

# **SETTLEMENT AGREEMENT**

## **1. INTRODUCTION**

### **1.1 John Moore and Poppin, Inc.**

This Settlement Agreement (Settlement Agreement) is entered into by and between John Moore (Moore) and Poppin, Inc. (Poppin) with Moore and Poppin collectively referred to as the “Parties.” Moore is an individual residing in California who seeks to promote awareness of exposures to toxic chemicals and to improve human health by reducing or eliminating hazardous substances contained in consumer products. Poppin 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 & Safety Code §§ 25249.5 *et seq.* (Proposition 65).

### **1.2 General Allegations**

Moore alleges that Poppin manufactures, imports, sells and/or distributes for sale in California, ottomans with foam padding that contain tris(1,3-dichloro-2-propyl) phosphate (TDCPP) and tris(2-chloroethyl) phosphate (TCEP), and that it does so without providing the health hazard warning that Moore alleges is required by Proposition 65. TDCPP and TCEP are listed pursuant to Proposition 65 as chemicals known to the State of California to cause cancer.

### **1.3 Product Description**

The products that are covered by this Settlement Agreement are ottomans with foam padding containing TDCPP and/or TCEP including, but not limited to, the *Poppin Mini Box Seat*, manufactured, imported, or purchased for resale by Poppin and distributed, sold and/or offered for sale in the State of California, hereinafter the “Products.”

### **1.4 Notice of Violation**

On or about March 21, 2018, Moore served Poppin and certain requisite public enforcement agencies with a 60-Day Notice of Violation (Notice), alleging that Poppin violated Proposition 65 when it failed to warn its customers and consumers in California that the Products

expose users to TDCPP and/or TCEP. To the best of the Parties' knowledge, no public enforcer has commenced and is diligently prosecuting the allegations set forth in the Notice.

### **1.5 No Admission**

Poppin denies the material, factual and legal allegations contained in the Notice and maintains that all 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 Poppin of any fact, finding, issue of law or violation of law; nor shall compliance with this Settlement Agreement constitute or be construed as an admission by Poppin of any fact, finding, conclusion, issue of law or violation of law. This section shall not, however, diminish or otherwise affect the obligations, responsibilities and duties under this Settlement Agreement.

Poppin represents that (i) it was assured by its supplier that the products at issue were not treated with either TDCPP or TCEP and further asserts that it did not knowingly and intentionally expose California consumers to either chemical; and (ii) its supplier further provided test results that confirmed the products were not treated with either TDCPP or TCEP. Poppin additionally states that, after receiving the Notice, it tested the Products and did not find them treated with either chemical. The parties have agreed that, rather than litigate the issue, they prefer to resolve the dispute of whether the testing performed by plaintiff, which showed the presence of both carcinogens, was an aberration or simply manufactured from bad batches of the Products.

### **1.6 Effective Date**

For purposes of this Settlement Agreement, the term "Effective Date" shall mean June 7, 2019.

## **2. INJUNCTIVE RELIEF: REFORMULATION OR WARNINGS**

### **2.1 Injunctive Relief**

Commencing on the Effective Date and continuing thereafter, Poppin shall only sell, ship for sale, or distribute for sale in California, Reformulated Products, or Products that contain a

clear and reasonable warning pursuant to Section 2.3. If, after the Effective Date, Poppin sells Products that are not Reformulated Products via mail order catalog and/or the internet to customers located in California, Poppin shall also provide warnings for such Products by identifying the specific Product to which the warning applies as specified in Sections 2.4 through 2.6.


## **2.2 Reformulation Standards**

“Reformulated Products” are Products that contain no more than 25 parts per million (0.0025%) each of TDCPP and/or TCEP when analyzed pursuant to Environmental Protection Agency testing methodologies 3545 and 8270C, or alternative methodologies used by state or federal agencies to determine the presence of, or to measure the amount of TDCPP or TCEP in a solid substance.

## **2.3 Clear and Reasonable Warnings**

Commencing on or before the Effective Date for all Products that are not Reformulated Products, Poppin shall provide clear and reasonable warnings for all Products provided for sale to customers in California in accordance with this Section pursuant to Title 27 California Code of Regulations § 25600, *et seq.* Each warning shall be prominently placed with such conspicuousness as 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 and shall be provided in a manner such that it is clearly associated with the specific Product to which the warning applies.


**(a) Warning.** The warning shall consist of the following statement (Warning)<sup>1</sup>:

 **WARNING:** This product can expose you to flame retardant chemicals including [tris(1,3-dichloro-2-propyl) phosphate (TDCPP and/or tris(2-chloroethyl) phosphate (TCEP)], which is [are] known to the State of California to cause cancer. For more information go to [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov).

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<sup>1</sup> Poppin shall tailor the Warning language as provided by the bracketed terminology in Sections 2.3(a), as appropriate, provided Poppin has a basis for its belief.

(b) **Short-Form Warning.** Poppin may, but is not required to, use the following short-form warning as set forth in this subsection 2.3(b) (Short-Form Warning), and subject to the additional requirements in Sections 2.5 and 2.6, as follows:

 **WARNING:** Cancer – [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov)

(c) **Foreign Language Requirement.** Where a consumer product sign, label or shelf tag used to provide a warning includes consumer information in a language other than English, the warning must also be provided in that language in addition to English.

#### **2.4 On-Product Short Form Warnings**

If Poppin uses a short-form warning pursuant to Section 2.2(b), Poppin shall affix the warning to the Product label or otherwise directly on each Product provided for sale in retail outlets in California or sold via mail order catalog and/or the internet to customers located in California. For the purpose of this agreement, “Product label” means a display of written, printed or graphic material that is printed on or affixed to a Product or its immediate container or wrapper. The entire warning shall appear in a type size of at least 6-point type and no smaller than the largest type size used for other consumer information on the product.

#### **2.5 Mail Order Catalog Warnings**

In the event that, after the Effective Date, Poppin prints new catalogs and sells Products via mail order through such catalogs to customers located in California, Poppin shall provide a warning for each Product both on the Product label in accordance with Section 2.4, and in the catalog in a manner that clearly associates the warning with the *specific* Product being purchased. Any warning provided in a mail order catalog shall be in the same type size or larger than other consumer information provided for the Product within the catalog and shall be provided on the same page and in the same location as the display and/or description of the Product. The catalog warning may use the Short-Form Warning content described in Section 2.3(b) if the warning provided on the Product label also uses the Short-Form Warning content.

## **2.6 Internet Warnings**

If, after the Effective Date, Poppin sells Products via the internet to customers located in California, Poppin shall provide warnings for each Product both on the Product label in accordance with Section 2.4, and by prominently displaying the warning to the customer prior to completing the purchase or during the purchase of the Products without requiring customers to seek out the warning. The warning or a clearly marked hyperlink to the warning using the word “WARNING” given in conjunction with the sale of the Products via the internet shall appear either: (a) on the same web page on which the Product is displayed; (b) on the same web page as the order form for the Product; or (c) on one or more web pages displayed to a purchaser during the checkout process. The warning shall appear in any of the above instances adjacent to or immediately following the display or description of the Product for which it is given in the same type size or larger than the other consumer information provided for the Product on the same web page. The internet warning may use the Short-Form Warning content described in Section 2.3(b) if the warning provided on the Product label also uses the Short-Form Warning content.

## **3. MONETARY SETTLEMENT TERMS**

### **3.1 Civil Penalty Payments**

Pursuant to Health and Safety Code § 25249.7(b), and in settlement of all claims alleged in the Notice or referred to in this Settlement Agreement, Poppin agrees to pay a total of \$2,000 in civil penalties. The 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 paid to the California Office of Environmental Health Hazard Assessment (OEHHA) and the remaining 25% of the penalty amount retained by Moore.

Poppin will deliver its civil penalty payment to the address in Section 3.3 by overnight courier, with a tracking number, such that payment is received by plaintiff’s counsel on or before June 10, 2019. Poppin shall provide two checks made payable to: (a) “OEHHA” in the amount of \$1,500; and (b) “John Moore, Client Trust Account” in the amount of \$500. Thereafter, Moore’s counsel shall send OEHHA’s portion of the penalties paid by Poppin to OEHHA.

### **3.2 Reimbursement of Attorneys' Fees and Costs**

The Parties acknowledge that Moore and his counsel offered to resolve this dispute without reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving the issue to be resolved after the material terms of the agreement had been settled. Shortly after the other settlement terms had been finalized, Poppin expressed a desire to resolve Moore's fees and costs. The Parties then negotiated a resolution of the compensation due to Moore's counsel under general contract principles and the private attorney general doctrine codified at California Code of Civil Procedure § 1021.5. For all work performed through the mutual execution of this agreement, Poppin shall reimburse Moore's counsel \$18,600. Poppin will deliver its payment to the address in Section 3.3 by overnight courier, with a tracking number, such that payment is received by plaintiff's counsel on or before June 10, 2019, in the form of a check payable to "The Chanler Group." The reimbursement shall cover all fees and costs incurred by Moore investigating, bringing this matter to Poppin's attention and negotiating a settlement of the matter.

### **3.3 Payment Address**

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

The Chanler Group  
Attn: Proposition 65 Controller  
2550 Ninth Street, Suite 205  
Berkeley, CA 94710

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

### **4.1 Moore's Release of Poppin**

This Settlement Agreement is a full, final and binding resolution between Moore, as an individual and *not* on behalf of the public, and Poppin, of any violation of Proposition 65 that was or could have been asserted by Moore on behalf of himself, his past and current agents, representatives, attorneys, successors, and/or assignees, against Poppin, its parents, subsidiaries, affiliated entities under common ownership, directors, officers, employees, attorneys, and each

entity to whom Poppin directly or indirectly distributes or sells Products, including, but not limited, to downstream distributors, wholesalers, customers, retailers, franchisees, cooperative members, and licensees (collectively, Releasees), based on their failure to warn about alleged exposures to Proposition 65 listed chemicals contained in the Products that were manufactured, distributed, sold and/or offered for sale by Poppin in California before the Effective Date, as alleged in the Notice.

In further consideration of the promises and agreements herein contained, Moore as an individual and *not* on behalf of the public, on behalf of himself, his past and current agents, representatives, attorneys, successors, and/or assignees, hereby waives all of 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 or in equity, suits, liabilities, demands, obligations, damages, costs, fines, penalties, losses, or expenses including, but not exclusively, investigation fees, expert fees, and attorneys' fees arising under Proposition 65 with respect to Proposition 65 listed chemicals in the Products, as alleged in the Notice, manufactured, distributed, sold and/or offered for sale by Poppin, before the Effective Date (collectively, Claims), against Poppin and Releasees.

The Parties further understand and agree that this Section 4.1 release shall not extend upstream to any entities that manufactured the Products or any component parts thereof, or any distributors or suppliers who sold the Products or any component parts thereof to Poppin. Nothing in this Section affects Moore's right to commence or prosecute an action under Proposition 65 against a Releasee that does not involve Poppin's Products.

#### **4.2 Poppin's Release of Moore**

Poppin, on behalf of itself, its past and current agents, representatives, attorneys, successors, and assignees, hereby waives any and all claims against Moore and his attorneys and other representatives, for any and all actions taken or statements made (or those that could have been taken or made) by Moore and his attorneys and other representatives, whether in the course

of investigating claims or otherwise seeking to enforce Proposition 65 against it in this matter with respect to the Products.

**4.3 California Civil Code §1542**

The Parties acknowledge that the claims released in Sections 4.1 and 4.2 may include unknown claims. The Parties further acknowledge that they are familiar with California Civil Code section 1542, which provides as follows:

A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS THAT THE CREDITOR OR RELEASING PARTY DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE AND THAT, IF KNOWN BY HIM OR HER, WOULD HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR OR RELEASED PARTY.

The Parties hereby expressly waive and relinquish any and all rights and benefits which they may have under, or which may be conferred on them by the provisions of California Civil Code section 1542 as well as under any other state or federal statute or common law principle of similar effect, to the fullest extent that it may lawfully waive such rights or benefits pertaining to the releases.

**5. SEVERABILITY**

If, subsequent to the execution of this Settlement Agreement, any of the provisions of this Settlement Agreement are deemed by a court to be unenforceable, the validity of the enforceable provisions remaining 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 if any of the provisions of this Settlement Agreement are rendered inapplicable or no longer required as a result of any such repeal or preemption or rendered inapplicable by reason of law generally as to the Products, then Poppin shall 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. Nothing in this Settlement Agreement shall be interpreted to relieve Poppin from any obligation to comply with any pertinent state or federal toxics control law.

**7. NOTICE**

Unless specified herein, all correspondence and notices required to be provided pursuant to this Settlement Agreement shall be in writing and: (a) personally delivered; (b) sent by first-class (registered or certified mail) return receipt requested; or (c) sent by overnight courier, to one party by the other party at the following addresses:

For Poppin:

Randy Nicolau, CEO  
Poppin, Inc.  
1115 Broadway Fl 3  
New York, NY 10010

With a Copy to:

Edward P. Sangster, Esq.  
K&L GATES LLP  
Four Embarcadero Center  
Suite 1200  
San Francisco, CA 94111

For Moore:

Proposition 65 Coordinator  
THE CHANLER GROUP  
2550 Ninth Street, Suite 205  
Berkeley, CA 94710

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

**8. COUNTERPARTS; FACSIMILE AND SIGNATURES**

This Settlement Agreement may be executed in counterparts and by facsimile or 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 agrees to comply with the reporting requirements referenced in Health & Safety Code § 25249.7(f).

10. **MODIFICATION**

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

11. **AUTHORIZATION**

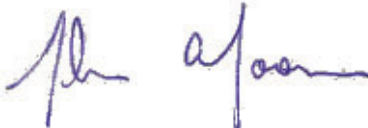
The undersigned are authorized to execute this Settlement Agreement and have read, understood and agree to all of the terms and conditions contained herein.

**AGREED TO:**

**AGREED TO:**

Date: June 4, 2019

Date: June \_\_, 2019

By:   
\_\_\_\_\_  
John Moore

By: \_\_\_\_\_  
Randy Nicolau, CEO  
Poppin, Inc.

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

Moore agrees to comply with the reporting requirements referenced in Health & Safety Code § 25249.7(f).

**10. MODIFICATION**

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

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

**AGREED TO:**

**AGREED TO:**

Date: June 4, 2019

Date: June 5, 2019

By: \_\_\_\_\_  
John Moore

By:  \_\_\_\_\_  
Jeremy Westin, Chief Business Officer  
Poppin, Inc.