

1 Josh Voorhees, State Bar No. 241436
Kimberly Gates, State Bar No. 282369
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
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6 Attorneys for Plaintiff
MARK MOORBERG
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8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF MARIN
10 UNLIMITED CIVIL JURISDICTION
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12 MARK MOORBERG,

13 Plaintiff,

14 v.

15 BERRY PLASTICS GROUP, INC.,; *et al.*

16 Defendants.
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Case No. CIV 1600281

[PROPOSED] CONSENT JUDGMENT

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

1 **1. INTRODUCTION**

2 **1.1 Parties**

3 This Consent Judgment is entered into by and between plaintiff Mark Moorberg
4 (“Moorberg”), and defendants Berry Plastics Corporation and Berry Plastics Group, Inc.
5 (collectively, “Berry Plastics”), with Moorberg and Berry Plastics each individually referred to as
6 a “Party” and collectively as the “Parties.”

7 **1.2 Plaintiff**

8 Moorberg is an individual residing in California who seeks to promote awareness of
9 exposures to toxic chemicals and to improve human health by reducing or eliminating hazardous
10 substances contained in consumer products.

11 **1.3 Berry Plastics**

12 Berry Plastics employs ten or more individuals and is a “person in the course of doing
13 business” for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, Health
14 and Safety Code § 25249.6 *et seq.* (“Proposition 65”).

15 **1.4 General Allegations**

16 Moorberg alleges that Berry Plastics imports, sells, or distributes for sale in California
17 vinyl/PVC electrical tape that contains di(2-ethylhexyl)phthalate (“DEHP”) without first providing
18 the exposure warning required by Proposition 65. DEHP is listed pursuant to Proposition 65 as a
19 chemical known to cause birth defects or other reproductive harm.

20 **1.5 Product Description**

21 The products covered by this Consent Judgment are vinyl/PVC electrical tapes containing
22 DEHP that are imported, sold, and/or distributed for sale in California by Berry Plastics,
23 including, but not limited to, the *Berry Plastics Corporation Electrical Tape, #1088276, UPC #0*
24 *75427 77701 9*, hereinafter the “Products.”

25 **1.6 Notice of Violation**

26 On June 26, 2015, Moorberg served Berry Plastics and the requisite public enforcement
27 agencies with a “60-Day Notice of Violation” (“Notice”) alleging that Berry Plastics violated
28 Proposition 65 by failing to warn its customers and consumers in California of the health hazards

1 associated with exposures to DEHP from the Products. To the best of the Parties’ knowledge, no
2 public enforcer has commenced and is diligently prosecuting an action to enforce the violations
3 alleged in the Notice.

4 **1.7 Complaint**

5 On January 25, 2016, Moorberg filed the instant action (“Complaint”) naming Berry
6 Plastics as a defendant for the alleged violations of Health and Safety Code § 25249.6 that are the
7 subject of the Notice.

8 **1.8 No Admission**

9 Berry Plastics denies the material, factual, and legal allegations contained in the Notice and
10 Complaint and maintains that all of the products it sold and distributed for sale in California,
11 including the Products, have been, and are, in compliance with all laws. Nothing in this Consent
12 Judgment shall be construed as an admission of any fact, finding, conclusion of law, issue of law,
13 or violation of law, nor shall compliance with this Consent Judgment constitute or be construed as
14 an admission of any fact, finding, conclusion of law, issue of law, or violation of law. This
15 Section shall not, however, diminish or otherwise affect Berry Plastics’ obligations,
16 responsibilities, and duties under this Consent Judgment.

17 **1.9 Jurisdiction**

18 For purposes of this Consent Judgment only, the Parties stipulate that this Court has
19 jurisdiction over Berry Plastics as to the allegations contained in the Complaint, that venue is
20 proper in the County of Marin, and that the Court has jurisdiction to enter and enforce the
21 provisions of this Consent Judgment pursuant to Proposition 65 and Code of Civil Procedure §
22 664.6.

23 **1.10 Effective Date**

24 For purposes of this Consent Judgment, the term “Effective Date” means the date on which
25 the Motion for Approval of the Consent Judgment is granted by the Court.

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1 **2. INJUNCTIVE RELIEF: REFORMULATION AND WARNINGS**

2 **2.1 Commitment to Reformulate or Provide Warnings**

3 Commencing on June 1, 2016, and continuing thereafter, Berry Plastics agrees that all
4 Products it sells or distributes for sale in California shall be either (1) “Reformulated Products”, as
5 defined by Section 2.2, below, or (2) Products bearing one of the clear and reasonable warnings
6 set forth in Section 2.3, below.

7 **2.2 Reformulation Standard**

8 “Reformulated Products” are defined as Products containing DEHP in a maximum
9 concentration of 1,000 parts per million (0.1%) by weight in any accessible component (i.e., any
10 component that can be touched or handled during reasonably foreseeable use) when analyzed
11 pursuant to Environmental Protection Agency testing methodologies 3580A and 8270C or other
12 methodology utilized by federal or state government agencies for the purpose of determining
13 DEHP content in a solid substance.

14 **2.3 Clear and Reasonable Product Warnings**

15 Commencing on June 1, 2016 and continuing thereafter, for all Products that do not qualify
16 as Reformulated Products, Berry Plastics agrees that it will only sell or distribute for sale in
17 California Products bearing a clear and reasonable warning, in compliance with this Section.

18 **2.3.1 General Warning Requirements**

19 For purposes of this Consent Judgment, a clear and reasonable warning shall be
20 prominently placed with such conspicuousness as compared with other words, statements, designs,
21 or devices as to render it likely to be read and understood by an ordinary individual under
22 customary conditions before purchase or use. Each warning shall be provided in a manner such
23 that the consumer or user understands to which specific Product the warning applies, so as to
24 minimize the risk of consumer confusion.

25 **2.3.2 Product Warnings**

26 Berry Plastics shall affix a warning to the packaging, labeling or directly on each
27 Product it sells or distributes for sale in or into California that states one of the following:
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WARNING: This product contains a chemical known to the State of California to cause cancer and birth defects or other reproductive harm.

Or

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

2.4 Grace Period for Existing Inventory of Products

Berry Plastics represents it implemented a health hazard warning for the Products, after receiving the Notice. Until it exhausts its current inventory of Products, Moorberg agrees Berry Plastics may continue to sell and offer for sale in California those Products labeled with the following statement: “Warning: This product contains a chemical known to the State of California to cause cancer, birth defects or other reproductive harm.”

2.5 Discontinuance of Product Sales.

Nothing herein shall affect the right of Berry Plastics to discontinue any one or all of the Products.

3. MONETARY SETTLEMENT TERMS

3.1 Civil Penalty Payment

Pursuant to Health and Safety Code § 25249.7(b), and in settlement of all claims referred to in the Notice, Complaint and this Consent Judgment, Berry Plastics shall pay \$16,000 in civil penalties. Within five days of the Effective Date, Berry Plastics shall provide its payment in a single check made payable to “The Chanler Group.” The civil penalty payment shall be allocated according to Health and Safety Code §§ 25249.12(c)(1) and (d), with seventy-five percent (75%) of the funds paid to the California Office of Environmental Health Hazard Assessment (“OEHHA”) and twenty-five percent (25%) of the funds remitted to Moorberg. Moorberg’s counsel shall be responsible for delivering OEHHA’s portion of any penalty payment made under this Consent Judgment.

1 **3.2 Reimbursement of Attorney’s Fees and Costs**

2 The parties reached an accord on the compensation due Moorberg and his counsel under
3 general contract principles and the private attorney general doctrine, codified at California Code of
4 Civil Procedure § 1021.5, for all work performed through the mutual execution of this Consent
5 Judgment and through court approval of the same, but exclusive of fees and costs on appeal, if
6 any. Within five days of the Effective Date, Berry Plastics shall pay \$44,000, in the form of a
7 single check made payable to “The Chanler Group,” for all fees and costs incurred by Moorberg in
8 investigating, bringing this matter to Berry Plastics’ attention, litigating and negotiating a
9 settlement in the public interest

10 **3.3 Payments Held in Trust**

11 All payments due under this Consent Judgment shall be held in trust until such time as the
12 Court approves the Parties’ settlement. All payments due under this agreement shall be delivered
13 within ten (10) days of the date that this Consent Judgment is fully executed by the Parties and
14 held in trust by Berry Plastics’ counsel until the Court grants the motion for approval of this
15 Consent Judgment, as contemplated by Section 5. Berry Plastics’ counsel shall confirm in
16 writing to Moorberg’s counsel that it has received Berry Plastics’ settlement payments. Within
17 five days of the Court’s approval of this Consent Judgment, Berry Plastics’ counsel shall deliver
18 the civil penalty and attorneys’ fees reimbursement payments to Moorberg’s counsel, to the
19 address in Section 3.4. Moorberg’s counsel shall confirm in writing to Berry Plastics’ counsel
20 when it receives Berry Plastics’ settlement payments.

21 **3.4 Payment Address**

22 All payments required by this Consent Judgment shall be delivered to:

23 The Chanler Group
24 Attn: Proposition 65 Controller
25 2560 Ninth Street
26 Parker Plaza, Suite 214
27 Berkeley, CA 94710

28 **4. CLAIMS COVERED AND RELEASED**

4.1 Moorberg’s Public Release of Proposition 65 Claims

 Moorberg, acting on his own behalf and in the public interest, releases Berry Plastics and

1 its parents, subsidiaries, successors, predecessors, affiliated entities under common ownership,
2 and the shareholders, directors, officers, employees, agents, representatives and attorneys
3 (“Releasees”) and each entity to whom Berry Plastics directly or indirectly distributed or sold the
4 Products including, but not limited to, its downstream distributors, wholesalers, customers,
5 retailers, franchisers, cooperative members, licensors and licensees (“Downstream Releasees”) for any violation arising under Proposition 65 pertaining to the failure to warn about exposures to
6 DEHP from Products sold or distributed for sale by Berry Plastics prior to the Effective Date, as
7 set forth in the Notice. Compliance with the terms of this Consent Judgment constitutes
8 compliance with Proposition 65 with respect to exposures to DEHP from Products sold or
9 distributed for sale by Berry Plastics after the Effective Date. The Parties agree and
10 acknowledge that the releases provided under this Consent Judgment shall not extend upstream
11 to any entity that manufactured the Products, or any components part thereof, or to any entity
12 that distributed or sold the Products, or any component parts thereof, to Berry Plastics.

14 **4.2 Moorberg’s Individual Release of Claims**

15 Moorberg, in his individual capacity only and *not* in his representative capacity and on
16 behalf of his past and current agents, representatives, attorneys, successors, and assignees, also
17 provides a release to Berry Plastics, Releasees and Downstream Releasees which shall be effective
18 as a full and final accord and satisfaction, as a bar to all actions, causes of action, obligations,
19 costs, expenses, attorneys’ fees, damages, losses, claims, liabilities and demands of Moorberg of
20 any nature, character or kind, whether known or unknown, suspected or unsuspected, arising out
21 of alleged or actual exposures to DEHP in Products sold or distributed for sale by Berry Plastics
22 before the Effective Date.

23 **4.3 Berry Plastics’s Release of Moorberg**

24 Berry Plastics, on its own behalf, and on behalf of its past and current agents,
25 representatives, attorneys, successors, and assignees, hereby waives any and all claims against
26 Moorberg and his attorneys and other representatives, for any and all actions taken or statements
27 made by Moorberg and his attorneys and other representatives, whether in the course of
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1 investigating claims, otherwise seeking to enforce Proposition 65 against it in this matter, or with
2 respect to the Products.

3 **5. COURT APPROVAL**

4 This Consent Judgment is not effective until it is approved and entered by the Court and
5 shall be null and void if it is not approved and entered by the Court within one year after it has
6 been fully executed by the Parties, or within such additional time as the Parties may agree to in
7 writing.

8 **6. SEVERABILITY**

9 If, subsequent to the Court's approval and entry of this Consent Judgment as a judgment,
10 any provision is held by a court to be unenforceable, the validity of the remaining injunctive
11 provisions shall not be adversely affected.

12 **7. GOVERNING LAW**

13 The terms of this Consent Judgment shall be governed by the laws of the state of
14 California and apply within the state of California. In the event that Proposition 65 is repealed, or
15 is otherwise rendered inapplicable by reason of law generally or as to the Products, then Berry
16 Plastics may provide written notice to Moorberg of any asserted change in the law, and shall have
17 no further injunctive obligations pursuant to this Consent Judgment with respect to, and to the
18 extent that, the Products are so affected.

19 **8. NOTICE**

20 Unless specified herein, all correspondence and notice required by this Consent Judgment
21 shall be in writing and sent by: (i) personal delivery; (ii) first-class, registered, or certified mail,
22 return receipt requested; or (iii) a recognized overnight courier to the following addresses:

23 For Berry Plastics:

24 Attn: General Counsel
25 Berry Plastics Corporation
26 101 Oakley Street
27 Evansville, IN 47710

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1 with a copy to:

2 Richard J. Wegener
3 Faegre Baker Daniels LLP
4 2200 Wells Fargo Center
5 90 South Seventh Street
6 Minneapolis, MN 55402

7 For Moorberg:

8 Proposition 65 Coordinator
9 The Chanler Group
10 2560 Ninth Street
11 Parker Plaza, Suite 214
12 Berkeley, CA 94710-2565

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

15 **9. COUNTERPARTS; FACSIMILE SIGNATURES**

16 This Consent Judgment may be executed in counterparts and by facsimile or PDF
17 signature, each of which shall be deemed an original, and all of which, when taken together, shall
18 constitute one and the same document.

19 **10. POST EXECUTION ACTIVITIES**

20 Moorberg agrees to comply with the reporting form requirements referenced in Health and
21 Safety Code § 25249.7(f). The Parties further acknowledge that, pursuant to Health and Safety
22 Code § 25249.7(f), a noticed motion is required to obtain judicial approval of the settlement. In
23 furtherance of obtaining such approval, Moorberg shall draft and file the motion for approval, and
24 the Parties agree to mutually employ their best efforts, and those of their counsel, to support the
25 entry of this agreement as a judgment, and to obtain judicial approval of their settlement in a
26 timely manner. For purposes of this Section, “best efforts” shall include, at a minimum,
27 cooperating on the drafting and filing of the necessary moving papers, supporting the motion, and
28 appearing at the hearing before the Court.

29 **11. MODIFICATION**

30 This Consent Judgment may be modified only by: (i) a written agreement of the Parties
31 and entry of a modified consent judgment thereon by the Court; or (ii) a successful motion or
32 application of any Party, and the entry of a modified consent judgment thereon by the Court.

1 **12. AUTHORIZATION**

2 The undersigned are authorized to execute this Consent Judgment and acknowledge that
3 they have read, understand, and agree to all of the terms and conditions contained herein.
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5 **AGREED TO:**

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7 Date: August 31, 2016

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9 By:  _____
10 MARK MOORBERG

AGREED TO:

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7 Date: 8/29/16

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9 By:  _____
10 Mark Miles, Chief Financial Officer
11 BERRY PLASTICS CORPORATION
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