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9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 FOR THE COUNTY OF ALAMEDA
11 UNLIMITED CIVIL JURISDICTION
12

13 JOHN MOORE,

14 Plaintiff,

15 v.

16 INNOVAGE LLC; MERCHSOURCE, LLC; and
DOES 1–150, inclusive,

17 Defendants.
18

Case No. RG11594937

**[PROPOSED] CONSENT
JUDGMENT**

Health & Safety Code § 25249.6

1 **1. INTRODUCTION**

2 **1.1 John Moore, and Innovage LLC and MerchSource, LLC**

3 This Consent Judgment is entered into by and between John Moore (“Moore”) and Innovage
4 LLC and MerchSource, LLC (“Defendants”), with Moore and Defendants collectively referred to as
5 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 Defendants employ ten or more persons and are persons 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 Defendants have sold in the State of California cases for portable
16 electronic devices containing di(2-ethylhexyl)phthalate (“DEHP”). DEHP is listed pursuant to
17 Proposition 65 as a chemical known to the State of California to cause birth defects or other
18 reproductive harm. DEHP is also referred to herein as the “Listed Chemical.”

19 **1.5 Product Description**

20 The products that are covered by this Consent Judgment are defined as cases for portable
21 electronic devices called *The Sharper Image 2.4” Portable Photo Album, #1624893 (19162) (#6*
22 *94202 10415 6)*, which Moore alleges contain the Listed Chemical. All such items shall be referred
23 to herein as the “Products.”

24 **1.6 Notice of Violation**

25 On or about March 31, 2011, Moore served Defendants and various public enforcement
26 agencies with a document entitled “60-Day Notice of Violation” (“Notice”) that provided Defendants
27 and such public enforcers with notice that alleged Defendants were in violation of Proposition 65 for
28 failing to warn consumers and customers that the Products exposed users in California to DEHP.

1 **1.7 Complaint**

2 On or about August 26, 2011, Moore, who alleges that he was and is acting in the interest of
3 the general public in California, filed the instant action in the Alameda County Superior Court
4 (“Complaint”), naming Defendants as defendants and alleging violations of Proposition 65 by
5 Defendants based on the alleged exposures to DEHP contained in the Products they manufactured,
6 distributed, and/or offered for sale in California.

7 **1.8 No Admission**

8 Defendants deny the material, factual, and legal allegations contained in the Notice and
9 Complaint and maintain that all of the products that they have sold in California, including the
10 Products, have been, and are, in compliance with all laws. Nothing in this Consent Judgment shall be
11 construed as an admission by Defendants of any fact, finding, conclusion, issue of law, or violation of
12 law; nor shall compliance with this Consent Judgment constitute or be construed as an admission by
13 Defendants of any fact, finding, conclusion, issue of law, or violation of law, such being specifically
14 denied by Defendants. However, this section shall not diminish or otherwise affect the obligations,
15 responsibilities, and duties of Defendants under this Consent Judgment.

16 **1.9 Consent to Jurisdiction**

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

21 **1.10 Effective Date**

22 For purposes of this Consent Judgment, the term “Effective Date” shall mean September 9,
23 2011.

24 **2. INJUNCTIVE RELIEF: REFORMULATION OR CESSATION OF SALES**

25 **2.1 Reformulation Commitment**

26 As of the Effective Date, Defendants shall not manufacture, distribute, sell or offer for sale in
27 California any Products unless they are “DEHP Free.” For purposes of this Settlement Agreement,
28 “DEHP Free” shall mean Products containing no more than 0.1 percent (1,000 parts per million) of

1 the Listed Chemical when analyzed pursuant to Environmental Protection Agency testing
2 methodologies 3580A and 8270C.

3 **3. MONETARY PAYMENTS**

4 **3.1 Payments Pursuant to California Health & Safety Code § 25249.7(b)**

5 Pursuant to Health & Safety Code § 25249.7(b), and in settlement of all claims alleged in the
6 Notice and Complaint and referred to in this Consent Judgment, Defendants shall pay civil penalties
7 in the amount of \$12,000 in combined penalty payments and credits. Because of Defendants'
8 cooperation in the resolution of this action, and their commitment to only offer to sell the Products in
9 California if they meet the definition of "DEHP Free Products" pursuant to Section 2.1 above ,
10 Moore agrees to apply an automatic credit of \$6,000 to the total civil penalty. Thereafter, Defendants
11 agree to pay the sum of \$6,000. The penalty shall be apportioned in accordance with California
12 Health & Safety Code §§ 25249.12(c)(1) & (d), with seventy-five percent of the amount remitted to
13 the State of California's Office of Environmental Health Hazard Assessment ("OEHHHA") and the
14 remaining twenty-five percent paid to Moore.

15 Defendants shall issue two checks for the penalty payment: (a) one check made payable to
16 "The Chanler Group in Trust for Office of Environmental Health Hazard Assessment" in the amount
17 of \$4,500; and (b) one check to The Chanler Group in Trust for John Moore in the amount of \$1,500.
18 Two 1099 forms shall also be issued for the above-payments to: (a) Office of Environmental Health
19 Hazard Assessment, P.O. Box 4010, Sacramento, CA 95814 (EIN: 68-0284486); and (b) John
20 Moore, whose information shall be provided upon request five days before the payment is due.

21 The penalty payment shall be delivered to Moore's counsel within five days of the Effective
22 Date 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. REIMBURSEMENT OF FEES AND COSTS**

2 **4.1 Attorney Fees and Costs**

3 The Parties acknowledge that Moore and his counsel offered to resolve this dispute without
4 reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving this fee
5 issue to be resolved after the material terms of the agreement had been settled. Defendants then
6 expressed a desire to resolve the fee and cost issue shortly after the other settlement terms had been
7 finalized. The Parties then attempted to (and did) reach an accord on the compensation due to Moore
8 and his counsel under general contract principles and the private attorney general doctrine codified at
9 California Code of Civil Procedure (“CCP”) § 1021.5, for all work performed through the mutual
10 execution of this Agreement. Defendants shall pay \$34,000 for fees and costs incurred by Moore as a
11 result of investigating, bringing this matter to their attention, and negotiating a settlement in the
12 public interest. This figure includes Moore’s future fees and costs including attorney’s fees to be
13 incurred in seeking judicial approval of this Consent Judgment as well as any other legal work
14 performed after the execution of this Consent Judgment incurred in an effort to obtain finality of the
15 case. However, in the event a third party were to appeal entry of this Consent Judgment, Plaintiff and
16 his counsel shall be entitled to seek their reasonable attorney’s fees and costs associated with all
17 appellate work defending the entry of judgment pursuant to CCP § 1021.5.

18 The payment for reimbursement of fees and costs shall be made payable to “The Chanler
19 Group” and shall be delivered within five days of the Effective Date at the following address:

20 The Chanler Group
21 Attn: Proposition 65 Controller
22 2560 Ninth Street
23 Parker Plaza, Suite 214
24 Berkeley, CA 94710

25 A third 1099 form shall be issued to “The Chanler Group” (EIN: 94-3171522) for the reimbursement
26 of Plaintiff’s fees and costs pursuant to this Section.

27 **5. RELEASE OF ALL CLAIMS**

28 **5.1 Full, Final and Binding Resolution of Proposition 65 Allegations.** This Consent
Judgment is a full, final and binding resolution between Moore, on behalf of himself and the public,
and Defendants, of any violation of Proposition 65 that was or could have been asserted by Moore

1 against Defendants, their parents, subsidiaries, affiliated entities that are under common ownership,
2 directors, officers, employees, attorneys, and each entity to whom Defendants directly or indirectly
3 distribute or sell Products, including but not limited to downstream distributors, wholesalers,
4 customers, retailers, franchisees, cooperative members, licensors, and licensees (“Releasees”), based
5 on their failure to warn about alleged exposures to the Listed Chemicals contained in the Products
6 that were sold by Defendants.

7 **5.2 Moore’s Public Release of Proposition 65 Claims.** In further consideration of the
8 promises and agreements herein contained, Moore on behalf of himself, his past and current agents,
9 representatives, attorneys, successors, and/or assignees, and in the interest of the general public,
10 hereby waives all rights to institute or participate in, directly or indirectly, any form of legal action
11 and releases all claims, including, without limitation, all actions, and causes of action, in law or in
12 equity, suits, liabilities, demands, obligations, damages, costs, fines, penalties, losses, or expenses --
13 including, but not limited to, investigation fees, expert fees, and attorneys’ fees, but exclusive of fees
14 and costs on appeal -- limited to and arising under Proposition 65 with respect to the Listed
15 Chemicals in the Products sold by Defendants (collectively “claims”), against Defendants and
16 Releasees.

17 **5.3 Moore’s Individual Release of Claims.** Moore also, in his individual capacity only
18 and not in his representative capacity, provides a release herein which shall be effective as a full and
19 final accord and satisfaction, as a bar to all actions, causes of action, obligations, costs, expenses,
20 attorneys’ fees, damages, losses, claims, liabilities and demands of Moore of any nature, character or
21 kind, whether known or unknown, suspected or unsuspected, limited to and arising out of alleged or
22 actual exposures to the Listed Chemicals in the Products manufactured, distributed or sold by
23 Defendants.

24 **6. COURT APPROVAL**

25 This Consent Judgment is not effective until it is approved and entered by the Court and shall
26 be null and void if, for any reason, it is not approved and entered by the Court within one year after it
27 has been fully executed by all Parties, in which event any monies that have been provided to Moore
28 or his counsel pursuant to Sections 3.1 and/or Section 4.1 above shall be refunded within fifteen (15)

1 days after receiving written notice from Defendants that the one-year period has expired and the
2 Consent Judgment has not been approved by the Court.

3 **7. SEVERABILITY**

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

7 **8. GOVERNING LAW**

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

15 **9. NOTICES**

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

20 For Defendants:

21 Elizabeth V. McNulty
22 Hewitt Wolensky LLP
23 4041 MacArthur Blvd., Suite 300
Newport Beach, CA 92660

24 For Moore:

25 Proposition 65 Coordinator
26 The Chanler Group
27 2560 Ninth Street
28 Parker Plaza, Suite 214
Berkeley, CA 94710

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.

1 **10. COUNTERPARTS; FACSIMILE SIGNATURES**

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

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

6 Moore agrees to comply with the reporting form requirements referenced in California Health
7 & Safety Code § 25249.7(f).

8 **12. ADDITIONAL POST EXECUTION ACTIVITIES**

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

16 **13. MODIFICATION**

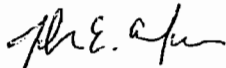
17 This Consent Judgment may be modified only: (1) by written agreement of the Parties and
18 upon entry of a modified consent judgment by the Court thereon; or (2) upon a successful motion of
19 any party and entry of a modified consent judgment by the Court

20 **14. 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:**

24 JOHN MOORE

25 

26 _____
27 Date: September 1, 2011

AGREED TO:

INNOVAGE LLC

25 By: 

26 Its: President

27 Date: 9/8/11

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AGREED TO:
MERCHSOURCE, LLC

By:  _____

Its: General Counsel

Date: 9/7/11