

SETTLEMENT AGREEMENT

1. INTRODUCTION

1.1 Mark Moorberg and Misty Mate, Inc.

This Settlement Agreement (“Settlement Agreement”) is entered into by and between Mark Moorberg (“Moorberg”) and Misty Mate, Inc. (“Misty Mate”) with Moorberg and Misty Mate collectively referred to as the “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. Misty Mate 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

Moorberg alleges that Misty Mate manufactures, imports, sells and/or distributes for sale in California, products containing di(2-ethylhexyl)phthalate (“DEHP”), and that it does so without providing the health hazard warning that Moorberg alleges is required by Proposition 65.

1.3 Product Description

The products covered by this Settlement Agreement are personal coolers with vinyl/PVC hoses including, but not limited to, *Misty Mate Twist and Mist Single Nozzle Air Cooler, Model 14000, UPC #7 31687 14000 9*, manufactured, imported, sold or offered for sale by Misty Mate, referred to hereinafter as the “Products.”

1.4 Notice of Violation

On June 26, 2015, Moorberg served Misty Mate and the requisite public enforcement agencies with a 60-Day Notice of Violation (the “Notice”), alleging that Misty Mate 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.

1.5 No Admission

Misty Mate denies the material, factual, and legal allegations contained in the Notice and maintains that all of the products that it has sold or distributed for sale in 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 Misty Mate 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 Misty Mate of any fact, finding, conclusion of law, issue of law, or violation of law. This Section shall not, however, diminish or otherwise affect Misty Mate’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 June 2, 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 government agencies for the purpose of determining DEHP content in a solid substance.

2.2 Reformulation Commitment

As of the Effective Date all Products manufactured, imported, distributed, sold and/or offered for sale in the State of California by Misty Mate shall be Products that qualify as Reformulated Products as defined in Section 2.1, or shall carry appropriate health hazard warnings per section 2.3, below.

2.3 Product Warnings

Commencing on or before the Effective Date, Misty Mate shall provide clear and reasonable warnings for all Products as set forth in subsections 2.3(a) and (b) for all products that do not qualify as Reformulated Products. Each 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 understands to which *specific* Product the warning applies, so as to minimize the risk of consumer confusion.

(a) Retail Store Sales.

(i) **Product Labeling.** Misty Mate shall affix a warning to the packaging, labeling, or directly on each Product provided for sale in retail outlets in California that states:

WARNING: This product contains DEHP, a phthalate chemical known to the State of California to cause birth defects and other reproductive harm.

(ii) **Point-of-Sale Warnings.** Alternatively, Misty Mate 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 Products. Such instruction sent to Misty Mate's customers shall be sent by certified mail, return receipt requested.

WARNING: This product contains DEHP, a phthalate chemical known to the State of California to cause birth defects and other reproductive harm.

Where more than one Product is sold in proximity to other like items or to those that do not require a warning (*e.g.*, Reformulated Products as defined in Section 2.1), the following statement shall be used:¹

¹For purposes of the Settlement Agreement, "sold in proximity" shall mean that the Product and another similar product are offered for sale close enough to each other that the consumer, under customary conditions of purchase, could not reasonably determine which of the two products is subject to the warning sign.

WARNING: The following products contain DEHP, a phthalate chemical, known to the State of California to cause birth defects and other reproductive harm:

[list products for which warning is required]

(b) Mail Order Catalog and Internet Sales. In the event that Misty Mate sells Products via mail order catalog and/or the internet, to customers located in California, after the Effective Date, that are not Reformulated Products, Misty Mate shall provide warnings for such Products sold via mail order catalog or the internet to California residents. Warnings given in the mail order catalog or on the internet shall identify the *specific* Product to which the warning applies as further specified in Sections 2.3(b)(i) and (ii).

(i) Mail Order Catalog Warning. Any warning provided in a mail order catalog shall be in the same type size or larger than the 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 Product:

WARNING: This product contains DEHP, a phthalate chemical known to the State of California to cause birth defects and other reproductive harm.

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 Product, Misty Mate 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 Product(s):

WARNING: Certain products identified with this symbol ▼ and offered for sale in this catalog contain DEHP, a phthalate chemical known to the State of California to cause birth defects and other reproductive harm.

The designated symbol must appear on the same page and in close proximity to the display and/or description of the Product. On each page where the designated symbol appears,

Misty Mate must provide a header or footer directing the consumer to the warning language and definition of the designated symbol.

(ii) **Internet Website Warning.** A warning shall be given in conjunction with the sale of the Products via the internet, which warning shall appear either: (a) on the same web page on which a Product is displayed; (b) on the same web page as the order form for a Product; (c) on the same page as the price for any Product; or (d) on one or more web pages displayed to a purchaser during the checkout process. The following warning statement shall be used and shall appear in any of the above instances adjacent to or immediately following the display, description, or price of the Product for which it is given in the same type size or larger than the Product description text:

WARNING: This product contains DEHP, a phthalate chemical known to the State of California to cause birth defects and other reproductive harm.

Alternatively, the designated symbol may appear adjacent to or immediately following the display, description, or price of the Product for which a warning is being given, provided that the following warning statement also appears elsewhere on the same web page, as follows:

WARNING: This product contains DEHP, a phthalate chemical known to the State of California to cause birth defects and other reproductive harm.

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, Misty Mate shall pay \$7,000 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) & (d), with 75% of the funds remitted to the California Office of Environmental Health Hazard Assessment (“OEHHA”) by Moorberg. Moorberg’s counsel shall be responsible for remitting Misty Mate’s penalty payment(s) under this Settlement Agreement to OEHHA.

3.1.1 Initial Civil Penalty. No later than the Effective Date, Misty Mate shall make an initial civil penalty payment of \$3,000. Misty Mate shall provide its payment in a single check made payable to “Mark Moorberg, Client Trust Account” to be delivered to the address provided in Section 3.3, below.

3.1.2 Final Civil Penalty. No later than October 15, 2016, Misty Mate shall make a final civil penalty payment of \$4,000. Pursuant to title 11 California Code of Regulations, section 3203(c), Moorberg agrees that the final civil penalty payment shall be waived in its entirety if, no later than October 1, 2016, an officer of Misty Mate provide Moorberg with a signed declaration certifying that all of the Products it ships for sale or distributes for sale in California as of the date of its declaration are Reformulated Products, and that Misty Mate will continue to offer only Reformulated Products in California in the future. The option to certify reformulation in lieu of warning, and making the final civil penalty payment otherwise required by this Section is a material term, and time is of the essence. To obtain a waiver of the final civil penalty, Misty Mate must deliver its declaration certifying reformulation to Moorberg’s counsel at the address provided in Section 3.3, below.

3.2 Reimbursement of Attorneys’ Fees and Costs

The Parties acknowledge that Moorberg 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, Misty Mate expressed a desire to resolve Moorberg’s fees and costs. The Parties then negotiated a resolution of the compensation due to Moorberg 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, Misty Mate shall reimburse Moorberg and his counsel \$24,000. Misty Mate’s payment shall be delivered on or before the Effective Date to the address in Section 3.3 in the form of a check payable to “The Chanler Group.” The reimbursement shall cover all fees and costs incurred by Moorberg investigating,

bringing this matter to Misty Mate'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 Moorberg's Release of Proposition 65 Claims

Moorberg acting on his own behalf, and *not* on behalf of the public, releases Misty Mate, its parents, subsidiaries, affiliated entities under common ownership, directors, officers, agents employees, attorneys, and each entity to whom Misty Mate directly or indirectly distribute or sell Products, including, but not limited, to downstream distributors, wholesalers, customers, retailers, franchisees, cooperative members, and licensees (collectively, "Releasees"), from all claims for violations of Proposition 65 through the Effective Date based on unwarned exposures to DEHP in the Products, as set forth in the Notice. Compliance with the terms of this Settlement Agreement constitutes compliance with Proposition 65 with respect to exposures to DEHP from 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, other than Misty Mate, that manufactured the Products or any component parts thereof, or any distributors or suppliers who sold the Products or any component parts thereof to Misty Mate.

4.2 Moorberg's Individual Releases of Claims

Moorberg, in his individual capacity only and *not* in his representative capacity, 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 Moorberg of any nature, character, or kind, whether known or unknown, suspected or unsuspected, limited to and arising out of alleged or actual exposures to DEHP in the Products manufactured, imported, distributed, or sold by Misty Mate prior to the Effective Date. The Parties further understand and agree that this Section 4.2 release shall not extend upstream to any entities that manufactured the Products, or any component parts thereof, or any distributors or suppliers who sold the Products, or any component parts thereof to Misty Mate. Nothing in this Section affects Moorberg's right to commence or prosecute an action under Proposition 65 against a Releasee that does not involve Misty Mate' Products.

4.3 Misty Mate's Release of Moorberg

Misty Mate, on behalf of itself, its past and current agents, representatives, attorneys, successors, and assignees, hereby waives any and all claims 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 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, preempted, or is otherwise rendered inapplicable by reason of law generally, or as to the Products, then Misty Mate may provide Moorberg with written notice 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 Products are so affected. Nothing in this Settlement

Agreement shall be interpreted to relieve Misty Mate from its obligation to comply with any pertinent state or federal law or regulation.

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 Misty Mate:

Barbara R. Adams, Esq.
Adams | Nye | Becht LLP
222 Kearny Street, Seventh Floor
San Francisco, CA 94108-4521

To Moorberg:

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)

Moorberg agrees 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 agree to all of the terms and conditions contained herein.

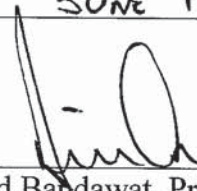
AGREED TO:

AGREED TO:

Date: 5/10/2016

Date: JUNE 1, 2016

By: 
Mark Moorberg

By: 
David Bandawat, President
Misty Mate, Inc.