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13
14 SUPERIOR COURT OF THE STATE OF CALIFORNIA
15 COUNTY OF SANTA CLARA
16 UNLIMITED CIVIL JURISDICTION
17

18 JOHN MOORE,

19 Plaintiff,

20 v.

21 JAZWARES, LLC, *et al.*,

22 Defendants.
23
24
25
26
27
28

Case No. 17CV319996

[PROPOSED] CONSENT JUDGMENT

(Health & Safety Code § 25249.6 *et seq.* and
Code Civ. Proc. § 664.6)

1 **1. INTRODUCTION**

2 **1.1 Parties**

3 This Consent Judgment is entered into by and between plaintiff John Moore (“Moore”), and
4 Jazwares, LLC (“Jazwares”), with Moore and Jazwares each individually referred to as a “Party” and
5 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 Defendant**

11 Jazwares 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 Jazwares imports, sells, or distributes for sale in California, amplifiers with
16 cabinet coverings that contain di(2-ethylhexyl)phthalate (“DEHP”) without first providing the
17 exposure warning required by Proposition 65. DEHP is listed pursuant to Proposition 65 as a
18 chemical known to cause birth defects or other reproductive harm.

19 **1.5 Product Description**

20 For purposes of this Consent Judgment “Products” are defined as amplifiers containing DEHP
21 that are manufactured, imported, sold, or distributed for sale in California by Jazwares, including, but
22 not limited to, the *First Act Select Edition Amplifier, Model No: MA104, Art: MA1040100.13, UPC*
23 *#6 07266 30616 9.*

24 **1.6 Notice of Violation**

25 On September 12, 2017, Moore served Jazwares, and the requisite public enforcement
26 agencies with a 60-Day Notice of Violation (“Notice”) alleging that Jazwares violated Proposition 65
27 by failing to warn its customers and consumers in California of the health hazards associated with
28

1 exposures to DEHP from the Products. No public enforcer has commenced and is diligently
2 prosecuting an action to enforce the violations alleged in the Notice.

3 **1.7 Complaint**

4 On or about December 4, 2017, Moore filed the instant action (“Complaint”), naming
5 Jazwares as a defendant for the alleged violations of Health and Safety Code section 25249.6 that are
6 the subject of the Notice.

7 **1.8 No Admission**

8 Jazwares denies the material, factual, and legal allegations contained in the Notice and
9 Complaint, and maintains that all of the products it has sold, manufactured, imported, and/or
10 distributed for sale in California, including the Products, have been, and are, in compliance with all
11 laws. Nothing in this Consent Judgment shall be construed as an admission of any fact, finding,
12 conclusion of law, issue of law, or violation of law, nor shall compliance with this Consent Judgment
13 constitute or be construed as an admission of any fact, finding, conclusion of law, issue of law, or
14 violation of law. This Section shall not, however, diminish or otherwise affect Jazwares’ obligations,
15 responsibilities, and duties under 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 Jazwares as to the allegations in the Complaint, that venue is proper in the County of
19 Santa Clara, and that the Court has jurisdiction to enter and enforce the provisions of this Consent
20 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 Court approves this Consent Judgment, including any unopposed tentative ruling granting
24 approval of this Consent Judgment.

25 **2. INJUNCTIVE RELIEF: REFORMULATION & WARNINGS**

26 **2.1 Commitment to Reformulate or Warn**

27 Commencing on the Effective Date and continuing thereafter, Jazwares shall only
28 manufacture for sale, purchase for sale, or import for sale in California, Products that are either: (a)

1 Reformulated Products as defined by Section 2.2, below; or (b) Products that are offered by Jazwares
2 with a clear and reasonable warning pursuant to Section 2.3.

3 **2.2 Reformulation Standard**

4 For the purposes of this Consent Judgment, “Reformulated Products” are defined as Products
5 that contain DEHP in concentrations less than 0.1 percent (1,000 parts per million) when analyzed
6 pursuant to U.S. Environmental Protection Agency testing methodologies 3580A and 8270C or other
7 methodology utilized by federal or state government agencies for the purpose of determining DEHP
8 content in a solid substance.

9 **2.3 Clear and Reasonable Warning**

10 Commencing no later than thirty (30) days of the Effective Date and continuing thereafter, all
11 Products Jazwares manufactures, sells and/or distributes for sale in California which do not qualify as
12 Reformulated Products, will bear a clear and reasonable warning pursuant to this Section. Jazwares
13 further agrees that the warning will be prominently placed with such conspicuousness when
14 compared with other words, statements, designs or devices as to render it likely to be read and
15 understood by an ordinary individual under customary conditions of use. For purposes of this
16 Settlement Agreement, a clear and reasonable warning for the Products shall consist of a warning
17 affixed to the packaging, label, tag, or directly to a Product sold in California and containing one of
18 the following statements:



WARNING: Reproductive Harm-
www.P65Warnings.ca.gov

OR



WARNING: This product can expose you to
chemicals including DEHP, which is known to the
State of California to cause birth defects or other
reproductive harm. For more information go to
www.P65Warnings.ca.gov

1 **3. MONETARY SETTLEMENT TERMS**

2 **3.1 Civil Penalty Payments**

3 Pursuant to Health & Safety Code § 25249.7(b), in settlement of all the claims referred to in
4 this Consent Judgment, Jazwares shall pay \$4,500 in civil penalties. The civil penalty payment shall
5 be allocated according to Health and Safety Code section 25249.12(c)(1) and (d) with seventy-five
6 percent (75%) of the funds paid to the California Office of Environmental Health Hazard Assessment
7 (“OEHHA”) and twenty-five percent (25%) of the funds remitted to Moore. Within 5 days of the
8 Effective Date, Jazwares shall provide its payment in two checks for the following amount made
9 payable to (a) “OEHHA” in the amount of \$3,375; and (b) “John Moore Trust Account” in the
10 amount of \$1,125. Moore’s counsel shall be responsible for remitting Jazwares’ payment under this
11 Consent Judgment to OEHHA.

12 **3.2 Reimbursement of Attorney’s Fees and Costs**

13 The parties acknowledge that Moore and his counsel offered to resolve this dispute without
14 reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving the issue to
15 be resolved after the material terms of this Consent Judgment had been settled. Shortly after the
16 other settlement terms had been finalized, the Parties negotiated the compensation due to Moore and
17 his counsel under general contract principles and the private attorney general doctrine codified at
18 California Code of Civil Procedure section 1021.5 for all work performed through the mutual
19 execution of this Consent Judgment, and court approval of the same, but exclusive of fees and costs
20 on appeal, if any. Under these legal principles, Jazwares shall pay \$33,000 for all fees and costs
21 incurred by Moore investigating, bringing this matter to Jazwares’ attention, litigating and
22 negotiating a settlement in the public interest. Jazwares’ payment shall be delivered in the form of a
23 check payable to “The Chanler Group” within 5 days of the Effective Date. To ensure timely
24 payment, Moore’s counsel will provide W9s to Jazwares’ counsel when Plaintiff files the Motion to
25 Approve the Consent Judgment with the court.

1 **3.3 Payment Address**

2 All payments required by this Consent Judgment shall be delivered to:

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

8 **4. CLAIMS COVERED AND RELEASED**

9 **4.1 Moore's Public Release of Proposition 65 Claims**

10 Moore, acting on his own behalf and in the public interest, waives all rights to institute or
11 participate in, directly or indirectly, any form of legal action and releases Jazwares and its parents,
12 subsidiaries, affiliated entities under common ownership, directors, officers, employees,
13 shareholders, and attorneys ("Releasees"), and each entity to whom Jazwares directly or indirectly
14 distributes or sells the Products including, without limitation, its downstream customers,
15 distributors, wholesalers, retailers, franchisees, cooperative members, licensors, and licensees
16 ("Downstream Releasees") from all claims including, without limitation, all actions and causes of
17 action in law or in equity, suits, liabilities, demands, obligations, damages, costs, fines, penalties,
18 losses or expenses, investigation fees, expert fees, and attorneys' fees of any nature whatsoever
19 arising from any violation under Proposition 65 pertaining to the failure to warn about exposures to
20 DEHP from Products manufactured, imported, sold, and/or distributed for sale by Jazwares prior to
21 the Effective Date, as set forth in the Notice. Compliance with the terms of this Consent Judgment
22 constitutes compliance with Proposition 65 with respect to exposures to DEHP from Products
23 manufactured, imported, sold, and/or distributed for sale by Jazwares after the Effective Date.

24 **4.2 Moore's Individual Release of Claims**

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

1 Effective Date. In furtherance of the foregoing, as to alleged exposures to DEHP in the Products,
2 Moore, on behalf of himself and himself only, hereby waives any and all rights and benefits which he
3 now has, or in the future may have, conferred upon him with respect to claims arising from any
4 violation of Proposition 65 or any other statutory or common law regarding the failure to warn about
5 alleged exposures to DEHP from the Products by virtue of the provisions of section 1542 of the
6 California Civil Code, which provides as follows:

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

10 Moore understands and acknowledges that the significance and consequence of this waiver
11 of California Civil Code section 1542 is that even if Moore suffers future damages arising out of or
12 resulting from, or related directly or indirectly to, in whole or in part, claims arising from any
13 violation of Proposition 65 or any other statutory or common law regarding the failure to warn
14 about alleged exposure to DEHP from the Products, including but not limited to any exposure to, or
15 failure to warn with respect to exposure to DEHP from the Products, Moore will not be able to
16 make any claim for those damages or injunctive relief against Jazwares, the Releasees or
17 Downstream Releasees. Furthermore, Moore acknowledges that he intends these consequences for
18 any such claims arising from any violation of Proposition 65 or any other statutory or common law
19 regarding the failure to warn about alleged exposure to DEHP from Products as may exist as of the
20 date of this release but which Moore does not know exist, and which, if known, would materially
21 affect his decision to enter into this Consent Judgment, regardless of whether his lack of knowledge
22 is the result of ignorance, oversight, error, negligence, or any other cause.

23 **4.3 Jazwares's Release of Moore**

24 Jazwares, on its own behalf, and on behalf of its past and current agents, representatives,
25 attorneys, successors, and assignees, hereby waives any and all claims against Moore, and his
26 attorneys and other representatives, for any and all actions taken or statements made by Moore, and
27 his attorneys and other representatives, whether in the course of investigating claims, otherwise
28 seeking to enforce Proposition 65 against it in this matter, or with respect to the Products.

1 **5. COURT APPROVAL**

2 This Consent Judgment is not effective until it is approved and entered by the Court and shall
3 be null and void if it is not approved and entered by the Court within one year after it has been fully
4 executed by the Parties, or by such additional time as the Parties may agree in writing. In the event
5 the Court does not approve this Consent Judgment within one year, the funds paid pursuant to this
6 Consent Judgment shall be returned to Jazwares.

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, or is otherwise
14 rendered inapplicable by reason of law generally or as to the Products, then Jazwares may provide
15 written notice to Moore of any asserted change in the law, and shall have no further injunctive
16 obligations pursuant to this Consent Judgment with respect to, and to the extent that, the Products are
17 so affected.

18 **8. NOTICE**

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

22 **Jazwares:**

23 Judd Zebersky, Chief Executive
24 Officer
25 Jazwares, LLC
26 963 Shotgun Road
27 Sunrise, FL 33326

28 Melissa A. Jones
 STOEL RIVES LLP
 500 Capitol Mall, Suite 1600
 Sacramento, CA 95814
 melissa.jones@stoel.com

1 **Moore:**

2 Proposition 65 Coordinator
3 The Chanler Group
4 2560 Ninth Street
 Parker Plaza, Suite 214
 Berkeley, CA 94710-2565

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

7 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

8 This Consent Judgment may be executed in counterparts and by facsimile signature or email
9 signature, each of which shall be deemed an original, and all of which, when taken together, shall
10 constitute one and the same document.

11 **10. POST EXECUTION ACTIVITIES**

12 Moore agrees to comply with the reporting form requirements referenced in Health and Safety
13 Code section 25249.7(f). The Parties further acknowledge that, pursuant to Health and Safety Code
14 section 25249.7(f), a noticed motion is required to obtain judicial approval of the settlement, which
15 Moore shall draft and file. In furtherance of obtaining such approval, the Parties agree to mutually
16 employ their best efforts, and those of their counsel, to support the entry of this agreement as a
17 consent judgment, and to obtain judicial approval of their settlement in a timely manner. For
18 purposes of this Section, "best efforts" shall include, at a minimum, filing an appearance in the
19 action, supporting the motion for approval, responding to any objection that any third-party may file
20 or lodge, and appearing at the hearing before the Court if so requested.

21 **11. MODIFICATION**

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

25 **12. DUTIES LIMITED TO CALIFORNIA**

26 This Consent Judgment shall have no effect on Covered Products sold or distributed by
27 Jazwares outside the State of California.

1 **13. AUTHORIZATION**

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

4 **AGREED TO:**

5 Date: 12/4/2017

6
7 By: 
8 JOHN MOORE

5 **AGREED TO:**

6 Date: 12/5/2017

7 By: 
8 JUDD ZEBERSKY, CEO
9 JAZWARES, LLC