

1 Josh Voorhees, State Bar No. 241436
Christopher Tuttle, State Bar No. 264545
2 THE CHANLER GROUP
2560 Ninth Street
3 Parker Plaza, Suite 214
Berkeley, CA 94710-2565
4 Telephone: (510) 848-8880
Facsimile: (510) 848-8118

5 Attorneys for Plaintiff
6 MARK MOORBERG

7
8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF SANTA CLARA
10 UNLIMITED CIVIL JURISDICTION
11

12 MARK MOORBERG,

13 Plaintiff,

14 v.

15 REXNORD CORPORATION; RBS
GLOBAL, INC.; ZURN INDUSTRIES, INC.;
16 and DOES 1 – 150, inclusive,

17 Defendants.

Case No. 115CV288688

[PROPOSED] CONSENT JUDGMENT

(Health and Safety Code § 25249.6 *et seq.*)

1 **1. INTRODUCTION**

2 **1.1 Parties**

3 This Consent Judgment is entered into by and between plaintiff Mark Moorberg
4 ("Moorberg") and Rexnord Corporation, RBS Global, Inc., and Zurn Industries, LLC, formerly
5 known as Zurn Industries, Inc. (collectively, "Defendants"), with Moorberg and Defendants each
6 individually referred to as a "Party" and collectively as the "Parties."

7 **1.2 Plaintiff**

8 Moorberg is an individual residing in California who seeks to promote awareness of
9 exposures to toxic chemicals and to improve human health by reducing or eliminating hazardous
10 substances contained in consumer products.

11 **1.3 Defendants**

12 For the purposes of this Consent Judgment only, Defendants stipulate that each employs
13 ten or more individuals and each is a "person in the course of doing business" for purposes of the
14 Safe Drinking Water and Toxic Enforcement Act of 1986, Health and Safety Code
15 section 25249.6 *et seq.* ("Proposition 65").

16 **1.4 General Allegations**

17 Moorberg alleges that Defendants manufacture, import, sell, offer for sale, distribute for
18 sale or purchase for resale in California tools with vinyl/PVC grips that contain di(2-
19 ethylhexyl)phthalate ("DEHP") without first providing the exposure warning required by
20 Proposition 65. DEHP is listed pursuant to Proposition 65 as a chemical known to the State of
21 California to cause (i) cancer and (ii) birth defects or other reproductive harm.

22 **1.5 Product Description**

23 The products covered by this Consent Judgment are tools with vinyl/PVC grips containing
24 DEHP that are manufactured, imported, sold, offered for sale, distributed for sale or purchased for
25 resale in California by Defendants including, but not limited to, *Zurn Multi-Head Crimp Tool Kit*
26 (hereinafter the "Products").

1 **1.6 Notice of Violation**

2 On or about July 31, 2015, Moorberg served Defendants and certain requisite public
3 enforcement agencies with a “60-Day Notice of Violation” (“Notice”) alleging that Defendants
4 violated Proposition 65 by failing to warn their customers and consumers in California that the
5 Products expose users to DEHP. To the best of the Parties’ knowledge, no public enforcer has
6 commenced and is diligently prosecuting the allegations set forth in the Notice.

7 **1.7 Complaint**

8 On November 23, 2015, Moorberg filed the instant action (“Complaint”) naming REXNORD
9 Corporation, RBS Global, Inc., and ZURN INDUSTRIES, INC. as defendants for the alleged violations
10 of Health and Safety Code section 25249.6 that are the subject of the Notice.

11 **1.8 No Admission**

12 Defendants deny the material, factual, and legal allegations contained in the Notice and
13 Complaint, and maintain that all of the products they have sold and distributed for sale in
14 California, including the Products, have been and are in compliance with Proposition 65. Nothing
15 in this Consent Judgment shall be construed as an admission of any fact, finding, conclusion of
16 law, issue of law, or violation of law, nor shall compliance with this Consent Judgment constitute
17 or be construed as an admission of any fact, finding, conclusion of law, issue of law, or violation
18 of law. This Section shall not, however, diminish or otherwise affect Defendants’ obligations,
19 responsibilities, and duties under this Consent Judgment.

20 **1.9 Jurisdiction**

21 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
22 jurisdiction over Defendants as to the allegations contained in the Complaint, that venue is proper
23 in the County of Santa Clara, and that the Court has jurisdiction to enter and enforce the
24 provisions of this Consent Judgment pursuant to Proposition 65 and California Code of Civil
25 Procedure section 664.6.

26 **1.10 Effective Date**

27 For purposes of this Consent Judgment, the term “Effective Date” means the date on
28 which the Motion for Approval of the Consent Judgment is granted by the Court.

1 **2. INJUNCTIVE RELIEF: REFORMULATION AND WARNINGS**

2 **2.1 Commitment to Reformulate or Warn**

3 Commencing sixty (60) days after the Effective Date, and continuing thereafter,
4 Defendants agree to only manufacture, import, sell, offer for sale, distribute for sale or purchase
5 for resale in California: (a) "Reformulated Products" or (b) Products that bear a clear and
6 reasonable health hazard warning, pursuant to Sections 2.2 and 2.3 below. For purposes of this
7 Consent Judgment, "Reformulated Products" are defined as Products with a maximum
8 concentration of 0.1 percent (1,000 parts per million) of DEHP when analyzed pursuant to U.S.
9 Environmental Protection Agency testing methodologies 3580A and 8270C, or other
10 methodologies utilized by state or federal agencies for the purpose of determining DEHP content
11 in a solid substance.

12 **2.2 Reformulation or Warning Commitment**

13 All Products manufactured, imported, sold, offer for sale, distributed for sale or purchased
14 for resale in the State of California by Defendants on or after the date that is sixty (60) days after
15 the Effective Date shall either qualify as Reformulated Products or otherwise shall be
16 accompanied by a Proposition 65 warning as set forth in Section 2.3 below.

17 **2.3 Clear and Reasonable Warnings**

18 Defendants agree that on or after the date that is sixty (60) days after the Effective Date,
19 all Products they sell and/or distribute in California that do not qualify as Reformulated Products
20 will bear a clear and reasonable warning pursuant to this Section. Defendants further agree that
21 the warning will be prominently placed with such conspicuousness when compared with other
22 words, statements, designs, or devices as to render it likely to be read and understood by an
23 ordinary individual under customary conditions before purchase or use. For purposes of this
24 Consent Judgment, a clear and reasonable warning for the Products shall consist of a warning
25 affixed to the packaging, or, if no packaging exists, directly on each non-reformulated Product
26 sold in California, and shall contain one of the statements below:

27 ///

28 ///

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

WARNING: This product contains chemicals, including DEHP, known to the State of California to cause cancer, birth defects and other reproductive harm.¹

or

WARNING: This product contains a chemical known to the State of California to cause cancer, birth defects and other reproductive harm.

3. MONETARY SETTLEMENT TERMS

3.1 Civil Penalty Payments

Pursuant to Health and Safety Code section 25249.7(b), in settlement of all the claims referred to in this Consent Judgment, Defendants shall pay a total of \$6,000 in civil penalties. The civil 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 funds paid to the California Office of Environmental Health Hazard Assessment (“OEHHA”), and twenty-five percent (25%) of the funds remitted to Moorberg.

3.1.1 Civil Penalty

Defendants shall make a civil penalty payment of \$6,000. Defendants shall provide their payment in two checks for the following amounts made payable to: (a) “OEHHA” in the amount of \$4,500; and (b) “Mark Moorberg, Client Trust Account” in the amount of \$1,500, as set forth in Sections 3.3 and 3.4.

3.2 Reimbursement of Attorneys’ Fees and Costs

The Parties acknowledge that Moorberg and his counsel offered to resolve this dispute without reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving the issue to be resolved after the material terms of this Consent Judgment had been settled. Shortly after the other settlement terms had been finalized, Defendants expressed a desire to resolve Moorberg’s fees and costs. The Parties then attempted to (and did) reach an accord on the

¹ Rexnord shall only use the plural “chemicals” in a warning where it has knowledge of more than one listed chemical in the Product.

1 compensation due to Moorberg and his counsel under general contract principles and the private
2 attorney general doctrine codified at California Code of Civil Procedure section 1021.5 for all
3 work performed through the mutual execution of this Consent Judgment. On or before the
4 Effective Date, Defendants shall pay \$29,000, to “The Chanler Group” to be held in trust, as set
5 forth in Sections 3.3 and 3.4, for the fees and costs incurred by Moorberg investigating, bringing
6 this matter to Defendants’ attention, litigating, and negotiating a settlement in the public interest.

7 **3.3 Payments Held in Trust**

8 Within five (5) days of the date that this agreement is fully executed by the Parties, all
9 payments required by this Consent Judgment shall be delivered to Moorberg’s counsel at the
10 address provided in Section 3.4. Moorberg’s counsel shall hold such payments in their trust
11 account until such time as any of the events described in Section 5 occur. Plaintiff requested that
12 the payments be held by the Defendants’ counsel but the Defendants’ counsel wanted the funds
13 held by Plaintiff’s counsel.

14 **3.4 Payment Address**

15 All payments required by this Consent Judgment shall be delivered to the following
16 address:

17 The Chanler Group
18 Attn: Proposition 65 Controller
19 2560 Ninth Street
20 Parker Plaza, Suite 214
21 Berkeley, CA 94710

22 **4. CLAIMS COVERED AND RELEASED**

23 **4.1 Moorberg’s Public Release of Proposition 65 Claims**

24 Moorberg, acting on his own behalf and in the public interest, fully and finally releases
25 Defendants and their parents, subsidiaries, affiliated entities under common ownership, directors,
26 officers, employees, and attorneys (“Releasees”) and each entity to whom they directly or
27 indirectly distribute or sell the Products, including, but not limited to, their downstream
28 distributors, wholesalers, sales representatives, customers, retailers, franchisers, cooperative
members, licensors and licensees (“Downstream Releasees”) for any actual or alleged violations
arising under Proposition 65 for unwarned exposures to DEHP (including use of any intended or

1 purported Proposition 65 warning other than those listed in Section 2.3) from Products
2 manufactured, imported, sold, offered for sale, distributed for sale or purchased for resale in
3 California by the Defendants (as set forth in the Notice) prior to the date that is sixty (60) days
4 after the Effective Date, or based on any other alleged violation by Defendants known to
5 Moorberg on or before the date that is sixty (60) days after the Effective Date. Compliance with
6 the terms of this Consent Judgment constitutes compliance with Proposition 65 with respect to
7 exposures to failures to warn about DEHP from the Products sold by Defendants (as set forth in
8 the Notice) prior to the date that is sixty (60) days after the Effective Date.

9 **4.2 Moorberg's Individual Release of Claims**

10 Moorberg, in his individual capacity only and *not* in his representative capacity, also
11 provides a release to Defendants, Releasees, and Downstream Releasees which shall be effective
12 as a full and final accord and satisfaction, as a bar to all actions, causes of action, obligations,
13 costs, expenses, attorneys' fees, damages, losses, claims, liabilities and demands of Moorberg of
14 any nature, character or kind, whether known or unknown, suspected or unsuspected, arising out
15 of alleged or actual exposures to DEHP in the Products manufactured, imported, sold, offered for
16 sale, distributed for sale or purchased for resale by Defendants, or based on any other alleged
17 violation by Defendants known to Moorberg, in each case on or before the date that is ninety (90)
18 days after the Effective Date.

19 **4.3 Defendants' Release of Moorberg**

20 Defendants, on their own behalf, and on behalf of their past and current agents,
21 representatives, attorneys, successors, and assignees, hereby waive any and all claims against
22 Moorberg and his attorneys and other representatives for any and all actions taken or statements
23 made by Moorberg and his attorneys and other representatives, whether in the course of
24 investigating claims, otherwise seeking to enforce Proposition 65 against them in this matter, or
25 with respect to the Products.

26 **5. COURT APPROVAL**

27 **5.1 Court Approval**

28 This Consent Judgment is not effective until it is approved and entered by the Court.

1 **5.2 Actions to be Taken Upon Court Approval**

2 Moorberg’s counsel shall, within five (5) days of the Court’s approval of this Consent
3 Judgment, cause the payments described in Section 3 to be made.

4 **5.3 Failure by the Court to Approve Consent Judgment**

5 If this Consent Judgment is not approved and entered by the Court within one hundred
6 eighty (180) days after it has been fully executed by the Parties, it shall be of no force or effect
7 and shall never be introduced into evidence or otherwise used in any proceeding. Upon written
8 request by the Defendants, all civil penalty payments and attorneys’ fee and cost reimbursements
9 shall be returned to Defendants within five (5) days of Defendants counsel’s receipt of such
10 request.

11 **6. SEVERABILITY**

12 If, subsequent to the Court’s approval and entry of this Consent Judgment as a judgment,
13 any provision is held by a court to be unenforceable, the validity of the remaining provisions shall
14 not be adversely affected, so long as the Parties’ original intent remains intact.

15 **7. GOVERNING LAW**

16 The terms of this Consent Judgment shall be governed by the laws of the state of
17 California and apply within the state of California. In the event that Proposition 65 is repealed,
18 preempted, or is otherwise rendered inapplicable by reason of law generally, or as to the Products,
19 Defendants may provide written notice to Moorberg of any asserted change in the law, and shall
20 have no further injunctive obligations pursuant to this Consent Judgment with respect to, and to
21 the extent that, the Products are so affected. Nothing in this Consent Judgment shall be
22 interpreted to relieve Defendants from any obligation to comply with any pertinent state or
23 federal toxics control laws.

24 **8. NOTICE**

25 Unless specified herein, all correspondence and notice required by this Consent Judgment
26 shall be in writing and sent by: (i) personal delivery; (ii) first-class, registered, or certified mail,
27 return receipt requested; or (iii) a recognized overnight courier to the following addresses:
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Defendants

Todd Adams, President
Rexnord Corporation
247 Freshwater Way, Suite 200
Milwaukee, WI 53204

O’Melveny & Myers LLP
400 South Hope Street
Los Angeles, CA 90071-2899
Attn: Bob Nicksin

Todd Adams, President
RBS Global, Inc.
4701 West Greenfield Ave.
Milwaukee, WI 53214

General Counsel
Rexnord Corporation
247 Freshwater Way, Suite 200
Milwaukee, WI 53204

Craig Wehr, President
Zurn Industries, LLC
1801 Pittsburgh Avenue
Erie, PA 16502

Moorberg

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

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

9. COUNTERPARTS; FACSIMILE SIGNATURES

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

10. POST EXECUTION ACTIVITIES

Moorberg agrees to comply with the reporting form requirements referenced in Health and Safety Code section 25249.7(f). The Parties further acknowledge that, pursuant to Health and Safety Code section 25249.7(f), a noticed motion is required to obtain judicial approval of the settlement. Moorberg shall prepare and file a Motion for Approval of this Consent Judgment. In furtherance of obtaining such approval, the Parties agree to mutually employ their best efforts, and those of their counsel, to support the entry of this agreement as judgment, and to obtain judicial approval of this Consent Judgment in a timely manner. For purposes of this Section,

1 "best efforts" shall include, at a minimum, cooperating on the drafting and filing of the necessary
2 moving papers. Defendants' obligation to support a Motion for Approval of this Consent
3 Judgment shall not necessarily apply to any proposed revisions to this Consent Judgment
4 requested by the Court or the California Attorney General.

5 **11. MODIFICATION**

6 This Consent Judgment may be modified only by: (i) a written agreement of the Parties
7 and entry of a modified consent judgment by the Court; or (ii) a successful motion or application
8 of any Party, and the entry of a modified consent judgment by the Court.

9 **12. ENFORCEMENT**

10 Any Party may, after meeting and conferring, for a period no longer than sixty (60) days,
11 by motion or application for an order to show cause before this Court, enforce the terms and
12 conditions contained in this Consent Judgment. This Court shall retain jurisdiction to implement
13 or modify the Consent Judgment.

14 **13. AUTHORIZATION**

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

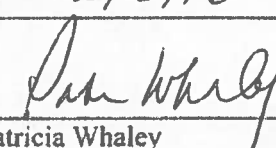
17
18 **AGREED TO:**

19 Date: February 2, 2016

20
21 By: 
22 MARK INCORBERG

18 **AGREED TO:**

19 Date: 2/3/16

20
21 By: 
22 Patricia Whaley
23 Vice President and General Counsel
24 REXNORD CORPORATION
25 ZURN INDUSTRIES, LLC
26 (formerly known as
27 ZURN INDUSTRIES, INC.)
28