

SETTLEMENT AGREEMENT

1. INTRODUCTION

1.1 Parties. This Settlement Agreement is entered into by and between Mark Moorberg (“Moorberg”) and Unger Enterprises Inc. (“Unger”), collectively referred to herein as “Parties.” Moorberg 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. Unger is a corporation, incorporated under the laws of Connecticut.

1.2 General Allegations. Moorberg alleges that Unger is a person in the course of doing business within the meaning of Health & Safety Code section 25249.11, and that Unger manufactures, distributes and/or sells tools with Vinyl/PVC grips containing Di(2-ethylhexyl)phthalate (“DEHP”), collectively referred to herein as “Products,” including, but not limited to, the Unger Inspection Mirror, IMIRR, UPC #761475620741, Unger Ergo Dustpan with Broom Red, EDPBR, UPC #761475612388, Unger Ergo Dustpan Telescopic Gray, EDTBG, UPC #761475644204, Unger Ergo Dustpan Telescopic Red, EDTBR, UPC #761475644167, and Unger Betterx Cleaning Specialist, RRSPC, UPC #761475650069 (collectively, “Products”). Moorberg also alleges that Unger violated the Safe Drinking Water and Toxic Enforcement Act of 1986, codified at Health and Safety Code sections 25249.6, et seq. (“Proposition 65”), by knowingly and intentionally exposing California consumers to DEHP, which Moorberg alleges escapes from Products, leading to human exposures.

1.3 Notice of Violation. Moorberg served Unger and the requisite public enforcement agencies with a document entitled “60-Day Notice of Violation,” dated May 21, 2014 (“Notice”) that provided the recipients with notice of the alleged violations of Proposition 65 based on the alleged failure to warn customers, consumers and users in the State of California that Products expose users to DEHP. To the best of the Parties’ knowledge, no public enforcer has commenced or is diligently prosecuting the allegations set forth in the Notice.¹

1.4 No Admission. Unger denies the material, factual, and legal allegations contained in the Notice and maintains that all of the products it has manufactured, imported, distributed, and/or sold in the State of 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 Unger of any fact, finding, conclusion of law, issue of law, or violation of law; nor shall compliance with this Settlement Agreement constitute or be construed as an admission by Unger of any fact, finding, conclusion of law, issue of law, or violation of law, the same being specifically denied by Unger. This paragraph shall not, however, diminish or otherwise affect Unger’s obligations, responsibilities, and duties under this Settlement Agreement.

1.5 Effective Date. For purposes of this Settlement Agreement, the term “Effective Date” shall mean November 30, 2014.

¹ Pursuant to Proposition 65, DEHP is listed as a chemical known to cause birth defects and other reproductive harm. DEHP is subject to the “clear and reasonable warning” requirements of Proposition 65. Cal. Code Regs., tit. 27, § 27001(b); Health & Safety Code §§ 25249.8, 25249.10(b).

2. INJUNCTIVE RELIEF

2.1 Reformulation Commitment. Commencing on the Effective Date, Unger shall manufacture, import, ship, sell, and distribute for sale in California only Products that contain no greater than 1000 ppm of DEHP, when analyzed pursuant to U.S. Environmental Protection Agency testing methodologies 3580 and 8270C, or equivalent methodologies utilized by federal or state agencies for the purpose of determining the presence, and measure the quantity of DEHP (“Reformulated Products”).

2.2 Provided that Unger has complied with Section 2.1 above, sales of Products that were supplied to unaffiliated third parties prior to the Effective Date, shall not be separately actionable against Unger or unaffiliated third parties in another case brought pursuant to Section 25249.7(d) of the Health and Safety Code alleging a failure to warn for DEHP under Proposition 65.

3. MONETARY SETTLEMENT TERMS

3.1 Civil Penalty Payments. Pursuant to Health and Safety Code section 25249.7(b), Unger shall pay the civil penalties described herein, and each penalty payment shall be allocated according to Health and Safety Code section 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 paid to Moorberg, as follows: Within five days of the Effective Date, Unger shall make a civil penalty payment of \$4,500. Unger shall provide its payment in two checks for the following amounts made payable to: (a) “OEHHA” in the amount of \$3,375; and (b) “Mark Moorberg, Client Trust Account” in the amount of \$1,125.

3.2 Attorney Fees and Costs. The Parties reached an accord on the compensation due to Moorberg and his counsel under general contract principles and the private attorney general doctrine codified at Code of Civil Procedure section 1021.5 for all work performed in this matter. Under these legal principles, Unger shall reimburse Moorberg and his counsel \$27,500 for the fees and costs incurred in investigating, bringing this matter to the attention of Unger’s management, and negotiating a settlement in the public interest. Within five days of the Effective Date, Unger shall provide payment in the form of a check for \$27,500 made payable to “Moscone Emblidge Sater & Otis LLP in Trust.”

3.3 Payment Procedures. Payments are to be delivered according to the following paragraphs.

3.3.1 Payment Address for Moorberg. All payments to Moorberg and his counsel under this Settlement Agreement are to be delivered to the following address:

Moscone Emblidge Sater & Otis LLP
Attn: Proposition 65 Controller
220 Montgomery Street, Suite 2100
San Francisco, CA 94104

3.3.2 Payment Addresses for OEHHA. All payments to OEHHA under this Settlement Agreement will be delivered directly to OEHHA (memo line: “Prop. 65 Penalties”) at one of the following addresses, as appropriate:

For United States Postal Delivery:

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

For Non-U.S. Postal Delivery or Courier:

Mike Gyurics
Fiscal Operations Branch Chief
Office of Environmental Health Hazard Assessment
1001 I Street
Sacramento, CA 95812-4010

3.3.3 Copy of Payments to OEHHA. Unger agrees to provide Moorberg’s counsel with a copy of each check payable to OEHHA, simultaneous with its penalty payments to Moorberg, to be delivered to the address provided in paragraph 3.3.1.

4. CLAIMS COVERED AND RELEASED

4.1 Moorberg’s Release of Unger. This Settlement Agreement is a full, final, and binding resolution between Moorberg and Unger of any violation of Proposition 65 that was or could have been asserted by Moorberg, on behalf of himself, or on behalf of his past and current agents, representatives, attorneys, successors, and assignees, against Unger, its successors, assignees, parents, subsidiaries, affiliated entities under common ownership, directors, officers, employees, shareholders, attorneys, and each entity to whom Unger directly or indirectly distributes or sells the Products, including, without limitation, its downstream distributors, wholesalers, customers, retailers, franchisees, cooperative members, and licensees (collectively, “Releasees”), based on unwarned exposures to DEHP in Products manufactured, sold or distributed for sale in California by Releasees prior to the Effective Date.

In further consideration of the promises and agreements herein contained, Moorberg, on his own behalf and on behalf of his past and current agents, representatives, attorneys, successors, and assignees, hereby waives all rights to institute or participate in, directly or indirectly, any form of legal action, and releases all claims that he may have against Unger, including, without limitation, all actions and causes of action, suits, liabilities, demands, obligations, damages, costs, fines, penalties, losses, or expenses, including, without limitation, investigation fees, expert fees, and attorneys’ fees arising under Proposition 65 for unwarned exposures to DEHP from Products manufactured, sold, or distributed for sale in California by Unger prior to the Effective Date.

4.2 Unger's Release of Moorberg. Unger, on its own behalf and on behalf of its past and current agents, representatives, attorneys, successors, assignees and Releasees, hereby waives any and all claims that it may have against Moorberg 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 Moorberg and his attorneys and other representatives, whether in the course of investigating claims, otherwise seeking to enforce Proposition 65 against it and the Releasees in this matter, or with respect to the Products.

5. SEVERABILITY

If, subsequent to the execution of this Settlement Agreement, any provision of this Settlement Agreement is held by a court to be unenforceable, the validity of the remaining provisions 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 as to the Products, then Unger may provide written notice to Moorberg of any asserted change in the law, and have no further 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 Unger or any Releasees from any obligation to comply with any pertinent state or federal law.

7. NOTICE

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

For Unger:

with a copy to:

Kathryn Edwards, Esq.
Orrick, Herrington & Sutcliffe LLP
405 Howard Street
San Francisco, CA 94105-2669

For Moorberg:

Moscone Emblidge Sater & Otis LLP
Attn: Proposition 65 Controller
220 Montgomery Street, Suite 2100
San Francisco, CA 94104

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

8. COUNTERPARTS; FACSIMILE SIGNATURES

This Settlement Agreement may be executed in counterparts, and by facsimile or portable document format (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. POST-EXECUTION ACTIVITIES

Moorberg agrees to comply with the reporting form requirements referenced in Health and Safety Code section 25249.7(f).

10. ENFORCEMENT

This Settlement Agreement is enforceable pursuant to Code of Civil Procedure section 664.6.

11. ENTIRE AGREEMENT

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 and understandings related hereto. No representations, oral or otherwise, express or implied, other than those contained herein have been made by any party hereto. No other agreements not specifically referred to herein, oral or otherwise, shall be deemed to exist or to bind any of the Parties

12. MODIFICATION

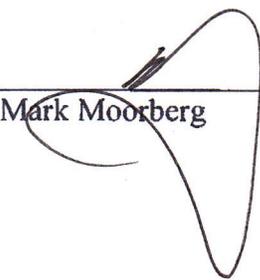
This Settlement Agreement may be modified only by written agreement of the Parties.

13. AUTHORIZATION

The undersigned are authorized to execute this Settlement Agreement on behalf of their respective Parties and have read, understood and agree to all of the terms and conditions of this Settlement Agreement.

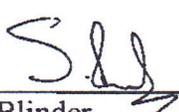
AGREED TO:

Date: 11. 05. 11

By: 
Mark Moorberg

AGREED TO:

Date: 1/24/14

By: 
Stuart Blinder
Chief Financial Officer
Unger Enterprises Inc.