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9 JOHN MOORE

10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 COUNTY OF SAN FRANCISCO - UNLIMITED CIVIL JURISDICTION

12 JOHN MOORE,

13 Plaintiff,

14 v.

15 PERRIGO COMPANY, et al.,

16 Defendants.

Case No. CGC-15-545702

[PROPOSED] CONSENT JUDGMENT

17 **1. INTRODUCTION**

18 **1.1 Parties**

19 The parties to this Consent Judgment (“Consent Judgment”) are Plaintiff John Moore
20 (“Moore”) on the one hand, and Defendant Perrigo Company (“Perrigo”) on the other hand (each
21 a “Party” and collectively “Parties”).

22 **1.2 Plaintiff**

23 Moore is an individual residing in the State of California who seeks to promote
24 awareness of exposures to toxic chemicals and to improve human health by reducing or
25 eliminating hazardous substances contained in consumer products.

26 **1.3 Defendant**

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

1 1.4 **General Allegations**

2 Moore alleges that Perrigo manufactures, distributes, imports, sells and/or offer for sale
3 in California Pet Grooming Tool products containing di(2-ethylhexyl)phthalate (“DEHP”)
4 without first providing the clear and reasonable warning required by Proposition 65. DEHP is
5 listed pursuant to Proposition 65 as a chemical known to the State of California to cause birth
6 defects or other reproductive harm.

7 1.5 **Product Description**

8 The products that are covered by this Consent Judgment are Pet Grooming Tools
9 containing DEHP that are sold or offered for sale in California by Perrigo, including, but not
10 limited to, Sergeant’s Dog Toenail Cutter, UPC #0 73091 35041 5, hereinafter the “Products.”

11 1.6 **Notice of Violation**

12 On September 30, 2014, Moore served Perrigo and certain public prosecutors with a “60-
13 Day Notice of Violation” (“Notice”) alleging that Defendants were in violation of Proposition 65
14 for failing to warn its customers and consumers in California that the Products expose users to
15 DEHP. To the best of the Parties’ knowledge, no public enforcer has commenced and is
16 diligently prosecuting the allegations set forth in the Notice.

17 1.7 **Complaint**

18 On May 6, 2015, Moore filed the instant action against Perrigo for the alleged violations
19 of Health and Safety Code section 25249.6 that are the subject of the Notice.

20 1.8 **No Admission**

21 Perrigo denies the material, factual, and legal allegations contained in the Notice and
22 Complaint, and maintains that all of the products that it has sold and distributed in California,
23 including the Products, have been, and are, in compliance with all laws. Nothing in this Consent
24 Judgment shall be construed as an admission of any fact, finding, conclusion of law, issue of law,
25 or violation of law, nor shall compliance with this Consent Judgment constitute or be construed
26 as an admission of any fact, finding, conclusion of law, issue of law, or violation of law. This
27 Section shall not, however, diminish or otherwise affect Perrigo’s obligations, responsibilities,
28 and 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 Perrigo as to the allegations in the Complaint, that venue is proper in San
4 Francisco County and that this Court has jurisdiction to enter and enforce the provisions of this
5 Consent Judgment.

6 **2. DEFINITIONS**

7 2.1 “Covered Products” means and is limited to Products containing DEHP sold or
8 distributed for sale in California by Perrigo or its predecessors and affiliates.

9 2.2 “Effective Date” means the date this Consent Judgment is approved by the court.

10 2.3 “Reformulation Standard” means the level of DEHP required under Section 3.1.

11 **3. INJUNCTIVE RELIEF: REFORMULATION**

12 3.1 **Reformulation Standard**

13 Commencing no later than the Effective Date, Perrigo shall not manufacture, import, or
14 distribute for sale in California any Covered Product that contains DEHP in concentrations
15 exceeding 0.1 percent (1,000 parts per million (“ppm”)) when analyzed pursuant to any
16 methodology utilized by federal or California state agencies for the purpose of determining
17 DEHP content in a solid substance.

18 **4. PAYMENTS**

19 4.1 **Payments Pursuant to Health and Safety Code § 25249.7(b)**

20 Pursuant to Health and Safety Code section 25249.7(b)(2), except as provided in Section
21 4.1.2, Perrigo shall pay \$14,000 in civil penalties. Each penalty payment shall be allocated
22 according to Health and Safety Code section 25249.12(c)(1) and (d), with 75% of the penalty
23 amount remitted to the California Office of Environmental Health Hazard Assessment and the
24 remaining 25% of each penalty payment remitted to Moore.

25 4.1.1 **Initial Civil Penalty**

26 Perrigo shall pay an initial civil penalty of \$4,000 within five (5) days of the
27 Effective Date.

1 4.1.2 **Final Civil Penalty; Waiver on Certification of Compliance with**

2 **Section 3.1**

3 No later than 30 days after the Effective Date, Perrigo shall pay a final civil penalty of
4 \$10,000, except that, the final civil penalty will be waived, in its entirety, if no later than 30 days
5 after the Effective Date, Perrigo provides Moore’s counsel with written certification that as of
6 the date of its certification, all Covered Products manufactured, imported, or distributed for sale
7 in California meet the Reformulation Standard, and that they will continue to only manufacture,
8 distribute, purchase or import Covered Products meeting the Reformulation Standard for sale in
9 California in the future.

10 4.2 **Reimbursement of Attorneys’ Fees and Costs**

11 The Parties acknowledge that Moore and his counsel offered to resolve this dispute
12 without reaching terms on the amount of fees and costs to be reimbursed to them, thereby
13 leaving the issue to be resolved after the material terms of the agreement had been settled.
14 Shortly after all other settlement terms had been finalized, Perrigo expressed a desire to resolve
15 the fees and costs. The Parties then attempted to (and did) reach an accord on the compensation
16 due Moore and his counsel under general contract principles and the private attorney general
17 doctrine codified at Code of Civil Procedure section 1021.5 for all work performed in this matter
18 exclusive of fees and costs incurred on appeal, if any. Under these legal principles, within 30
19 days of the Effective Date, Defendants shall pay \$38,000 for the fees and costs incurred
20 investigating, litigating, and enforcing this matter, including the fees and costs incurred (and to
21 be incurred) drafting, negotiating, and obtaining the Court’s approval of this Consent Judgment
22 in the public interest.

23 4.3 **Payment Procedures.**

24 4.3.1 **Payment Addresses**

25 (a) **All payments to Moore and Moscone Emblidge & Otis LLP shall**
26 **be delivered to the following address:**

27 Moscone Emblidge & Otis LLP
28 Attn: Proposition 65 Coordinator
 220 Montgomery Street, Suite 220
 San Francisco, CA 94104

1 (b) All payments to OEHHA (EIN: 68-0284486) shall be delivered
2 directly to OEHHA (Memo line "Prop 65 Penalties") at the following address:

3 Mike Gyurics
4 Fiscal Operations Branch Chief
5 Office of Environmental Health Hazard Assessment
6 P.O. Box 4010
7 Sacramento, CA 95812-4010

8 With a copy of the check(s) payable to OEHHA mailed to Moscone Emblidge & Otis LLP at the
9 payment address provided in section 4.3.1(a), as proof of payment to OEHHA.

10 **5. CLAIMS COVERED AND RELEASED**

11 **5.1 Public Release of Proposition 65 Claims**

12 In consideration of the promises and commitments herein contained, Moore, on his own
13 behalf and on behalf of his past and current agents, representatives, attorneys, successors, and/or
14 assignees, and in the public interest, hereby waives and releases Perrigo, its parents, subsidiaries,
15 affiliated entities under common ownership or control, directors, officers, employees, and
16 attorneys ("Releasees"); and each entity to whom it directly or indirectly distributes or sells
17 Covered Products, and any distributors, wholesalers, customers, retailers, franchisees,
18 cooperative members, licensors, and licensees ("Downstream Defendant Releasees"), from all
19 claims for violations of Proposition 65 based on exposures to DEHP from the Covered Products
20 through the Effective Date. This waiver and release is limited to those claims arising under
21 Proposition 65 for unwarned exposures to DEHP from Covered Products sold by Defendants
22 before the Effective Date. Defendants' and Releasees' compliance with this Consent Judgment
23 constitute compliance with Proposition 65.

24 **5.2 Private Release in Plaintiff's Individual, Non-representative Capacity**

25 Moore, in his individual capacity only and not in his representative capacity, also
26 provides a release to Perrigo, Releasees, and Downstream Defendant Releasees which shall be
27 effective as a full and final accord and satisfaction, as a bar to all actions, causes of action,
28 obligations, costs, expenses, attorneys' fees, damages, losses, claims, liabilities and demands of
Moore of any nature, character or kind, whether known or unknown, suspected or unsuspected,
arising out of alleged or actual unwarned exposures to DEHP from the Covered Products.

1 **5.3 Perrigo’s Release of Moore**

2 Perrigo waives any and all claims against Moore and his attorneys and other
3 representatives, for any and all actions taken or statements made (or those that could have been
4 taken or made) by Moore and his attorneys and other representatives, whether in the course of
5 investigating claims, otherwise seeking enforcement of Proposition 65 against it in this matter, or
6 with respect to the Covered Products.

7 **6. NOTICES**

8 When any Party is entitled to receive any notice under this Consent Judgment, the notice
9 shall be sent by: (a) first class, registered or certified mail; (b) personal delivery; or (c) a
10 recognized overnight courier on any one Party by the other Party at the following addresses:

11 For Moore:

12 Moscone Emblidge & Otis LLP
13 Attn: Proposition 65 Coordinator
14 220 Montgomery Street, Suite 220
15 San Francisco, CA 94104

16 For Perrigo:

17 Perrigo Company
18 515 Eastern Avenue
19 Allegan, MI 49010
20 Attention: General Counsel

21 With a copy to:

22 William F. Tarantino
23 Morrison & Foerster LLP
24 425 Market Street
25 San Francisco, CA 94105

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

28 **7. POST SETTLEMENT ACTIVITIES AND COURT APPROVAL**

 7.1 Moore agrees to comply with the reporting form requirements referenced in
Health and Safety Code section 25249.7(f).

 7.2 The Parties further acknowledge that, pursuant to Health and Safety Code
§ 25249.7(f)(4), a noticed motion is required to obtain judicial approval of the settlement, which

1 motion Moore shall draft and file, and Perrigo shall join. Moore and Perrigo agree to mutually
2 employ their best efforts to support the entry of this agreement as a Consent Judgment and obtain
3 approval of the Consent Judgment by the Court in a timely manner. If any third party objection
4 to the noticed motion is filed, Moore and Perrigo shall work together to file a joint reply and
5 appear at any hearing before the Court. This provision is a material component of the Consent
6 Judgment and shall be treated as such in the event of a breach.

7 7.3 If this Consent Judgment is not approved by the Court, (a) this Consent Judgment
8 and any and all prior agreements between the parties as to the Notices or Complaint referenced
9 herein shall terminate and become null and void, and the action shall revert to the status that
10 existed prior to the execution date of this Consent Judgment; (b) no term of this Consent
11 Judgment or any draft thereof, or of the negotiation, documentation, or other part or aspect of the
12 Parties' settlement discussions, shall have any effect, nor shall any such matter be admissible in
13 evidence for any purpose in this action, or in any other proceeding; and (c) the parties agree to
14 meet and confer to determine whether to modify the terms of the Consent Judgment and to
15 resubmit it for approval.

16 **8. ENFORCEMENT**

17 Any Party may, by motion or application for an order to show cause before this Court,
18 enforce the terms and conditions contained in this Consent Judgment.

19 **9. SEVERABILITY**

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

23 **10. GOVERNING LAW**

24 The terms of this Consent Judgment shall be governed by the laws of the State of
25 California and apply within the State of California. In the event that Proposition 65 is repealed,
26 preempted or is otherwise rendered inapplicable by reason of law generally, or if any of the
27 provisions of this Consent Judgment are rendered inapplicable or no longer require as a result of
28 any such repeal or preemption or rendered inapplicable by reason of law generally as to the

1 Products, then Perrigo shall provide written notice to Moore of any asserted change in law, and,
2 if Moore agrees, Perrigo shall have no further obligations pursuant to this Consent Judgment
3 with respect to, and to the extent that, the Products are so affected. Nothing in this Consent
4 Judgment shall be interpreted to relieve Perrigo from any obligation to comply with any pertinent
5 state or federal toxics control law.

6 **11. DRAFTING**

7 The Parties, including their counsel, have participated and cooperated in the drafting and
8 preparation of this Consent Judgment and this Consent Judgment is the result of the joint efforts
9 of the Parties. This Consent Judgment was subject to revision and modification by the Parties
10 and has been accepted and approved as to its final form by all Parties and their counsel.

11 Accordingly, any uncertainty or ambiguity existing in this Consent Judgment shall not be
12 interpreted against any Party as a result of the manner of the preparation of this Consent
13 Judgment. Each Party to this Consent Judgment agrees that any statute or rule of construction
14 providing that ambiguities are to be resolved against the drafting Party should not be employed
15 in the interpretation of this Consent Judgment and, in this regard, the Parties hereby waive
16 California Civil Code Section 1654.

17 **12. MODIFICATION**

18 This Consent Judgment may be modified only: (1) by written agreement of the Parties
19 and upon entry of a modified Consent Judgment by the Court thereon; or (2) upon a successful
20 motion of any Party and entry of a modified Consent Judgment by the Court.

21 **13. COUNTERPARTS**

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

25 **14. AUTHORIZATION**

26 Each signatory to this Consent Judgment certifies that he or she is fully authorized by the
27 Party he or she represents to agree to the terms and conditions of this Consent Judgment, to enter
28 into and execute the Consent Judgment on behalf of the Party represented, and to legally bind

1 that Party, and that he or she has read, understood, and agree to all of the terms and conditions of
2 this Consent Judgment.

3 AGREED TO:

AGREED TO:

4
5 Date: 9/27/2016

Date: 18-OCT-2016

6
7 By:

Plaintiff John Mopre

By:

Defendant Perrigo Company

