benefits
21 pertaining to the released matters, which are defined as RGH's alleged or actual failure to warn
22 about exposures to DEHP from the Products, and Moorberg and Moorberg's counsel's statements
23 and actions made or taken in connection with the investigation or enforcement of Moorberg's
24 claims with respect to the Products, as alleged in the Notice and Complaint.

25 **5. COURT APPROVAL**

26 This Consent Judgment is not effective until it is approved and entered by the Court and
27 shall be null and void if, for any reason, it is not approved and entered by the Court within one year
28 after it has been fully executed by all Parties. Moorberg and RGH agree to support the entry of this

1 agreement as a judgment, and to obtain the Court's approval of their settlement in a timely manner.
2 The Parties acknowledge that, pursuant to California Health and Safety Code section 25249.7(f), a
3 noticed motion is required for judicial approval of this Consent Judgment, which motion Moorberg
4 shall draft and file and RGH shall support, appearing at the hearing if so requested. If any third-
5 party objection to the motion is filed, Moorberg and RGH agree to work together to file a reply and
6 appear at any hearing. This provision is a material component of the Consent Judgment and shall
7 be treated as such in the event of a breach.

8 **6. APPLICATION OF JUDGMENT**

9 The obligations of this Consent Judgment shall apply to and be binding upon all plaintiffs
10 acting in the public interest pursuant to Health and Safety Code § 25249.7(d), and RGH, and its
11 successors and assigns. The terms contained in this Consent Judgment shall be submitted to the
12 California Attorney General's office prior to the entry of this Consent Judgment by the Court.

13 **7. COMPLIANCE WITH SERVICE AND REPORTING REQUIREMENTS**

14 Moorberg and his attorneys agree to comply with the reporting and service requirements
15 referenced in California Health and Safety Code section 25249.7(f), and Title 11, California Code
16 of Regulations, section 3003, et seq., providing the Attorney General's Office receive a form
17 reporting of the settlement, and service of the Consent Judgment and all moving papers in support
18 of the approval motion at least 45 days before the Court hears the motion.

19 **8. SEVERABILITY**

20 If, subsequent to the execution of this Consent Judgment, any provision of this Consent
21 Judgment is found by a court to be unenforceable, the validity of the remaining provisions shall not
22 be adversely affected.

23 **9. GOVERNING LAW**

24 The terms of this Consent Judgment shall be governed by the laws of the State of California
25 and apply within the State of California. In the event that Proposition 65 is repealed, preempted, or
26 is otherwise rendered inapplicable by reason of law generally, or as to the Products, then RGH may
27 provide Moorberg with written notice of any asserted change in the law, and shall have no further
28 obligations pursuant to this Consent Judgment, with respect to, and to the extent that, the Products

1 are so affected. Nothing in this Consent Judgment shall be interpreted to relieve RGH from its
2 obligation to comply with any pertinent state or federal law or regulation.

3 **10. 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 any Party by the other at the
7 following addresses:

8 For RGH:

For Moorberg:

9 Steven Eisenberg
10 AssuraMed
11 1810 Summit Commerce Park
Twinsburg, OH 44087

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

12 with copy to:

13 John F. Cermak, Jr.
14 Baker & Hostetler LLP
11601 Wilshire Boulevard, Suite 1400
Los Angeles, CA 90025-0509

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

17 **11. COUNTERPARTS, FACSIMILE AND PDF 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 **12. COMPLIANCE WITH REPORTING REQUIREMENTS**

22 Moorberg and his counsel agree to comply with the reporting form requirements referenced
23 in California Health and Safety Code section 25249.7(f).

24 **13. MODIFICATION**

25 This Consent Judgment may be modified only: (1) upon written agreement of the Parties
26 and upon entry of a modified Consent Judgment by the Court thereon; or (2) upon a successful
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1 motion of any party as provided by law and upon entry of a modified Consent Judgment by the
2 Court.

3 **14. ENTIRE AGREEMENT**

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

10 **15. AUTHORIZATION**

11 Each signatory to this Consent Judgment certifies that he or she is fully authorized by the
12 Party he or she represents to enter into this Consent Judgment and to execute it on behalf of the
13 party represented and legally to bind that party.

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1 **APPROVED AS TO FORM:**

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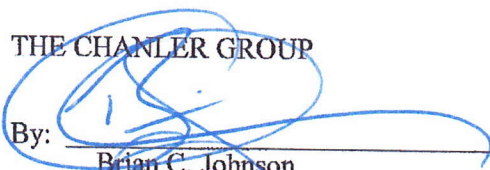
3 Dated: 3/2/15, 2015

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THE CHANLER GROUP

By: 
Brian C. Johnson
Attorneys for Plaintiff
MARK MOORBERG

7 **APPROVED AS TO FORM:**

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9 Dated: 2/27/, 2015

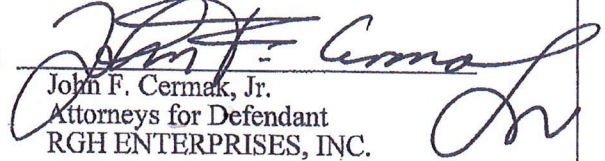
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BAKER & HOSTETLER LLP

By: 
John F. Cermak, Jr.
Attorneys for Defendant
RGH ENTERPRISES, INC.

14 **AGREED TO:**

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MARK MOORBERG

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18 Dated: 3.3.15

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AGREED TO:


RGH, INC.

By: Steve Eisenberg
(Print Name)

Its: Vice President
(Title)

Dated: 2/27/15