

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

ENDORSED
FILED
ALAMEDA COUNTY

NOV 06 2015

CLERK OF THE SUPERIOR COURT
By Maria Carrera
Maria Carrera, Deputy

11 SUPERIOR COURT OF THE STATE OF CALIFORNIA

12 COUNTY OF ALAMEDA

13 UNLIMITED CIVIL JURISDICTION

14 JOHN MOORE,

15 Plaintiff,

16 v.

17 POLYFORM PRODUCTS COMPANY, INC.,

18 Defendant.

19) Case No. RG 15792473

20) **COMPLAINT FOR CIVIL PENALTIES**
21) **AND INJUNCTIVE RELIEF**

22) (Health & Safety Code § 25249.5 *et seq.*)

1 NATURE OF THE ACTION

2 1. This Complaint is a representative action brought by plaintiff JOHN MOORE in
3 the public interest of the citizens of the State of California to enforce the People’s right to be
4 informed of the health hazards caused by exposures to di(2-ethylhexyl)phthalate (“DEHP”), a
5 toxic chemical found in vinyl/PVC art tool pouches sold by defendant in California.

6 2. By this Complaint, plaintiff seeks to remedy defendant’s continuing failure to
7 warn individuals not covered by California’s Occupational Safety Health Act, Labor Code
8 section 6300 et seq., who purchase, use or handle defendant’s products, about the risks of
9 exposure to DEHP present in and on the vinyl/PVC art tool pouches manufactured, distributed,
10 and offered for sale or use throughout the State of California. Individuals not covered by
11 California’s Occupational Safety Health Act, Labor Code section 6300 et seq., who purchase,
12 use or handle defendant’s products, are referred to hereinafter as “consumers.”

13 3. Detectable levels of DEHP are found in and on the vinyl/PVC art tool pouches
14 that defendant manufactures, distributes, and offers for sale to consumers throughout the State
15 of California.

16 4. Under the Safe Drinking Water and Toxic Enforcement Act of 1986, codified at
17 Health and Safety Code section 25249.6 et seq. (“Proposition 65”), “[n]o person in the course of
18 doing business shall knowingly and intentionally expose any individual to a chemical known to
19 the state to cause cancer or reproductive toxicity without first giving clear and reasonable
20 warning to such individual . . .” Health & Safety Code § 25249.6.

21 5. Pursuant to Proposition 65, on October 24, 2003, California identified and listed
22 DEHP as a chemical known to cause birth defects (and reproductive harm). DEHP became
23 subject to the “clear and reasonable warning” requirements of the act one year later on October
24 24, 2004. Cal. Code Regs. tit. 27, § 27001(c); Health & Safety Code §§ 25249.8 &
25 25249.10(b).

26 6. Defendant manufactures, distributes, imports, sells, and offers for sale without
27 health hazard warnings in California, vinyl/PVC art tool pouches containing DEHP such as, but
28

1 not limited to, the *Sculpey 8 Piece Clay Tool Set, A8PS, #179480813, UPC #7 15891 14048 2*
2 collectively hereinafter as “PRODUCTS.”

3 7. Defendant’s failure to warn consumers in the State of California of the health
4 hazards associated with exposures to DEHP in conjunction with defendant’s sales of the
5 PRODUCTS are violations of Proposition 65, and subjects defendant to enjoinder of such
6 conduct as well as civil penalties for each violation. Health & Safety Code § 25249.7(a) &
7 (b)(1).

8 8. For defendant’s violations of Proposition 65, plaintiff seeks preliminary and
9 permanent injunctive relief to compel defendant to provide consumers of the PRODUCTS with
10 the required warning regarding the health hazards associated with exposures to DEHP. Health
11 & Safety Code § 25249.7(a).

12 9. Pursuant to Health and Safety Code section 25249.7(b), plaintiff also seeks civil
13 penalties against defendant for its violations of Proposition 65.

14 **PARTIES**

15 10. Plaintiff JOHN MOORE is a citizen of the State of California who is dedicated to
16 protecting the health of California citizens through the elimination or reduction of toxic
17 exposures from consumer products; and he brings this action in the public interest pursuant to
18 Health and Safety Code section 25249.7(d).

19 11. Defendant POLYFORM PRODUCTS COMPANY, INC. (“POLYFORM”) is a
20 person in the course of doing business within the meaning of Health and Safety Code sections
21 25249.6 and 25249.11.

22 12. POLYFORM manufactures, imports, distributes, sells, and/or offers the
23 PRODUCTS for sale or use in the State of California, or implies by its conduct that it
24 manufactures, imports, distributes, sells, and/or offers the PRODUCTS for sale or use in the
25 State of California.

26 13. POLYFORM shall hereinafter, where appropriate, be referred to as the
27 “DEFENDANT.”

1 **VENUE AND JURISDICTION**

2 14. Venue is proper in Alameda County Superior Court, pursuant to Code of Civil
3 Procedure sections 393, 395, and 395.5, because this Court is a court of competent jurisdiction,
4 because plaintiff seeks civil penalties against DEFENDANT, because one or more instances of
5 wrongful conduct occurred, and continue to occur, in this county, and/or because DEFENDANT
6 conducts business in Alameda County with respect to the PRODUCTS.

7 15. The California Superior Court has jurisdiction over this action pursuant to
8 California Constitution Article VI, section 10, which grants the Superior Court “original
9 jurisdiction in all causes except those given by statute to other trial courts.” The statute under
10 which this action is brought does not specify any other basis of subject matter jurisdiction.

11 16. The California Superior Court has jurisdiction over DEFENDANT based on
12 plaintiff’s information and good faith belief that DEFENDANT is a person, firm, corporation or
13 association that is a citizen of the State of California, has sufficient minimum contacts in the
14 State of California, and/or otherwise purposefully avails itself of the California market.
15 DEFENDANT’S purposeful availment renders the exercise of personal jurisdiction by
16 California courts consistent with traditional notions of fair play and substantial justice.

17 **FIRST CAUSE OF ACTION**

18 **(Violation of Proposition 65 - Against All Defendants)**

19 17. Plaintiff realleges and incorporates by reference, as if fully set forth herein,
20 Paragraphs 1 through 16, inclusive.

21 18. In enacting Proposition 65, in the preamble to the Safe Drinking Water and Toxic
22 Enforcement Act of 1986, the People of California expressly declared their right “[t]o be
23 informed about exposures to chemicals that cause cancer, birth defects, or other reproductive
24 harm.”

25 19. Proposition 65 states, “[n]o person in the course of doing business shall
26 knowingly and intentionally expose any individual to a chemical known to the state to cause
27
28

1 cancer or reproductive toxicity without first giving clear and reasonable warning to such
2 individual” Health & Safety Code § 25249.6.

3 20. On February 27, 2015, plaintiff served a sixty-day notice of violation, together
4 with the accompanying certificate of merit, on POLYFORM, the California Attorney General’s
5 Office, and the requisite public enforcement agencies alleging that, as a result of
6 DEFENDANT’S sales of the PRODUCTS, consumers in the State of California are being
7 exposed to DEHP resulting from their reasonably foreseeable use of the PRODUCTS, without
8 the consumers first receiving a “clear and reasonable warning” regarding the harms associated
9 with exposures to DEHP, as required by Proposition 65.

10 21. DEFENDANT manufactures, imports, distributes, sells, and offers the
11 PRODUCTS for sale or use in violation of Health and Safety Code section 25249.6, and
12 DEFENDANT’S violations have continued beyond its receipt of plaintiff’s sixty-day notice of
13 violation. As such, DEFENDANT’S violations are ongoing and continuous in nature and,
14 unless enjoined will continue in the future.

15 22. After receiving plaintiff’s sixty-day notice of violation, no public enforcement
16 agency has commenced and diligently prosecuted a cause of action against DEFENDANT under
17 Proposition 65 to enforce the alleged violations that are the subject of plaintiff’s notice of
18 violation.

19 23. The PRODUCTS that DEFENDANT manufactures, imports, distributes, sells,
20 and offers for sale or use in California cause exposures to DEHP as a result of the reasonably
21 foreseeable use of the PRODUCTS. Such exposures caused by DEFENDANT and endured by
22 consumers in California are not exempt from the “clear and reasonable” warning requirements
23 of Proposition 65, yet DEFENDANT provides no warning.

24 24. DEFENDANT knew or should have known that the PRODUCTS it manufactures,
25 imports, distributes, sells, and offers for sale in California contain DEHP.

26 25. DEHP is present in or on the PRODUCTS in such a way as to expose consumers
27 through dermal contact and/or ingestion during reasonably foreseeable use.

28

1 2. That the Court, pursuant to Health and Safety Code section 25249.7(a),
2 preliminarily and permanently enjoin DEFENDANT from manufacturing, distributing, or
3 offering the PRODUCTS for sale or use in California without first providing a “clear and
4 reasonable warning” in accordance with title 27 of the California Code of Regulations, section
5 25601 *et seq.*, regarding the harms associated with exposures to DEHP;

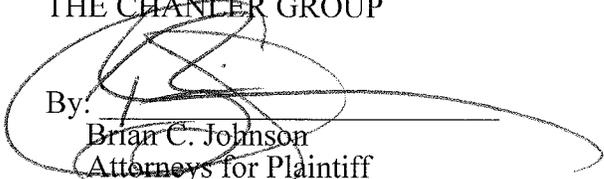
6 3. That the Court, Pursuant to Health and Safety Code section 25249.7(a), issue
7 preliminary and permanent injunctions mandating that DEFENDANT recall all PRODUCTS
8 currently in the chain of commerce in California without a “clear and reasonable warning” as
9 defined by California Code of Regulations title 27, section 25601 *et seq.*;

10 4. That the Court grant plaintiff his reasonable attorneys’ fees and costs of suit; and

11 5. That the Court grant such other and further relief as may be just and proper.

12 Dated: November 5, 2015

Respectfully submitted,
THE CHANLER GROUP

13
14 By: 
15 Brian C. Johnson
16 Attorneys for Plaintiff
17 JOHN MOORE
18
19
20
21
22
23
24
25
26
27
28