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13 SUPERIOR COURT OF THE STATE OF CALIFORNIA
14 COUNTY OF MARIN
15 UNLIMITED CIVIL JURISDICTION
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18 JOHN MOORE,

19 Plaintiff,

20 v.

21 C.E. SMITH CO., INC., *et al.*,

22 Defendants.

Case No. CIV1800435

[PROPOSED] CONSENT JUDGMENT

(Health & Safety Code § 25249.6 *et seq.* and
Code Civ. Proc. § 664.6)

1 **1. INTRODUCTION**

2 **1.1 Parties**

3 This Consent Judgment is entered into by and between plaintiff John Moore (“Moore”), and
4 C.E. Smith Co., Inc. (“C.E. Smith”), with Moore and C.E. Smith each individually referred to as a
5 “Party” and collectively as the “Parties.”

6 **1.2 Plaintiff**

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

10 **1.3 Defendant**

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

14 **1.4 General Allegations**

15 Moore alleges that C.E. Smith imports, sells, or distributes for sale in California, vinyl/PVC
16 trailer lift handles that contain di(2-ethylhexyl)phthalate (“DEHP”) without first providing the
17 exposure warning required by Proposition 65. DEHP is listed pursuant to Proposition 65 as a
18 chemical known to cause birth defects or other reproductive harm.

19 **1.5 Product Description**

20 The products covered by this Consent Judgment are vinyl/PVC trailer lift handles containing
21 DEHP, including, but not limited to, the *Smith Lift Handle, P/N 3240A, UPC #7 68296 00719 5* that
22 are manufactured, imported, distributed, sold and/or offered for sale in California by C.E. Smith
23 (“Products”).

24 **1.6 Notice of Violation**

25 On September 12, 2017, Moore served C.E. Smith, and the requisite public enforcement
26 agencies with a 60-Day Notice of Violation (“Notice”) alleging that C.E. Smith violated Proposition
27 65 by failing to warn its customers and consumers in California of the health hazards associated with
28

1 exposures to DEHP from the Products. No public enforcer has commenced and is diligently
2 prosecuting an action to enforce the violations alleged in the Notice.

3 **1.7 Complaint**

4 On February 6, 2018, Moore filed the instant action (“Complaint”), naming C.E. Smith as a
5 defendant for the alleged violations of Health and Safety Code section 25249.6 that are the subject of
6 the Notice.

7 **1.8 No Admission**

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

16 **1.9 Jurisdiction**

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

21 **1.10 Effective Date**

22 For purposes of this Consent Judgment, the term “Effective Date” means the date on which
23 the Court approves this Consent Judgment, including any unopposed tentative ruling granting
24 approval of this Consent Judgment.

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

2 **2.1 Commitment to Reformulate or Warn**

3 Commencing on the Effective Date and continuing thereafter, C.E. Smith agrees to only
4 manufacture, import, distribute, sell or offer for sale in California, Products that are either (a)
5 Reformulated Products as defined by Section 2.2, below, or (b) Products that bear a clear and
6 reasonable health hazard warning pursuant to Section 2.3 below.


7 **2.2 Reformulation Standard**

8 For the purposes of this Consent Judgment, “Reformulated Products” are defined as Products
9 that contain DEHP in concentrations that do not exceed 1,000 parts per million (0.1%) when analyzed
10 pursuant to U.S. Environmental Protection Agency (“EPA”) testing methodologies 3580A and 8270C
11 or equivalent methodologies utilized by state or federal agencies for the purpose of determining
12 DEHP content in a solid substance.

13 **2.3 Clear and Reasonable Warnings**

14 Commencing on the Effective Date and continuing thereafter, for any Products sold or
15 distributed for sale in California by C.E. Smith that are not Reformulated Products, C.E. Smith agrees
16 to only sell or distribute such Products for sale in California with a clear and reasonable warning in
17 accordance with this Section or Title 27 California Code of Regulations section 25602 and 25603.

18 C.E. Smith further agrees that any warning used will be prominently placed in relation to the
19 Products with such conspicuousness when compared with other words, statements, designs, or
20 devices as to render it likely to be read and understood by an ordinary individual under customary
21 conditions of purchase or use. For purposes of this Consent Judgment, a warning satisfying the
22 above criteria that is affixed directly to a Product or its accompanying labeling or packaging
23 containing the following statement shall be deemed clear:

24
25  **WARNING:** This product can expose you to chemicals
26 including DEHP, which is known to the
27 State of California to cause birth defects
28 or other reproductive harm. For more
information go to www.P65Warnings.ca.gov.

1 **3. MONETARY SETTLEMENT TERMS**

2 **3.1 Civil Penalty Payments**

3 Pursuant to Health and Safety Code section 25249.7(b), and in settlement of all the claims
4 referred to in the Notice, Complaint, and this Consent Judgment, C.E. Smith shall pay \$2,500 in civil
5 penalties. The civil penalty payment shall be allocated according to Health and Safety Code section
6 25249.12(c)(1) and (d), with seventy-five percent (75%) of the penalty paid to the California Office
7 of Environmental Health Hazard Assessment (“OEHHA”), and the remaining twenty-five percent
8 (25%) of the penalty retained by Moore. Moore’s counsel shall be responsible for delivering
9 OEHHA’s portion of any penalty payment(s) made under this Consent Judgment. C.E. Smith shall
10 provide its payment in a check made payable to “John Moore, Client Trust Account” in the amount of
11 \$625 and a check made payable to “OEHHA” in the amount of \$1,875 to be delivered to the address
12 provided in Section 3.3, below.

13 **3.2 Reimbursement of Attorney’s Fees and Costs**

14 The parties acknowledge that Moore and his counsel offered to resolve this dispute without
15 reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving the issue to
16 be resolved after the material terms of this Consent Judgment had been settled. Shortly after the
17 other settlement terms had been finalized, the Parties negotiated the compensation due to Moore and
18 his counsel under general contract principles and the private attorney general doctrine codified at
19 California Code of Civil Procedure section 1021.5 for all work performed through the mutual
20 execution of this Consent Judgment, and court approval of the same, but exclusive of fees and costs
21 on appeal, if any. Under these legal principles, C.E. Smith shall pay \$15,000 for all fees and costs
22 incurred by Moore investigating, bringing this matter to C.E. Smith’s attention, litigating and
23 negotiating a settlement in the public interest. C.E. Smith’s payment shall be delivered to the address
24 in Section 3.4 in a check payable to “The Chanler Group.”

1 **3.3 Payment Timing; Payments Held in Trust**

2 All payments due under this Consent Judgment shall be held in trust until such time as the
3 Court approves the Parties' settlement. Within five (5) days of the date that this Consent Judgment is
4 fully executed by the Parties, all payments due under this agreement shall be delivered to C.E.
5 Smith's counsel and held in trust until the Effective Date. C.E. Smith's counsel shall provide
6 Moore's counsel with written confirmation upon its receipt of the settlement payments. Within five
7 days of the Effective Date, C.E. Smith's counsel shall deliver the civil penalty and attorneys' fee
8 reimbursement payments to Moore's counsel.

9 **3.4 Payment Address**

10 All payments required by this Consent Judgment shall be delivered to:

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

16 **4. CLAIMS COVERED AND RELEASED**

17 **4.1 Moore's Public Release of Proposition 65 Claims**

18 Moore, acting on his own behalf and in the public interest, releases C.E. Smith and its
19 parents, subsidiaries, affiliated entities under common ownership, directors, officers, employees,
20 and attorneys ("Releasees"), and each entity to whom C.E. Smith directly or indirectly distributes or
21 sells the Products including, without limitation, its downstream customers, distributors, wholesalers,
22 and retailers ("Downstream Releasees") for any violation arising under Proposition 65 pertaining to
23 the failure to warn about exposures to DEHP from Products sold or distributed for sale by C.E.
24 Smith prior to the Effective Date, as set forth in the Notice. Compliance with the terms of this
25 Consent Judgment constitutes compliance with Proposition 65 with respect to exposures to DEHP
26 from Products sold or distributed for sale by C.E. Smith after the Effective Date.
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1 **4.2 Moore’s Individual Release of Claims**

2 Moore, in his individual capacity only and *not* in any representative capacity, also provides a
3 release to C.E. Smith, Releasees, and Downstream Releasees, which shall be effective as a full and
4 final 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 Moore of any nature, character or
6 kind, whether known or unknown, suspected or unsuspected, arising out of alleged or actual
7 exposures to DEHP in Products sold or distributed for sale by C.E. Smith before the Effective Date.

8 **4.3 C.E. Smith’s Release of Moore**

9 C.E. Smith, 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 Moore, and his
11 attorneys and other representatives, for any and all actions taken or statements made by Moore, and
12 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 it is not approved and entered by the Court within one year after it has been fully
17 executed by the Parties, or by such additional time as the Parties may agree in writing.

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, or is otherwise
25 rendered inapplicable by reason of law generally or as to the Products, then C.E. Smith may provide
26 written notice to Moore of any asserted change in the law, and shall have no further injunctive
27 obligations pursuant to this Consent Judgment with respect to, and to the extent that, the Products are
28 so affected.

1 **8. NOTICE**

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

5 For C.E. Smith:

6 Carl Smith, President
7 C.E. Smith Co., Inc.
8 1001 Bitting Street
9 Greensboro, NC 27403

with a copy to:

10 For Moore:

11 Proposition 65 Coordinator
12 The Chanler Group
13 2560 Ninth Street
14 Parker Plaza, Suite 214
15 Berkeley, CA 94710-2565

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

18 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

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

22 **10. POST EXECUTION ACTIVITIES**

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

1 responding to any objection that any third-party may file or lodge, and appearing at the hearing
2 before the Court if so requested.

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

7 **12. AUTHORIZATION**

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

11 **AGREED TO:**

AGREED TO:

13 Date: 6/25/2018

Date: 6-28-18

14 By: 

15 JOHN MOORE

14 By: 

15 C.E. Smith, President

16 C.E. SMITH CO., INC.