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9 JOHN MOORE

10
11 SUPERIOR COURT OF THE STATE OF CALIFORNIA
12 COUNTY OF MARIN
13 UNLIMITED CIVIL JURISDICTION

14 JOHN MOORE

15 Plaintiff,

16 v.

17 EXCLUSIVE IMPORTS, INC.; and DOES 1-
18 150, inclusive,

19 Defendants.

Case No. CIV 1105660

[PROPOSED] CONSENT JUDGMENT

1 **1. INTRODUCTION**

2 **1.1 Parties**

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

7 **1.2 Plaintiff**

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

11 **1.3 Defendant**

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

15 **1.4 General Allegations**

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

21 **1.5 Product Description**

22 The products that are covered by this Consent Judgment are ID cases containing DEHP,
23 specifically limited to the *Baumgarten’s Horizontal Badge Holder, #67810 (#0 85288 67810 3)*,
24 manufactured, imported, distributed, sold and/or offered for sale in the State of California by
25 Exclusive, hereinafter referred to as the “Products.”

1 **1.6 Notice of Violation**

2 On September 1, 2011, Moore served Exclusive Imports, Inc. and various public
3 enforcement agencies with a document entitled “60-Day Notice of Violation” (“Notice”) that
4 provided the recipients with notice of alleged violations of Proposition 65 for failing to warn
5 consumers that ID cases sold by Exclusive exposed users in California to DEHP. To the best of
6 the Parties’ knowledge, no public enforcer has commenced and is diligently prosecuting the
7 allegations set forth in the Notice.

8 **1.7 Complaint**

9 On or about November 16, 2011, Moore, who was and is acting in the interest of the
10 general public in California, filed a complaint (“Complaint” or “Action”) in the Superior Court
11 in and for the County of Marin against Exclusive and Does 1 through 150, alleging, *inter alia*,
12 violations of Proposition 65 based on the alleged exposures to DEHP contained in ID cases sold
13 by Exclusive.

14 **1.8 No Admission**

15 Exclusive denies the material factual and legal allegations contained in Moore’s Notice
16 and Complaint and maintains that all Products sold and distributed in California have been and
17 are in compliance with all laws. Nothing in this Consent Judgment shall be construed as an
18 admission by Exclusive of any fact, finding, issue of law, or violation of law; nor shall
19 compliance with this Consent Judgment constitute or be construed as an admission by Exclusive
20 of any fact, finding, conclusion, issue of law, or violation of law, such being specifically denied
21 by Exclusive. However, this section shall not diminish or otherwise affect Exclusive’s
22 obligations, responsibilities, and duties under this Consent Judgment.

23 **1.9 Consent to Jurisdiction**

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

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1 **1.10 Effective Date**

2 For purposes of this Consent Judgment, the term “Effective Date” shall mean the date
3 that this Consent Judgment is approved by the court.

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

5 **2.1 Reformulation Commitment**

6 As of the Effective Date, Exclusive shall only manufacture, import, distribute, sell and/or
7 offer for sale in California Products that are “DEHP Free” or Products that contain the proper
8 warning language pursuant to Section 2.2 below. For purposes of this Consent Judgment,
9 “DEHP Free” Products shall mean Products containing DEHP in concentrations less than or
10 equal to 1,000 parts per million (0.1%) when analyzed pursuant to Environmental Protection
11 Agency testing methodologies 3580A and 8270C or any other methodology utilized by federal
12 and state agencies for the purpose of determining DEHP content in a solid substance.

13 **2.2 Product Warnings**

14 As of the Effective Date, Exclusive shall, for all Products, other than DEHP Free
15 Products, manufactured, imported, distributed, sold and/or offered for sale in California, provide
16 clear and reasonable warnings as set forth in subsections 2.2(a) and (b). Each warning shall be
17 prominently placed with such conspicuousness as compared with other words, statements,
18 designs, or devices as to render it likely to be read and understood by an ordinary individual
19 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
21 applies, so as to minimize the risk of consumer confusion.

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

23 **(i) Product Labeling.** Exclusive shall affix a warning to the
24 packaging, labeling, or directly on each Product sold in retail outlets in California by Exclusive
25 or any person selling the Products, that states:

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

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WARNING: This product contains chemicals, including the phthalate chemical DEHP, known to the State of California to cause birth defects and other reproductive harm.

Where it is impracticable to provide the warning on the same page and in the same location as the display and/or description of the Product, Exclusive may utilize a designated symbol to cross reference the applicable warning and shall define the term “designated symbol” with the following language on the inside of the front cover of the catalog or on the same page as any order form for the Product(s):

WARNING: Certain products identified with this symbol ▼ and offered for sale in this catalog contain chemicals, including the phthalate chemical DEHP, known to the State of California to cause birth defects and other reproductive harm.

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

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

WARNING: This product contains chemicals, including the phthalate chemical DEHP, known to the State of California to cause birth defects and other reproductive harm.

Alternatively, the designated symbol may appear adjacent to or immediately following the display, description, or price of the Product for which a warning is being given, provided

1 that the following warning statement also appears elsewhere on the same web page, as follows:

2 **WARNING:** Products identified on this page with the
3 following symbol ▼ contain chemicals,
4 including the phthalate chemical DEHP, known
 to the State of California to cause birth defects
 and other reproductive harm.

5 **3. MONETARY PAYMENTS**

6 **3.1 Civil Penalty Payments Pursuant to Health & Safety Code § 25249.7(b)**

7 Pursuant to Health & Safety Code § 25249.7(b), Exclusive shall pay \$6,000 in civil
8 penalties. Exclusive shall pay an initial civil penalty of \$2,000 and a final civil penalty of \$4,000
9 on the dates and in the manner provided in Section 3.3. However, the final civil penalty shall be
10 waived in its entirety if an officer of Exclusive provides Moore with a written certification that,
11 as of May 15, 2013 and continuing on into the future, Exclusive has sold and will continue to
12 sell only DEHP Free Products as defined by Section 2.1 of this Consent Judgment. Moore must
13 receive any such certification no later than May 15, 2013 and time is of the essence.

14 The penalty payments will be allocated according to Health & Safety Code §§ 25249.12
15 (c)(1) & (d), with seventy-five percent (75%) of the penalty amount earmarked for the California
16 Office of Environmental Health Hazard Assessment (“OEHHA”) and the remaining twenty-five
17 (25%) of the penalty amount earmarked for Moore.

18 **3.2 Reimbursement of Plaintiff’s Fees and Costs**

19 The Parties reached an accord on the compensation due to Moore and his counsel under
20 general contract principles and the private attorney general doctrine codified at California Code
21 of Civil Procedure § 1021.5, for all work performed in this matter, except fees that may be
22 incurred on appeal. Under these legal principles, Exclusive shall pay the amount of \$20,000 for
23 fees and costs incurred investigating, litigating and enforcing this matter, including the fees and
24 costs incurred (and yet to be incurred) negotiating, drafting, and obtaining the Court’s approval
25 of this Consent Judgment in the public interest.

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3.3 Payment Procedures

3.3.1 Funds Held In Trust. The initial civil penalty payments required by Sections 3.1 and the payment required by Section 3.2 shall be delivered on or before the Effective Date to The Chanler Group and shall be held in trust pending the Court’s approval of this Consent Judgment.

Payments delivered to The Chanler Group shall be made payable, as follows:

- (a) One check made payable to “The Chanler Group in Trust for OEHHA” in the amount of \$1,500;
- (b) One check made payable to “The Chanler Group in Trust for John Moore” in the amount of \$500; and
- (c) One check made payable to “The Chanler Group in Trust” in the amount of \$20,000.

3.3.2 Final Civil Penalty. If the final civil penalty of \$4,000 referenced in Section 3.1 above is not waived, payments shall be delivered on or before May 29, 2013 to The Chanler Group and made payable, as follows:

- (a) One check made payable to “The Chanler Group in Trust for OEHHA” in the amount of \$3,000; and
- (b) One check made payable to “The Chanler Group in Trust for John Moore” in the amount of \$1,000.

3.3.3 Issuance of 1099 Forms. After the Consent Judgment has been approved and the settlement funds have been transmitted to Moore’s counsel, Exclusive shall issue separate 1099 forms, as follows:

- (a) The first 1099 shall be issued to the Office of Environmental Health Hazard Assessment, P.O. Box 4010, Sacramento, CA 95814 (EIN: 68-0284486) in the amount of \$1,500;

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- (b) The second 1099 shall be issued to John Moore in the amount of \$500, whose address and tax identification number shall be furnished upon request;
- (c) The third 1099 shall be issued to The Chanler Group (EIN: 94-3171522) in the amount of \$20,000;
- (d) If the penalty of \$4,000 referenced in Section 3.1 above is paid, the fourth 1099 shall be issued to the Office of Environmental Health Hazard Assessment, P.O. Box 4010, Sacramento, CA 95814 (EIN: 68-0284486) in the amount of \$3,000; and
- (e) If the penalty of \$4,000 referenced in Section 3.1 above is paid, the fifth 1099 shall be issued to John Moore in the amount of \$1,000, whose address and tax identification number shall be furnished upon request.

3.3.4 Payment Address. All payments to the Chanler Group shall be delivered to the following payment address:

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

4. CLAIMS COVERED AND RELEASED

4.1 Covered Claims

In consideration for the promises and agreements contained herein, and for the payments made pursuant to Section 3, Moore, acting on his own behalf and in the public interest, hereby releases Exclusive, and its parents, subsidiaries, affiliated entities, sister and related companies, directors, officers, shareholders, employees, attorneys, successors and assigns (collectively “Defendant Releasees”) and each entity to whom Exclusive directly or indirectly distributes or sells Products, including but not limited to downstream distributors, wholesalers, customers, resellers, franchisees, cooperative members, licensors, licensees and retailers (collectively

1 “Downstream Defendant Releasees”) that sold or distributed the Products, of all claims for
2 violations of Proposition 65 up through the Effective Date based on exposure to DEHP from the
3 Products as set forth in the Notice. Compliance with the terms of this Consent Judgment
4 constitutes compliance with Proposition 65 with respect to exposures to DEHP from the Products
5 as set forth in the Notice.

6 **4.2 Release of Claims**

7 In further consideration for the promises and agreements contained herein, and for the
8 payments made pursuant to Section 3, Moore, in his individual capacity only and *not* his
9 representative capacity, and on behalf of his past and current agents, representatives, attorneys,
10 successors, and/or assignees, hereby releases the Defendant Releasees and the Downstream
11 Defendant Releasees from all claims, including without limitation, all actions, causes of action,
12 in law or in equity, suits, liabilities, obligations, costs, fines, penalties, expenses, attorneys’ fees,
13 demands of any nature, whether known or unknown, arising out of alleged or actual exposures to
14 DEHP in the Products manufactured, imported, distributed, sold and/or offered for sale by
15 Defendant Releasees and Downstream Defendant Releasees.

16 **4.3 Exclusive’s Release of Moore**

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

23 **5. COURT APPROVAL**

24 This Consent Judgment is not effective until it is approved and entered by the court and
25 shall be null and void if, for any reason, it is not approved and entered by the court within one
26 year after it has been fully executed by all Parties, in which event any monies that have been
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1 provided to Moore or his counsel pursuant to Section 3 above, shall be refunded within fifteen
2 (15) days after receiving written notice from Exclusive that the one-year period has expired.

3 **6. SEVERABILITY**

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

7 **7. GOVERNING LAW**

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

14 **8. NOTICES**

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

19 To Exclusive:

20 David Baumgarten
21 Exclusive Imports, Inc.
22 144 Ottley Drive NE
Atlanta, GA 30324

To Moore:

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

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

25 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

26 This Consent Judgment may be executed in counterparts and by facsimile or portable
27 document format (“.pdf”), each of which shall be deemed an original, and all of which, when
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1 taken together, shall constitute one and the same document. A facsimile or .pdf signature shall
2 be as valid as the original.

3 **10. COMPLIANCE WITH HEALTH & SAFETY CODE § 25249.7(f)**

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

6 **11. ADDITIONAL POST EXECUTION ACTIVITIES**

7 The Parties agree to mutually employ their, and their counsel's, reasonable best efforts to
8 support the entry of this agreement as a Consent Judgment and obtain approval of the Consent
9 Judgment by the Court in a timely manner. The Parties acknowledge that, pursuant to
10 California Health & Safety Code § 25249.7, a noticed motion is required to obtain judicial
11 approval of this Consent Judgment, which Moore shall file, and which Exclusive shall not
12 oppose. If any third party objection to the noticed motion is filed, Moore and Exclusive shall
13 work together to file a joint reply and appear at any hearing before the Court. If the Court does
14 not approve the motion to approve this Consent Judgment, and the Parties choose not to pursue
15 a modified Consent Judgment within 30 days of said denial, or in the event that the Court
16 approve this Consent Judgment and any person successfully appeals that approval, all payments
17 made pursuant to this Consent Judgment will be returned to Exclusive.

18 **12. MODIFICATION**

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


22 **13. ENTIRE AGREEMENT**

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

3 **14. AUTHORIZATION**

4 The undersigned are authorized to execute this Consent Judgment on behalf of their
5 respective parties and have read, understood, and agree to all of the terms and conditions of this
6 Consent Judgment.

7	AGREED TO:	AGREED TO:
8	Date: <u>JANUARY 10, 2013</u>	Date: _____
9		
10	By: <u></u>	By: _____
11	John Moore	David Baumgarten Exclusive Imports, Inc.

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Date:

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1/9/15

By:

John Moore

By:



David Baumgarten
Exclusive Imports, Inc.