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8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF ALAMEDA
10 UNLIMITED CIVIL JURISDICTION
11

12 JOHN MOORE,)	Case No. HG12-640488
)	
13 Plaintiff,)	Assigned For All Purposes To The
)	Honorable James R. Ritchie, Dept. E
14 v.)	
)	
15 WINSOME TRADING, INC.; and DOES 1-150,)	CONSENT JUDGMENT AS TO
16 inclusive,)	WINSOME TRADING, INC.
)	
17 Defendants.)	
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)	
18)	
19)	

1 **1. INTRODUCTION**

2 1.1 **John Moore and Winsome Trading, Inc.** This Consent Judgment is entered into
3 by and between plaintiff John Moore (“Moore” or “Plaintiff”) and defendant Winsome Trading,
4 Inc. (“Winsome Trading” or “Defendant”), with Moore and Winsome Trading collectively
5 referred to as the “Parties.”

6 1.2 **Plaintiff.** Moore is an individual residing in the State of California who seeks to
7 promote awareness of exposure to toxic chemicals and improve human health by reducing or
8 eliminating hazardous substances contained in consumer products.

9 1.3 **Defendant.** Winsome Trading employs ten or more persons and is a person in the
10 course of doing business for purposes of the Safe Drinking Water and Toxic Enforcement Act of
11 1986, California Health & Safety Code § 25249.5 et seq. (“Proposition 65”).

12 1.4 **General Allegations.** Moore alleges that Winsome Trading has manufactured,
13 distributed and/or sold stools with vinyl seats containing di(2-ethylhexyl)phthalate (“DEHP”) for
14 use in the State of California without the requisite health hazard warnings. DEHP is listed
15 pursuant to Proposition 65 as a chemical known to the State of California to cause birth defects
16 and other reproductive harm.

17 1.5 **Notice of Violation.** On May 10, 2012, Moore served Winsome Trading and
18 various public enforcement agencies with a document entitled “60-Day Notice of Violation,” that
19 alleged that Winsome Trading violated Proposition 65 by failing to warn consumers that stools
20 with vinyl seats including, but not limited to, the *Winsome Wood Bar Stool, 30”, #024450 (#0*
21 *2173 94030 8)*, exposed users in California to DEHP.

22 1.6 **Complaint.** On July 24, 2012, Moore filed a complaint in this action, naming
23 Winsome Trading as a defendant, alleging violations of Health & Safety Code § 25249.6 based
24 on the alleged exposures to DEHP contained in stools with vinyl seats manufactured, distributed,
25 and/or sold by Winsome Trading.

26 1.7 **No Admission.** The Parties enter into this Consent Judgment as a full and final
27 settlement of all claims that were raised in the Complaint or that could have been raised in the
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1 Complaint, arising out of the facts or conduct alleged therein. By execution of this Consent
2 Judgment and agreeing to comply with its terms, Winsome Trading does not admit any facts or
3 conclusions of law, including, but not limited to, any facts or conclusions of law suggesting or
4 demonstrating any violations of Proposition 65 or any other statutory, common law or equitable
5 requirements relating to DEHP in Covered Products as defined in Section 2.2. Nothing in this
6 Consent Judgment shall be construed as an admission by Winsome Trading of any fact,
7 conclusion of law, issue of law or violation of law, nor shall compliance with the Consent
8 Judgment constitute or be construed as an admission by Winsome Trading of any fact, conclusion
9 of law, issue of law, or violation of law.

10 Nothing in this Consent Judgment shall prejudice, waive or impair any right, remedy,
11 argument or defense Winsome Trading may have in this or any other or future legal proceedings.
12 This Consent Judgment is the product of negotiation and compromise and is accepted by
13 Winsome Trading for purposes of settling, compromising, and resolving issues disputed in this
14 action. However, this section shall not diminish or otherwise affect the obligations,
15 responsibilities and duties of Winsome Trading under this Consent Judgment.

16 1.8 **Consent to Jurisdiction.** For purposes of this Consent Judgment only, Winsome
17 Trading stipulates that this Court has jurisdiction over Winsome Trading as to the allegations
18 contained in the Complaint, that venue is proper in the County of Alameda and that this Court has
19 jurisdiction to enter and enforce the provisions of this Consent Judgment.

20 **2. DEFINITIONS**

21 2.1 “Accessible Component” means a vinyl component of a Covered Product that
22 could be touched by a person during normal, intended, and reasonably foreseeable use.

23 2.2 “Covered Products” means stools with vinyl seats manufactured, distributed and/or
24 sold by Winsome Trading.

25 2.3 “Effective Date” means the date this Consent Judgment is approved by the Court.
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1 **3. INJUNCTIVE RELIEF: REFORMULATION AND WARNINGS**

2 **3.1 Reformulated Products.** Commencing on the Effective Date, and continuing
3 thereafter, Winsome Trading shall not ship, sell or offer for sale in California any Covered
4 Product that is not a Reformulated Product, unless such Covered Product is sold with clear and
5 reasonable warnings pursuant to Section 3.3. For purposes of this Consent Judgment,
6 “Reformulated Products” are Covered Products that comply with the reformulation standards set
7 forth in Section 3.2.

8 **3.2 Reformulation Standards.** Reformulated Products shall mean Covered Products
9 with Accessible Components that contain DEHP in concentrations no greater than 1,000 parts per
10 million (0.1%) when analyzed pursuant to U.S. Environmental Protection Agency testing
11 methodologies 3580A and 8270C or any other methodology utilized by federal and state agencies
12 for the purpose of determining DEHP content in a solid substance.

13 **3.3 Clear and Reasonable Warnings.** For Covered Products that Winsome Trading
14 ships, sells or offers for sale in California that are not Reformulated Products, Winsome Trading
15 shall provide a clear and reasonable health hazard warning. Winsome Trading shall provide such
16 warning affixed to the packaging or labeling, or directly to the Covered Product with the
17 following statement:

18 **WARNING:** This product contains chemicals known to the State of
19 California to cause [cancer,] birth defects and other
20 reproductive harm.

21 The bracketed language is optional. The warning shall be prominently placed with such
22 conspicuousness as compared with other words, statements, designs, or devices as to render it
23 likely to be read and understood by an ordinary individual under customary conditions of
24 purchase or use.

25 **4. ENFORCEMENT OF CONSENT JUDGMENT**

26 **4.1 General Enforcement Provisions.** Any Party may, by motion, application, or any
27 other remedy afforded by law, enforce the terms and conditions contained in this Consent
28 Judgment. A Party may file such a motion or application only after that Party first provides 30

1 days' notice to the Party allegedly failing to comply with the terms and conditions of this Consent
2 Judgment and attempts to resolve such Party's failure to comply in an open and good faith
3 manner for a period of no less than 30 days. The Parties agree and understand that the 30-day
4 meet and confer resolution process provided by this Section shall not apply to a motion,
5 application or any other remedy afforded by law that is pursued in order to enforce the payment
6 terms of Section 5.

7 **5. MONETARY PAYMENTS**

8 5.1 **Initial Civil Payment.** Pursuant to Health & Safety Code §§ 25249.12(c)(1) and
9 (d), Winsome Trading shall pay an initial civil penalty in the amount of \$2,000 to be apportioned
10 in accordance with California Health & Safety Code § 25192, with 75% of these funds remitted to
11 the State of California's Office of Environmental Health Hazard Assessment ("OEHHA") and the
12 remaining 25% of the amount remitted to John Moore as provided by California Health & Safety
13 Code § 25249.12(d).

14 5.2 **Final Civil Penalty Payment; Waiver Upon Certification.** Pursuant to Health &
15 Safety Code §§ 25249.12(c)(1) and (d), Winsome Trading shall pay a final civil penalty in the
16 amount of \$4,000 on February 28, 2013. As an incentive to reformulate the Covered Products,
17 the final civil penalty shall be waived in its entirety if an officer of Winsome Trading certifies to
18 Moore's counsel in writing that Winsome Trading shall sell, ship and offer for sale in California
19 only Reformulated Products as of February 15, 2013. Such certification shall be received by The
20 Chanler Group on or before February 28, 2013.

21 5.3 **Reimbursement of Fees and Costs.** The Parties acknowledge that Moore and his
22 counsel offered to resolve this dispute without reaching terms on the amount of fees and costs to
23 be reimbursed to them, thereby leaving the issue to be resolved after the material terms of the
24 agreement had been settled. Shortly after all other settlement terms had been finalized, Winsome
25 Trading expressed a desire to resolve the issue. The Parties then attempted to (and did) reach an
26 accord on the compensation due Moore and his counsel under general contract principles and the
27 private attorney general doctrine codified at California Code of Civil Procedure § 1021.5 for all
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1 work performed in this matter exclusive of fees and costs that may be incurred on appeal, if any.
2 Under these legal principles, Moore shall pay \$33,000 for fees and costs incurred investigating,
3 litigating, and enforcing this matter, including the fees and costs incurred (and to be incurred)
4 negotiating a settlement, drafting the motion for judicial approval, and moving the Court for, and
5 obtaining its approval of, this Consent Judgment in the public interest.

6 **5.4 Payment Procedure.**

7 **5.4.1 Initial Civil Penalty and Reimbursement of Fees and Costs.** All
8 payments made under Sections 5.1 and 5.3 of this Consent Judgment shall be delivered within
9 five business days of the Effective Date (provided Plaintiff shall have provided Winsome Trading
10 with completed applicable Forms W-9), and in the form of three checks for the following
11 amounts, made payable to:

- 12 (a) "The Chanler Group in Trust for OEHHA" in the amount of
13 \$1,500;
- 14 (b) "The Chanler Group in Trust for John Moore" in the amount of
15 \$500; and
- 16 (c) "The Chanler Group" in the amount of \$33,000.

17 **5.4.2 Final Civil Penalty Payment.** Unless waived, the final civil penalty
18 payment shall be allocated according to Health & Safety Code § 25249.12(c)(1) and (d), with
19 seventy-five percent of the amount earmarked for OEHHA, and the remaining twenty-five
20 percent retained by Moore. On February 28, 2013, Winsome Trading shall deliver two checks for
21 the following amounts, made payable to:

- 22 (a) "The Chanler Group in Trust for OEHHA" in the amount of
23 \$3,000; and
- 24 (b) "The Chanler Group in Trust for John Moore" in the amount of
25 \$1,000.

26 **5.5 Payment Address.** All payments required by this Consent Judgment shall be
27 delivered to Moore's counsel at the following address:

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

6 **6. CLAIMS COVERED AND RELEASE**

7 6.1 **Moore’s Public Release of Proposition 65 Claims.** This Consent Judgment is a
8 full, final and binding resolution between Moore acting on his own behalf and in the public
9 interest and Winsome Trading and its shareholders, parents, subsidiaries, affiliated entities, sister
10 and related companies, directors, officers, shareholders, employees, attorneys, successors and
11 assigns (“Defendant Releasees”) and each entity to whom Defendant Releasees directly or
12 indirectly distribute or sell Covered Products, including but not limited to distributors,
13 wholesalers, customers, resellers, retailers, franchisees, and cooperative members, that sell or
14 distribute the Covered Products to consumers or other third parties (“Downstream Defendant
15 Releasees”) of all claims for violations of Proposition 65 up through the Effective Date based on
16 exposures to DEHP from the Covered Products as set forth in the Notice. Compliance with the
17 terms of this Consent Judgment by Winsome Trading and Defendant Releasees constitutes
18 compliance with Proposition 65 with respect to exposures to DEHP from the Covered Products.

19 6.2 **Moore’s Individual Release of Claims.** Moore also, in his individual capacity
20 only and *not* in his representative capacity, and on behalf of his attorneys, successors, heirs,
21 assigns, and other representatives hereby waives, releases and forever discharge Defendants,
22 Defendant Releasees, and Downstream Defendant Releasees from all actions, causes of action,
23 obligations, costs, expenses, attorneys’ fees, damages, losses, claims, liabilities and demands of
24 plaintiff of any nature, character or kind, whether known or unknown, suspected or unsuspected,
25 limited to and arising out of alleged or actual exposures to DEHP in the Covered Products.

26 6.3 **Winsome Trading’s Release of Moore.** Winsome Trading on behalf of itself, its
27 past and current agents, representatives, attorneys, successors, and/or assigns, hereby waives any
28 and all claims against Moore, his attorneys and other representatives, for any and all actions taken
or statements made (or those that could have been taken or made) by Moore and his attorneys and

1 other representatives, whether in the course of investigating claims, otherwise seeking to enforce
2 Proposition 65 against it in this matter, or with respect to the Covered Products.

3 **7. COURT APPROVAL**

4 7.1 Plaintiff shall file a motion seeking approval of this Consent Judgment pursuant to
5 California Health & Safety Code § 25249.7(f), and Winsome Trading shall support the entry of
6 such motion.

7 7.2 If this Consent Judgment is not approved by the Court, (a) this Consent Judgment
8 and any and all prior agreements between the parties shall terminate and become null and void,
9 and the action shall revert to the status that existed prior to the execution date of this Consent
10 Judgment; (b) no term of this Consent Judgment or any draft thereof, or of the negotiation,
11 documentation, or other part or aspect of the Parties' settlement discussions, shall have any effect,
12 nor shall any such matter be admissible in evidence for any purpose in this action, or in any other
13 proceeding; and (c) the parties agree to meet and confer to determine whether to modify the terms
14 of the Consent Judgment and to resubmit it for approval.

15 **8. GOVERNING LAW**

16 8.1 The terms of this Consent Judgment shall be governed by the laws of the State of
17 California, and shall apply only to Covered Products offered for sale in the State of California. In
18 the event that Proposition 65 is repealed or is otherwise rendered inapplicable by reason of law
19 generally, or as to Covered Products, then Winsome Trading may provide written notice to Moore
20 of any asserted change in the law, and shall have no further obligations pursuant to this Consent
21 Judgment with respect to, and to the extent that, the Covered Products are so affected.

22 8.2 The Parties, including their counsel, have participated in the preparation of this
23 Consent Judgment and this Consent Judgment is the result of the joint efforts of the Parties. This
24 Consent Judgment was subject to revision and modification by the Parties and has been accepted
25 and approved as to its final form by all Parties and their counsel. Accordingly, any uncertainty or
26 ambiguity existing in this Consent Judgment shall not be interpreted against any Party as a result
27 of the manner of the preparation of this Consent Judgment. Each Party to this Consent Judgment
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1 agrees that any statute or rule of construction providing that ambiguities are to be resolved against
2 the drafting Party should not be employed in the interpretation of this Consent Judgment and, in
3 this regard, the Parties hereby waive California Civil Code § 1654.

4 **9. NOTICES**

5 9.1 Unless specified herein, all correspondence and notices required to be provided
6 pursuant to this Consent Judgment shall be in writing and personally delivered or sent by: (i)
7 first-class, (registered or certified mail) return receipt requested; or (ii) overnight courier on any
8 Party by the other Party at the following addresses:

9 To Winsome Trading:

To Moore:

10 Scott Chow
11 Winsome Trading, Inc.
12 16111 Woodinville Redmond Road NE
Woodinville, WA 98072

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

13 With a copy to:

14 Jeffrey B. Margulies, Esq.
15 Fulbright & Jaworski LLP
16 555 South Flower Street
41st Floor
17 Los Angeles, California 90071
213-892-9286
213-892-9494 fax
18 jmargulies@fulbright.com

19 9.2 Any Party, from time to time, may specify in writing to the other Party a change of
20 address to which all notices and other communications shall be sent.

21 **10. MODIFICATION**

22 10.1 **Modification.** This Consent Judgment may be modified by written agreement of
23 the Parties and upon entry of a modified Consent Judgment by the court, or by motion of any
24 Party and entry of a modified Consent Judgment by the court.

25 10.2 **Subsequent Legislation.** If, subsequent to the Effective Date, legislation or
26 regulation is adopted that addresses the DEHP content of Covered Products sold in California,
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1 any Party shall be entitled to request that the Court modify the reformulation standard of Section
2 3.1 of this Consent Judgment for good cause shown.

3 10.3 **Notice; Meet and Confer.** Any Party seeking to modify this Consent Judgment
4 shall attempt in good faith to meet and confer with the other Party prior to filing a motion to
5 modify the Consent Judgment.

6 **11. ENTIRE AGREEMENT**

7 11.1 This Consent Judgment contains the sole and entire agreement and understanding
8 of the Parties with respect to the entire subject matter set forth in this Consent Judgment, and any
9 and all prior discussions, negotiations, commitments, or understandings related thereto, if any, are
10 deemed merged. No representations, oral or otherwise, express or implied, other than those
11 specifically referred to in this Consent Judgment have been made by any Party. No other
12 agreements not specifically contained or referenced in this Consent Judgment, oral or otherwise,
13 shall be deemed to exist or to bind any of the Parties. No supplementation, modification, waiver,
14 or termination of this Consent Judgment shall be binding unless executed in writing by the Party
15 to be bound thereby. No waiver of any of the provisions of this Consent Judgment shall be
16 deemed or shall constitute a waiver of any of the other provisions hereof whether or not similar,
17 nor shall such waiver constitute a continuing waiver.

18 **12. RETENTION OF JURISDICTION**


19 12.1 This Court shall retain jurisdiction of this matter to implement or modify the
20 Consent Judgment.

21 **13. COUNTERPARTS; FACSIMILE SIGNATURES**

22 13.1 This Consent Judgment may be executed in counterparts and by facsimile or
23 portable document format (pdf), each of which shall be deemed an original, and all of which,
24 when taken together, shall constitute one and the same document.

1 **14. AUTHORIZATION**

2 14.1 The undersigned are authorized to execute this Consent Judgment on behalf of
3 their respective Parties and have read, understood, and agree to all of the terms and conditions of
4 this Consent Judgment.
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AGREED TO:	AGREED TO:
Date: <u>January 8, 2013</u>	Date: _____
By: <u></u> Plaintiff JOHN MOORE	By: _____ Defendant WINSOME TRADING, INC.

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13 **IT IS SO ORDERED.**

14 Date: _____
15 _____
16 JUDGE OF THE SUPERIOR COURT
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