

1 Brian C. Johnson, State Bar No. 235965
2 Josh Voorhees, State Bar No. 241436
3 THE CHANLER GROUP
4 2560 Ninth Street
5 Parker Plaza, Suite 214
6 Berkeley, CA 94710-2565
7 Telephone: (510) 848-8880
8 Facsimile: (510) 848-8118

9 Attorneys for Plaintiff
10 JOHN MOORE

11 SUPERIOR COURT OF THE STATE OF CALIFORNIA
12 COUNTY OF SAN FRANCISCO
13 UNLIMITED CIVIL JURISDICTION

14 JOHN MOORE,

15 Plaintiff,

16 v.

17 IN GEAR FASHIONS, INC.; *et al.*,

18 Defendants.

Case No. CGC-11-511834

[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 defendant, In Gear Fashions, Inc. (“In Gear”) with Moore and In Gear collectively referred to as the
5 “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 In Gear employs ten or more persons and is a person in the course of doing business for
12 purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, California Health & Safety
13 Code § 25249.6 *et seq.* (“Proposition 65”).

14 **1.4 General Allegations**

15 Moore alleges that In Gear sold footwear containing di(2-ethylhexyl)phthalate (“DEHP”) and
16 di-n-butyl phthalate (“DBP”) without first providing the clear and reasonable warning required by
17 Proposition 65. DEHP and DBP are each listed pursuant to Proposition 65 as a chemical that is
18 known to the state of California to cause birth defects or other reproductive harm. DEHP and DBP
19 shall be referred to collectively as the “Listed Chemicals.”

20 **1.5 Product Description**

21 The products covered by this Consent Judgment are footwear manufactured, sold, or
22 distributed for sale in California by In Gear, including, but not limited to, the *Blue Aqua Flip Flops*,
23 *L10F212C* (#6 75220 36791 4) (collectively, “Products”).

24 **1.6 Notices of Violation**

25 On or about March 31, 2011, Moore served In Gear and various public enforcement agencies
26 with a “60-Day Notice of Violation” (“Notice”), a document that informed the recipients of Moore’s
27 allegation that In Gear was in violation of Proposition 65 for failing to warn its customers and
28 consumers in California that the Products expose users to the Listed Chemicals. Thereafter, on

1 September 19, 2011, Moore served In Gear, its importer and supplier, Frisky Nineteen, LLC (“Frisky
2 Nineteen”), and the same requisite public enforcement agencies with a second “60-Day Notice of
3 Violation” (“Second Notice”), alleging that Frisky Nineteen was also in violation of Proposition 65
4 with respect to unwarned exposures to the Listed Chemicals contained in the Products sold or
5 distributed for sale in California by In Gear. The Notice and Second Notice are referred to
6 collectively as the “Notices.” To the best of the Parties knowledge, no public enforcer has
7 commenced and is diligently prosecuting the violations alleged in the Notices.

8 **1.7 Complaint**

9 On June 20, 2011, Moore initiated this action against In Gear for the violations of Health &
10 Safety Code § 25249.6 alleged in the Notice. On November 7, 2011, Moore filed a First Amended
11 Complaint, the operative pleading in this action (“Complaint”), adding In Gear’s supplier, Frisky
12 Nineteen, as a defendant in the action.

13 **1.8 No Admission**

14 In Gear denies the material, factual, and legal allegations contained in the Notice and
15 Complaint, and maintains that all of the products that it has sold in California, including the Products,
16 have been, and are, in compliance with all laws. Nothing in this Consent Judgment shall be
17 construed as an admission of any fact, finding, conclusion of law, issue of law, or violation of law;
18 nor shall compliance with this Consent Judgment constitute or be construed as an admission of any
19 fact, finding, conclusion of law, issue of law, or violation of law, the same being specifically denied
20 by In Gear. This section shall not, however, diminish or otherwise affect In Gear’s obligations,
21 responsibilities, and duties under this Consent Judgment.

22 **1.9 Consent to Jurisdiction**

23 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
24 jurisdiction over In Gear as to the allegations in the Complaint, that venue is proper in the county of
25 San Francisco, and that this Court has jurisdiction to enter and enforce the provisions of this Consent
26 Judgment.

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1 **1.10 Effective Date**

2 For purposes of this Consent Judgment, the term “Effective Date” shall mean May 31, 2012.

3 **2. INJUNCTIVE RELIEF: REFORMULATION**

4 **2.1 Reformulated Products**

5 Beginning on November 15, 2012 and continuing thereafter, In Gear shall not import,
6 manufacture, sell, or distribute for sale in California, any Product that contains more than 1,000 parts
7 per million of either of the Listed Chemicals in any accessible component (i.e., any component that
8 may be handled or touched by a user during reasonably foreseeable use) when analyzed pursuant to
9 Environmental Protection Agency testing methodologies 3580A and 8270C or equivalent
10 methodologies used by federal or state agencies for purposes of determining DEHP or DBP content
11 in a solid substance.

12 **3. MONETARY PAYMENTS**

13 **3.1 Civil Penalty Payment Pursuant to Health & Safety Code § 25249.7(b)**

14 Pursuant to Health & Safety Code § 25249.7(b), In Gear shall pay \$4,000 in civil penalties.
15 The penalty amount reflects a credit of \$6,000 agreed to by Moore in response to In Gear’s
16 commitment to Proposition 65 compliance, including, its agreement to reformulate the Products to
17 comply with the DEHP and DBP content requirements established by section 2.

18 The penalty payment shall be allocated according to Health & Safety Code § 25249.12 (c)(1)
19 & (d), with seventy-five percent (75%) of the penalty payment earmarked for the California Office of
20 Environmental Health Hazard Assessment (“OEHHA”) and the remaining twenty-five (25%) of the
21 penalty payment earmarked for Moore. Payment shall be delivered to Moore’s counsel according the
22 payment schedule provided in section 3.3.2.

23 **3.2 Reimbursement of Plaintiff’s Fees and Costs**

24 The Parties acknowledge that Moore and his counsel offered to resolve this dispute without
25 reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving the issue to
26 be resolved after the material terms of the agreement had been settled. Shortly after all other
27 settlement terms had been finalized, In Gear expressed a desire to resolve the issue. The Parties then
28 attempted to (and did) reach an accord on the compensation due Moore and his counsel under general

1 contract principles and the private attorney general doctrine codified at California Code of Civil
2 Procedure § 1021.5 for all work performed in this matter exclusive of fees and costs that may be
3 incurred on appeal, if any. Under these legal principles, In Gear shall pay \$25,500 for fees and costs
4 incurred investigating, litigating, and enforcing this matter, including the fees and costs incurred (and
5 to be incurred) negotiating a settlement, drafting the motion for judicial, and moving the Court for,
6 and obtaining its approval of, this Consent Judgment in the public interest. Payment shall be
7 delivered to Moore’s counsel according to the payment schedule provided in section 3.3.2.

8 **3.3 Payment Procedures**

9 **3.3.1 Funds Held in Trust**

10 All payments made under this Consent Judgment shall be held in trust until the Court
11 approves the settlement. The Parties acknowledge that Moore’s counsel gave In Gear the option of
12 depositing the funds into its attorney’s trust account, but that In Gear elected to have The Chanler
13 Group hold the settlement trust funds in its own account.

14 **3.3.2 Payment Schedule**

15 (a) On or before June 15, 2012, In Gear shall deliver two checks for the following
16 amounts made payable to:

17 (1) “The Chanler Group in Trust for OEHHA” in the amount of \$3,000;
18 and

19 (2) “The Chanler Group in Trust for John Moore” in the amount of
20 \$1,000.

21 (b) On or before July 15, 2012, In Gear shall deliver a third check to “The
22 Chanler Group in Trust” in the amount of \$6,375; and

23 (c) on or before August 15, 2012, In Gear shall deliver a fourth check to “The
24 Chanler Group in Trust” in the amount of \$6,375; and

25 (d) on or before September 15, 2012, In Gear shall deliver a fifth check to “The
26 Chanler Group in Trust” in the amount of \$6,375; and

27 (e) on or before October 15, 2012, in Gear shall deliver a sixth check to “The
28 Chanler Group in Trust” in the amount of \$6,375.

1 **3.3.3 Issuance of 1099 Forms**

2 After the Consent Judgment has been approved, In Gear shall provide Moore’s
3 counsel with three 1099 forms for its payments to:

4 (a) “Office of Environmental Health Hazard Assessment”, P.O. Box 4010,
5 Sacramento, CA 95814 (EIN: 68-0284486) for its civil penalty payment amount of
6 \$3,000;

7 (b) “John Moore”, whose address and tax identification number shall be
8 furnished upon request after the date that this Consent Judgment is fully executed by
9 the Parties, for the civil penalty payment of \$1,000; and

10 (c) “The Chanler Group” (EIN: 94-3171522) for the reimbursement of Moore’s
11 fees and costs in the amount of \$25,500.

12 **3.3.3 Payment Address**

13 All payments and tax forms required by this Consent Judgment shall be delivered to
14 the following address:

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

20 **4. CLAIMS COVERED AND RELEASED**

21 **4.1 Moore’s Public Release of Proposition 65 Claims**

22 Moore acting on his own behalf and in the public interest releases In Gear, its parents,
23 subsidiaries, affiliated entities under common ownership, directors, officers, employees, attorneys,
24 In Gear’s, including, without limitation, In Gear’s importer and supplier of the Products, Frisky
25 Nineteen, LLC, and each entity to whom In Gear directly or indirectly distributed or sold the
26 Products, including, without limitation, its downstream distributors, wholesalers, dealers,
27 customers, owners, purchasers, users, auctioneers, retailers (including but not limited to Wal-Mart
28 Stores, Inc. and its affiliates and subsidiaries), franchisees, cooperative members, licensors, and
licensees (collectively, “Releasees”) from all claims for violations of Proposition 65 up through the
Effective Date based on exposures to the Listed Chemicals from the Products sold by In Gear, as set

1 forth in the Notice. Compliance with the terms of this Consent Judgment constitutes compliance
2 with Proposition 65 with respect to exposures to the Listed Chemicals from the Products sold by In
3 Gear as set forth in the Notice.

4 **4.2 Moore's Individual Release of Claims**

5 Moore, in his individual capacity only and *not* in his representative capacity, also provides a
6 release herein which shall be effective as a full and final accord and satisfaction, as a bar to all
7 actions, causes of action, obligations, costs, expenses, attorneys' fees, damages, losses, claims,
8 liabilities and demands of Moore of any nature, character or kind, whether known or unknown,
9 suspected or unsuspected, arising out of alleged or actual exposures to the Listed Chemicals in the
10 Products manufactured, distributed, or sold by In Gear.

11 **4.3 In Gear's Release of Moore**

12 In Gear on behalf of itself, its past and current agents, representatives, attorneys, successors,
13 and/or assignees, hereby waives any and all claims against Moore and his attorneys and other
14 representatives for any and all actions taken or statements made (or those that could have been
15 taken or made) by Moore and his attorneys and other representatives, whether in the course of
16 investigating claims, otherwise seeking to enforce Proposition 65 against it in this matter, or with
17 respect to the Products.

18 **5. COURT APPROVAL**

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

22 **6. SEVERABILITY**

23 If, subsequent to the execution of this Consent Judgment, any provision is held by a court to
24 be unenforceable, the validity of the remaining provisions shall not be adversely affected.

25 **7. GOVERNING LAW**

26 The terms of this Consent Judgment shall be governed by the laws of the state of California
27 and apply within the state of California. In the event that Proposition 65 is repealed, preempted, or is
28 otherwise rendered inapplicable by reason of law generally, or as to the Products, then In Gear may

1 provide written notice to Moore of any asserted change in the law, and shall have no further
2 obligations pursuant to this Consent Judgment with respect to, and to the extent that, the Products are
3 so affected. Nothing in this Consent Judgment shall be interpreted to relieve In Gear from any
4 obligation to comply with any pertinent state or federal toxics control laws.

5 **8. NOTICES**

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

10 For In Gear:

11 Kevin Frija, President
12 In Gear Fashions, Inc.
13 4401 Northwest 167th Street
Miami Gardens, FL 33055

14 For Moore:

15 Proposition 65 Coordinator
16 The Chanler Group
17 2560 Ninth Street
Parker Plaza, Suite 214
Berkeley, CA 94710

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

20 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

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

24 **10. POST EXECUTION ACTIVITIES**

25 Moore agrees to comply with the reporting form requirements referenced in California Health
26 & Safety Code § 25249.7(f). The Parties further acknowledge that, pursuant to California Health &
27 Safety Code § 25249.7(f)(4), a noticed motion is required to obtain judicial approval of this Consent
28 Judgment. In furtherance of obtaining such approval, Moore and In Gear and their respective counsel

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agree to mutually employ their best efforts to support the entry of this agreement as a Consent Judgment and obtain judicial approval of the same in a timely manner. For purposes of this section, "best efforts" shall include, at a minimum, cooperating on the drafting and filing of any papers in support of the required motion for judicial approval.

11. MODIFICATION

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

12. AUTHORIZATION

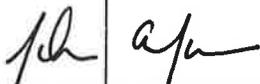
The undersigned are authorized to execute this Consent Judgment and have read, understood, and agree to all of the terms and conditions contained herein.

AGREED TO:

AGREED TO:

Date: MAY 25, 2012

Date: 05-24-2012

By: 
JOHN MOORE

By: 
Kevin Frija, President
IN GEAR FASHIONS, INC.