

SETTLEMENT AGREEMENT

1. INTRODUCTION

1.1 Parties. This Settlement Agreement is entered into by and between Laurence Vinocur (“Vinocur”) and Implus Footcare, LLC (“Implus”), collectively referred to herein as “Parties.” Vinocur 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. Implus is a limited liability company formed under the laws of Delaware.

1.2 General Allegations. Vinocur alleges that that Implus is a person in the course of doing business within the meaning of Health and Safety Code section 25249.11, and that Implus manufactures, distributes and/or sells safety armbands with Vinyl/PVC components containing Di(2-ethylhexyl)phthalate (“DEHP”) including, but not limited to, New Balance Safety Armband, UPC # 0 96506 52016 6 (collectively “Products”). Vinocur also alleges that Implus 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 Vinocur alleges escapes from Products, leading to human exposures.

1.3 Notice of Violation. Vinocur served Implus and the requisite public enforcement agencies with a document entitled “60-Day Notice of Violation,” dated October 24, 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 Subsequent to its receipt of the Notice, Implus voluntarily advised Vinocur that its own tests had also detected the presence of Diisononyl phthalate (“DINP”), which was also recently added to the list of prohibited chemicals under Proposition 65, in a sample Product tested outside of the State of California. All Products containing DINP are collectively referred to herein as “Additional Products.”

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).

1.4 No Admission. Implus 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 and Additional Products, have been, and are, formulated, designed and intended to be in compliance with all laws. Nothing in this Settlement Agreement shall be construed as an admission by Implus 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 Implus of any fact, finding, conclusion of law, issue of law, or violation of law, the same being specifically denied by Implus. This paragraph shall not, however, diminish or otherwise affect Implus'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 February 28, 2015.

2. INJUNCTIVE RELIEF

2.1 Reformulation Commitment. Implus has advised Vinocur that the Products and Additional Products are not formulated and have never been formulated to contain either DEHP or DINP, such that the presence of these chemical in the test Products is, to Implus's understanding and belief, the result of an error by the third-party manufacturer of this Product. Notwithstanding the foregoing, Implus agrees that commencing on April 1, 2015, it shall manufacture, import, ship, sell, and distribute for sale in California only safety armbands with Vinyl/PVC components that are formulated to contain no greater than 1000 ppm of DEHP or DINP 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 measuring the quantity of DEHP and DINP ("Reformulated Products").

2.2 Labeling Requirement. Commencing on the Effective Date, Implus shall provide a clear and reasonable warning on all Products and Additional Products, including Reformulated Products, that are in Implus's possession and that Implus has reason to believe may be sold or distributed for sale in California. For purposes of clarity, Implus intends to place a warning on all such Products and Additional Products, including Reformulated Products, that are shipped by Implus after the Effective Date for sale or resale in California despite the fact that they are not formulated or intended to contain any chemicals listed in Proposition 65 out of an

excess of caution, in the event that a similar manufacturer error should occur in the future.

2.3 Product Warnings/Labeling. The following warning, as appropriate, when measuring 3" x 5", with no less than 12 point font, affixed to the packaging, labeling, or directly on each Product, shall constitute a clear and reasonable warning, in compliance with paragraph 2.2 of this Settlement Agreement:

WARNING: This product contains chemicals known to the State of California to cause cancer, birth defects and other reproductive harm.

3. MONETARY SETTLEMENT TERMS

3.1 Civil Penalty Payments. Pursuant to Health and Safety Code section 25249.7(b), Implus 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 Vinocur, as follows:

3.1.1 Initial Civil Penalty. Within five days of the Effective Date, Implus shall make an initial civil penalty payment of \$3,000. Implus shall provide its payment in two checks for the following amounts made payable to: (a) "OEHHA" in the amount of \$2,250; and (b) "Laurence Vinocur, Client Trust Account" in the amount of \$750.

3.1.2 Final Civil Penalty. On or before March 25, 2015, Implus will make a final civil penalty payment of \$6,000. Pursuant to California Code of Regulations, title 11, section 3203(c), \$3,000 of the final civil penalty payment will be waived if, no later than March 17, 2015, an officer of Implus certifies in writing to Vinocur's counsel that, as of the date of the certification, and into the future, it shall only manufacture or import for distribution or sale in California or cause to be manufactured or imported for distribution or sale in California, Products and Additional Products that qualify as Reformulated Products or that are labeled in compliance with paragraphs 2.2 and 2.3 of this Agreement. An additional \$3,000 of the final civil penalty payment will be waived if, no later than March 1, 2015, an officer of Implus certifies in writing to Vinocur's counsel that, as of the date of the certification Implus has complied with the requirements of paragraph 2.2 of this Agreement. The option to make the certifications in compliance with this paragraph 3.1.2 constitutes a material term of this Settlement Agreement, and with regard to such term, time is of the essence.

3.2 Attorney Fees and Costs. The Parties reached an accord on the compensation due to Vinocur 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, Implus shall reimburse Vinocur and his counsel \$29,500 for the fees and costs incurred in investigating, bringing this matter to the attention of Implus's management, and negotiating a settlement in the public interest. Within five days of the Effective Date, Implus shall provide payment in the form of a check 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 Vinocur. All payments to Vinocur 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. Implus agrees to provide Vinocur's counsel with a copy of each check payable to OEHHA, simultaneous with its penalty payments to Vinocur, to be delivered to the address provided in paragraph 3.3.1.

4. CLAIMS COVERED AND RELEASED

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

In further consideration of the promises and agreements herein contained, Vinocur acting on his own behalf and in the public interest releases Releasees from all claims for violations of Proposition 65 up through the Effective Date based on exposure to DEHP from the Products as set forth in the Notice. Compliance with the terms of this Agreement constitutes compliance with Proposition 65 with respect to exposures to DEHP from the Products as set forth in the Notice.

4.2 Implus's Release of Vinocur. Implus, 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 Vinocur 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 Vinocur 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 and/or Additional 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 and/or Additional Products, then Implus may provide written notice to Vinocur 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 and/or Additional Products are so affected. Nothing in this Settlement Agreement shall be interpreted to relieve Implus 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 Implus:

Buchanan Ingersoll & Rooney, PC
Craig D. Mills, Esq.
50 South 16th Street, Suite 3200
Philadelphia, Pennsylvania 19102

For Vinocur:

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

Vinocur 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: February 27, 2015

By: 
Laurence Vinocur

AGREED TO:

Date: February 12, 2015

By: 
Name: JOHN H. HASE, JR.
Title: Vice President + General Counsel
Implus Footcare, LLC