

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

5 Attorneys for Plaintiff
JOHN MOORE

ENDORSED
FILED
ALAMEDA COUNTY

MAR 03 2016

CLERK OF THE SUPERIOR COURT
By ParamBir Deputy

8
9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 COUNTY OF ALAMEDA
11 UNLIMITED CIVIL JURISDICTION

13 JOHN MOORE

14 Plaintiff,

15 v.

17 POLYFORM PRODUCTS COMPANY, INC.,

18 Defendant.

Case No. RG15792473

~~PROPOSED~~ ORDER APPROVING
PROPOSITION 65 SETTLEMENT

Date: March 3, 2016

Time: 3:45 p.m.

Dept. 24

Judge: Hon. Frank Roesch

Reservation No. R-1701042

1 Plaintiff John Moore and defendant Polyform Products Company, Inc. have agreed
2 through their respective counsel to the terms of a settlement resolving all parties and
3 claims at issue in this Health and Safety Code section 25249.5 et seq. (Proposition 65)
4 action pursuant to the terms of the stipulated settlement agreement (“Settlement”) executed
5 by the parties, and attached to this Order as Exhibit 1. After consideration of the papers
6 submitted and the arguments presented, the Court finds that the terms of the Settlement
7 meet the criteria established by Health and Safety Code section 25249.7(f) in that:

- 8 1. the injunctive relief, including the product reformulation required by the
9 Settlement complies with Proposition 65;
- 10 2. the reimbursement of attorneys’ fees under the Settlement is reasonable
11 under California law; and
- 12 3. the payment of civil penalties required by the Settlement is reasonable
13 based on the criteria set forth in Health and Safety Code section
14 25249.7(b)(2).

15 Accordingly, the Motion for Approval of the Proposition 65 Settlement is GRANTED. At
16 the request of the parties, the Court will maintain jurisdiction over this matter to enforce
17 the terms of the Settlement pursuant to Code of Civil Procedure section 664.6.

18 **IT IS SO ORDERED.**

19
20 Dated: 3/3/16
21

FRANK ROESCH
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JUDGE OF THE SUPERIOR COURT

EXHIBIT 1

1 Brian C. Johnson, State Bar No. 235965
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9 JOHN MOORE

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18 JOHN MOORE,

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21 POLYFORM PRODUCTS COMPANY, INC.;

22 Defendant.

Case No. RG15792473

STIPULATED SETTLEMENT

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

1 **INTRODUCTION**

2 **1.1 Parties**

3 This Stipulated Settlement Agreement pursuant To Section 664.6 C.C.P. (the “Settlement
4 Agreement”) is entered into by and between John Moore (“Moore”) and Polyform Products
5 Company, Inc. (“Polyform”), with Moore and Polyform each individually referred to as a
6 “Party” and collectively as the “Parties.” Moore is an individual residing in the State of
7 California who seeks to promote awareness of exposures to toxic chemicals and to improve
8 human health by reducing or eliminating hazardous substances used in consumer products.
9 Polyform employs ten or more persons and is a person in the course of doing business for
10 purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, California Health and
11 Safety Code § 25249.5 *et seq.* (“Proposition 65”).

12 **1.2 General Allegations**

13 Moore alleges that Polyform manufactures, sells, and/or distributes for sale in California,
14 vinyl/PVC art tool pouches containing the phthalate chemical di(2-ethylhexyl)phthalate
15 (“DEHP”). DEHP is listed pursuant to Proposition 65 as a chemical known to cause birth
16 defects or other reproductive harm. Moore alleges Polyform failed to provide the health hazard
17 warning required by Proposition 65 for consumer exposures to DEHP from the vinyl/PVC art
18 tool pouches.

19 **1.3 Product Description**

20 The products covered by this Settlement Agreement are vinyl/PVC art tool pouches
21 containing DEHP that are manufactured, sold, or distributed for sale in California by Polyform,
22 including, but not limited to, the pouch component of the *Sculpey 8 Piece Clay Tool Set, A&PS,*
23 *#179480813, UPC #7 15891 14048 2* (the “Products”).

1 **1.4 Notice of Violation**

2 On May 21, 2015, Moore served Polyform and the requisite public enforcement agencies
3 with a 60-Day Notice of Violation (the “Notice”), alleging that Polyform violated Proposition 65
4 when it failed to warn consumers in California of the health hazards associated with exposures to
5 DEHP from the Products. No public enforcer has commenced and is diligently prosecuting an
6 action to enforce the alleged violations that are the subject of the Notice.

7 **1.5 Complaint**

8 On November 6, 2015, Moore commenced the instant action (“Complaint”), setting forth
9 Polyform as a defendant for the alleged violations that are the subject of the Notice.

10 **1.6 Jurisdiction**

11 For purposes of this Settlement Agreement only, the Parties stipulate that this Court has
12 jurisdiction over Polyform as to the allegations contained in the Complaint, that venue is proper
13 in the County of Alameda, and that the Court has jurisdiction to enforce the provisions of this
14 Stipulated Settlement pursuant to Code of Civil Procedure section 664.6 as to the alleged
15 violations of Proposition 65 set forth in the Notice and Complaint.

16 **1.5 No Admission**

17 Polyform denies that a consumer is exposed to DEHP from the Products or any of its
18 other products in an amount that mandates a warning of any type pursuant to Proposition 65.

19 Polyform further denies the material, factual, and legal allegations contained in the 60-
20 Day Notice, and maintains that all of the products that Polyform has sold, imported, and/or
21 distributed in California, and all of said products manufactured, imported, sold, or distributed by
22 others in which Polyform is in the stream of commerce, including the Products, have been and
23 are in compliance with all laws, including but not limited to Proposition 65. Nothing herein
24 shall be construed as an admission by Polyform of any fact, finding, issue of law, or violation of
25 law, nor shall compliance with this Settlement Agreement constitute or be construed as an
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27

1 admission by Polyform of any fact, finding, conclusion, issue of law, or violation of law.

2 Except as expressly set forth herein, nothing in this Settlement Agreement shall
3 prejudice, waive, or impair any right, remedy, argument, complaint, or defense the Parties may
4 have in any other or future legal proceeding unrelated to this specific proceeding.

5 **1.6 Effective Date**

6 For purposes of this Settlement Agreement, the term "Effective Date" shall mean the date
7 this Settlement Agreement is approved by the Court.

8 **2. INJUNCTIVE SETTLEMENT TERMS: REFORMULATED PRODUCTS**

9 Commencing on the Effective Date and continuing thereafter, Polyform agrees to only
10 manufacture for sale or purchase for sale in or into California, "Reformulated Products." For
11 purposes of this Settlement Agreement, "Reformulated Products" shall mean products containing
12 less than or equal to 1,000 parts per million (0.1%) DEHP in each component when analyzed
13 pursuant to Environmental Protection Agency testing methodologies 3580A and 8270C or
14 equivalent methodologies utilized by federal or state agencies for the purpose of determining the
15 DEHP content in a solid, as opposed to liquid, substance.

16 **3. MONETARY SETTLEMENT TERMS**

17 **3.1 Civil Penalty Payments**

18 Pursuant to Health and Safety Code section 25249.7(b)(2), and in settlement of all claims
19 alleged in the Notice or referred to in this Settlement Agreement, Polyform agrees to pay \$2,000
20 in civil penalties. The penalty payment will be allocated in accordance with California Health
21 and Safety Code section 25249.12(c)(1) and (d), with 75% of the penalty amount remitted to the
22 California Office of Environmental Health Hazard Assessment ("OEHHA") and the remaining
23 25% of the penalty amount paid to Moore. Polyform shall tender its payment in a single check
24 made payable to "John Moore, Client Trust Account." Moore's counsel shall undertake and be
25

1 responsible for delivering OEHHA's portion of any civil penalty payment made under this
2 Settlement Agreement to OEHHA.

3 **3.2 Attorneys' Fees and Costs**

4 The Parties reached an accord on the compensation due to Moore and his counsel under
5 general contract principles and the private attorney general doctrine codified at Code of Civil
6 Procedure section 1021.5 for all work performed in this matter. Under these legal principles,
7 Polyform agrees to pay \$28,000 in the form of a check made payable to "The Chanler Group" for
8 all fees and costs incurred investigating, bringing this matter to the attention of Polyform's
9 management, and negotiating a settlement in the public interest.

10 **3.3 Payment Address**

11 All payments under this Settlement Agreement shall be delivered to:

12 The Chanler Group
13 Attn: Proposition 65 Controller
14 2560 Ninth Street
15 Parker Plaza, Suite 214
16 Berkeley, CA 94710-2565

17 **3.4 Payment Timing; Payments Held in Trust**

18 All payments due under this Settlement Agreement shall be delivered to Polyform's
19 counsel within fifteen (15) days of the date that this Settlement Agreement is fully executed by
20 the Parties, and held in trust until, and disbursed within five days after the Effective Date
21 (Moore having given notice to Polyform of said approval by the Court).

22 **4. RELEASE OF ALL CLAIMS**

23 **4.1** Moore, suing in the public interest, hereby releases Polyform; all of Polyform's
24 downstream distributors and retailers of the Products; and, the affiliates and subsidiaries of each
25 of these aforementioned entities; all entities served with a 60-day notice; the divisions, successors,
26 subsidiaries, parent corporations, related entities, affiliates, agents, contractors, experts,
27 consultants, counsel, service providers, officers, directors, and employees of Polyform; and, all
28

1 of the aforementioned entities described or named in this Para. 4.1, of any liability whatsoever
2 under Proposition 65 related to the Products and the alleged failure to warn California consumers
3 of an alleged exposure to DEHP from any of the Products sold in California on or before the
4 Effective Date.

5 **4.2** Polyform, on behalf of itself, and on behalf of its past and current officers,
6 directors, managers, agents, representatives, attorneys, successors, and/or assignees, hereby
7 waives any and all claims against Moore, his attorneys and other representatives, for any and all
8 actions taken or statements made (or those that could have been taken or made) by Moore and
9 his attorneys and other representatives, whether in the course of investigating claims or otherwise
10 seeking to enforce Proposition 65 against them in this matter with respect to the Products.

11 **4.3** The Parties agree, understand, and acknowledge that this Settlement Agreement
12 represents a compromise of this action and the release of claims as set forth herein, and that
13 neither the fact nor the terms of this Settlement Agreement shall be construed as an admission of
14 liability or wrongdoing on the part of the Parties.

15 **4.4 Mutual Waiver of California Civil Code Section 1542**

16 The Parties each acknowledge he/it is familiar with Section 1542 of the Civil Code,
17 which provides as follows:

18 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE
19 CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR
20 HER FAVOR 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.

21 The Parties, each on his/its own behalf (and Moore in his individual capacity only and *not* in any
22 representative capacity), and on behalf of his/its past and current agents, representatives,
23 attorneys, successors, and/or assignees, expressly waive and relinquish any and all rights and
24 benefits which they may have under, or which may be conferred upon them by the provisions of
25 Civil Code section 1542 as well as under any other state or federal statute or common law
26
27

28 _____
STIPULATED SETTLEMENT

1 principle of similar effect, to the fullest extent he/it may lawfully waive such rights or benefits
2 pertaining to the released matters, as defined by Sections 4.21 and 4.3, above.

3 **5. APPLICATION AND SEVERABILITY**

4 **5.1** This Settlement Agreement shall apply to, be binding upon, and benefit the
5 Parties and their respective officers, directors, shareholders, employees, agents, parent
6 companies, subsidiaries, divisions, affiliates, franchisees, licensees, customers, distributors,
7 wholesalers, retailers, predecessors, successors, and assigns. This Settlement Agreement shall
8 have no application to the Products which are distributed or sold outside the State of California
9 and which thereafter are not used by consumers in California.

10 **5.2** If, subsequent to the execution of this Settlement Agreement, any provision of this
11 Settlement Agreement is held by a court to be unenforceable, the validity of the remaining
12 provisions shall not be adversely affected.

13 **6. GOVERNING LAW**

14 The terms of this Settlement Agreement shall be governed by the laws of the State of
15 California and apply within the State of California. Compliance with the terms of this Settlement
16 resolves any issue, now or in the future, as to the requirements of Proposition 65 with respect to
17 alleged exposures to DEHP arising from the Products. In the event that Proposition 65 is
18 repealed or is otherwise rendered inapplicable by reason of law generally, or as to the Products,
19 then Polyform may provide written notice to Moore of any asserted change in the law, and shall
20 have no further injunctive obligations pursuant to this Settlement Agreement with respect to, and
21 to the extent that, the Products are so affected.

22 **7. NOTICE**

23 Unless specified herein, all correspondence and notice required to be provided pursuant
24 to this Settlement Agreement shall be in writing and sent by: (a) personal delivery; (b) first-class,
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1 registered or certified mail, return receipt requested; or (c) a recognized overnight courier on any
2 Party by the other at the following addresses:

3 For Moore:

4 Proposition 65 Coordinator
5 The Chanler Group
6 2560 Ninth Street
7 Parker Plaza, Suite 214
8 Berkeley, CA 94710
9 Ph: (510) 848-8880
10 Fax: (510) 848-8118
11 Email: brian@chanler.com

12 For Polyform:

13 Denice Steinmann, President
14 Polyform Products Company, Inc.
15 1901 Estes Avenue
16 Elk Grove Village, IL 60007

17 with a copy to:

18 Thomas H. Clarke, Jr.
19 Attn.: Roxana Riedell
20 RMKB
21 1001 Marshall Street, Suite 500
22 Redwood City 94063-2052
23 Ph: 650-364-8200
24 Fax: 650-780-1701
25 Email: thomas.clarke@rmkb.com

26 For all notices and correspondence required to be provided pursuant to this Settlement
27 Agreement in writing, the Parties shall also send a courtesy notice by electronic mail and/or
28 facsimile to counsel with the correspondence or notice attached thereto. The provision of such
courtesy notice shall not lessen, diminish, or void the requirement noted herein regarding how
actual notices and correspondence are to be sent. Any Party may, from time to time, specify in
writing to the other a change of address to which all notices and other communications shall be
sent.

1 **8. COUNTERPARTS; FACSIMILE SIGNATURES**

2 This Settlement Agreement may be executed in counterparts and by facsimile or portable
3 document format (PDF) signature, each of which shall be deemed an original, and all of which,
4 when taken together, shall constitute one and the same document.

5 **9. COMPLIANCE WITH HEALTH & SAFETY CODE § 25249.7(f)**

6 Moore and his attorneys agree to comply with the reporting form requirements referenced
7 in California Health and Safety Code section 25249.7(f).

8 **10. MODIFICATION**

9 This Settlement Agreement may be modified only by written agreement of the Parties.

10 **11. AUTHORIZATION**

11 **11.1** Each of the Parties acknowledges that they had the right and ability to consult
12 with and seek the advice of counsel of their choice and each voluntarily has entered into this
13 Settlement.

14 **11.2** The undersigned affirmatively represent that they are authorized to execute this
15 Settlement on behalf of their respective Parties and have read, understood, and agree to all of the
16 terms and conditions of this document, and further certifies that he or she is fully authorized by
17 the Party he or she represents to execute the Settlement Agreement on behalf of the Party
18 represented and legally bind that Party.

19 **11.3** Except to the extent otherwise noted, each of the Parties shall bear its own costs
20 and fees.

21 **12. COURT APPROVAL**

22 **12.1** Upon execution of this Settlement Agreement by the Parties, Moore shall notice a
23 Motion for Court Approval. The Parties shall use their best efforts to support approval of this
24 Settlement Agreement.

1 **12.2** If the California Attorney General objects to any term in this Settlement
2 Agreement, the Parties shall use their best efforts to resolve the concern in a timely manner, and
3 if possible prior to the hearing on the motion.

4 **12.3** If this Settlement Agreement is not approved by the Court, it shall be void and
5 have no force or effect.

6 **13. DRAFTING**

7 The terms of this Settlement Agreement have been reviewed by the respective counsel
8 for each Party prior to its signing, and each Party has had an opportunity to fully discuss the
9 terms and conditions with legal counsel. The Parties agree that, in any subsequent interpretation
10 and construction of this Settlement Agreement, no inference, assumption, or presumption shall
11 be drawn, and no provision of this Settlement Agreement shall be construed against any Party,
12 based on the fact that one of the Parties and/or one of the Parties' legal counsel prepared and/or
13 drafted all or any portion of the Settlement Agreement. It is conclusively presumed that all of
14 the Parties participated equally in the preparation and drafting of this Settlement Agreement.

15 **15. GOOD FAITH ATTEMPT TO RESOLVE DISPUTESAND ENFORCEMENT**

16 **15.1** If a dispute arises with respect to either Party's compliance with the terms of this
17 Settlement Agreement, the Parties shall meet in person or by telephone and endeavor to resolve
18 the dispute in an amicable manner prior to filing of any motion related to the terms and
19 conditions of the Settlement Agreement.

20 **15.2** For purposes of this Settlement Agreement only, the Parties stipulate that in the
21 event that enforcement of this Settlement Agreement is deemed necessary by one or both of the
22 Parties, or a dispute between the Parties arises regarding this Settlement Agreement, the Superior
23 Court of California, County of Alameda, has proper jurisdiction and venue over the Parties as to
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20 Alameda, and that this Court has jurisdiction to approve, enter, and oversee the enforcement of
21 this Settlement Agreement.

22 **AGREED TO:**

AGREED TO:

23 Date: 12/10/2015

Date: _____

24 By: 
25 JOHN MOORE

26 By: _____
27 Denice Steinmann, President
28 POLYFORM PRODUCTS COMPANY, INC.

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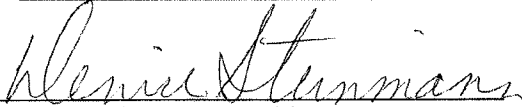
22 **AGREED TO:**

AGREED TO:

23 Date: _____

Date: _____

24 By: _____
25 JOHN MOORE

26 By: 
27 Denice Steinmann, President
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