

1 Stephen S. Sayad, State Bar No. 104866  
Laralei S. Paras, Sate Bar No. 203319  
2 THE CHANLER GROUP  
81 Throckmorton Ave, Suite 203  
3 Mill Valley, CA 94941  
Telephone: (415) 388-1128  
4 Facsimile: (415) 388-1135

5 Attorneys for Plaintiff  
JOHN MOORE

6 **BUCHALTER NEMER**  
A Professional Corporation  
7 RUSSELL L. ALLYN (SBN: 143531)  
8 SARAH A. SYED (SBN: 253534)  
1000 Wilshire Boulevard, Suite 1500  
9 Los Angeles, CA 90017-2457  
Telephone: (213) 891-0700  
10 Facsimile: (213) 896-0400

11 Attorneys for Defendant  
BABY ASPEN, INC. d/b/a THE  
12 ASPEN BRANDS COMPANY

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  
22 THE ASPEN BRANDS COMPANY, *et al.*,

23 Defendants.  
24  
25  
26  
27  
28

Case No. CGC-11-513305

**[PROPOSED] CONSENT JUDGMENT  
AS TO BABY ASPEN, INC. DBA THE  
ASPEN BRANDS COMPANY**

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

1     **1. INTRODUCTION**

2             **1.1 Parties**

3             This Consent Judgment is entered into by and between plaintiff, John Moore (“Moore” or  
4     “Plaintiff”), and defendant, Baby Aspen, Inc. dba The Aspen Brands Company (“Aspen” or  
5     “Defendant”), with Moore and Aspen 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 to improve human health by reducing or eliminating hazardous substances  
9     contained in consumer products.

10            **1.3 Defendant**

11            Aspen 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 Aspen sold luggage tags containing di(2-ethylhexyl)phthalate (“DEHP”)  
16     without first providing the clear and reasonable warning required by Proposition 65. DEHP is listed  
17     pursuant to Proposition 65 as a chemical known to the state of California to cause birth defects or  
18     other reproductive harm.

19            **1.5 Product Description**

20            The products covered by this Consent Judgment are luggage tags manufactured, distributed,  
21     sold, or offered for sale in California by Aspen, including, but not limited to, the *Kate Aspen Luggage*  
22     *Tag Air Plane* (#8 43905 06858 0). All such items are referred to collectively as the “Products.”

23            **1.6 Notice of Violation**

24            On or about May 11, 2011, Moore served Aspen and various public enforcement agencies  
25     with a “60-Day Notice of Violation” (“Notice”), a document that informed Aspen and the public  
26     enforcers of Moore’s allegation that Aspen was in violation of Proposition 65 for failing to warn its  
27     customers and consumers in California that the Products expose users to DEHP.

28     ///

1           **1.7 Complaint**

2           On August 30, 2011, Moore filed the instant action against Aspen (“Complaint”) for the  
3 violations of Health & Safety Code § 25249.6 alleged in the Notice.

4           **1.8 No Admission**

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

13           **1.9 Consent to Jurisdiction**

14           For purposes of this Consent Judgment only, the Parties stipulate that this Court has  
15 jurisdiction over Aspen as to the allegations in the Complaint, that venue is proper in the City and  
16 County of San Francisco, and that this Court has jurisdiction to enter and enforce the provisions of  
17 this Consent Judgment.

18           **1.10 Execution Date**

19           For purposes of this Consent Judgment, the term “Execution Date” shall mean the date this  
20 Consent Judgment is signed by both parties.

21           **1.11 Effective Date**

22           For purposes of this Consent Judgment, the term “Effective Date” shall mean the date this  
23 Consent Judgment is entered by the Court.

24           **2. INJUNCTIVE RELIEF: REFORMULATION**

25           Beginning on the Effective Date and continuing thereafter, Aspen shall not import, ship, sell,  
26 or offer to ship for sale in California, any Product that contains more than 1000 parts per million of  
27 DEHP in any accessible component (i.e., any component that may be touched or handled by a user  
28 during reasonably foreseeable use) analyzed pursuant to Environmental Protection Agency testing

1 methodologies 3580A and 8270C or equivalent methodologies used by federal or state agencies for  
2 the purpose of determining DEHP content in a solid substance.

3 **3. MONETARY PAYMENTS**

4 **3.1 Civil Penalty Payment Pursuant to Health & Safety Code § 25249.7(b)**

5 Pursuant to Health & Safety Code § 25249.7(b) Aspen shall pay a civil penalty of \$7,500.

6 The penalty amount reflects a credit of \$12,000 agreed to by Moore in response to Aspen's  
7 commitment to Proposition 65 compliance, including offering only Products reformulated to comply  
8 with the DEHP content standard established by section 2 hereinabove.

9 The penalty shall be allocated according to Health & Safety Code § 25249.12 (c)(1) & (d),  
10 with seventy-five percent (75%) of the penalty payment earmarked for the California Office of  
11 Environmental Health Hazard Assessment ("OEHHA") and the remaining twenty-five (25%) of the  
12 penalty payment earmarked for Moore. Payment shall be delivered to Aspen's counsel within five  
13 days of the Execution Date.

14 **3.2 Reimbursement of Plaintiff's Fees and Costs**

15 The Parties acknowledge that Moore and his counsel offered to resolve this dispute without  
16 reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving the issue to  
17 be resolved after the material terms of the agreement had been settled. Shortly after all other  
18 settlement terms had been finalized, Aspen expressed a desire to resolve the issue. The Parties then  
19 attempted to (and did) reach an accord on the compensation due Moore and his counsel under general  
20 contract principles and the private attorney general doctrine codified at California Code of Civil  
21 Procedure § 1021.5 for all work performed in this matter exclusive of fees and costs that may be  
22 incurred on appeal, if any. Under these legal principles, Aspen shall pay \$35,000 for fees and costs  
23 incurred investigating, litigating, and enforcing this matter, including the fees and costs incurred (and  
24 to be incurred) negotiating a settlement, drafting the motion for judicial, and moving the Court for,  
25 and obtaining its approval of, this Consent Judgment in the public interest.

26 **3.3 Payment Procedures**

27 **3.3.1 Payments Held in Trust**

28 All payments made under section 3.1 of this Consent Judgment shall be held in trust

1 by Buchalter Nemer, counsel for Aspen, until the Court approves the Consent Judgment. The  
2 settlement funds shall be made payable by checks, as follows:

- 3 (a) One check made payable to “Buchalter Nemer in Trust for OEHHA”  
4 in an amount equal to \$5,625.00;
- 5 (b) One check made payable to “Buchalter Nemer in Trust for John  
6 Moore” in an amount equal to \$1,875.00.

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

- 11 (a) One check made payable to “The Chanler Group in Trust for  
12 OEHHA” in an amount equal to \$5,626.00;
- 13 (b) One check made payable to “The Chanler Group in Trust for John  
14 Moore” in an amount equal to \$1,875.00

### 15 **3.3.2 Payment Schedule**

16 All payments made under section 3.2 of this Consent Judgment shall be delivered and made  
17 payable to “The Chanler Group” in three installments at the Payment Address provided in section  
18 3.3.4, pursuant to the following schedule:

- 19 (a) \$15,000 shall be due on September 1, 2012;
- 20 (b) \$10,000 shall be due on November 1, 2012; and
- 21 (c) \$10,000 shall be due on January 1, 2013.

### 22 **3.3.3 Issuance of 1099 Forms**

23 After the Consent Judgment has been approved and all payments have been made  
24 pursuant to section 3.3.1 and 3.3.2, Aspen shall issue three 1099 forms for the payments made  
25 pursuant Sections 3.1 and 3.2, as follows:

- 26 (a) one 1099 form to “Office of Environmental Health Hazard Assessment”, P.O.  
27 Box 4010, Sacramento, CA 95814 (EIN: 68-0284486) for civil penalties paid in the  
28 amount of \$5,625;

1 (b) a second 1099 form to “John Moore”, whose address and tax identification  
2 number shall be furnished upon request after the Execution Date, for civil penalties  
3 paid in the amount of \$1,875;

4 and

5 (c) a third 1099 form to “The Chanler Group” (EIN: 94-3171522) for the  
6 reimbursement of Moore’s fees and costs in the amount of \$35,000.

7 **3.3.4 Payment Address**

8 All payments and tax forms required by Sections 3.1, 3.2, 3.3.2 and 3.3.3 of this  
9 Consent Judgment shall be delivered to Moore’s counsel at the following address:

10 The Chanler Group  
11 Attn: Proposition 65 Controller  
12 2560 Ninth Street  
13 Parker Plaza, Suite 214  
14 Berkeley, CA 94710

13 **4. CLAIMS COVERED AND RELEASED**

14 **4.1 Moore’s Public Release of Proposition 65 Claims**

15 Moore acting on his own behalf and in the public interest releases Aspen its parents,  
16 subsidiaries, affiliated entities, including Kate Aspen, Inc., that are under common ownership,  
17 directors, officers, employees and attorneys (“Defendant Releasees”) and each entity to whom  
18 Aspen directly distributes or sells the Products, including, but not limited to, downstream  
19 distributors, wholesalers, customers, retailers, franchisees, cooperative members, and licensees  
20 (“Downstream Releasees”), from all claims for violations of Proposition 65 up through the  
21 Effective Date based on exposures to DEHP from the Products as set forth in the Notice.  
22 Compliance with the terms of this Consent Judgment constitutes compliance with Proposition 65  
23 with respect to exposures to DEHP from the Products as set forth in the Notice.

24 **4.2 Moore’s Individual Release of Claims**

25 Moore, in his individual capacity only and *not* in his representative capacity, also provides a  
26 release herein which shall be effective as a full and final accord and satisfaction, as a bar to all  
27 actions, causes of action, obligations, costs, expenses, attorneys’ fees, damages, losses, claims,  
28 liabilities and demands of plaintiff of any nature, character or kind, whether known or unknown,

1 suspected or unsuspected, against Aspen, each of its Defendant Releasees and each of its  
2 Downstream Releasees, limited to and arising out of alleged or actual exposures to DEHP in the  
3 Products manufactured, distributed or sold by Aspen and its Releasees, including but not limited to,  
4 Kate Aspen, Inc.

#### 5 **4.3 Aspen's Release of Moore**

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

#### 12 **5. COURT APPROVAL**

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

#### 19 **6. SEVERABILITY**

20 If, subsequent to the execution of this Consent Judgment, any provision is held by a court to  
21 be unenforceable, the validity of the remaining provisions shall not be adversely affected.

#### 22 **7. GOVERNING LAW**

23 The terms of this Consent Judgment shall be governed by the laws of the state of California  
24 and apply within the state of California. In the event that Proposition 65 is repealed, preempted, or is  
25 otherwise rendered inapplicable by reason of law generally, or as to the Products, then Aspen may  
26 provide written notice to Moore of any asserted change in the law, and shall have no further  
27 obligations pursuant to this Consent Judgment with respect to, and to the extent that, the Products are  
28

1 so affected. Nothing in this Consent Judgment shall be interpreted to relieve Aspen from any  
2 obligation to comply with any pertinent state or federal toxics control laws.

3 **8. NOTICES**

4 Unless specified herein, all correspondence and notices required to be provided pursuant to  
5 this Consent Judgment shall be in writing and sent by: (i) personal delivery; (ii) first-class, registered  
6 or certified mail, return receipt requested; or (iii) a recognized overnight courier to one party by the  
7 other at the following addresses:

8 For Aspen:

9 Jennifer Fallon, C.E.O.  
10 Baby Aspen, Inc.  
2400 Chattahoochee Drive  
11 Duluth, GA 30097

12 with a copy to:

13 Russell L. Allyn, Esq.  
Sarah A. Syed, Esq.  
14 Buchalter Nemer  
A Professional Corporation  
1000 Wilshire Boulevard, Suite 1500  
15 Los Angeles, CA 90017-2457

16 For Moore:

17 Proposition 65 Coordinator  
18 The Chanler Group  
2560 Ninth Street  
19 Parker Plaza, Suite 214  
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, when  
25 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 Health  
28 & Safety Code § 25249.7(f). The Parties further acknowledge that, pursuant to California Health &



1 Safety Code § 25249.7(f)(4), a noticed motion is required to obtain judicial approval of this Consent  
2 Judgment. In furtherance of obtaining such approval, Moore and Aspen and their respective counsel  
3 agree to mutually employ their best efforts to support the entry of this agreement as a Consent  
4 Judgment and to obtain judicial approval of the same in a timely manner. For purposes of this  
5 section, "best efforts" shall include, at a minimum, cooperating on the drafting and filing of any  
6 papers in support of the required motion for judicial approval.

7 **11. MODIFICATION**

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

11 **12. ENTIRE AGREEMENT**

12 This Consent Judgment contains the sole and entire agreement and understanding of the  
13 Parties with respect to the entire subject matter hereof, and any and all prior discussions, negotiations,  
14 commitments, and understandings related hereto. No representations, oral or otherwise, express or  
15 implied, other than those contained herein have been made by any Party hereto. No other agreements  
16 not specifically referred to herein, oral or otherwise, shall be deemed to exist or to bind any of the  
17 Parties. This Consent Judgment may be modified only by stipulation of the Parties and an order of  
18 the Court or upon a motion by any Party that is granted by the Court.

19 **13. AUTHORIZATION**

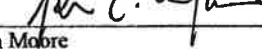
20 The undersigned are authorized to execute this Consent Judgment and have read, understood,  
21 and agree to all of the terms and conditions contained herein.

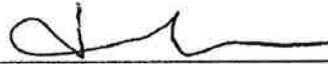
22 **AGREED TO:**

**AGREED TO:**

23  
24 Date: July 5, 2012

Date: 6-29-12

25  
26 By:   
John Moore

25  
26 By:   
Jennifer Fallon, Chief Executive Officer  
Baby Aspen, Inc. dba The Aspen Brands  
Company

27  
28 BN 11748394v1