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FILED

MAR 22 2016

JAMES M. KIM, Court Executive Officer
MARIN COUNTY SUPERIOR COURT
By: E. Chals, Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF MARIN

UNLIMITED CIVIL JURISDICTION

JOHN MOORE,

Plaintiff,

v.

MCDAVID, INC., *et al.*

Defendants.

Case No. CIV1504421

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

Date: March 22, 2016
Time: 1:30 PM
Dept.: A
Judge: Hon. Geoffrey M. Howard

Plaintiff John Moore and Defendant McDavid, 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 their Proposition 65 settlement and Consent Judgment, and for good cause being shown,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that, pursuant to Health and Safety Code section 25249.7(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 terms of the settlement under Code of Civil Procedure section 664.6.

IT IS SO ORDERED.

GEOFFREY M. HOWARD

Dated: MAR 22 2016

JUDGE OF THE SUPERIOR COURT

EXHIBIT 1

Josh Voorhees, State Bar No. 241436
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JOHN MOORE

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF MARIN

UNLIMITED CIVIL JURISDICTION

JOHN MOORE, Plaintiff, v. MCDAVID, INC.; *et al.*, Defendants.	Case No. CIV1504421 **[PROPOSED] CONSENT JUDGMENT** (Health & Safety Code § 25249.6 *et seq.*)

1. INTRODUCTION

1.1 Parties

This Consent Judgment is entered into by and between John Moore ("Moore") and defendant McDavid, Inc. ("McDavid" or "Settling Defendant"). Moore and McDavid may be each individually referred to as a "Party" and collectively as the "Parties."

1.2 Plaintiff

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

1.3 Defendants

Plaintiff alleges that Settling Defendant employs ten or more persons and are each a "person in the course of doing business" for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, Health and Safety Code section 25249.6 *et seq.* ("Proposition 65").

1.4 General Allegations

Moore alleges that Settling Defendant manufactures, imports, sells, or distributes for sale in California, wrist braces with vinyl/PVC components containing di(2-ethylhexyl)phthalate ("DEHP"), without first providing the requisite Proposition 65 warning. DEHP is listed pursuant to Proposition 65 as a chemical known to the State of California to cause cancer, birth defects or other reproductive harm.

1.5 Product Description

The Settling Defendant's products that are covered by this Consent Judgment are defined as wrist braces with vinyl/PVC components containing DEHP including, but not limited to, *McDavid Wrist Brace, #454, UPC #0 29369 45409 5,* which are manufactured, sold or distributed for sale in California by Settling Defendant (the "Products").

1.6 Notice of Violation

On or about May 21, 2015, Moore served McDavid, and certain requisite public enforcement agencies with a 60-Day Notice of Violation ("Notice") alleging that McDavid was in violation of

Proposition 65 for failing to warn its customers and consumers in California that the Products expose users to DEHP.

1.7 Complaint

On December 8, 2015, Moore filed the instant action ("Complaint"), naming McDavid as a defendant for the alleged violations of Health and Safety Code section 25249.5 that are the subject of the Notice.

1.8 No Admission

The Parties enter into this Consent Judgment as a full and final settlement of all claims that were raised in the Notice and Complaint, or that could have been raised in the Complaint, arising out of the facts and/or conduct alleged therein. McDavid denies the material factual and legal allegations contained in the Notice and Complaint, and maintains that all of the products that it has manufactured, imported, sold and distributed for sale in California, including the Products, have been, and are, in compliance with all laws, and are completely safe for their intended use. Nothing in this Consent Judgment shall be construed as an admission of any fact, finding, conclusion of law, issue of law, or violation of law, nor shall compliance with the terms of this Consent Judgment constitute or be construed as an admission of any fact, finding, conclusion of law, issue of law, or violation of law. This Section shall not, however, diminish or otherwise affect McDavid's obligations, responsibilities, and duties under this Consent Judgment.

1.9 Jurisdiction

For purposes of this Consent Judgment only, the Parties stipulate that this Court has jurisdiction over McDavid as to the allegations in the Complaint, that venue is proper in the County of Marin, and that this Court has jurisdiction to enter and enforce the provisions of this Consent Judgment.

1.10 Effective Date

For purposes of this Consent Judgment, the term "Effective Date" means the date this Consent Judgment is approved by the Court, including any unopposed tentative rulings.

2. INJUNCTIVE RELIEF: REFORMULATION AND WARNINGS

2.1 Reformulation Commitment

Commencing on the March 15, 2016, and continuing thereafter, McDavid shall only manufacture, ship, distribute, sell and/or offer for sale in California "Reformulated Products." For purposes of this Consent Judgment, "Reformulated Products" are products that contain DEHP in concentrations of less than 0.1 percent (1,000 parts per million) in accessible components when analyzed pursuant to U.S. Environmental Protection Agency testing methodologies 3580A and 8270C or any other methodology utilized by federal or state agencies for the purpose of determining the DEHP content in a solid substance. In addition to the EPA test methods authorized above, the Parties may utilize equivalent methodologies employed by state or federal agencies to determine DEHP content in a solid substance.

3. MONETARY SETTLEMENT TERMS

3.1 Civil Penalty Payments

Pursuant to Health and Safety Code section 25249.7(b), in complete settlement of all the claims referred to in this Consent Judgment, McDavid shall pay $24,000, in civil penalties. Each civil penalty payment shall be allocated according to Health and Safety Code section 25249.12(c)(1) and (d) with seventy-five percent (75%) of the funds paid to the California Office of Environmental Health Hazard Assessment ("OEHHA") and twenty-five percent (25%) of the funds remitted to Moore.

3.1.1 Initial Civil Penalty

Within two weeks of the mutual execution of this Consent Judgment, McDavid shall issue a check for its initial civil penalty payment in the amount of $8,000 to its counsel of record—Stoel Rives, LLP, c/o Melissa A. Jones--who then shall provide The Chanler Group with written confirmation within five days of receipt that the funds have been deposited in a trust account. Within five business days of the Effective Date, McDavid's attorneys of record who receive the initial civil penalty payment in trust shall issue a check for the initial civil penalty payment to "John Moore, Client Trust Account." Moore will have the sole responsibility for providing the required 75% of the

initial civil penalty payment to OEHHA in accordance with Health and Safety Code section 25249.12(c)(1) and (d).

3.1.2 Final Civil Penalty

On or before March 31, 2016, McDavid shall make a final civil penalty payment of $16,000. Pursuant to title 11 California Code of Regulations, section 3203(c), Moore agrees that the final civil penalty payment shall be waived in its entirety if, no later than January 31, 2016, officers of McDavid provide Moore with written certification that all of the Products manufactured for sale in California as of the date of such certification are Reformulated Products as defined by Section 2.1, and that Settling Defendant will continue to manufacture, ship, distribute, sell and/or offer for sale, only Reformulated Products in California in the future, or no longer sell Products in California. Moore will have the sole responsibility for providing the required 75% of any final civil penalty payment hereunder to OEHHA in accordance with Health and Safety Code section 25249.12(c)(1) and (d). The option to certify reformulation in lieu of making the final civil penalty payment required by this Section is a material term and time is of the essence.

3.2 Reimbursement of Fees and Costs

The parties acknowledge that Moore and his counsel offered to resolve this dispute without reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving the issue to be resolved after the material terms of this Consent Judgment had been settled. Shortly after the other settlement terms had been finalized, McDavid expressed a desire to resolve Moore's fees and costs. The Parties then attempted to (and did) reach an accord on the compensation due to Moore and his counsel under general contract principles and the private attorney general doctrine codified at California Code of Civil Procedure section 1021.5 for all work performed through the mutual execution of this Consent Judgment, and yet to be performed in connection with seeking court approval and entry of this Consent Judgment, including but not limited to, preparing and filing a motion seeking court approval of this Consent Judgment. McDavid shall, within two weeks of the mutual execution of this Consent Judgment, issue a check payable to their counsel of record-- Stoel Rives, LLP, c/o Melissa A. Jones --in the amount of fees and costs of $31,250 to be held in trust by

McDavid's counsel of record for The Chanler Group. Settling Defendant's counsel of record who receive this settlement payment in trust shall provide The Chanler Group with written confirmation within five days of receipt that the funds have been deposited in a trust account. Within five business days of the Effective Date, Defendant's counsel of record who received this settlement payment in trust shall issue a check in the amount of $31,250 payable to "The Chanler Group" to the address found in Section 3.3 below.

3.3 Payment Addresses

All payments required by McDavid under this Consent Judgment shall be delivered to:

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

4. CLAIMS COVERED AND RELEASED

4.1 Moore's Public Release of Proposition 65 Claims

Moore, acting on his own behalf and in the public interest, releases McDavid and its parents, subsidiaries, affiliated entities under common ownership, directors, officers, employees, agents, and attorneys ("Releasees") and each entity to whom it directly or indirectly distribute or sell the Products, including but not limited to their downstream distributors, wholesalers, customers, retailers, franchisers, franchisees, cooperative members, licensors, and licensees ("Downstream Releasees") for any alleged violations arising under Proposition 65 for unwarned exposures to DEHP from the Products manufactured, distributed, sold or offered for sale by McDavid prior to the Effective Date, as set forth in the Notice and Complaint. Compliance with the terms of this Consent Judgment constitutes compliance with Proposition 65 with respect to exposures to DEHP from the Products manufactured, distributed, sold or offered for sale by McDavid after the Effective Date.

4.2 Moore's Individual Release of Claims

Moore, in his individual capacity only and *not* in his representative capacity, also provides a release to Settling Defendant, Releasees, and Downstream Releasees which shall be effective as a full

and final accord and satisfaction, as a bar to all actions, causes of action, obligations, costs, expenses, attorneys' fees, damages, losses, claims, liabilities and demands of Moore of any nature, character or kind, whether known or unknown, suspected or unsuspected, arising out of alleged or actual exposures to DEHP from the Products manufactured, distributed, sold or offered for sale by McDavid before the Effective Date.

4.3 Defendant's Release of Moore

McDavid, on its own behalf, and on behalf of its past and current agents, representatives, attorneys, successors, and assignees, hereby waives any and all claims against Moore and his attorneys and other representatives, for any and all actions taken or statements made by Moore and his attorneys and other representatives, whether in the course of investigating claims, otherwise seeking to enforce Proposition 65 against it in this matter, or with respect to the Products.

4.4 Parties' Mutual Release

The individual Parties, on behalf of themselves, their past and current agents, representatives, attorneys, successors, and/or assignees, provide a general release herein which shall be effective as a full and final accord and satisfaction, as a bar to all actions, causes of action, obligations, costs, expenses, attorneys' fees, damages, losses, claims, liabilities and demands of any nature, character or kind, known or unknown, suspected or unsuspected, arising out of Products manufactured, distributed, sold or offered for sale by McDavid prior to the Effective Date. Moore and McDavid acknowledge that they are familiar with Section 1542 of the California Civil Code, which provides as follows:

> A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR.

Moore, in his individual capacity, and Settling Defendant, expressly waive and relinquish any and all rights and benefits which they may have under, or which may be conferred on them by the provisions of Section 1542 of the California Civil Code as well as under any other state or federal statute or common law principle of similar effect, to the fullest extent that they may lawfully waive

such rights or benefits pertaining to the released matters. In furtherance of such intention, the release hereby given shall be and remain in effect as a full and complete release notwithstanding the discovery or existence of any such additional or different claims or facts arising out of the released matters.

5. COURT APPROVAL

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 the Parties. Moore and McDavid agree to support the entry of this agreement as a Consent Judgment and to seek approval of the Consent Judgment by the Court in a timely manner. The Parties acknowledge that, pursuant to California Health and Safety Code section 25249.7(f), a noticed motion is required for judicial approval of this Consent Judgment, which motion Moore shall draft and file and McDavid shall support. If any third-party objection to the motion is filed, Moore and McDavid agree to work together to file a reply and appear at any hearing, with Moore agreeing to take the lead on any further filing required. This provision is a material component of the Consent Judgment and shall be treated as such in the event of a breach.

If the Court does not approve the Consent Judgment, the Parties shall meet and confer as to whether to modify the language or appeal the ruling. If the Parties do not jointly agree on a course of action to take, then the case shall proceed in its normal course on the Court's trial calendar. If the Court's approval is ultimately overturned by an appellate court, the Parties shall meet and confer as to whether to modify the terms of this Consent Judgment. If the Parties do not jointly agree on a course of action to take, then the case shall proceed in its normal course on the Court's trial calendar. In the event that this Consent Judgment is entered by the Court and subsequently overturned by any appellate court or not approved by the Court, any monies that have been provided to OEHHA, Moore or his counsel pursuant to Section 3, above, shall be refunded within 15 days of the appellate decision becoming final.

6. SEVERABILITY

If, subsequent to the Court's approval and entry of this Consent Judgment, any provision is held by a court to be unenforceable, the validity of the remaining provisions 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 as to the Products, then McDavid may 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 McDavid from any obligation to comply with any other pertinent state or federal toxics control laws.

8. NOTICE

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

For Settling Defendant:

Melissa A. Jones, Esq.
Stoel Rives, LLP
500 Capitol Mall, Suite 1600
Sacramento, CA 95814

For Moore:

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

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

9. RETENTION OF JURISDICTION

This Court shall retain jurisdiction of this matter to implement or modify the Consent Judgment and shall retain jurisdiction to enforce this Consent Judgment, or any provision hereof, under C.C.P. §664.6. Should either Party allege a violation of this Consent Judgment, the alleging Party agrees to provide written notice thereof, and to meet and confer for a period no less than 30 days and provide all relevant evidence of any alleged violation to the other Party. If the Parties cannot agree on an appropriate resolution of the alleged violation within 30 days of the written notice thereof and provision of all relevant evidence, either Party shall be free to move the Court to enforce the terms of this Consent Judgment.

11. COUNTERPARTS; FACSIMILE SIGNATURES

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

12. POST EXECUTION ACTIVITIES

Moore agrees to comply with the reporting form requirements referenced in Health and Safety Code section 25249.7(f). The Parties further acknowledge that, pursuant to Health and Safety Code section 25249.7(f), a noticed motion is required to obtain judicial approval of the settlement. In furtherance of obtaining such approval, Moore and McDavid agree to mutually employ their best efforts, and that of their counsel, to support the entry of this agreement as a judgment, and to obtain judicial approval of their settlement in a timely manner. For purposes of this Section, "best efforts" shall include, at a minimum, cooperating with the drafting and filing of the necessary moving papers, and supporting the motion for judicial approval.

13. MODIFICATION

This Consent Judgment may be modified only by: (i) a written agreement of the Parties and entry of a modified consent judgment by the Court; or (ii) a successful motion or application of any Party, and the entry of a modified consent judgment by the Court. The parties agree to meet and confer in good faith prior to the filing of any motion or application to modify this Consent Judgment.

14. **AUTHORIZATION**

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

AGREED TO:

Date: 12/23/2015

By: _____
JOHN MOORE

AGREED TO:

Date: 12/15/15

Name: DENNIS J. GIETZ

Title: CFO

By: _____
Defendant McDavid, Inc.