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7
8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 FOR THE COUNTY OF ALAMEDA
10 UNLIMITED CIVIL JURISDICTION
11

12 JOHN MOORE,
13 Plaintiff,
14 v.
15 NEW ENTERPRISE STONE & LIME
16 CO., INC., *et al.*,
17 Defendants.

Case No. RG15781127
[PROPOSED] CONSENT JUDGMENT
(Health & Safety Code § 25249.6 *et seq.* and
Code of Civil Procedure § 664.6)

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1 **1. INTRODUCTION**

2 **1.1 Parties**

3 This Consent Judgment is entered into by and between plaintiff John Moore (“Moore”) and
4 defendants New Enterprise Stone & Lime Co., Inc. and Work Area Protection Corporation
5 (collectively “Settling Defendants”), with Moore and Settling Defendants each referred to
6 individually as a “Party” and collectively as the “Parties.”

7 **1.2 Plaintiff**

8 Moore is a resident of the State of California who seeks to promote awareness of exposures
9 to toxic chemicals, and to improve human health by reducing or eliminating harmful substances in
10 consumer and commercial products.

11 **1.3 Defendant**

12 Settling Defendants each employ ten or more persons and are each a person in the course of
13 doing business for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986,
14 California Health and Safety Code section 25249.5, *et seq.* (“Proposition 65”).

15 **1.4 General Allegations**

16 Moore alleges that Settling Defendants manufacture, import, sell and/or distribute for sale in
17 California, vinyl/PVC cones containing di(2-ethylhexyl)phthalate (“DEHP”), and that they does so
18 without providing the health hazard warning that Moore alleges is required by Proposition 65.
19 DEHP is listed pursuant to Proposition 65 as a chemical that is known to cause birth defects or
20 other reproductive harm.

21 **1.5 Product Description**

22 The products covered by this Consent Judgment are vinyl/PVC cones (such as traffic or
23 safety cones) that contain DEHP, including, but not limited to, the *Cone, #12PVCS, UPC #8 94043*
24 *00001 7* (collectively, “Products”).

25 **1.6 Notice of Violation**

26 On February 27, 2015, Moore served Settling Defendants and the requisite public
27 enforcement agencies with a 60-Day Notice of Violation (“Notice”), alleging that Settling
28 Defendants violated Proposition 65 when they failed to warn their customers and consumers in

1 California of the health hazards associated with exposures to DEHP from the Products. To the best
2 of the Parties' knowledge, no public enforcer has commenced and is diligently prosecuting an
3 action to enforce the allegations set forth in the Notice.

4 **1.7 Complaint**

5 On August 7, 2015, Moore commenced the instant action, naming Settling Defendants as
6 defendants for the alleged violations of Proposition 65 that are the subject of the Notice.

7 **1.8 No Admission**

8 Settling Defendants deny the material, factual, and legal allegations contained in the Notice
9 and Complaint, and maintain that all of the products that they have sold or distributed for sale in
10 California, including the Products, have been, and are, in compliance with all laws. Nothing in this
11 Consent Judgment shall be construed as an admission by Settling Defendants of any fact, finding,
12 conclusion of law, issue of law, or violation of law, nor shall compliance with this Consent
13 Judgment constitute or be construed as an admission by Settling Defendants of any fact, finding,
14 conclusion of law, issue of law, or violation of law. This Section shall not, however, diminish or
15 otherwise affect Settling Defendants' obligations, responsibilities, and duties under this Consent
16 Judgment.

17 **1.9 Jurisdiction**

18 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
19 jurisdiction over Settling Defendants as to the allegations in the Complaint, that venue is proper in
20 the County of Alameda, and that the Court has jurisdiction to enter and enforce the provisions of
21 this Consent Judgment pursuant to Proposition 65 and Code of Civil Procedure section 664.6.

22 **1.10 Effective Date**

23 For purposes of this Consent Judgment, the term "Effective Date" shall mean the date that
24 the Court grants the motion for approval of this Consent Judgment contemplated by Section 5.

25 **2. INJUNCTIVE SETTLEMENT TERMS**

26 Commencing on the Effective Date, and continuing thereafter, Settling Defendants shall
27 only manufacture for sale in California, or purchase for sale in California, Reformulated Products.
28 For purposes of this Consent Judgment, "Reformulated Products" are defined as Products with a

1 maximum DEHP concentration of 0.1 percent (1,000 parts per million) when analyzed pursuant to
2 U.S. Environmental Protection Agency testing methodologies 3580A and 8270C, or other
3 methodologies utilized by state or federal agencies for the purpose of determining DEHP content in
4 a solid substance.

5 **3. MONETARY SETTLEMENT TERMS**

6 **3.1 Payments Pursuant to Health and Safety Code § 25249.7(b)(2)**

7 Pursuant to Health and Safety Code section 25249.7(b)(2), and in settlement of all the
8 claims referred to in this Consent Judgment, Settling Defendants shall pay a total of \$7,500 in civil
9 penalties in accordance with this Section. The penalty payment will be allocated in accordance
10 with California Health & Safety Code § 25249.12(c)(1) & (d), with 75% of the funds remitted to
11 the California Office of Environmental Health Hazard Assessment (“OEHHA”) and the remaining
12 25% of the penalty remitted to Moore. Settling Defendants shall provide the civil penalty payment
13 in a single check made payable to “John Moore, Client Trust Account” to be delivered to the
14 address provided in Section 3.4, below. Moore’s counsel shall be responsible for remitting Settling
15 Defendants’ penalty payment under this Consent Judgment to OEHHA.

16 **3.2 Reimbursement of Attorneys’ Fees and Costs**

17 The Parties acknowledge that Moore and his counsel offered to resolve this dispute without
18 reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving the issue
19 to be resolved after the material terms of the agreement had been settled. Shortly after finalizing
20 the other settlement terms, the Parties negotiated a resolution of the compensation due to Moore
21 and his counsel as a final and independent term of this Consent Judgment pursuant to general
22 contract principles and the private attorney general doctrine codified at California Code of Civil
23 Procedure section 1021.5. For all work performed through the mutual execution of this agreement
24 and the Court’s approval of the same, but exclusive of fees and costs on appeal, if any, Settling
25 Defendants shall reimburse Moore and his counsel \$32,500. Settling Defendants’ payment shall
26 be delivered to the address in Section 3.4 in the form of a check payable to “The Chanler Group.”
27 The reimbursement shall cover all fees and costs incurred by Moore investigating, bringing this
28 matter to Settling Defendants’ attention, litigating, and negotiating a settlement of the matter in the

1 public interest.

2 **3.3 Payment Timing; Payments Held In Trust**

3 The Settling Defendants shall deliver all payments required by this Consent Judgment to
4 their counsel within one week of the date that this agreement is fully executed by the Parties.
5 Settling Defendants' counsel shall confirm receipt of settlement funds in writing to Moore's
6 counsel and, thereafter, hold the amounts paid in trust until such time as the Court grants the
7 motion for approval of the Parties' settlement contemplated by Section 5. Within five days of the
8 Effective Date, New Enterprise's counsel shall deliver all settlement payments to Moore's counsel
9 at the address provided in Section 3.4.

10 **3.4 Payment Address**

11 All payments required by this Consent Judgment shall be delivered to the following
12 address:

13 The Chanler Group
14 Attn: Proposition 65 Controller
2560 Ninth Street
15 Parker Plaza, Suite 214
Berkeley, CA 94710

16 **4. CLAIMS COVERED AND RELEASED**

17 **4.1 Moore's Release of Proposition 65 Claims**

18 Moore, acting on his own behalf and in the public interest, releases Settling Defendants and
19 each of their parents, subsidiaries, shareholders, affiliated entities under common ownership,
20 directors, officers, agents, employees, independent sales representatives, partners, and attorneys
21 ("Releasees") and each entity to whom each of the Settling Defendants directly or indirectly
22 distributes or sells the Products including, but not limited to, their downstream distributors,
23 wholesalers, customers, retailers, franchisers, cooperative members, licensors and licensees
24 ("Downstream Releasees") for all claims alleging any violations arising under Proposition 65 for
25 unwarned exposures to DEHP from Products manufactured, imported, distributed or sold by
26 Settling Defendants prior to the Effective Date, as set forth in the Notice. Compliance with the
27 terms of this Consent Judgment constitutes compliance with Proposition 65 by Settling Defendants
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1 with respect to the alleged or actual failure to warn about exposures to DEHP from Products
2 manufactured, sold or distributed for sale by Settling Defendants after the Effective Date.

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 Settling Defendants, Releasees, and Downstream Releasees which shall be effective as a
6 full and final accord and satisfaction, as a bar to all actions, causes of action, obligations, costs,
7 expenses, attorneys' fees, damages, losses, claims, liabilities and demands of Moore of any nature,
8 character or kind, whether known or unknown, suspected or unsuspected, arising out of alleged or
9 actual exposures to DEHP in Products manufactured, imported, distributed or sold by Settling
10 Defendants before the Effective Date.

11 **4.3 Settling Defendants' Release of Moore**

12 Settling Defendants, on their own behalf and on behalf of their past and current agents,
13 representatives, attorneys, successors and/or assignees, hereby waive any and all claims against
14 Moore and his attorneys and other representatives, for any and all actions taken or statements made
15 by Moore and his attorneys and other representatives in the course of investigating claims, seeking
16 to enforce Proposition 65 against it in this matter, or with respect to the Products.

17 **4.4 Mutual Waiver of California Civil Code Section 1542**

18 The Parties each acknowledge he/it is familiar with Section 1542 of the Civil
19 Code, which provides as follows:

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

24 The Parties, each on his/its own behalf, and on behalf of his/its past and current agents,
25 representatives, attorneys, successors, and/or assignees, expressly waive and relinquish any and
26 all rights and benefits which they may have under, or which may be conferred upon them by
27 the provisions of Civil Code §1542 as well as under any other state or federal statute or
28 common law principle of similar effect, to the fullest extent he/it may lawfully waive such

1 rights or benefits pertaining to the released matters, as defined by Sections 4.1 through 4.3,
2 above.

3 **5. COURT APPROVAL**

4 This Consent Judgment is not effective until it is approved and entered by the Court and
5 shall be null and void if, for any reason, it is not approved and entered by the Court within one year
6 after it has been fully executed by the Parties. Moore and Settling Defendants agree to support the
7 entry of this agreement as a judgment, and to obtain the Court's approval of their settlement in a
8 timely manner. The Parties acknowledge that, pursuant to California Health and Safety Code
9 section 25249.7(f), a noticed motion is required for judicial approval of this Consent Judgment,
10 which motion Moore shall draft and file and Settling Defendants shall support, including by
11 appearing at the hearing if so requested. If any third-party objection to the motion is filed, Moore
12 and Settling Defendants agree to work together to file a reply and appear at any hearing. This
13 provision is a material component of the Consent Judgment and shall be treated as such in the event
14 of a breach.

15 **6. SEVERABILITY**

16 If, subsequent to the Court's approval and entry of this Consent Judgment as a judgment,
17 any provision of this Consent Judgment is held by a court to be unenforceable, the validity of the
18 remaining provisions shall not be adversely affected.

19 **7. GOVERNING LAW**

20 The terms of this Consent Judgment shall be governed by the laws of the State of California
21 and apply within the State of California. In the event that Proposition 65 is repealed, preempted, or
22 is otherwise rendered inapplicable by reason of law generally, or as to the Products, then Settling
23 Defendants may provide Moore with written notice of any asserted change in the law, and shall
24 have no further obligations pursuant to this Consent Judgment, with respect to, and to the extent
25 that, the Products are so affected. Nothing in this Consent Judgment shall be interpreted to relieve
26 Settling Defendants from their obligation to comply with any pertinent state or federal law or
27 regulation.

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1 **8. NOTICE**

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

6 To Settling Defendants:

To Moore:

7 Paul Detwiler Jr., President
8 New Enterprise Stone & Lime Co., Inc.
9 3912 Brumbaugh Road
New Enterprise, PA 16664

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

10 with copies to:

11 Jeffrey Goldman, Esq.
12 Pepper Hamilton LLP
13 4 Park Plaza, Suite 1200
Irvine, CA 92614

14 AnnMarie Sanford, Esq.
15 Pepper Hamilton, LLP
16 4000 Town Center, Suite 1800
Southfield, MI 48075-1505

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

19 **9. COUNTERPARTS, FACSIMILE AND PDF SIGNATURES**

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

23 **10. COMPLIANCE WITH REPORTING REQUIREMENTS**

24 Moore and his counsel agree to comply with the reporting form requirements referenced in
25 California Health and Safety Code section 25249.7(f).
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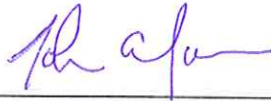
1 **11. MODIFICATION**

2 This Consent Judgment may be modified only by: (i) a written agreement of the Parties and
3 the entry of a modified Consent Judgment by the Court thereon; or (ii) upon a successful motion of
4 any party and the entry of a modified Consent Judgment by the Court thereon.

5 **12. AUTHORIZATION**

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

9
10 **AGREED TO:**

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12 _____
13 JOHN MOORE

14 Dated: Sept. 14, 2015

10 **AGREED TO:**

11 

12 _____
13 NEW ENTERPRISE STONE & LIME CO., INC.

14 By: Paul I. Detwiler, III

(Print Name)

15 Its: President, C.E.O. Secretary

(Title)

16 Dated: 9/11/15

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18 **AGREED TO:**

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21 WORK AREA PROTECTION
22 CORPORATION

23 By: Joseph Ford

(Print Name)

24 Its: President-Traffic / Safety Division

(Title)

25 Dated: 9/11/15

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