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13
14 SUPERIOR COURT OF THE STATE OF CALIFORNIA
15 COUNTY OF SAN FRANCISCO
16 UNLIMITED CIVIL JURISDICTION
17

18 JOHN MOORE,

19 Plaintiff,

20 v.

21 K&M INTERNATIONAL, INC.; *et al.*,

22 Defendants.
23
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Case No. CGC-16-555388

[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”)
4 and K&M International, Inc. (“K&M”), with Moore and K&M each individually referred to as
5 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
8 exposures to toxic chemicals and to improve human health by reducing or eliminating
9 hazardous substances contained in consumer products.

10 **1.3 Defendant**

11 K&M 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
13 Safety Code § 25249.6 *et seq.* (“Proposition 65”).

14 **1.4 General Allegations**

15 Moore alleges that K&M manufactures, sells, and distributes for sale in California
16 vinyl/PVC keychains containing di(2-ethylhexyl)phthalate (“DEHP”), without first providing
17 the exposure warning required by Proposition 65. DEHP is listed pursuant to Proposition 65 as
18 a 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 keychains containing
21 DEHP that are manufactured, imported, distributed, sold, and/or offered for sale in California,
22 by K&M, including, but not limited to, the vinyl/PVC keychain component of the *Wild*
23 *Republic Just My Style DIY Purse*, SKU Nos. 10694, 10695, 10696, 10715, 10716, 10717,
24 13048, 13210, 14148, hereinafter the “Products.”

25 **1.6 Notice of Violation**

26 On June 14, 2016, Moore served K&M, the California Attorney General, and the
27 requisite public enforcement agencies with a “60-Day Notice of Violation” (“Notice”), alleging
28 that K&M violated Proposition 65 by failing to warn its customers and consumers in California

1 of the health hazards associated with exposures to DEHP from the Products. To the best of the
2 Parties' knowledge, no public enforcer has commenced and is diligently prosecuting an action
3 to enforce the violations alleged in the Notice.

4 **1.7 Complaint**

5 On November 16, 2016, Moore filed the instant action ("Complaint"), naming K&M as
6 a defendant for the alleged violations of Health and Safety Code § 25249.6 that are the subject
7 of the Notice.

8 **1.8 No Admission**

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

17 **1.9 Jurisdiction**

18 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
19 jurisdiction over K&M as to the allegations in the Complaint, that venue is proper in the
20 County of San Francisco, and that the Court has jurisdiction to enter and enforce the provisions
21 of this Consent Judgment pursuant to Proposition 65 and Code of Civil Procedure § 664.6.

22 **1.10 Effective Date**

23 For purposes of this Consent Judgment, the term "Effective Date" shall mean the date
24 on which the Motion for Approval of this Consent Judgment is granted by the Court.

25 **2. INJUNCTIVE RELIEF: REFORMULATION**

26 **2.1 Commitment to Reformulate or Warn**

27 Commencing on the Effective Date and continuing thereafter, K&M shall only
28 manufacture for sale, purchase for sale, or import for sale in California, Products that are either:


1 (a) Reformulated Products, as defined by Section 2.2, below; or (b) Products that are offered by
2 K&M with a clear and reasonable warning, pursuant to Section 2.3.

3 **2.2 Reformulated Products Defined**

4 “Reformulated Products” are defined as Products containing DEHP in a maximum
5 concentration of 1,000 parts per million (0.1%) in any accessible component (i.e., any
6 component that may be touched during a reasonably foreseeable use) when analyzed pursuant
7 to U.S. Environmental Protection Agency testing methodologies 3580A and 8270C or
8 equivalent methodologies utilized by federal or state agencies for the purpose of determining
9 DEHP content in a solid substance.

10 **2.3 Clear and Reasonable Warnings**

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

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

25 **WARNING:** This product contains a chemical known to the State of
26 California to cause cancer and birth defects or other
27 reproductive harm.

28 **3. MONETARY SETTLEMENT TERMS**

3.1 Civil Penalty Payment

1 Pursuant to Health and Safety Code § 25249.7(b), and in settlement of all claims alleged
2 in the Notice and Complaint and referred to in this Consent Judgment, K&M agrees to pay
3 \$4,750 in civil penalties. The civil penalty payment shall be apportioned pursuant to Health
4 and Safety Code §§ 25249.12(c)(1) and (d), with seventy-five percent (75%) of the penalty paid
5 to the California Office of Environmental Health Hazard Assessment (“OEHHA”), and the
6 remaining twenty-five percent (25%) of the penalty paid to Moore. K&M shall issue its
7 payment in two checks for the following amounts: (a) “OEHHA” in the amount of \$3,562.50;
8 and (b) “John Moore, Client Trust Account” in the amount of \$1,187.50. Moore’s counsel
9 shall be responsible for delivering OEHHA’s portion of any penalty payment made under this
10 Settlement Agreement.

11 **3.2 Reimbursement of Attorney’s Fees and Costs**

12 The parties acknowledge that Moore and his counsel offered to resolve this dispute
13 without reaching terms on the amount of fees and costs to be reimbursed to them, thereby
14 leaving the issue to be resolved after the material terms of this Consent Judgment were settled.
15 After the Parties finalized the other settlement terms, they then reached an accord on the
16 compensation due to Moore and his counsel, under general contract principles and the private
17 attorney general doctrine, codified at California Code of Civil Procedure § 1021.5, for all work
18 performed through the mutual execution of this Consent Judgment, and through Court approval
19 of same, but exclusive of fees and costs on appeal, if any. Under these legal principles, K&M
20 agrees to pay \$34,000 to Moore and his counsel for all fees and costs incurred in investigating,
21 bringing this matter to the attention of K&M’s management, and negotiating a settlement in the
22 public interest. K&M’s payment shall be delivered in the form of a check payable to “The
23 Chanler Group.”

24 **3.3 Payment Timing; Payments Held in Trust**

25 All payments due under this Consent Judgment shall be held in trust until such time as
26 the Court approves the Parties’ settlement. Within ten (10) days of the date this Consent
27 Judgment is fully executed by the Parties, all payments due under this agreement shall be
28 delivered to and held in trust by K&M’s counsel, Hahn Loeser & Parks, LLP, until the Court

1 grants the motion for approval of this Consent Judgment, as contemplated by Section 5.
2 K&M's counsel shall confirm in writing to Moore's counsel when it receives K&M's
3 payments. Within five (5) days of the Court's approval of this Consent Judgment, K&M's
4 counsel shall deliver all payments due under this agreement to Moore's counsel. Within five
5 (5) days of the date this consent judgment is fully executed by the Parties, Moore's counsel
6 agrees to provide K&M's counsel with IRS W9 forms for Moore, his counsel and
7 OEHHA, to enable K&M to process payments due per the terms of this agreement. The
8 Parties agree that payments under this Agreement will not become due until such IRS W9
9 forms are provided to K&M by Moore and his counsel.

10 **3.4 Payment Address**

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

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

15 **4. CLAIMS COVERED AND RELEASED**

16 **4.1 Moore's Public Release of Proposition 65 Claims**

17 Moore, acting on his own behalf and in the public interest, releases K&M and its
18 parents, subsidiaries, affiliated entities under common ownership, directors, officers,
19 employees, and attorneys ("Releasees"), and each entity to whom K&M directly or indirectly
20 distributes or sells the Products, including, without limitation, its downstream customers,
21 distributors, wholesalers, and retailers ("Downstream Releasees"), for any violation arising
22 under Proposition 65 pertaining to the failure to warn about exposures to DEHP from
23 Products sold or distributed for sale by K&M prior to the Effective Date, as set forth in the
24 Notice. Compliance with the terms of this Consent Judgment constitutes compliance with
25 Proposition 65 with respect to exposures to DEHP from Products sold or distributed for sale
26 by K&M after the Effective Date. The Parties agree and acknowledge that the releases
27 provided under this Consent Judgment shall not extend upstream to any entity that
28 manufactured the Products, or any components part thereof, or to any entity that distributed or

1 sold the Products, or any component parts thereof, to K&M.

2 **4.2 Moore's Individual Release of Claims**

3 Moore, in his individual capacity only and *not* in his representative capacity, also
4 provides a release to K&M, Releasees, and Downstream Releasees which shall be effective as a
5 full and final accord and satisfaction, as a bar to all actions, causes of action, obligations, costs,
6 expenses, attorneys' fees, damages, losses, claims, liabilities and demands of Moore of any
7 nature, character or kind, whether known or unknown, suspected or unsuspected, arising out of
8 alleged or actual exposures to DEHP in Products sold or distributed for sale by K&M prior to
9 the Effective Date.

10 **4.3 K&M's Release of Moore**

11 K&M, on its own behalf, and on behalf of its past and current agents, representatives,
12 attorneys, successors, and assignees, hereby waives any and all claims against Moore and his
13 attorneys and other representatives, for any and all actions taken or statements made by Moore
14 and his attorneys and other representatives, whether in the course of investigating claims,
15 otherwise seeking to enforce Proposition 65 against it in this matter, or with respect to the
16 Products.

17 **4.4 Mutual Waiver of California Civil Code § 1542.**

18 The Parties each acknowledge that he/it is familiar with § 1542 of the Civil Code, which
19 provides as follows:

20 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH
21 THE CREDITOR DOES NOT KNOW OR SUSPECT EXIST IN HIS OR
22 HER FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH
23 IF KNOWN BY HIM OR HER MUST HAVE MATERIALLY
24 AFFECTED HIS SETTLEMENT WITH THE DEBTOR.

25 The Parties, each on his/its own behalf, and on behalf of his/its past and current
26 agents, representatives, attorneys, successors, and/or assignees, expressly waive and
27 relinquish any and all rights and benefits which they may have under, or which may be
28 conferred upon them by the provisions of Civil Code §1542, as well as under any other state
or federal statute or common law principle of similar effect, to the fullest extent he/it may

1 lawfully waive such rights or benefits pertaining to the released matters, as specifically
2 defined by Sections 4.2 and 4.3, above.

3 **5. COURT APPROVAL**

4 This Consent Judgment shall not become effective until it is approved and entered by
5 the Court, and it shall be null and void if it is not approved and entered by the Court within one
6 year after it is fully executed by the Parties, or within such additional time as the Parties may
7 mutually agree to in writing. If this Consent Judgment is not entered by the Court, it shall have
8 no force and effect, and shall not be introduced into evidence or otherwise used in any
9 proceeding for any purpose.

10 **6. SEVERABILITY**

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

14 **7. GOVERNING LAW**

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

21 **8. NOTICE**

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

26 For K&M:

27 Vishnu Chandran, President
28 K&M International, Inc.
1955 Midway Drive, Suite A
Twinsburg, OH 44087

1 with a copy to K&M's counsel:

2 Michael J. Gleason, Esq.
3 Hahn Loeser & Parks LLP
4 One America Plaza
5 600 W. Broadway, Suite 1500
6 San Diego, CA 92101

7 For Moore:

8 Proposition 65 Coordinator
9 The Chanler Group
10 2560 Ninth Street
11 Parker Plaza, Suite 214
12 Berkeley, CA 94710-2565

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

15 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

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

19 **10. POST-EXECUTION ACTIVITIES**

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

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11. MODIFICATION

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

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: _____

Date: 11/7/2017 _____

By: _____
JOHN MOORE

By:  _____
Vishnu Chandran
K&M INTERNATIONAL, INC.