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3 THE CHANLER GROUP
4 2560 Ninth Street
5 Parker Plaza, Suite 214
6 Berkeley, CA 94710-2565
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9 Attorneys for Plaintiff
10 JOHN MOORE

11 Jeffrey D. Pearlman, State Bar No. 123580
12 LAW OFFICES OF JEFFREY D. PEARLMAN
13 1801 Century Park East, Sixteenth Floor
14 Los Angeles, California 90067
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17 Attorneys for Defendant
18 PREGER & WERTENTEIL, INC.

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

22 JOHN MOORE,
23)
24) Plaintiff,
25)
26) v.
27)
28) PREGER & WERTENTEIL, INC. and DOES
1-150, inclusive,
Defendants.

Case No.: CIV-1104614
[PROPOSED] CONSENT JUDGMENT
Dept:
Judge:
Date: None set
Complaint Filed: September 16, 2011

1 **1. INTRODUCTION**

2 **1.1 John Moore and Preger & Wertenteil, Inc.**

3 This Consent Judgment is entered into by and between John Moore (“Moore” or “Plaintiff”),
4 and Preger & Wertenteil, Inc. (“P&W” or “Defendant”), with Plaintiff and Defendant collectively
5 referred to as the “Parties.”

6 **1.2 John Moore**

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

10 **1.3 Preger & Wertenteil, Inc.**

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

14 **1.4 General Allegations**

15 Moore alleges that P&W has manufactured, imported, distributed and/or sold footwear
16 containing Di-n-butyl phthalate (“DBP”) without the requisite Proposition 65 warnings. DBP and
17 another phthalate chemical, di(2-ethylhexyl)phthalate (“DEHP”), are listed under Proposition 65 as
18 chemicals known to cause birth defects and other reproductive harm.

19 **1.5 Product Description**

20 The products that are covered by this Consent Judgment are defined as follows: footwear
21 containing DBP including, but not limited to, *GMI Gold Medal Flip Flops, FLIP 520-H (#0 81091*
22 *10718 2)*, *GMI Gold Medal Flip Flops, FLIP 330-H, (#0 81091 24534 1)* and *GMI Gold Medal Flip*
23 *Flops, FLIP 320-H, #0 81091 12563 6)* manufactured, imported, distributed and/or sold by P&W,
24 hereinafter the “Products.”

25 **1.6 Notice of Violation**

26 On March 17, 2011, Moore served P&W and various public enforcement agencies, with a
27 document entitled “60-Day Notice of Violation” (the “Notice”) that provided the recipients with
28 notice of alleged violations of Proposition 65 based on P&W’s alleged failure to warn consumers

1 that the Products exposed users in California to DBP. To the best of the Parties' knowledge, no
2 public enforcer has prosecuted the allegations set forth in the Notice.

3 **1.7 Complaint**

4 On September 16, 2011, Moore filed a complaint in the Superior Court in and for the
5 County of Marin against Preger & Wertenteil, Inc. and Does 1 through 150, *Moore v. Preger &*
6 *Wertenteil, Inc., et al.*, Case No. CIV-1104614 ("Complaint" or "Action"), alleging violations of
7 Proposition 65, based on the alleged exposures to DBP contained in certain footwear sold by P&W.

8 **1.8 No Admission**

9 P&W denies the material, factual and legal allegations contained in Moore's Notice and
10 Complaint and maintains that all products that it has sold, manufactured, imported and/or
11 distributed in California, including the Products, have been and are in compliance with all laws.
12 Nothing in this Consent Judgment shall be construed as an admission by P&W of any fact, finding,
13 issue of law, or violation of law, nor shall compliance with this Consent Judgment constitute or be
14 construed as an admission by P&W of any fact, finding, conclusion, issue of law, or violation of
15 law. However, this section shall not diminish or otherwise affect P&W's obligations,
16 responsibilities, and duties under this Consent Judgment.

17 **1.9 Consent to Jurisdiction**

18 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
19 jurisdiction over P&W as to the allegations contained in the Complaint, that venue is proper in the
20 County of Marin and that this Court has jurisdiction to enter and enforce the provisions of this
21 Consent Judgment.

22 **1.10 Effective Date**

23 For purposes of this Consent Judgment, the term "Effective Date" shall mean two days after
24 the date of the hearing on which the Court approves the Consent Judgment.

25 **2. INJUNCTIVE RELIEF: REFORMULATION**

26 **2.1 Reformulation Standard**

27 Reformulated Products are defined as those Products containing DBP and DEHP each in
28 concentrations less than 0.1 percent (1,000 parts per million) in each accessible component when

1 analyzed pursuant to U.S. Environmental Protection Agency testing methodologies 3580A and
2 8270C or any other methodology utilized by federal or state agencies for the purpose of determining
3 the DBP and DEHP content in a solid substance.

4 **2.2 Reformulation Commitment**

5 As of the Effective Date, P&W shall only acquire for potential distribution to, or sale in,
6 California, Products that qualify as Reformulated Products as defined in Section 2.1 above.
7 However, provided that P&W complies with the Reformulation Standard and Reformulation
8 Commitment set forth herein, sales of the Products that were purchased, imported, manufactured, or
9 supplied to unaffiliated third parties prior to the deadline for implementation of the Reformulation
10 Standard shall not be separately actionable in another case brought pursuant to Section 25249.7(d)
11 of the Health and Safety Code alleging a failure to warn under Proposition 65 with respect to DBP
12 and DEHP.

13 **3. MONETARY PAYMENTS**

14 **3.1 Civil Penalty Payment Pursuant to Health & Safety Code § 25249.7(b)**

15 Pursuant to Health & Safety Code §25249.7(b), P&W shall pay civil penalties totaling
16 \$30,000. P&W shall pay an initial civil penalty in the amount of \$10,000 on or before the Effective
17 Date, to be apportioned in accordance with California Health & Safety Code § 25249.12,
18 subdivisions (c)(1) and (d), with 75% of these funds remitted to the State of California's Office of
19 Environmental Health Hazard Assessment ("OEHHA") and the remaining 25% of the penalty
20 remitted to Moore. Payment of the initial civil penalty shall be delivered to Moore's counsel no
21 later than December 21, 2012.

22 P&W shall pay a final civil penalty of \$20,000 on or before June 21, 2013, to be
23 apportioned in accordance with Health & Safety Code section 25249.12, subdivisions (c)(1) and (d),
24 with 75% of these funds earmarked for OEHHA and the remaining 25% of these penalty monies
25 earmarked for Moore. However, the final civil penalty identified in this section shall be waived in
26 its entirety if an Officer of P&W or its designee certifies in writing that as of June 21, 2013, P&W
27 shall only sell and offer for sale in California, Products that qualify as Reformulated Products. Such
28 certification must be received by The Chanler Group on or before June 11, 2013.

1 **3.2 Reimbursement of Moore’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. P&W 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, P&W shall pay
10 the amount of \$57,000 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. Payment of
13 Moore’s fees and costs shall be delivered no later than December 21, 2012.

14 **3.3 Payment Procedures**

15 **3.3.1 Funds Held In Trust:** All payments required by Sections 3.1 and 3.2 shall
16 be delivered to either The Chanler Group or the attorney of record for the P&W, and shall be held
17 in trust pending the Court’s approval of this Consent Judgment. Payments delivered to The
18 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 \$7,500;
21 (b) One check made payable to “The Chanler Group in Trust for John
22 Moore” in the amount of \$2,500; and
23 (c) One check made payable to “The Chanler Group in Trust” in the
24 amount of \$57,000.

25 Payments delivered to Law Offices of Jeffrey D. Pearlman shall be made payable, as
26 follows:

- 27 (a) One check made payable to “Law Offices Of Jeffrey D. Pearlman in
28 Trust for OEHHA” in the amount of \$7,500;

- 1 (b) One check made payable to “Law Offices Of Jeffrey D. Pearlman in
2 Trust for John Moore” in the amount of \$2,500; and
3 (c) One check made payable to “Law Offices Of Jeffrey D. Pearlman in
4 Trust for The Chanler Group” in the amount of \$57,000.

5 If P&W elects to deliver payments to its attorney of record, such attorney of record shall:

6 (a) confirm in writing within five days of receipt that the funds have been deposited in a trust
7 account; and (b) within two days of the date of the hearing on which the Court approves the
8 Consent Judgment, deliver the payment to The Chanler Group in three separate checks, as follows:

- 9 (a) One check made payable to “The Chanler Group in Trust for
10 OEHHA” in the amount of \$7,500;
11 (b) One check to “The Chanler Group in Trust for John Moore” in the
12 amount of \$2,500; and
13 (c) One check to “The Chanler Group” in the amount of \$57,000.

14 **3.3.2 Final Civil Penalty:** If the final civil penalty of \$20,000 referenced in
15 Section 3.1 above is not waived, payments shall be delivered on or before June 21, 2013, to The
16 Chanler Group and made payable, as follows:

- 17 (a) One check made payable to “The Chanler Group in Trust for
18 OEHHA” in the amount of \$15,000;
19 (b) One check made payable to “The Chanler Group in Trust for John
20 Moore” in the amount of \$5,000.

21 **3.3.3 Issuance of 1099 Forms.** After the Consent Judgment has been approved
22 and the settlement funds have been transmitted to Moore’s counsel, P&W shall issue three separate
23 1099 forms, as follows:

- 24 (a) The first 1099 shall be issued to the Office of Environmental Health
25 Hazard Assessment, P.O. Box 4010, Sacramento, CA 95814 (EIN:
26 68-0284486) in the amount of \$7,500;
27 (b) The second 1099 shall be issued to John Moore in the amount of
28 \$2,500, whose address and tax identification number shall be

1 furnished upon request; and

2 (c) The third 1099 shall be issued to The Chanler Group (EIN: 94-
3 3171522) in the amount of \$57,000.

4 **3.3.4 Payment Address:** All payments to the Chanler Group shall be delivered to
5 the following payment address:

6 The Chanler Group
7 Attn: Proposition 65 Controller
8 2560 Ninth Street
9 Parker Plaza, Suite 214
10 Berkeley, CA 94710

9 **4. CLAIMS COVERED AND RELEASED**

10 **4.1 Moore's Release of Proposition 65 Claims**

11 Moore acting on his own behalf and in the public interest releases P&W, its parents,
12 subsidiaries, affiliated entities under common ownership, directors, officers, stockholders,
13 employees, attorneys, and each entity to whom P&W directly or indirectly distributes or sells
14 Products, including, but not limited, to downstream distributors, wholesalers, customers, retailers
15 including, but not limited to, Walgreen Co., franchisees, cooperative members, and licensees
16 ("Releasees"), from all claims for violations of Proposition 65 up through the Effective Date based
17 on exposure to DBP from the Products set forth in the Notice. Compliance with the terms of this
18 Consent Judgment constitutes compliance with Proposition 65 with respect to exposures to DBP
19 from the Products as set forth in the Notice.

20 **4.2 Moore's Individual Release of Claims**

21 Moore also, in his individual capacity only and *not* in his representative capacity, provides a
22 release herein which shall be effective as a full and final accord and satisfaction, as a bar to all
23 actions, causes of action, obligations, costs, expenses, attorneys' fees, damages, losses, claims,
24 liabilities and demands of plaintiff of any nature, character or kind, whether known or unknown,
25 suspected or unsuspected, limited to and arising out of alleged or actual exposures to the DBP and
26 DEHP in the Products manufactured, distributed or sold by P&W.

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1 **4.3 P&W's Release of Moore**

2 P&W on behalf of itself, its past and current agents, representatives, attorneys, successors,
3 and/or assignees, hereby waives any and all claims against Moore, his attorneys and other
4 representatives, for any and all actions taken or statements made (or those that could have been
5 taken or made) by Moore and his attorneys and other representatives, whether in the course of
6 investigating claims or otherwise seeking to enforce Proposition 65 against it in this matter with
7 respect to the Products.

8 **5. COURT APPROVAL**

9 This Consent Judgment is not effective until it is approved and entered by the Court and
10 shall be null and void if, for any reason, it is not approved and entered by the Court within one year
11 after it has been fully executed by all Parties.

12 **6. SEVERABILITY**

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

16 **7. GOVERNING LAW**

17 The terms of this Consent Judgment shall be governed by the laws of the State of California
18 and apply within the State of California. In the event that Proposition 65 is repealed, preempted or
19 is otherwise rendered inapplicable by reason of law generally, or if any of the provisions of this
20 Consent Judgment are rendered inapplicable or no longer require as a result of any such repeal or
21 preemption or rendered inapplicable by reason of law generally as to the Products, then P&W shall
22 have no further obligations pursuant to this Consent Judgment with respect to, and to the extent that,
23 the Products are so affected.

24 **8. NOTICES**

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

To P&W:
Jeffrey D. Pearlman, Esq.
Law Offices of Jeffrey D. Pearlman
1801 Century Park East, Sixteenth Floor
Los Angeles, California 90067

To 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 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 P&W 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 P&W shall join. If any third party objection to the noticed motion is filed, Moore and P&W 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.

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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.

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: _____

Date: _____

By: _____
Plaintiff, John Moore

By: _____
Defendant, Preger & Wertenteil, Inc.

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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: DECEMBER 19, 2012

Date: _____

By: 
Plaintiff, John Moore

By: _____
Defendant, Preger & Wertenteil, Inc.

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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: _____

Date: 12-18-2012

By: _____
Plaintiff, John Moore

By: *J. M. Preger*
Defendant, Preger & Wertenteil, Inc.