

1 Clifford A. Chanler, State Bar No. 135534
2 Brian C. Johnson, State Bar No. 235965
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 SUPERIOR COURT OF THE STATE OF CALIFORNIA
13 IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO
14
15 UNLIMITED CIVIL JURISDICTION

16 JOHN MOORE,

17 Plaintiff,

18 v.

19 BARNES & NOBLE, INC., *et al.*,

20 Defendants.

Case No. CGC-10-501865

**~~PROPOSED~~ JUDGMENT
PURSUANT TO TERMS OF
PROPOSITION 65 SETTLEMENT
AND CONSENT JUDGMENT**

Date: May 6, 2011
Time: 9:30 a.m.
Dept: 301
Judge: Peter J. Busch

ENDORSED
FILED
San Francisco County Superior Court
MAY - 6 2011
CLERK OF THE COURT
BY: MARTA VALLEJO
Deputy Clerk

1 In the above-entitled action, Plaintiff JOHN MOORE and Defendants BARNES & NOBLE,
2 INC. and BARNES & NOBLE BOOKSELLERS, INC., having agreed through their respective
3 counsel that judgment be entered pursuant to the terms of the Proposition 65 Settlement Agreement
4 and Consent Judgment entered into by the parties, and following issuance of an order approving this
5 Proposition 65 settlement agreement and entering the Consent Judgment:

6 IT IS HEREBY ORDERED, ADJUDGED AND DECREED that pursuant to Health & Safety
7 Code § 25249.7(f)(4) and Code of Civil Procedure § 664.6, judgment is entered in accordance with
8 the terms of the Consent Judgment attached hereto as **Exhibit 1**. By stipulation of the parties, the
9 Court will retain jurisdiction to enforce the settlement under Code of Civil Procedure § 664.6.

10
11 **IT IS SO ORDERED.**

12
13 Dated: MAY - 6 2011

14 

JUDGE OF THE SUPERIOR COURT

Exhibit 1

1 Clifford A. Chanler, State Bar No. 135534
2 Brian C. Johnson, State Bar No. 235965
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 Merton A. Howard, State Bar No. 161125
12 Sophia B. Belloli, State Bar No. 238403
13 HANSON BRIDGETT LLP
14 425 Market Street, 26th Floor
15 San Francisco, CA 94105
16 Telephone: (415) 777-3200
17 Facsimile: (415) 541-9366

18 Attorneys for Defendants
19 Barnes & Noble, Inc. and
20 Barnes & Noble Booksellers, Inc.

21
22
23
24
25
26
27
28
SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE CITY AND COUNTY OF SAN FRANCISCO
UNLIMITED CIVIL JURISDICTION

JOHN MOORE,
Plaintiff,

v.

BARNES & NOBLE, INC.; *et al.*,
Defendants.

Case No. CGC-10-501865

[PROPOSED] CONSENT JUDGMENT

CONSENT JUDGMENT

1 **1. INTRODUCTION**

2 **1.1 John Moore and Barnes & Noble, Inc.**

3 This Consent Judgment is entered into by and between John Moore ("Moore") and Barnes &
4 Noble, Inc., and Barnes & Noble Booksellers, Inc. (collectively "Barnes & Noble"), with Moore and
5 Barnes & Noble collectively referred to 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 improve human health by reducing or eliminating hazardous substances
9 contained in consumer products.

10 **1.3 Defendant**

11 The Barnes & Noble entities referenced above each employ ten or more persons and are
12 persons in the course of doing business for purposes of the Safe Drinking Water and Toxic
13 Enforcement Act of 1986, California Health & Safety Code §25249.6, *et seq.* ("Proposition 65").

14 **1.4 General Allegations**

15 Moore alleges that Barnes & Noble has sold in the State of California books containing di(2-
16 ethylhexyl)phthalate ("DEHP"). DEHP is listed pursuant to Proposition 65, as a chemical known to
17 the State of California to cause birth defects and other reproductive harm. DEHP is referred to herein
18 as the "Listed Chemical."

19 **1.5 Product Description**

20 The products that are covered by this Consent Judgment are defined as Moleskine® products
21 containing the Listed Chemical including, but not limited to, *Moleskine Ruled Notebook, ISBN 978-*
22 *88-8370-740-7*. All such items shall be referred to herein as the "Products" and any one of such items
23 shall be referred to as a "Product."

24 **1.6 Notice of Violation**

25 On April 9, 2010, Moore served Barnes & Noble and various public enforcement agencies
26 with a document entitled "60-Day Notice of Violation" that provided Barnes & Noble and such public
27 enforcers with notice that alleged that Barnes & Noble was in violation of Proposition 65 for failing to
28 warn consumers and customers that the Products exposed users in California to the Listed Chemical.

1 To the best of the Parties' knowledge, no public enforcer has diligently prosecuted the allegations set
2 forth in the 60-Day Notice of Violation ("Notice").

3 **1.7 Complaint**

4 On July 23, 2010, Moore, who was and is acting in the interest of the general public in
5 California, filed a complaint ("Complaint" or "Action") in the Superior Court in and for the City and
6 County of San Francisco, Case No. CGC-10-501865, alleging that Barnes & Noble violated
7 Proposition 65 based on the exposures to the Listed Chemical contained in the Products it offered for
8 sale in California.

9 **1.8 No Admission**

10 Barnes & Noble denies the material, factual, and legal allegations contained in Moore's Notice
11 and maintains that all products that it has sold in California, including the Products, have been, and
12 are, in compliance with all laws. Nothing in this Consent Judgment shall be construed as an
13 admission by Barnes & Noble of any fact, finding, conclusion, issue of law, or violation of law; nor
14 shall compliance with this Consent Judgment constitute or be construed as an admission by Barnes &
15 Noble of any fact, finding, conclusion, issue of law, or violation of law, such being specifically denied
16 by Barnes & Noble. However, this section shall not diminish or otherwise affect the obligations,
17 responsibilities and duties of Barnes & Noble under this Consent Judgment.

18 **1.9 Consent to Jurisdiction**

19 For purposes of this Consent Judgment only, the parties stipulate that this Court has
20 jurisdiction over Barnes & Noble as to the allegations contained in the Complaint, that venue is proper
21 in the City and County of San Francisco, and that this Court has jurisdiction to enter and enforce the
22 provisions of this Consent Judgment.

23 **1.10 Effective Date**

24 For purposes of this Consent Judgment, the term "Effective Date" shall be June 1, 2011.

25 **2. INJUNCTIVE RELIEF: REFORMULATION & WARNINGS**

26 **2.1 Reformulation Commitment**

27 Commencing on the Effective Date, Barnes & Noble shall not ship, sell or offer to be shipped
28 for sale in California any Product that is not "DEHP Free," except as described in section 2.2. For

1 purposes of this Consent Judgment, DEHP Free shall mean Products containing DEHP in
2 concentrations less than 0.1 percent (1,000 parts per million ("ppm")) of the Listed Chemical, when
3 analyzed pursuant to Environmental Protection Agency ("EPA") 3580A and 8270C or EN 14372:
4 2004, GC-MS testing methodologies.

5 **2.2 Warnings for Products Manufactured Prior to the Effective Date**

6 Products manufactured, distributed, sold, or offered for sale in California prior to the Effective
7 Date that do not meet the criteria for DEHP Free Products set forth in Section 2.1, shall not be in
8 violation of this Consent Judgment as long as customers are provided with the following warning:

9 **"WARNING:** This product contains a chemical known to the State of California to
10 cause cancer, birth defects or other reproductive harm."

11 Products manufactured after the Effective Date that do not meet the criteria for DEHP Free
12 Products set forth in Section 2.1, shall not be in violation of this Consent Judgment as long as
13 customers are provided with the following warning:

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

16 The Parties agree and understand that the warning shall be prominently placed with such
17 conspicuousness as compared with other words, statements, designs, or devices as to render it likely
18 to be read and understood by an ordinary individual under customary conditions of purchase or use.

19 **3. MONETARY PAYMENTS**

20 **3.1 Payments Pursuant to Health & Safety Code §25249.7(b)**

21 Pursuant to Health & Safety Code §25249.7(b), Barnes & Noble, directly or from settlement
22 funds from Moleskine Srl, shall pay \$10,000.00 in civil penalties in settlement of this claim. This
23 payment shall be apportioned in accordance with California Health & Safety Code §25192, with 75%
24 of these funds remitted to the State of California's Office of Environmental Health Hazard
25 Assessment ("OEHHA") and the remaining 25% remitted to Moore as provided by California Health
26 & Safety Code §§ 25249.12(c)(1) & (d).

27 Barnes & Noble or its designee shall issue two checks for each of these payments pursuant to
28 §25192: (a) one check made payable to "The Chanler Group in Trust for the OEHHA" in the amount

1 of \$7,500.00, representing 75% of the total; and (b) one check to "The Chanler Group in Trust for
2 John Moore" in the amount of \$2,500.00, representing 25% of the total. Two 1099s shall be issued
3 for the above payments: The first 1099 shall be issued to OEHHA, P.O. Box 4010, Sacramento, CA
4 95184 (EIN: 68-0284486) in the amount of \$7,500.00. The second 1099 shall be issued in the amount
5 of \$2,500.00 to Moore, whose address and tax identification number shall be furnished, within three
6 court days of the execution of this Agreement. The payments shall be delivered no later than five
7 court days following the execution of this Agreement to the following address:

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

13 **4. REIMBURSEMENT OF FEES AND COSTS**

14 **4.1 Attorney Fees and Costs**

15 The Parties acknowledge that Moore and his counsel offered to resolve this dispute without
16 reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving this fee
17 issue to be resolved after the material terms of the agreement had been settled. Barnes & Noble then
18 expressed a desire to resolve the fee and cost issue shortly after the other settlement terms had been
19 finalized. The Parties then attempted to (and did) reach an accord on the compensation due to Moore
20 and his counsel under general contract principles and the private attorney general doctrine codified at
21 California Code of Civil Procedure §1021.5, for all work performed through the mutual execution of
22 this agreement. Having received settlement funds from Moleskine Srl, Barnes & Noble or its
23 designee, on behalf of Barnes & Noble and those in its chain of distribution, shall reimburse Moore
24 and his counsel a total of \$38,000.00 for fees and costs incurred as a result of investigating, bringing
25 this matter to Barnes & Noble's attention, and litigating and negotiating a settlement in the public
26 interest. Barnes & Noble or its designee shall issue a separate 1099 for fees and costs (EIN: 94-
27 3171522) and shall make the check payable to "The Chanler Group." Payment shall be delivered no
28 later than five court days following the execution of this Agreement to the following address:

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

6 **5. RELEASE OF ALL CLAIMS**

7 **5.1 Moore 's Release of Barnes & Noble and Moleskine Srl**

8 In further consideration of the promises and agreements herein contained, and for the
9 payments to be made pursuant to Sections 3.1 and 4.1 above, Moore on behalf of himself, his past and
10 current agents, representatives, attorneys, successors, and/or assignees, and in the interest of the
11 general public, hereby waives all rights to institute or participate in, directly or indirectly, any form of
12 legal action and releases all claims including, without limitation, all actions, and causes of action, in
13 law or in equity, suits, liabilities, demands, obligations, damages, costs, fines, penalties, losses, or
14 expenses (including, but not limited to, investigation fees, expert fees, and attorneys' fees) of any
15 nature whatsoever, whether known or unknown, fixed or contingent (collectively "Claims"), that were
16 brought or could have been brought against Barnes & Noble or any of its parents, subsidiaries or
17 affiliates, and all of their customers, distributors, wholesalers, retailers, licensors, licensees,
18 employees, officers, agents, or any other person in the course of doing business, and the successors
19 and assigns of any of them, who may use, maintain, manufacture, distribute, advertise, market or sell
20 the Product(s), and the officers, directors, managers, employees, members, shareholders, agents,
21 insurers and representatives of each of them in this matter, or brought against the manufacturer of the
22 Products, Moleskine Srl, or any of its parents, subsidiaries or affiliates, and all of its customers,
23 distributors, wholesalers, retailers, suppliers, licensors, licensees, employees, officers, agents, or any
24 other person in the course of doing business, and the successors and assigns of any of them, who may
25 use, maintain, manufacture, distribute, advertise, market or sell such Products, and the officers,
26 directors, managers, employees, members, shareholders, agents, insurers and representatives of each
27 of them (collectively "Releasees"). This release is limited to, but is intended to be a full, final, and
28 binding resolution of, those Claims that arise under Proposition 65, as against Barnes & Noble, and
the Releasees, as such Claims relate to the alleged failure to warn about alleged or actual exposures to
the Listed Chemical contained in the Products. Compliance with this Settlement Agreement shall

1 constitute compliance with Proposition 65 for Barnes & Noble and the Releasees with respect to the
2 Listed Chemical in such items.

3 Moore also, on behalf of himself and his agents, attorneys, representatives, successors and
4 assigns, in his individual capacity only and *not* in his representative capacity, provides a general
5 release of the Releasees herein which shall be effective as a full and final accord and satisfaction, as a
6 bar to all actions, causes of action, obligations, costs, expenses, attorneys' fees, damages, losses,
7 claims, liabilities and demands of Moore of any nature, character or kind, known or unknown,
8 suspected or unsuspected, arising out of the subject matter of this dispute. Moore acknowledges that
9 he is familiar with Section 1542 of the California Civil Code, which provides as follows:

10 A general release does not extend to claims which the creditor does not know or
11 suspect to exist in his or her favor at the time of executing the release, which if
12 known by him or her must have materially affected his or her settlement with the
debtor.

13 Moore, in his individual capacity only and *not* in his representative capacity, on behalf of
14 himself and his agents, attorneys, representatives, successors and assigns, expressly waives and
15 relinquishes any and all rights and benefits which he may have under, or which may be conferred on
16 him by the provisions of Section 1542 of the California Civil Code as well as under any other state or
17 federal statute or common law principle of similar effect, to the fullest extent that he may lawfully
18 waive such rights or benefits pertaining to the released matters. In furtherance of such intention, the
19 release hereby given shall be and remain in effect as a full and complete release notwithstanding the
20 discovery or existence of any such additional or different claims or facts arising out of the released
21 matters.

22 **6. COURT APPROVAL**

23 This Consent Judgment is not effective until it is approved and entered by the Court and shall
24 be null and void if, for any reason, it is not approved and entered by the Court within one year after it
25 has been fully executed by all parties, in which event any monies that have been provided to Moore,
26 or his counsel pursuant to Section 3.1 and/or Section 4.1 above, shall be refunded within fifteen (15)
27 days after receiving written notice from Barnes & Noble that the one-year period has expired.

1 **7. SEVERABILITY**

2 If, subsequent to the execution of this Consent Judgment, any of the provisions of this Consent
3 Judgment are held by a court to be unenforceable, the validity of the enforceable provisions remaining
4 shall not be adversely affected.

5 **8. GOVERNING LAW**

6 The terms of this Consent Judgment shall be governed by the laws of the State of California
7 and apply within the State of California. In the event that Proposition 65 is repealed, preempted, or is
8 otherwise rendered inapplicable by reason of law generally, or as to the Products specifically, then
9 Barnes & Noble shall provide written notice to Moore of any asserted change in the law, and shall
10 have no further obligations pursuant to this Consent Judgment with respect to, and to the extent that,
11 the Products are so affected. Nothing in this Consent Judgment shall be interpreted to relieve Barnes
12 & Noble from any obligation to comply with any pertinent state or federal toxics control laws.

13 **9. NOTICES**

14 Unless specified herein, all correspondence and notices required to be provided pursuant to
15 this Consent Judgment shall be in writing and personally delivered or sent by: (i) first-class,
16 registered or certified mail, return receipt requested; or (ii) overnight courier on any party by the other
17 party at the following addresses:

18 For Barnes & Noble:

19 Merton A. Howard, Esq.
20 Sophia B. Belloli, Esq.
21 Hanson Bridgett LLP
22 425 Market Street, 26th Floor
23 San Francisco, CA 94105

24 With copies to:

25 Adam Thurston
26 Drinker Biddle & Reath, LLP
27 1800 Century Park East
28 Suite 1400
29 Los Angeles, CA 90067

30 And

1 Barnes & Noble, Inc.
2 122 Fifth Avenue
3 New York, NY 10011
4 Attn: Legal Department

5 For Moore :

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

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

13 **10. COUNTERPARTS; FACSIMILE SIGNATURES**

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

17 **11. COMPLIANCE WITH HEALTH & SAFETY CODE §25249.7(f)**

18 Moore agrees to comply with the reporting requirements referenced in California Health &
19 Safety Code §25249.7(f).

20 **12. ADDITIONAL POST EXECUTION ACTIVITIES**

21 The parties acknowledge that, pursuant to Health & Safety Code §25249.7, a noticed motion is
22 required to obtain judicial approval of this Consent Judgment. In furtherance of obtaining such
23 approval, Moore and Barnes & Noble and their respective counsel agree to mutually employ their best
24 efforts to support the entry of this agreement as a Consent Judgment and obtain approval of the
25 Consent Judgment by the Court in a timely manner. For purposes of this paragraph, "best efforts"
26 shall include, at a minimum, cooperating on the drafting and filing of any papers in support of the
27 requisite motion for judicial approval.

28 **13. MODIFICATION**

This Consent Judgment may be modified only: (1) by written agreement of the parties and
upon entry of a modified consent judgment by the Court thereon; or (2) upon a successful motion of
any party and entry of a modified consent judgment by the Court.

1 **14. AUTHORIZATION**

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

5 **AGREED TO:**

6 Date: JANUARY 28, 2011

7 By: 
8 JOHN MOORE

AGREED TO:

Date: _____

By: _____

9 Its: _____

10 BARNES & NOBLE, INC.

11 **AGREED TO:**

12 Date: _____

13 By: _____

14 Its: _____

15 BARNES & NOBLE BOOKSELLERS, INC.
16
17
18
19
20
21
22
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

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 hereof.

AGREED TO:

Date: _____
By: _____
JOHN MOORE

AGREED TO:

Date: 1/28/11
By: [Signature]
Its: Chief Merchandising Officer
BARNES & NOBLE, INC.

AGREED TO:

Date: 1/28/11
By: [Signature]
Its: Chief Merchandising Officer
BARNES & NOBLE BOOKSELLERS, INC.