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JOHN MOORE

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SACRAMENTO
UNLIMITED CIVIL JURISDICTION

JOHN MOORE,
Plaintiff,
v.
ANCIENT GRAFFITI, INC., and DOES 1-
150, inclusive
Defendants.

Case No. 34-2018-0023189

CONSENT JUDGMENT

(Health & Safety Code § 25249.6 *et seq.* and
Code of Civil Procedure § 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 defendant Ancient Graffiti, Inc. (Ancient Graffiti), with Moore and Ancient Graffiti each referred to
5 individually as a “Party” and collectively as the “Parties.”

6 **1.2 Plaintiff**

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

10 **1.3 Defendant**

11 Ancient Graffiti employs ten or more persons and is a person in the course of doing business
12 for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, California Health and
13 Safety Code § 25249.5 *et seq.* (Proposition 65).

14 **1.4 General Allegations**

15 Moore alleges that Ancient Graffiti manufactures, imports, sells and/or distributes for sale in
16 California glass rain gauges with exterior designs containing lead, and that it does so without
17 providing the health hazard warning that Moore alleges is required by Proposition 65. Lead is listed
18 pursuant to Proposition 65 as a chemical known to the State of California to cause birth defects and
19 other reproductive harm.

20 **1.5 Product Description**

21 The products covered by this Consent Judgment are glass rain gauges with exterior designs
22 containing lead including, but not limited to, the *Ancient Graffiti Cast Brass Staked Rain Gauge,*
23 *Turtle, AG-1171, UPC #6 38071 77770 7,* that are manufactured, imported, distributed, sold and/or
24 offered for sale by Ancient Graffiti in the State of California, hereinafter the “Products.”

25 **1.6 Notice of Violation**

26 On February 14, 2018, Moore served Ancient Graffiti and the requisite public enforcement
27 agencies with a 60-Day Notice of Violation (Notice), alleging that Ancient Graffiti violated
28 Proposition 65 when it failed to warn its customers and consumers in California that the Products

1 expose users to lead. To the best of the Parties' knowledge, no public enforcer has commenced and
2 is diligently prosecuting an action to enforce the allegations set forth in the Notice.

3 **1.7 Complaint**

4 On April 26, 2018, Moore commenced the instant action (Complaint), naming Ancient
5 Graffiti as one of the defendants for the alleged violations of Proposition 65 that are the subject of
6 the Notice.

7 **1.8 No Admission**

8 Ancient Graffiti denies the material, factual and legal allegations contained in the Notice and
9 Complaint, and maintains that all of the products that it has sold or 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, nor shall compliance with this Consent Judgment constitute or be
12 construed as, an admission by Ancient Graffiti of any fact, finding, conclusion of law, issue of law,
13 or violation of law. This section shall not, however, diminish or otherwise affect Ancient Graffiti's
14 obligations, responsibilities, and duties under this Consent Judgment.

15 **1.9 Jurisdiction**

16 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
17 jurisdiction over Ancient Graffiti as to the allegations in the Complaint, that venue is proper in the
18 County of Sacramento, and that the Court has jurisdiction to enter and enforce the provisions of this
19 Consent Judgment pursuant to Proposition 65 and Code of Civil Procedure § 664.6.

20 **1.10 Effective Date**

21 For purposes of this Consent Judgment, the term "Effective Date" shall mean the date this
22 Consent Judgment is approved by the Court, including an unopposed tentative ruling.

23 **2. INJUNCTIVE RELIEF: REFORMULATION OR WARNINGS**

24 **2.1 Commitment to Reformulate or Provide Warnings**

25 Commencing on the Effective Date and continuing thereafter, Ancient Graffiti shall only
26 manufacture for sale, import for sale, and purchase for resale in California Products that are
27 Reformulated Products as defined by Section 2.2. Any Products, that are not Reformulated
28 Products, which Ancient Graffiti distributes for sale or sells to customers or consumers in California,

1 or to customers with nationwide distribution, after the Effective Date, shall be labeled with a clear
2 and reasonable warning as set forth in Section 2.3. If, after the Effective Date, Ancient Graffiti sells
3 Products that are not Reformulated Products via mail order catalog and/or the internet to customers
4 located in California, Ancient Graffiti shall also provide warnings for such Products by identifying
5 the specific Product to which the warning applies as specified in Sections 2.4 through 2.6.


6 **2.2 Reformulation Standard**

7 “Reformulated Products” are defined as Products that contain lead in concentrations that do
8 not exceed 90 parts per million (ppm), equivalent to 0.009%, in any exterior parts analyzed pursuant
9 to U.S. Environmental Protection Agency (EPA) testing methodologies 3050B and 6010B. In
10 addition to the above test methodologies, the Parties may use any equivalent methodologies utilized
11 by a state or federal agency to determine lead content in a solid substance.

12 **2.3 Clear and Reasonable Warnings**

13 Commencing on or before the Effective Date, Ancient Graffiti shall provide clear and
14 reasonable warnings for all Products provided for sale to customers in California. Each warning
15 shall be prominently placed with such conspicuousness as compared with other words, statements,
16 designs, or devices as to render it likely to be read and understood by an ordinary individual under
17 customary conditions before purchase or use and shall be provided in a manner such that it is clearly
18 associated with the specific Product to which the warning applies. Where a consumer product sign,
19 label or shelf tag used to provide a warning includes consumer information in a language other than
20 English, the warning must also be provided in that language in addition to English.

21 **(a) Warning.** The warning shall consist of the following statement (Warning):

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

25 **(b) Short-Form Warning.** Ancient Graffiti may, but is not required to, use the
26 following short-form warning as set forth in this subsection 2.3(b) (Short-Form Warning), and
27 subject to the additional requirements in Sections 2.5 and 2.6, as follows:

28  **WARNING:** Reproductive Harm – www.P65Warnings.ca.gov

1 (c) **Foreign Language Requirement.** Where a consumer product sign, label or
2 shelf tag used to provide a warning includes consumer information in a language other than English,
3 the warning must also be provided in that language in addition to English.

4 **2.4 Product Warnings**

5 Ancient Graffiti shall affix a warning to the Product label or otherwise directly on each
6 Product provided for sale in retail outlets in California or sold via mail order catalog and/or the
7 internet to customers located in California. For the purpose of this agreement, “Product label”
8 means a display of written, printed or graphic material that is printed on or affixed to a Product or its
9 immediate container or wrapper. The entire warning shall appear in a type size of at least 6 point
10 type and no smaller than the largest type size used for other consumer information on the product.
11 The warning shall consist of either the Warning, or the Short-Form Warning described in subsection
12 2.3(a) or (b), respectively.

13 **2.5 Mail Order Catalog Warnings**

14 In the event that, after the Effective Date, Ancient Graffiti prints new catalogs and sells
15 Products via mail order through such catalogs to customers located in California, Ancient Graffiti
16 shall provide a warning for each Product both on the Product label in accordance with Section 2.4,
17 and in the catalog in a manner that clearly associates the warning with the specific Product being
18 purchased. Any warning provided in a mail order catalog shall be in the same type size or larger
19 than other consumer information provided for the Product within the catalog and shall be provided
20 on the same page and in the same location as the display and/or description of the Product. The
21 catalog warning may use the Short-Form Warning content described in Section 2.3(b) if the warning
22 provided on the Product label also uses the Short-Form Warning content.

23 **2.6 Internet Warnings**

24 If, after the Effective Date, Ancient Graffiti sells Products via the internet to customers
25 located in California, Ancient Graffiti shall provide warnings for each Product both on the Product
26 label in accordance with Section 2.4, and by prominently displaying the warning to the customer
27 prior to completing the purchase or during the purchase of the Products without requiring customers
28 to seek out the warning. Warnings given in conjunction with the sale of the Products via the internet

1 shall appear either: (a) on the same web page on which the Product is displayed; (b) on the same web
2 page as the order form for the Product; or (c) on one or more web pages displayed to a purchaser
3 during the checkout process. The warning shall appear in any of the above instances adjacent to or
4 immediately following the display or description of the Product for which it is given in the same
5 type size or larger than the Product description text. The internet warning may use the Short-Form
6 Warning content described in Section 2.3(b) if the warning provided on the Product label also uses
7 the Short-Form Warning content. Ancient Graffiti may also comply with this section by providing
8 the warning using a clearly marked hyperlink that includes the word “WARNING” on the same web
9 page and in the same location as the display and/or description of the Product.

10 **3. MONETARY SETTLEMENT TERMS**

11 **3.1 Civil Penalty Payments**

12 Pursuant to Health and Safety Code § 25249.7(b), and in settlement of all claims referred to
13 in the Notice, Complaint, and this Consent Judgment, Ancient Graffiti agrees to pay \$7,000 in civil
14 penalties. Ancient Graffiti’s civil penalty payments will be allocated according to Health and Safety
15 Code § 25249.12(c)(1) and (d), with seventy-five percent (75%) of the penalty paid to the California
16 Office of Environmental Health Hazard Assessment (OEHHA), and the remaining twenty-five
17 percent (25%) of the penalty payment retained by Moore. Moore’s counsel shall be responsible for
18 delivering OEHHA’s portion of the penalty payments.

19 **3.1.1 Initial Civil Penalty Payment.** Ancient Graffiti shall deliver its initial civil
20 penalty payment in the amount of \$2,000 within five (5) business days after the Effective Date in
21 two checks made payable as follows: (a) “OEHHA” in the amount of \$1,500; and (b) “John Moore,
22 Client Trust Account” in the amount of \$500.

23 **3.1.2 Final Waivable Civil Penalty Payment.** Ancient Graffiti shall pay a final
24 civil penalty of \$5,000. However, the final civil penalty shall be waived in its entirety, if, within five
25 (5) days of the Effective Date, an officer of Ancient Graffiti certifies that as of the Effective Date,
26 and continuing thereafter, all Products, manufactured, imported, or purchased for resale to customers
27 in California, are Reformulated Products as defined by Section 2.2. The option to certify to product
28 reformulation in lieu of making the payment required by this Section is a material term, and time is

1 of the essence. Unless waived, within ten (10) days of the Effective Date, Ancient Graffiti shall
2 provide its initial civil penalty payment in two checks made payable as follows: (a) "OEHHA" in the
3 amount of \$3,750; and (b) "John Moore, Client Trust Account" in the amount of \$1,250.

4 **3.2 Reimbursement of Attorneys' Fees and Costs**

5 The parties acknowledge that Moore and his counsel offered to resolve this dispute without
6 reaching terms on their fees and costs. Shortly after the other settlement terms had been finalized,
7 the Parties negotiated the compensation to be paid to Moore and his counsel under general contract
8 principles and the private attorney general doctrine codified at California Code of Civil Procedure
9 § 1021.5 for all work performed through the mutual execution of this Consent Judgment and court
10 approval of the same, but exclusive of fees and costs on appeal, if any. Ancient Graffiti agrees to
11 reimburse Moore and his counsel \$23,000 for all fees and costs incurred investigating, bringing this
12 matter to Ancient Graffiti's attention, litigating, and negotiating a settlement in the public interest.
13 Ancient Graffiti's settlement payment pursuant to this subsection in the form of a check made
14 payable to "The Chanler Group" shall be delivered to the address in Section 3.3, within
15 five (5) business days of the Effective Date.

16 **3.3 Payment Address**

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

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

21 **4. CLAIMS COVERED AND RELEASED**

22 **4.1 Moore's Release of Proposition 65 Claims**

23 Moore, acting on his own behalf and in the public interest, releases Ancient Graffiti and its
24 parents, subsidiaries, affiliated entities under common ownership, directors, officers, employees, and
25 attorneys (collectively, Releasees) and each entity to whom Ancient Graffiti directly or indirectly
26 distributes or sells the Products including, but not limited to, its downstream distributors,
27 wholesalers, customers, retailers, franchisers, cooperative members, licensors and licensees
28 (Downstream Releasees) for any violations arising under Proposition 65 for unwarned exposures to

1 lead from the Products manufactured, imported, distributed or sold by Ancient Graffiti prior to the
2 Effective Date, as set forth in the Notice and Complaint. Compliance with the terms of this Consent
3 Judgment constitutes compliance with Proposition 65 by Ancient Graffiti with respect to the alleged
4 or actual failure to warn about exposures to lead from Products manufactured, sold or distributed for
5 sale by Ancient Graffiti after the Effective Date.

6 **4.2 Moore's Individual Release of Claims**

7 Moore, in his individual capacity only and *not* in his representative capacity, also provides a
8 release to Ancient Graffiti, Releasees, and Downstream Releasees which shall be effective as a full
9 and final accord and satisfaction, as a bar to all actions, causes of action, obligations, costs,
10 expenses, attorneys' fees, damages, losses, claims, liabilities and demands of Moore of any nature,
11 character or kind, whether known or unknown, suspected or unsuspected, arising out of alleged or
12 actual exposures to lead in Products manufactured, imported, distributed or sold by Ancient Graffiti
13 before the Effective Date. Nothing in Section 4 affects Moore's right to commence or prosecute an
14 action under Proposition 65 against a Releasee or Downstream Releasee that does not involve
15 Ancient Graffiti's Products.

16 **4.3 Ancient Graffiti's Release of Moore**

17 Ancient Graffiti, on its own behalf and on behalf of its past and current agents,
18 representatives, attorneys, successors and/or assignees, hereby waives any and all claims against
19 Moore and his attorneys and other representatives, for any and all actions taken or statements made
20 (or those that could have been taken or made) by Moore and his attorneys and other representatives
21 in the course of investigating claims, seeking to enforce Proposition 65 against it in this matter, or
22 with respect to the Products.

23 **5. COURT APPROVAL**

24 This Consent Judgment shall be null and void if, for any reason, it is not approved and
25 entered by the Court within one year after it has been fully executed by all Parties. Moore and
26 Ancient Graffiti agree to support the entry of this agreement as a judgment, and to obtain the Court's
27 approval of their settlement in a timely manner. The Parties acknowledge that, pursuant to
28 California Health and Safety Code § 25249.7(f)(4), a noticed motion is required for judicial approval

1 of this Consent Judgment, which motion Moore shall draft and file. In furtherance of obtaining such
2 approval, the Parties agree to mutually employ their best efforts, and those of their counsel, to
3 support the entry of this agreement as a judgment, and to obtain judicial approval of their settlement
4 in a timely manner. For purposes of this section, "best efforts" shall include, at a minimum,
5 supporting the motion for approval, responding to any objection that any third-party may file or
6 lodge, and appearing at the hearing before the Court if so requested.

7 **6. SEVERABILITY**

8 If, subsequent to the Court's approval and entry of this Consent Judgment as a judgment, any
9 provision of this Consent Judgment is held by a court to be unenforceable, the validity of the
10 remaining provisions shall not be 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
14 is otherwise rendered inapplicable by reason of law generally, or as to the Products, then Ancient
15 Graffiti may provide Moore with written notice of any asserted change in the law, and shall have no
16 further injunctive obligations pursuant to this Consent Judgment, with respect to, and to the extent
17 that, the Products are so affected. Nothing in this Consent Judgment shall be interpreted to relieve
18 Ancient Graffiti from its obligation to comply with any pertinent state or federal law or regulation.

19 **8. NOTICE**

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

24 To Ancient Graffiti:

25 Ron Zisman
26 Ancient Graffiti, Inc.
27 300 E IL Route 22
28 Lake Zurich, IL 60047

To Moore:

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

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

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

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

7 **10. COMPLIANCE WITH REPORTING REQUIREMENTS**

8 Moore and his counsel agree to comply with the reporting form requirements referenced in
9 California Health and Safety Code § 25249.7(f).

10 **11. ENTIRE AGREEMENT**

11 This Consent Judgment contains the sole and entire agreement and understanding of the
12 Parties with respect to the entire subject matter hereof, and any and all prior discussions,
13 negotiations, commitments, or understandings related thereto, if any, are hereby merged herein and
14 therein. There are no warranties, representations, or other agreements between the Parties except as
15 expressly set forth herein. No representations, oral or otherwise, express or implied, other than those
16 specifically referred to in this Consent Judgment have been made by any Party hereto. No other
17 agreements not specifically contained or referenced herein, oral or otherwise, shall be deemed to
18 exist or to bind any of the Parties hereto.

19 **12. MODIFICATION**

20 This Consent Judgment may be modified only by: (a) a written agreement of the Parties and
21 the entry of a modified Consent Judgment by the Court thereon; or (b) upon a successful motion of
22 any party and the entry of a modified Consent Judgment by the Court thereon.

1 **13. AUTHORIZATION**


2 The undersigned are authorized to execute this Consent Judgment on behalf of their
3 respective Parties and have read, understood, and agreed to all of the terms and conditions of this
4 Consent Judgment.

5
6 **AGREED TO:**

AGREED TO:

7 Date: 11/20/2018

Date: _____

8
9 By:  _____
10 JOHN MOORE

By: _____
11 Ron Zisman
12 ANCIENT GRAFFITI, INC.

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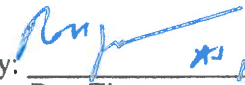
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6 **AGREED TO:**

7 Date: _____
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9 By: _____
10 JOHN MOORE

AGREED TO:

Date: 11/21/18

By:  as president of
Ron Zisman ANCIENT
ANCIENT GRAFFITI, INC. GRAFFITI
INC.

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