

SETTLEMENT AGREEMENT

1. INTRODUCTION

1.1 This Settlement Agreement is entered into by and between Plaintiff Evelyn Wimberley (“Wimberley”) and Defendants Ray Padula Enterprises, LLC and RP Distribution - West (collectively “Padula”). Wimberley and Padula are collectively referred to as the “Parties”. Wimberley is an individual residing in California who is acting as a private enforcer pursuant to the Safe Drinking Water and Toxic Enforcement Act of 1986, California Health & Safety Code §25249.5 *et seq.* (“Proposition 65”)), and is enforcing Proposition 65. Padula employs 10 or more persons and is a person in the course of doing business for the purposes of Proposition 65.

1.2 On or about April 18, 2011, Wimberley served Defendant Ray Padula Enterprises, LLC (“Padula”) and various public enforcement agencies with a document entitled "60-Day Notice of Violation" pursuant to Health & Safety Code §25249.7(d) (the "Notice"), alleging that Padula was in violation of Proposition 65. Wimberley’s Notice alleges that Padula has manufactured, distributed, and/or offered for sale in California certain garden accessories including nozzles and sprinklers that expose consumers to lead and lead compounds without the requisite Proposition 65 warnings. Lead and lead compounds (the "Listed Chemical") are listed pursuant to Proposition 65 as a chemical known to the State of California to cause cancer, birth defects and other reproductive harm. The Notice alleges that Padula’s conduct violates Health & Safety Code §25249.6, the warning provision of Proposition 65.

1.3 Padula denies the material, factual and legal allegations contained in the Notice, and maintains that all products sold, distributed or offered for sale in California have been and are in compliance with all laws, including, without limitation, Proposition 65.

1.4 The Parties enter into this Settlement Agreement to resolve all Proposition 65 claims concerning Padula’s products set forth in Wimberley’s Notice, including claims against Padula’s customers, Armstrong Garden Centers, Target, Sears Holdings, Buy.com; and Sears Roebuck & Company, who have also received the Notice alleging violations of Proposition 65

resulting from their distribution and/or sale of Padula's products in California. By executing this Settlement Agreement, the Parties do not admit any facts or conclusions of law. It is the Parties' intent that nothing in this Settlement Agreement shall be construed as an admission by the Parties of any fact, finding, conclusion of law, issue of law or violation of law, nor shall compliance with the Settlement Agreement constitute or be construed as an admission by the Parties of any fact, conclusion of law, issue of law, or violation of law. Nothing in this Settlement Agreement shall prejudice, waive or impair any right, remedy, argument or defense the Parties may have in this or any other or future legal proceedings.

2. DEFINITIONS

2.1 The products covered by this Settlement Agreement shall be designated "Covered Products." The Covered Products are Ray Padula Mini Brass Twist Nozzle and Ray Padula Brass Power Jet Nozzle. .

2.2 The term "Effective Date" means the date that Wimberley gives Padula notice that this Settlement Agreement has been submitted by Wimberley to the California Office of the Attorney General.

3. INJUNCTIVE RELIEF

3.1 A Covered Product that is shipped for sale in California on or after 60 days after the Effective Date shall either be (a) reformulated pursuant to Section 3.2 or (b) include a warning as provided in Section 3.3.

3.2 **Reformulation.** A Covered Product does not require a warning if the reasonable use by the average consumer does not expose said individual to more than .5 micrograms of lead per day, as determined pursuant to California Code of Regulations title 27 section 25800 et. seq. For purposes of this Settlement Agreement, a wipe test result of the exterior surface of the Covered Product performed as set forth in NIOSH Method No. 9100 that yields a result of 1.0 micrograms or less shall be deemed to meet the .5 safe harbor exposure level for lead for the Covered Product.

3.3 **Product Labeling.** A Covered Product that does not meet the reformulation level of Section 3.2 shall contain a warning affixed to or printed on the Covered Product’s packaging or labeling. The following warning statement shall be provided:

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

3.4 **Direct to Consumer Sales.** If a Covered Product does not meet the reformulation level of Section 3.2, Padula shall provide the warning set forth under ¶3.3 herein for any internet or catalog sale of any Covered Product shipped to a consumer in California.

4. SETTLEMENT PAYMENTS

4.1 Padula shall pay a settlement amount of \$26,000 to Wimberley, to be allocated by Wimberley as follows:

4.1.1 **Civil Penalty:** \$ 2,600.00 as a civil penalty pursuant to Health and Safety Code Section 25249.7(b). Wimberley shall remit 75% of the civil penalty to the California Office of Environmental Health Hazard Assessment (“OEHHA”), pursuant to Health and Safety Code Section 25192.

4.1.2 **Attorneys’ Fees and Costs:** \$ 23,400.00 to reimburse Wimberley and her attorneys for their reasonable investigation fees and costs, attorneys’ fees, and any other costs incurred as a result of investigating, bringing this matter to Padula’s attention, litigating and negotiating a settlement, pursuant to Code of Civil Procedure Section 1021.5.

4.2 **Payments.** Padula shall deliver the payments required under this section by bank wire to the Law Offices of Stephen Ure, PC Client Trust Account within ten (10) days the full execution of this Settlement Agreement. .

5. CLAIMS COVERED AND RELEASED

5.1 This Settlement Agreement is a full, final and binding resolution between Wimberley on behalf of herself, her past and current attorneys, agents, representatives, successors, assigns, , on the one hand; and Padula, and its parents, shareholders, divisions,

subdivisions, subsidiaries, partners, sister companies, and affiliates, and their successors and assigns (“Defendant Releasees”), all entities to whom they directly or indirectly distribute or sell Covered Products, including but not limited to distributors, wholesalers, customers, retailers, franchisees, cooperative members, and Defendant Releasees' licensors and licensees, including but not limited to Armstrong Garden Centers, Target, Sears Holdings, Buy.com; and Sears Roebuck & Company, (“Downstream Defendant Releasees”), on the other hand; regarding any violation of Proposition 65 that was or could have been asserted in the Notice against Padula, Defendant Releasees, and Downstream Defendant Releasees, based on failure to warn about alleged exposure to chemicals contained in Covered Products, with respect to any Covered Products manufactured, shipped, distributed or sold by Padula prior to the Effective Date. The Parties further understand and agree that this release shall not extend upstream to any entities that manufactured the Covered Products for Padula or any component parts thereof or to any distributors or suppliers who sold the Covered Products or any component parts thereof to Padula.

5.2 In further consideration of the promises and agreements herein contained, the injunctive relief commitments set forth in Section 3, and for the payments to be made pursuant to Section 4, Wimberley, on behalf of herself, her past and current agents, representatives, attorneys, including but not limited to the Law Offices of Stephen Ure, PC, successors, and/or assignees, , hereby waives all rights to institute or participate in, directly or indirectly, any form of legal action and release all claims, 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 limited to, investigation fees, expert fees, and attorneys’ fees) of any nature whatsoever, whether known or unknown, fixed, or contingent (collectively “Claims”) that were brought or could have been brought against Padula, the Defendant Releasees, and the Downstream Defendant Releasees based on claims arising under Proposition 65 with respect to chemicals in the Covered Products, as such claims relate to the alleged failure to warn under Health & Safety Code Section 25249.6.

5.3 On behalf of itself and Defendant Releasees, Padula waives all rights to institute any form of action against Wimberley, her attorneys, consultants, and representatives for all actions taken or statements made in the course of this Action prior to the date of the execution of this Settlement Agreement.

5.4 Compliance with the terms of this Settlement Agreement by Padula resolves any issue, now and in the future, concerning compliance by Padula, the Defendant Releasees, and the Downstream Defendant Releasees with the requirements of with Proposition 65 with respect to the Listed Chemical in any Covered Products that are manufactured, shipped, or sold by Padula following the Effective Date.

6. ENFORCEMENT

6.1 Any Party may file suit to enforce the terms and conditions contained in this Settlement Agreement. A Party may enforce any of the terms and conditions of this Settlement Agreement only after that Party first provides 30 days notice to the Party allegedly failing to comply with the terms and conditions of this Settlement Agreement and attempts to resolve such Party's failure to comply in an open and good faith manner.

7. MODIFICATION

7.1 This Settlement Agreement may be modified from time to time by express written agreement of the Parties, with the approval of the Court, or by an order of this Court upon motion and in accordance with law. A Party seeking to modify this Settlement Agreement shall attempt in good faith to meet and confer with all affected Parties prior to filing a motion to modify the Settlement Agreement. The Attorney General shall be served with notice of any proposed modification to this Settlement Agreement at least fifteen (15) days in advance of its consideration by the Court.

8. ACCURACY OF SALES DATA

Padula understands that the sales data provided to counsel for Wimberley by Padula was a material factor upon which Wimberley has relied to determine the amount of payments made

pursuant to Health and Safety Code §25249.7(b) under this Agreement. Padula represents that it has provided true and accurate sales data to plaintiff to the best of its ability.

9. ENTIRE AGREEMENT

9.1 This Settlement Agreement contains the sole and entire agreement and understanding of the Parties with respect to the entire subject matter hereof, and any and all prior discussions, negotiations, commitments, or understandings related thereto, if any, are hereby merged herein and therein. No representations, oral or otherwise, express or implied, other than those specifically referred to in this Settlement Agreement have been made by any Party hereto. No supplementation, modification, waiver, or termination of this Settlement Agreement shall be binding unless executed in writing by the Party to be bound thereby. No waiver of any of the provisions of this Settlement Agreement shall be deemed or shall constitute a waiver of any of the other provisions hereof whether or not similar, nor shall such waiver constitute a continuing waiver.

10. GOVERNING LAW AND APPLICATION

10.1 The terms of this Settlement Agreement shall be governed by the laws of the State of California and shall apply only to Covered Products that are sold or offered for sale in the State of California. In the event that Proposition 65 is repealed, preempted, or otherwise rendered inapplicable by reason of law generally, or as to the Products, then Padula shall have no further obligations pursuant to this Settlement Agreement with respect to, and to the extent that, the Products are so effected.

10.2 This Settlement Agreement shall apply to and be binding upon Wimberley and Padula and its divisions, subdivisions, and subsidiaries, and the Parties' successors and assigns.

10.3 The Parties, including their counsel, have participated in the preparation of this Settlement Agreement and this Settlement Agreement is the result of the joint efforts of the Parties. This Settlement Agreement was subject to revision and modification by the Parties and has been accepted and approved as to its final form by all Parties and their counsel.

Accordingly, any uncertainty or ambiguity existing in this Settlement Agreement shall not be

interpreted against any Party as a result of the manner of the preparation of this Settlement Agreement.

11. PROVISION OF NOTICE

11.1 All notices required pursuant to this Settlement Agreement and correspondence shall be sent to the following:

For Wimberley:

Law Offices of Stephen Ure, PC
1518 Sixth Avenue
San Diego, CA 92101

For Padula:

Ray Padula Enterprises, LLC
Mr. Ray Padula, CEO
4 East 34th St.
New York, NY 10016
With a copy to:

Carol Rene Brophy
Sedgwick, LLP
333 Bush Street, 30th Floor
San Francisco, CA 94104

12. ATTORNEY'S FEES

12.1 A party who unsuccessfully brings or contests an action arising out of this Settlement Agreement shall be required to pay the prevailing party's reasonable attorney's fees and costs unless the unsuccessful party has acted with substantial justification. For purposes of this Settlement Agreement, the term substantial justification shall carry the same meaning as used in the Civil Discovery Act of 1986, Code of Civil Procedure Section 2016, et seq.

12.2 Nothing in this Section 15 shall preclude a Party from seeking an award of sanctions pursuant to law.

13. EXECUTION AND COUNTERPARTS

13.1 The stipulations to this Settlement Agreement may be executed in counterparts and by means of facsimile and/or portable document format (pdf), which taken together shall be deemed to constitute one document.

14. COMPLIANCE WITH HEALTH AND SAFETY CODE § 25249.7(f)

14.1 Wimberley agrees to comply with the reporting form requirements referenced in California Health and Safety Code § 25249.7(f).

15. AUTHORIZATION

15.1 Each signatory to this Settlement Agreement certifies that he or she is fully authorized by the party he or she represents to stipulate to this Settlement Agreement and to enter into and execute the Settlement Agreement on behalf of the party represented and legally bind that party. The undersigned have read, understand and agree to all of the terms and conditions of this Settlement Agreement. Except as explicitly provided herein, each party is to bear its own fees and costs.

AGREED TO:

Dated:

Stephen Ure
Attorney for Evelyn Wimberley

Dated:

RAY PADULA ENTERPRISES
By _____
Name: _____
Title: _____

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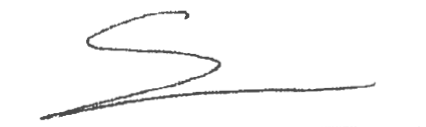
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AGREED TO:

Dated: 11-10-11




Stephen Ure

Attorney for Evelyn Wimberley

Dated: 11-15-11

RAY PADULA ENTERPRISES

By 

Name: Ray Padula

Title: President