

1 Brian C. Johnson, State Bar No. 235965
2 Josh Voorhees, State Bar No. 241436
3 THE CHANLER GROUP
4 2560 Ninth Street
5 Parker Plaza, Suite 214
6 Berkeley, CA 94710-2565
7 Telephone: (510) 848-8880
8 Facsimile: (510) 848-8118

9 Attorneys for Plaintiff
10 JOHN MOORE

11
12
13 SUPERIOR COURT OF THE STATE OF CALIFORNIA
14 COUNTY OF SAN MATEO
15 UNLIMITED CIVIL JURISDICTION
16

17 JOHN MOORE,

18 Plaintiff,

19 v.

20 NOVELTY INC., *et al.*

21 Defendants.
22
23
24
25
26
27
28

Case No. CIV535496

[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 Novelty, Inc. (“Novelty”), with Moore and Novelty each individually referred to as a “Party” and
5 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 Novelty employs ten or more individuals and is a “person in the course of doing business” for
12 purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, Health and Safety Code
13 § 25249.6 *et seq.* (“Proposition 65”).

14 **1.4 General Allegations**

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

19 **1.5 Product Description**

20 The products covered by this Consent Judgment are earphones with vinyl/PVC cords containing
21 DEHP that are imported, sold, or distributed for sale in California by Novelty (collectively, “Products”)
22 including, but not limited to, the cord component of the *Colorz Ear Buds, UPC #7 94080 29193 8*
23 (alone referred to as the “Exemplar Product”). For purposes of this Consent Judgment, “New Products”
24 are defined as Products which, as alleged by Plaintiff, contain DEHP and require a warning under
25 Proposition 65, and are not in Novelty’s inventory as of the Effective Date, including but not limited
26 to Products which are manufactured for or by, purchased by, received by, or acquired by, Novelty after
27 the Effective Date.
28

1 **1.6 Notice of Violation**

2 On May 21, 2015, Moore served Novelty, and the requisite public enforcement agencies with
3 a 60-Day Notice of Violation (“Notice”), alleging that Novelty violated Proposition 65 by failing to
4 warn its customers and consumers in California of the health hazards associated with exposures to
5 DEHP from the Products.

6 On December 29, 2015, Moore served Novelty, Jo-Ann Stores, LLC, and the requisite public
7 enforcement agencies with a Supplemental 60-Day Notice of Violation (“Supplemental Notice”),
8 alleging that Novelty and Jo-Ann Stores, LLC violated Proposition 65 by failing to warn their
9 customers and consumers in California of the health hazards associated with exposures to DEHP from
10 the Products.

11 The Notice and Supplemental Notice are referred to herein as the “Notices.” To the best of the
12 Parties’ knowledge, no public enforcer has commenced and is diligently prosecuting an action to
13 enforce the violations alleged in the Notices.

14 **1.7 Complaint**

15 On September 18, 2015, Moore filed the instant action (“Complaint”), naming Novelty as a
16 defendant for the alleged violations of Health and Safety Code § 25249.6 that are the subject of the
17 Notice.

18 **1.8 No Admission**

19 Novelty denies the material, factual, and legal allegations contained in the Notice and
20 Complaint, and maintains that all of the products it has sold and distributed for sale in California,
21 including the Products, have been, and are, in compliance with all laws. Nothing in this Consent
22 Judgment shall be construed as an admission of any fact, finding, conclusion of law, issue of law, or
23 violation of law, nor shall compliance with this Consent Judgment constitute or be construed as an
24 admission of any fact, finding, conclusion of law, issue of law, or violation of law. This Section shall
25 not, however, diminish or otherwise affect Novelty’s obligations, responsibilities, and duties under this
26 Consent Judgment.

1 **1.9 Jurisdiction**

2 For purposes of this Consent Judgment only, the Parties stipulate that this Court has jurisdiction
3 over Novelty as to the allegations in the Complaint, that venue is proper in the County of San Mateo,
4 and that the Court has jurisdiction to enter and enforce the provisions of this Consent Judgment
5 pursuant to Proposition 65 and Code of Civil Procedure § 664.6.

6 **1.10 Effective Date**

7 For purposes of this Consent Judgment, the term “Effective Date” means the date on which the
8 motion for approval of the Consent Judgment is granted by the Court.

9 **2. INJUNCTIVE RELIEF: REFORMULATION**

10 **2.1 Commitment to Provide Reformulated Products or Warnings**

11 Commencing on the Effective Date and continuing thereafter, with respect to New Products
12 only, Novelty agrees to only sell or distribute for sale in or into California (a) New Products which are
13 reformulated (called “Reformulated Products”) as defined in Section 2.2 or (b) New Products sold with
14 a clear and reasonable warning pursuant to Section 2.3. However, with respect to the Exemplar
15 Product, Novelty further agrees that it will not sell or distribute for sale in California the Exemplar
16 Product unless it meets the definition of “Reformulated Products” set forth below.

17 **2.2 Reformulation Standard**

18 For purposes of this Consent Judgment, “Reformulated Products” are Products or New Products
19 containing DEHP in a maximum concentration of 1,000 parts per million (0.1%) in any accessible
20 component (i.e., any component that may be touched during a reasonably foreseeable use) when
21 analyzed pursuant to U.S. Environmental Protection Agency testing methodologies 3580A and 8270C
22 or equivalent methodologies utilized by federal or state agencies for the purpose of determining DEHP
23 content in a solid substance.

24 **2.3 Clear and Reasonable Warnings**

25 Commencing on the Effective Date and continuing thereafter, for any New Products sold or
26 distributed for sale in California by Novelty that are not Reformulated Products, Novelty will only sell
27 or distribute such New Products with a clear and reasonable warning in accordance with this Section.
28 Novelty further agrees that any warning used will be prominently placed in relation to the New Product

1 with such conspicuousness when compared with other words, statements, designs, or devices as to
2 render it likely to be read and understood by an ordinary individual under customary conditions of
3 purchase or use. For purposes of this Consent Judgment, a clear and reasonable warning for the New
4 Products satisfying these criteria shall consist of a warning affixed directly to a New Product or its
5 accompanying labeling or packaging sold in California containing one of the following statements:

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

8 For New Products that Novelty has a good faith belief also contain a Proposition 65-listed carcinogen
9 the warning may state:

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

13 **3. MONETARY SETTLEMENT TERMS**

14 **3.1 Civil Penalty Payment**

15 Pursuant to Health and Safety Code § 25249.7(b), and in settlement of all the claims referred to
16 in the Notices, Complaint, and this Consent Judgment, Novelty shall pay \$4,000 in civil penalties. The
17 civil penalty payment shall be allocated according to Health and Safety Code § 25249.12(c)(1) and (d),
18 with seventy-five percent (75%) of the penalty paid to the California Office of Environmental Health
19 Hazard Assessment (“OEHHA”), and the remaining twenty-five percent (25%) of the penalty paid to
20 Moore. Novelty shall provide its payment in a single check made payable to “John Moore, Client Trust
21 Account.” Moore’s counsel shall be responsible for delivering OEHHA’s portion of any penalty
22 payment(s) made under this Consent Judgment.

23 **3.2 Reimbursement of Attorney’s Fees and Costs**

24 The parties acknowledge that Moore and his counsel offered to resolve this dispute without
25 reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving the issue to
26 be resolved after the material terms of this Consent Judgment had been settled. Shortly after the other
27 settlement terms had been finalized, the Parties negotiated the compensation due to Moore and his
28 counsel under general contract principles and the private attorney general doctrine codified at

1 California Code of Civil Procedure § 1021.5 for all work performed through the mutual execution of
2 this Consent Judgment, and through court approval of the same, but exclusive of fees and costs on
3 appeal, if any. Novelty shall pay \$24,000 for all fees and costs incurred by Moore investigating,
4 bringing this matter to Novelty's attention, litigating and negotiating a settlement in the public interest.

5 **3.3 Payment Timing**

6 All payments due under this Consent Judgment shall be tendered within ten (10) days after
7 Novelty receives notice of the Court granting the motion for approval of this Consent Judgment
8 contemplated by Section 5, including notice by electronic mail of any unopposed tentative ruling
9 granting the motion for settlement approval.

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 Novelty and its parents,
18 subsidiaries, affiliated entities under common ownership, directors, officers, employees, and
19 attorneys ("Releasees"), each manufacturer or other entity supplying Novelty with Products or New
20 Products (including, without limitation, Meifan Manufacturing Co. LTD), and each entity to whom
21 Novelty directly or indirectly distributes or sells the Products, including, without limitation, its
22 downstream customers, distributors, wholesalers, and retailers (including, without limitation, Jo-Ann
23 Stores, LLC, Winneram International Inc., Sm Guam, Inc., The Gift Shop at Stanford Hospital,
24 Fundraisers.Org, Santa Cruz Seaside Company and Browns Valley Elementary) ("Downstream
25 Releasees") for any violation arising under Proposition 65 pertaining to the failure to warn about
26 exposures to DEHP from Products sold or distributed for sale by Novelty and Jo-Ann Stores, LLC
27 prior to the Effective Date, as set forth in the Notices. Compliance with the terms of this Consent
28 Judgment constitutes compliance with Proposition 65 with respect to exposures to DEHP from

1 Products and New Products sold or distributed for sale by Novelty and Jo-Ann Stores, LLC after the
2 Effective Date.

3 The Parties further agree and understand that the releases provided by Moore under this
4 agreement only extend upstream to the manufacturer or other entity supplying Novelty with Products
5 or New Products to the extent such Products or New Products were/are actually sold or distributed for
6 sale by Novelty.

7 **4.2 Moore's Individual Release of Claims**

8 Moore, in his individual capacity only and *not* in his representative capacity, also provides a
9 release to Novelty, Releasees, and Downstream Releasees which shall be effective as a full and final
10 accord and satisfaction, as a bar to all actions, causes of action, obligations, costs, expenses, attorneys'
11 fees, damages, losses, claims, liabilities and demands of Moore of any nature, character or kind,
12 whether known or unknown, suspected or unsuspected, arising out of alleged or actual exposures to
13 DEHP in Products sold or distributed for sale by Novelty and Jo-Ann Stores, LLC before the Effective
14 Date.

15 **4.3 Novelty's Release of Moore**

16 Novelty, on its own behalf, and on behalf of its past and current agents, representatives,
17 attorneys, successors, and assignees, hereby waives any and all claims against Moore and his
18 attorneys and other representatives, for any and all actions taken or statements made by Moore and
19 his attorneys and other representatives before the Effective Date, whether in the course of
20 investigating claims, otherwise seeking to enforce Proposition 65 against it in this matter, or with
21 respect to the Products.

22 **4.4 Mutual Waiver of California Civil Code Section 1542**

23 The Parties each acknowledge that he/it is familiar with Section 1542 of the Civil Code,
24 which provides as follows:

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

1 The Parties, each on his/its own behalf (and Moore in his individual capacity only and *not* in any
2 representative capacity), and on behalf of his/its past and current agents, representatives, counsel,
3 successors, and/or assignees, expressly waive and relinquish any and all rights and benefits which they
4 may have under, or which may be conferred upon him/it by the provisions of Civil Code section 1542
5 as well as under any other state or federal statute or common law principle of similar effect, to the
6 fullest extent he/it may lawfully waive such rights or benefits pertaining to the released matters, as
7 defined by Sections 4.2 and 4.3, above.

8 **5. COURT APPROVAL**

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

12 **6. SEVERABILITY**

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

16 **7. GOVERNING LAW**

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

23 **8. NOTICE**

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

27 For Novelty:
28

1 Todd Green, President
2 Novelty Inc.
3 351 West Muskegon Drive
4 Greenfield, IN 46140

5 with a copy to Novelty's counsel:

6 Naki Margolis, Esq.
7 Blank Rome LLP
8 555 California Street, Suite 4925
9 San Francisco, CA 94104

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 § 25249.7(f). The Parties further acknowledge that, pursuant to Health and Safety Code
25 § 25249.7(f), a noticed motion is required to obtain judicial approval of the settlement, which motion
26 Moore shall draft and file. In furtherance of obtaining such approval, the Parties agree to mutually
27 employ their best efforts, and those of their counsel, to support the entry of this agreement as judgment,
28 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, and appearing at the hearing before
the Court if so requested.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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

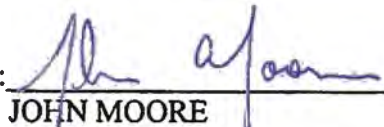
The undersigned are authorized to execute this Consent Judgment and acknowledge that they have read, understand, and agree to all of the terms and conditions contained herein.

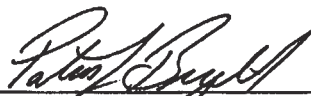
AGREED TO:

AGREED TO:

Date: 6/6/2016

Date: 6/3/16

By: 
JOHN MOORE

By: 
Patrick J. Brazill, CFO
NOVELTY, INC.