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FILED
 ALAMEDA COUNTY
 FFR - 6 2012

CLERK OF THE SUPERIOR COURT
 By Ann Hanel Deputy

7
 8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
 9 COUNTY OF ALAMEDA
 10 UNLIMITED CIVIL JURISDICTION
 11

12
 13 JOHN MOORE,
 14 Plaintiff,
 15 v.
 16 BENSUSSEN DEUTSCH & ASSOCIATES,
 INC.; and DOES 1-150, inclusive,
 17 Defendants.
 18

Case No. RG11564500
**[PROPOSED] JUDGMENT PURSUANT
 TO TERMS OF PROPOSITION 65
 SETTLEMENT AND [PROPOSED]
 CONSENT JUDGMENT**
 Date: January 24, 2012
 Time: 3:45 p.m.
 Dept. 24 **FRANK ROESCH**
 Judge: Hon. ~~Yvonne Gonzalez Rogers~~
 Reservation No. R-1239302

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Plaintiff John Moore and Defendant Bensussen Deutsch & Associates, Inc., having agreed through their respective counsel that Judgment be entered pursuant to the terms of their settlement agreement in the form of a Consent Judgment, and following this Court's issuance of an Order approving this Proposition 65 settlement and Consent Judgment on January 24, 2012.

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

IT IS SO ORDERED.

Dated: FEB - 6 2012



JUDGE OF THE SUPERIOR COURT 

Exhibit 1

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Attorneys for Plaintiff
JOHN MOORE

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ALAMEDA
UNLIMITED CIVIL JURISDICTION

JOHN MOORE,
Plaintiff,
v.
BENSUSSEN DEUTSCH & ASSOCIATES,
INC.; and DOES 1-150, inclusive,
Defendants.

Case No. RG11564500

[PROPOSED] CONSENT JUDGMENT

(Cal. Health & Saf. Code, § 25249.6 et seq.)

1 **1. INTRODUCTION**

2 **1.1 John Moore and Bensussen Corp.**

3 This Consent Judgment is entered into by and between John Moore (hereinafter "Moore")
4 and Bensussen Deutsch & Associates, Inc. (hereinafter "Bensussen"), with Moore and Bensussen
5 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
8 to toxic chemicals and improve human health by reducing or eliminating hazardous substances
9 contained in consumer products.

10 **1.3 Defendant**

11 Moore alleges that Bensussen 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 section 25249.6 *et seq.* ("Proposition 65").

14 **1.4 General Allegations**

15 Moore alleges that Bensussen has manufactured, distributed, and/or offered for sale in
16 California cases for mobile electronic devices containing di(2-ethylhexyl)phthalate ("DEHP")
17 without the requisite Proposition 65 warnings. DEHP is listed pursuant to Proposition 65 as a
18 chemical known to the State of California to cause birth defects and other reproductive harm.

19 **1.5 Product Description**

20 The products that are covered by this Consent Judgment are cases for mobile electronic
21 devices containing DEHP, including but not limited to: *Game Boy Advance SP Game Folio (#6*
22 *17885 93564 0)*, manufactured, distributed, or sold by Bensussen in California ("Products").

23 **1.6 Notice of Violation**

24 On December 21, 2010, Moore served Bensussen and various public enforcement agencies
25 with a document entitled 60-Day Notice of Violation ("Notice") that provided Bensussen and such
26 public enforcers with notice that alleged that Bensussen was in violation of Proposition 65 for
27 failing to warn consumers and customers that its Products exposed users in California to DEHP.

28

1 **1.7 Complaint**

2 On March 8, 2011, Moore filed a complaint in the Alameda County Superior Court (the
3 “Complaint”), naming Bensussen as a defendant and alleging violations of Proposition 65 based on
4 the allegations in the Notice.

5 **1.8 No Admission**

6 Bensussen denies the factual and legal allegations contained in the Notice and Complaint,
7 and maintains that all products that it has sold in California have been and are in compliance with
8 all laws, including, without limitation, Proposition 65. Nothing in this Consent Judgment shall be
9 construed as an admission by Bensussen of any fact, finding, conclusion, issue of law, or violation
10 of law, nor shall compliance with this Consent Judgment constitute or be construed as an admission
11 by Bensussen of any fact, finding, conclusion, issue of law, or violation of law, such being
12 specifically denied by Bensussen. However, this Section shall not diminish or otherwise affect
13 Bensussen’s obligations, responsibilities and duties under this Consent Judgment.

14 **1.9 Consent to Jurisdiction**

15 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
16 jurisdiction over Bensussen as to the allegations contained in the Complaint, that venue is proper in
17 the County of Alameda, and that this Court has jurisdiction to enter and enforce the provisions of
18 this Consent Judgment, pursuant to California Code of Civil Procedure section 664.6, as a full and
19 binding resolution of all claims which were or could have been raised in the Complaint against
20 Bensussen based on the facts alleged therein and in the Notice.

21 **1.10 Effective Date**

22 For purposes of this Consent Judgment, the term “Effective Date” shall mean September 20,
23 2011.

24 **2. INJUNCTIVE RELIEF**

25 **2.1 Reformulation Standards**

26 As of the Effective Date and except as provided below, Bensussen shall not ship, sell, or
27 offer to be shipped for sale in California, any Product unless it is a “Reformulated Product,” which
28 is a Product containing DEHP in concentrations less than 1,000 parts per million (the “DEHP

1 Standard”) in each accessible component when analyzed pursuant to U.S. Environmental Protection
2 Agency testing methodologies 3580A and 8270C or any other methodology utilized by federal or
3 state agencies for the purpose of determining DEHP content in a solid substance. However
4 Bensussen may ship, sell or offer to be shipped for sale in California, until December 1, 2011 and
5 not thereafter, except upon election of extension as provided by Section 2.2, a Product that does not
6 meet the DEHP Standard, if the following conditions are met: (i) no Reformulated Product or
7 equivalent DEHP-free substitute product is “reasonably commercially feasible;” (ii) the Product is
8 not primarily intended for use by individuals twelve years of age or younger; and (iii) Bensussen
9 complies with the warning requirements set forth in Section 2.3 below. For purposes of this Section
10 2.1 whether a Reformulated Product or equivalent DEHP-free substitute product is “reasonably
11 commercially feasible” shall be a determination within the sole discretion of Bensussen, after
12 considering the following factors: availability and supply of a Reformulated Product or equivalent
13 DEHP-free product; cost of the Reformulated Product or equivalent DEHP-free product; and
14 performance characteristics of the Reformulated Product or equivalent DEHP-free product,
15 including but not limited to performance, safety, and stability. Upon request, Bensussen shall
16 produce to plaintiff records demonstrating that a Reformulated Product or equivalent DEHP-free
17 product is not reasonably commercially feasible.

18 **2.2 Election of Extension**

19 The December 1, 2011 deadline for meeting the DEHP Standard imposed pursuant to
20 Section 2.1 above shall be extend to March 1, 2012, subject to the same conditions as the original
21 December 1, 2011 deadline set forth in Section 2.1, if Bensussen provides a written notification of
22 election of extension to Moore on or before December 1, 2011. Upon such election, and
23 accompanying the notification of election, Bensussen shall pay the additional penalty set forth in
24 Section 3.2 below. After March 1, 2012, Bensussen shall not, under any circumstances, ship, sell
25 or offer to be shipped for sale in California any Product that does not meet the DEHP Standard.

26 **2.3 Product Warnings**

27 Commencing on the Effective Date, Bensussen shall, for all Products sold in California that
28 do not meet the DEHP Standard, provided the conditions in Section 2.1 are met, provide clear and

1 reasonable warnings as set forth in subsections 2.2(a) and (b). Each warning shall be prominently
2 placed with such conspicuousness as compared with other words, statements, designs, or devices as
3 to render it likely to be read and understood by an ordinary individual under customary conditions
4 before purchase or use. Each warning shall be provided in a manner such that the consumer or user
5 understands to which specific Product the warning applies, so as to minimize the risk of consumer
6 confusion.

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

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

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

15 (ii) **Point-of-Sale Warnings.** Alternatively, Bensussen may provide
16 warning signs in the form below to its customers in California with instructions to post the
17 warnings in close proximity to the point of display of the Products. Such instruction sent to
18 Bensussen's customers shall be sent by certified mail.

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

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

26 **WARNING:** The following products contain DEHP, a
27 phthalate chemical known to the State of
28 California to cause birth defects and other
reproductive harm:

[list products for which warning is required]

¹ For purposes of the Consent Judgment, "sold in proximity" shall mean that the Product and another 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 **(b) Mail Order Catalog and Internet Sales.** In the event that Bensussen sells
2 Products via mail order catalog and/or the internet, to customers located in California, after the
3 Effective Date, and that are not Reformulated Products, Bensussen shall provide a warning for such
4 Products sold via mail order catalog or the internet to California residents: (1) in the mail order
5 catalog; or (2) on the website. Warnings given in the mail order catalog or on the internet shall
6 identify the *specific* Product to which the warning applies as further specified in Sections 2.2(b)(i)
7 and (ii).

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

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

14 Where it is impracticable to provide the warning on the same page and in the same location as
15 the display and/or description of the Product, Bensussen may utilize a designated symbol to cross
16 reference the applicable warning and shall define the term "designated symbol" with the following
17 language on the inside of the front cover of the catalog or on the same page as any order form for the
18 Product(s):

19 **WARNING:** Certain products identified with this symbol
20 ▼ and offered for sale in this catalog contain
21 DEHP, a phthalate chemical known to the
 State of California to cause birth defects and
 other reproductive harm.

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

26 **(ii) Internet Website Warning.** A warning may be given in conjunction
27 with the sale of the Products via the internet, when the sale is to a consumer in California, provided it
28 appears either: (a) on the same web page on which a Product is displayed; (b) on the same web page

1 as the order form for a Product; (c) on the same page as the price for any Product; or (d) on one or
2 more web pages displayed to a purchaser during the checkout process. The following warning
3 statement shall be used and shall appear in any of the above instances adjacent to or immediately
4 following the display, description, or price of the Product for which it is given in the same type size
5 or larger than the Product description text:

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

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

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

14 **3. MONETARY PAYMENTS**

15 **3.1 Civil Penalty**

16 Bensussen shall make an initial payment of \$ 32,500 to be apportioned in accordance with
17 Health & Safety Code section 25249.12, subdivisions (c)(1) and (d), with 75% of these funds
18 remitted to the State of California's Office of Environmental Health Hazard Assessment
19 ("OEHHA") and the remaining 25% of these penalty monies remitted to Moore as provided by
20 Health & Safety Code section 25249.12, subdivision (d). Bensussen shall issue two checks for the
21 penalty payment: (a) one check made payable to "The Chanler Group in Trust for OEHHA" in the
22 amount of \$ 24,375, representing 75% of the total penalty, and (b) one check to "The Chanler Group
23 in Trust for John Moore" in the amount of \$ 8,125, representing 25% of the total penalty. Two
24 1099s shall be issued for the above payments. The first 1099 shall be issued to the Office of
25 Environmental Health Hazard Assessment, P.O. Box 4010, Sacramento, CA 95814 (EIN: 68-
26 0284486) in the amount of \$ 24,375. The second 1099 shall be issued to Moore in the amount of \$
27 8,125, whose address and tax identification number shall be furnished upon request. The payments
28 shall be delivered within ten (10) days of the Effective Date, to the Payment Address set forth in

1 Section 3.3.

2 **3.2 Additional Civil Penalty upon Election of Extension**

3 Bensussen shall pay, at the time it provides notification of the election of extension, a second
4 civil penalty of \$70,000, to be apportioned in accordance with Health & Safety Code
5 section 25249.12, subdivisions (c)(1) and (d), as described above.

6 **3.3 Payment Address**

7 All payments, unless waived, shall be delivered to the following Payment Address:

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

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

12 The Parties acknowledge that Moore and his counsel offered to resolve this dispute without
13 reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving this fee
14 issue to be resolved after the material terms of the agreement had been settled. Bensussen then
15 expressed a desire to resolve the fee and cost issue shortly after the other settlement terms had been
16 finalized. The Parties then attempted to (and did) reach an accord on the compensation due to
17 Moore and his counsel under general contract principles and the private attorney general doctrine
18 codified at California Code of Civil Procedure section 1021.5, for all work performed in this matter,
19 except fees that may be incurred on appeal. Under these legal principles, Bensussen shall pay the
20 amount of \$55,000 for fees and costs incurred as a result of investigating, bringing this matter to
21 Bensussen's attention, and negotiating a settlement in the public interest. Bensussen shall issue a
22 separate 1099 for fees and costs (EIN: 94-3171522) and shall make the check payable to "The
23 Chanler Group." Payment shall be delivered on or before September 30, 2011, at the Payment
24 Address.

25 **5. CLAIMS COVERED AND RELEASED**

26 **5.1 Full, Final and Binding Resolution of Proposition 65 Allegations**

27 This Consent Judgment is a full, final and binding resolution between Moore, on behalf of
28 himself and the public, and Bensussen, of any violation of Proposition 65 that was or could have been

1 asserted by Moore against Bensussen, its parents, subsidiaries, affiliated entities that are under
2 common ownership, directors, officers, employees, attorneys, and each entity to whom Bensussen
3 directly or indirectly distributes or sells Products, including but not limited to downstream
4 distributors, wholesalers, customers, retailers, franchisees, cooperative members, licensors, and
5 licensees ("Releasees"), based on their failure to warn about alleged exposures to DEHP contained in
6 the Products that were sold by Bensussen.

7 **5.2 Moore's Public Release of Proposition 65 Claims**

8 In further consideration of the promises and agreements herein contained, Moore on behalf of
9 himself, his past and current agents, representatives, attorneys, successors, and/or assignees, and in
10 the interest of the general public, hereby waives all rights to institute or participate in, directly or
11 indirectly, any form of legal action and releases all claims, including, without limitation, all actions,
12 and causes of action, in law or in equity, suits, liabilities, demands, obligations, damages, costs, fines,
13 penalties, losses, or expenses--including, but not limited to, investigation fees, expert fees, and
14 attorneys' fees, but exclusive of fees and costs on appeal--limited to and arising under Proposition 65
15 with respect to DEHP in the Products sold by Bensussen (collectively "claims"), against Bensussen
16 and Releasees.

17 **5.3 Moore's Individual Release of Claims**

18 Moore also, in his individual capacity only and not in his representative capacity, provides a
19 release herein which shall be effective as a full and final accord and satisfaction, as a bar to all
20 actions, causes of action, obligations, costs, expenses, attorneys' fees, damages, losses, claims,
21 liabilities and demands of plaintiff of any nature, character or kind, whether known or unknown,
22 suspected or unsuspected, limited to and arising out of alleged or actual exposures to DEHP in the
23 Products manufactured, distributed or sold by Bensussen.

24 **5.4 Bensussen's Release of Moore**

25 Bensussen on behalf of itself, its past and current agents, representatives, attorneys,
26 successors, and/or assignees, hereby waives any and all claims against Moore, his attorneys and other
27 representatives, for any and all actions taken or statements made (or those that could have been taken
28 or made) by Moore and his attorneys and other representatives, whether in the course of investigating

1 claims or otherwise seeking to enforce Proposition 65 against it in this matter with respect to the
2 Products.

3 **6. COURT APPROVAL**

4 This Consent Judgment is not effective until it is approved and entered by the Court and
5 shall be null and void if, for any reason, it is not approved and entered by the Court within one year
6 after it has been fully executed by all Parties, in which event any monies that have been provided to
7 Moore or his counsel pursuant to Section 3 and/or Section 4 above shall be refunded within fifteen
8 (15) days after receiving written notice from Bensussen that the one-year period has expired.

9 **7. SEVERABILITY**

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

13 **8. GOVERNING LAW**

14 The terms of this Consent Judgment shall be governed by the laws of the State of California
15 and apply within the State of California.

16 **9. NOTICES**

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

21 For Bensussen:

22 ~~Murray Valene, President~~
23 ~~Bensussen Corp.~~
24 ~~3700 Desire Parkway~~
~~New Orleans, LA 70126~~

John Rostas, Chief Operating Officer
15525 Woodinville - Redmond Rd. NE
Woodinville, WA 98072

25 For Moore:

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

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

3 **10. COUNTERPARTS; FACSIMILE SIGNATURES**

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

7 **11. POST EXECUTION ACTIVITIES**

8 Moore agrees to comply with the reporting form requirements referenced in California
9 Health & Safety Code section 25249.7, subdivision (f). In addition, the Parties acknowledge that,
10 pursuant to California Health & Safety Code section 25249.7, a noticed motion is required to obtain
11 judicial approval of this Consent Judgment. In furtherance of obtaining such approval, Moore and
12 Bensussen and their respective counsel agree to mutually employ their best efforts to support the
13 entry of this agreement as a Consent Judgment and obtain approval of the Consent Judgment by the
14 Court in a timely manner. For purposes of this section, best efforts shall include, at a minimum,
15 cooperating on the drafting and filing of any papers in support of the required motion for judicial
16 approval.

17 **12. MODIFICATION**

18 This Consent Judgment may be modified only: (1) by written agreement of the Parties and
19 upon entry of a modified consent judgment by the Court thereon; or (2) upon a successful motion of
20 any party and entry of a modified consent judgment by the Court. The Attorney General shall be
21 served with notice of any proposed modification to this Consent Judgment at least fifteen (15) days
22 in advance of its consideration by the Court.

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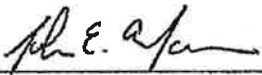
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13. AUTHORIZATION

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:

By: 
JOHN MOORE

Date: September 16, 2011

AGREED TO:

By: 
Eric Bensussen,
BENSUSSEN DEUTSCH & ASSOCIATES, INC

Date: Oct 7, 2011