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9 Attorneys for Plaintiff
10 JOHN MOORE

11 SUPERIOR COURT OF THE STATE OF CALIFORNIA
12 COUNTY OF ALAMEDA
13 UNLIMITED CIVIL JURISDICTION

14 JOHN MOORE,

15 Plaintiff,

16 v.

17 ETNA PRODUCTS CO., INC.; *et al.*

18 Defendants.

Case No. RG12643164

[PROPOSED] CONSENT JUDGMENT

(Health & Safety Code § 25249.6 et seq.)

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1 **1. INTRODUCTION**

2 **1.1 Parties**

3 This Consent Judgment is entered into by and between John Moore (“Moore”) and Etna
4 Products Co., Inc. (“Etna”), with Taylor Gifts, Inc. (“Taylor”) as an intended third party beneficiary.
5 Moore and Etna are each individually referred to as a “Party” and collectively 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 improve human health by reducing or eliminating hazardous substances
9 contained in consumer products.

10 **1.3 Defendant**

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

14 **1.4 General Allegations**

15 Moore alleges that Etna sold or distributed for sale in California, ottomans containing di(2-
16 ethylhexyl)phthalate (“DEHP”) without providing the clear and reasonable warning required by
17 Proposition 65. DEHP is listed pursuant to Proposition 65 as a chemical known to the state of
18 California to cause birth defects or other reproductive harm.

19 **1.5 Product Description**

20 The products that are covered by this Consent Judgment are ottomans containing DEHP that
21 are sold or distributed for sale in California by Etna, including, but not limited to, the *Storage*
22 *Ottoman with Snack Tray, Style #4187-AL, Item #26784A (#0 84358 04187 8)* (collectively
23 “Products”).

24 **1.6 Notice of Violation**

25 On or about January 19, 2012, Moore served Etna and certain requisite public enforcement
26 agencies with a “60-Day Notice of Violation” (“Notice”), a document alleging that Etna was in
27 violation of Proposition 65 for failing to warn its customers and consumers in California that the
28 Products expose users to DEHP.

1 **1.6 Complaint**

2 On August 10, 2012, Moore filed the instant action against Etna ("Complaint") for the alleged
3 violations of Health and Safety Code section 25249.6 that are the subject of the Notice.

4 **1.8 No Admission**

5 Etna denies the material, factual and legal allegations contained in the Notice and Complaint,
6 and it maintains that all of the products that it has sold and distributed in California, including the
7 Products, 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. This Section shall not, however,
11 diminish or otherwise affect Etna' obligations, responsibilities, and duties under this Consent
12 Judgment.

13 **1.9 Consent to Jurisdiction**

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

17 **1.10 Effective Date**

18 For purposes of this Consent Judgment, the term "Effective Date" shall mean December 21,
19 2012.

20 **2. INJUNCTIVE RELIEF: REFORMULATION**

21 Commencing on the August 1, 2013, and continuing thereafter, Etna shall only import for
22 sale, manufacture for sale, or distribute for sale in California, "Reformulated Products." For purposes
23 of this Consent Judgment, Reformulated Products contain a maximum of 1,000 parts per million
24 (0.1%) DEHP content in any accessible component (i.e., any component that may be touched or
25 handled during a reasonably foreseeable use) when analyzed pursuant to EPA testing methodologies
26 3580A and 8270C, or equivalent methodologies utilized by state or federal agencies for the purpose
27 of determining DEHP content in a solid substance.
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3. MONETARY PAYMENTS

3.1 Civil Penalty Payments

Pursuant to Health and Safety Code section 25249.7(b), Etna shall pay \$7,500 in civil penalties. Etna shall pay an initial civil penalty of \$2,500. On July 1, 2013, Etna shall pay a final civil penalty of \$5,000. The final civil penalty will be waived in its entirety, however, if no later than June 15, 2013, an officer of Etna certifies in writing to Moore's counsel that, as of the date of such certification, one hundred percent of Etna's Products purchased for sale or distributed for sale in California are Reformulated Products as defined by section 2 and that Etna will continue to only offer Reformulated Products in California in the future.

Each penalty payment shall be allocated according to Health and Safety Code section 25249.12 (c)(1) and (d), with seventy-five percent (75%) of the penalty amount earmarked for the California Office of Environmental Health Hazard Assessment ("OEHHA") and the remaining twenty-five (25%) of the penalty amount earmarked for Moore.

3.2 Reimbursement of Moore's Fees and Costs

The Parties acknowledge that Moore and his counsel offered to resolve this dispute without reaching terms on the amount of fees and costs to be reimbursed, thereby leaving the issue to be resolved after the material terms of the agreement had been settled. Shortly after all other settlement terms had been finalized, Etna expressed a desire to negotiate the reimbursement of Moore's fees and costs. The Parties then attempted to (and did) reach an accord on the compensation due Moore and his counsel under general contract principles and the private attorney general doctrine codified at Code of Civil Procedure section 1021.5 for all work performed in this matter exclusive of fees and costs incurred on appeal, if any. Under these legal principles, Etna shall pay \$24,500 for the fees and costs incurred investigating, litigating, and enforcing this matter, including the fees and costs incurred (and to be incurred) drafting, negotiating, and obtaining the Court's approval of this Consent Judgment in the public interest.

1 **3.3 Payment Procedures**

2 **3.3.1 Payments to Moore in Trust**

3 All payments made under this Consent Judgment shall be held in trust until the Court
4 approves the settlement. The Parties acknowledge that Moore's counsel gave Etna the option of
5 depositing the funds into its attorneys' trust account, but that Etna elected to have The Chanler
6 Group hold the settlement funds in trust until such time as the hearing of the motion for judicial
7 approval. Settlement funds shall be delivered according to the payment schedule set forth in section
8 3.3.2.

9 **3.3.2 Payment Schedule**

10 Etna represents that, as of the Effective Date, it lacks the financial capacity to satisfy
11 all of the monetary obligations provided by this Settlement Agreement, and must provide its
12 settlement payments in installments according to the following payment schedule. The Parties agree,
13 however, that in the event that Etna fails to make any payment required by this Consent Judgment, or
14 any payment is delayed by more than five days, all amounts owed will become due immediately.

15 (a) On or before January 15, 2012, Etna shall deliver two checks for the
16 following amounts made payable to:

17 (i) "The Chanler Group in Trust for OEHHA" in the amount of \$1,875;
18 and

19 (ii) "The Chanler Group in Trust for John Moore" in the amount of \$625.

20 (b) On or before February 15, 2013, Etna shall deliver a third check to "The
21 Chanler Group in Trust" in the amount of \$8,500; and

22 (c) on or before March 15, 2013, Etna shall deliver a fourth check to "The
23 Chanler Group in Trust" in the amount of \$ 8,000; and

24 (d) on or before April 15, 2013, Etna shall deliver a fifth check to "The Chanler
25 Group in Trust" in the amount of \$ 8,000.
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1 Proposition 65 with respect to exposures to DEHP from Products sold or distributed for sale in
2 California by Etna before the Effective Date as set forth in the Notice.

3 **4.2 Moore's Individual Release of Claims**

4 Moore, in his individual capacity only and *not* in his representative capacity, also provides a
5 release to Etna and each of its downstream distributors, wholesalers, licensees, auctioneers,
6 retailers, dealers, and customers, specifically including Taylor, which shall be effective as a full and
7 final accord and satisfaction, as a bar to all actions, causes of action, obligations, costs, expenses,
8 attorneys' fees, damages, losses, claims, liabilities and demands of Moore of any nature, character
9 or kind, whether known or unknown, suspected or unsuspected, arising out of alleged or actual
10 exposures to DEHP in Products sold or distributed for sale in California by Etna before the
11 Effective Date.

12 **4.3 Etna's Release of Moore**

13 Etna, on its own behalf, and on behalf of its past and current agents, representatives,
14 attorneys, successors, and/or assignees, hereby waives any and all claims against Moore and his
15 attorneys and other representatives, for any and all actions taken or statements made (or those that
16 could have been taken or made) by Moore and his attorneys and other representatives, whether in
17 the course of investigating claims, otherwise seeking to enforce Proposition 65 against it in this
18 matter, or with respect to the Products.

19 **5. COURT APPROVAL**

20 This Consent Judgment is not effective until it is approved and entered by the Court, and shall
21 be null and void if, for any reason, it is not approved and entered by the Court within one year after it
22 has been fully executed by the Parties.

23 **6. SEVERABILITY**

24 If, subsequent to the Court's approval of this Consent Judgment, any provision of this
25 Consent Judgment is held by a court to be unenforceable, the validity of the remaining provisions
26 shall not be adversely affected.
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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, preempted, or is otherwise rendered inapplicable by reason of law generally, or as to the Products, then Etna may 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. Nothing in this Consent Judgment shall be interpreted to relieve Etna from any obligation to comply with any pertinent state or federal toxics control laws.

8. **NOTICES**

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

For Etna:

Jeffrey Snyder, President
Etna Products Co., Inc.
53 West 23rd Street, 3rd Floor
New York, NY 10010

with copies to:

Mark L. Manewitz, Esq.
Manewitz & Studholme LLC
134 Nassau Street
Princeton, NJ 08542

and:

Todd O. Maiden, Esq.
Reed Smith LLP
101 Second Street, Suite 1800
San Francisco, CA 94105

For Moore:

Proposition 65 Coordinator
The Chanler Group
2560 Ninth Street
Parker Plaza, Suite 214
Berkeley, CA 94710-2565

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

3 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

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

7 **10. POST EXECUTION ACTIVITIES**

8 Moore agrees to comply with the reporting form requirements referenced in Health and Safety
9 Code section 25249.7(f). The Parties further acknowledge that, pursuant to Health and Safety Code
10 section 25249.7(f), a noticed motion ("Motion") is required to obtain judicial approval of this
11 Consent Judgment, which Etna shall draft and Moore and Etna shall jointly file. Etna shall provide
12 draft moving papers including, but not limited to, the notice of motion, memorandum of points
13 authorities, and necessary supporting papers to Moore's within 15 days of the date that this Consent
14 Judgment is fully executed by the parties. Moore's counsel will draft and finalize the supporting
15 declaration of counsel. Thereafter, within 15 days of receiving draft moving papers from Etna,
16 Moore's counsel agrees to file the Motion and all supporting papers with the Court. The Parties
17 further agree and understand that if any third party objection to the Motion is filed, they shall work
18 together to file a joint reply and appear at any hearing before the Court. This provision is a material
19 component of the Consent Judgment and shall be treated as such in the event of a breach.

20 **12. MODIFICATION**

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

24 **13. AUTHORIZATION**

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

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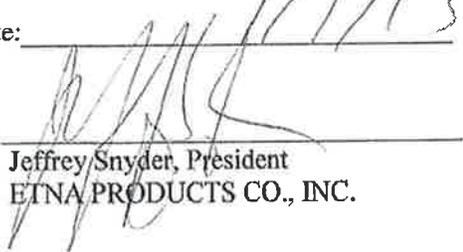
AGREED TO:

Date: JANUARY 10, 2013

By: 
JOHN MOORE

AGREED TO:

Date: 1/7/13

By: 
Jeffrey Snyder, President
ETNA PRODUCTS CO., INC.