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16 Attorneys for Defendants
17 ALTUS ATHLETIC MANUFACTURING
18 COMPANY and OK-1 MANUFACTURING
19 COMPANY

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF MARIN
UNLIMITED CIVIL JURISDICTION

JOHN MOORE,

Plaintiff,

v.

OK-1 MANUFACTURING COMPANY;
ALTUS ATHLETIC MANUFACTURING
COMPANY; and DOES 1 through 150,
inclusive,

Defendants.

Case No. CIV 1004177

**STIPULATION AND [PROPOSED] ORDER
RE: CONSENT JUDGMENT AS TO
DEFENDANTS ALTUS ATHLETIC
MANUFACTURING COMPANY AND OK-1
MANUFACTURING COMPANY**

1 **1. INTRODUCTION**

2 **1.1 John Moore, Altus Athletic Manufacturing Company**
3 **and OK-1 Manufacturing Company**

4 This Consent Judgment is entered into by and between Plaintiff John Moore (hereinafter
5 "Moore" or "Plaintiff") on the one hand, and Defendants Altus Athletic Manufacturing Company
6 ("Altus Athletic") and OK-1 Manufacturing Company ("OK-1") (collectively "Defendants") on
7 the other hand, with Plaintiff and Defendants collectively referred to as the "Parties" and each
8 individually referred to as a "Party."

9 **1.2 Plaintiff**

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

13 **1.3 Defendants**

14 Altus Athletic and OK-1 each employ ten or more persons and each is a person in the
15 course of doing business for purposes of the Safe Drinking Water and Toxic Enforcement Act of
16 1986, California Health and Safety Code section 25249.5 *et seq.* (hereinafter "Proposition 65").

17 **1.4 General Allegations**

18 Moore alleges that Defendants manufactured, imported, distributed, and/or sold training
19 and sauna fitness suits containing di(2-ethylhexyl)phthalate (hereinafter "DEHP") in the State of
20 California without the requisite Proposition 65 warnings. DEHP is listed pursuant to Proposition
21 65 as known to the State of California to cause birth defects and other reproductive harm.

22 **1.5 Product Description**

23 The products that are covered by this Consent Judgment are defined as follows: training
24 and sauna fitness suits containing DEHP, including, but not limited to the *Altus Thermal Training*
25 *Suit Item #1211 011s/m (#0 11726 02598 7)* manufactured, distributed, and/or sold in the State of
26 California by Defendants. All such training and sauna fitness suits are referred to hereinafter as
27 the "Products."
28

1 **1.6 Notices of Violation**

2 On May 7, 2010, Moore served Defendants and various public enforcement agencies with
3 a document entitled "60-Day Notice of Violation" (hereinafter "Notice") that provided recipients
4 with notice of alleged violations of California Health and Safety Code section 25249.6 for
5 allegedly failing to warn consumers that the Products exposed users in California to DEHP.

6 **1.7 Complaint**

7 On August 9, 2010, Moore, who was and is acting in the interest of the general public in
8 California, filed a complaint (hereinafter "Complaint" or "Action") in the Superior Court in and
9 for the County of Marin against Defendants, Inc., OK-I Manufacturing Company, Altus Athletic
10 Manufacturing Company and Does 1 through 150, alleging violations of California Health and
11 Safety Code section 25249.6 based on the alleged exposures to DEHP contained in the Products.

12 **1.8 No Admission**

13 Defendants deny the material, factual, and legal allegations contained in Moore's Notice
14 and Complaint, and maintain that all Products sold and distributed in California have been and are
15 in compliance with all laws. Nothing in this Consent Judgment shall be construed as an admission
16 by Defendants of any fact, finding, issue of law, or violation of law; nor shall compliance with this
17 Consent Judgment constitute or be construed as an admission by Defendants of any fact, finding,
18 conclusion, issue of law, or violation of law. However, this section shall not diminish or
19 otherwise affect Defendants' obligations, responsibilities, and duties under this Consent Judgment.

20 **1.9 Consent to Jurisdiction**

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

25 **1.10 Effective Date**

26 For purposes of this Consent Judgment, the term "Effective Date" shall mean July 30,
27 2011.

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

2 **2.1 Reformulation Standards and Commitment**

3 As of the Effective Date, Defendants shall ship, sell, or offer to be shipped for sale in
4 California only Products that are Phthalate Free as further defined below. For purposes of this
5 Consent Judgment, "Phthalate Free" shall mean Products containing less than or equal to 1,000
6 parts per million ("ppm") of DEHP when analyzed pursuant to U.S. Environmental Protection
7 Agency testing methodologies 3580A and 8270C or any other methodology utilized by federal or
8 state agencies for the purpose of determining DEHP content in a solid substance.

9 **3. PENALTIES PURSUANT TO HEALTH & SAFETY CODE SECTION 25249.7(b)**

10 **3.1 Civil Penalty**

11 Defendants shall collectively pay a civil penalty of \$20,000 to be apportioned in
12 accordance with California Health & Safety Code sections 25249.12(c)(1) and (d), with 75% of
13 these funds remitted to the State of California's Office of Environmental Health Hazard
14 Assessment and the remaining 25% of the initial civil penalty to John Moore, as provided by
15 California Health & Safety Code section 25249.12(d). This initial civil penalty reflects credits of:
16 (a) \$30,000 based on Defendants commitment to reformulate the Products pursuant to Section
17 2.1 above; and (b) 20,000 based on Defendants actions to remove Products from the marketplace
18 in a timely fashion in response to the Notice. Defendants shall issue two separate checks for the
19 penalty payment: (a) one check made payable to "The Chanler Group in Trust For OEHHA" in
20 an amount representing 75% of the total penalty; and (b) one check to "The Chanler Group in
21 Trust for John Moore" in an amount representing 25% of the total penalty. Two separate 1099s
22 shall be issued for the above payments: (a) OEHHA, P.O. Box 4010, Sacramento, CA, 95814
23 (EIN: 68-0284486); and (b) John Moore, whose information shall be provided five calendar days
24 before the payment is due.

25 The payments shall be delivered to Moore's counsel on or before the Effective Date and
26 Defendants shall deliver the payments to the following address:
27
28

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

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

5 **4.1 Attorney's Fees and Costs**

6 The Parties acknowledge that Moore and his counsel offered to resolve this dispute without
7 reaching terms on the amount of fees and costs to be reimbursed, thereby leaving this fee issue to
8 be resolved until after the other material terms of the agreement had been settled. The Parties
9 then attempted to (and did) reach an accord on the compensation due to Moore and his counsel
10 under general contract principles and the private attorney general doctrine codified at California
11 Code of Civil Procedure ("CCP") section 1021.5, for all work performed through the mutual
12 execution of this agreement. Defendants shall reimburse Moore and his counsel \$65,000 for fees
13 and costs incurred to date, as a result of investigating, bringing this matter to their attention, and
14 negotiating a settlement in the public interest. This figure also includes future anticipated fees and
15 costs including, but not limited to, attorney's fees to be incurred in seeking judicial approval of
16 this Consent Judgment as well as any other legal work performed after the execution of this
17 Consent Judgment incurred in an effort to obtain finality of the case. In the event a third party
18 were to appeal entry of this Consent Judgment, Moore and his counsel shall be entitled to seek
19 their reasonable attorney's fees and costs associated with all appellate work defending the entry of
20 judgment pursuant to CCP section 1021.5 from the party appealing the consent judgment.

21 Defendants shall reimburse Moore for fees and costs in the following installments:
22 \$5,000 on or before the Effective Date; \$6,666 on or before August 30, 2011; \$6,666 on or
23 before September 30, 2011; \$6,666 on or before October 30, 2011; \$6,666 on or before
24 November 30, 2011; \$6,666 on or before December 30, 2011; \$6,666 on or before January 30,
25 2012; \$6,666 on or before February 28, 2012; \$6,666 on or before March 30, 2012; and \$6,672
26 on or before April 30, 2012. If Defendants fail to deliver any installment payment on or before
27 the date provided above, counsel for Moore shall provide notice to counsel for Defendants by
28

1 electronic mail. Defendants shall deliver the delinquent payment within five days from the
2 notice. If Defendants fail to deliver the delinquent installment payment within five days, the
3 total remaining amount due under Section 4 shall become immediately due and payable and
4 shall accrue interest at the statutory judgment interest rate provided in the Code of Civil
5 Procedure section 685.010.

6 Each installment payment for reimbursement of fees and costs shall be made payable to
7 "The Chanler Group" and shall be delivered on or before the installment payment date provided
8 above. Defendants shall deliver each payment to the following address:

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

14 A separate 1099 shall be issued to "The Chanler Group" (EIN: 94-3171522) for the
15 amount of the reimbursement of Plaintiff's fees and costs.

16 **5. CLAIMS COVERED AND RELEASED**

17 **5.1 Full, Final and Binding Resolution of Proposition 65 Allegations.**

18 This Consent Judgment is a full, final and binding resolution between Plaintiff, on behalf
19 of himself and the public, and Defendants, of any violation of Proposition 65 that was or could
20 have been asserted by Plaintiff against Defendants, their parents, subsidiaries, affiliated entities
21 that are under common ownership, directors, officers, employees, attorneys, and each entity to
22 whom Defendants directly or indirectly distribute or sell Products, including but not limited to
23 downstream distributors, wholesalers, customers, retailers, franchisees, cooperative members,
24 licensors, and licensees ("Releasees"), based on their failure to warn about alleged exposures to
25 DEHP contained in the Products that were sold by Defendants.

26 **5.2 Plaintiff's Public Release of Proposition 65 Claims.**

27 In further consideration of the promises and agreements herein contained, Plaintiff on
28 behalf of himself, his past and current agents, representatives, attorneys, successors, and/or
assignees, and in the interest of the general public, hereby waives all rights to institute or

1 participate in, directly or indirectly, any form of legal action and releases all claims, including,
2 without limitation, all actions, and causes of action, in law or in equity, suits, liabilities,
3 demands, obligations, damages, costs, fines, penalties, losses, or expenses – including, but not
4 limited to, investigation fees, expert fees, and attorneys’ fees, but exclusive of fees and costs on
5 appeal – limited to and arising under Proposition 65 with respect to DEHP in the Products sold
6 by Defendants (collectively “claims”), against Defendantst and Releasees.

7 **5.3 Plaintiff’s Individual Release of Claims.**

8 Plaintiff also, in his individual capacity only and not in his representative capacity,
9 provides a release herein which shall be effective as a full and final accord and satisfaction, as a
10 bar to all actions, causes of action, obligations, costs, expenses, attorneys’ fees, damages, losses,
11 claims, liabilities and demands of plaintiff of any nature, character or kind, whether known or
12 unknown, suspected or unsuspected, limited to and arising out of alleged or actual exposures to
13 DEHP in the Products manufactured, distributed or sold by Defendants.

14 **5.4 Defendant’s Release of Plaintiff.**

15 Defendants on behalf of themselves, their past and current agents, representatives,
16 attorneys, successors, and/or assignees, hereby waive any and all claims against Plaintiff, his
17 attorneys and other representatives, for any and all actions taken or statements made (or those
18 that could have been taken or made) by Plaintiff and his attorneys and other representatives,
19 whether in the course of investigating claims or otherwise seeking to enforce Proposition 65
20 against them in this matter with respect to the Products.

21 **6. COURT APPROVAL**

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

1 **7. SEVERABILITY**

2 If, subsequent to the execution of this Consent Judgment, any of the provisions of this
3 Consent Judgment are held by a court to be unenforceable, the validity of the enforceable
4 provisions remaining 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
7 California and apply within the State of California. In the event that Proposition 65 is repealed or
8 is otherwise rendered inapplicable by reason of law generally, or as to the Products, then
9 Defendants shall provide written notice to Moore of any asserted change in the law, and shall have
10 no further obligations pursuant to this Consent Judgment with respect to, and to the extent that, the
11 Products are so affected.

12 **9. NOTICES**

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

17 To Defendants:

18 Keith Johnson
19 Altus Athletic Manufacturing Company
20 OK-I Manufacturing Company
21 709 South Veterans Drive
22 Altus, OK 73521

23 With a copy to

24 William F. Tarantino
25 Morrison & Foerster LLP
26 425 Market Street, Suite 3300
27 San Francisco, California 94105
28

1 To Moore:

2 Proposition 65 Coordinator
3 THE CHANLER GROUP
4 2560 Ninth Street
Parker Plaza, Suite 214
Berkeley, CA 94710-2565

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

7 **10. COUNTERPARTS; FACSIMILE SIGNATURES**

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

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

12 Moore agrees to comply with the reporting form requirements referenced in California
13 Health and Safety Code section 25249.7(f).

14 **12. ADDITIONAL POST EXECUTION ACTIVITIES**

15 The Parties agree to mutually employ their, and their counsel's, reasonable best efforts to
16 support the entry of this agreement as a Consent Judgment and obtain approval of the Consent
17 Judgment by the Court in a timely manner. The Parties acknowledge that, pursuant to California
18 Health and Safety Code section 25249.7, a noticed motion is required to obtain judicial approval
19 of this Consent Judgment, which Moore shall file, and which Defendants shall not oppose. If any
20 third party objection to the noticed motion is filed, Moore and Defendants shall work together to
21 file a joint reply and appear at any hearing before the Court. This provision is a material
22 component of the Consent Judgment and shall be treated as such in the event of a breach. If the
23 Superior Court does not approve the motion to approve this Consent Judgment, and the Parties
24 choose not to pursue a modified Consent Judgment within 30 days of said denial, or in the event
25 that the Superior Court approve this Consent Judgment and any person successfully appeals that
26 approval, all payments made pursuant to this Consent Judgment will be returned to Defendants.

1 **13. MODIFICATION**

2 This Consent Judgment may be modified only: (1) by written agreement of the Parties and
3 upon entry of a modified Consent Judgment by the Court thereon; or (2) upon a successful motion
4 of any Party and entry of a modified Consent Judgment by the Court. The Attorney General shall
5 be served with notice of any proposed modification to this Consent Judgment at least fifteen (15)
6 days in advance of its consideration by the Court. Moore shall be entitled to his reasonable fees
7 and costs incurred in the modification process under California Code of Civil Procedure section
8 1021.5 if Defendants seek to modify the terms of this Consent Judgment.

9 **14. AUTHORIZATION**

10 The undersigned are authorized to execute this Consent Judgment on behalf of their
11 respective Parties and have read, understood, and agree to all of the terms and conditions of this
12 Consent Judgment.

13
14 **AGREED TO:**

15 Date: JUNE 30, 2011

16
17 By: 
18 Plaintiff JOHN MOORE

AGREED TO:

Date: _____

17 By: _____
18 Defendant ALTUS MANUFACTURING
COMPANY

19 Date: _____
20

21 By: _____
22 Defendant OK-1 MANUFACTURING
23 COMPANY
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26
27
28

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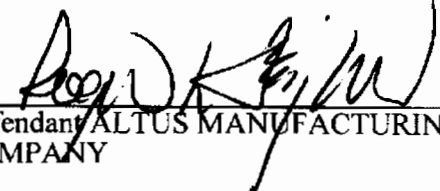
13
14 **AGREED TO:**

15 Date: _____

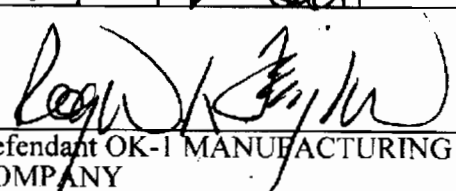
16
17 By: _____
18 Plaintiff JOHN MOORE

AGREED TO:

15 Date: 07-12-2011

16
17 By: 
18 Defendant ALTUS MANUFACTURING
COMPANY

19 Date: 07-12-2011

20
21 By: 
22 Defendant OK-1 MANUFACTURING
23 COMPANY