

# SETTLEMENT AGREEMENT

## 1. INTRODUCTION

### 1.1 Parties

This Settlement Agreement is entered into by and between John Moore (“Moore”) and Vic Firth Company (“Vic Firth”), with Moore and Vic Firth each individually referred to as a “Party” and collectively as the “Parties.” Moore is an individual residing in the State of California who seeks to promote awareness of exposures to toxic chemicals and to improve human health by reducing or eliminating hazardous substances used in consumer products. Vic Firth employs ten or more persons and is a person in the course of doing business for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, California Health and Safety Code § 25249.6 *et seq.* (“Proposition 65”).

### 1.2 General Allegations

Moore alleges that Vic Firth manufactures, sells, and distributes for sale in California, headphones with vinyl/PVC ear cushions containing the phthalate chemical di(2-ethylhexyl)phthalate (“DEHP”). DEHP is listed pursuant to Proposition 65 as a chemical known to cause birth defects or other reproductive harm. Moore alleges that Vic Firth failed to provide the health hazard warning required by Proposition 65 for exposures to DEHP from its headphones with vinyl/PVC ear cushions.

### 1.3 Product Description

The products covered by this Settlement Agreement are headphones with vinyl/PVC ear cushions containing DEHP that are manufactured, sold or distributed for sale in California by Vic Firth, including, but not limited to, the headphones with vinyl/PVC ear cushions identified as the *Vic Firth Musician’s Stereo Isolation Headphones, SIH1, UPC #7 50795 00447 8* (“Products”).

### 1.4 Notice of Violation

On May 21, 2015, Moore served Vic Firth and the requisite public enforcement agencies with a 60-Day Notice of Violation (“Notice”), alleging that Vic Firth violated Proposition 65

when it failed to warn its customers and consumers in California of the health hazards associated with exposures to DEHP from the Products. To the best of the Parties' knowledge, no public enforcer has commenced and is diligently prosecuting an action to enforce the violations alleged in the Notice.

### **1.5 No Admission**

Vic Firth denies the material, factual, and legal allegations contained in the Notice and maintains that all of the products that it has sold and distributed in California, including the Products, have been, and are, in compliance with all laws. Nothing in this Settlement Agreement shall be construed as an admission by Vic Firth of any fact, finding, conclusion, issue of law, or violation of law, nor shall compliance with this Settlement Agreement constitute or be construed as an admission by Vic Firth of any fact, finding, conclusion, issue of law, or violation of law, such being specifically denied by Vic Firth. This Section shall not, however, diminish or otherwise affect Vic Firth's obligations, responsibilities, and duties under this Settlement Agreement.

### **1.6 Effective Date**

For purposes of this Settlement Agreement, the term "Effective Date" shall mean December 2, 2015.

## **2. INJUNCTIVE RELIEF: REFORMULATED PRODUCTS & WARNINGS**

### **2.1 Reformulated Products**

Commencing on May 15, 2016, and continuing thereafter, Vic Firth agrees to only manufacture for sale, purchase for sale, or distribute for sale in or into California: (a) "Reformulated Products," or (b) Products that are sold with a clear and reasonable health hazard warning, pursuant to Section 2.2 below. For purposes of this Settlement Agreement, "Reformulated Products" shall mean Products containing no more than 1,000 parts per million (0.1%) DEHP in each accessible component (i.e., any components that may be touched during use) when analyzed pursuant to Environmental Protection Agency testing methodologies 3580A and 8270C or equivalent methodologies utilized by federal or state agencies for the purpose of

determining DEHP content in a solid substance.

## **2.2 Clear and Reasonable Warnings**

Vic Firth agrees that as of May 15, 2016, and continuing thereafter, all Products it sells and/or distributes for sale in California that do not qualify as Reformulated Products will bear a clear and reasonable warning pursuant to this Section. Vic Firth further agrees that the warning will be prominently placed with such conspicuousness when compared with other words, statements, designs or devices as to render it likely to be read and understood by an ordinary individual under customary conditions before purchase or use. For purposes of this Settlement Agreement, a clear and reasonable warning for the Products shall consist of a warning affixed to the packaging, label, tag, or directly to a Product sold in California that contains one of the following statements:

**WARNING:** This product contains DEHP, a chemical known to the State of California to cause birth defects or other reproductive harm.

Or

**WARNING:** This product contains a chemical known to the State of California to cause birth defects or other reproductive harm.

Or

**WARNING:** This product contains a chemical known to the State of California to cause cancer and birth defects (or other reproductive harm).

## **3. MONETARY SETTLEMENT TERMS**

### **3.1 Civil Penalty Payments**

Pursuant to Health and Safety Code § 25249.7(b)(2), and in settlement of all claims alleged in the Notice or referred to in this Settlement Agreement, Vic Firth agrees to pay \$10,500 in civil penalties. Each penalty payment will be allocated in accordance with California Health

and Safety Code §§ 25249.12(c)(1) and (d), with 75% of the penalty amount remitted to the California Office of Environmental Health Hazard Assessment (“OEHHA”) and the remaining 25% of the penalty amount paid to Moore. Moore’s counsel shall be responsible for delivering OEHHA’s portion of any civil penalty payment(s) made under this Settlement Agreement to OEHHA.

### **3.1.1 Initial Civil Penalty Payment**

Within ten (10) business days of the Effective Date, Vic Firth shall make an initial civil penalty payment of \$3,000. It shall deliver its payment in a single check made payable to “John Moore, Client Trust Account” to be delivered to the address provided in Section 3.3, below.

### **3.1.2 Final Civil Penalty Payment; Waiver for Early Reformulation**

On or before May 1, 2016, Vic Firth shall make a final civil penalty payment in the amount of \$7,500. Pursuant to Title 11 California Code of Regulations § 3203(c), Moore agrees that the final civil penalty will be waived in its entirety if, no later than April 15, 2016, Vic Firth provides Moore’s counsel with a signed declaration certifying that all of the Products it is shipping for sale or distributing for sale in California as of the date of the declaration are Reformulated Products as defined by Section 2.1, and that Vic Firth will continue to only offer Reformulated Products in California in the future. The option to provide a declaration certifying early completion of reformulation in lieu of making the final civil penalty payment is a material term of this Settlement Agreement, and time is of the essence.

### **3.2 Attorneys’ Fees and Costs**

The Parties acknowledge that Moore and his counsel offered to resolve this dispute without reached an accord on the compensation due to Moore and his counsel under general contract principles and the private attorney general doctrine codified at Code of Civil Procedure § 1021.5 for all work performed in this matter. Under these legal principles, within ten business days of the Effective Date, Vic Firth agrees to pay \$25,000 in the form of a check made payable to “The Chanler Group” for all fees and costs incurred investigating, bringing this matter to the attention of Vic Firth’s management, and negotiating a settlement in the public interest. The

Chanler Group shall cooperate with Vic Firth by providing such taxpayer information as is necessary to process payments within the period specified here.

### **3.3 Payment Address**

All payments under this Settlement Agreement shall be delivered to the following address:

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

## **4. CLAIMS COVERED AND RELEASED**

### **4.1 Moore's Release of Vic Firth**

This Settlement Agreement is a full, final and binding resolution between Moore, as an individual and *not* on behalf of the public, and Vic Firth, of any violation of Proposition 65 that was or could have been asserted by Moore, on his own behalf or on behalf of his past and current agents, representatives, attorneys, successors, and assignees ("Releasers"), against Vic Firth, its parents, subsidiaries, affiliated entities under common ownership, directors, officers, employees, attorneys (collectively "Releasees"), and each entity to whom they directly or indirectly distribute or sells Products, including, but not limited to, their downstream distributors, wholesalers, customers, retailers, franchisees, cooperative members, licensors, and licensees ("Downstream Releasees"), based on the failure to warn about exposures to DEHP in Products manufactured, distributed, sold, and/or offered for sale by Releasees in California before the Effective Date, as alleged in the Notice. Compliance with the terms of this Settlement Agreement constitutes compliance with Proposition 65 by Vic Firth, Releasees and Downstream Releasees with regard to the alleged or actual failure to warn about exposures to DEHP from Products manufactured, sold or distributed for sale after the Effective Date. Releasers hereby release any such claims against Releasees and Downstream Releasees.

In further consideration of the promises and agreements herein contained, Moore, as an individual and not on behalf of the public, on his own behalf and on behalf of his past and current agents, representatives, attorneys, successors, and assignees, hereby waives all Moore's rights to institute or participate in, directly or indirectly, any form of legal action and releases all claims that Moore may have, including, without limitation, all actions and causes of action in law and in equity, all suits, liabilities, demands, obligations, damages, costs, fines, penalties, losses, or expenses, including, but not exclusively, investigation fees, expert fees, and attorney's fees arising under Proposition 65 with respect to DEHP in Products manufactured, distributed, sold and/or offered for sale by Vic Firth, before the Effective Date, as alleged in the Notice.

The releases provided by Moore under this Settlement Agreement are provided solely on Moore's behalf and are *not* releases on behalf of the public.

#### **4.2 Vic Firth's Release of Moore**

Vic Firth, on its own behalf, and on behalf of its past and current agents, representatives, attorneys, successors, and/or assignees, hereby waives any and all claims against Moore and his attorneys and other representatives, for any and all actions taken or statements made by Moore and his attorneys and other representatives, whether in the course of investigating claims, seeking to enforce Proposition 65 against it in this matter, or with respect to the Products.

#### **5. SEVERABILITY**

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

#### **6. GOVERNING LAW**

The terms of this Settlement Agreement shall be governed by the laws of the State of California and apply within the State of California. In the event that Proposition 65 is repealed or is otherwise rendered inapplicable by reason of law generally, or as to the Products, then Vic Firth may provide written notice to Moore of any asserted change in the law, and shall have no

further injunctive obligations pursuant to this Settlement Agreement with respect to, and to the extent that, the Products are so affected.

**7. NOTICE**

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

For Vic Firth:

James Doyle  
Vic Firth Company  
65 Sprague Street  
Boston, MA 02136

For Moore:

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

With a copy to:

Lauren M. Michals, Esq.  
Nixon Peabody LLP  
One Embarcadero Center, 18<sup>th</sup> Floor  
San Francisco, CA 94111-3600

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.

**8. COUNTERPARTS; FACSIMILE SIGNATURES**

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

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

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

**10. MODIFICATION**

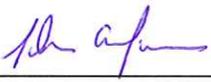
This Settlement Agreement may be modified only by written agreement of the Parties.

11. **AUTHORIZATION**

The undersigned are authorized to execute this Settlement Agreement on behalf of their respective Parties and have read, understand, and agreed to all of the terms and conditions of this Settlement Agreement.

**AGREED TO:**

Date: 12/14/05

By: 

JOHN MOORE

**AGREED TO:**

Date: 12-8-2015

By: 

Craigie Zildjian, CEO  
VIC FIRTH COMPANY