

SETTLEMENT AGREEMENT

1. INTRODUCTION

1.1 Parties

This Settlement Agreement is entered into by and between Michael DiPirro (“DiPirro”) and M&M Sales Enterprises Inc. (“M&M Sales”), with DiPirro and M&M Sales individually referred to as a “Party” and collectively as the “Parties.” DiPirro 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. DiPirro asserts that M&M Sales 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, Health and Safety Code section 25249.6 *et seq.* (“Proposition 65”).

1.2 General Allegations

DiPirro alleges that M&M Sales manufactures, imports, sells, or distributes for sale in the state of California, tire swings containing Benz[a]anthracene, Benzo[b]fluoranthene, Benzo[a]pyrene, Benzo (k) fluoranthene, and Chrysene without first providing the clear and reasonable exposure warning required by Proposition 65. Benz[a]anthracene, Benzo[b]fluoranthene, Benzo[a]pyrene, Benzo (k) fluoranthene, and Chrysene are each listed pursuant to Proposition 65 as chemicals that are known to the state of California to cause cancer (hereinafter “Listed Chemicals”).

1.3 Product Description

The products covered by this Settlement Agreement are tire swings containing the Listed Chemicals that are manufactured, sold, or distributed for sale in California by M&M Sales, including, but not limited to, the *Bull Ride 'N Tire Swing Recycled Tire Swing* (“Products”).

1.4 Notice of Violation

On or about October 1, 2015, DiPirro served M&M Sales and certain requisite public enforcement agencies with a “60-Day Notice of Violation” (“Notice”), a document that informed the recipients of DiPirro’s allegation that M&M Sales violated Proposition 65 by failing to warn

its customers and consumers in California that the Products expose users to the Listed Chemicals. To the best of the Parties' knowledge, no public enforcer has commenced and is diligently prosecuting the allegations set forth in the Notice.

1.5 No Admission

M&M Sales denies the material, factual, and legal allegations contained in the Notice and maintains that all of the products it has manufactured, 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 M&M Sales 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 M&M Sales of any fact, finding, conclusion of law, issue of law, or violation of law, the same being specifically denied by M&M Sales. This section shall not, however, diminish or otherwise affect M&M Sales' obligations, responsibilities, and duties under this Settlement Agreement.

1.6 Effective Date

For purposes of this Settlement Agreement, the term "Effective Date" shall mean May 2, 2016.

2. INJUNCTIVE RELIEF: REFORMULATION OR WARNINGS

2.1 Reformulation Commitment or Cessation of Sales Option

In order to waive the second civil penalty under Section 3.2, on and after August 1, 2016 M&M Sales shall either discontinue sales of the Products into California, or only manufacture for sale or distribute for sale in California, Products that are reformulated ("Reformulated Products") or the Products must bear the warning language set forth below in Section 2.3 as "Option 1." For purposes of this Consent Judgment, Reformulated Products are Products that meet the Reformulation Standards of Section 2.2 below.

2.2 Reformulation Standard

For purposes of this Consent Judgment, "Reformulated Products" are defined as Products which contain non-detectable levels ("ND") of all of the Listed Chemicals when

analyzed pursuant to EPA testing methodologies 3580A and 8270C, or equivalent methodologies utilized by state or federal agencies for the purpose of determining polycyclic aromatic hydrocarbons (“PAHs”) content in a solid substance.

2.3 Product Warnings

Commencing on or before August 1, 2016, for all Products that contain one or more of the Listed Chemicals, and are manufactured, or distributed and shipped for sale in California by M&M Sales, M&M Sales shall provide a clear and reasonable warning as set forth below. 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. The text of the warning shall be printed in black ink on a light background, in a font that is easy to read and legible, but in no case less than a size 36 font, unless the existing consumer information or instructional text on the Product label is smaller than 36 font, in which case the font used shall be at least the same size as the consumer informational or instructional text. The text of the warning shall be as follows, at M&M Sales’ option:

OPTION 1:

WARNING: This product contains one or more polycyclic aromatic hydrocarbon chemicals (PAHs) known to the State of California to cause cancer and birth defects or other reproductive harm. To learn more visit oehha.ca.gov/prop65.

OPTION 2:

WARNING: This product contains chemicals known to the State of California to cause cancer and birth defects or other reproductive harm. To learn more visit oehha.ca.gov/prop65.

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

3.1 Initial Civil Penalty Payment Pursuant to Health & Safety Code § 25249.7(b).

M&M Sales shall make an initial civil penalty payment of \$2,500.00, in accordance with this section, on or before the Effective Date. The 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”) and the remaining 25% of the penalty remitted to DiPirro in accordance with Section 3.3 below. The penalty payment shall be delivered to the address listed in Section 3.3 below.

3.2 Second Civil Penalty Payment Pursuant to Health & Safety Code § 25249.7(b).

On or before August 10, 2016, M&M Sales shall pay a second civil penalty of \$5,000.00. The second civil penalty shall be waived in its entirety if an officer of M&M Sales certifies in writing that as of August 1, 2016, M&M Sales is either manufacturing, distributing, selling or offering for sale in California: (a) only Reformulated Products as set forth in Section 2.1 above; or (b) has ceased all sales of the Products into California; or (c) such Products bear the warning listed as “Option 1” under Section 2.3 above. Such certification must be received by the Law Offices of David R. Bush on or before August 10, 2016. The second civil penalty payment shall be apportioned in accordance with California Health & Safety Code § 25249.12(c) & (d), with 75% of these funds remitted to OEHHA and the remaining 25% of the penalty remitted to DiPirro in accordance with Section 3.3.

3.3 Payments Held in Trust. Payments shall be delivered to the Law Offices of David R. Bush, 3270 Mendocino Avenue, Suite 2E, Santa Rosa, CA 95403, and shall be in the form of three checks for the following amounts made payable to:

- (a) “Law Office of David R. Bush” in the amount of \$1,875.00 for payment to OEHHA. Law Office of David R. Bush agrees to forward such funds to OEHHA in a timely manner.
- (b) “Law Office of David R. Bush” in the amount of \$625.00 as payment to Michael DiPirro. David R. Bush agrees to forward such funds in a timely

manner; and

- (c) “Bush & Henry, Attorneys at Law, PC” in the amount of \$22,500.00, as payment for attorneys’ fees and costs pursuant to Section 4 below.

For any payment that is returned for insufficient funds, payment must be made by a cashier’s check within ten (10) calendar days of notification of insufficient funds, plus a 10% service fee.

3.4 Issuance of 1099 Forms. M&M Sales shall provide DiPirro’s counsel with a separate 1099 form for each of its payments under this Agreement to:

- (a) “Office of Environmental Health Hazard Assessment”, P.O. Box 4010, Sacramento, CA 95814 (EIN: 68-0284486) for civil penalties paid;
- (b) “Michael DiPirro,” whose address and tax identification number shall be furnished upon request after this Agreement has been fully executed by the Parties for his portion of the civil penalties paid; and
- (c) “Bush & Henry, Attorneys at Law, PC,” for fees and costs reimbursed pursuant to Section 4.

4. REIMBURSEMENT OF FEES AND COSTS

The parties acknowledge that DiPirro 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. M&M Sales then expressed a desire to resolve the fee and cost issue shortly after the other settlement terms had been finalized. The parties then attempted to (and did) reach an accord on the compensation due to DiPirro 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. M&M Sales shall pay \$22,500.00 for fees and costs incurred as a result of investigating, bringing this matter to M&M Sales’ attention, and negotiating a settlement in the public interest. M&M Sales shall issue a separate 1099 for fees and costs (EIN: 94-3171522), shall make the check payable to “Bush & Henry,

Attorneys at Law, PC” and shall deliver payment on or before the Effective Date to the address listed in Section 3.3 above.

5. CLAIMS COVERED AND RELEASED

5.1 DiPirro’s Release of M&M Sales

This Settlement Agreement is a full, final, and binding resolution between DiPirro and M&M Sales of any violation of Proposition 65 that was or could have been asserted by DiPirro, on behalf of himself, or on behalf of his past and current agents, representatives, attorneys, successors, and assignees, against M&M Sales, its parents, subsidiaries, affiliated entities under common ownership, directors, officers, employees, attorneys, and each entity to whom M&M Sales directly or indirectly distributes or sells the Products, including, without limitation, its downstream distributors, wholesalers, customers, retailers, franchisees, cooperative members, and licensees, including, but not limited to, Toys “R” Us and Amazon.com (“Releasees”), for unwarned exposures to the Listed Chemicals from the Products manufactured, distributed, sold or distributed for sale in California prior to August 1, 2016.

In further consideration of the promises and agreements herein contained, DiPirro, on his own behalf and on behalf of his past and current agents, representatives, attorneys, successors, and/or 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 M&M Sales and Releasees, 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 exposures to the Listed Chemicals from Products manufactured, distributed, sold, or distributed for sale in California prior to August 1, 2016.

5.2 M&M Sales’ Release of DiPirro

M&M Sales, on its own behalf and on behalf of its past and current agents, representatives, attorneys, successors, and assignees, hereby waives any and all claims that it may have against DiPirro 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 DiPirro and his attorneys and other representatives, whether in the course of investigating claims, otherwise seeking to enforce Proposition 65 against it in this matter, or with respect to the Products up through the Effective Date.

6. 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.

7. 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 M&M Sales may provide written notice to DiPirro 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.

8. NOTICES

Unless specified herein, all correspondence and notices required to be provided pursuant to 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 on any party by the other party at the following addresses:

For M&M Sales Enterprises Inc.:

M&M Sales Enterprises Inc.
7425 Chavenelle Road
Dubuque, IA 52002

With a copy to:

Brian J. Kane, Esq.
Kane, Norby & Reddick, P.C.
2100 Asbury Road, Suite 2

Dubuque, IA 52001

For DiPirro:

Bush & Henry
3270 Mendocino Avenue, Suite 2E
Santa Rosa, CA 95403

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.

9. 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.

10. POST-EXECUTION ACTIVITIES

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

11. MODIFICATION

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

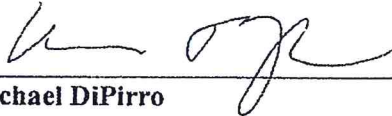
12. AUTHORIZATION

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

[Signatures on following page]


AGREED TO:

Date: 4/28/16

By: 
Michael DiPirro

AGREED TO:

Date: 04/27/16

By: 
M&M/Sales Enterprises Inc.
Print Name: JOHN BRIAN PRIEST
Title: CEO