

## SETTLEMENT AGREEMENT

### 1. INTRODUCTION

#### 1.1 **Anthony Ferreiro & Blue Wave Products, Inc.**

This Settlement Agreement is entered into by and between Anthony Ferreiro ("Ferreiro") and Blue Wave Products, Inc. ("Blue Wave"). Together, Ferreiro and Blue Wave are collectively referred to as the "Parties." Ferreiro is an individual that resides in the State of California, and seeks to promote awareness of exposures to toxic chemicals and to improve human health by reducing or eliminating hazardous substances contained in consumer products.

#### 1.2 **General Allegations**

Ferreiro alleges that Blue Wave has imported, distributed and/or sold in the State of California a Deluxe Weighted Spa Booster Seat and a Deluxe Weighted Spa Headrest without requisite Proposition 65 warning that the Products contain the chemical Diisononyl phthalate (DINP) ("Covered Products").

On December 20, 2013, the State of California listed DINP as a chemical known to cause cancer.

#### 1.3 **Notice of Violation(s)**

On June 15, 2015 Ferreiro served Sears Holdings Management Corporation, Sears Holdings Management Corporation, Sears Holdings, Inc., Sears Holdings Corporation, Sears Corporation (collectively, "Sears"), Blue Wave, BestPoolBuys.com, and various public enforcement agencies with a document entitled "Notice of Violation of California Health & Safety Code § 25249.5, *et seq.*" (the "Notice"). The Notice provided Blue Wave and such others, including public enforcers, with notice that alleged that Blue Wave was in violation of California Health & Safety Code § 25249.5, for failing to warn consumers and customers that the Covered Products exposed users in California to DINP. No public enforcer has diligently prosecuted the allegations set forth in the Notice.

#### 1.4 **No Admission**

Blue Wave denies the material factual and legal allegations contained in the Notice and maintains that, to the best of its knowledge, all products that are or have been sold and distributed in California, including the Covered Products, has been and are in compliance with all laws. Nothing in this Settlement Agreement is or shall be construed as an admission by Blue Wave 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 Blue Wave of any fact, finding, conclusion of law, issue of law, or violation of law, such being specifically denied by Blue Wave. However, this section shall not diminish or otherwise affect the obligations, responsibilities, and duties under this Settlement Agreement. Notwithstanding the allegations in the Notice, Blue Wave maintains that it has not knowingly manufactured, or caused to be manufactured, the Covered Products for sale in California in violation of Proposition 65.

### **1.5 Effective Date**

For purposes of this Settlement Agreement, the term "Effective Date" shall mean December 5, 2015.

## **2. INJUNCTIVE RELIEF**

### **2.1 Reformulation of the Covered Products**

Commencing on the Effective Date, and continuing thereafter, Blue Wave shall only ship, sell, or offer for sale in California, reformulated Covered Products pursuant to Section 2.2 or Covered Products that are labeled with a clear and reasonable warning pursuant to Section 2.3. For purposes of this Settlement Agreement, a "Reformulated Covered Product" is a Covered Product that meets the standard set forth in Section 2.2 below.

### **2.2 Reformulation Standard**

"Reformulated Covered Products" shall mean Covered Products that contain less than or equal to 1,000 parts per million ("ppm") of DINP when analyzed pursuant to U.S. Environmental Protection Agency testing methodologies 3580A and 8270C.

## **2.3 Clear and Reasonable Warnings**

Commencing on the Effective Date, Blue Wave shall, for all Covered Products it sells or distributes and which is intended for sale in California that are not Reformulated Covered Products, or which Blue Wave has reason to believe will be shipped or sold in California, provide clear and reasonable warnings as set forth in subsections 2.3(a) and (b) below. The warning shall be prominently placed with such conspicuousness as compared with other words, statements, designs, or devices as to render it likely to be read and understood by an ordinary individual under customary conditions before purchase or use. Each warning shall be provided in a manner such that the consumer or user is reasonably likely to understand to which specific Covered Product the warning applies, so as to minimize the risk of consumer confusion.

In the event that the Office of Environmental Health Hazard Assessment promulgates one or more regulations requiring or permitting warning text and/or methods of transmission different than those set forth above, Blue Wave shall be entitled to use, at its discretion, such other warning text and/or method of transmission without being deemed in breach of this Agreement.

### **(a) Retail Store Sales**

**(i) Covered Product Labeling.** Blue Wave shall affix a warning to the packaging, labeling or directly on each Covered Product in California by Blue Wave that states:

**[PROPOSITION 65] WARNING:**

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

The bracketed text may, but is not required to, be used.

**(ii) Point of Sale Warnings.** Alternatively, Blue Wave may provide warning signs in the form below to its customers in California with instructions to post the warnings in

close proximity to the point of display of the Product. Such instruction sent to Blue Wave customers shall be sent by certified mail, return receipt requested.

**[PROPOSITION 65] WARNING:**

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

The bracketed text may, but is not required to, be used.

**(b) Mail Order Catalog Warning.** In the event that Blue Wave sells Covered Products via mail order catalog directly to consumers located in California after the Effective Date that are not Reformulated Covered Products, Blue Wave shall provide a warning for such Covered Products sold via mail order catalog to such California residents. A warning that is given in a mail order catalog shall be in the same type size or larger than the Covered Product description text within the catalog. The following warning shall be provided on the same page and in the same location as the display and/or description of the Covered Product:

**[PROPOSITION 65] WARNING:**

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

The bracketed text may, but is not required to, be used. Where it is impracticable to provide the warning on the same page and in the same location as the display and/or description of the Covered Product, Blue Wave may utilize a designated symbol to cross reference the applicable warning and shall define the term “designated symbol” with the following language on the inside of the front cover of the catalog or on the same page as any order form for the Covered Product:

**[PROPOSITION 65] WARNING:** Certain products identified with this symbol ▼ and offered for sale in this catalog contain chemicals known to the State of California to cause cancer and birth defects or other reproductive harm.

The bracketed text may, but is not required to, be used. The designated symbol must appear on the same page and in close proximity to the display and/or description of the Covered Product. On each page where the designated symbol appears, Blue Wave must provide a header or footer directing the consumer to the warning language and definition of the designated symbol.

(c) **Internet Sales Warning.** In the event that Blue Wave sells Covered Products via the internet directly to consumers located in California after the Effective Date that is not a Reformulated Covered Product, Blue Wave shall provide a warning for such Covered Product sold via the internet to such California residents. A warning that is given on the internet shall be in the same type size or larger than the Covered Product description text and shall be given in conjunction with the direct sale of the Covered Product. The warning shall appear either: (a) on the same web page on which the Covered Product is displayed; (b) on the same web page as the order form for the Covered Product; (c) on the same page as the price for the Covered Product; or (d) on one or more web pages displayed to a purchaser during the checkout process. The following warning shall be provided:

**[PROPOSITION 65] WARNING:**

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

**3. PENALTIES PURSUANT TO HEALTH & SAFETY CODE § 25249.7(b)**

In settlement of all the claims referred to in this Settlement Agreement, Blue Wave shall pay a total of \$2,000.00 in civil penalties in accordance with this Section. Each penalty payment will be allocated in accordance with California Health & Safety Code § 25249.12(c)(1) and (d), with 75% of the funds remitted to the California Office of Environmental Health Hazard Assessment ("OEHHA") and the remaining 25% of the penalty remitted to Ferreiro. Each penalty payment shall be delivered to the addresses listed in Section 3.2 below. Blue Wave shall be liable for payment of interest, at a rate of

10% simple interest, for all amounts due and owing that are not received within two business days of the date they are due.

### **3.1 Civil Penalty**

On or before the Effective Date, Blue Wave shall issue two separate checks for the initial civil penalty payment to (a) "OEHHA" in the amount of \$1,500.00; and (b) "Brodsky & Smith, LLC in Trust for Ferreiro" in the amount of \$500.00. All penalty payments shall be delivered to the addresses listed in Section 3.2 below.

### **3.2 Payment Procedures**

**(a) Issuance of Payments.** Payments shall be delivered as follows:

(i) All payments owed to Ferreiro, pursuant to Section 3.1 shall be delivered to the following payment address:

Evan J. Smith, Esquire  
Brodsky & Smith, LLC  
Two Bala Plaza, Suite 510  
Bala Cynwyd, PA 19004

(ii) All payments owed to OEHHA (EIN: 68-0284486), pursuant to Section 3.1 shall be delivered directly to OEHHA (Memo Line "Prop 65 Penalties") at the following addresses:

For United States Postal Service Delivery:

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

For Non-United States Postal Service Delivery:

Mike Gyurics  
Fiscal Operations Branch Chief  
Office of Environmental Health Hazard Assessment  
1001 I Street  
Sacramento, CA 95814

(b) **Copy of Payments to OEHHA.** Blue Wave agrees to provide Ferreiro's counsel with a copy of the checks payable to OEHHA, simultaneous with its penalty payments to Ferreiro, to be delivered to the address provided in Section 3.2(a)(i), as proof of payment to OEHHA.

(C) **Tax Documentation.** Blue Wave agrees to provide a completed IRS 1099 for its payments to each of the following payees under this Settlement Agreement:

(i) "Anthony Ferreiro" whose address and tax identification number shall be provided after this Settlement Agreement is fully executed by the Parties;

(ii) "Brodsky & Smith, LLC" (EIN: 23-2971061) at the address provided in Section 3.2(a)(i); and

(iii) "Office of Environmental Health Hazard Assessment" 1001 I Street, Sacramento, CA 95814.

#### **4. REIMBURSEMENT OF FEES AND COSTS**

The parties acknowledge that Ferreiro 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 this fee issue to be resolved after the material terms of the agreement had been settled. Ferreiro then expressed a desire to resolve the fee and cost issue shortly after the other settlement terms had been finalized. The Parties reached an accord on the compensation due to Ferreiro and his counsel under general contract principles and the private attorney general doctrine and principles codified at California Code of Civil Procedure § 1021.5, for all work performed through the mutual execution of this agreement. Under these legal principles, Blue Wave shall reimburse Ferreiro's counsel for fees and costs incurred as a result of investigating and bringing this matter to Blue Wave's attention, and negotiating a settlement in the public interest. On or before the

Effective Date, Blue Wave shall issue a check payable to “Brodsky & Smith, LLC” in the amount of \$23,000.00 for delivery to the following address:

Evan Smith, Esquire  
Brodsky & Smith, LLC  
Two Bala Plaza, Ste. 510  
Bala Cynwyd, PA 19004

**5. RELEASE OF ALL CLAIMS**

**5.1 Release of Blue Wave, Sears, and Downstream Customers and Entities**

Ferreiro acting on his own behalf, releases Blue Wave, Sears, and their parents, subsidiaries, affiliated entities under common ownership, directors, officers, agents, employees, agents, shareholders, successors, assigns, attorneys and each entity to whom Blue Wave directly or indirectly distributes or sells the Covered Product, including but not limited to, downstream distributors, wholesalers, customers, retailers, franchisees, cooperative members, licensors, and licensees (collectively, the “Releasees”), from all claims for violations of Proposition 65 through the Effective Date based on their failure to warn about alleged exposures to the chemical DINP contained in Covered Products distributed, sold and/or offered for sale by Blue Wave to customers and consumers in the State of California. This settlement is a full, final and binding resolution of all claims that were or could have been asserted against Blue Wave and/or the Releasees for failure to provide warnings for alleged exposures to DINP contained in the Covered Products.

In further consideration of the promises and agreements herein contained, and for the payments to be made pursuant to Section(s) 3 and 4 above, Ferreiro, on behalf of himself, his past and current agents, representatives, attorneys, successors and/or assignees, provides a release herein which shall be effective as a full and final accord and satisfaction, as a bar to all actions, causes of action, obligations, costs, expenses, attorneys’ fees, damages, losses, claims, liabilities and demands of Blue Wave or the



Releasees of any nature, character, or kind, whether known or unknown, suspected or unsuspected, limited to and arising out of the alleged or actual exposure to the chemical DINP in the Covered Product.

### **5.2 Blue Wave's Release of Ferreiro**

Blue Wave, on behalf of itself, its past and current agents, representatives, attorneys, successors and/or assignees, hereby waives any and all claims against Ferreiro, his attorneys and other representatives, for any and all actions taken or statements made (or those that could have been taken or made) by Ferreiro and/or his attorneys and other representatives, whether in the course of investigating claims or otherwise seeking to enforce Proposition 65 against it in this matter or with respect to the Covered Products.

### **5.3 California Civil Code Section 1542**

It is possible that other claims not known to the Parties arising out of the facts alleged in the Notice and relating to the Covered Products will develop or be discovered. Ferreiro on behalf of himself only, on one hand, and Blue Wave, on the other hand, acknowledge that this Agreement is expressly intended to cover and include all such claims up through the Effective Date, including all rights of action therefor. The Parties acknowledge that the claims released in Sections 5.1 and 5.2 above may include unknown claims, and nevertheless waive 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.**

Ferreiro and Blue Wave each acknowledge and understand the significance and consequences of this specific waiver of California Civil Code section 1542.

## **6. 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.

**7. GOVERNING LAW**

The terms of this Settlement Agreement shall be governed by the law 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 Covered Product, Blue Wave shall provide written notice to Ferreiro of any asserted change in the law, and shall have no further obligations pursuant to this Settlement Agreement with respect to, and to the extent that, the Covered Product is so affected.

**8. NOTICES**

Unless specified herein, all correspondence and notices required to be provided pursuant to this Settlement Agreement shall be in writing and personally delivered or sent by: (i) first-class (registered or certified mail) return receipt requested; or (ii) overnight or two-day courier on any party by the other party to the following addresses:

For Blue Wave:

George Gigounas  
DLA Piper LLP (US)  
555 Mission Street, Suite 2400  
San Francisco, CA 94105-2933  
T: 415.836.2500  
F: 415.836.2501

For Ferreiro:

Evan J. Smith  
Brodsky & Smith, LLC  
Two Bala Plaza, Suite 510  
Bala Cynwyd, PA 19004  
877-534-2590

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

**9. COUNTERPARTS: 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.

**10. COMPLIANCE WITH HEALTH & SAFETY CODE § 25249.7(f)**

Ferreiro agrees to comply with the reporting requirements referenced in Health & Safety Code section 25249.7(f).

**11. MODIFICATION**

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

**12. AUTHORIZATION**

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

**AGREED TO:**

**AGREED TO:**

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

Date: 10/26/15

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

Anthony Ferreiro

By: 

Blue Wave Products, Inc.

Douglas Flood

President & CEO

Blue Wave Inc.

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**AGREED TO:**

**AGREED TO:**

Date: October 16, 2015

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

By: *Anthony Ferreiro*  
Anthony Ferreiro

By: \_\_\_\_\_  
Blue Wave Products, Inc.