

1 Brian C. Johnson, State Bar No. 235965
Josh Voorhees, State Bar No. 241436
2 THE CHANLER GROUP
2560 Ninth Street
3 Parker Plaza, Suite 214
Berkeley, CA 94710
4 Telephone: (510) 848-8880
Facsimile: (510) 848-8118

5 Attorneys for Plaintiff
6 JOHN MOORE

7
8
9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 COUNTY OF SAN FRANCISCO
11 UNLIMITED CIVIL JURISDICTION
12

13 JOHN MOORE,

14 Plaintiff,

15 v.

16
17 BROWNLOW PUBLISHING COMPANY; *et*
18 *al.*,

19 Defendants.

Case No. CGC-11-511836

**[PROPOSED] CONSENT
JUDGMENT**

(Health & Safety Code § 25249.6 *et seq.*)

1 **1. INTRODUCTION**

2 **1.1 Parties**

3 This Consent Judgment is entered into by and between John Moore (“Moore” or “Plaintiff”)
4 and Brownlow Publishing Company (“Brownlow” or “Defendant”), with Moore and Brownlow
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 to
8 toxic chemicals and improve human health by reducing or eliminating hazardous substances
9 contained in consumer products.

10 **1.3 Defendant**

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

14 **1.4 General Allegations**

15 Moore alleges that Brownlow sold in the State of California coverings for notepads containing
16 di(2-ethylhexyl)phthalate (“DEHP”), purses containing DEHP and di-n-butyl phthalate (“DBP”), and
17 ceramicware with exterior designs containing lead. Lead, DEHP, and DBP are each listed pursuant
18 to Proposition 65 as a chemical that is known to the State of California to cause birth defects or other
19 reproductive harm. DEHP and DBP are referred to collectively herein as the “Phthalate Chemicals”,
20 and lead, DEHP, and DBP are referred to collectively herein as the “Listed Chemicals.”

21 **1.5 Product Description**

22 The products that are covered by this Consent Judgment are defined as follows:

23 (a) purses containing DEHP and/or DBP, including, without limitation,
24 *Brownlow Gifts Olivia Purse Note (#7 03800 03413 7)*;

25 (b) notepads with vinyl coverings containing DEHP, including, without
26 limitation, *Brownlow Gifts Fashion Notes (#7 03800 03398 7)*; and

27 (c) ceramicware with exterior designs containing lead, including, without
28 limitation, *Dear Teacher Mug (#7 03800 03290 4)*.

1 All of the above items are referred to collectively herein as “Products” and are limited to those items
2 manufactured, sold, or distributed by Brownlow in California.

3 **1.6 Notices of Violation**

4 On or about March 17, 2011, Moore served Brownlow and various public enforcement
5 agencies with a document entitled “60-Day Notice of Violation” (“Notice”) that provided Brownlow
6 and such public enforcers with notice that Brownlow was allegedly in violation of Health & Safety
7 Code § 25249.6 for failing to warn its customers and consumers in California that its purses exposed
8 users to DEHP and DBP and its notepads exposed users to DEHP.

9 On or about September 1, 2011, Moore served Brownlow and the required public enforcers
10 with a document titled “Supplemental 60-Day Notice of Violation” (“Supplemental Notice”) that, in
11 addition to the allegations of unwarned exposures to the Phthalate Chemicals contained in the Notice,
12 alleged further violations for unwarned exposures to lead on the exterior designs of the ceramicware
13 Brownlow sold in California.

14 The Notice and Supplemental Notice are referred to collectively herein as the “Notices.”

15 **1.7 Complaint**

16 On or about June 20, 2011, Moore, acting in the interest of the general public in California,
17 filed the instant action (“Complaint”), against Brownlow for the violations of Proposition 65 alleged
18 in the Notice. To the best of the Parties’ knowledge no public enforcer has commenced enforcement
19 and is diligently prosecuting the allegations set forth in the Notices. Upon entry of this Consent
20 Judgment, the Complaint shall be deemed amended *nunc pro tunc* to include the violations of Health
21 & Safety Code § 25249.6 alleged in the Supplemental Notice for unwarned exposures to lead in the
22 ceramicware sold by Brownlow.

23 **1.8 No Admission**

24 Brownlow denies the material, factual, and legal allegations contained in the Notice and
25 Complaint and maintains that all of the products that it has sold in California, including the Products,
26 have been, and are, in compliance with all laws. Nothing in this Consent Judgment shall be
27 construed as an admission of any fact, finding, conclusion of law, issue of law, or violation of law;
28 nor shall compliance with this Consent Judgment constitute or be construed as an admission of any

1 fact, finding, conclusion of law, issue of law, or violation of law, the same being specifically denied
2 by Brownlow. This section shall not, however, diminish or otherwise affect Brownlow's obligations,
3 responsibilities, and duties under this Consent Judgment.

4 **1.9 Consent to Jurisdiction**

5 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
6 jurisdiction over Brownlow as to the allegations contained in the Complaint, that venue is proper in
7 this County, and that the Court has jurisdiction to enter and enforce the provisions of this Consent
8 Judgment.

9 **1.10 Effective Date**

10 For purposes of this Consent Judgment, the term "Effective Date" shall mean May 1, 2012.

11 **2. INJUNCTIVE RELIEF: VENDOR NOTIFICATION, REFORMULATION**

12 **2.1 Reformulation Standards**

13 For the purposes of this Consent Judgment, the Reformulation Standard, applicable to each of
14 Brownlow's Products, is defined as follows:

15 (a) purses containing each of the Phthalate Chemicals in a concentration
16 less than or equal to 1,000 parts per million ("ppm") (0.1%);

17 (b) notepads with vinyl coverings containing DEHP in a concentration less
18 than or equal to 1,000 ppm (0.1%); and

19 (c) ceramicware containing a total lead content of less than or equal to 90
20 ppm and residual surface lead in an amount that does not exceed 1.0
21 microgram (μg).

22 **2.2 Verification of Reformulated Products**

23 The method of analysis used to determine whether Brownlow's purses and notepads are
24 Reformulated Products in compliance with this Section 2 shall be made pursuant to U.S.
25 Environmental Protection Agency ("EPA") testing methodologies 3580A and 8270C. The
26 determination regarding the lead content of Brownlow's ceramicware shall be made pursuant to EPA
27 testing methodologies 3050B and 6010B. The residual lead content on the surface of Brownlow's
28 ceramicware shall be determined according to the NIOSH 9100 testing protocol.

1 **2.3 Vendor Notification**

2 Within thirty days of the date that this Consent Judgment is fully executed by the Parties, to
3 the extent it has not already provided such notice, Brownlow shall provide the Reformulation
4 Standards to each of its then-current vendors of Products and shall instruct each vendor to provide
5 only Products that comply with the Reformulation Standards and shall not employ statements that
6 will encourage a vendor to delay compliance with the Reformulation Standard.

7 **2.4 Compliance**

8 Commencing on December 31, 2012, and continuing thereafter, Brown shall only purchase,
9 import, sell, or distribute for sale in California, Products that comply with the Reformulation
10 Standards established by Section 2.1. If a vendor or supplier of Brownlow's indicates that it cannot
11 produce Products in compliance with the applicable Reformulation Standard by the compliance
12 deadline, Brownlow shall find an alternate supplier or cease the sale of the Product in California.
13 Brownlow shall maintain for a period of not less than twenty-four months copies of any vendor
14 notification, vendor certification, or test results establishing compliance with this Section.
15 Brownlow further agrees to provide Moore with copies of such documents upon request; Moore
16 shall regard such copies as confidential business information.

17 **2.5 Products Sold Prior to Compliance Deadline**

18 Provided that Brownlow complies with the Reformulation Standard and vendor notification
19 requirements established by this Section, sales of Products purchased, imported, sold or distributed
20 for sale in California prior to the compliance deadline established by section 2.4, shall not be
21 separately actionable in another case brought pursuant to section 25249.7(d) of the Health and
22 Safety Code, alleging unwarned exposures to the Listed Chemicals in the respective Products sold
23 by Brownlow.

24 **3. MONETARY PAYMENTS**

25 **3.1 Payments Pursuant to Health & Safety Code § 25249.7(b)**

26 Pursuant to Health & Safety Code § 25249.7(b), Brownlow shall pay \$2,000 in civil
27 penalties. The penalty amount reflects a credit of \$8,000 agreed to by Moore in response to
28 Brownlow's commitment to Proposition 65 compliance, including its agreement to offer only

1 Products in compliance with the Reformulation Standards established by Section 2 after the
2 Effective Date. Brownlow's civil penalty payment shall be apportioned in accordance with Health
3 & Safety Code § 25249.12 (c)(1) & (d), with seventy-five percent (75%) of the penalty earmarked
4 for the California Office of Environmental Health Hazard Assessment ("OEHHA") and the
5 remaining twenty-five percent (25%) of the penalty earmarked for Moore.

6 **3.2 Reimbursement of Plaintiff's Fees and Costs**

7 The Parties acknowledge that Moore and his counsel offered to resolve this dispute without
8 reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving the issue
9 to be resolved after the material terms of the agreement had been settled. Shortly after the other
10 settlement terms had been finalized, Brownlow expressed a desire to resolve the fee and cost issue.
11 The Parties then attempted to (and did) reach an accord on the compensation due to Moore and his
12 counsel under general contract principles and the private attorney general doctrine codified at
13 California Code of Civil Procedure § 1021.5 for all work performed in this matter, except fees that
14 may be incurred on appeal. Under these legal principles, Brownlow shall pay \$15,000 for the fees
15 and costs incurred by Moore and Moore's counsel investigating, litigating and enforcing this matter,
16 and negotiating a settlement, including the fees and costs incurred (and yet to be incurred)
17 negotiating, drafting, and obtaining the Court's approval of this Consent Judgment in the public
18 interest.

19 **3.3 Payment Procedures**

20 **3.3.1 Funds Held in Trust**

21 All payments made under this Consent Judgment shall be held in trust until such time
22 as the Court approves this settlement. The Parties acknowledge that Moore's counsel gave
23 Brownlow the option of depositing the funds into its attorney's trust account, but that Brownlow
24 elected to have The Chanler Group hold the settlement funds in its own trust account.

25 **3.3.2 Payment Schedule**

26 (a) On or before March 15, 2012, Brownlow shall deliver three checks made
27 payable as follows:

- 28 (1) one check to "The Chanler Group in Trust for OEHHA" in the amount

1 of \$1,500;

2 (2) a second check to “The Chanler Group in Trust for John Moore” in
3 the amount of \$500; and

4 (3) a third check to “The Chanler Group in Trust” in the amount of
5 \$5,000;

6 (b) on or before April 15, 2012, Brownlow shall deliver a fourth check to “The
7 Chanler Group in Trust” in the amount of \$5,000; and

8 (c) on or before May 15, 2012, Brownlow shall deliver a fifth check to “The
9 Chanler Group in Trust” in the amount of \$5,000.

10 **3.3.3 Issuance of 1099 Forms**

11 After the Consent Judgment has been approved, Brownlow shall provide Moore’s
12 counsel with three 1099 forms for its settlement payments, as follows:

13 (a) one 1099 for the “Office of Environmental Health Hazard Assessment”, P.O.
14 Box 4010, Sacramento, CA 95814 (EIN: 68-0284486) for the civil penalty payment to OEHHA;

15 (b) a second 1099 for the civil penalty payment to “John Moore”, whose address
16 and tax identification number shall be furnished upon request after this Consent Judgment has been
17 fully executed by the Parties; and

18 (c) a third 1099 form to “The Chanler Group” (EIN: 94-3171522) for the total fee
19 and cost reimbursement required by this Consent Judgment.

20 **3.3.4 Payment Address**

21 All payments and tax documentation required by this Section shall be delivered to
22 Moore’s counsel at the following address:

23 The Chanler Group
24 Attn: Proposition 65 Controller
25 2560 Ninth Street
26 Parker Plaza, Suite 214
27 Berkeley, CA 94710
28

1 **4. CLAIMS COVERED AND RELEASED**

2 **4.1 Moore’s Public Release of Proposition 65 Claims**

3 Moore acting on his own behalf and in the public interest releases Brownlow from all claims
4 for violations of Proposition 65 up through the Effective Date based on exposures to the Listed
5 Chemicals from the respective Products, as set forth in the Notice. Compliance with the terms of this
6 Consent Judgment constitutes compliance with Proposition 65 with respect to exposures to the Listed
7 Chemicals resulting from the respective Products as set forth in the Notices.

8 **4.2 Moore’s Individual Release of Claims**

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

15 **4.3 Brownlow’s Release of Moore**

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

22 **5. COURT APPROVAL**

23 This Consent Judgment is not effective until it is approved and entered by the Court and shall
24 be null and void if, for any reason, it is not approved and entered within one year after it has been
25 fully executed by the Parties. In the event the Consent Judgment is not entered in this period, any
26 monies that have been provided to Moore or his counsel pursuant to Section 3 of this Consent
27 Judgment shall be refunded within fifteen (15) days of receiving written notice from Brownlow that
28

1 the one-year period has expired and the Consent Judgment has not been approved and entered by the
2 Court.

3 **6. SEVERABILITY**

4 If, subsequent to the execution of this Consent Judgment, any of its provisions are held to be
5 unenforceable, the validity of the remaining provisions shall not be adversely affected.

6 **7. GOVERNING LAW**

7 The terms of this Consent Judgment shall be governed by the laws of the State of California
8 and apply within the State of California. In the event that Proposition 65 is repealed, preempted, or is
9 otherwise rendered inapplicable by reason of law generally, or as to the Products, then Brownlow
10 may provide written notice to Moore of any asserted change in the law, and shall have no further
11 obligations pursuant to this Consent Judgment with respect to, and to the extent that, the Products are
12 so affected. Nothing in this Consent Judgment shall be interpreted to relieve Brownlow from any
13 obligation to comply with any pertinent state or federal toxics control laws.

14 **8. NOTICES**

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

18 For Brownlow:

19 Paul Brownlow, President
20 Brownlow Publishing Company
21 6309 Airport Freeway
22 Fort Worth, TX 76117

23 and

24 John A. Clifford, Esq.
25 Merchant & Gould, LLP
26 3200 IDS Center
27 80 South Eighth St.
28 Minneapolis, MN 55402

For Moore:

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

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

3 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

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

7 **10. ADDITIONAL POST EXECUTION ACTIVITIES**

8 Moore agrees to comply with the reporting form requirements referenced in California Health
9 & Safety Code § 25249.7(f). The Parties also acknowledge that, pursuant to California Health &
10 Safety Code § 25249.7(f)(4), a noticed motion is required to obtain judicial approval of their
11 settlement. In furtherance of obtaining such approval, Moore and Brownlow and their respective
12 counsel agree to mutually employ their "best efforts" to support the entry of this agreement as a
13 Consent Judgment and obtain approval of the Consent Judgment by the Court in a timely manner.
14 For purposes of this section, "best efforts" shall include, at a minimum, cooperating on the drafting
15 and filing of any papers in support of the required motion for judicial approval.

16 **11. MODIFICATION**

17 This Consent Judgment may be modified only by: (i) a written agreement of the Parties and
18 upon entry of a modified consent judgment by the Court thereon; or (ii) upon a successful motion or
19 application of any party and the entry of a modified consent judgment by the Court.

20 **12. AUTHORIZATION**

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

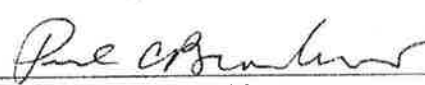
23 **AGREED TO:**

AGREED TO:

24 Date: February 27, 2012

Date: 2/24/12

25
26 By: 
27 John Moore

25
26 By: 
27 Paul Brownlow, President
Brownlow Publishing Company