

# SETTLEMENT AGREEMENT

## 1. INTRODUCTION

### 1.1 John Moore and Browntrout Publishers, Inc.

This Settlement Agreement is entered into by and between John Moore (“Moore”) and Browntrout Publishers, Inc. (“Browntrout”) with Moore and Browntrout collectively referred to as the “Parties.” Moore is an individual residing in the State of California who seeks to promote awareness of exposures to toxic chemicals and to improve human health by reducing or eliminating hazardous substances contained in consumer products.

Browntrout 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”).

### 1.2 General Allegations

Moore alleges that Browntrout has manufactured, distributed, and/or offered for sale in California books with covers containing excessive amounts of di(2-ethylhexyl)phthalate (“DEHP”), without the requisite Proposition 65 warnings. DEHP shall be referred to herein as the “Listed Chemical.” The Listed Chemical is identified by the State of California as a chemical known to cause birth defects and other reproductive harm.

### 1.3 Product Description

The products that are covered by this Settlement Agreement are defined as follows: books with covers containing the Listed Chemical sold by Browntrout, including calendars and planners such as the *Labrador Retrievers 2010 Weekly Planner* (#9 781421 651019). All such items are referred to herein as the “Products.”

#### **1.4 Notice of Violation**

On or about July 1, 2010, Moore served Browntrout and various public enforcement agencies with a document entitled “60-Day Notice of Violation” (the “Notice”) that provided Browntrout and public enforcers with notice that Browntrout was alleged to be in violation of California Health & Safety Code § 25249.6 for failing to warn consumers and other individuals in California that the Products it sold exposed users to the Listed Chemical. To the best of the Parties’ knowledge, no public enforcer has diligently prosecuted the allegations set forth in the Notice.

#### **1.5 No Admission**

Browntrout denies the material, factual, and legal allegations contained in Moore’s Notice and maintains that all of the Products it has sold and distributed in California have been, and are, in compliance with all laws. Nothing in this Settlement Agreement shall be construed as an admission by Browntrout of any fact, finding, conclusion, issue of law, or violation of law; nor shall compliance with this Settlement Agreement constitute or be construed as an admission by Browntrout of any fact, finding, conclusion, issue of law, or violation of law, the same being specifically denied by Browntrout. However, this section shall not diminish or otherwise affect Browntrout’s obligations, responsibilities, and duties under this Settlement Agreement.

#### **1.6 Effective Date**

For purposes of this Settlement Agreement, the term “Effective Date” shall mean December 15, 2010.

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

### **2.1 Reformulation Standards**

Reformulated Products are defined as those Products containing DEHP in concentrations less than 0.1 percent (1,000 parts per million) when analyzed pursuant to any methodology utilized by Environmental Protection Agency Testing Methodologies 3580A and 8270C or any other testing protocol utilized by federal or state agencies for the purpose of determining DEHP content in a solid substance.

### **2.2 Product Warnings**

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

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

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

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

**(ii) Point-of-Sale Warnings.** Alternatively, Browntrout may provide warning signs in the form below to its customers in California with instructions to post the warnings in close proximity to the point of display of the Products.

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

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

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

*[list products for which warning is required]*

**(b) Mail Order Catalog and Internet Sales.** In the event that Browntrout sells Products via mail order catalog or internet to customers located in California after the Effective Date that are not Reformulated Products, Browntrout shall provide a warning for Products sold via mail order catalog or the Internet to California residents: (1) in the mail order catalog; or (2) on the website. Warnings given in the mail order catalog or on the website shall identify the *specific* Product to which the warning applies as further specified in Sections 2.2(b)(i) and (ii).

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

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

---

<sup>1</sup>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.

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

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

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

If Browntrout elects to provide warnings in the mail order catalog, then the warnings must be included in all catalogs offering to sell one or more Products printed after the Effective Date.

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

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

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

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

**3. MONETARY PAYMENTS**

**3.1 Penalties Pursuant to Health & Safety Code §25249.7(b)**

**3.1.1 Initial Civil Penalty.** In settlement of all the claims referred to in this Consent Judgment and alleged in the Notice and Complaint, Browntrout shall pay an initial civil penalty of \$2,000 to be apportioned in accordance with California Health & Safety Code §§25249.12 (c)(1) and (d), with 75% of these funds remitted to the State of California’s Office of Environmental Health Hazard Assessment (“OEHHA”) and the remaining 25% of the penalty paid to Moore as provided. Browntrout shall issue two separate checks for the penalty payment: (a) one check made payable to “The Chanler Group in Trust for OEHHA” in the amount of \$1,500.00; and (b) one check to “The Chanler Group in Trust for John Moore” in the amount of \$500.00.

The payments shall be delivered within ten (10) days of the Effective Date, to the following address:

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

Two separate 1099s shall be issued for the above payments: (a) OEHHA, P.O. Box 4010, Sacramento, CA, 95814 (EIN: 68-0284486); and (b) John Moore, whose information shall be provided within two (2) calendar days of payment delivery.

**3.1.2 Final Civil Penalty.** Browntrout shall pay a final civil penalty of \$8,000 on March 1, 2011. As an incentive to achieve reformulation of the Products however, the final civil penalty shall be waived in its entirety if an officer of Browntrout certifies in writing that it, as of February 15, 2011, has sold, shipped and offered for sale in California only Reformulated Products, and that it will continue to sell, ship and offer for sale in California only Reformulated Products. Such certification must be received by The Chanler Group on or before March 1, 2011.

Payment of the final civil penalty amount, if any, shall be divided between Moore and OEHHA according to California Health & Safety Code §§25249.12 (c)(1) and (d), with 75% of the amount remitted to OEHHA and remaining 25% paid to Moore. Payment for the Final Civil Penalty shall be made out to The Chanler Group in trust Moore and OEHHA and delivered to The Chanler Group at the address provided in Section 3.1.1 on or before March 1, 2011.

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

The Parties acknowledge that Browntrout responded to Moore's Prop 65 Notice within the 60-day period, and entered into a dialogue with Moore following the expiration of the statutory 60-day period. The Parties subsequently agreed that they were interested in resolving this dispute, prior to the filing of suit. The Parties acknowledge that Moore and his counsel initially offered to resolve this dispute without reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving this fee issue to be resolved after the material terms of the agreement had been settled. The Parties then attempted to (and did) reach an accord on the compensation due to Moore and his counsel

under the private attorney general doctrine codified at California Code of Civil Procedure (CCP) §1021.5, for all work performed through the mutual execution of this agreement.

Browntrout shall pay the total amount of \$27,000.00 for fees and costs incurred as a result of investigating, bringing this matter to Browntrout's attention, and negotiating a settlement in the public interest. Browntrout shall issue a separate 1099 for fees and costs (EIN: 94-3171522) and shall make the check payable to "The Chanler Group" and shall deliver payment within ten days of the Effective Date, to the following address:

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

**5. RELEASE OF ALL CLAIMS**

**5.1 Moore's Release of Browntrout**

In further consideration of the promises and agreements herein contained, and for the payments to be made pursuant to Sections 3 and 4, Moore on 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 participate in, directly or indirectly, any form of legal action and releases all claims including, without limitation, all actions, and causes of action, in law or in equity, suits, liabilities, demands, obligations, damages, costs, fines, penalties, losses, or expenses (including, but not limited to, investigation fees, expert fees, and attorneys' fees) of any nature whatsoever, whether known or unknown, fixed or contingent (collectively "Claims"), that were brought or could be brought against Browntrout, or its parents, subsidiaries or affiliates, and all of their customers, distributors, wholesalers, retailers, licensors, licensees, or any other person in



the course of doing business, and the successors and assigns of any of them, who may use, maintain, manufacture, distribute, advertise, market or sell Products, and the officers, directors, managers, employees, members, shareholders, agents, insurers, and representatives of each of them (collectively "Releasees") in this matter. This release is limited to, but is intended to be a full, final, and binding resolution of, those Claims that arise under Proposition 65, as against Browntrout and the Releasees, as such Claims relate to Browntrout's alleged failure to warn about exposures to the Listed Chemical contained in the Products. Browntrout's compliance with this Settlement Agreement shall constitute compliance with Proposition 65 for Browntrout and the Releasees with respect to the Listed Chemical in the Products after the Effective Date.

The above release specifically includes all Products that were manufactured and distributed by Browntrout prior to the Effective Date, including calendars, books, and planners for the calendar year of 2010 and 2011 that have already been manufactured and sold by Browntrout. The Parties further understand and agree that this release shall not extend upstream to any entities that manufactured the Products or any component parts thereof, or to any distributors or suppliers who sold Products or any component parts thereof to Browntrout, except as to those Products that were ultimately manufactured, sold or distributed by Browntrout.

Moore acknowledges that he is 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 SETTLEMENT WITH THE DEBTOR.**

Moore, in his individual capacity only and *not* in his representative capacity, expressly waives and relinquishes any and all rights and benefits which he may have under, or which may be conferred on him 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 he 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.

The Parties intend and agree that this Settlement Agreement shall be given full effect for purposes of precluding claims regarding the Products against Browntrout or the Releasees under Proposition 65 as covered under this release. If, within eighteen months of the Effective Date, Browntrout is served with another 60-day notice of violation of Proposition 65 alleging the presence of the Listed Chemical in the covers of books/planners, Browntrout may request in writing to Moore's counsel, that Moore file a complaint and seek judicial approval of this Settlement Agreement in the form of a consent judgment incorporating the terms of this Settlement Agreement pursuant to California Health and Safety Code Section 25249.7, or as may be otherwise allowed by law. If requested, Moore and Browntrout agree to reasonably cooperate with each other and to use best efforts and that of their counsel to support the entry of a consent judgment incorporating the terms of this Settlement Agreement for approval by a superior court in California. The parties agree that any fees or costs incurred by or on behalf of Plaintiff in filing and bringing such an action will be the responsibility of Plaintiff, without reimbursement or further payment from Browntrout. Browntrout will pay its own attorney

fees and costs to its own counsel, but no further amounts will be paid or owed to Plaintiff or his counsel for this additional work.

## **5.2 Browntrout's Release of Moore**

Browntrout waives any and all claims against Moore, his attorneys, and other representatives (collectively "Moore Releasees") for any and all actions taken or statements made (or those that could have been taken or made) by Moore and his attorneys and other representatives, whether in the course of investigating claims or otherwise seeking enforcement of Proposition 65 against them in this matter, and/or with respect to the Products.

Browntrout also provides a general release to the Moore Releasees 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 Browntrout of any nature, character or kind, known or unknown, suspected or unsuspected, arising out of the subject matter of the Notice or this Settlement Agreement.

Browntrout acknowledges that it is 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 SETTLEMENT WITH THE DEBTOR.

Browntrout expressly waives and relinquishes any and all rights and benefits which it may have under, or which may be conferred on it 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 it 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.

**6. SEVERABILITY**

If, subsequent to the execution of this Settlement Agreement, any of the provisions of this Settlement Agreement 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 Settlement Agreement 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 or is otherwise rendered inapplicable by reason of law generally, or as to the Products, then Browntrout may provide written notice to Moore of any asserted change in the law, and shall have no further obligations pursuant to this Settlement Agreement with respect to, and to the extent that, the Products are so affected.

**8. NOTICES**

Unless specified herein, all correspondence and notice required to be provided pursuant to this settlement agreement 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:

for Browntrout:

John R. Campo, Esq.  
Branson Brinkop, Griffith & Strong  
643 Bair Island Road, Suite 400  
Redwood City, CA 94063-2754

for Moore:

Proposition 65 Coordinator  
The Chanler Group  
2560 Ninth Street  
Parker Plaza, Suite 214  
Berkeley, CA 94710-2565

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.

**9. COUNTERPARTS; FACSIMILE SIGNATURES**

This Settlement Agreement may be executed in counterparts and by facsimile, 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 optically scanned image of a Party's signature shall be valid, as if 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).

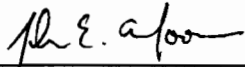
**11. MODIFICATION**

This Settlement Agreement may be modified only by written agreement of the Parties.

**12. AUTHORIZATION**

The undersigned are authorized to execute this Settlement Agreement on behalf of their respective party and have read, understood, and agree to all of the terms and conditions of this Settlement Agreement.

AGREED TO:

By:   
JOHN MOORE

Date: DECEMBER 15, 2010

AGREED TO:

By: \_\_\_\_\_  
WENDOVER BROWN for  
BROWNTROUT PUBLISHERS, INC.

Date: \_\_\_\_\_

for Moore:

Proposition 65 Coordinator  
The Chanler Group  
2560 Ninth Street  
Parker Plaza, Suite 214  
Berkeley, CA 94710-2565

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.

**9. COUNTERPARTS; FACSIMILE SIGNATURES**

This Settlement Agreement may be executed in counterparts and by facsimile, 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 optically scanned image of a Party's signature shall be valid, as if 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. MODIFICATION**

This Settlement Agreement may be modified only by written agreement of the Parties.

**12. AUTHORIZATION**


The undersigned are authorized to execute this Settlement Agreement on behalf of their respective party and have read, understood, and agree to all of the terms and conditions of this Settlement Agreement.

AGREED TO:

By: \_\_\_\_\_  
JOHN MOORE

Date: \_\_\_\_\_

AGREED TO:

By:  \_\_\_\_\_  
WENDOVER BROWN for  
BROWNTROUT PUBLISHERS, INC.

Date: December 15, 2010