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10 JOHN MOORE

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SANTA CLARA
UNLIMITED CIVIL JURISDICTION

JOHN MOORE,

Plaintiff,

v.

WINCRAFT, INCORPORATED, *et al.*

Defendants.

Case No. 16CV302456

[PROPOSED] CONSENT JUDGMENT

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

1 **1. INTRODUCTION**

2 **1.1 Parties**

3 This Consent Judgment is entered into by and between plaintiff John Moore (“Moore”), and
4 WinCraft, Incorporated (“WinCraft”), with Moore and WinCraft each individually referred to as a
5 “Party” and collectively as the “Parties.”

6 **1.2 Plaintiff**

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

10 **1.3 WinCraft**

11 WinCraft employs ten or more individuals and is a “person in the course of doing business”
12 for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, Health and Safety
13 Code section 25249.6 *et seq.* (“Proposition 65”).

14 **1.4 General Allegations**

15 Moore alleges that WinCraft manufactures, imports, sells, or distributes for sale in California,
16 badge/ID holders with components that contain di(2-ethylhexyl)phthalate (“DEHP”) without first
17 providing the exposure warning required by Proposition 65. DEHP is listed pursuant to Proposition
18 65 as a chemical known to the State of California to cause birth defects or other reproductive harm.

19 **1.5 Product Description**

20 The products covered by this Consent Judgment are badge/ID holders with components
21 containing DEHP that are manufactured, imported, sold, or distributed for sale in California by
22 WinCraft including, but not limited to, *WinCraft Sports MLB Premium Badge Holder, #4747012,*
23 *UPC #0 32085 47147 5*, hereinafter the “Products”.

24 **1.6 Notice of Violation**

25 On or about June 14, 2016, Moore served WinCraft, and certain requisite public enforcement
26 agencies with a “60-Day Notice of Violation” (“Notice”) alleging that WinCraft violated Proposition
27 65 by failing to warn its customers and consumers in California that the Products expose users to
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1 DEHP. To the best of the Parties' knowledge, no public enforcer has commenced and is diligently
2 prosecuting the allegations set forth in the Notice.

3 **1.7 Complaint**

4 On November 8, 2016, Moore filed the instant action ("Complaint") naming WinCraft as a
5 defendant for the alleged violations of Health and Safety Code section 25249.6 that are the subject of
6 the Notice.

7 **1.8 No Admission**

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

16 **1.9 Jurisdiction**

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

21 **1.10 Effective Date**

22 For purposes of this Consent Judgment, the term "Effective Date" means the date on which
23 the Motion for Approval of the Consent Judgment is granted by the Court.

24 **2. INJUNCTIVE RELIEF: REFORMULATION**

25 **2.1 Reformulated Products**

26 Commencing on the June 1, 2017, and continuing thereafter, WinCraft agrees to only
27 manufacture for sale or purchase for sale in or into California, "Reformulated Products". For
28 purposes of this Consent Judgment, "Reformulated Products" are Products containing DEHP in

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

5 **3. MONETARY SETTLEMENT TERMS**

6 **3.1 Civil Penalty Payments**

7 Pursuant to Health & Safety Code section 25249.7(b), in settlement of all the claims referred
8 to in this Consent Judgment, WinCraft shall pay \$28,000 in civil penalties. Each civil penalty
9 payment shall be allocated according to Health and Safety Code section 25249.12(c)(1) and (d), with
10 seventy-five percent (75%) of the funds paid to the California Office of Environmental Health
11 Hazard Assessment (“OEHHA”), and twenty-five percent (25%) of the funds remitted to Moore.

12 **3.1.1 Initial Civil Penalty**

13 WinCraft shall make an initial civil penalty payment of \$8,000. WinCraft shall
14 provide its payment in two checks for the following amounts made payable to: (a) “OEHHA” in the
15 amount of \$6,000; and (b) “John Moore, Client Trust Account” in the amount of \$2,000; as set forth
16 in Sections 3.3 and 3.4.

17 **3.1.2 Final Civil Penalty**

18 On May 31, 2017, WinCraft shall make a final civil penalty payment of \$20,000.
19 Pursuant to title 11 California Code of Regulations, section 3203(c), Moore agrees that the final civil
20 penalty payment shall be waived in its entirety if, no later than May 15, 2017, an officer of WinCraft
21 provides Moore with written certification that all of the Products it is selling or distributing for sale in
22 California as of the date of such certification are Reformulated Products as defined by Section 2.1,
23 and that WinCraft will continue to offer only Reformulated Products for sale in California in the
24 future. The option to certify to expedite reformulation in lieu of making the final civil penalty
25 payment required by this Section is a material term, and with regard to such term, time is of the
26 essence. WinCraft shall deliver its certificate, if any, to Moore’s counsel at the address provided in
27 Section 3.4, below. In the event that WinCraft does not timely certify its compliance or make the
28 final civil penalty payment required by this Section, the Parties agree that Moore may file a motion or

1 application seeking an order compelling WinCraft's compliance with this Section. If successful, the
2 Parties further agree that Moore shall be entitled to his reasonable attorneys' fees and costs pursuant
3 to general contract principles and Code of Civil Procedure section 1021.5.

4 **3.2 Reimbursement of Attorney's Fees and Costs**

5 The parties acknowledge that Moore and his counsel offered to resolve this dispute without
6 reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving the issue to
7 be resolved after the material terms of this Consent Judgment had been settled. Shortly after the
8 other settlement terms had been finalized, WinCraft expressed a desire to resolve Moore's fees and
9 costs. The Parties then attempted to (and did) reach an accord on the compensation due to Moore and
10 his counsel under general contract principles and the private attorney general doctrine codified at
11 California Code of Civil Procedure section 1021.5 for all work performed through the mutual
12 execution of this Consent Judgment. On or before the Effective Date, WinCraft shall pay \$31,500 for
13 the fees and costs incurred by Moore investigating, bringing this matter to WinCraft's attention,
14 litigating and negotiating a settlement in the public interest.

15 **3.3 Payments Held in Trust**

16 All payments due under this Consent Judgment shall be held in trust until such time as the
17 Court approves the Parties' settlement. Except the final civil penalty payment required by Section
18 3.1.2, all payments due under this agreement shall be delivered within five (5) days of the date that
19 this Consent Judgment is fully executed by the Parties, and held in trust by WinCraft's counsel until
20 the Court grants the motion for approval of this Consent Judgment contemplated by Section 5.
21 Within two business days of the Court's approval of this Consent Judgment, WinCraft's counsel
22 shall tender the initial civil penalty payments and attorneys' fee and costs reimbursements required
23 by Sections 3.1 and 3.2.

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1 **3.4 Payment Address**

2 All payments required by this Consent Judgment shall be delivered to the following
3 address:

4 The Chanler Group
5 Attn: Proposition 65 Controller
6 2560 Ninth Street
7 Parker Plaza, Suite 214
8 Berkeley, CA 94710

9 **4. CLAIMS COVERED AND RELEASED**

10 **4.1 Moore’s Public Release of Proposition 65 Claims**

11 Moore, acting on his own behalf and in the public interest, releases WinCraft and its parents,
12 subsidiaries, affiliated entities under common ownership, directors, officers, employees, and
13 attorneys (“Releasees”) and each entity to whom it directly or indirectly distributes or sells the
14 Products including, but not limited to, its downstream distributors, wholesalers, customers, retailers,
15 franchisers, cooperative members, licensors and licensees (“Downstream Releasees”) for any
16 violations arising under Proposition 65 for unwarned exposures to DEHP from Products sold by
17 WinCraft prior to the Effective Date, as set forth in the Notice. Compliance with the terms of this
18 Consent Judgment constitutes compliance with Proposition 65 with respect to exposures to failures
19 to warn about DEHP from the Products sold by WinCraft before the Effective Date, as set forth in
20 the Notice.

21 **4.2 Moore’s Individual Release of Claims**

22 Moore, in his individual capacity only and *not* in his representative capacity, also provides a
23 release to WinCraft, Releasees, and Downstream Releasees which shall be effective as a full and final
24 accord and satisfaction, as a bar to all actions, causes of action, obligations, costs, expenses,
25 attorneys’ fees, damages, losses, claims, liabilities and demands of Moore of any nature, character or
26 kind, whether known or unknown, suspected or unsuspected, arising out of alleged or actual
27 exposures to DEHP in the Products sold or distributed for sale by WinCraft before the Effective Date.

28 **4.3 WinCraft’s Release of Moore**

 WinCraft, on its own behalf, and on behalf of its past and current agents, representatives,
attorneys, successors, and assignees, hereby waives any and all claims against Moore and his
attorneys and other representatives, for any and all actions taken or statements made by Moore and

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

3 **5. COURT APPROVAL**

4 This Consent Judgment is not effective until it is approved and entered by the Court and shall
5 be null and void if, for any reason, it is not approved and entered by the Court within one year after it
6 has been fully executed by the Parties.

7 **6. SEVERABILITY**

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

11 **7. GOVERNING LAW**

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

19 **8. NOTICE**

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

23 **WinCraft**

24 John Killen, President
25 WinCraft, Incorporated
26 960 East Mark Street
Winona, MN 55987

Steven M. Siro
Jenner & Block LLP
353 N. Clark St.
Chicago, IL
60654-3456

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Moore
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

Moore 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. 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 their settlement in a timely manner. For purposes of this Section, “best efforts” shall include, at a minimum, cooperating on the drafting and filing of the necessary moving papers, supporting the motion, and appearing at the hearing before the Court.

11. MODIFICATION

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

1 **12. AUTHORIZATION**

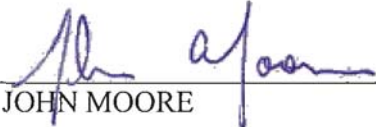
2 The undersigned are authorized to execute this Consent Judgment and have read, understood,
3 and agree to all of the terms and conditions contained herein.

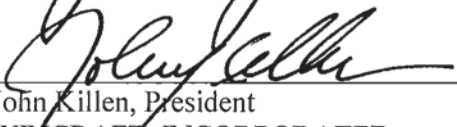
4 **AGREED TO:**

AGREED TO:

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6 Date: 1/26/2017

Date: January 25, 2017

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8 By: 
JOHN MOORE

By: 
John Killen, President
WINCRAFT, INCORPORATED

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