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6 CENTER FOR ENVIRONMENTAL HEALTH

ENDORSED
FILED
San Francisco County Superior Court

OCT 22 2007

GORDON PARK-LI, Clerk

BY: _____ Deputy Clerk

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8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF SAN FRANCISCO
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12 CENTER FOR ENVIRONMENTAL HEALTH,)
13 a non-profit corporation,)

14 Plaintiff,)

15 v.)

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17 POLYFORM PRODUCTS COMPANY, *et al;*)

18 Defendants.)
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Case No. CGC 07-465288

**[PROPOSED] CONSENT JUDGMENT
RE: POLYFORM PRODUCTS
COMPANY**

1 **1. INTRODUCTION**

2 **1.1** On July 19, 2007, plaintiff the Center for Environmental Health
3 (“CEH”), a non-profit corporation acting in the public interest, filed a complaint titled *Center for*
4 *Environmental Health v. Polyform Products Company, et al.*, San Francisco County Superior
5 Court Case Number CGC 07-465288 (the “CEH Action”), for civil penalties and injunctive relief
6 pursuant to the provisions of Cal. Health & Safety Code §25249.5 *et seq.* (“Proposition 65”)
7 naming Polyform Products Company (“Defendant”) as a defendant.

8 **1.2** Defendant is a corporation that employs 10 or more persons and
9 manufactured, distributed and/or sold modeling clay (the “Products”) outside the State of
10 California that resulted in the sale and use of the Products within the State of California. Some
11 of the Products are for use by children, while one Product, Super Sculpey, is a high end product
12 designed for use by artists.

13 **1.3** Beginning on or about February 12, 2007, CEH served Defendant and the
14 appropriate public enforcement agencies with the requisite 60-day notice alleging that Defendant
15 was in violation of Proposition 65. CEH’s notice and the Complaint in this Action allege that
16 Defendant exposes people who use or otherwise handle the Products to butyl benzyl phthalate
17 (“BBP”) and di-n-hexyl phthalate (“DnHP”), chemicals known to the State of California to cause
18 birth defects and other reproductive harm, without first providing clear and reasonable warning
19 to such persons regarding the reproductive toxicity of BBP and DnHP. The notice and
20 Complaint allege that Defendant’s conduct violates Health & Safety Code §25249.6, the warning
21 provision of Proposition 65. Defendant disputes such allegations and asserts that all of its
22 products are safe and comply with all applicable laws.

23 **1.4** Upon receipt of CEH’s Notice, Defendant asserts it took immediate
24 measures to address the allegations set forth therein and to investigate the substance of CEH’s
25 allegations and how to reformulate the Products to eliminate the BBP and DnHP.

26 **1.5** For purposes of this Consent Judgment only, the parties stipulate that this
27 Court has jurisdiction over the subject matter of the violations alleged in CEH’s Complaint and
28 personal jurisdiction over Defendant as to the acts alleged in CEH’s Complaint, that venue is

1 proper in the County of San Francisco, and that this Court has jurisdiction to enter this Consent
2 Judgment as a full and final resolution of all claims which were or could have been raised in the
3 Complaint based on the facts alleged therein.

4 **1.6** The Parties enter into this Consent Judgment pursuant to a settlement of
5 certain disputed claims between the Parties as alleged in the Complaint. By executing this
6 Consent Judgment, the Parties do not admit any facts or conclusions of law. It is the parties'
7 intent that nothing in this Consent Judgment shall be construed as an admission by the Parties of
8 any fact, conclusion of law, issue of law or violation of law, nor shall compliance with the
9 Consent Judgment constitute or be construed as an admission by the Parties of any fact,
10 conclusion of law, issue of law, or violation of law. Nothing in this Consent Judgment shall
11 prejudice, waive or impair any right, remedy, argument or defense the Parties may have in this or
12 any other or future legal proceedings.

13 **2. COMPLIANCE**

14 **2.1 Removal of Phthalates for all Products Except for Super Sculpey.**

15 After August 30, 2007 (the "Compliance Date"), Defendant shall not manufacture, distribute,
16 ship, or sell or cause to be manufactured, distributed or sold, any Product other than Super
17 Sculpey that is comprised of BBP, DnHP or any other Phthalate. For purposes of this Consent
18 Judgment, "Phthalate" means "any dialkyl or alkyl aryl esters of 1,2-benzenedicarboxylic acid."

19 **2.2 Proof of reformulation.** Within 60 days of the Compliance Date,
20 Defendant shall provide test results from an independent laboratory to CEH demonstrating that
21 the Products other than Super Sculpey no longer contain Phthalates. All testing shall be
22 performed in accordance with either of the following test protocols: (1) EPA SW8270C; or (2)
23 EPA SW3580A (together referred to as the "Test Protocols").

24 **2.3 Confirmatory Testing by CEH.** CEH intends to conduct confirmatory
25 testing of the Products other than Super Sculpey. Any such testing will be conducted by CEH at
26 an independent laboratory, in accordance with either of the Test Protocols. In the event that
27 CEH's testing demonstrates that the Products other than Super Sculpey contain Phthalates
28 subsequent to the Compliance Date, CEH shall inform Defendant of the test results, including

1 information sufficient to permit Defendant to identify the Product(s). Defendant shall, within 30
2 days following such notice, provide CEH, at the address listed in Section 12, with an explanation
3 regarding the presence of Phthalates in the Products. Unless Defendant provides CEH with
4 information sufficient to demonstrate that CEH's test result was incorrect, Defendant shall be
5 liable for stipulated payments in lieu of penalties for Products for which CEH produces tests
6 demonstrating the presence of Phthalates in the Products. The payments shall be made to CEH
7 and used for the purposes described in Section 3.1.

8 **2.3.1 Stipulated Payments In Lieu of Penalties.** If stipulated
9 payments in lieu of penalties are warranted under section 2.3, the stipulated payment amount
10 shall be as follows for each unit of Product other than Super Sculpey for which CEH produces a
11 test result showing that Defendant sold a Product other than Super Sculpey containing phthalate
12 or Phthalates after the Compliance Date:

13	First Occurrence:	\$100
14	Second Occurrence:	\$150
15	Third Occurrence:	\$200
16	Thereafter:	\$250

17 **2.3.2 Products in the stream of commerce.** Defendant's
18 Products that have been manufactured, shipped, sold, or that otherwise are in the stream of
19 commerce prior to the Compliance Date shall be released from any claims that were brought or
20 that could have been brought by CEH in its Complaint, as though they were Covered Claims
21 within the meaning of Section 7.1, below. As a result, the stipulated payments in section 2.3.1
22 above do not apply to these Products.

23 **2.4 Warnings for Super Sculpey.** As of the Compliance Date, Defendant
24 shall not manufacture, distribute, ship, or sell or cause to be manufactured, distributed or sold,
25 any Super Sculpey Product unless such Product contains the following warning:

26 **WARNING: This product contains chemicals known to cause**
27 **birth defects or other reproductive harm. Wash**
28 **hands after use.**

1 The warning shall be displayed with such conspicuousness, as compared with other words,
2 statements, or designs as to render it likely to be read and understood by an ordinary individual.
3 The warning statement shall not be preceded, followed, or surrounded by words, symbols, or
4 other matter that reduces its conspicuousness or that introduces, modifies, qualifies, or explains
5 the required text, such as "legal notice required by law." This warning may be conveyed by
6 sticker, hang tag, or label on the Product itself.

7 **3. SETTLEMENT PAYMENTS**

8 **3.1 Monetary Payment in Lieu of Penalty.** Defendant shall pay to CEH
9 eleven thousand dollars (\$11,000) in lieu of any penalty pursuant to Health and Safety Code
10 §25249.7(b). CEH shall use such funds to continue its work protecting people from exposures to
11 toxic chemicals. As part of this work, CEH intends to conduct periodic testing of the Products as
12 set forth in section 2.3. The parties acknowledge that the payment in lieu of penalty provided for
13 in this section has been greatly reduced due to Defendant's prompt agreement to eliminate
14 phthalates from the Products. The payment required under this section shall be made payable to
15 CEH.

16 **3.2 Attorneys' Fees and Costs.** Defendant shall pay twenty thousand dollars
17 (\$20,000) to reimburse CEH and its attorneys for their reasonable investigation fees and costs,
18 attorneys' fees, and any other costs incurred as a result of investigating, bringing this matter to
19 Defendant' attention, litigating and negotiating a settlement in the public interest. The payment
20 required under this section shall be made payable to Lexington Law Group, LLP.

21 **3.3 Timing of payments.** The payments required under Sections 3.1 and 3.2
22 shall be made payable within 10 days of entry of judgment. All of the payments made pursuant
23 to this Section 3 shall be delivered to the Lexington Law Group, LLP at the address set forth in
24 section 12.1.

25 **4. MODIFICATION OF CONSENT JUDGMENT**

26 **4.1** This Consent Judgment may be modified by written agreement of
27 CEH and Defendant, or upon motion of CEH or Defendant as provided by law.
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5. ENFORCEMENT OF CONSENT JUDGMENT

5.1 CEH may, by motion or application for an order to show cause, enforce the terms and conditions contained in this Consent Judgment. Should CEH prevail on any such motion, it shall be entitled to recover its reasonable attorneys' fees and costs associated with enforcing the Consent Judgment.

6. APPLICATION OF CONSENT JUDGMENT

6.1 This Consent Judgment shall apply to and be binding upon the parties hereto, their divisions, subdivisions and subsidiaries, and the successors or assigns of any of them.

7. CLAIMS COVERED

7.1 This Consent Judgment is a full, final and binding resolution between CEH both on its own behalf and on behalf of the public interest pursuant to Health and Safety Code §25249.7(d) and Defendant of any violation of Proposition 65 that was or could have been asserted in the Complaint against Defendant (including any claims that could be asserted in connection with any of the Products covered by this Consent Judgment) or its parents, subsidiaries, affiliates, directors, officers, employees, agents, attorneys, distributors, or customers (collectively, "Defendant Releasees") based on failure to warn about alleged exposures to BBP and DnHP resulting from any Products manufactured, distributed or sold by Defendant ("Covered Claims") on or prior to the date of entry of this Consent Judgment. Upon payment of the amounts specified above, CEH, both on its own behalf and on behalf of the public interest pursuant to Health and Safety Code §25249.7(d), does hereby irrevocably release Defendant, its officers, directors, shareholders and agents from and against any claim, damage, liability, obligation and cost whatsoever including, without limitation, attorneys fees and costs (other than as specified above). Compliance with the terms of this Consent Judgment constitutes compliance with Proposition 65 for purposes of BBP and DnHP exposures from the Products.

8. SEVERABILITY

8.1 In the event that any of the provisions of this Consent Judgment are

1 held by a court to be unenforceable, the validity of the enforceable provisions shall not be
2 adversely affected.

3 **9. SPECIFIC PERFORMANCE**

4 **9.1** The parties expressly recognize that Defendant's obligations
5 under this Consent Judgment are unique. In the event that any Defendant is found to be in breach
6 of this Consent Judgment for failure to comply with the provisions of Section 2 hereof, the
7 parties agree that it would be extremely impracticable to measure the resulting damages and that
8 such breach would cause irreparable damage. Accordingly, CEH, in addition to any other
9 available rights or remedies, may sue in equity for specific performance, and Defendant expressly
10 waive the defense that a remedy in damages will be adequate.

11 **10. GOVERNING LAW**

12 **10.1** The terms of this Consent Judgment shall be governed by the laws of
13 the State of California.

14 **11. RETENTION OF JURISDICTION**

15 **11.1** This Court shall retain jurisdiction of this matter to implement and
16 enforce the terms this Consent Judgment.

17 **12. PROVISION OF NOTICE**

18 **12.1** All notices required pursuant to this Consent Judgment and
19 correspondence shall be sent to the following:

20 For CEH:

21 Mark N. Todzo
22 Lexington Law Group, LLP
23 1627 Irving Street
24 San Francisco, CA 94122

24 For Defendant:

25 Robert M. Mintz, Esq.
26 Holland & Knight
27 131 South Dearborn Street 30th Floor
28 Chicago, IL 60603

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13. COURT APPROVAL

13.1 CEH will comply with the settlement notice provisions of Health and Safety Code § 25249.7(f) and Title 11 of the California Code of Regulations § 3003.

14. EXECUTION AND COUNTERPARTS

14.1 The stipulations to this Consent Judgment may be executed in counterparts and by means of facsimile, which taken together shall be deemed to constitute one document.

15. AUTHORIZATION

15.1 Each signatory to this Consent Judgment certifies that he or she is fully authorized by the party he or she represents to stipulate to this Consent Judgment and to enter into and execute the Consent Judgment on behalf of the party represented and legally bind that party. The undersigned have read, understand and agree to all of the terms and conditions of this Consent Judgment. Except as explicitly provided herein, each party is to bear its own fees and costs.

AGREED TO:

CENTER FOR ENVIRONMENTAL HEALTH



~~Michael Green, Executive Director~~
Center for Environmental Health

CHARLIE PIZARRO, ACTING E.D.

Dated: 8/27/04

POLYFORM PRODUCTS COMPANY

Dated: _____

_____ [Name]

_____ [Title]

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AGREED TO:

CENTER FOR ENVIRONMENTAL HEALTH

_____ Dated: _____
Michael Green, Executive Director
Center for Environmental Health

POLYFORM PRODUCTS COMPANY

Denice Steinmann Dated: *8/8/07*

Denice Steinmann
[Name]

President
[Title]

ORDER AND JUDGMENT

1
2 Based upon the stipulated Consent Judgment between CEH and Polyform
3 Products Company, the settlement is approved and judgment is hereby entered according to the
4 terms herein.

5 **OCT 22 2007**
6 Dated: _____

7 **JOHN K. STEWART**

8 _____
9 Judge, Superior Court of the State of California
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