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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 VICTORY INTERNATIOAL GROUP,
16 LLC; WAL-MART STORES, INC.; and
17 DOES 1 -100, inclusive,

18 Defendants.

Case No. CGC-15-543815

[PROPOSED] CONSENT JUDGMENT

19 **1. INTRODUCTION**

20 **1.1 Parties**

21 The parties to this Consent Judgment (“Consent Judgment”) are Plaintiff John Moore
22 (“Moore”) on the one hand, and Defendant Victory International Group, LLC (“Victory”) on the
23 other hand (each a “Party” and collectively “Parties”).

24 **1.2 Plaintiff**

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

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1 1.3 **Defendant**

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

5 1.4 **General Allegations**

6 Moore alleges that Victory manufactures, distributes, imports, sells and/or offer for sale
7 in California headphones with vinyl/PVC components containing di(2-ethylhexyl)phthalate
8 (“DEHP”) without first providing the clear and reasonable warning required by Proposition 65.
9 DEHP is listed pursuant to Proposition 65 as a chemical known to the State of California to
10 cause birth defects or other reproductive harm.

11 1.5 **Product Description**

12 The products that are covered by this Consent Judgment are headphones with vinyl/PVC
13 components containing DEHP that are distributed, sold, or offered or for sale in California by
14 Victory, including, but not limited to, the Accellorize Headband Headphones, #00102, UPC #8
15 90968 00102 3, hereinafter the “Products.”

16 1.6 **Notice of Violation**

17 On September 30, 2014, Moore served Victory and Wal-Mart Stores, Inc. (“Walmart”),
18 and certain public prosecutors with a “60-Day Notice of Violation” (“Notice”) alleging that
19 Victory and Walmart (collectively, “Defendants”) were in violation of Proposition 65 for failing
20 to warn its customers and consumers in California that the Products expose users to DEHP. To
21 the best of the Parties’ knowledge, no public enforcer has commenced and is diligently
22 prosecuting the allegations set forth in the Notice.

23 1.7 **Complaint**

24 On January 23, 2015, Moore filed the instant action against Victory and Wal-Mart for the
25 alleged violations of Health and Safety Code section 25249.6 that are the subject of the Notice.
26 On January 27, 2015, Moore filed a First Amended Complaint in this action.

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1 1.8 **No Admission**

2 Victory and Walmart each deny the material, factual, and legal allegations contained in
3 the Notice, Complaint, and First Amended Complaint, and maintain that all of the products that
4 they each have sold and distributed in California, including the Products, have been, and are, in
5 compliance with all laws. Nothing in this Consent Judgment shall be construed as an admission
6 of any fact, finding, conclusion of law, issue of law, or violation of law, nor shall compliance
7 with this Consent Judgment constitute or be construed as an admission of any fact, finding,
8 conclusion of law, issue of law, or violation of law. This Section shall not, however, diminish or
9 otherwise affect Victory’s obligations, responsibilities, and duties under this Consent Judgment.

10 1.9 **Consent to Jurisdiction**

11 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
12 jurisdiction over Defendants as to the allegations in the Complaint, that venue is proper in San
13 Francisco County and that this Court has jurisdiction to enter and enforce the provisions of this
14 Consent Judgment.

15 **2. DEFINITIONS**

16 2.1 “Covered Products” means and is limited to Products containing DEHP sold or
17 distributed for sale in California by Victory.

18 2.2 “Effective Date” means date this Consent Judgment is approved by the court.

19 2.3 “Reformulation Standard” means the level of DEHP required under Section 3.1.

20 **3. INJUNCTIVE RELIEF: REFORMULATION**

21 3.1 **Reformulation Standard**

22 Commencing no later than the Effective Date, Victory shall not manufacture, distribute,
23 purchase or import for sale, sell, and/or offer for sale in California any Covered Product that
24 contains DEHP in concentrations exceeding 0.1 percent (1,000 parts per million (“ppm”)) when
25 analyzed pursuant to any methodology utilized by federal or California state agencies for the
26 purpose of determining DEHP content in a solid substance.

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1 **4. PAYMENTS**

2 4.1 **Payments Pursuant to Health and Safety Code § 25249.7(b)**

3 Pursuant to Health and Safety Code section 25249.7(b)(2), except as provided in Section
4 4.1.2, Victory shall pay \$12,000 in civil penalties. Each penalty payment shall be allocated
5 according to Health and Safety Code section 25249.12(c)(1) and (d), with 75% of the penalty
6 amount remitted to the California Office of Environmental Health Hazard Assessment and the
7 remaining 25% of each penalty payment remitted to Moore.

8 4.1.1 **Initial Civil Penalty**

9 Victory shall pay an initial civil penalty of \$3,000 within 10 days of the
10 Effective Date.

11 4.1.2 **Final Civil Penalty; Waiver on Certification of Compliance with**
12 **Section 3.1**

13 Within 45 days of the Effective Date, Victory shall pay a final civil penalty of \$9,000 (the
14 “Final Civil Penalty”), except that, the Final Civil Penalty will be waived, in its entirety, if no
15 later than 30 days after the Effective Date, an officer or other authorized representative of
16 Victory provides Moore’s counsel with written certification that as of the date of its certification:
17 i) Victory no longer sells, nor intends to sell, Covered Products for distribution into California;
18 or ii) all Covered Products manufactured, distributed, imported, sold, or offered for sale in
19 California after the Effective Date meet the Reformulation Standard, and that they will continue
20 to only manufacture, distribute, import, sell, or offer for sale in California Covered Products
21 meeting the Reformulation Standard in the future. The option to provide a written certification
22 in lieu of making the final civil penalty payment constitutes a material term of this Consent
23 Judgment, and with regard to such term, time is of the essence.

24 4.2 **Reimbursement of Attorneys’ Fees and Costs**

25 The Parties acknowledge that Moore and his counsel offered to resolve this dispute
26 without reaching terms on the amount of fees and costs to be reimbursed to them, thereby
27 leaving the issue to be resolved after the material terms of the agreement had been settled.
28 Shortly after all other settlement terms had been finalized, Defendants expressed a desire to

1 resolve the fees and costs. The Parties then attempted to (and did) reach an accord on the
2 compensation due Moore and his counsel under general contract principles and the private
3 attorney general doctrine codified at Code of Civil Procedure section 1021.5 for all work
4 performed in this matter exclusive of fees and costs incurred on appeal, if any. Under these legal
5 principles, within 10 days of the Effective Date, Defendants shall pay \$42,000 for the fees and
6 costs incurred investigating, litigating, and enforcing this matter, including the fees and costs
7 incurred (and to be incurred) drafting, negotiating, and obtaining the Court’s approval of this
8 Consent Judgment in the public interest.

9 4.3 **Payment Procedures.**

10 4.3.1 **Payments**

11 All payments required by Sections 4.1 and 4.2 shall be delivered within 10 days of the
12 Effective Date.

13 4.3.1 **Payment Addresses**

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

16 Moscone Emblidge & Otis LLP
17 Attn: Proposition 65 Coordinator
18 220 Montgomery Street, Suite 220
19 San Francisco, CA 94104

20 (b) **All payments to OEHHA (EIN: 68-0284486) shall be delivered**
21 **directly to OEHHA (Memo line “Prop 65 Penalties”) at the following address:**

22 Mike Gyurics
23 Fiscal Operations Branch Chief
24 Office of Environmental Health Hazard Assessment
25 P.O. Box 4010
26 Sacramento, CA 95812-4010

27
28
29 With a copy of the check(s) payable to OEHHA mailed to Moscone Emblidge & Otis LLP at the
30 payment address provided in section 4.3.1(a), as proof of payment to OEHHA.

1 **5. CLAIMS COVERED AND RELEASED**

2 **5.1 Public Release of Proposition 65 Claims**

3 In consideration of the promises and commitments herein contained, Moore, on his own
4 behalf and on behalf of his past and current agents, representatives, attorneys, successors, and/or
5 assignees, and in the public interest, hereby waives and releases Victory, its parents, subsidiaries,
6 affiliated entities under common ownership or control, directors, officers, employees, and
7 attorneys (“Releasees”); and each entity to whom it directly or indirectly distributes or sells
8 Covered Products, including but not limited to Walmart and its affiliates and subsidiaries, and any
9 distributors, wholesalers, customers, other retailers, franchisees, cooperative members, licensors,
10 and licensees (“Downstream Defendant Releasees”), from all claims for violations of Proposition
11 65 based on exposures to DEHP from the Covered Products through the Effective Date. This
12 waiver and release is limited to those claims arising under Proposition 65 for unwarned
13 exposures to DEHP from Covered Products manufactured by Victory before the Effective Date.
14 Defendants’ and Releasees’ compliance with this Consent Judgment constitute compliance with
15 Proposition 65.

16 **5.2 Private Release in Plaintiff’s Individual, Non-representative Capacity**

17 Moore, in his individual capacity only and not in his representative capacity, also
18 provides a release to Victory, Releasees, and Downstream Defendant Releasees which shall be
19 effective as a full and final accord and satisfaction, as a bar to all actions, causes of action,
20 obligations, costs, expenses, attorneys’ fees, damages, losses, claims, liabilities and demands of
21 Moore of any nature, character or kind, whether known or unknown, suspected or unsuspected,
22 arising out of alleged or actual unwarned exposures to DEHP from the Covered Products. Moore
23 acknowledges that he is familiar with Section 1542 of Civil Code, which provides as follows:

24 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS
25 WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO
26 EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING
27 THE RELEASE, WHICH IF KNOWN BY HIM OR HER MUST
28 HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT
WITH THE DEBTOR.

1 Moore, and on behalf of himself and his past and current agents, representatives,
2 attorneys, successors, and/or assignees, expressly waives and relinquishes any and all rights and
3 benefits which he may have under, or which may be conferred on him by the provisions of Civil
4 Code section 1542 as well as under any other state or federal statute or common law principle of
5 similar effect, to the fullest extent that he/it may lawfully waive such rights or benefits pertaining
6 to the released matters.

7 **5.3 Victory's Release of Moore**

8 Victory waives any and all claims against Moore and his attorneys and other
9 representatives, for any and all actions taken or statements made (or those that could have been
10 taken or made) by Moore and his attorneys and other representatives, whether in the course of
11 investigating claims, otherwise seeking enforcement of Proposition 65 against it in this matter, or
12 with respect to the Covered Products.

13 **6. NOTICES**

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

17 For Moore:

18 Moscone Emblidge & Otis LLP
19 Attn: Proposition 65 Coordinator
20 220 Montgomery Street, Suite 220
San Francisco, CA 94104

21 For Defendants:

22 Dawson Fan, President
23 Victory International Group, LLC
24 9800 Irvine Center Drive
Irvine, CA 92618

25 With a copy to:

26 Matthew S. Kenefick
27 Jeffer Mangels Butler & Mitchell LLP
28 Two Embarcadero Center, 5th Floor
San Francisco, California 94111

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

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

4 7.1 Moore agrees to comply with the reporting form requirements referenced in
5 Health and Safety Code section 25249.7(f).

6 7.2 The Parties further acknowledge that, pursuant to Health and Safety Code section
7 25249.7(f)(4), a noticed motion is required to obtain judicial approval of the settlement. Moore
8 and Victory agree to mutually employ their best efforts to support the entry of this agreement as
9 a Consent Judgment and obtain approval of the Consent Judgment by the Court in a timely
10 manner. The Parties acknowledge that, pursuant to California Health & Safety Code § 25249.7,
11 a noticed motion is required to obtain judicial approval of this Consent Judgment, which Moore
12 shall draft and file, and Victory shall join. If any third party objection to the noticed motion is
13 filed, Moore and Victory shall work together to file a joint reply and appear at any hearing before
14 the Court. This provision is a material component of the Consent Judgment and shall be treated
15 as such in the event of a breach.

16 7.3 If this Consent Judgment is not approved by the Court, (a) this Consent Judgment
17 and any and all prior agreements between the parties as to the Notices or Complaint referenced
18 herein shall terminate and become null and void, and the action shall revert to the status that
19 existed prior to the execution date of this Consent Judgment; (b) no term of this Consent
20 Judgment or any draft thereof, or of the negotiation, documentation, or other part or aspect of the
21 Parties' settlement discussions, shall have any effect, nor shall any such matter be admissible in
22 evidence for any purpose in this action, or in any other proceeding; and (c) the parties agree to
23 meet and confer to determine whether to modify the terms of the Consent Judgment and to
24 resubmit it for approval.

25 **8. ENFORCEMENT**

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

1 **9. SEVERABILITY**

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

5 **10. GOVERNING LAW**

6 The terms of this Consent Judgment shall be governed by the laws of the State of
7 California and apply within the State of California. In the event that Proposition 65 is repealed,
8 preempted or is otherwise rendered inapplicable by reason of law generally, or if any of the
9 provisions of this Consent Judgment are rendered inapplicable or no longer require as a result of
10 any such repeal or preemption or rendered inapplicable by reason of law generally as to the
11 Covered Products, then Victory shall provide written notice to Moore of any asserted change in
12 law, and shall have no further obligations pursuant to this Consent Judgment with respect to, and
13 to the extent that, the Covered Products are so affected.

14 **11. DRAFTING**

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

25 **12. MODIFICATION**

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

1 **13. COUNTERPARTS**

2 13.1 This Consent Judgment may be executed in counterparts and by facsimile or
3 portable document format (PDF) signature, each of which shall be deemed an original, and all
4 of which, when taken together, shall constitute one and the same document.

5 **14. AUTHORIZATION**

6 Each signatory to this Consent Judgment certifies that he or she is fully authorized by
7 the Party he or she represents to agree to the terms and conditions of this Consent Judgment, to
8 enter into and execute the Consent Judgment on behalf of the Party represented, and to legally
9 bind that Party, and that he or she has read, understood, and agree to all of the terms and
10 conditions of this Consent Judgment.

11 AGREED TO:

AGREED TO:

12
13 Date: SEPTEMBER 10, 2015

Date: 8/26/2015

14
15 By: 
16 Plaintiff John Moore

By: 
17 Defendant Victory International
18 Group, LLC