

SETTLEMENT AGREEMENT

1. INTRODUCTION

1.1 Parties

This Settlement Agreement is entered into by and between Michael DiPirro (“DiPirro”) and United Brands Products Design Development and Marketing, Inc., dba United Brands, Inc., dba Whip-It! (“United Brands”), with DiPirro and United Brands 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. United Brands 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 United Brands manufactures, imports, sells, or distributes for sale, in the state of California, nitrous oxide cartridges/chargers containing Nitrous Oxide (“N₂O”) without first providing the clear and reasonable exposure warning required by Proposition 65. N₂O is listed pursuant to Proposition 65 as a chemical that is known to the state of California to cause birth defects or other reproductive harm (hereinafter “Listed Chemical”).

1.3 Product Description

The products covered by this Settlement Agreement are nitrous oxide cartridges/chargers containing the Listed Chemical that are manufactured, sold, or distributed for sale in California by United Brands, including, but not limited to, “*The Original*” Whip-It! Cream Chargers, 8g (“Products”).

1.4 Notice of Violation

On or about October 1, 2015, DiPirro served United Brands 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 United Brands violated Proposition 65 by failing to

warn its customers and consumers in California that the Products expose users to the Listed Chemical. 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

United Brands 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 United Brands 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 United Brands of any fact, finding, conclusion of law, issue of law, or violation of law, the same being specifically denied by United Brands. This section shall not, however, diminish or otherwise affect United Brands' obligations, responsibilities, and duties under this Settlement Agreement.

2. INJUNCTIVE RELIEF: PRODUCT WARNINGS

2.1 Provision of Product Warning Signs. Within 60 days of the execution of this Settlement Agreement, United Brands will provide one warning sign, substantially as provided in Exhibit A, to each of its current customers who is either (1) a reseller of the Products to individual consumers in California, or (2) a distributor whom United Brands knows distributes the Products to a reseller who sells the Products to individual consumers in California. In the future, when United Brands obtains an order for the Products from a new customer in either of these two categories, United Brands will provide that new customer with the same warning sign in conjunction with the first order to the new customer. The warning signs will be accompanied by a letter, substantially as provided in Exhibit B, instructing the customer that if they will be selling the Products to consumers in California, they must post the enclosed sign in close proximity to the display of the products or at the point of sale for the products, and that failure to post this sign may subject the reseller to an enforcement action in which the reseller may be forced to post the sign and provide other warnings, pay civil penalties of up to \$2,500

per violation per day, and reimburse the attorney's fees of the enforcer.

2.2 Internet Warnings. For all Products that United Brands offers for sale directly to consumers in California via its own internet store, it shall provide a warning for such Products by including the warning on one or more of the following: a) on the product display page; b) using a clearly marked hyperlink using the word "WARNING" on the product display page, which will take the user to a page in which the warning will be prominently featured on the top of the page so that a customer will not have to search for it, or c) by including a warning in the shipment to the California consumer. The language of the warning shall be substantially as provided in Exhibit A.

2.3 Additional Warnings. In order to waive the second civil penalty under Section 3.2, United Brands shall provide to each of its current customers who is either (1) a reseller of the Products to individual consumers in California, or (2) a distributor whom United Brands knows distributes the Products to a reseller who sells the Products to individual consumers in California, one sheet of multiple adhesive labels bearing the warning language set out below along with instructions that such warnings are to be affixed to the exterior packaging of each unit of Products sold or intended to be sold to individual consumers in California. In the future, when United Brands obtains an order for the Products from a new customer in either of these two categories, United Brands will provide that new customer with one sheet of such adhesive labels and instructions in conjunction with the first order to the new customer. The instructions will note that each warning label needs to 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 and that the warning label shall not be placed so as to obscure other safety information and user instructions printed on the exterior of the package for the Products. 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 12 font. United Brands shall use one of the following warning language options, at United Brands' election:

OPTION 1:

WARNING: This product contains nitrous oxide, a chemical known to the State of California to cause birth defects or other reproductive harm.

OPTION 2:

WARNING: Whipped cream cartridges contain nitrous oxide, a chemical known to the State of California to cause birth defects or other reproductive harm.

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

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

United Brands shall make an initial civil penalty payment of \$6,000.00, in accordance with this section, within 60 days of the execution of this Settlement Agreement. 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 3.2 below. The penalty payment shall be remitted in accordance with the procedure set out in Section 3.3.

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

On or before January 1, 2017, United Brands shall pay a second civil penalty of \$12,000.00. The second civil penalty shall be waived in its entirety if an officer of United Brands certifies in writing that as of January 1, 2017, United Brands will be providing the Additional Warnings as set forth in Section 2.3 above. Such certification must be received Bush & Henry on or before January 1, 2017. The second civil penalty payment, if any, 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 the procedure set out in Section 3.3.

3.3 Payments Held in Trust. Payments shall be delivered to the offices of Bush & Henry, 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) “Bush & Henry, Attorneys at Law” in the amount of \$4,500.00 for payment to OEHHA. Bush & Henry agree to forward such funds to OEHHA in a timely manner. Alternatively, at Defendant’s option, it can choose to deliver to the offices of Bush & Henry a certified or cashier’s check made payable to “Office of Environmental Health Hazard Assessment.”
- (b) “Bush & Henry, Attorneys at Law” in the amount of \$1,500.00 as payment to Michael DiPirro. Bush & Henry agree to forward such funds in a timely manner. Alternatively, at Defendant’s option, it can choose to deliver to the offices of Bush & Henry a certified or cashier’s check made payable to “Michael DiPirro.”
- (c) “Bush & Henry, Attorneys at Law” in the amount of \$44,500.00, 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. United Brands 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. United Brands 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. United Brands shall pay \$44,500.00 for fees and costs incurred as a result of investigating, bringing this matter to United Brands' attention, and negotiating a settlement in the public interest. United Brands shall issue a separate 1099 for fees and costs (EIN: 81-1257634), shall make the check payable to "Bush & Henry, Attorneys at Law" and shall deliver payment within 60 days of the execution of this Settlement Agreement to the address listed in Section 3.3 above.

5. CLAIMS COVERED AND RELEASED

5.1 DiPirro's Release of United Brands

This Settlement Agreement is a full, final, and binding resolution between DiPirro and United Brands 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 United Brands, its parents, subsidiaries, affiliated entities under common ownership, directors, officers, employees, attorneys, and each entity to whom United Brands directly or indirectly distributes or sells the Products ("Releasees"), for unwarned exposures to the Listed Chemical from the Products manufactured, distributed, sold or distributed for sale in California by United Brands prior to the execution of this Settlement Agreement.

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 United Brands 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 Chemical from Products distributed, sold, or distributed for sale in California by United Brands prior to the execution of this Settlement Agreement.

5.2 United Brands's Release of DiPirro

United Brands, 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.

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 United Brands 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 United Brands:

United Brands Products Design Development and Marketing, Inc.
170 Associated Rd.
South San Francisco, CA 94080

With a copy to:

Trenton H. Norris, Esq.
Arnold & Porter LLP
Three Embarcadero Center, 10th Floor
San Francisco, CA 94111

For DiPirro:

Bush & Henry, Attorneys at Law, PC
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

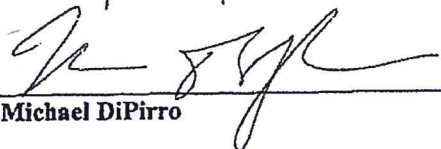
This Settlement Agreement may be modified only by a written agreement of the Parties.

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.

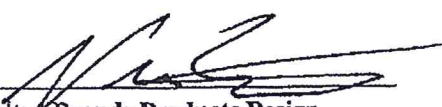
AGREED TO:

Date: 8/30/16

By: 
Michael DiPirro

AGREED TO:

Date: 8/26/2016

By: 
United Brands Products Design
Development and Marketing, Inc., dba
United Brands, Inc., dba Whip-It!
Print Name: Nesser Zahra
Title: CEO

WARNING:

**Whipped cream
cartridges contain
nitrous oxide, a
chemical known to the
State of California to
cause birth defects or
other reproductive
harm.**

Exhibit B

United Brands Inc., dba Whip-It! (“United Brands”) has entered into a settlement agreement with a citizen enforcer in the State of California regarding the presence of nitrous oxide in cartridges sold by certain retailers at retail locations to individual consumers in California.

Under the terms of this settlement agreement, United Brands is providing the enclosed warning sign to certain distributors and certain retailers to be posted in retail stores selling nitrous oxide cartridges, including but not limited to “*The Original*” *Whip-It! Cream Chargers, 8g* (the “Products”), to individual consumers in California.

If you are a distributor, you must provide this sign to any retailer to whom you distribute the Products who sells them to individual consumers in California.

If you are a retailer and you will be selling the Products to individual consumers in California, you must post the enclosed sign in close proximity to the display of the Products or at the point of sale for the Products, as legally required by the Safe Drinking Water and Toxic Enforcement Act of 1986, Health and Safety Code section 25249.6 *et seq.* (“Proposition 65”). Failure to post this sign may subject you to an enforcement action under Proposition 65 in which you may be forced to post the sign or provide other warnings, pay civil penalties of up to \$2,500 per violation per day, and reimburse the attorney’s fees of the enforcer.