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6 JOHN MOORE

7 SUPERIOR COURT OF THE STATE OF CALIFORNIA
8 COUNTY OF ALAMEDA
9 UNLIMITED CIVIL JURISDICTION
10

11 JOHN MOORE,

12 Plaintiff,

13 v.

14 FISKARS BRANDS, INC.; and DOES 1-150,
15 inclusive,

16 Defendants.

Case No. HG12644848

[PROPOSED] CONSENT JUDGMENT

1 **1. INTRODUCTION**

2 **1.1 John Moore and Fiskars Brands, Inc.**

3 This Consent Judgment is entered into by and between plaintiff John Moore (“Moore” or
4 “Plaintiff”) and defendant Fiskars Brands, Inc. (“Fiskars” or “Defendant”), with Plaintiff and
5 Defendant collectively referred to as the “Parties” and each individually referred to as a “Party.”

6 **1.2 Plaintiff**

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

10 **1.3 Defendant**

11 Fiskars 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 &
13 Safety Code § 25249.6 *et seq.* (“Proposition 65”).

14 **1.4 General Allegations**

15 Moore alleges that Fiskars manufactured, imported, distributed, sold and/or offered for
16 sale tools with grips containing di(2-ethylhexyl)phthalate (“DEHP”) in the State of California
17 without the requisite Proposition 65 health hazard warnings. DEHP is listed pursuant to
18 Proposition 65 as known to the state of California to cause birth defects and other reproductive
19 harm.

20 **1.5 Product Description**

21 The products that are covered by this Consent Judgment are defined as tools with grips
22 containing DEHP including, but not limited to, *Craftsman Grass Shears, No. 71.85258 (#0*
23 *46561 27820 5)*, which Fiskars manufactured, imported, distributed, sold and/or offered for sale
24 in the State of California, hereinafter referred to as the “Noticed Products.” In addition to the
25 above, this Consent Judgment also covers the *Fiskars 7-Piece Ultra ShapeXpress Starter Set,*
26 *#148020-1001 (#0 78484 04802 3)* and the *Fiskars Zig Zag Tear Edger, #12-9186, #04-004821-*
27 *A (#0 78484 09186 9)* which contain DEHP and which Fiskars manufactured, imported,
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1 distributed, sold and/or offered for sale in the State of California, hereinafter referred to as the
2 “Additional Products.” Noticed Products and Additional Products are hereinafter referred to as
3 the “Products.”

4 **1.6 Notice of Violation**

5 On October 28, 2011, Moore served Fiskars and various public enforcement agencies
6 with a document entitled “60-Day Notice of Violation” (“Notice”) that provided the recipients
7 with notice of alleged violations of Proposition 65 for failing to warn consumers that the
8 Noticed Products exposed users in California to DEHP. To the best of the Parties’ knowledge,
9 no public enforcer has commenced and is diligently prosecuting the allegations set forth in the
10 Notice.

11 **1.7 Complaint**

12 On or about August 23, 2012, Moore, who was and is acting in the interest of the general
13 public in California, filed a complaint (“Complaint” or “Action”) in the Superior Court in and
14 for the County of Alameda against Fiskars and Does 1 through 150, alleging, *inter alia*, for
15 violations of Proposition 65 based on the alleged exposures to DEHP contained in the Noticed
16 Products.

17 **1.8 No Admission**

18 Fiskars denies the material factual and legal allegations contained in Moore's Notice and
19 Complaint and maintains that all Products sold and distributed in California have been and are
20 in compliance with all laws. Nothing in this Consent Judgment shall be construed as an
21 admission by Fiskars of any fact, finding, issue of law, or violation of law; nor shall compliance
22 with this Consent Judgment constitute or be construed as an admission by Fiskars of any fact,
23 finding, issue of law, or violation of law, such being specifically denied by Fiskars. However,
24 this section shall not diminish or otherwise affect Fiskars’ obligations, responsibilities, and
25 duties under this Consent Judgment.

1 **1.9 Consent to Jurisdiction**

2 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
3 jurisdiction over Fiskars as to the allegations contained in the Complaint, that venue is proper in
4 the County of Alameda, and that this Court has jurisdiction to enter and enforce the provisions
5 of this Consent Judgment.

6 **1.10 Effective Date**

7 For purposes of this Consent Judgment, the term “Effective Date” shall mean February
8 15, 2013.

9 **2. INJUNCTIVE RELIEF: REFORMULATION AND WARNINGS**

10 **2.1 Reformulation Standard and Obligation**

11 No more than 30 days after the Effective Date, Fiskars shall provide the reformulation
12 standards for DEHP in Reformulated Products to its then-current Vendors of the Products that
13 will be sold or offered for sale to California consumers and shall instruct each Vendor to use
14 reasonable efforts to provide Reformulated Products expeditiously. As used herein, the term
15 “Reformulated Products” shall mean Products containing less than 1,000 parts per million
16 (0.1%) of DEHP when analyzed pursuant to Environmental Protection Agency testing
17 methodologies 3580A and 8270C, CPSC-CH-C1001-09.3 Standard Operating Procedure for
18 Determination of Phthalates, or any method utilized by state or federal agencies for the purposes
19 of determining DEHP content in a solid substance. Additionally, as used herein the term
20 “Vendor” means a person or entity that manufactures, imports, distributes, or otherwise supplies
21 Products to Fiskars. In addressing the obligation set forth in this Section, Fiskars shall not
22 employ statements that will encourage a Vendor to delay compliance with the reformulation
23 standards. Upon request, Fiskars shall provide Plaintiff with copies of such Vendor notification
24 and Plaintiff shall regard such copies as confidential business information.

25 2.1.1 Commencing on July 1, 2013, Fiskars shall not purchase, manufacture or
26 cause to be manufactured any Product, that will be sold or offered for sale to California
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1 consumers unless it is a Reformulated Product, or, alternatively, unless the Product contains
2 clear and reasonable warnings as set forth herein.

3 2.1.2 Provided that Fiskars has complied with the Reformulation Obligation set
4 forth in Section 2.1 above, sales of Noticed Products that were purchased or manufactured
5 before July 1, 2013 shall not be separately actionable in another case brought pursuant to
6 Section 25249.7(d) of the Health & Safety Code alleging a failure to warn under Proposition 65
7 with respect to DEHP in the Noticed Products.

8 **2.2 Warnings Commitment**

9 Fiskars shall, for all Products, other than Reformulated Products, purchased,
10 manufactured, or caused to be manufactured after July 1, 2013, for distribution and sale in
11 California, provide clear and reasonable warnings as set forth in subsections 2.2(a) and (b).
12 Each warning shall be prominently placed with such conspicuousness as compared with other
13 words, statements, designs, or devices as to render it likely to be read and understood by an
14 ordinary individual under customary conditions before purchase or use. Each warning shall be
15 provided in a manner such that the consumer or user understands to which *specific* Product the
16 warning applies, so as to minimize the risk of consumer confusion.

17 **(a) Retail Store Sales.**

18 **(i) Product Labeling.** Fiskars shall affix a warning to the packaging,
19 labeling, or directly on each Product sold in retail outlets in California by Fiskars or any person
20 selling the Products, that states:

21 **WARNING:** This product contains DEHP, a phthalate
22 chemical known to the State of California to
cause birth defects and other reproductive harm.

23 **(ii) Point-of-Sale Warnings.** Alternatively, Fiskars may provide
24 warning signs in the form below to its customers in California with instructions to post the
25 warnings in close proximity to the point of display of the Products. Such instruction sent to
26 Fiskars' customers shall be sent by certified mail, return receipt requested.

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1 **WARNING:** This product contains DEHP, a phthalate
2 chemical known to the State of California to
 cause birth defects and other reproductive harm.

3 Where more than one Product is sold in proximity to other like items or to those that do
4 not require a warning (*e.g.*, Reformulated Products as defined in Section 2.1), the following
5 statement shall be used:¹

6 **WARNING:** The following products contain DEHP, a
7 phthalate chemical known to the State of
8 California to cause birth defects and other
 reproductive harm:

9 [*list products for which warning is required*]

10 **(b) Mail Order Catalog and Internet Sales.**

11 In the event that Fiskars sells Products via mail order catalog and/or the internet, to
12 customers located in California, after the Effective Date, that are not Reformulated Products,
13 Fiskars shall provide warnings for such Products sold via mail order catalog or the internet to
14 California residents. Warnings given in the mail order catalog or on the internet shall identify
15 the *specific* Product to which the warning applies as further specified in Sections 2.2(b)(i) and
16 (ii).

17 **(i) Mail Order Catalog Warning.** Any warning provided in a mail
18 order catalog shall be in the same type size or larger than the Product description text within the
19 catalog. The following warning shall be provided on the same page and in the same location as
20 the display and/or description of the Product:

21 **WARNING:** This product contains DEHP, a phthalate
22 chemical known to the State of California to
 cause birth defects and other reproductive harm.

23 Where it is impracticable to provide the warning on the same page and in the same
24 location as the display and/or description of the Product, Fiskars may utilize a designated
25 symbol to cross reference the applicable warning and shall define the term “designated symbol”

26 _____
27 ¹ For purposes of the Consent Judgment, “sold in proximity” shall mean that the Product and another similar
28 product are offered for sale close enough to each other that the consumer, under customary conditions of purchase,
could not reasonably determine which of the two products is subject to the warning sign.

1 with the following language on the inside of the front cover of the catalog or on the same page
2 as any order form for the Product(s):

3 **WARNING:** Certain products identified with this symbol ▼
4 and offered for sale in this catalog contain
5 DEHP, a phthalate chemical known to the State
6 of California to cause birth defects and other
7 reproductive harm.

8 The designated symbol must appear on the same page and in close proximity to the
9 display and/or description of the Product. On each page where the designated symbol appears,
10 Fiskars must provide a header or footer directing the consumer to the warning language and
11 definition of the designated symbol.

12 **(ii) Internet Website Warning.** A warning shall be given in
13 conjunction with the sale of the Products via the internet, which warning shall appear either: (a)
14 on the same web page on which a Product is displayed; (b) on the same web page as the order
15 form for a Product; (c) on the same page as the price for any Product; or (d) on one or more web
16 pages displayed to a purchaser during the checkout process. The following warning statement
17 shall be used and shall appear in any of the above instances adjacent to or immediately
18 following the display, description, or price of the Product for which it is given in the same type
19 size or larger than the Product description text:

20 **WARNING:** This product contains DEHP, a phthalate
21 chemical known to the State of California to
22 cause birth defects and other reproductive harm.

23 Alternatively, the designated symbol may appear adjacent to or immediately following
24 the display, description, or price of the Product for which a warning is being given, provided
25 that the following warning statement also appears elsewhere on the same web page, as follows:

26 **WARNING:** Products identified on this page with the
27 following symbol ▼ contain DEHP, a phthalate
28 chemical known to the State of California to
 cause birth defects and other reproductive harm.

1 **3. MONETARY PAYMENTS**

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

3 Fiskars shall pay an initial civil penalty in the amount of \$22,000 and which shall be
4 apportioned in accordance with California Health & Safety Code § 25249.12, subdivisions (c)(1)
5 and (d), with 75% of these funds remitted to the State of California’s Office of Environmental
6 Health Hazard Assessment (“OEHHA”) and the remaining 25% of the penalty remitted to
7 Moore.

8 **3.2 Payment in Lieu of Civil Penalty**

9 Fiskars shall pay the sum of \$8,000 to Silent Spring Institute (“Silent Spring”), a not-for-
10 profit institution, in lieu of further civil fines pursuant to Health & Safety Code § 25249.7(b),
11 and California Code of Regulations, Title 11, § 3202(b). Silent Spring will use such funds to
12 continue its work identifying the links between exposure to environmental chemicals, including
13 DEHP, and reproductive and developmental harm, as well as educating the public about such
14 potential exposures. Silent Spring will conduct exposure- and risk-based prioritization of
15 chemicals listed under Proposition 65, or chemicals OEHHA has identified as candidates for
16 listing, in order to identify exposures of potential public health significance. Silent Spring may
17 also use a portion of such funds to monitor compliance with the reformulation and warnings
18 requirements of this and other similar consent judgments addressing Proposition 65-listed
19 chemical exposures, as well as to conduct additional exposure measurements that evaluate the
20 levels of chemical exposures to users of products that contain phthalate chemicals and lead.

21 **3.3 Final Civil Penalty Pursuant to Health & Safety Code § 25249.7 (b)**

22 Fiskars shall pay a final civil penalty of \$60,000 on or before July 30, 2013, which shall
23 be apportioned in accordance with Health & Safety Code § 25249.12, subdivisions (c)(1) and
24 (d), with 75% of these funds earmarked for OEHHA and the remaining 25% of these penalty
25 monies earmarked for Moore. As incentive to reformulate the Products, however, the final civil
26 penalty identified in this Section shall be waived in its entirety if an Officer of Fiskars or its
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1 designee certifies in writing that as of July 15, 2013, and continuing on into the future, 75% or
2 more of the Noticed Products purchased, manufactured and/or imported by Fiskars for
3 distribution and sale in California are Reformulated Products pursuant to Section 2.1 above.
4 Such certification must be received by The Chanler Group on or before July 15, 2013.

5 **3.4 Payment Procedures**

6 Fiskars shall put the initial civil penalty payment amount and the payment in lieu amount
7 into escrow in Foley & Lardner LLP's client trust account on or before ten days after the
8 Effective Date, and written notice shall timely be provided by Foley & Lardner LLP to counsel
9 for Plaintiff that the funds have been received and have cleared. Within ten days of the hearing
10 approving this Consent Judgment by the Court, three separate checks shall be issued from the
11 escrow: (a) one check made payable to "The Chanler Group in Trust for OEHHA" in the amount
12 of \$16,500 representing 75% of the total initial penalty; (b) one check to "The Chanler Group in
13 Trust for John Moore" in the amount of \$5,500 representing 25% of the total initial penalty; and
14 (c) one check in the amount of \$8,000 made payable to "The Chanler Group in Trust for Silent
15 Spring Institute." Three separate 1099s shall be issued for the above payments as follows: (a)
16 OEHHA, P.O. Box 4010, Sacramento, CA, 95814 (EIN: 68-0284486); (b) John Moore, whose
17 information shall be provided by email or other means within five (5) calendar days of Fiskars'
18 execution and delivery of this Consent Judgment document to Moore's counsel; and (c) Silent
19 Spring Institute, 29 Crafts Street, Newton, Massachusetts 02458, whose information shall be
20 provided by email or other means within five (5) calendar days of final execution of this
21 agreement.

22 By no later than July 30, 2013, Fiskars, if required, shall also directly issue two separate
23 checks for the final civil penalty payment: (a) one check made payable to "The Chanler Group in
24 Trust for OEHHA" in the amount of \$45,000, representing 75% of the total final penalty; and (b)
25 one check to "The Chanler Group in Trust for John Moore" in the amount of \$15,000,
26 representing 25% of the total final penalty. Two corresponding separate 1099s shall also be
27 issued by Fiskars for the above payments.
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1 All payments due under this Consent Judgment shall be delivered to Moore’s counsel at
2 the following address:

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

8 **3.5 Reimbursement of Fees and Costs**

9 The Parties reached an accord on the compensation due to Moore and his counsel under
10 the private attorney general doctrine and principles of contract law. Under these legal principles,
11 Fiskars shall reimburse Moore’s counsel for fees and costs incurred as a result of investigating,
12 bringing this matter to their attention, and negotiating a settlement and obtaining approval and
13 entry of this Consent Judgment. Fiskars shall pay Moore and his counsel \$65,000 for all
14 attorneys’ fees, expert and investigation fees, and related costs, including the fees and costs
15 associated with negotiating, drafting, and implementing the provisions of this Consent Judgment
16 addressing the Products. Fiskars shall put the payment required by this paragraph into escrow in
17 Foley & Lardner LLP’s client trust account on or before ten days after the Effective Date, and
18 Foley & Lardner LLP shall provide timely written notice to counsel for Plaintiff that the funds
19 have been received and have cleared. Within ten days of the hearing approving this Consent
20 Judgment, the payment required by this paragraph shall be provided from escrow to “The
21 Chanler Group” and a separate 1099 shall be issued for The Chanler Group, 2560 Ninth Street,
22 Parker Plaza, Suite 214, Berkeley, California 94710 (EIN: 94-3171522). This payment shall be
23 delivered to Moore’s counsel at the address shown for payments above.

24 **4. CLAIMS COVERED AND RELEASED**

25 **4.1 Moore’s Public Release of Proposition 65 Claims**

26 In consideration of the promises and commitments herein contained, Moore on behalf of
27 himself and his past and current agents, representatives, attorneys, successors, and/or assignees,
28 and in the public interest, hereby waive and release Fiskars, all of its parents, subsidiaries,
affiliated entities that are under common ownership or control, directors, officers, employees,

1 and attorneys (“Releasees”) and each entity to whom they directly or indirectly distribute or sell
2 Noticed Products, including but not limited to Sears Holdings Corporation, Sears Brands
3 Management Corporation and all distributors, wholesalers, customers, retailers, franchisees,
4 cooperative members, licensors, and licensees (“Downstream Releasees”), from all claims for
5 violations of Proposition 65 based on exposure to DEHP from Noticed Products arising up
6 through the date on which the Court enters this Consent Judgment. This waiver and release is
7 limited to those claims that arise under Proposition 65 with respect to DEHP in the Noticed
8 Products associated with Fiskars, as such claims relate to the alleged failure to warn under
9 Health & Safety Code § 25249.6 and apply only as to Noticed Products. Compliance with the
10 terms of this Consent Judgment constitutes compliance with Proposition 65 with respect to
11 exposures to DEHP from the Noticed Products as set forth in the Notice.

12 **4.2 Moore’s Individual Release of Claims**

13 Moore also, in his individual capacity only and *not* in his representative capacity,
14 provides a release herein which shall be effective as a full and final accord and satisfaction, as a
15 bar to all actions, causes of action, obligations, costs, expenses, attorneys’ fees, damages, losses,
16 claims, liabilities and demands of plaintiff of any nature, character or kind, whether known or
17 unknown, suspected or unsuspected, limited to and arising out of alleged or actual exposures to
18 DEHP in the Products manufactured, imported, distributed, sold and/or offered for sale by
19 Fiskars.

20 **4.3 Fiskars’s Release of Moore**

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

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5. COURT APPROVAL

This Consent Judgment is not effective until it is approved and entered by the court and shall be null and void if, for any reason, it is not approved and entered by the court within one year after it has been fully executed by all Parties, in which event any monies that have been provided to Moore or his counsel pursuant to Section 3 above, shall be refunded within fifteen (15) days after receiving written notice from Fiskars that the one-year period has expired.

6. SEVERABILITY

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

7. GOVERNING LAW

The terms of this Consent Judgment shall be governed by the laws of the State of California and apply within the State of California. In the event that Proposition 65 is repealed or is otherwise rendered inapplicable by reason of law generally, or as to the Products, then Fiskars shall provide written notice to Moore of any asserted change in the law, and shall have no further obligations pursuant to this Consent Judgment with respect to, and to the extent that, the Products are so affected.

8. NOTICES

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

To Fiskars:	To Moore:
Attention:	Proposition 65 Coordinator
Legal Department	The Chanler Group
Fiskars Brands, Inc.	2560 Ninth Street
2537 Daniels Street	Parker Plaza, Suite 214
Madison, WI 53718	Berkeley, CA 94710

1 With a copy to:

2 Michael E. Delehunt, Esq.
3 Foley & Lardner LLP
4 555 California Street, Suite 1700
San Francisco, CA 94104

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

7 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

8 This Consent Judgment may be executed in counterparts and by facsimile or portable
9 document format (".pdf"), each of which shall be deemed an original, and all of which, when
10 taken together, shall constitute one and the same document. A facsimile or .pdf signature shall
11 be as valid as the original.

12 **10. COMPLIANCE WITH HEALTH & SAFETY CODE § 25249.7(f)**

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

15 **11. ADDITIONAL POST EXECUTION ACTIVITIES**

16 The Parties agree to mutually employ their, and their counsel's, reasonable best efforts to
17 support the entry of this agreement as a Consent Judgment and obtain approval of the Consent
18 Judgment by the Court in a timely manner. The Parties acknowledge that, pursuant to
19 California Health & Safety Code § 25249.7, a noticed motion is required to obtain judicial
20 approval of this Consent Judgment, which Moore shall file, and which Fiskars shall not oppose.
21 If any third party objection to the noticed motion is filed, Moore and Fiskars shall work together
22 to file a joint reply and appear at any hearing before the Court. If the Court does not approve
23 the motion to approve this Consent Judgment, and the Parties choose not to pursue a modified
24 Consent Judgment within 30 days of said denial, or in the event that the Court approve this
25 Consent Judgment and any person successfully appeals that approval, all payments made
26 pursuant to this Consent Judgment will be returned to Fiskars.

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12. MODIFICATION

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.

13. ENTIRE AGREEMENT

This Consent Judgment contains the sole and entire agreement and understanding of the Parties with respect to the entire subject matter hereof, and any and all prior discussions, negotiations, commitments, and understandings related hereto. No representations, oral or otherwise, express or implied, other than those contained herein have been made by any party hereto. No other agreements not specifically referred to herein, oral or otherwise, shall be deemed to exist or to bind any of the Parties.

14. AUTHORIZATION

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

AGREED TO:

AGREED TO:

Date: 2-20-13

Date: _____

By: 
John Moore

By: _____
Fiskars Brands, Inc.

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14. AUTHORIZATION

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

AGREED TO:

AGREED TO:

Date: _____

Date: February 15, 2013

By: _____
John Moore

By:  V.P.
Fiskars Brands, Inc.