

**PROPOSITION 65 SETTLEMENT AGREEMENT
(Susan Davia AG Notice 2017-01682)**

1. INTRODUCTION

1.1 The Parties

This settlement agreement (“Agreement” or “Settlement Agreement”) is entered into by and between Susan Davia, (“Davia”) on the one hand, and Tween Brands, Inc. (“Tween”) on the other hand, with Tween collectively referred to as “Defendant” and Tween and Davia collectively referred to as the “Parties.”

1.2 Davia

Davia is an individual residing in the State of California who seeks to promote awareness of exposure to toxic chemicals and improve human health by reducing or eliminating hazardous substances contained in consumer products.

1.3 Tween Brands, Inc.

Tween and its corporate parent, Ascena Retail Group, Inc. are alleged to have been responsible for the manufacture and distribution of the products subject to this Agreement. Ascena and Tween are each 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 §§ 25249.6 *et seq.* (“Proposition 65”).

1.4 General Allegations

Davia alleges that Ascena and Tween participated in the manufacture, distribution and/or sale, in the State of California, of PVC product display and storage cases made with materials that exposed users to DINP without first providing “clear and reasonable warning” under Proposition 65. DINP is listed as a carcinogen pursuant to Proposition 65. DINP shall be referred to hereinafter as the “Listed Chemical”.

1.5 Notices of Violation

On July 6, 2017, Davia served Ascena and Tween and various public enforcement agencies with a document entitled “60-Day Notice of Violation” that provided public enforcers and the noticed

entities with notice of alleged violations of Health & Safety Code § 25249.6 for failing to warn consumers of the presence of DINP in the Covered Packaging (as defined below) sold in California (AG Notice 2017-01682). The July 6, 2017, 60-Day Notice of Violation shall be referred to herein as “Notice.”

Ascena and Tween received the Notice. Ascena and Tween represent that, as of the date they execute this Agreement, they are not aware of any public enforcer that is diligently prosecuting a Proposition 65 enforcement action related to the Covered Packaging or Covered Products (as defined below), as identified in the 60-Day Notice.

1.6 No Admission

This Agreement resolves claims that are denied and disputed by Tween on behalf of itself and on behalf of Ascena. The Parties enter into this Agreement pursuant to a full, final and binding settlement of any and all claims between the Parties for the purpose of avoiding prolonged litigation. Tween, on behalf of itself and Ascena, denies the material factual and legal allegations contained in the Notices, maintains that it did not knowingly or intentionally expose California consumers to DINP, or any other phthalates listed under Proposition 65, through the reasonably foreseeable use of the Covered Packaging or Covered Products and otherwise contends that, all Covered Packaging and Covered Products it has manufactured, distributed and/or sold have been and are in compliance with all applicable laws. Nothing in this Agreement shall be construed as an admission by Ascena or Tween of any fact, finding, issue of law, or violation of law, nor shall compliance with this Agreement constitute or be construed as an admission by Tween, on behalf of itself and Ascena, of any fact, finding, conclusion, issue of law, or violation of law, such being specifically denied by Tween, on its own behalf and on Ascena’s behalf. However, notwithstanding the foregoing, this section shall not diminish or otherwise affect Tween’s obligations, responsibilities, and duties under this Agreement.

2. DEFINITIONS

2.1 The term “Covered Product” shall mean all Justice-branded bedding products manufactured by or for, and which were or are sold, or offered for sale, to consumers in California by

Tween (including, but not limited to, Justice brand bed in a bag sets (all styles and sizes), such as Emoji, Cat , Peace & Love, Paris, Emoji Sticker and Varsity).

2.2 The term “Covered Packaging” means any storage or packaging case made in whole or part of vinyl or PVC materials into which a Covered Product is packaged and sold or offered for sale to consumers in California.

2.3 The term “Phthalate Free” Covered Packaging shall mean that each component of each packaging or storage case for any Covered Product contains less than or equal to 1,000 parts per million (“ppm”) of di(2-ethylhexyl phthalate) (“DEHP”), dibutyl phthalate (“DBP”), diisononyl phthalate (“DINP”), diisodecyl phthalate (“DIDP”), di-n-hexyl phthalate (“DnHP”) and butyl benzyl phthalate (“BBP”) (collectively Listed Chemical) as determined test results using Environmental Protection Agency (“EPA”) testing methodologies 3580A and 8270C.

2.4 “Effective Date” shall mean October 15, 2017.

3. INJUNCTIVE-TYPE RELIEF

3.1 Product Reformulation Commitment

3.1.1 No later than the Effective Date, Tween shall provide the Phthalate Free phthalate concentration standards of Section 2.3 to the then-current vendors of any Covered Product and Covered Packaging and instruct such entities not to incorporate any raw or component materials that do not meet the Phthalate Free concentration standards of Section 2.3 into any Covered Packaging. Tween shall maintain copies of all vendor correspondence relating to the Phthalate Free concentration standards for two (2) years after the Effective Date and shall produce such copies to Davia within fifteen (15) days of receipt of reasonable request made in writing from Davia, as long as such request is made within two (2) years after the Effective Date.

3.1.2 After the Effective Date, Tween shall provide the Phthalate Free phthalate concentration standards of Section 2.3 to any New Vendors of any Covered Product or Covered Packaging and instruct such entities not to incorporate any raw or component materials that do not meet the Phthalate Free concentration standards of Section 2.3 into any Covered Packaging. “New

Vendors” means vendors of Covered Products from Tween was not obtaining Covered Products as of the Effective Date. Prior to purchase and acquisition of any Covered Product from any New Vendor, Tween shall obtain a written confirmation and accompanying laboratory test result from the New Vendor demonstrating compliance with the Phthalate Free phthalate concentration standard in all materials comprising the Covered Packaging. For two (2) years after the Effective Date, for every Covered Product Tween manufactures, causes to be manufactured, orders, causes to be ordered or otherwise obtains from a New Vendor after the Effective Date, Tween shall maintain copies of all testing of such products demonstrating compliance with this section, shall maintain copies of all vendor correspondence relating to the Phthalate Free concentration standards and shall produce such copies to Davia within fifteen (15) days of receipt of reasonable request made in writing from Davia as long as such request is made within two (2) years after the Effective Date.

3.1.3 As of the Effective Date, Tween shall not manufacture or cause to be manufactured, order or cause to be ordered, distribute or cause to be distributed or otherwise sell in the State of California any Covered Product incorporating Covered Packaging that is not Phthalate Free. For every Covered Product Tween manufactures, causes to be manufactured, orders, causes to be ordered or otherwise sells in California after the Effective Date, Tween shall maintain copies of all testing of incorporated Covered Packaging demonstrating compliance with this section, shall maintain copies of all vendor correspondence relating to the Phthalate Free concentration standards of Section 2.3 and shall produce such copies to Davia within fifteen (15) days of receipt of reasonable request made in writing from Davia, as long as such request is made within two (2) years after the Effective Date.

3.2 Previously Manufactured Covered Products.

3.2.1 Inventory Repackaging - As a material term of this Agreement, Tween represents and warrants that, prior to this Agreement being executed, it re-packaged all remaining inventory of Covered Products in Covered Packaging that met the requirements of Section 2.3 above. In such case as Tween discovers any inventory of Covered Product packaged in Covered Packaging that is not confirmed to be Phthalate Free, Tween shall not sell or ship any of such Covered Product in a

California retail store or to any customer located in California unless it is re-packaged into Covered Packaging that meets the requirements of Section 2.3 above.

3.2.2 Tween shall maintain records of compliance correspondence, inventory reports or other communication confirming compliance with § 3.2.1 for two (2) years from the issuance of the initial Notice and shall produce copies of such records upon reasonable written request by Davia.

4. MONETARY PAYMENTS

4.1 Civil Penalty

As a portion of the consideration for this settlement, Ascena and Tween shall cause to be paid a total of \$3,000 in civil penalties in accordance with California Health & Safety Code § 25249.12(c)(1) & (d).

4.2 Augmentation of Penalty Payments

For purposes of the penalty assessment under this Agreement, Davia is relying entirely upon Tween and its counsel for accurate, good faith reporting to Davia of the nature and amounts of relevant sales activity. If within nine (9) months of the Effective Date, Davia discovers and presents to Tween evidence that the Covered Products have been distributed by Tween in sales volumes materially (more than 25%) different than those identified by Tween prior to execution of this Agreement, then Tween shall be liable for an additional penalty amount of up to \$10,000.00. In such event, Tween shall also be liable, in accordance with the requirements of Code of Civil Procedure section 1021.5 for any reasonable, additional attorney fees expended by Davia in discovering such additional sales. Davia agrees to provide Ascena and Tween with a written demand for all such additional penalties and attorney fees under this Section, including Davia's evidence supporting any claim for a materially different sales volume. After service of such demand, Ascena and Tween shall have thirty (30) days to agree to the amount of fees and penalties owing by Ascena and Tween and submit such payment to Davia in accordance with the method of payment of penalties and fees identified in Section 4.1 and 4.4. Should this thirty (30) day period pass without any such resolution between the parties and payment of such additional penalties and fees, Davia shall be entitled to file a

formal legal claim for additional civil penalties pursuant to this Section. The prevailing party on any claim filed pursuant to this section shall be entitled to its reasonable fees and costs.

4.3 Reimbursement of Davia's Fees and Costs

Davia has confirmed to Ascena and Tween her willingness to execute a settlement on all terms except for reimbursement of plaintiff's fees and costs, leaving such issue for formal resolution independent of this Agreement. Tween 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 Davia and her counsel under general contract principles and the private attorney general doctrine codified at California Code of Civil Procedure section 1021.5, for all work performed in this matter, except fees that may be incurred on appeal. Under these legal principles, Tween shall cause to be paid to Davia's counsel the amount of \$19,000 for fees and costs incurred investigating, litigating and enforcing this matter. Such payment shall be made payable to "Sheffer Law Firm."

4.4 Payment Procedures

Tween shall satisfy its obligation to pay civil penalties pursuant to Section 4.1 by delivery of a civil penalty check payable to "OEHHA" (EIN: 68-0284486, Memo line "Prop 65 Penalties, 2017-01682"), in the amount of \$2,250 and a civil penalty check payable to "Susan Davia" (Tax ID to be supplied, Memo line "Prop 65 Penalties, 2017-01682") in the amount of \$750. Davia shall be responsible for delivering to the California Office of Environmental Health Hazard Assessment the civil penalty check payable to OEHHA.

Tween shall satisfy its obligation to pay attorney fees and costs pursuant to Section 4.3 by delivery of a check payable to "Sheffer Law Firm" (EIN 55-08-58910, Memo line "2017-01682") in the amount of \$19,000.

Tween shall satisfy its obligation to pay any civil penalties pursuant to Section 4.2 by civil penalty checks payable to "OEHHA" and "Susan Davia" (Memo line "Prop 65 Penalties, 2017-01682"), in the amounts agreed to pursuant to Section 4.2 or as ordered by the Court.

All Section 4.1 and Section 4.3 civil penalty and attorney fee/cost payments shall be delivered

to plaintiff's counsel within ten (10) business days after execution of this Agreement, at the following address:

Sheffer Law Firm
Attn: Proposition 65 Controller
81 Throckmorton Ave., Suite 202
Mill Valley, CA 94941

Tween shall be liable for payment of interest, at a rate of 10% simple interest, for all amounts due and owing from it under this Section that are not received by Sheffer Law Firm within two business days of the due date for such payment.

4.5 Issuance of 1099 Forms

After this Agreement has been executed and the settlement funds have been transmitted to Davia's counsel, Tween shall cause three separate 1099 forms to be issued, as follows:

- (a) The first 1099 shall be issued to the Office of Environmental Health Hazard Assessment, P.O. Box 4010, Sacramento, CA 95814 (EIN: 68-0284486) in the amount paid pursuant to Sections 4.1 and 4.2;
- (b) The second 1099 shall be issued to Davia in the amount paid pursuant to Sections 4.1 and 4.2, whose address and tax identification number shall be furnished upon request; and
- (c) The third 1099 shall be issued to the Sheffer Law Firm (EIN: 55-08-58910) in the amount paid pursuant to Section 4.3 and 4.2.

5. RELEASES

5.1 Davia's Release of Ascena and Tween

5.1.1 Plaintiff, on behalf of herself, her attorneys, successors, and/or assignees releases Ascena and Tween and each of their attorneys, successors, licensors and assigns, as well as their directors, officers, employees, corporate affiliates and assignees ("Defendant Releasees") from any and all claims for violation of Proposition 65 that have or could have been asserted against Defendant Releasees regarding the failure to warn about exposure to Listed Chemicals arising in connection with any Covered Product or Covered Packaging distributed or otherwise sold by Tween prior to the

Effective Date. Going forward, as to Davia, Tween's compliance with this agreement shall constitute compliance with Proposition 65 with respect to the Listed Chemicals in the Covered Products and Covered Packaging.

5.2 Tween's Release Of Davia

5.2.1 On behalf of itself, Ascena and their Defendant Releasees, Tween waives any and all claims against Davia, her attorneys, and other representatives for any and all actions taken or statements made (or those that could have been taken or made) by Davia and her attorneys and other representatives prior to the Effective Date, whether in the course of investigating claims or otherwise seeking enforcement of Proposition 65 against it in this matter, and/or with respect to the Covered Products or Covered Packaging.

5.3 General Release

5.3.1 Each Party also provides, for the benefit of the other Party and Defendant Releasees, a general 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 any Party of any nature, character or kind, known or unknown, suspected or unsuspected, arising out of distribution of the Covered Products or Covered Packaging prior to the Effective Date. Each Party acknowledges that it 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.

Each Party expressly waives and relinquishes any and all rights and benefits that it may have under, or which may be conferred on it by the provisions of Section 1542 of the California Civil Code as well as under any other state or federal statute or common law principle of similar effect, to the fullest extent that it may lawfully waive such rights or benefits pertaining to the released matters. In furtherance of such intention, the release hereby given shall be and remain in effect as a full and

complete release notwithstanding the discovery or existence of any such additional or different claims or facts arising out of the released matters.

6. SEVERABILITY

If any of the provisions of this Agreement are found by a competent court of law to be unenforceable, the validity of the enforceable provisions remaining, after express agreement of the Parties, shall not be adversely affected, unless the court finds that any unenforceable provision is not severable from the remainder of the Agreement.

7. GOVERNING LAW

The terms of this Agreement shall be governed by the laws of the State of California and any action brought concerning this Agreement shall be brought in the California Superior Court venued in Marin County, California.

8. NOTICES

When any Party is entitled to receive any notice under this Agreement, the notice shall be sent by FedEx (or other tracked delivery service) or electronic mail to the following:

For Ascena and Tween:

General Counsel
Tween Brands, Inc.
8323 Walton Parkway
New Albany, OH 43054

With a copy to their counsel:

Robert L. Falk, Esq.
Morrison & Foerster, LLP
425 Market Street, 32nd Floor
San Francisco, CA 94105-2482
Email: rfalk@mofo.com

For Davia to:

Proposition 65 Coordinator
Sheffer Law Firm
81 Throckmorton Ave., Suite 202
Mill Valley, CA 94941

Any Party may modify the person and address to whom the notice is to be sent by sending each other Party notice by certified mail and/or other verifiable form of written communication.

9. COMPLIANCE WITH HEALTH & SAFETY CODE § 25249.7(F)

Davia agrees to comply with the reporting form requirements referenced, in California Health & Safety Code §25249.7(f).

10. MODIFICATION

This Agreement may be modified only: (1) by written agreement of the Parties; or (2) upon written agreement of the Parties, a successful motion of any Party and approval of a modified Agreement by the Court.

11. ENTIRE AGREEMENT

This Agreement contains the sole and entire agreement and understanding of the Parties with respect to the entire subject matter hereof, and any and all prior discussions, negotiations, commitments, and understandings related hereto. No representations, oral or otherwise, express or implied, other than those contained herein have been made by any Party hereto. No other agreements not specifically referred to herein, oral or otherwise, shall be deemed to exist or to bind any of the Parties. No supplementation, modification, waiver, or termination of this Agreement shall be binding unless executed in writing by the Party to be bound. No waiver of any of the provisions of this Agreement shall be deemed or shall constitute a waiver of any of the other provisions whether or not similar, nor shall such waiver constitute a continuing waiver

12. ATTORNEY'S FEES

12.1 Should either of the Parties prevail on any motion, application for order to show cause or other proceeding to enforce a violation of this Agreement, so long as that party engaged in a good faith meet and confer attempt regarding the dispute, such Party shall be entitled to its reasonable attorney fees and costs incurred as a result of such motion, order or application, consistent with C.C.P. § 1021.5.

12.2 Except as otherwise specifically provided herein, each Party shall bear its own costs and attorney's fees in connection with the Notice and this Agreement.

12.3 Nothing in this Section shall preclude a Party from seeking an award of sanctions pursuant to law.

13. NEUTRAL CONSTRUCTION

Both Parties and their counsel have participated in the preparation of this Agreement and this Agreement is the result of the joint efforts of the Parties. This Agreement was subject to revision and modification by the Parties and has been accepted and approved as to its final form by all Parties and their counsel. Accordingly, any uncertainty or ambiguity existing in this Agreement shall not be interpreted against any Party as a result of the manner of the preparation of this Agreement. Each Party to this Agreement agrees that any statute or rule of construction providing that ambiguities are to be resolved against the drafting Party should not be employed in the interpretation of this Agreement and, in this regard, the Parties hereby waive California Civil Code Section 1654.

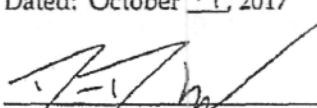
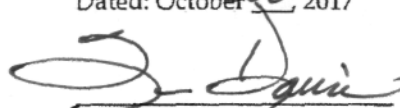
14. COUNTERPARTS, FACSIMILE SIGNATURES

This Agreement may be executed in counterparts and by facsimile or portable document format (PDF), each of which shall be deemed an original, and all of which, when taken together, shall constitute one and the same document.

15. AUTHORIZATION

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

IT IS SO AGREED

<p>Dated: October <u>24</u>, 2017</p>  <p>Name: _____ for Tween Brands, Inc.</p>	<p>Dated: October <u>26</u>, 2017</p>  <p>Susan Davia</p>
---	---