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JOHN MOORE  
7

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA

9 COUNTY OF ALAMEDA

10 UNLIMITED CIVIL JURISDICTION  
11

12 JOHN MOORE,

13 Plaintiff,

14 v.

15 BENSUSSEN DEUTSCH & ASSOCIATES,  
16 INC.; and DOES 1-150, inclusive,

17 Defendants.  
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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.

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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  
harm.

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

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

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

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

26 *[list products for which warning is required]*

27 <sup>1</sup> For purposes of the Consent Judgment, "sold in proximity" shall mean that the Product and another product are  
28 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 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  
8 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  
14 California to cause birth defects and other  
15 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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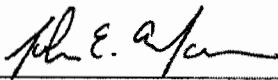
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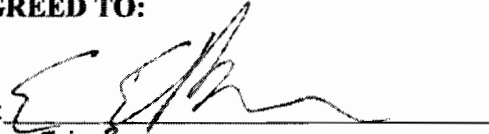
1 **13. AUTHORIZATION**

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

4 **AGREED TO:**

**AGREED TO:**

5  
6 By:   
7 JOHN MOORE

By:   
Eric Beasussen,  
BENSUSSEN DEUTSCH & ASSOCIATES, INC

8 Date: September 16, 2011

Date: Oct 7, 2011

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