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7 SUPERIOR COURT OF THE STATE OF CALIFORNIA
8 COUNTY OF MARIN
9 UNLIMITED CIVIL JURISDICTION

10
11 JOHN MOORE,
12 Plaintiff,
13 v.
14 WBC GROUP, LLC,
15 Defendant.

Case No. CIV1503449
[PROPOSED] CONSENT JUDGMENT
(Health & Safety Code § 25249.6 *et seq.*)

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1 **1. INTRODUCTION**

2 **1.1 Parties**

3 This Consent Judgment is entered into by and between plaintiff John Moore (“Moore”)
4 and defendant WBC Group, LLC (“WBC”), with Moore and WBC each referred to individually
5 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
8 exposures to toxic chemicals, and to improve human health by reducing or eliminating harmful
9 substances contained in consumer and commercial products.

10 **1.3 Defendant**

11 WBC 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 WBC manufactures, imports, sells and/or distributes for sale in
16 California vinyl/PVC exercise balls containing the phthalate chemical di(2-ethylhexyl) phthalate
17 (“DEHP”), and that it does so without providing the health hazard warning that Moore alleges is
18 required by Proposition 65.

19 **1.5 Product Description**

20 The products covered by this Consent Judgment are vinyl/PVC exercise balls containing
21 DEHP, including, but not limited to, the *Body Sport Fusion Ball, BDS10010, UPC #8 15802*
22 *01107 5* (collectively, “Products”).

23 **1.6 Notice of Violation**

24 On May 21, 2015, Moore served WBC and the requisite public enforcement agencies with
25 a 60-Day Notice of Violation (“Notice”), alleging that WBC violated Proposition 65 when it
26 failed to warn its customers and consumers in California that the Products expose users to DEHP.
27 To the best of the Parties’ knowledge, no public enforcer has commenced and is diligently
28 prosecuting an action to enforce the allegations set forth in the Notice.

1 **1.7 Complaint**

2 On September 18, 2015 Moore commenced the instant action (“Complaint”), naming
3 WBC, as a defendant for the alleged violations of Proposition 65 that are the subject of the
4 Notice.

5 **1.8 No Admission**

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

14 **1.9 Jurisdiction**

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

19 **1.10 Effective Date**

20 For purposes of this Consent Judgment, the term “Effective Date” shall mean the date that
21 the Court grants the motion for approval of this Consent Judgment contemplated by Section 5.

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

23 **2.1 Reformulated Products**

24 Commencing on the January 1, 2016, and continuing thereafter, WBC shall only purchase
25 for sale, manufacture for sale, import, sell, or distribute for sale in California “Reformulated
26 Products,” or Products that are sold with a clear and reasonable warning pursuant to Section 2.2
27 below. For purposes of this Consent Judgment, “Reformulated Products” are products that
28 contain DEHP in concentrations of less than 0.1 percent (1,000 parts per million) when analyzed

1 pursuant to U.S. Environmental Protection Agency testing methodologies 3580A and 8270C or
2 any other methodology utilized by federal or state agencies for the purpose of determining the
3 DEHP content in a solid substance. In addition to the EPA test methods authorized above, the
4 Parties may utilize equivalent methodologies employed by state or federal agencies to determine
5 DEHP content in a solid substance.

6 **2.2 Product Warnings**

7 WBC shall provide clear and reasonable warnings for all Products as set forth in
8 subsection 2.2(a) below, commencing on January 1, 2016, and subsection 2.2(b) below,
9 commencing on March 31, 2016, for all products that do not currently have warnings and that do
10 not qualify as Reformulated Products. Each warning shall be prominently placed with such
11 conspicuousness as compared with other words, statements, designs, or devices as to render it
12 likely to be read and understood by an ordinary individual under customary conditions before
13 purchase or use. Each warning shall be provided in a manner such that the consumer or user
14 understands to which *specific* Product the warning applies, so as to minimize the risk of consumer
15 confusion.

16 **(a) Retail Store Sales.**

17 **(i) Product Labeling.** WBC shall affix a warning to the packaging,
18 labeling, or directly on each Product provided for sale in retail outlets in California that states:

19 **WARNING:** This product contains DEHP, a chemical
20 known to the State of California to cause cancer,
birth defects and other reproductive harm.

21 Or:

22 **WARNING:** This product contains chemicals known to
23 the State of California to cause cancer,
birth defects and other reproductive harm.

24 **(ii) Point-of-Sale Warnings.** Alternatively, WBC may provide
25 warning signs in the form below to its customers in California with instructions to post the
26 warnings in close proximity to the point of display of the Products. Such instruction sent to
27 WBC's customers shall be sent by certified mail, return receipt requested.
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WARNING: This product contains DEHP, a chemical known to the State of California to cause cancer, birth defects and other reproductive harm.

Or:

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

Where more than one Product is sold in proximity to other like items or to those that do not require a warning (e.g., Reformulated Products as defined in Section 2.1), the following statement shall be used:¹

WARNING: The following products contain DEHP, a chemical known to the State of California to cause cancer, birth defects and other reproductive harm:
[list products for which warning is required]

Or:

WARNING: The following products contain chemicals known to the State of California to cause cancer, birth defects and other reproductive harm:
[list products for which warning is required]

(b) Mail Order Catalog and Internet Sales. In the event that WBC sells

Products via mail order catalog and/or the internet, to customers located in California, after March 31, 2016, that are not Reformulated Products, WBC shall provide warnings for such Products sold via mail order catalog or the internet to California residents. Warnings given in the mail order catalog or on the internet shall identify the *specific* Product to which the warning applies as further specified in Sections 2.2(b)(i) and (ii).

(i) Mail Order Catalog Warning. Any warning provided in a mail

order catalog shall be in the same type size or larger than the Product description text within the catalog. The following warning shall be provided on the same page and in the same location as the display and/or description of the Product:

WARNING: This product contains DEHP, a chemical known to the State of California to cause cancer, birth defects and other reproductive harm.

¹ For purposes of the Settlement Agreement, “sold in proximity” shall mean that the Product and another similar product are offered for sale close enough to each other that the consumer, under customary conditions of purchase, could not reasonably determine which of the two products is subject to the warning sign.

1
2 Or:

3 **WARNING:** This product contains chemicals
4 known to the State of California to cause
5 cancer, birth defects and other reproductive harm.

6 Where it is impracticable to provide the warning on the same page and in the same
7 location as the display and/or description of the Product, WBC may utilize a designated symbol to
8 cross reference the applicable warning and shall define the term “designated symbol” with the
9 following language on the inside of the front cover of the catalog or on the same page as any
10 order form for the Product(s):

11 **WARNING:** Certain products identified with this symbol ▼
12 and offered for sale in this catalog contain DEHP,
13 a chemical known to the State of California to cause
14 cancer, birth defects and other reproductive harm.

15 Or:

16 **WARNING:** Certain products identified with this symbol ▼
17 and offered for sale in this catalog contain
18 chemicals known to the State of California to cause
19 cancer, birth defects and other reproductive harm.

20 The designated symbol must appear on the same page and in close proximity to the
21 display and/or description of the Product. On each page where the designated symbol appears,
22 WBC must provide a header or footer directing the consumer to the warning language and
23 definition of the designated symbol.

24 **(ii) Internet Website Warning.** A warning shall be given in
25 conjunction with the sale of the Products via the internet, which warning shall appear either: (a)
26 on the same web page on which a Product is displayed; (b) on the same web page as the order
27 form for a Product; (c) on the same page as the price for any Product; or (d) on one or more web
28 pages displayed to a purchaser during the checkout process. The following warning statement
shall be used and shall appear in any of the above instances adjacent to or immediately following
the display, description, or price of the Product for which it is given in the same type size or
larger than the Product description text:

1 **3.1.2 Final Civil Penalty**

2 On or before September 30, 2016, WBC shall pay a final civil penalty of \$10,000 in the
3 manner set forth in Paragraph 3.1.1 above. The final civil penalty shall be waived in its entirety,
4 however, if, no later than September 16, 2016, an officer of WBC provides Moore’s counsel with
5 written certification that, as of the date of the certification, all Products shipped, sold or
6 distributed for sale in California are Reformulated Products, and that they will continue to provide
7 only Reformulated Products in the future. The option to provide a written certification of
8 reformulation in lieu of providing health hazard warnings and making the final civil penalty
9 payment required by this Section is a material term, and time is of the essence. WBC shall
10 deliver its certificate, if any, to Moore’s counsel at the address provided in Section 3.4, below. In
11 the event that WBC does not timely certify its compliance or make the final civil penalty payment
12 required by this Section, Moore may seek relief under any available legal remedy. If successful,
13 the Parties further agree that Moore shall be entitled to his reasonable attorneys’ fees and costs
14 pursuant to general contract principles and Code of Civil Procedure section 1021.5.

15 **3.2 Reimbursement of Attorneys’ Fees and Costs**

16 The Parties acknowledge that Moore and his counsel offered to resolve this dispute
17 without reaching terms on the amount of fees and costs to be reimbursed to them, thereby
18 leaving the issue to be resolved after the material terms of the agreement had been settled.
19 Shortly after the other settlement terms had been finalized, WBC expressed a desire to resolve
20 Moore’s fees and costs. The Parties then negotiated a resolution of the compensation due to
21 Moore and his counsel under general contract principles and the private attorney general doctrine
22 codified at California Code of Civil Procedure § 1021.5 for all work performed in this matter.
23 Under these principals, WBC agrees to pay \$31,000 to Moore and his counsel for all fees and
24 costs incurred by Moore investigating, bringing this matter to WBC’s attention, litigating, and
25 negotiating a settlement of the matter in the public interest. WBC’s payment shall be delivered
26 pursuant to Section 3.3. and to the address in Section 3.4 in the form of a check payable to “The
27 Chanler Group.”
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1 **3.3 Payment Timing; Payments In Trust**

2 With the exception of the final civil penalty payment required by Section 3.1.2, WBC
3 shall deliver all payments required by this Consent Judgment to its counsel within thirty (30)
4 days of the date that this agreement is fully executed by the Parties. WBC’s counsel shall
5 confirm receipt of settlement funds in writing to Moore’s counsel and, thereafter, hold the
6 amounts paid in trust until such time as the Court grants the motion for approval of the Parties’
7 settlement contemplated by Section 5. Within ten (10) days of the Effective Date, WBC’s
8 counsel shall deliver all settlement payments it has held in trust to Moore’s counsel at the
9 address provided in Section 3.4. In the event the final civil penalty payment required by Section
10 3.1.2 becomes due prior to the Effective Date, then WBC shall deliver the final civil penalty
11 payment to its attorney to be held in trust until, and disbursed within ten (10) days after the
12 Effective Date.

13 **3.4 Payment Address**

14 All payments required by this Consent Judgment shall be delivered to the following
15 address:

16 The Chanler Group
17 Attn: Proposition 65 Controller
18 2560 Ninth Street
19 Parker Plaza, Suite 214
20 Berkeley, CA 94710

21 **4. CLAIMS COVERED AND RELEASED**

22 **4.1 Moore’s Release of Proposition 65 Claims**

23 Moore, acting on his own behalf and in the public interest, releases WBC and its parents,
24 subsidiaries, affiliated entities under common ownership, directors, officers, employees, and
25 attorneys (“Releasees”) and each entity to whom they directly or indirectly distribute or sell the
26 Products including, but not limited to, their downstream distributors, wholesalers, customers,
27 retailers, franchisers, cooperative members, licensors and licensees (“Downstream Releasees”)
28 for any violations arising under Proposition 65 for unwarned exposures to DEHP from the
Products manufactured, imported, distributed or sold by WBC prior to the Effective Date, as set
forth in the Notice.

1 WHICH IF KNOWN BY HIM OR HER MUST HAVE MATERIALLY
2 AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR.

3 The Parties, each on his/its own behalf, and on behalf of his/its past and current agents,
4 representatives, attorneys, successors, and/or assignees, expressly waives and relinquishes any
5 and all rights and benefits which he/it may have under, or which may be conferred on him/it by
6 the provisions of Civil Code § 1542 as well as under any other state or federal statute or common
7 law principle of similar effect, to the fullest extent that he/it may lawfully waive such rights or
8 benefits pertaining to the released matters, which are defined as WBC's alleged or actual failure
9 to warn about exposures to DEHP from the Products, and Moore and Moore's counsel's
10 statements and actions made or taken in connection with the investigation or enforcement of
11 Moore's claims with respect to the Products manufactured, imported, distributed, or sold before
12 the Effective Date, as alleged in the Notice and Complaint.

13 **5. COURT APPROVAL**

14 This Consent Judgment is not effective until it is approved and entered by the Court and
15 shall be null and void if, for any reason, it is not approved and entered by the Court within one
16 year after it has been fully executed by the Parties. Moore and WBC agree to support the entry of
17 this agreement as a judgment, and to obtain the Court's approval of their settlement in a timely
18 manner. The Parties acknowledge that, pursuant to California Health and Safety Code section
19 25249.7(f), a noticed motion is required for judicial approval of this Consent Judgment, which
20 motion Moore shall draft and file, and WBC shall support, including by appearing at the hearing
21 if so requested. If any third-party objection to the motion is filed, Moore and WBC agree to work
22 together to file a reply and appear at any hearing. This provision is a material component of the
23 Consent Judgment and shall be treated as such in the event of a breach.

24 **6. APPLICATION OF JUDGMENT**

25 The obligations of this Consent Judgment shall apply to and be binding upon all plaintiffs
26 acting in the public interest pursuant to Health and Safety Code § 25249.7(d), and WBC, and its
27 successors and assigns. The terms contained in this Consent Judgment shall be submitted to the
28 California Attorney General's office prior to the entry of this Consent Judgment by the Court.

1 **7. COMPLIANCE WITH SERVICE AND REPORTING REQUIREMENTS**

2 Plaintiff and his attorneys agree to comply with the reporting and service requirements
3 referenced in California Health and Safety Code section 25249.7(f), and Title 11, California Code
4 of Regulations, section 3003, *et seq.*, providing the Attorney General's Office receive a form
5 reporting of the settlement, and service of the Consent Judgment and all moving papers in support
6 of the approval motion at least 45 days before the Court hears the motion.

7 **8. SEVERABILITY**

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

11 **9. GOVERNING LAW**

12 The terms of this Consent Judgment shall be governed by the laws of the State of
13 California and apply within the State of California. In the event that Proposition 65 is repealed,
14 preempted, or is otherwise rendered inapplicable by reason of law generally, or as to the Products,
15 then WBC may provide Moore with written notice of any asserted change in the law, and shall
16 have no further obligations pursuant to this Consent Judgment, with respect to, and to the extent
17 that, the Products are so affected. Nothing in this Consent Judgment shall be interpreted to
18 relieve WBC from its obligation to comply with any pertinent state or federal law or regulation.

19 **10. NOTICE**

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

24 To WBC:

25 Liz Cross
26 WBC Group, LLC
27 6333 Hudson Crossing Parkway
28 Hudson, OH 44236

To Moore:

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

1 With a copy to:
2 John F. Cermak, Jr.
3 Baker & Hostetler LLP
4 11601 Wilshire Boulevard, Suite 1400
5 Low Angeles, CA 90025-0509

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

8 **11. COUNTERPARTS, FACSIMILE AND PDF SIGNATURES**

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

12 **12. MODIFICATION**

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

16 **13. ENTIRE AGREEMENT**

17 This Consent Judgment contains the sole and entire agreement and understanding of the
18 Parties with respect to the entire subject matter hereof, and any and all prior discussions,
19 negotiations, commitments, and understandings related hereto. No representations, oral or
20 otherwise, express or implied, other than those contained herein have been made by any Party
21 hereto. No other agreements not specifically referred to herein, oral or otherwise, shall be
22 deemed to exist or to bind any of the Parties.

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1 **14. AUTHORIZATION**

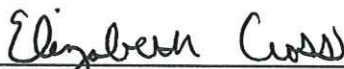
2 The undersigned are authorized to execute this Consent Judgment on behalf of their
3 respective Parties and have read, understood, and agree to all of the terms and conditions of this
4 Consent Judgment.

6 **AGREED TO:**

7 
8 _____
JOHN MOORE

9 Dated: 01/04/2016

AGREED TO:


_____ Elizabeth Cross
WBC Group, LLC

By: Elizabeth Cross
(Print Name)

Its: Controller
(Title)

Dated: 12/30/15

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