

## **SETTLEMENT AGREEMENT**

### **1. INTRODUCTION**

#### **1.1 The Parties**

This Settlement Agreement is entered into by and between Ema Bell (“Bell”), and Barnes & Noble Booksellers, Inc. (“Barnes & Noble”). Together, Bell and Barnes & Noble are collectively referred to as the “Parties” and individually as a “Party.” Bell 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.

Barnes & Noble employs ten or more persons and is considered a person in the course of doing business for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, Health & Safety Code section 25249.6, et seq. (“Proposition 65”).

#### **1.2 General Allegations**

Bell alleges that Barnes & Noble has imported, distributed and/or sold in the State of California Piccadilly Internet Password Log Books, ISBN No. 9781620097274 (the “Product” or “Products”) without requisite Proposition 65 warning that the Product contains the chemical Di(2-ethylhexyl)phthalate (“DEHP”). On January 1, 1988, the State of California listed DEHP as a chemical known to the State to cause cancer. On October 24, 2003, the State of California listed DEHP as a chemical known to cause reproductive toxicity.

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

On September 8, 2016, Bell served Barnes & Noble, 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 provides Barnes & Noble and such others, including public enforcers, with notice that alleged that Barnes & Noble

was in violation of California Health & Safety Code § 25249.5, for failing to warn consumers and customers that the Product exposed users in California to DEHP. No public enforcer has diligently prosecuted the allegations set forth in the Notice.

#### **1.4 No Admission**

Barnes & Noble 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 Products, have been and are in compliance with all laws, including Proposition 65. Nothing in this Settlement Agreement shall be construed as an admission by Barnes & Noble of any fact, finding, issue of law, or violation of law; nor shall compliance with this Settlement Agreement constitute or be construed as an admission by Barnes & Noble of any fact, finding, conclusion, issue of law or violation of law. However, this section shall not diminish or otherwise affect the obligations, responsibilities and duties under this Settlement Agreement.

#### **1.5 Effective Date**

For purposes of this Settlement Agreement, the term “Effective Date” shall mean the later of November 17, 2016 or the date on which this Settlement Agreement is fully executed.

### **2. INJUNCTIVE RELIEF**

#### **2.1 Reformulation of the Product**

Commencing on the date that is ninety (90) days after the Settlement Agreement is fully executed by the Parties (the “Compliance Date”), and continuing thereafter, Barnes & Noble shall only ship, sell, or distribute in California Product that either (1) qualifies as a Reformulated Product pursuant to Section 2.2 or (2) complies with the warning requirements of Section 2.3. Products that Barnes & Noble shipped, sold, or

distributed before the Compliance Date are not subject to the requirements of Section 2.1 but are nonetheless covered within the release of claims in Section 5.1.

## **2.2 Reformulation Standard**

A “Reformulated Product” shall mean a Product that contains no more than 1,000 parts per million (“ppm”) of DEHP when analyzed pursuant to U.S. Environmental Protection Agency testing methodologies 3580A and 8270C.

## **2.3 Clear and Reasonable Warnings**

If Barnes & Noble provides a warning for a Product pursuant to Section 2.1, Barnes & Noble shall provide the following warning statement (“Warning”) using at least one of the methods set forth in Section 2.3.1 or 2.3.2:

[California Proposition 65] **WARNING:** This product may contain chemicals known to the State of California to cause cancer, birth defects or other reproductive harm.

Terms in brackets may be used by Barnes & Noble at its option. Barnes & Noble shall use one or both of the warning methods set out in Sections 2.3.1 or 2.3.2.

### **2.3.1 Product Labeling**

Barnes & Noble shall affix or print the Warning upon the Product or the unit package of such Product. 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.

### **2.3.2 Point-of-Display Warnings**

In the alternative to Section 2.3.1, Barnes & Noble may provide one or more signs or placards containing the Warning in its California stores in close proximity to the point of display of the Products. For internet sales that Barnes & Noble ships to customers in California, in the alternative to Section 2.3.1, Barnes & Noble may provide the Warning

or a hyperlink to the Warning in one or more of the following locations on its website:

(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.

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

In settlement of all the claims referred to in this Settlement Agreement, Barnes & Noble shall pay a total of \$2,000.00 in civil penalties in accordance with this Section. The 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 Bell. Each penalty payment shall be delivered to the addresses listed in Section 3.2 below. Barnes & Noble 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**

Within five business days of the Effective Date, Barnes & Noble shall issue two separate checks for the civil penalty payment to (a) "OEHHA" in the amount of \$1,500.00; and (b) "Brodsky & Smith, LLC in Trust for Bell" 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 Bell, 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 OEHHHA (EIN: 68-0284486), pursuant to Section 3.1 shall be delivered directly to OEHHHA (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 OEHHHA.** Barnes & Noble agrees to provide Bell's counsel with a copy of the checks payable to OEHHHA, simultaneous with its penalty payments to Bell, to be delivered to the address provided in Section 3.2(a)(i), as proof of payment to OEHHHA.

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

The Parties acknowledge that Bell and her 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. Bell 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 Bell and her 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, Barnes & Noble shall reimburse Bell's counsel for fees and costs incurred as a result of investigating and bringing this matter to Barnes & Noble's attention, and negotiating a settlement in the public interest. Within five business days of the Effective Date, Barnes & Noble 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 Barnes & Noble and Downstream Customers and Entities**

Bell, acting on her own behalf, releases (a) Barnes & Noble, and its parent (i.e., Barnes & Noble, Inc.), subsidiaries, affiliated entities under common ownership, predecessors, successors, assigns, directors, officers, agents, employees, attorneys; and (b) each entity to whom Barnes & Noble directly or indirectly has distributed or sold the Product, including but not limited to, downstream distributors, wholesalers, customers, retailers, franchisees, cooperative members and licensees, and their respective parents, subsidiaries, affiliated entities under common ownership, predecessors, successors, assigns, directors, officers, agents, employees, attorneys (the entities and individuals released above in subsections (a) and (b) are collectively referred to as "Releasees"), from all claims for violations of Proposition 65 asserted in the Notice based on Barnes & Noble's failure to warn about alleged exposures to the chemical DEHP contained in the Products that were distributed or sold by Barnes & Noble in California prior to the Compliance Date.

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, Bell, on behalf of herself, her past and current agents, representatives, attorneys, successors and/or assignees, hereby covenants not to sue and waives any right to institute or participate in, directly or indirectly, any form of legal action and releases all claims that she may have against Releasees, including, without limitation, all actions and causes of action in law and in equity, all suits, liabilities, demands, obligations, damages, costs, fines, penalties, losses, or expenses including, but not exclusively, investigation fees, expert fees, and attorneys' fees (collectively, "Claims") of any nature, character or kind, known or unknown, suspected or unsuspected, arising under Proposition 65 with respect to any DEHP contained in the Products manufactured, distributed, or sold by Barnes & Noble before the Compliance Date. The release in this Section 5 is effective as a full and final accord and satisfaction, as a bar to all actions. Bell acknowledges that she is familiar with Section 1542 of the California Civil Code, which provides 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.

Bell, in her individual capacity only and not in her representative capacity, expressly waives and relinquishes any and all rights and benefits which she may have under, or which may conferred on her by the provisions of Civil Code § 1542 to the fullest extent that she may lawfully waive such rights or benefits pertaining to the released matters.

Barnes & Noble and Bell, in -their individual capacity only, agree that compliance by Barnes & Noble with the terms of this Settlement Agreement shall constitute compliance with Proposition 65 with respect to any DEHP that is contained in the Products.

## **5.2 Barnes & Noble's Release of Bell**

Barnes & Noble, on behalf of itself, its past and current agents, representatives, attorneys, successors and/or assignees, hereby waives any and all claims against Bell, her attorneys and other representatives, for any and all actions taken or statements made (or those that could have been taken or made) by Bell and/or her 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 Product.

**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 Product, Barnes & Noble shall have no further obligations pursuant to this Settlement Agreement with respect to, and to the extent that, the 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 Barnes & Noble:

Trenton H. Norris  
Sarah Esmaili  
ARNOLD & PORTER LLP



Three Embarcadero Center, 10<sup>th</sup> Floor  
San Francisco, CA 94111

For Bell:

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

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)**

Bell 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. Notwithstanding the foregoing, Barnes & Noble shall be entitled, at its sole option, to modify any warning that it provides under Section 2.3 to conform with any change in the Proposition 65 warning regulations set forth in Title 27 of the California Code of Regulations.

**13. 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:**

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

By: \_\_\_\_\_  
Ema Bell

**AGREED TO:**

Date: November 17, 2016

By: Betsy A. Farnsworth  
Barnes & Noble Booksellers, Inc.

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: 11/17/16

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

By:   
Ema Bell

By: \_\_\_\_\_  
Barnes & Noble Booksellers, Inc.