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Attorneys for Plaintiff
JOHN MOORE

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF MARIN
UNLIMITED CIVIL JURISDICTION

JOHN MOORE,

Plaintiff,

v.

ATLAS COPCO NORTH AMERICA LLC, *et al.*,

Defendants.

Case No. CIV1600164
[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 Chicago Pneumatic Tool Company, LLC (“Chicago Pneumatic”), with Moore and Chicago
5 Pneumatic each individually referred to as a “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 Chicago Pneumatic employs ten or more individuals and is a “person in the course of doing
12 business” for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, Health and
13 Safety Code § 25249.6 *et seq.* (“Proposition 65”).

14 **1.4 General Allegations**

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

19 **1.5 Product Description**

20 For purposes of this Consent Judgment “Products” are defined as gloves with vinyl/PVC
21 components containing DEHP that are imported, sold, or distributed for sale in California by Chicago
22 Pneumatic including, but not limited to, the *Chicago Pneumatic Impact Gloves, CP300XXL, Part #*
23 *8940171573*.

24 **1.6 Notice of Violation**

25 On October 21, 2015, Moore served Chicago Pneumatic, and the requisite public enforcement
26 agencies with a 60-Day Notice of Violation (“Notice”) alleging that Chicago Pneumatic violated
27 Proposition 65 by failing to warn its customers and consumers in California of the health hazards
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1 associated with exposures to DEHP from the Products. No public enforcer has commenced and is
2 diligently prosecuting an action to enforce the violations alleged in the Notice.

3 **1.7 Complaint**

4 On January 14, 2016, Moore filed the instant action (“Complaint”), naming Chicago
5 Pneumatic as a defendant for the alleged violations of Health and Safety Code § 25249.6 that are the
6 subject of the Notice.

7 **1.8 No Admission**

8 Chicago Pneumatic denies the material, factual, and legal allegations contained in the Notice
9 and 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 Chicago Pneumatic’s obligations, responsibilities, and
15 duties under 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 Chicago Pneumatic as to the allegations in the Complaint, that venue is proper in the
19 County of Marin, and that the Court has jurisdiction to enter and enforce the provisions of this
20 Consent Judgment pursuant to Proposition 65 and Code of Civil Procedure § 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 grants the motion for approval of the Consent Judgment contemplated by Section 5.

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

25 **2.1 Commitment to Reformulate or Warn**

26 Commencing on the Effective Date, and continuing thereafter, Chicago Pneumatic shall only
27 manufacture for sale, purchase for sale, or import for sale in California, either: (a) Reformulated
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1 Products as defined by Section 2.2, below; or (b) Products that are offered with a clear and reasonable
2 Warning pursuant to Section 2.3.

3 **2.2 Reformulated Products**

4 For purposes of this Consent Judgment, Reformulated Products are Products containing
5 DEHP in concentrations that do not exceed 1,000 parts per million (0.1%) when analyzed pursuant to
6 U.S. Environmental Protection Agency testing methodologies 3580A and 8270C or equivalent
7 methodologies utilized by federal or state agencies for the purpose of determining DEHP content in a
8 solid substance.

9 **2.3 Clear and Reasonable Warnings**

10 Commencing on the Effective Date and continuing thereafter, for any Products sold or
11 distributed for sale in California by Chicago Pneumatic that are not Reformulated Products, Chicago
12 Pneumatic agrees to only offer such Products for sale with a clear and reasonable warning in
13 accordance with this Section. Chicago Pneumatic further agrees that any warning used will be
14 prominently placed in relation to the Product with such conspicuousness when compared with other
15 words, statements, designs, or devices as to render it likely to be read and understood by an ordinary
16 individual under customary conditions of purchase or use. For purposes of this Consent Judgment, a
17 clear and reasonable warning for the Products satisfying these criteria shall consist of a warning
18 affixed directly to a Product or its accompanying labeling or packaging sold in California containing
19 one of the following statements:

20 **WARNING:** This product contains DEHP a chemical
21 known to the State of California to cause birth
defects or other reproductive harm.

22 For Products Chicago Pneumatic reasonably believes contain an additional Proposition 65-
23 listed chemical:

24 **WARNING:** This product contains chemicals known to
25 the State of California to cause cancer and
birth defects or other reproductive harm.

26 In the event that Chicago Pneumatic sells Products via its internet website to customers
27 located in California, the warning requirements of this section shall be satisfied if the foregoing
28 warning appears either: (a) on the same web page on which a Product is displayed and/or described;

1 (b) on the same page as the price for the Product; or (c) on one or more web pages displayed to
2 purchaser prior to purchase during the checkout process. Alternatively, a symbol consisting of a
3 black exclamation point in a yellow or white equilateral triangle may appear adjacent to or
4 immediately following the display, description, price, or checkout listing of the Product, provided
5 that the warning statement appears elsewhere on the same web page in a manner that clearly
6 associates it with the product(s) to which the warning applies.

7 **3. MONETARY SETTLEMENT TERMS**

8 **3.1 Civil Penalty Payments**

9 Pursuant to Health and Safety Code § 25249.7(b), and in settlement of all the claims referred
10 to in the Notice, Complaint, and this Consent Judgment, Chicago Pneumatic shall pay \$10,000 in
11 civil penalties. Each civil penalty payment shall be allocated according to Health and Safety Code §
12 25249.12(c)(1) and (d), with seventy-five percent (75%) of the penalty paid to the California Office
13 of Environmental Health Hazard Assessment (“OEHHA”), and the remaining twenty-five percent
14 (25%) of the penalty retained by Moore. Moore’s counsel shall be responsible for delivering
15 OEHHA’s portion of any penalty payment(s) made under this Consent Judgment.

16 **3.1.1 Initial Civil Penalty**

17 Chicago Pneumatic shall make an initial civil penalty payment of \$2,500. Chicago Pneumatic
18 shall provide its payment in a single check made payable to “John Moore, Client Trust Account.”

19 **3.1.2 Final Civil Penalty**

20 On February 15, 2017, Chicago Pneumatic shall make a final civil penalty payment of \$7,500.
21 Pursuant to title 11 California Code of Regulations § 3203(c), Moore agrees that the final civil
22 penalty payment shall be waived in its entirety if, no later than February 1, 2017, an officer of
23 Chicago Pneumatic provides Moore with a signed declaration certifying that, as of that date of the
24 declaration, all of the Products Chicago Pneumatic is shipping for sale or distributing for sale in
25 California, are Reformulated Products, and that Chicago Pneumatic will continue to offer only
26 Reformulated Products in California in the future. Alternatively, Chicago Pneumatic may provide
27 Moore with a declaration certifying that it is no longer shipping the Products for sale, or distributing
28 the Products for sale in California, but that, should it recommence sales in the future in California, it

1 agrees to only offer reformulated Products. The option to certify to complete reformulation in lieu of
2 making the final civil penalty payment required by this Section is a material term, and time is of the
3 essence.

4 **3.2 Reimbursement of Attorney's Fees and Costs**

5 The parties acknowledge that Moore and his counsel offered to resolve this dispute without
6 reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving the issue to
7 be resolved after the material terms of this Consent Judgment had been settled. Shortly after the
8 other settlement terms had been finalized, the Parties negotiated the compensation due to Moore and
9 his counsel under general contract principles and the private attorney general doctrine codified at
10 California Code of Civil Procedure § 1021.5 for all work performed through the mutual execution of
11 this Consent Judgment, and court approval of the same, but exclusive of fees and costs on appeal, if
12 any. Under these legal principles, Chicago Pneumatic shall pay \$22,500 for all fees and costs
13 incurred by Moore investigating, bringing this matter to Chicago Pneumatic's attention, litigating,
14 and negotiating a settlement in the public interest.

15 **3.3 Payment Timing; Payments Held in Trust**

16 All payments due under this Consent Judgment shall be held in trust until such time as the
17 Court approves the Parties' settlement. Within five (5) business days of the date that this Consent
18 Judgment is fully executed by the Parties, with the exception of the final civil penalty payment
19 required by Section 3.1.2, all payments due under this agreement shall be delivered by Chicago
20 Pneumatic to its counsel and held in trust until the Court grants the motion for approval of this
21 Consent Judgment contemplated by Section 5. Chicago Pneumatic's counsel shall notify Moore's
22 counsel in writing to confirm receipt of the settlement payments. Within five (5) calendar days of
23 the Court's approval of this Consent Judgment, Chicago Pneumatic's counsel shall deliver the initial
24 civil penalty and attorneys' fee reimbursement payments to Moore's counsel. In the event that the
25 final civil penalty payment required by subsection 3.1.2 has not been waived and becomes due prior
26 to the Effective Date, the penalty payment shall be tendered to Chicago Pneumatic's counsel when
27 due, held in trust until due, and disbursed within five days after the Effective Date.

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1 **3.4 Payment Address**

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

3 The Chanler Group
4 Attn: Proposition 65 Controller
5 2560 Ninth Street
6 Parker Plaza, Suite 214
7 Berkeley, CA 94710

6 **4. CLAIMS COVERED AND RELEASED**

7 **4.1 Moore’s Public Release of Proposition 65 Claims**

8 Moore, acting on his own behalf and in the public interest, releases Chicago Pneumatic and
9 its parent (including, without limitation, Atlas Copco North America, LLC), subsidiaries, affiliated
10 entities under common ownership, directors, officers, employees, and attorneys (“Releasees”), and
11 each entity to whom Chicago Pneumatic directly or indirectly distributes or sells the Products
12 including, without limitation, its downstream customers, distributors, wholesalers, and retailers
13 (“Downstream Releasees”) for any violation arising under Proposition 65 pertaining to the failure to
14 warn about exposures to DEHP from Products sold or distributed for sale by Chicago Pneumatic
15 prior to the Effective Date, as set forth in the Notice. Compliance with the terms of this Consent
16 Judgment constitutes compliance with Proposition 65 with respect to exposures to DEHP from
17 Products sold or distributed for sale by Chicago Pneumatic after the Effective Date.

18 **4.2 Moore’s Individual Release of Claims**

19 Moore, in his individual capacity only and *not* in any representative capacity, also provides a
20 release to Chicago Pneumatic, Releasees, and Downstream Releasees which shall be effective as a
21 full and final accord and satisfaction, as a bar to all actions, causes of action, obligations, costs,
22 expenses, attorneys’ fees, damages, losses, claims, liabilities, and demands of Moore of any nature,
23 character or kind, whether known or unknown, suspected or unsuspected, arising out of alleged or
24 actual exposures to DEHP in Products sold or distributed for sale by Chicago Pneumatic before the
25 Effective Date.

26 **4.3 Chicago Pneumatic’s Release of Moore**

27 Chicago Pneumatic, on its own behalf, and on behalf of its past and current agents,
28 representatives, attorneys, successors, and assignees, hereby waives any and all claims against

1 Moore, and plaintiff's attorneys and other representatives, for any and all actions taken or
2 statements made by Moore and his attorneys and other representatives, whether in the course of
3 investigating claims, otherwise seeking to enforce Proposition 65 against it in this matter, or with
4 respect to the Products.

5 **5. COURT APPROVAL**

6 This Consent Judgment is not effective until it is approved and entered by the Court and shall
7 be null and void if it is not approved and entered by the Court within one year after it has been fully
8 executed by the Parties, or by such additional time as the Parties may agree in writing.

9 **6. SEVERABILITY**

10 If, subsequent to the Court's approval and entry of this Consent Judgment as a judgment, any
11 provision is found by a court to be unenforceable, the validity of the remaining provisions shall not
12 be adversely affected.

13 **7. GOVERNING LAW**

14 The terms of this Consent Judgment shall be governed by the laws of the state of California
15 and apply within the state of California. In the event that Proposition 65 is repealed, or is otherwise
16 rendered inapplicable by reason of law generally or as to the Products, then Chicago Pneumatic may
17 provide written notice to Moore of any asserted change in the law, and shall have no further
18 injunctive obligations pursuant to this Consent Judgment with respect to, and to the extent that, the
19 Products are so affected.

20 **8. NOTICE**

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

24 For Chicago Pneumatic:

25 Jack Henschel, VP & General Counsel
26 Mark Francini, Corporate Counsel
27 Atlas Copco North America, LLC
28 7 Campus Drive, Suite 200
Parsippany, NJ 07054

Nigel Smith,
General Manager
Chicago Pneumatic Tool Co., LLC
1800 Overview Drive
Rock Hill, SC 29730

1 with a copy to:

2 Patrick J. Hagan, Esq.
3 Jack C. Henning, Esq.
4 Dillingham & Murphy, LLP
 601 California Street, Suite 1900
 San Francisco, California 94108

5 For Moore:

6 Proposition 65 Coordinator
7 The Chanler Group
8 2560 Ninth Street
 Parker Plaza, Suite 214
 Berkeley, CA 94710-2565

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

11 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

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

15 **10. POST EXECUTION ACTIVITIES**

16 Moore agrees to comply with the reporting form requirements referenced in Health and Safety
17 Code § 25249.7(f). The Parties further acknowledge that, pursuant to Health and Safety Code
18 § 25249.7(f), a noticed motion is required to obtain judicial approval of the settlement, which motion
19 Moore shall draft and file. In furtherance of obtaining such approval, the Parties agree to mutually
20 employ their best efforts, and those of their counsel, to support the entry of this agreement as a
21 judgment, and to obtain judicial approval of their settlement in a timely manner. For purposes of this
22 Section, “best efforts” shall include, at a minimum, supporting the motion for approval, responding to
23 any objection that any third-party may file or lodge, and appearing at the hearing before the Court if
24 so requested.

25 **11. MODIFICATION**

26 This Consent Judgment may be modified only by: (i) a written agreement of the Parties and
27 entry of a modified consent judgment thereon by the Court; or (ii) a successful motion or application
28 of any Party, and the entry of a modified consent judgment thereon by the Court.

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12. AUTHORIZATION

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


AGREED TO:

AGREED TO:

Date: 6/1/2016

Date: 6/5/2016

By: 
JOHN MOORE

By: 
Nigel Smith, General Manager
CHICAGO PNEUMATIC TOOL
COMPANY, LLC