

SETTLEMENT AGREEMENT & RELEASE – TOMDAN, INC.

This Settlement Agreement and Release (the “Agreement”) is between the Center for Environmental Health (“CEH”) and Tomdan, Inc. (“Tomdan”) (together, the “Parties”).

1. INTRODUCTION

1.1. On April 22, 2013, CEH, a non-profit corporation acting in the public interest, provided a “Notice of Violation of Proposition 65” to the California Attorney General, the District Attorneys of every county in California, the City Attorneys of every California city with a population greater than 750,000, and to Tomdan regarding the presence of lead and lead compounds (collectively, “Lead”) in gloves made with leather, vinyl or imitation leather materials manufactured, distributed or sold in California by Tomdan (the “Notice”).

1.2. The Notice alleges that Tomdan’s gloves contain Lead. The Notice alleges that such gloves expose people who touch, wear or otherwise handle the Covered Products to Lead, a chemical known to the State of California to cause cancer, birth defects or other reproductive harm, without first providing clear and reasonable warning to such persons regarding the carcinogenic or reproductive hazards associated with Lead. The Notice alleges that such conduct violates Health & Safety Code § 25249.6, the warning provision of Proposition 65. Tomdan does not admit any of the allegations stated in the Notice.

1.3. The Parties enter into this Agreement for the purpose of avoiding prolonged and costly litigation regarding gloves manufactured, distributed and/or sold in California by Tomdan. By executing this Agreement, the Parties do not admit any facts or conclusions of law. It is the Parties’ intent that nothing in this Agreement shall be construed as an admission by the Parties of any fact, conclusion of law, issue of law or violation of law, nor shall compliance with the 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 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. “Accessible Component” means a component of a Covered Product that could be touched by a person during normal or reasonably foreseeable use.

2.2. “Covered Products” means gloves.

2.3. “Lead Limits” means the maximum concentrations of lead and lead compounds by weight specified in Section 3.2.

2.4. “Manufactured” and “Manufactures” means to manufacture, produce or assemble.

2.5. “Paint or other Surface Coatings” means a fluid, semi-fluid, or other material, with or without a suspension of finely divided coloring matter, which changes to a solid film when a thin layer is applied to a metal, wood, stone, paper, leather, cloth, plastic, or other surface. This term does not include printing inks or those materials which actually become a part of the substrate, such as the pigment in a plastic article, or those materials which are actually bonded to the substrate, such as by electroplating or ceramic glazing.

2.6. “Supplier” means a person or entity that Manufactures, imports, distributes or supplies a Covered Product to Tomdan.

3. INJUNCTIVE RELIEF

3.1. Specification Compliance Date. To the extent it has not already done so, no more than 30 days after execution of this Agreement, Tomdan shall provide the Lead Limits to its Suppliers of Covered Products and shall instruct each Supplier to use reasonable efforts to provide Covered Products that comply with the Lead Limits on a nationwide basis.

3.2. Lead Limits. Upon execution of this Agreement, Tomdan shall not purchase, import, Manufacture, supply, sell or offer for sale any Covered Product that will be sold or offered for sale to California consumers that exceeds the following Lead Limits:

3.2.1. Paint or other Surface Coatings on Accessible Components: 90 parts per million (“ppm”).

3.2.2. Polyvinyl chloride (“PVC”) Accessible Components: 200 ppm.

3.2.3. All other Accessible Components other than cubic zirconia (sometimes called cubic zirconium, CZ), crystal, glass or rhinestones: 300 ppm.

3.3. Action Regarding Specific Products.

3.3.1. Upon execution of this Agreement, Tomdan shall cease selling the Marina Luna Gloves in Orange, SKU No. 1274-030782404-002499-09-1 (the “Recall Product”), to customers who sell or offer for sale the Recall Product to California consumers. Upon execution of this Agreement, Tomdan shall also: (i) cease shipping the Recall Product to any of its customers that resell the Recall Product in California, and (ii) send instructions to any of its customers that resell the Recall Product in California instructing them to either (a) return all the Recall Product to Tomdan for destruction; or (b) to directly destroy the Recall Product.

3.3.2. Any destruction of the Recall Product shall be in compliance with all applicable laws.

3.3.3. Within sixty (60) days of execution of this Agreement, Tomdan shall provide CEH with written certification from Tomdan confirming compliance with the requirements of Section 3.3.

4. ENFORCEMENT OF SETTLEMENT AGREEMENT

4.1. The Parties agree that the any action based on violation of this Agreement shall be

brought in the Superior Court of California in Marin County. For purposes of this Agreement, notwithstanding Section 1.3 above, the Parties agree that the Superior Court of California in Marin County has subject matter jurisdiction over any disputes arising from this Agreement and personal jurisdiction over each of the Parties, and that venue is proper in the County of Marin. Should a Party to this Agreement prevail on any action to enforce the terms of this Agreement, it shall be entitled to reasonable attorneys' fees and costs associated with such enforcement.

4.2. Enforcement Procedures. Prior to bringing any action to enforce the terms of this Agreement, a Party seeking to enforce shall provide the violating Party thirty (30) days advanced written notice of the alleged violation. The Parties shall meet and confer during such thirty (30) day period in an effort to try to reach agreement on an appropriate cure for the alleged violation. After such thirty (30) day period, the Party seeking to enforce may, by new action before the Superior Court of California in Marin County, seek to enforce the terms and conditions contained in this Agreement.

5. SETTLEMENT PAYMENTS

5.1. In consideration of the mutual covenants and releases provided in this Agreement, within five (5) business days of execution of this Agreement, Tomdan shall pay a total of \$22,500.00 as a settlement payment. This total shall be paid in three separate checks delivered to the offices of the Lexington Law Group (Attn: Eric S. Somers), 503 Divisadero Street, San Francisco, California 94117, and shall be made payable and allocated as follows. Any failure by Tomdan to comply with the payment terms herein shall be subject to a stipulated late fee in the amount of \$100 for each day after the delivery date the payment is received. The late fees required under this Section shall be recoverable, together with reasonable attorneys' fees, in an enforcement proceeding brought pursuant to Section 4.1 of this Agreement.

5.1.1. Civil Penalty. Tomdan shall pay \$2,930 as a penalty pursuant to Health & Safety Code § 25249.7(b), such money to be apportioned by CEH in accordance with Health & Safety Code § 25249.12. The penalty check shall be made payable to the Center for Environmental Health.

5.1.2. Monetary Payment in Lieu of Civil Penalty. Tomdan shall pay \$4,400 as payment to CEH in lieu of civil penalty pursuant to Health & Safety Code § 25249.7(b), and California Code of Regulations, Title 11, § 3203(b). CEH will use such funds to continue its work educating and protecting people from exposures to toxic chemicals, including heavy metals. In addition, as part of its Community Environmental Action and Justice Fund, CEH will use four percent of such funds to award grants to grassroots environmental justice groups working to educate and protect people from exposures to toxic chemicals. The method of selection of such groups can be found at the CEH web site at www.ceh.org/justicefund. The payment in lieu of penalty check shall be made payable to the Center for Environmental Health.

5.1.3. Attorneys' Fees and Costs. Tomdan shall pay \$15,170 to reimburse CEH and its attorneys for their reasonable investigation fees and costs, attorneys' fees, and any other costs incurred as a result of investigating, bringing this matter to Tomdan's attention, litigating and negotiating a settlement in the public interest. This payment shall be made payable to the Lexington Law Group.

6. MODIFICATION OF SETTLEMENT AGREEMENT

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

7. APPLICATION OF SETTLEMENT AGREEMENT

7.1. This Agreement shall apply to and be binding upon the Parties hereto, their

divisions, subdivisions and subsidiaries, and the successors or assigns of any of them.

8. CLAIMS COVERED

8.1. Except as otherwise provided herein, CEH hereby releases and discharges Tomdan, its parents, subsidiaries, directors, officers, employees, agents (hereinafter “Releasees”), and all entities to whom they distribute or sell Covered Products, including but not limited to distributors, wholesalers, customers, retailers (including but not limited to Marshalls of MA, Inc. and Marshalls of CA, LLC), franchisees, cooperative members, and licensees (hereinafter “Downstream Releasees”), with respect to any violation of Proposition 65 that was or could have been asserted against the Releasees or Downstream Releasees regarding the failure to warn about exposures to Lead arising in connection with Covered Products manufactured, distributed or sold by Tomdan on or before the execution of this Agreement.

8.2. Compliance with the terms of this Agreement constitutes compliance with Proposition 65 for purposes of exposures to Lead from the Covered Products.

9. SPECIFIC PERFORMANCE

9.1. The Parties expressly recognize that Tomdan’s obligations under this Agreement are unique. In the event that Tomdan is found to be in breach of this Agreement for failure to comply with the provisions of Section 3 hereto, the Parties agree that it would be extremely impracticable to measure any resulting damages and that such breach would cause irreparable damage. Accordingly, CEH, in addition to any other available rights or remedies, may sue in equity for specific performance, and Tomdan expressly waives the defense that a remedy in damages will be adequate.

10. PROVISION OF NOTICE

10.1. All notices required pursuant to this Agreement and correspondence shall be sent by first class and electronic mail to the following:

For CEH:

Howard Hirsch
Lexington Law Group
503 Divisadero Street
San Francisco, CA 94117
hhirsch@lexlawgroup.com

For Tomdan, Inc.:

Stanley W. Landfair
Rebecca L. Woodson
McKenna Long & Aldridge LLP
101 California Street, Floor 41
San Francisco, CA 94111
rwoodson@mckennalong.com

10.2. Any Party may modify the person and address to whom the notice is to be sent by sending the other Party notice by first class and electronic mail.

11. GOVERNING LAW

11.1. The terms of this Agreement shall be governed by the laws of the State of California.

11. ENTIRE AGREEMENT

11.1. This 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. There are no warranties, representations, or other agreements between the Parties except as expressly set forth herein. No representations, oral or otherwise, express or implied,

other than those specifically referred to in this Agreement have been made by any Party hereto. No other agreements not specifically contained or referenced herein, oral or otherwise, shall be deemed to exist or to bind any of the Parties hereto. Any agreements specifically contained or referenced herein, oral or otherwise, shall be deemed to exist or to bind any of the Parties hereto only to the extent that they are expressly incorporated herein. No supplementation, modification, waiver, or termination of this Agreement shall be binding unless executed in writing by the Party to be bound thereby. No waiver of any of the provisions of this 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.

12. NO EFFECT ON OTHER SETTLEMENTS

12.1. Nothing in this Agreement shall preclude CEH from resolving any claim against any entity besides Tomdan on terms that are different than those contained in this Agreement.

13. EXECUTION IN COUNTERPARTS


13.1. The stipulations to this Agreement may be executed in counterparts by electronic mail, which taken together shall be deemed to constitute one document.

14. AUTHORIZATION

14.1. Each signatory to this Agreement certifies that he or she is fully authorized by the party he or she represents to stipulate to this Agreement and to enter into and execute the 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 Agreement. Except as explicitly provided herein, each Party is to bear its own fees and costs.

AGREED TO:

CENTER FOR ENVIRONMENTAL HEALTH



Charlie Pizarro
Associate Director

Dated: 7/12/2013

TOMDAN, INC.

Dated:

[Name]

[Title]

AGREED TO:

CENTER FOR ENVIRONMENTAL HEALTH

Charlie Pizarro
Associate Director

Dated:

TOMDAN, INC.

Chuck DiNatale
Chuck DiNatale

Dated: 7/10/13

Charles Pizarro
Owner-President
TOMDAN, Inc.