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10 JOHN MOORE

FILED

JUN 17 2011

KIM L. GNER
Court Executive Officer
MARIN COUNTY SUPERIOR COURT
By: A. Garcia, Deputy

11 SUPERIOR COURT OF THE STATE OF CALIFORNIA

12 COUNTY OF MARIN

13 UNLIMITED CIVIL JURISDICTION

14 JOHN MOORE,

15 Plaintiff,

16 v.

17 EVERLAST WORLDWIDE, INC.; *et al.*,

18 Defendants.

) Case No.: CIV-1004742

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

) Date: June 17, 2011

) Time: 8:30 a.m.

) Dept.: K

) Judge: Hon. Faye D'Opal

1 In the above-entitled action, Plaintiff JOHN MOORE and Defendant EVERLAST
2 WORLDWIDE, INC.; having agreed through their respective counsel that a judgment be entered
3 pursuant to the terms of the Consent Judgment entered into by the parties in resolution of this
4 Proposition 65 action, and following the issuance of an order approving the Parties' settlement
5 agreement on June 17, 2011.

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 hereby entered in accordance
8 with the terms of the Consent Judgment attached hereto as Exhibit 1. By stipulation of the parties,
9 the Court will retain jurisdiction to enforce the settlement under Code of Civil Procedure § 664.6.
10

11 **IT IS SO ORDERED.**

12
13 Dated: 6.17.2011

14 
15 _____
16 JUDGE OF THE SUPERIOR COURT
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Exhibit 1

1 **1. INTRODUCTION**

2 **1.1 John Moore and Everlast Worldwide Inc.**

3 This Consent Judgment is entered into by and between plaintiff John Moore (“Moore” or
4 “Plaintiff”) and Everlast Worldwide Inc. (“Everlast”), with Moore and Everlast collectively
5 referred to as the “parties.”

6 **1.2 John Moore**

7 Moore is an individual residing in the State of California who seeks to promote awareness of
8 exposure to toxic chemicals and to improve human health by reducing or eliminating hazardous
9 substances contained in consumer and commercial products.

10 **1.3 Everlast Worldwide Inc.**

11 Moore alleges that Everlast employs ten or more persons and is a person in the course of
12 doing business for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986,
13 California Health & Safety Code § 25249.6, *et seq.* (“Proposition 65”).

14 **1.4 General Allegations**

15 Moore alleges that Everlast has manufactured, imported, distributed and/or sold
16 exercise/fitness mats which may contain phthalates, including di(2-ethylhexyl)phthalate (“DEHP”),
17 without the requisite Proposition 65 warnings. DEHP is on the Proposition 65 list as known to
18 cause cancer as well as birth defects and other reproductive harm.

19 **1.5 Product Description**

20 As used in this Consent Judgment, “Product” and “Products” mean exercise and fitness
21 mats containing DEHP including, but not limited to, *Everlast Folding Exercise Mat, Model: 8050 (*
22 *0 09283 08050 1)* sold by Everlast.

23 **1.6 Notice of Violation**

24 On June 3, 2010, Moore served Everlast, and various public enforcement agencies, with a
25 document entitled “60-Day Notice of Violation” (the “Notice”) that provided the recipients with
26 notice of alleged violations of California Health & Safety Code § 25249.6 based on Everlast’s
27 alleged failure to warn consumers that the Products exposed users in California to DEHP.

28

1 To the best of the parties' knowledge, no public enforcer has prosecuted the allegations set
2 forth in the Notice.

3 **1.7 Complaint**

4 On September 8, 2010, Moore filed a complaint in the Superior Court in and for the County
5 of Marin against Everlast, and Does 1 through 150, *Moore v Everlast, et al.*, Case No. CIV-1004742
6 (the "Complaint"), alleging violations of California Health & Safety Code § 25249.6, based on the
7 alleged exposures to DEHP contained in certain exercise and fitness mats sold by Everlast.

8 **1.8 No Admission**

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

17 **1.9 Consent to Jurisdiction**

18 For purposes of this Consent Judgment only, the parties stipulate that this Court has
19 jurisdiction over Everlast as to the allegations contained in the Complaint, that venue is proper in
20 the County of Marin and that this Court has jurisdiction to enter and enforce the provisions of this
21 Consent Judgment.

22 **1.10 Effective Date**

23 For purposes of this Consent Judgment, the term "Effective Date" shall mean January 7,
24 2011.

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

2 **2.1 Reformulation Standards**

3 Reformulated Products are defined as those Products containing DEHP in concentrations
4 less than 0.1 percent (1,000 parts per million) in each accessible component when analyzed
5 pursuant to U.S. Environmental Protection Agency testing methodologies 3580A and 8270C or any
6 other methodology utilized by federal or state agencies for the purpose of determining the DEHP
7 content in a solid substance.

8 **2.2 Product Warnings**

9 Commencing on the Effective Date, Everlast shall, for all Products other than Reformulated
10 Products, provide clear and reasonable warnings as set forth in subsections 2.2(a) and (b). Each
11 warning shall be prominently placed with such conspicuousness as compared with other words,
12 statements, designs, or devices as to render it likely to be read and understood by an ordinary
13 individual under customary conditions before purchase or use. Each warning shall be provided in a
14 manner such that the consumer or user understands to which *specific* Product the warning applies,
15 so as to minimize the risk of consumer confusion.

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

17 **(i) Product Labeling.** Everlast shall affix a warning to the packaging,
18 labeling, or directly on each Product sold in retail outlets in California by Everlast or any person
19 selling the Products, that states:

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

23 **(ii) Point-of-Sale Warnings.** Alternatively, Everlast may provide
24 warning signs in the form below to its customers in California with instructions to post the
25 warnings in close proximity to the point of display of the Products. Such instruction sent to
26 Everlast's customers shall be sent by certified mail, return receipt requested.

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

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

4 **WARNING:** The following products contain DEHP, a
5 phthalate chemical known to the State of
6 California to cause birth defects and other
7 reproductive harm:

8 *[list products for which warning is required]*

9 **(b) Mail Order Catalog and Internet Sales.** In the event that Everlast sell
10 Products via mail order catalog and/or the internet, to customers located in California, after the
11 Effective Date, that are not Reformulated Products, Everlast shall provide warnings for such
12 Products sold via mail order catalog or the internet to California residents. Warnings given in the
13 mail order catalog or on the internet shall identify the *specific* Product to which the warning applies
14 as further specified in Sections 2.2(b)(i) and (ii).

15 **(i) Mail Order Catalog Warning.** Any warning provided in a mail
16 order catalog shall be in the same type size or larger than the Product description text within the
17 catalog. The following warning shall be provided on the same page and in the same location as the
18 display and/or description of the Product:

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

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

27 ¹For purposes of the Consent Judgment, “sold in proximity” shall mean that the Product and another similar product
28 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 **WARNING:** Certain products identified with this symbol
2 ▼ and offered for sale in this catalog contain
3 DEHP, a phthalate chemical known to the
 State of California to cause birth defects and
 other reproductive harm.

4 The designated symbol must appear on the same page and in close proximity to the display
5 and/or description of the Product. On each page where the designated symbol appears, Everlast
6 must provide a header or footer directing the consumer to the warning language and definition of
7 the designated symbol.

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

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

18 Alternatively, the designated symbol may appear adjacent to or immediately following the
19 display, description, or price of the Product for which a warning is being given, provided that the
20 following warning statement also appears elsewhere on the same web page, as follows:

21 **WARNING:** Products identified on this page with the
22 following symbol ▼ contain DEHP, a
23 phthalate chemical known to the State of
 California to cause birth defects and other
 reproductive harm.

24 **3. PAYMENT OF PENALTIES**

25 In settlement of all the claims referred to in this Consent Judgment, Everlast shall pay
26 \$30,000, in civil penalties as follows:

1 **3.1 Initial Civil Penalty**

2 Everlast shall pay an initial civil penalty of \$3,000, to be apportioned in accordance with
3 California Health & Safety Code § 25249.12(c) & (d), with 75% of these funds remitted to the State
4 of California's Office of Environmental Health Hazard Assessment ("OEHHA") and the remaining
5 25% of the penalty remitted to John Moore. Everlast shall issue two separate checks for the penalty
6 payment: (a) one check made payable to "The Chanler Group in Trust For OEHHA" in the amount
7 of \$2,250, representing 75% of the total penalty; and (b) one check to "The Chanler Group in Trust
8 for John Moore" in the amount of \$750, representing 25% of the total penalty. Two separate 1099s
9 shall be issued for the above payments: (a) OEHHA, P.O. Box 4010, Sacramento, CA, 95814 (EIN:
10 68-0284486); and (b) John Moore, whose information shall be provided five calendar days before
11 the payment is due.

12 Payment shall be delivered to Moore's counsel on or before January 14, 2011, at the
13 following address:

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

19 **3.2 Final Civil Penalty**

20 Everlast shall pay a second and final civil penalty of \$27,000 on September 15, 2011. As
21 incentive for Everlast to reformulate its Products, however, the final civil penalty shall be waived in
22 its entirety if an Officer of Everlast certifies in writing that it, as of September 1, 2011, has sold,
23 shipped and offered for sale in California only Reformulated Products and that it will continue to
24 sell, ship and offer for sale in California only Reformulated Products. Such certification must be
25 received by The Chanler Group on or before September 8, 2011. The final civil penalty payment
26 shall be apportioned in accordance with California Health & Safety Code § 25249.12(c) & (d), with
27 75% of these funds remitted to OEHHA and the remaining 25% of the penalty remitted to John
28 Moore. Everlast shall issue two separate checks for the final civil penalty payment: (a) one check
made payable to "The Chanler Group in Trust For OEHHA" in the amount of \$20,250, representing

1 75% of the total penalty; and (b) one check to “The Chanler Group in Trust for John Moore” in the
2 amount of \$6,750, representing 25% of the total penalty. Two separate 1099s shall be issued for the
3 above payments: (a) OEHHA, P.O. Box 4010, Sacramento, CA, 95814 (EIN: 68-0284486); and (b)
4 John Moore, whose information shall be provided five calendar days before the payment is due (if
5 different than the information already provided to Everlast under Section 3.1 above).

6 Payment shall be delivered to Moore’s counsel at the following address:

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

12 **4. REIMBURSEMENT OF ATTORNEY’S FEES AND COSTS**

13 The parties reached an accord on the compensation due to Moore and his counsel under
14 general contract principles and the private attorney general doctrine codified at California Code of
15 Civil Procedure (CCP) § 1021.5. Everlast shall reimburse Moore and his counsel \$32,000 for fees
16 and costs incurred as a result of investigating, bringing this matter to its attention, and negotiating a
17 settlement in the public interest. This figure includes Moore’s future fees and costs including
18 attorney’s fees to be incurred in seeking judicial approval of this Consent Judgment as well as any
19 other legal work performed after the execution of this Consent Judgment incurred in an effort to
20 obtain finality of the case. However, in the event a third party were to appeal entry of this
21 Consent Judgment, Plaintiff and his counsel shall be entitled to seek their reasonable attorney’s fees
22 and costs associated with all appellate work defending the entry of judgment pursuant to CCP §
23 1021.5.

24 The check for reimbursement of fees and costs shall be made payable to “The Chanler
25 Group” and shall be delivered on or before January 14, 2011, to the following address:

26 The Chanler Group
27 Attn: Proposition 65 Controller
28 2560 Ninth Street
Parker Plaza, Suite 214
Berkeley, CA 94710

1 A separate 1099 shall be issued to “The Chanler Group” (EIN: 94-3171522) for the amount
2 of the reimbursement of Plaintiff’s fees and costs.

3 **5. RELEASE OF ALL CLAIMS**

4 **5.1 Moore’s Release of Everlast**

5 In further consideration of the promises and agreements herein contained, and for the
6 payments to be made pursuant to Sections 3 and 4, Moore, on behalf of himself, his past and current
7 agents, representatives, attorneys, successors, and/or assignees, and in the interest of the general
8 public pursuant to Health & Safety Code § 25249.7(d), hereby waives all rights to institute or
9 participate in, directly or indirectly, any form of legal action and releases all claims, including,
10 without limitation, all actions, and causes of action, in law or in equity, suits, liabilities, demands,
11 obligations, agreements, promises, royalties, accountings, damages, costs, fines, penalties, losses, or
12 expenses (including, but not limited to, investigation fees, expert fees, and attorney’s fees) of any
13 nature whatsoever, whether known or unknown, fixed or contingent (collectively “claims”), against
14 Everlast and each of its downstream wholesalers, licensors, licensees, auctioneers, retailers,
15 distributors, franchisees, dealers, customers, owners, purchasers, users, parent companies, corporate
16 affiliates, subsidiaries, and their respective officers, directors, attorneys, representatives,
17 shareholders, agents, and employees, and sister and parent entities, (collectively “Releasees”) that
18 arise under Proposition 65, as such claims relate to Everlast’s alleged failure to warn about
19 exposures to DEHP contained in the Products. The parties further understand and agree that this
20 release shall not extend upstream to any entities that manufactured the Products for Everlast or any
21 component parts thereof or to any distributors or suppliers who sold the Products or any component
22 parts thereof to Everlast.

23 **5.2 Everlast’s Release of Moore**

24 Everlast, on behalf of itself and its Releasees, waives any and all claims against Moore, his
25 attorneys, and other representatives for any and all actions taken by Moore and his attorneys and
26 other representatives, whether in the course of investigating claims or otherwise seeking
27 enforcement of Proposition 65 against it in this matter, and/or with respect to the Products.
28

1 **6. COURT APPROVAL**

2 This Consent Judgment is not effective until it is approved and entered by the Court and
3 shall be null and void if, for any reason, it is not approved and entered by the Court within one year
4 after it has been fully executed by all parties.

5 **7. SEVERABILITY**

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

9 **8. GOVERNING LAW**

10 The terms of this Consent Judgment shall be governed by the laws of the State of California
11 and apply within the State of California. In the event that Proposition 65 is repealed, preempted or
12 is otherwise rendered inapplicable by reason of law generally, or if any of the provisions of this
13 Consent Judgment are rendered inapplicable or no longer require as a result of any such repeal or
14 preemption or rendered inapplicable by reason of law generally as to the Products, then Everlast
15 shall have no further obligations pursuant to this Consent Judgment with respect to, and to the
16 extent that, the Products are so affected.

17 **9. NOTICES**

18 Unless specified herein, all correspondence and notices required to be provided pursuant to
19 this Consent Judgment shall be in writing and: (i) personally delivered; (ii) sent by first-class,
20 (registered or certified mail) return receipt requested; or (iii) sent by overnight courier to one party
21 from the other party at the following addresses:

22 To Everlast:

23 Bruce Nye, Esq.
24 adams | nye | becht LLP
25 222 Kearny Street, 7th Floor
26 San Francisco, CA 94108-4521

22 To Moore:

23 Proposition 65 Coordinator
24 The Chanler Group
25 2560 Ninth Street
26 Parker Plaza, Suite 214
27 Berkeley, CA 94710-2565

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

1 **10. COUNTERPARTS; FACSIMILE SIGNATURES**

2 This Consent Judgment may be executed in counterparts and by facsimile or pdf signature,
3 each of which shall be deemed an original, and all of which, when taken together, shall constitute
4 one and the same document. A facsimile or pdf signature shall be as valid as the original.

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

6 Moore and his attorneys agree to comply with the reporting form requirements referenced in
7 California Health & Safety Code § 25249.7(f).

8 **12. ADDITIONAL POST EXECUTION ACTIVITIES**

9 Moore and Everlast agree to mutually employ their, and their counsel's, best efforts to
10 support the entry of this agreement as a Consent Judgment and obtain approval of the Consent
11 Judgment by the Court in a timely manner. The parties acknowledge that, pursuant to California
12 Health & Safety Code § 25249.7, a noticed motion is required to obtain judicial approval of this
13 Consent Judgment, which Moore shall draft and file, and Everlast shall join. If any third party
14 objection to the noticed motion is filed, Moore and Everlast shall work together to file a joint reply
15 or separate replies if the parties so desire and appear at any hearing before the Court. This provision
16 is a material component of the Consent Judgment and shall be treated as such in the event of a
17 breach. If the Court does not approve the motion to approve this Consent Judgment, and if the
18 parties choose not to pursue a modified Consent Judgment within 30 days after the Court's denial of
19 the motion to approve, then, upon remittitur, all payments made pursuant to this Consent Judgment
20 will be returned to counsel
21 for Everlast.

22 **13. MODIFICATION**

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

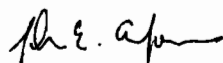
The undersigned are authorized to execute this Consent Judgment and have read, understood, and agree to all of the terms and conditions of this Consent Judgment.

AGREED TO:

AGREED TO:

Date: JANUARY 14, 2011

Date: January 13, 2011

By: 
Plaintiff, John Moore

By:  CEO
Defendant, Everlast Worldwide Inc.