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Attorneys for Plaintiff
JOHN MOORE

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ALAMEDA
UNLIMITED CIVIL JURISDICTION

JOHN MOORE,
Plaintiff,
v.

M-D BUILDING PRODUCTS, INC.; and
DOES 1-150, inclusive,
Defendants.

Case No. RG 11597931

[PROPOSED] CONSENT JUDGMENT

(Cal. Health & Saf. Code § 25249.6 et seq.)

1 **1. INTRODUCTION**

2 **1.1 John Moore and M-D Building Products, Inc.**

3 This Consent Judgment is entered into by and between John Moore ("Moore") and M-D
4 Building Products, Inc. ("M-D"), with Moore and M-D 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 Moore alleges that M-D employs ten or more persons and is a person in the course of doing
11 business for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, Health &
12 Safety Code section 25249.6 *et seq.* ("Proposition 65").

13 **1.4 General Allegations**

14 Moore alleges that M-D has manufactured, distributed, and/or offered for sale in California
15 vinyl stair treads containing di(2-ethylhexyl)phthalate ("DEHP") and hand tools with grips
16 containing lead without the requisite Proposition 65 warnings. DEHP and lead are listed pursuant
17 to Proposition 65 as chemicals known to the State of California to cause birth defects and other
18 reproductive harm.

19 **1.5 Product Description**

20 The products that are covered by this Consent Judgment are vinyl stair treads containing
21 DEHP including, but not limited to, the *Stair Tread 24"* (#0 43374 75556 5) ("Tread Products"),
22 and the *Precision Components 4" Adjustable Floor & Wall Scraper*, #172270 (#0 43374 49801 1)
23 (the "Grip Product"), distributed or sold by M-D, directly or through others, to consumers in
24 California (collectively, "Products").

25 **1.6 Notices of Violation**

26 On or about July 20, 2011, Moore served M-D and various California public enforcement
27 agencies with a document entitled 60-Day Notice of Violation ("Notice") alleging that M-D was in
28 violation of Proposition 65 for failing to warn its customers and consumers in California that its

1 Tread Products expose users in California to DEHP. On or about April 25, 2012, Moore sent a
2 Supplemental 60-Day Notice of Violation ("Supplemental Notice") to M-D, and the same public
3 enforcement agencies as before, alleging that M-D is in violation of Proposition 65 for failing to
4 warn its customers and consumers in California that the Tread Products expose users to DEHP and
5 the Grip Product exposes users to lead. The Notice and Supplemental Notice shall be referred to
6 collectively as the "Notices."

7 **1.7 Complaint**

8 On September 30, 2011, Moore filed a complaint in Alameda County Superior Court against
9 M-D and Does 1 through 150 (the "Complaint" or "Action"), alleging violations of Proposition 65,
10 based on the alleged exposures to DEHP contained in Tread Products distributed or sold by M-D.
11 The sixty-day notice period for Plaintiff's Supplemental Notice expired on or about July 5, 2012.
12 Upon entry of this Consent Judgment, the Complaint shall be deemed amended *nunc pro tunc* to
13 include the Grip Product containing lead sold or distributed by Defendant in California as alleged in
14 the Supplemental Notice, provided that no Public Enforcer has diligently prosecuted any of the
15 allegations set forth in the Supplemental Notice.

16 **1.8 No Admission**

17 M-D denies the material factual and legal allegations contained in the Notices and
18 Complaint and maintains that all products that it has sold or distributed in California, including the
19 Products, have been, and are, in compliance with all laws. Nothing in this Consent Judgment shall
20 be construed as an admission by M-D of any fact, finding, conclusion of law, issue of law, or
21 violation of law, nor shall compliance with this Consent Judgment constitute or be construed as an
22 admission by M-D of any fact, finding, conclusion of law, issue of law, or violation of law, such
23 being specifically denied by M-D. However, this Section shall not diminish or otherwise affect
24 M-D's obligations, responsibilities, and duties under this Consent Judgment.

25 **1.9 Consent to Jurisdiction**

26 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
27 jurisdiction over M-D as to the allegations contained in the Complaint, that venue is proper in
28 Alameda County, and that this Court has jurisdiction to enter and enforce the provisions of this

1 Consent Judgment, pursuant to California Code of Civil Procedure section 664.6, as a full and
2 binding resolution of all claims that were or could have been raised in the Complaint against M-D
3 based on the facts alleged therein and in the Notices.

4 **1.10 Effective Date**

5 For purposes of this Consent Judgment, the term "Effective Date" shall mean the date this
6 judgment is entered by the Court.

7 **2. INJUNCTIVE RELIEF: REFORMULATION**

8 **2.1 Reformulation**

9 As of June 15, 2012, M-D has not and shall not purchase, manufacture, or cause to be
10 manufactured any Product that will be sold or offered for sale to California consumers unless each
11 accessible component (i.e., any component that can be touched, handled, or mouthed by a person
12 during reasonably foreseeable use) contains DEHP in concentration less than 1,000 parts per million
13 when analyzed pursuant to U.S. Environmental Protection Agency sample preparation and test
14 methodologies 3580A and 8270C ("DEHP Standard") or other equivalent test used by the EPA,
15 U.S. Consumer Product Safety Commission, or other federal or state regulatory agency for the
16 purpose of determining DEHP content in a solid substance, and lead in concentration less than 100
17 parts per million when analyzed pursuant to EPA testing methodologies 3050B and/or 6010B
18 ("Lead Standard");

19 **2.2 Vendor Notification**

20 On or before September 14, 2012, M-D shall provide the Phthalate Standard and Lead
21 Standard to its then-current Vendors ("Vendor" means any person or entity that manufactures,
22 imports, distributes, or otherwise supplies any Products to M-D) of Products that will be sold or
23 offered for sale to consumers or businesses in the United States or its territories and shall instruct
24 each Vendor to use reasonable efforts to comply with such standards expeditiously. M-D shall not
25 in any way encourage any Vendor to delay compliance with these standards. Upon Moore's
26 request, within 30 days of each such request, M-D shall provide Moore by mail with copies of each
27 such Vendor notification and any responses from any Vendor. Moore shall regard such copies as
28 confidential business information.

1 **3. MONETARY PAYMENTS**

2 All payments made under this Consent Judgment shall be held in trust by the Chanler Group
3 until the Court approves the Consent Judgment. All payments transmitted to the Chanler Group
4 shall be delivered to the following address ("Payment Address"):

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

10 In the alternative, payments may be made by wire transfer, instructions for which will be
11 provided upon request.

12 **3.1 Penalties**

13 Payments of all penalties by M-D under this Agreement shall be apportioned in accordance
14 with Health & Safety Code section 25249.12, subdivisions (c)(1) and (d). In each instance,
15 payments equal to 75% of the civil penalty shall be earmarked for the State of California's Office of
16 Environmental Health Hazard Assessment ("OEHHA") made payable to "The Chanler Group in
17 Trust for OEHHA," and the remaining 25% of the penalty monies shall be earmarked for Moore
18 made payable to "The Chanler Group in Trust for John Moore."

19 Upon payment of each penalty, M-D shall issue two 1099 forms, one to the Office of
20 Environmental Health Hazard Assessment, P.O. Box 4010, Sacramento, CA 95814 (EIN: 68-
21 0284486) for the civil penalties payable to OEHHA, and a second to Moore, whose address and tax
22 identification number shall be furnished upon request, for the civil penalties payable to Moore.

23 **(a) Initial Civil Penalty**

24 On or before the Effective Date M-D shall pay a penalty of \$6,000.

25 **(b) Second Civil Penalty**

26 M-D shall pay a second civil penalty of \$43,000 on or before October 1, 2012. The second
27 civil penalty shall be waived in its entirety if an officer or director of M-D certifies, in writing, that,
28 as of October 1, 2012, the Grip Product and all of the Tread Products that M-D distributes, ships,
sells, or offers to ship for sale in the United States and its territories comply with the Lead Standard
and the DEHP Standard. Such certification must be received by The Chanler Group on or before

1 October 1, 2012.

2 **3.2 Reimbursement of Plaintiff's Fees and Costs**

3 The Parties have reached an accord on the compensation to be paid to Moore and his counsel,
4 which the parties agree is appropriate under general contract principles and the private attorney
5 general doctrine codified at California Code of Civil Procedure section 1021.5, for all work
6 performed in this matter, except fees that may be incurred in the event of an appeal. M-D shall pay
7 \$43,000, on or before the Effective Date, for fees and costs incurred investigating, litigating and
8 enforcing this matter, including the fees and costs incurred (and yet to be incurred) negotiating,
9 drafting, and obtaining the Court's approval of this Consent Judgment in the public interest.

10 Payments of all fees and costs by M-D under this Agreement shall be by check or wire transfer
11 to "The Chanler Group in Trust." Upon payment of fees and costs, M-D shall issue a 1099 form to
12 The Chanler Group (EIN: 94-3171522) for the amount of \$43,000.

13 **4. CLAIMS COVERED AND RELEASED**

14 **4.1 Plaintiff's Public Release of Proposition 65 Claims**

15 Moore acting on his own behalf and in the public interest releases M-D from all claims for
16 violations of Proposition 65 up through the Effective Date based on exposure to DEHP from the
17 Tread Products and lead from the Grip Product. Compliance with the terms of this Consent
18 Judgment constitutes compliance with Proposition 65 with respect to exposures to DEHP from
19 Tread Products and exposures to lead from the Grip Product.

20 **4.2 Plaintiff'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 DEHP from
26 the Tread Products distributed or sold by M-D and exposures to lead from the Grip Product
27 distributed or sold by M-D.

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1 **4.3 Defendant's Release of Plaintiff**

2 M-D 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, in which event any monies that have been provided to
12 Moore or his counsel pursuant to Section 3 above shall be refunded within fifteen (15) days after
13 receiving written notice from M-D that the one-year period has expired.

14 **6. SEVERABILITY**

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

18 **7. GOVERNING LAW**

19 The terms of this Consent Judgment shall be governed by the laws of the State of California
20 and apply within the State of California.

21 **8. NOTICES**

22 Unless specified herein, all correspondence and notices required to be provided pursuant to
23 this Consent Judgment shall be in writing and sent by (i) personal delivery, (ii) first-class, registered
24 or certified mail, return receipt requested, or (iii) overnight courier on any party by the other party at
25 the following addresses:

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1 For M-D:

2 William F. Tarantino, Esq.
3 Morrison & Foerster LLP
4 425 Market Street
5 San Francisco, CA 94105-2482

6 For Moore:

7 Proposition 65 Coordinator
8 The Chanler Group
9 2560 Ninth Street
10 Parker Plaza, Suite 214
11 Berkeley, CA 94710

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

14 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

15 This Consent Judgment may be executed in counterparts and by facsimile or .pdf signature,
16 each of which shall be deemed an original, and all of which, when taken together, shall constitute
17 one and the same document.

18 **10. POST EXECUTION ACTIVITIES**

19 Moore agrees to comply with the reporting form requirements referenced in California
20 Health & Safety Code section 25249.7, subsection (f). In addition, the Parties acknowledge that,
21 pursuant to California Health & Safety Code section 25249.7, a noticed motion is required to obtain
22 judicial approval of this Consent Judgment. In furtherance of obtaining such approval, Moore and
23 M-D and their respective counsel agree to mutually employ their best efforts to support the entry of
24 this agreement as a Consent Judgment and obtain approval of the Consent Judgment by the Court in
25 a timely manner. For purposes of this section, best efforts shall include, at a minimum, cooperating
26 on the drafting and filing of any papers in support of the required motion for judicial approval.

27 **11. MODIFICATION**

28 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.

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1 **12. AUTHORIZATION**

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

4 AGREED TO:

AGREED TO:

5 JOHN MOORE

M-D BUILDING PRODUCTS, INC.

6
7 By: 
8 JOHN MOORE

By: _____

9 Date: August 28, 2012

Date:

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4 AGREED TO:

5 JOHN MOORE

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7 By: _____
8 JOHN MOORE

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9 Date:

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AGREED TO:

M-D BUILDING PRODUCTS, INC.

By: _____
LARRY SANFORD

Date: August 16, 2012