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13 Counsel for Plaintiff
14 ECOLOGICAL RIGHTS FOUNDATION

15 SUPERIOR COURT OF THE STATE OF CALIFORNIA
16 COUNTY OF SAN FRANCISCO

17 ECOLOGICAL RIGHTS FOUNDATION,

18 Plaintiff,

19 v.

20 3D PRINT OF NORTH AMERICA, INC., et al.,

21 Defendants.

22 Case No. CGC-19-580009

23 [PROPOSED] CONSENT JUDGMENT
24 AS TO MAKERBOT INDUSTRIES, LLC

25 **1. INTRODUCTION**

26 1.1 On October 15, 2019, the Ecological Rights Foundation (“ERF”) acting on behalf
27 of itself and the general public, filed a Complaint for civil penalties and injunctive relief
28 (“Complaint”) in San Francisco Superior Court, Case No. CGC-19-580009 against defendant
MAKERBOT INDUSTRIES, LLC (also referred to herein as “MakerBot” or “Defendant”). The
Complaint alleges, among other things, that Defendant violated provisions of the Safe Drinking
Water and Toxic Enforcement Act of 1986, Health and Safety Code Sections 25249.5, *et seq.*
 (“Proposition 65”) by failing to give clear and reasonable warnings to those residents of

1 California who use filaments incorporating a styrene monomer, including acrylonitrile-
2 butadiene-styrene (ABS) filaments high impact polystyrene (HIPS) filaments, and polycarbonate
3 acrylonitrile-butadiene-styrene (PC-ABS) in the operation of 3d printers. The Complaint further
4 alleges that use of such filaments in 3d printing exposes people to Styrene, a chemical known to
5 the State of California to cause cancer. The Complaint was based upon a 60-Day Notice letter,
6 sent by ERF on April 24, 2019, to MakerBot, the California Attorney General, all District
7 Attorneys, and all City Attorneys with populations exceeding 750,000.

8 For purposes of this settlement and Consent Judgment, “Covered Products” means the
9 following MakerBot filaments incorporating a styrene monomer: (1) ABS filaments, (2) HIPS
10 filaments, (3) acrylonitrile styrene acrylate (ASA) filaments, (4) PC-ABS filaments, and (5) PC-
11 ABS FR filaments, which are sold, offered for sale or distributed in California for use in 3d
12 printing.


13 Defendant is a business that employs more than ten persons and manufactures,
14 distributes, and sells Covered Products. For purposes of this Consent Judgment, ERF and
15 MakerBot (each a “Party” and collectively, the “Parties”) stipulate that this Court has jurisdiction
16 over the allegations of violations contained in the Complaint and personal jurisdiction over
17 MakerBot, that venue is proper in the County of San Francisco, and that this Court has
18 jurisdiction to enter this Consent Judgment as a full settlement and resolution of the allegations
19 contained in the Complaint.


20 1.2 This Consent Judgment resolves claims that are denied and disputed. The Parties
21 enter into this Consent Judgment pursuant to a full and final settlement of any and all claims
22 between the Parties for the purpose of avoiding prolonged litigation. Neither this Consent
23 Judgment nor anything contained herein shall constitute an admission with respect to any factual
24 or legal allegation of the Complaint, each and every allegation of which MakerBot denies.
25 Neither this Consent Judgment nor compliance with it may be used as evidence of any
26 wrongdoing, misconduct, culpability or liability on the part of MakerBot.

1 1.3 The term “Effective Date” means the date that this Consent Judgment is entered by
2 the Court.

3 **2. INJUNCTIVE RELIEF**

4 **2.1 Warnings on Covered Products**

5 (a) No later than forty-five (45) days following the Effective Date, MakerBot
6 shall affix or print the following warning statement on the outer packaging of all Covered
7 Products other than filaments that, prior to the Effective Date, have already been labelled with a
8 warning statement that complies with Proposition 65 (i.e. a label that contains the following
9 warning:  **WARNING:** Cancer - www.P65Warnings.ca.gov):

10  **WARNING:** This Filament - when used for 3D printing - can expose you and others
11 in the same room to styrene, a chemical known to the State of California to cause cancer.
12 www.P65Warnings.ca.gov.

13 **ALWAYS USE THIS PRODUCT IN A WELL-VENTILATED AREA.**

14 (b) No later than fourteen (14) days after the Effective Date, with respect to
15 any Covered Products sold over the internet by MakerBot, Makerbot also shall include, the
16 above warning statement in accordance with the provisions of Health and Safety Code section
17 25602(b).


18 (c) The warning statements required by Sections 2.1(a) and (b) shall be
19 displayed with such conspicuousness, as compared with other words, statements, designs, or
20 devices as to render them likely to be read and understood by an ordinary individual under
21 customary conditions of purchase or use. The type size of the warning statements must be no
22 smaller than any other warning provided with the Covered Products, and in no case less than the
23 requirements of Health and Safety Code Sections 25249.5, *et seq.* and the implementing
24 regulations set forth in Title 27, Article 6 of the California Code of Regulations.

25 **2.2 Notice to Downstream Releasees**

26 (a) No later than thirty (30) days following the Effective Date, MakerBot shall
27 provide a one-time notice by mail on its letterhead to all its distributors, wholesalers, customers,
28

1 retailers, franchisees, cooperative members, and licensees that since April 2017, directly or
2 indirectly, sold, offered for sale or distributed the Covered Products in California (“Downstream
3 Defendant Releasees”), which notice shall include the following statement:

4 This letter is sent as a **notice and warning** that your California sales inventory may include the
5 following Covered Products (ABS (METHOD series), ABS (Replicator series), ASA, HIPS, PC-
6 ABS, and PC-ABS FR) which, when used in the operation of 3D Printers, may expose users to
styrene, a chemical known to the State of California to cause cancer.

7 (b) The notice provided by MakerBot pursuant to this section shall also instruct the
8 Downstream Defendant Releasees that they must attach stick-on labels to the front of Covered
9 Products in the inventory of the Downstream Defendant Releasees, and that they must provide
10 the warning for any Covered Product sold over the internet in a manner that complies with
11 Proposition 65. The stick-on labels provided by MakerBot shall comply with Sections 2.1(a),
12 2.1(b) and 2.1(c) above. MakerBot shall provide such stick-on labels in sufficient quantity and
13 for sufficient duration to meet the reasonably anticipated inventory needs of each Downstream
14 Defendant Releasee. MakerBot is under no obligation to furnish stick on labels for Covered
15 Products that prior to the Effective Date contain a warning statement that complies with
16 Proposition 65 (i.e., a label that contains the following warning:  **WARNING: Cancer -**
www.P65Warnings.ca.gov).

17 **2.3 Change In Law**

18 (a) In the event Proposition 65 warnings cease to be required for any Covered
19 Product as a result of any change in law, MakerBot shall have no further obligations under this
20 Consent Judgment with respect to such Covered Product.

21 (b) In the event that the California Office of Environmental Health Hazard
22 Assessment promulgates one or more regulations requiring or permitting warning text and/or
23 methods of transmission for the Covered Products different from those set forth in the
24 regulations as they exist as of the Effective Date, MakerBot shall be entitled to use, at its
25 discretion, such other warning text and/or method of transmission without being deemed in
26 breach of this Consent Judgment.
27

1 **3. SETTLEMENT PAYMENTS**

2 **3.1 Civil Penalties and Payments In Lieu of Penalties**

3 Pursuant to Health and Safety Code section 25249.7(b)(2), MakerBot shall pay
4 \$18,750.00 in civil penalties. The penalty payment will be allocated in accordance with
5 California Health and Safety Code section 25249.12(c)(1) & (d), with 75% of the penalty amount
6 remitted to the California Office of Environmental Health Hazard Assessment (“OEHHA”) and
7 the remaining 25% of the penalty amount paid to Ecological Rights Foundation. Defendant will
8 provide these payments in two checks for the following amounts made payable to: 1) “OEHHA”
9 in the amount of \$14,062.50 and 2) “Ecological Rights Foundation” in the amount of \$4,687.50.

10 The payments to OEHHA and Ecological Rights Foundation shall be sent no later than 10
11 days after the Effective Date. All payments shall be sent via USPS certified mail, return receipt
12 requested, to the following addresses:

13 All payments to Ecological Rights Foundation shall be delivered to:

14 Fredric Evenson
15 Ecology Law Center
16 P.O. Box 1000
17 Santa Cruz, CA 95061

18 The payment to OEHHA shall be delivered to:

19 Mike Gyurics
20 Fiscal Operations Branch Chief
21 Office of Environmental Health Hazard Assessment
22 P.O. Box 4010
23 Sacramento, CA 95812-4010

24 **3.2 Attorneys’ Fees and Litigation Costs**

25 MakerBot shall reimburse ERF’s counsel for \$30,000.00 in ERF’s fees and costs incurred
26 as a result of investigating and bringing this matter to MakerBot’s attention, and negotiating a
27 settlement in the public interest. The payment shall be made payable to “Brian Gaffney Attorney
28 Client Trust Account” and sent no later than fourteen (14) days after the Effective Date via USPS
certified mail, return receipt requested, to the following address:

LAW OFFICES OF BRIAN GAFFNEY, A Professional Corporation
446 Old County Road, Suite 100-310

Pacifica, California 94044

1 4. **RELEASE OF ALL CLAIMS**

2 4.1 **Release of MakerBot**

3 ERF acting on its own behalf and on behalf of itself and its past and current agents,
4 representatives, attorneys, successors and assignees (all of whom, collectively, are defined as the
5 “ERF Releasers”), releases MakerBot, and its parents, subsidiaries, affiliated entities,
6 marketplaces, directors, officers, agents, employees, attorneys and each entity to whom
7 MakerBot directly or indirectly distributes or sells the Covered Products, including but not
8 limited to, downstream distributors, wholesalers, customers, retailers, franchisees, cooperative
9 members and licensees and all other upstream and downstream entities in the distribution chain,
10 and the parents, subsidiaries, affiliated entities, directors, officers, agents, employees, attorneys,
11 predecessors, successors, and assigns of any of them (collectively, the “Releasees”), from all
12 Claims for alleged violations of Proposition 65 through the Effective Date arising in whole or in
13 part from any failure to warn about alleged exposures to Styrene from use of the Covered
14 Products. For purposes of this settlement and Consent Judgment, “Claims” means all claims,
15 actions, causes of action, suits, liabilities, demands, obligations, damages, costs, fines, penalties,
16 losses or expenses (including but not limited to investigation fees, expert fees and attorneys’
17 fees) of any nature whatsoever, whether known or unknown. This settlement is a full, final and
18 binding resolution of all Claims that were or could have been asserted against MakerBot, and/or
19 the Releasees for failure to provide warnings for alleged exposures to Styrene contained in the
20 Covered Products.

21 In further consideration of the promises and agreements herein contained, and for the
22 payment to be made pursuant to Section 3 above, the ERF Releasers provide a release herein
23 which shall be effective as a full and final accord and satisfaction, as a bar to all Claims against
24 MakerBot and/or any of the Releasees of any nature, character, or kind, whether known or
25 unknown, suspected or unsuspected, limited to and arising out of the alleged or actual exposure
26 to Proposition 65 chemicals from use of the Covered Products.

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4.2 **MakerBot's Release of ERF**

MakerBot hereby waives any and all claims against ERF and the ERF Releasors for any and all actions taken or statements made by ERF and/or its attorneys and other representatives, whether in the course of investigating claims or otherwise seeking to enforce Proposition 65 against it in this matter or with respect to the Covered Products.

4.3 **California Civil Code Section 1542**

It is possible that other claims not known to the Parties arising out of the facts alleged in the Notice and relating to the Covered Products will develop or be discovered. ERF on behalf of itself only, on one hand, and MakerBot, on the other hand, acknowledge that this Agreement is expressly intended to cover and include all such claims up through the Effective Date, including all rights of action therefor. The Parties acknowledge that the claims released in Sections 4.1 and 4.2 above may include unknown claims, and nevertheless waive California Civil Code section 1542 as to any such unknown claims. California Civil Code section 1542 reads 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.

ERF and MakerBot each acknowledge and understand the significance and consequences of this specific waiver of California Civil Code section 1542.

5. **ENFORCEMENT OF JUDGMENT**

5.1 The terms of this Consent Judgment shall be enforced exclusively by the Parties hereto. Each Party may, by noticed motion or order to show cause before the Superior Court of San Francisco County, giving the notice required by law, enforce the terms and conditions contained herein. In the event that a dispute arises with respect to any of the provisions of this Consent Judgment, the Parties shall meet and confer within 10 days after either Party receives written notice of an alleged violation of this Agreement. In any proceeding brought by either Party to enforce this Consent Judgment, such party may seek whatever fines, costs, penalties or

1 remedies as may be provided by law for any violation of Proposition 65 or this Consent
2 Judgment.

3 **6. MODIFICATION OF JUDGMENT**

4 6.1 This Consent Judgment may be modified only upon written agreement of the
5 Parties and upon entry of a modified Consent Judgment by the Court thereon, or upon motion of
6 any Party as provided by law and upon entry of a modified Consent Judgment by the Court.

7 **7. TERMINATION AND RETENTION OF JURISDICTION**

8 7.1 This Court shall retain jurisdiction of this matter to implement and enforce the
9 terms of this Consent Judgment.

10 **8. AUTHORITY TO STIPULATE**

11 8.1 Each signatory to this Consent Judgment certifies that he or she is fully authorized
12 by the Party he or she represents to enter into this Consent Judgment and to execute it on behalf
13 of the Party represented and legally to bind that Party.

14 **9. SERVICE ON THE ATTORNEY GENERAL**

15 9.1 ERF shall serve a copy of this Consent Judgment, signed by both Parties, on the
16 California Attorney General on behalf of the Parties so that the Attorney General may review
17 this Consent Judgment prior to its submittal to the Court for approval. No sooner than forty five
18 (45) days after the Attorney General has received the aforementioned copy of this Consent
19 Judgment, and in the absence of any written objection by the Attorney General to the terms of
20 this Consent Judgment, the Parties may then submit it to the Court for approval.

21 **10. ENTIRE AGREEMENT**

22 10.1 This Consent Judgment contains the sole and entire agreement and understanding of
23 the parties with respect to the entire subject matter hereof and any and all prior discussions,
24 negotiations, commitments and understandings related hereto. No representations, oral or
25 otherwise, express or implied, other than those contained herein have been made by any Party
26 hereto. No other agreements not specifically referred to herein, oral or otherwise, shall be
27 deemed to exist or to bind any of the parties.

1 **11. GOVERNING LAW**

2 11.1 The validity, construction and performance of this Consent Judgment shall be
3 governed by the laws of the State of California, without reference to any conflicts of law
4 provisions of California law.

5 **12. EXECUTION AND COUNTERPARTS**

6 12.1 This Consent Judgment may be executed in counterparts which taken together shall
7 be deemed to constitute one document.

8 **13. COURT APPROVAL**

9 13.1 If this Consent Judgment is not approved by the Court, it shall be of no force or
10 effect, and cannot be used in any proceeding for any purpose.

11 **14. NOTICES**

12 14.1 In the event that a dispute arises with respect to any of the provisions of this
13 Agreement, the Parties shall meet and confer within 14 days after either Party receives written
14 notice of an alleged violation of this Agreement.

15 14.2 Any notices or payments due under this Consent Judgment shall be sent by USPS
16 certified mail, return receipt requested.

17 If to Ecological Rights Foundation:

18 Fredric Evenson
19 Ecology Law Center
20 P.O. Box 1000
Santa Cruz, CA 95061

21 With a copy to:

22 LAW OFFICES OF BRIAN GAFFNEY, A Professional Corporation
23 446 Old County Road, Suite 100-310
Pacifica, California 94044

24 If to MAKERBOT INDUSTRIES, LLC:

25 Frank Polcino
26 General Counsel
MakerBot Industries, LLC
27 One MetroTech Center, 21st Floor

Brooklyn, NY 11201

With a copy to:
Scott H. Reisch
Hogan Lovells US LLP
1601 Wewatta Street, Suite 900
Denver, CO 80202

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.

IT IS SO STIPULATED:

DATED: JUNE 16, 2020

ECOLOGICAL RIGHTS FOUNDATION

Ecological Rights Foundation

BY: *James Lampton*, EXEC. DIR.
JAMES LAMPORT, EXECUTIVE DIRECTOR

DATED: _____

MAKERBOT INDUSTRIES, LLC

BY: _____

ITS: _____

IT IS SO ORDERED, ADJUDGED AND DECREED:

DATED: _____

JUDGE OF THE SUPERIOR COURT

Brooklyn, NY 11201

With a copy to:
Scott H. Reisch
Hogan Lovells US LLP
1601 Wewatta Street, Suite 900
Denver, CO 80202

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.

IT IS SO STIPULATED:

DATED: _____


ECOLOGICAL RIGHTS FOUNDATION

BY: _____

ITS: _____

DATED: 06/19/2020

MAKERBOT INDUSTRIES, LLC

BY:  _____

ITS: Nadav Goshen

IT IS SO ORDERED, ADJUDGED AND DECREED:

DATED: _____

JUDGE OF THE SUPERIOR COURT