

1 Christopher F. Tuttle, State Bar No. 264545
THE CHANLER GROUP
2 2560 Ninth Street
Parker Plaza, Suite 214
3 Berkeley, CA 94710
Telephone: (510) 848-8880
4 Facsimile: (510) 848-8118
5 Attorneys for Plaintiff
JOHN MOORE
6

7
8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF SANTA CLARA
10 UNLIMITED CIVIL JURISDICTION

11 JOHN MOORE
12
13 Plaintiff,
14 v.
15 PULL'R HOLDING COMPANY, LLC
16 et al.,
17 Defendants.

Case No. 115CV282947
[PROPOSED] CONSENT JUDGMENT
(Health & Safety Code § 25249.6 *et seq.* and
Code of Civil Procedure § 664.6)

18
19
20
21
22
23
24
25
26
27
28

1 **1. INTRODUCTION**

2 **1.1 Parties**

3 This Consent Judgment is entered into by and between plaintiff John Moore (“Moore”) and
4 defendant Pull’R Holding Company, LLC (“Pull’R”), with Moore and Pull’R each referred to
5 individually as a “Party” and collectively as the “Parties.”

6 **1.2 Plaintiff**

7 Moore is a resident of the State of California who seeks to promote awareness of exposures
8 to toxic chemicals, and to improve human health by reducing or eliminating harmful substances
9 contained in consumer and commercial products.

10 **1.3 Defendant**

11 Pull’R employs ten or more persons and is a “person in the course of doing business” for
12 purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, California Health and
13 Safety Code section 25249.5 *et seq.* (“Proposition 65”).

14 **1.4 General Allegations**

15 Moore alleges that Pull’R is causing consumer and occupational exposures not covered by
16 California State Occupational and Health Administration (OSHA), in the state of California
17 associated with tools with vinyl/PVC grips containing di(2-ethylhexyl)phthalate (“DEHP”) without
18 first providing the clear and reasonable warning required by Proposition 65.

19 **1.5 Product Description**

20 The products covered by this Consent Judgment are defined as tools with vinyl/PVC grips
21 containing DEHP, including, but not limited to, the *Dead On Tools Annihilator 18” Ultimate*
22 *Utility/Wrecking Bar, Model No: AN18, UPC #6 44323 88900 5* (collectively, “Covered Products”).

23 **1.6 Notice of Violation**

24 Moore provided Pull’R and the requisite public enforcement agencies with a 60-Day Notice
25 of Violation dated February 27, 2015 (“Notice”), alleging that Pull’R violated Proposition 65 when
26 it failed to warn consumers in California that the Covered Products expose users to DEHP. To the
27 best of the Parties’ knowledge, no public enforcer has commenced and is diligently prosecuting an
28 action to enforce the allegations set forth in the Notice.

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

1.7 Complaint

On July 13, 2015, Moore filed the captioned action (“Complaint”), naming Pull’R, among others, as a defendant for the alleged violations of Proposition 65 that are the subject of the Notice.

1.8 No Admission

Pull’R denies the material, factual, and legal allegations contained in Moore’s Notice and Complaint, and maintains that all of the products it has sold or distributed for sale in California, including the Covered Products, have been, and are, in compliance with all laws. Nothing in this Consent Judgment shall be construed as an admission by Pull’R of any fact, finding, conclusion of law, issue of law, or violation of law, nor shall compliance with this Consent Judgment constitute or be construed as an admission by Pull’R of any fact, finding, conclusion of law, issue of law, or violation of law, such being specifically denied by Pull’R. This Section shall not, however, diminish or otherwise affect the obligations, responsibilities, and duties under this Consent Judgment.

1.9 Consent to Jurisdiction

For purposes of this Consent Judgment only, the Parties stipulate that this Court has jurisdiction over Pull’R as to the allegations contained in the Complaint, that venue is proper in the County of Santa Clara, and that the Court has jurisdiction to enter and enforce the provisions of this Consent Judgment pursuant to Proposition 65 and Code of Civil Procedure section 664.6.

1.10 Effective Date

For purposes of this Consent Judgment, the term “Effective Date” shall mean five (5) days after the date Moore’s counsel of record provides written notice to Pull’R’s counsel of record that this Consent Judgment has been approved by and entered by the Court as provided by Section 5.

2. INJUNCTIVE SETTLEMENT TERMS

Within five (5) days of the Effective Date, and continuing thereafter, Pull’R shall only manufacture for sale, or purchase for sale in California: (i) Reformulated Covered Products as defined in Section 2.1 below; or (ii) Covered Products which have a compliant Proposition 65 warning pursuant to Section 2.2 or Section 11, below.

1 **2.1 Reformulated Covered Products**

2 For purposes of this Consent Judgment, “Reformulated Covered Products” are defined as
3 Covered Products containing a maximum concentration of 0.1 percent (1,000 parts per million) of
4 each DEHP and diisononyl phthalate (“DINP”) when sampled and analyzed pursuant to U.S.
5 Environmental Protection Agency testing methodologies 3580A and 8270C, or other methodologies
6 utilized by state or federal agencies for the purpose of determining DEHP and/or DINP content in a
7 solid substance.

8 **2.2 Clear and Reasonable Warning**

9 Within five (5) days of the Effective Date, Pull’R shall not manufacture, import, distribute,
10 sell or offer the non-Reformulated Covered Products for sale in the State of California unless they
11 carry the Proposition 65 warnings specified in this Section. For all Covered Products that are not
12 Reformulated Covered Products, Pull’R agrees that it will only offer such Covered Products for sale
13 in California with a clear and reasonable Proposition 65 warning. A clear and reasonable warning
14 may consist of a warning affixed to the packaging, label, tag, or directly to the Covered Product,
15 containing the following statement:

16 **Warning:** This product contains DEHP, a chemical known to the
17 State of California to cause cancer, and birth defects and
 other reproductive harm.¹

18 **2.3 Grace Period for Existing Inventory and Health Hazard Warnings**

19 Liability for Covered Products that were manufactured and distributed for retail sale prior to the
20 Effective Date shall be subject to the releases provided by Section 4 of this Settlement
21 Agreement. In addition, Pull’R represents that it currently has a health hazard warning in place for
22 its inventory of Covered Products. Moore agrees that, until it exhausts its current inventory of
23 Covered Products, it may continue to sell and offer for sale in California those Covered Products
24 labeled with its existing warning, with substantially the following statement: “This product contains
25

26 ¹ Pull’R may substitute the word “chemicals” for “DEHP, a chemical” where it has obtained
27 information indicating that a Product contains DEHP, but also has reason to believe the Product
28 contains other Proposition 65-listed chemicals at levels at which a warning is likely required if the
Product is sold in California. Pull’R may also add the term “and other chemicals” to the above
warning statement where it has reason to believe the Product contains both DEHP and other
Proposition-65 listed chemicals.

1 chemicals known to the State of California to cause cancer and birth defects or other reproductive
2 harm.”

3 **3. MONETARY SETTLEMENT TERMS**

4 **3.1 Payments Pursuant to Health and Safety Code § 25249.7(b)(2)**

5 Pursuant to Health and Safety Code section 25249.7(b)(2), and in settlement of all the
6 claims referred to in this Consent Judgment, Pull’R shall pay \$4,000.00 in civil penalties. The
7 penalty payment will be allocated in accordance with California Health & Safety Code §
8 25249.12(c)(1) & (d), with 75% of the funds remitted to the California Office of Environmental
9 Health Hazard Assessment (“OEHHA”) and the remaining 25% of the penalty remitted to Moore.
10 Moore’s counsel shall be responsible for remitting Pull’R’s penalty payment under this Consent
11 Judgment to OEHHA. Pull’R shall provide its payment in a check payable to “John Moore, Client
12 Trust Account” to be delivered to the address provided in Section 3.4 below.

13 **3.2 Reimbursement of Attorneys’ 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 this fee
16 issue to be resolved after the material terms of this Consent Judgment had been settled. The
17 Parties then reached an accord on the compensation due to Moore and his counsel under general
18 contract principles and the private attorney general doctrine codified at California Code of Civil
19 Procedure § 1021.5 for all work performed related to this matter. Under these legal principles,
20 Pull’R shall reimburse Moore and his counsel \$32,000.00 for fees and costs incurred, and yet to be
21 incurred, as a result of investigating, bringing this matter to Pull’R’s attention, negotiating a
22 settlement of the matter in the public interest, complying with all reporting obligations, and
23 securing court approval of this Consent Judgment. Pull’R shall provide its payment in the form of
24 a check payable to “The Chanler Group” to be delivered to the address in Section 3.4, below.

25 **3.3 Payment Timing**

26 Pull’R shall deliver all payments required by this Consent Judgment to the address
27 provided in Section 3.4 within five days of the Effective Date. In the event that any payment
28 required by this Consent Judgment is untimely, the Parties agree and acknowledge that (a) Pull’R

1 shall be liable to Moore for 10% simple interest on any unpaid amount(s); (b) Moore may seek to
2 enforce Pull'R's payment obligations under general contract principles and Code of Civil
3 Procedure section 664.6; and (c) Moore shall be entitled to reasonable fees incurred recovering
4 such settlement payments pursuant to general contract principles and Code of Civil Procedure
5 section 1021.5.

6 **3.4 Payment Address**

7 All payments owed to Moore, pursuant to Sections 3.1 and 3.2 of this Consent Judgment,
8 shall be delivered to the following address:

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

12 **4. CLAIMS COVERED AND RELEASED**

13 **4.1 Release of Proposition 65 Claims**

14 Moore, acting on his own behalf and in the public interest, releases Pull'R and The Home
15 Depot, Inc. and their parents, subsidiaries, affiliated entities under common ownership, directors,
16 officers, agents, employees, and attorneys (collectively, "Releasees") and each entity to whom they
17 directly or indirectly distribute or sell the Covered Products including, but not limited to, their
18 downstream distributors, wholesalers, customers, retailers, franchisers, cooperative members,
19 licensors and licensees, and any other person or entity to whom they directly or indirectly distribute,
20 distributed, sell, or sold Covered Products to (collectively, "Downstream Releasees") from any
21 alleged or actual violations arising under Proposition 65 for unwarned exposures to DEHP from the
22 Covered Products sold by Pull'R prior to the Effective Date, as set forth in the Notice. Compliance
23 with the terms of this Consent Judgment constitutes compliance with Proposition 65 by Pull'R with
24 respect to the alleged or actual failure to warn about exposures to DEHP from Covered Products
25 manufactured, sold or distributed for sale by Pull'R after the Effective Date.

26 **4.2 Moore's Individual Release of Claims**

27 Moore, on his own behalf and on behalf of his past and current agents, representatives,
28 attorneys, successors, and/or assignees, and *not* in his representative capacity, hereby waives all

1 rights to institute or participate in directly or indirectly, any form of legal action, and releases all
2 claims that he may have against the Releasees, including, without limitation, all actions, causes of
3 action, suits, obligations, costs, fines, penalties, losses, expenses, attorneys' fees, investigation fees,
4 damages, claims, liabilities and demands of Moore of any nature, character or kind, whether known
5 or unknown, suspected or unsuspected, limited to and arising out of alleged or actual exposures to
6 DEHP and/or DINP in Covered Products manufactured, imported, distributed or sold by Pull'R
7 prior to the Effective Date.

8 **4.3 Pull'R's Release of Moore**

9 Pull'R hereby waives any and all claims against Moore and his attorneys and other
10 representatives, for any and all actions taken or statements made by Moore and his attorneys and
11 other representatives, whether in the course of investigating claims, otherwise seeking to enforce
12 Proposition 65 against it in this matter, or with respect to the Covered Products.

13 **4.4 Mutual California Civil Code Section 1542 Waiver**

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

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

21 The Parties, each on his/its own behalf, and on behalf of his/its past and current agents,
22 representatives, attorneys, successors, and/or assignees, expressly waive and relinquish any and all
23 rights and benefits which they may have under, or which may be conferred upon them by the
24 provisions of Civil Code section 1542 as well as under any other state or federal statute or common
25 law principle of similar effect, to the fullest extent he/it may lawfully waive such rights or benefits
26 pertaining to the released matters, as specifically defined by Sections 4.1 through 4.3, above.

27 **5. COURT APPROVAL**

28 This Consent Judgment is not effective until it is approved and entered by the Court and
shall be null and void if, for any reason, it is not approved and entered by the Court within one year
after it has been fully executed by the Parties. Moore and Pull'R agree to support the entry of this

1 agreement as a judgment, and to obtain the Court's approval of their settlement in a timely manner.
2 The Parties acknowledge that, pursuant to California Health and Safety Code section 25249.7(f), a
3 noticed motion is required for judicial approval of this Consent Judgment, which motion Moore
4 shall draft and file and Pull'R shall support, including by appearing at the hearing if so requested.
5 If any third-party objection to the motion is filed, Moore and Pull'R agree to work together to file a
6 reply and appear at any hearing. This provision is a material component of the Consent Judgment
7 and shall be treated as such in the event of a breach.

8 **6. SEVERABILITY**

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

12 **7. GOVERNING LAW**

13 The terms of this Consent Judgment shall be governed by the laws of the State of California
14 and apply within the State of California. In the event that Proposition 65 is repealed, preempted, or
15 is otherwise rendered inapplicable by reason of law generally, or if any of the provisions of this
16 Consent Judgment are rendered inapplicable or no longer required as a result of any such repeal or
17 preemption, as to the Covered Products, then Pull'R may provide Moore with written notice of any
18 asserted change in the law, and shall have no further injunctive obligations pursuant to this Consent
19 Judgment, with respect to, and to the extent that, the Covered Products are so affected. Nothing in
20 this Consent Judgment shall be interpreted to relieve Pull'R from any obligations to comply with
21 any pertinent state or federal toxics control law.

22 **8. DISMISSAL OF THE HOME DEPOT, INC.**

23 Within 5 days of execution of this Consent Judgment, Moore will file a request for a
24 dismissal without prejudice as to defendant The Home Depot, Inc.

25 **9. NOTICE**

26 Unless specified herein, all correspondence and notice required by this Consent Judgment
27 shall be in writing and sent by: (i) personal delivery, (ii) first-class registered or certified mail,
28

1 return receipt requested; or (iii) a recognized overnight courier to any Party by the other at the
2 following addresses:

3 To Pull'R:

To Moore:

4 Sharon Lin, Controller
5 Pull'R Holding Company, LLC
6 415 East State Parkway
7 Schaumburg, IL 60173

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

8 With a copy to:

9 Malcolm C. Weiss, Esq.
10 Stephanie Chen, Esq.
11 Hunton & Williams LLP
12 550 South Hope Street
13 Suite 2000
14 Los Angeles, CA 90071

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

17 **10. COUNTERPARTS, FACSIMILE AND PDF SIGNATURES**

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

21 **11. COMPLIANCE WITH REPORTING REQUIREMENTS**

22 Moore and his counsel agree to comply with the reporting form requirements referenced in
23 California Health and Safety Code section 25249.7(f).

24 **12. REGULATORY CHANGES**

25 If the requirements of Proposition 65 are modified, changed or amended, compliance with
26 either the warning provisions in section 2.2 above, or compliance with the modified, changed, or
27 amended rules or regulations will be deemed as compliance with Proposition 65.
28

1 **13. MODIFICATION**

2 This Consent Judgment may be modified only by: (i) a written agreement of the Parties and
3 the entry of a modified Consent Judgment by the Court thereon; or (ii) upon a successful motion of
4 any party and the entry of a modified Consent Judgment by the Court thereon.

5 **14. AUTHORIZATION**

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

9
10 **AGREED TO:**

11
12 _____
13 JOHN MOORE

14 Dated: _____

AGREED TO:

15
16 _____
17 PULL'R HOLDING COMPANY, LLC

18 By: Sharon Lin
19 (Print Name)

20 Its: Controller
21 (Title)

22 Dated: 11/17/2015

23
24
25
26
27
28

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

13. MODIFICATION


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

14. AUTHORIZATION

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

AGREED TO:

AGREED TO:



JOHN MOORE

PULL'R HOLDING COMPANY, LLC

Dated: 11/24/2015

By: _____
(Print Name)

Its: _____
(Title)

Dated: _____