

# **SETTLEMENT AGREEMENT**

## **1. INTRODUCTION**

### **1.1 John Moore and Downeast Concepts, Inc.**

This Settlement Agreement (“Settlement Agreement”) is entered into by and between John Moore (“Moore”) and Downeast Concepts, Inc. (“Downeast”) with Moore and Downeast collectively referred to as the “Parties.” Moore 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. Downeast employs ten or more persons and is a person in the course of doing business for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, California Health & Safety Code §§ 25249.5 *et seq.* (“Proposition 65”).

### **1.2 General Allegations**

Moore alleges that Downeast manufactures, imports, sells and/or distributes for sale in California, vinyl/PVC memo pad covers and luggage tags with vinyl/PVC components containing di(2-ethylhexyl)phthalate (“DEHP”). On October 24, 2013, DEHP was listed pursuant to Proposition 65 as a chemical known to cause birth defects and other reproductive harm. Moore alleges that Downeast failed to provide the health hazard warning required by Proposition 65 for exposures to DEHP.

### **1.3 Product Description**

The products covered by this Settlement Agreement are vinyl/PVC memo pad covers including, but not limited to, the *Cape Shore Memopad*, #1318193, UPC #0 96164 94543 1, and luggage tags with vinyl/PVC components including, but not limited to, the *Lovin' Life with Cape Shore Luggage Tag*, *Hermit Crab*, UPC #0 96164 90507 7, manufactured, distributed, sold and/or offered for sale in California by Downeast (“Products”).

#### **1.4 Notice of Violation**

On September 30, 2014, Moore served Downeast and certain requisite public enforcement agencies with a 60-Day Notice of Violation (“Notice”), alleging that Downeast violated Proposition 65 when it failed to warn its customers and consumers in California that the Products expose users to DEHP. To the best of the Parties’ knowledge, no public enforcer has commenced and is diligently prosecuting an action to enforce the allegations set forth in the Notice. As a result of receiving the Notice, Downeast represents that they discontinued sales of the Products and that warning labels were placed on inventory held by retailers in California.

#### **1.5 No Admission**

This settlement resolves claims that are denied and disputed by Downeast. The Parties enter into this Agreement for the purpose of avoiding prolonged and/or expensive litigation. Downeast denies the material, factual, and legal allegations contained in the Notice and maintains that all of the products that it has sold and/or distributed for sale in California, including the Products, have been, and are, in compliance with all federal, state, or local laws. Nothing in this Settlement Agreement shall be construed as an admission by Downeast 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 Downeast of any fact, finding, conclusion of law, issue of law, or violation of law, the same being specifically denied by Downeast. However, this Section shall not diminish or otherwise affect Downeast’s obligations, responsibilities, and duties under this Settlement Agreement.

#### **1.6 Effective Date**

For purposes of this Settlement Agreement, the term “Effective Date” shall mean July 31, 2016.

### **2. INJUNCTIVE SETTLEMENT TERMS**

#### **2.1 Reformulation Standards**

“Reformulated Products” are defined as those Products containing DEHP in concentrations less than 0.1 percent (1,000 parts per million) when analyzed pursuant to U.S.

Environmental Protection Agency testing methodologies 3580A and 8270C or other methodology utilized by federal or state agencies for the purpose of determining DEHP content in a solid substance.

**2.2 Reformulation Commitment**

As of the Effective Date, Downeast shall not manufacture, import, distribute, sell or offer the Products for sale in the State of California unless they are Reformulated Products pursuant to Section 2.1 above.

**3. MONETARY SETTLEMENT TERMS**

**3.1 Payments Pursuant to Health and Safety Code § 25249.7(b)(2)**

Pursuant to Health and Safety Code section 25249.7(b)(2), and in settlement of all the claims referred to in this Settlement Agreement, Downeast shall pay \$2,000 in civil penalties in accordance with this Section. The penalty payment shall be made on or before the Effective Date and will be allocated in accordance with California Health & Safety Code § 25249.12(c)(1) & (d), with 75% of the funds remitted to the California Office of Environmental Health Hazard Assessment (“OEHHA”) by Moore. Downeast shall provide its payment in a single check made payable to “John Moore, Client Trust Account” to be delivered to the address provided in Section 3.3, below. Moore’s counsel shall be responsible for remitting Downeast’s penalty payment(s) under this Settlement Agreement to OEHHA.

**3.2 Reimbursement of Attorneys’ Fees and Costs**

The Parties acknowledge that Moore and his counsel offered to resolve this dispute without reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving the issue to be resolved after the material terms of the agreement had been settled. Shortly after the other settlement terms had been finalized, Downeast expressed a desire to resolve Moore’s fees and costs. The Parties then negotiated a resolution of the compensation due to Moore and his counsel under general contract principles and the private attorney general doctrine codified at California Code of Civil Procedure § 1021.5. For all work performed through the mutual execution of this agreement, Downeast shall reimburse Moore and his

counsel \$19,000. Downeast's payment shall be delivered to the address in Section 3.3, on or before the Effective Date, in the form of a check payable to "The Chanler Group." The reimbursement shall cover all fees and costs incurred by Moore investigating, bringing this matter to Downeast's attention and negotiating a settlement of the matter in the public interest.

### **3.3 Payment Address**

All payments required by this Settlement Agreement shall be delivered to the following address:

The Chanler Group  
Attn: Proposition 65 Controller  
2560 Ninth Street  
Parker Plaza, Suite 214  
Berkeley, CA 94710

## **4. CLAIMS COVERED AND RELEASED**

### **4.1 Moore's Release of Proposition 65 Claims**

This Settlement Agreement is a full, final, and binding resolution between Moore and Downeast of any violation of Proposition 65 that was or could have been asserted by Moore on behalf of himself, his past and current agents, representatives, attorneys, successors, and assigns, and *not* on behalf of the public, against Downeast, its parents, subsidiaries, affiliated entities under common ownership, directors, officers, agents employees, attorneys, and each entity to whom Downeast directly or indirectly has distributed or sold the Products, including, but not limited, to downstream distributors, wholesalers, customers, retailers (including, but not limited to, Tuesday Morning Corporation and Tuesday Morning, Inc.), franchisees, cooperative members, and licensees and each of their respective directors, officers, agents, employees, attorneys, predecessors, successors, and assigned (collectively, referred to as "Releasees"), from all claims for violations of Proposition 65 through the Effective Date based on unwarned exposures to DEHP, including from all claims based on the failure to warn about alleged exposure to any DEHP in the Products, as set forth in the Notice. The Parties further understand and agree that this Section 4.1 release shall not extend upstream to any entities that supply to Downeast any Products or component parts thereof. Downeast's compliance with the terms of

this Agreement constitutes compliance with Proposition 65 with respect to exposures to DEHP and failure to warn about alleged exposure to any DEHP concerning the Products.

#### **4.2 Moore's Individual Releases of Claims**

Moore, in his individual capacity only on behalf of himself and his past and current agents, representatives, attorneys, successors, and assigns, and *not* in his representative capacity, 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 the Releasees including, but not limited to all actions, causes of action, suits, obligations, costs, penalties, fees (including, but not limited to, investigation fees, expert fees, and attorneys' fees, damages, losses, liabilities, and demands of any nature, character, or kind, whether known or unknown, suspected or unsuspected, (collectively, "Claims") arising out of alleged or actual exposures to any DEHP in the Products manufactured, imported, distributed, or sold by Downeast prior to the Effective Date. Moore acknowledges that the release in this Section 4.2 may include unknown Claims and nevertheless waives 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 WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR.

Moore acknowledges and understands the significance and consequences of this specific waiver of California Civil Code section 1542.

The Parties further understand and agree that this Section 4.2 release shall not extend upstream to any entities that supply to Downeast any Products, or component parts thereof. Nothing in this Section affects Moore's right to commence or prosecute an action under Proposition 65 against a Releasee that does not involve Downeast's products or the Products.

**4.3 Downeast's Release of Moore**

Downeast, on behalf of itself, its past and current agents, representatives, attorneys, successors, and assignees, hereby waives any and all claims against Moore 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 Moore and his attorneys and other representatives, whether in the course of investigating claims or otherwise seeking to enforce Proposition 65 against it in this matter with respect to the Products.

**5. SEVERABILITY**

If, subsequent to the execution of this Settlement Agreement, any of the provisions of this Settlement Agreement are deemed by a court to be unenforceable, the validity of the enforceable provisions remaining 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 if any of the provisions of this Settlement Agreement are rendered inapplicable or no longer required as a result of any such repeal or preemption or rendered inapplicable by reason of law generally as to the Products, then Downeast shall provide written notice to Moore of any asserted change in the law and, with the exception of Sections 3.1 and 3.2 above, shall 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 Downeast from any obligation to comply with any pertinent state or federal toxics control law.

**7. NOTICE**

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

To Downeast:

Daniel A. Nuzzi, Esq.  
Brann & Isaacson  
184 Main Street, 4<sup>th</sup> Floor  
Lewiston, ME 04243-3070

To Moore:

Attn: Proposition 65 Coordinator  
The Chanler Group  
2560 Ninth Street  
Parker Plaza, Suite 214  
Berkeley, CA 94710-2565

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 AND SIGNATURES**

This Settlement Agreement may be executed in counterparts and by facsimile or 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. COMPLIANCE WITH HEALTH & SAFETY CODE § 25249.7(f)**

Moore and his attorneys agree to comply with the reporting requirements referenced in Health & Safety Code § 25249.7(f).

**10. MODIFICATION**

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

**11. AUTHORIZATION**

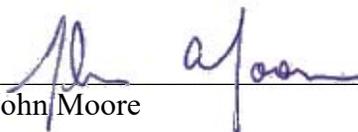
The undersigned are authorized to execute this Settlement Agreement and have read, understood and agreed to all of the terms and conditions contained herein.

**AGREED TO:**

**AGREED TO:**

Date: 8/3/2016

Date: \_\_\_\_\_

By:  \_\_\_\_\_  
John Moore

DOWNEAST CONCEPTS, INC.

By: \_\_\_\_\_

Its: \_\_\_\_\_

To Downeast:

Daniel A. Nuzzi, Esq.  
Brann & Isaacson  
184 Main Street, 4<sup>th</sup> Floor  
Lewiston, ME 04243-3070

To Moore:

Attn: Proposition 65 Coordinator  
The Chanler Group  
2560 Ninth Street  
Parker Plaza, Suite 214  
Berkeley, CA 94710-2565

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 AND SIGNATURES**

This Settlement Agreement may be executed in counterparts and by facsimile or 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. COMPLIANCE WITH HEALTH & SAFETY CODE § 25249.7(f)**

Moore and his attorneys agree to comply with the reporting requirements referenced in Health & Safety Code § 25249.7(f).

**10. MODIFICATION**

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

**11. AUTHORIZATION**

The undersigned are authorized to execute this Settlement Agreement and have read, understood and agreed to all of the terms and conditions contained herein.

**AGREED TO:**

**AGREED TO:**

Date: \_\_\_\_\_

Date: 7/29/16

By: \_\_\_\_\_  
John Moore

DOWNEAST CONCEPTS, INC.  
By: Michael Perfito  
Its: Managing Director