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ALAMEDA COUNTY

DEC 11 2012

CLERK OF THE SUPERIOR COURT  
By JEFFERY K. JUE  
Deputy

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Josh Voorhees, State Bar No. 241436  
Troy C. Bailey, State Bar No. 277424  
THE CHANLER GROUP  
2560 Ninth Street  
Parker Plaza, Suite 214  
Berkeley, CA 94710  
Telephone: (510) 848-8880  
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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.

DYNAFLEX INTERNATIONAL, INC.; *et al.*,  
Defendants.

Case No.: RG11594926

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

Date: December 11, 2012  
Time: 2:30 p.m.  
Dept.: 514  
Judge: Hon. George C. Hernandez

Reservation No. R-1335003

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In the above-entitled action, plaintiff John Moore and defendant Dynaflex International, 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 December 11, 2012:

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

**IT IS SO ORDERED.**

Dated: 12/11/12

  
\_\_\_\_\_  
JUDGE OF THE SUPERIOR COURT

# Exhibit 1

1 Josh Voorhees, State Bar No. 241436  
2 Troy C. Bailey, State Bar No. 277424  
3 THE CHANLER GROUP  
4 2560 Ninth Street  
5 Parker Plaza, Suite 214  
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Attorneys for Plaintiff  
JOHN MOORE

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

12 JOHN MOORE,

13 Plaintiff,

14 v.

15 DYNAFLEX INTERNATIONAL, INC.; and  
16 DOES 1-150, inclusive,

17 Defendants.

) Case No. RG11594926  
)  
)

) **[PROPOSED] CONSENT JUDGMENT**  
)

) Dept:  
) Judge:  
) Date: None set  
)

) Action Filed: September 13, 2011  
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**1. INTRODUCTION**

**1.1 John Moore and Dynaflex International, Inc.**

This Consent Judgment is entered into by and between plaintiff John Moore (“Moore” or “Plaintiff”) and defendant Dynaflex International, Inc. (“Dynaflex” or “Defendant”), with Plaintiff and Defendant collectively referred to as the “parties”.

**1.2 John Moore**

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

**1.3 Dynaflex International, Inc.**

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

**1.4 General Allegations**

Moore alleges that Dynaflex has manufactured, imported, distributed, and/or sold exercise balls that contain the phthalate chemical di(2-ethylhexyl)phthalate (“DEHP”) without the requisite Proposition 65 warnings. DEHP is on the Proposition 65 list as known to cause birth defects and other reproductive harm.

**1.5 Product Description**

The products that are covered by this Consent Judgment is the *DynaFlex ExerFlex Pro Ball* (#7 15671 00035 7) exercise ball containing DEHP manufactured, imported, distributed, and/or sold by Dynaflex in the State of California, referred to hereinafter as the “Products.”

**1.6 Notice of Violation**

On June 29, 2011, Moore served Dynaflex and various public enforcement agencies with a document entitled “60-Day Notice of Violation” (the “Notice”) that provided the recipients with notice of alleged violations of California Health & Safety Code § 25249.6 based on Dynaflex’s alleged failure to warn consumers that the Products exposed users in California to DEHP. To the

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

3 **1.7 Complaint**

4 On September 13, 2011, Moore filed a complaint in the Superior Court in and for the  
5 County of Alameda against Dynaflex International, Inc. and Does 1 through 150, *Moore v.*  
6 *Dynaflex, et al.*, Case No. RG11594926 (the "Action"), alleging violations of California Health &  
7 Safety Code § 25249.6, based on the alleged exposures to DEHP contained in certain exercise balls  
8 sold by Dynaflex.

9 **1.8 No Admission**

10 Dynaflex denies the material, factual and legal allegations contained in Moore's Notice and  
11 Complaint and maintains that all products that it has sold, manufactured, imported and/or  
12 distributed in California, including the Products, have been and are in compliance with all laws.  
13 Nothing in this Consent Judgment shall be construed as an admission by Dynaflex of any fact,  
14 finding, issue of law, or violation of law, nor shall compliance with this Consent Judgment  
15 constitute or be construed as an admission by Dynaflex of any fact, finding, conclusion, issue of  
16 law, or violation of law. However, this section shall not diminish or otherwise affect Dynaflex's  
17 obligations, responsibilities, and duties 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 Dynaflex as to the allegations contained in the Complaint, that venue is proper in  
21 the County of Alameda and that this Court has jurisdiction to enter and enforce the provisions of  
22 this Consent Judgment.

23 **1.10 Effective Date**

24 For purposes of this Consent Judgment, the term "Effective Date" shall mean September 15,  
25 2012.

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1       **2.    INJUNCTIVE RELIEF: REFORMULATION**

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) pursuant to U.S. Environmental Protection Agency  
5               testing methodologies 3580A and 8270C or any other methodology utilized by federal or state  
6               agencies for the purpose of determining the DEHP content in a solid substance.

7               **2.2    Reformulation Commitment**

8               As of the Effective Date all Products manufactured, imported, distributed, sold or offered for  
9               sale in the State of California by Dynaflex shall be Products that qualify as Reformulated Products  
10              as defined in section 2.1 above.

11       **3.    MONETARY PAYMENTS**

12              In settlement of all the claims referred to in this Consent Judgment, Dynaflex shall pay  
13              \$25,000 in civil penalties as follows:

14              **3.1    Initial Civil Penalty**

15              Dynaflex shall make a an initial civil payment of \$2,000 to be apportioned in accordance  
16              with Health & Safety Code section 25249.12, subdivisions (c)(1) and (d), with 75% of these funds  
17              earmarked for the State of California’s Office of Environmental Health Hazard Assessment  
18              (“OEHHA”) and the remaining 25% of these penalty monies earmarked for John Moore.

19              **3.2    Final Civil Penalty**

20              Pursuant to Health & Safety Code § 25249.7(b), on June 15, 2013, Dynaflex shall pay a  
21              final civil penalty in the amount of \$23,000. The final civil penalty shall be waived in its entirety,  
22              if, after the Effective date, but on or before June 1, 2013, an officer of Dynaflex certifies to Moore’s  
23              counsel in writing that Dynaflex has destroyed all remaining inventory of the Products, ceased all  
24              sales of the Products, and will not manufacture, import, distribute, sell, or offer for sale any  
25              Products after the date of certification.

26              Unless waived, the final civil penalty shall be allocated according to Health & Safety Code §  
27              25249.7(c)(1) and (d), with seventy-five percent of the penalty payment earmarked for OEHHA,  
28              and the remaining twenty-five percent of the penalty earmarked for Moore.

1                   **3.3     Reimbursement of Plaintiff's Fees and Costs**

2                   The Parties acknowledge that Moore and his counsel offered to resolve this dispute without  
3 reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving this fee  
4 issue to be resolved after the material terms of the agreement had been settled. Dynaflex then  
5 expressed a desire to resolve the fee and cost issue shortly after the other settlement terms had been  
6 finalized. The Parties then attempted to (and did) reach an accord on the compensation due to  
7 Moore and his counsel under general contract principles and the private attorney general doctrine  
8 codified at California Code of Civil Procedure section 1021.5, for all work performed in this  
9 matter, except fees that may be incurred on appeal. Under these legal principles, Dynaflex shall  
10 pay the amount of \$10,000 for fees and costs incurred investigating, litigating and enforcing this  
11 matter, including the fees and costs incurred (and yet to be incurred) negotiating, drafting, and  
12 obtaining the Court's approval of this Consent Judgment in the public interest.

13                   **3.4     Payment Procedures**

14                   **3.4.1   Funds Held In Trust:** All payments required by Sections 3.1 through 3.3  
15 shall be delivered on or before October 15, 2012, to either The Chanler Group or the attorney of  
16 record for Dynaflex, and shall be held in trust pending the Court's approval of this Consent  
17 Judgment.

18                   Payments delivered to The Chanler Group shall be made payable, as follows:

- 19                   (a)     One check made payable to "The Chanler Group in Trust for  
20                   OEHHA" in the amount of \$1,500;  
21                   (b)     One check made payable to "The Chanler Group in Trust for John  
22                   Moore" in the amount of \$500; and  
23                   (c)     One check made payable to "The Chanler Group in Trust" in the  
24                   amount of \$10,000.

25                   Payments delivered to Geurts Law Firm shall be made payable, as follows:

- 26                   (a)     One check made payable to "Geurts Law Firm in Trust for OEHHA" in  
27                   the amount of \$1,500;  
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- (b) One check made payable to “Geurts Law Firm in Trust for John Moore” in the amount of \$500; and
- (c) One check made payable to “Geurts Law Firm in Trust for The Chanler Group” in the amount of \$10,000.

If Dynaflex elects to deliver payments to its attorney of record, such attorney of record shall: (a) confirm in writing within two days of receipt that the funds have been deposited in a trust account; and (b) within two days of the date of the hearing on which the Court approves the Consent Judgment, deliver the payment to The Chanler Group in three separate checks, as follows:

- (a) One check made payable to “The Chanler Group in Trust for OEHHA” in the amount of \$1,500;
- (b) One check to “The Chanler Group in Trust for John Moore” in the amount of \$500; and
- (c) One check to “The Chanler Group” in the amount of \$10,000.

**3.4.2 Issuance of 1099 Forms.** After the Consent Judgment has been approved and the settlement funds have been transmitted to plaintiff’s counsel, Dynaflex shall issue three separate 1099 forms, as follows:

- (a) The first 1099 shall be issued to the Office of Environmental Health Hazard Assessment, P.O. Box 4010, Sacramento, CA 95814 (EIN: 68-0284486) in the amount of \$1,500;
- (b) The second 1099 shall be issued to John Moore in the amount of \$500, whose address and tax identification number shall be furnished upon request; and
- (c) The third 1099 shall be issued to The Chanler Group (EIN: 94-3171522) in the amount of \$10,000.

**3.4.3 Payment Address:** All payments to the Chanler Group shall be delivered to the following payment address:

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

6 **4. CLAIMS COVERED AND RELEASED**

7 **4.1 Moore's Public Release of Proposition 65 Claims**

8 Moore acting on his own behalf and in the public interest releases Dynaflex from all claims  
9 for violations of Proposition 65 up through the Effective Date based on exposure to DEHP from the  
10 Products as set forth in the Notice. Compliance with the terms of this Consent Judgment constitutes  
11 compliance with Proposition 65 with respect to exposures to DEHP from the Products as set forth in  
12 the Notice.

13 **4.2 Moore's Individual Release of Claims**

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

20 **4.3 Dynaflex's Release of Moore**

21 Dynaflex on behalf of itself, its past and current agents, representatives, attorneys,  
22 successors, and/or assignees, hereby waives any and all claims against Moore, his attorneys and  
23 other representatives, for any and all actions taken or statements made (or those that could have  
24 been taken or made) by Moore and his attorneys and other representatives, whether in the course of  
25 investigating claims or otherwise seeking to enforce Proposition 65 against it in this matter with  
26 respect to the Products.

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 all parties.

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**6. SEVERABILITY**

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

**7. GOVERNING LAW**

The terms of this Consent Judgment shall be governed by the laws of the State of California and apply within the State of California. In the event that Proposition 65 is repealed, preempted or is otherwise rendered inapplicable by reason of law generally, or if any of the provisions of this Consent Judgment are rendered inapplicable or no longer require as a result of any such repeal or preemption or rendered inapplicable by reason of law generally as to the Products, then Dynaflex shall provide written notice to Moore of any asserted change in the law, and shall have no further obligations pursuant to this Consent Judgment with respect to, and to the extent that, the Products are so affected. Nothing in this Consent Judgment shall be interpreted to relieve Dynaflex from any obligation to comply with any pertinent state or federal toxics control law.

**8. NOTICES**

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

<p>To Dynaflex:</p> <p>Floyd Smith, President          Dynaflex International, Inc.          1144 North Grove Street          Anaheim, CA 92806</p>	<p>To Moore:</p> <p>Proposition 65 Coordinator          The Chanler Group          2560 Ninth Street          Parker Plaza, Suite 214          Berkeley, CA 94710-2565</p>
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Any party, from time to time, may specify in writing to the other party a change of address to which all notices and other communications shall be sent.

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**9. COUNTERPARTS; FACSIMILE AND PDF SIGNATURES**

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

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

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

**11. ADDITIONAL POST EXECUTION ACTIVITIES**

Moore and Dynaflex agree to mutually employ their best efforts to support the entry of this agreement as a Consent Judgment and obtain approval of the Consent Judgment by the Court in a timely manner. The parties acknowledge that, pursuant to California Health & Safety Code § 25249.7, a noticed motion is required to obtain judicial approval of this Consent Judgment, which Moore shall draft and file, and Dynaflex shall join. If any third party objection to the noticed motion is filed, Moore and Dynaflex shall work together to file a joint reply and appear at any hearing before the Court. This provision is a material component of the Consent Judgment and shall be treated as such in the event of a breach.

**12. 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.

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13. 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:

Date: OCTOBER 27, 2012

Date: Oct 5, 2012

By:   
John Moore

By:   
Floyd Smith, President  
Dynaflex International, Inc.