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12 C&S WHOLESALE GROCERS, INC.

13
14 SUPERIOR COURT OF THE STATE OF CALIFORNIA
15 COUNTY OF SAN FRANCISCO
16 UNLIMITED CIVIL JURISDICTION
17

18 JOHN MOORE,

19 Plaintiff,

20 v.

21 C & S WHOLESALE GROCERS, INC.; *et al.*,

22 Defendants.
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Case No. CGC-11-514766

**[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”) and C & S
4 Wholesale Grocers, Inc. (“C & S”), with Moore and C & S collectively referred to as the “Parties.”

5 **1.2 Plaintiff**

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

9 **1.3 Defendant**

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

13 **1.4 General Allegations**

14 Moore alleges that C & S sold or distributed for sale in California footwear containing
15 excessive amounts of di(2-ethylhexyl)phthalate (“DEHP”) and di-n-butyl phthalate (“DBP”)
16 without first providing the “clear and reasonable” exposure warnings required by Proposition 65.
17 DEHP and DBP are listed pursuant to Proposition 65 as chemicals known to the state of California
18 to cause birth defects and other reproductive harm.

19 **1.5 Product Description**

20 The product that is covered by this Consent Judgment, and to which this Consent Judgment
21 is specifically limited, is the *Caribbean Cartel Lds Metallic Flex Zori, Article #1200W (#8 02668*
22 *01200 1)* model of footwear which contains DBP and/or DEHP and was manufactured and supplied
23 to C & S by Touchsport Footwear USA, Inc., and sold in California by C & S (hereafter the
24 “Product”).

25 **1.6 Notice of Violation**

26 On April 8, 2011, Moore served C & S and various public enforcement agencies with a 60-
27 Day Notice of Violation (“Notice”), a document that informed the recipients of Moore’s allegation
28

1 that C & S was allegedly in violation of Proposition 65 for failing to warn its customers and
2 consumers in California that the Product exposes users to DEHP and DBP.

3 **1.7 Complaint**

4 On September 30, 2011, Moore filed the instant action (“Complaint”) against C & S for the
5 violations of Health & Safety Code § 25249.6 alleged in the Notice.

6 **1.8 No Admission**

7 C & S denies the material, factual, and legal allegations contained in the Notice and
8 Complaint, and maintains that all of the products that it has sold in California, including the
9 Product, have been, and are, in compliance with all laws. Nothing in this Consent Judgment shall
10 be construed as an admission by C & S of any fact, finding, conclusion of law, issue of law, or
11 violation of law, nor shall compliance with this Consent Judgment constitute or be construed as an
12 admission of any fact, finding, conclusion of law, issue of law, or violation of law, the same being
13 specifically denied by C & S. This section shall not, however, diminish or otherwise affect C & S’s
14 obligations, responsibilities and duties under this Consent Judgment.

15 **1.9 Consent to Jurisdiction**

16 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
17 jurisdiction over C & S as to the allegations in the Complaint, that venue is proper in the county of
18 San Francisco, and that this Court has jurisdiction to enter and enforce the provisions of the Consent
19 Judgment.

20 **1.10 Effective Date**

21 For purposes of this Consent Judgment, the term “Effective Date” shall mean March 9,
22 2012.

23 **2. INJUNCTIVE RELIEF**

24 Commencing on the Effective Date and continuing thereafter, C&S shall not ship, sell, or
25 offer to ship for sale in California any Product that is not “Phthalate Free.” For purposes of this
26 Consent Judgment, “Phthalate Free” shall mean Products containing either DEHP or DBP in
27 concentrations less than 1,000 parts per million (0.1%) when using a method of detection and
28 analysis authorized under Tit. 27 Cal. Code Regs. § 25900.

1 **3. MONETARY PAYMENTS**

2 **3.1 Civil Penalty Payment Pursuant to Health & Safety Code § 25249.7(b)**

3 Pursuant to Health & Safety Code § 25249.7(b), C & S shall pay a civil penalty of \$3,500.
4 This amount reflects a credit of \$5,500 agreed to by Moore in response to C & S’s commitment to
5 Proposition 65 compliance, including only selling or distributing for sale in California a Product that
6 complies with the DEHP and DBP content standards established by Section 2. The penalty payment
7 shall be allocated according to Health & Safety Code § 25249.12(c)(1) & (d), with seventy-five
8 percent (75%) of the penalty amount earmarked for the California Office of Environmental Health
9 Hazard Assessment (“OEHHA”) and the remaining twenty-five percent (25%) earmarked for
10 Moore.

11 **3.2 Reimbursement of Moore’s 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 the issue
14 to be resolved after the material terms of the agreement had been settled. C & S then expressed a
15 desire to resolve the fee and cost issue shortly after the other settlement terms had been finalized.
16 The Parties then attempted to (and did) reach an accord on the compensation due to Moore and his
17 counsel under general contract principles and the private attorney general doctrine codified at
18 California Code of Civil Procedure § 1021.5 for all work performed in this matter. Under these
19 legal principles, C & S shall pay \$28,500, for all fees and costs incurred investigating, litigating and
20 enforcing this matter, including the fees and costs incurred (and yet to be incurred) drafting,
21 negotiating, and obtaining the Court’s approval of this Consent Judgment in the public interest.

22 **3.3 Payment Address**

23 All payments required by the settlement shall be held in trust by counsel to C & S,
24 and shall be delivered to Moore’s counsel within five days of date of the judicial approval hearing
25 contemplated by section 5 at the following address:

26 ///

27 ///

28 ///

1 The Chanler Group
2 Attn: Proposition 65 Controller
3 2560 Ninth Street
4 Parker Plaza, Suite 214
5 Berkeley, CA 94710

6 **4. CLAIMS COVERED AND RELEASED**

7 **4.1 Full, Final and Binding Resolution of Proposition 65 Allegations**

8 This Consent Judgment is a full, final, and binding resolution between Plaintiff and
9 Defendant, of any violation of Proposition 65 that was or could have been asserted by Plaintiff
10 against Defendant, its parents, subsidiaries, affiliated entities that are under common ownership,
11 directors, officers, employees, attorneys, and each entity to whom Defendant directly or indirectly
12 distributes or sells Products, including but not limited to downstream distributors, wholesalers,
13 customers, retailers, franchisees, cooperative members, licensors, and licensees (“Releasees”), based
14 on their failure to warn about alleged exposures to DEHP and DBP contained in the Products that
15 were manufactured, distributed, or sold by Defendant prior to the Effective Date.

16 **4.2 Moore’s Public Release of Proposition 65 Claims**

17 Moore, acting on his own behalf and in the public interest, releases C & S and the Releasees
18 from all claims for violations of Proposition 65 up through the Effective Date based on exposures to
19 DEHP and/or DBP from the Product as set forth in the Notice. Compliance with the terms of this
20 Consent Judgment constitutes compliance with Proposition 65 with respect to exposures to the DBP
21 and DEHP from the Product as set forth in the Notice.

22 **4.3 Moore’s Individual Release of Claims**

23 Moore, in his individual capacity only and *not* in his representative capacity, also provides a
24 release herein which shall be effective as a full and final accord and satisfaction, as a bar to all
25 actions, causes of action, obligations, costs, expenses, attorneys’ fees, damages, losses, claims,
26 liabilities, and demands of any nature, character, or kind, whether known or unknown, suspected or
27 unsuspected, arising out of alleged or actual exposures to DEHP and/or DBP contained in the Product
28 sold or distributed for sale in California by C & S or the Releasees.

1 Moore further acknowledges that he is familiar with Section 1542 of the California Civil
2 Code, which provides as follows:

3 **A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE**
4 **CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR**
5 **AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM OR**
6 **HER MUST HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH**
7 **THE DEBTOR.**

8 Moore, in his individual capacity only and *not* in his representative capacity, on behalf of
9 himself and his agents, attorneys, representatives, successors and assigns, expressly waives and
10 relinquishes any and all rights and benefits which he may have under, or which may be conferred on
11 him by the provisions of Section 1542 of the California Civil Code as well as under any other state or
12 federal statute or common law principle of similar effect, to the fullest extent that he may lawfully
13 waive such rights or benefits pertaining to the released matters. In furtherance of such intention, the
14 release hereby given shall be and remain in effect as a full and complete release notwithstanding the
15 discovery or existence of any such additional or different claims or facts arising out exposures to
16 DBP and DEHP from the Product.

17 **4.4 C & S's Release of Moore**

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

23 C & S further acknowledges that it is familiar with Section 1542 of the California Civil Code,
24 which provides as follows:

25 **A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE**
26 **CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR**
27 **AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM OR**
28 **HER MUST HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH**
THE DEBTOR.

1 C & S, on behalf of itself, and its past and current its owners, subsidiaries, affiliates, sister
2 and related companies, employees, shareholders, directors, insurers, attorneys, successors, and
3 assigns expressly waives and relinquishes any and all rights and benefits which it may have under,
4 or which may be conferred on it by the provisions of Section 1542 of the California Civil Code, as
5 well as under any other state or federal statute or common law principle of similar effect, to the
6 fullest extent that it may lawfully waive such rights or benefits pertaining to the released matters. In
7 furtherance of such intention, the release hereby given shall be and remain in effect as a full and
8 complete release notwithstanding the discovery or existence of any such additional or different
9 claims or facts arising out of the released matters.

10 **5. COURT APPROVAL**

11 This Consent Judgment is not effective until it is approved and entered by the Court and
12 shall be null and void if, for any reason, it is not approved and entered within one year after it has
13 been fully executed by the Parties, in which event any monies that have been provided to Moore or
14 his counsel pursuant to sections 3.1 and/or 3.2 shall be refunded within fifteen days of receiving
15 written notice from C & S that the one-year period has expired and the Consent Judgment has not
16 been approved and entered by the Court.

17 **6. SEVERABILITY**

18 If, subsequent to the execution of this Consent Judgment, any of its provisions are held by a
19 court to be unenforceable, the validity of the remaining provisions shall not be adversely affected.

20 **7. GOVERNING LAW**

21 The terms of this Consent Judgment shall be governed by the laws of the State of California
22 and apply within the State of California. In the event that Proposition 65 is repealed, preempted, or
23 is otherwise rendered inapplicable by reason of law generally, or as to the Product, then C & S shall
24 have no further obligations pursuant to this Consent Judgment, with respect to, and to the extent
25 that, the Product is so affected.

26 **8. NOTICES**

27 Unless specified herein, all correspondence and notices required to be provided pursuant to
28 this Consent Judgment shall be in writing and sent by: (i) personal delivery, (ii) first-class,

1 registered, or certified mail, return receipt requested, or (iii) a recognized overnight courier on any
2 party by the other party at the following addresses:

3 For C & S:

4 Bryan Granger
5 Vice President of Compliance & Government Relations
6 C&S Wholesale Grocers, Inc.
7 7 Corporate Drive
8 Keene, NH 03431

9 With a copy to:
10 Daniel Fox, Esq.
11 K&L Gates
12 4 Embarcadero Center, Suite 1200
13 San Francisco, CA 94111

14 For Moore:

15 Proposition 65 Coordinator
16 The Chanler Group
17 2560 Ninth Street
18 Parker Plaza, Suite 214
19 Berkeley, CA 94710

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

22 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

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

26 **10. POST EXECUTION ACTIVITIES**

27 Moore agrees to comply with the reporting form requirements referenced in California
28 Health & Safety Code § 25249.7(f). In addition, 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. In furtherance of obtaining such approval, Moore and C & S and their
respective counsel 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. For purposes of this section, “best efforts” shall include, at a minimum, cooperating on the
drafting and filing of any papers in support of the required motion for judicial approval.

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11. MODIFICATION

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

12. AUTHORIZATION

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

AGREED TO:

AGREED TO:

By: 
JOHN MOORE

By: _____
Bryan Granger, Vice President of
Compliance & Government Relations,
C & S WHOLESALE GROCERS, INC.

Date: MARCH 13, 2012

Date: _____

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11. MODIFICATION

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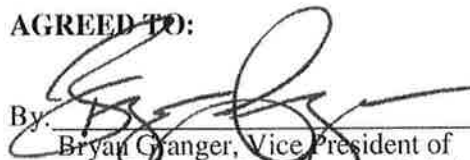
12. AUTHORIZATION

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

AGREED TO:

By: _____
JOHN MOORE

AGREED TO:

By:  _____
Bryan Granger, Vice President of
Compliance & Government Relations,
C & S WHOLESALE GROCERS, INC.

Date: _____

Date: 3/16/12 _____