

SETTLEMENT AGREEMENT

1. INTRODUCTION

1.1 The Parties

This Settlement Agreement is entered into by and between Karen Calacin ("Calacin") and ESI Cases and Accessories, Inc. ("ESI"). Together, Calacin and ESI are collectively referred to as the "Parties." Calacin 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.

ESI 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

Calacin alleges that ESI has imported, distributed and/or sold in the State of California Wireless Gear Adjustable Smartphone Armbands that expose individuals to the chemicals Diisononyl phthalate (DINP) and Di(2-ethylhexyl) phthalate (DEHP) without the requisite Proposition 65 exposure warning.

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

On January 1, 1988, the State of California listed DEHP as a chemical known to the State to cause cancer and, on October 24, 2003, the State of California listed DEHP as a chemical known to cause reproductive toxicity.

1.3 Product Description

The products covered by this Settlement Agreement are Wireless Gear Adjustable Smartphone Armband, UPC No. 680988104510 (the "Product" or "Products") that are imported, distributed, and/or sold in the State of California by ESI, and that contain DINP and DEHP.

1.4 Notice of Violation

On June 29, 2017, Calacin served ESI 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 ESI and such others, including public enforcers, with notice that alleged that ESI 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 DINP and DEHP. No public enforcer has diligently prosecuted the allegations set forth in the Notice.

1.5 No Admission

ESI 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. Nothing in this Settlement Agreement shall be construed as an admission by ESI 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 ESI of any fact, finding, conclusion, issue of law or violation of law, such being specifically denied by ESI. However, this section shall not diminish or otherwise affect the obligations, responsibilities and duties under this Settlement Agreement. Notwithstanding the allegations in the Notice, ESI maintains that it has not knowingly manufactured, or caused to be manufactured, the Products for sale in California in violation of Proposition 65.

1.6 Effective Date

For purposes of this Settlement Agreement, the term "Effective Date" shall mean the date this Agreement is last executed by the Parties.

2. INJUNCTIVE RELIEF

2.1 Reformulation of the Products

Commencing ninety (90) days after the Effective Date, and continuing thereafter, ESI agrees to distribute, or purchase for sale in California only (a) reformulated Products pursuant to Section 2.2, or (b) Products that are labeled with a clear and reasonable warning pursuant to Section 2.3. ESI and its downstream retailers shall have no obligation to reformulate or label Product that entered the stream of commerce prior to the Effective Date.

2.2 Reformulation Standard

“Reformulated Product” shall mean Product that contains in any accessible component less than or equal to 1,000 parts per million (“ppm”) of each of DINP and DEHP when analyzed pursuant to U.S. Environmental Protection Agency testing methodologies 3580A and 8270C.

2.3 Clear and Reasonable Warnings

Commencing ninety (90) days after the Effective Date, ESI shall provide a clear and reasonable warning for any Product that it manufactures, distributes or purchases for sale in California that is not a Reformulated Product. ESI shall provide the warning affixed to the packaging or labeling using language similar to the warnings below:

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

Or

WARNING: This product can expose you to chemicals including Diisononyl phthalate (DINP) and Di(2-ethylhexyl) phthalate (DEHP), which are known to the State of California to cause cancer and birth defects or other reproductive harm. For more information go to www.P65Warnings.ca.gov.

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 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, ESI 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.

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

In settlement of all the claims referred to in this Settlement Agreement, ESI shall pay a total of \$1,000.00 as a Civil Penalty 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 Calacin. Each penalty payment shall be delivered to the addresses listed in Section 3.2 below.

3.1 Civil Penalty

Within fifteen (15) calendar days of the Effective Date ESI shall issue two separate checks for the Civil Penalty payment to (a) "OEHHA" in the amount of \$750.00; and (b) "Brodsky & Smith, LLC in Trust for Calacin" in the amount of \$250.00. 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 Calacin, 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.** ESI agrees to provide Calacin's counsel with a copy of the checks payable to OEHHA, simultaneous with its penalty payments to Calacin, to be delivered to the address provided in Section 3.2(a)(i), as proof of payment to OEHHA.

(c) **Tax Documentation.** ESI agrees to provide a completed IRS 1099 for its payments to, and Calacin agrees to provide IRS W-9 forms for, each of the following payees under this Settlement Agreement:

(i) "Karen Calacin" whose address and tax identification number shall be provided within five (5) days 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 Calacin and her counsel offered to reach preliminary agreement on the material terms of this dispute before reaching terms on the amount of fees and costs to be reimbursed to them. The Parties thereafter reached an accord on the compensation due to Calacin 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, ESI shall reimburse Calacin's counsel \$14,000.00 for fees and costs incurred as a result of investigating and bringing this matter to ESI's attention, and negotiating a settlement in the public interest. The timing specified for payment required by this Section is a material term, and time is of the essence. The payment required by this subsection shall be made as follows:

4.1 Within fifteen (15) calendar days of the Effective Date, ESI shall issue a check for Attorney Fees and Costs payable to "Brodsky & Smith, LLC" in the amount of \$14,000.00 and delivered to the address listed in Section 3.2(a)(i), above.

4.2 ESI shall be liable for reimbursement of additional attorney fees and costs (“Additional Fees”) totaling \$1,000.00, with respect to any and all amounts due and owing under this Settlement Agreement that are not received within five (5) calendar days of the date they are due.

5. RELEASE OF ALL CLAIMS

5.1 Release of ESI and Downstream Customers and Entities

This Settlement Agreement is a full, final and binding resolution between Calacin, acting on her own behalf, and ESI, of any violation of Proposition 65 that was or could have been asserted by Calacin or on behalf of her past and current agents, representatives, attorneys, successors, and/or assigns (“Releasors”), and Releasors hereby release any such claims against ESI and its parents, subsidiaries, affiliated entities, shareholders, marketplaces, directors, officers, agents, employees, attorneys, successors and assignees, and each entity to whom ESI directly or indirectly distributes or sells the Products, including but not limited to, downstream distributors, wholesalers, customers, retailers, including but not limited to OMX, Inc., The Office Club, Inc., OfficeMax Incorporated, and each of their respective subsidiaries, affiliates and parents, franchisees, cooperative members and licensees, (collectively, the “Releasees”), from all claims for violations of Proposition 65 through the Effective Date. Nothing in this Section affects Releasors’ right to commence or prosecute an action under Proposition 65 against a Releasee that does not involve ESI’s products.

In further consideration of the promises and agreements herein contained, and for the payments to be made pursuant to Sections 3 and 4 above, Calacin, 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, participate in, directly or indirectly, any form of legal action and releases all claims that she may have, including without limitation, all actions and causes of action in law and in equity, all obligations, expenses (including without limitation all attorneys’ fees, expert fees, and investigation fees, and costs), damages, losses, liabilities and demands against any of 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 Violation of Proposition 65. Nothing in this

Section affects Releasers' right to commence or prosecute an action under Proposition 65 against a Releasee that does not involve ESI's products.

5.2 ESI's Release of Calacin

ESI, on behalf of itself, its past and current agents, representatives, attorneys, successors and/or assignees, hereby waives any and all claims against Calacin, her attorneys and other representatives, for any and all actions taken or statements made (or those that could have been taken or made) by Calacin 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 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 Products will develop or be discovered. Calacin on behalf of herself only, on one hand, and ESI, 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.

Calacin and ESI each acknowledge and understand the significance and consequences of this specific waiver of California Civil Code section 1542.

5.4 Deemed Compliance with Proposition 65

Compliance by ESI with this Settlement Agreement constitutes compliance with Proposition 65 with respect to exposures to DEHP and DINP in the Products.

5.5. Public Benefit

It is ESI's understanding that the commitments it has agreed to herein, and actions to be taken by ESI under this Settlement Agreement, would confer a significant benefit to the general public, as set forth in Code of Civil Procedure section 1021.5 and Cal. Admin. Code tit. 11, section 3201. As such, it is the intent of ESI that to the extent any other private party initiates an action alleging a violation of Proposition 65 with respect to ESI's failure to provide a warning concerning exposure to DEHP or DINP with respect to the Products it has manufactured, distributed, sold, or offered for sale in California, or will manufacture, distribute, sell, or offer for sale in California, such private party action would not confer a significant benefit on the general public as to those Products addressed in this Settlement Agreement, provided that ESI is in material compliance with this Settlement Agreement.

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 but only to the extent the deletion of the provision deemed unenforceable does not materially affect, or otherwise result in the effect of the Settlement Agreement being contrary to the intent of the Parties in entering into this Settlement Agreement.

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 or limited by reason of law generally, or as to the Products, ESI shall have no further obligations pursuant to this Settlement Agreement with respect to, and to the extent that, a 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 ESI:

Elliott Azoulay
ESI Cases and Accessories, Inc.
240 Madison Avenue
11th Floor
New York, N.Y. 10016

With a copy to:

Carol R. Brophy
Sedgwick LLP
333 Bush Street
Thirtieth Floor
San Francisco, California 94104-2834

For Calacin:

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)

Calacin 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.

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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: 11/13/17

By: _____
Karen Calacin

By:  _____
ESI Cases & Accessories, Inc.

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: 11/1/2017

Date: _____

By: 
Karen Calacin

By: _____
ESI Cases & Accessories, Inc.