

SETTLEMENT AGREEMENT

1. INTRODUCTION

1.1 Parties

This Settlement Agreement (“Agreement”) is entered into by and between Anthony Ferreiro (“Ferreiro”), Gabriel Espinosa (“Espinosa”) (collectively, “Citizen Enforcers”) and Innova Products US, LLC (“Innova”) (Collectively referred to as “Parties”). Ferreiro and Gabriel are individuals that reside in the State of California, and that seek to promote awareness of exposures to toxic chemicals and to improve human health by reducing or eliminating hazardous substances contained in consumer products.

1.2 General Allegations

Citizen Enforcers allege that Innova 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”) and it causes to be distributed or has sold to California customers Strahl Polycarbonate Goblets and Salad Servers (collectively, the “Products”). Citizen Enforcers allege that Innova has imported, distributed and/or sold in the State of California the Products without a requisite Proposition 65 warning that Products contain the chemical Bisphenol A (BPA). On May 11, 2015, the State of California listed BPA as a chemical known to cause developmental reproductive toxicity.

1.3 Notice of Violation(s)

On August 8, 2017, Citizen Enforcers served Innova, Amazon.com, Inc. (“Amazon”), West Marine, Inc. (“West Marine”) 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 Innova and such others, including public enforcers, with notice that alleged that Innova was in violation of California Health & Safety Code § 25249.5, for failing to warn consumers and customers that the Products

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exposed users in California to BPA. No public enforcer has diligently prosecuted the allegations set forth in the Notice.

1.4 No Admission

Innova denies the material factual and legal allegations contained in the Notice and maintains that it is not considered a person in the course of doing business for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986 and, 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 Agreement shall be construed as an admission by Innova 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 Innova of any fact, finding, conclusion, issue of law or violation of law, such being specifically denied by Innova. However, this section shall not diminish or otherwise affect the obligations, responsibilities and duties under this Agreement. Notwithstanding the allegations in the Notice, Innova maintains that it has not knowingly distributed, or caused to be distributed, Products for sale in California in violation of Proposition 65. Nothing in this settlement agreement, nor compliance with its terms, shall constitute or be construed as an admission by the Parties of any fact, conclusion of law, issue of law, or violation of law, or of fault, wrongdoing, or liability by Innova, or its owners, officers, directors, employees, parents, subsidiaries, employees, shareholders, directors, insurers, attorneys, successors and assigns, past and present, affiliated entities or corporations, or entities absorbed by merger or acquisition, or be offered or admitted as evidence in any administrative or judicial proceeding or litigation in any court, agency, or forum. Furthermore, nothing in this Agreement shall prejudice, waive or impair any right, remedy, argument, or defense the Parties may have in any other or future legal proceeding, except as expressly provided in this Agreement.

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The bracketed text may, but is not required to be used.

Where it is impracticable to provide the warning on the same page and in the same location as the display and/or description of the Products, Innova may utilize a designated symbol to cross reference the applicable warning and shall define the term “designated symbol” with the following language on the inside of the front cover of the catalog or on the same page as any order form for the Products:

[PROPOSITION 65] WARNING: Certain products identified with this symbol ▼ and offered for sale in this catalog contain chemicals known to the State of California to cause birth defects or other reproductive harm.

The bracketed text may, but is not required to be used. The designated symbol must appear on the same page and in close proximity to the display and/or description of the Products. On each page where the designated symbol appears, Innova must provide a header or footer directing the consumer to the warning language and definition of the designated symbol.

(c) Internet Sales Warning. In the event that Innova sells Products via the Internet directly, and not through third Parties, to consumers located in California after the Effective Date or more than ninety (90) days of the Effective Date that is not a Reformulated Product, Innova shall provide a warning for such Products sold via the Internet to California residents. A warning that is given on the Internet shall be in the same type size or larger than the Products description text and shall be given in conjunction with the direct sale of the Products. The warning shall appear either: (a) on the same web page on which the Products is displayed; (b) on the same web page as the order form for the Products; (c) on the same page as the price for the Products; (d) on a page the consumer may click on for Proposition 65 warning information or (e) on one or more web pages displayed to a purchaser during the checkout process. The following warning shall be provided:

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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] Bisphenol A [(BPA)], which is 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 bracketed text may, but is not required to be used.

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

In settlement of all the claims referred to in this Agreement, Innova shall pay a total of \$1,000.00 as a Civil Penalty in accordance with this Section. The Civil Penalty payment shall 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 the Citizen Enforcers. The Civil Penalty payment shall be delivered to the addresses listed in Section 4.2, below. Innova 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.

4.1 Civil Penalty

Within seven days of the Effective Date, Innova shall issue three separate checks for the Civil Penalty payment to (a) "OEHHA" in the amount of \$750.00; (b) "Brodsky & Smith, LLC in Trust for Ferreiro" in the amount of \$125.00; and (c) "Brodsky & Smith, LLC in Trust for Espinosa" in the amount of \$125.00. All penalty payment(s) shall be delivered to the addresses listed in Section 4.2 below.

4.2 Payment Procedures

(a) Issuance of Payments. Payments shall be delivered as follows:

(i) All payments owed to Citizen Enforcers, pursuant to Section 4.1 shall be delivered to the following payment address:

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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 4.1 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.** Innova agrees to provide Citizen Enforcers' counsel with a copy of the checks payable to OEHHA, simultaneous with its penalty payments to Citizen Enforcers, to be delivered to the address provided in Section 4.2(a)(i), as proof of payment to OEHHA.

(C) **Tax Documentation.** Innova agrees to provide a completed IRS 1099 for its payments to each of the following payees under this Settlement Agreement:

(i) "Anthony Ferreiro" whose address and tax identification number shall be provided after this Settlement Agreement is fully executed by the Parties;

(ii) "Gabriel Espinosa" whose address and tax identification number shall be provided after this Settlement Agreement is fully executed by the Parties;

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(iii) “Brodsky & Smith, LLC” (EIN: 23-2971061) at the address provided in Section 4.2(a)(i); and

(iii) “Office of Environmental Health Hazard Assessment” 1001 I Street, Sacramento, CA 95814.

5. REIMBURSEMENT OF FEES AND COSTS

The Parties acknowledge that the Citizen Enforcers and their 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. The Citizen Enforcers 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 the Citizen Enforcers and their 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, Innova shall reimburse the Citizen Enforcers’ counsel for fees and costs incurred as a result of investigating and bringing this matter to Innova’s attention, and negotiating a settlement in the public interest. Within seven days of the Effective Date, Innova shall issue a check payable to “Brodsky & Smith, LLC” in the amount of \$16,500.00 for delivery to the address identified in Section 3.2(a)(i), above.

6. RELEASE OF ALL CLAIMS

6.1 This Agreement is a full and final resolution between the Citizen Enforcers, each on behalf of himself and his past and current agents, representatives, attorneys, successors and/or assignees and in the public interest, on the one hand, and (a) Innova and its respective owners, officers, directors, insurers, attorneys, employees, parents, shareholders, divisions, subdivisions, subsidiaries, partners, affiliates, sister and related companies, entities absorbed by merger or acquisition, their predecessor or successor entities, and their heirs, assigns and successors in interest, past or present and (b) any other

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person or entity who may directly or indirectly use, provide, maintain, distribute or sell Products in the course of doing business, including but not limited to each of West Marine, Amazon, customers, distributors, wholesalers, retailers, on the other hand, for all violations or claimed violations of Proposition 65 up through 90 days after the Effective Date based on exposure to BPA or the failure to warn about exposure to BPA arising in connection with the Products shipped and/or otherwise distributed for California sale on or before the Effective Date. ("Released Claims"). Innova and its downstream releasees' compliance with this Agreement shall constitute compliance with Proposition 65 with respect to BPA contained in Products.

6.2 Citizen Enforcers' Release

Citizen Enforcers, each acting on his own behalf, waives, releases and forever discharges Innova and its parents, subsidiaries, affiliated entities under common ownership, successors and/or assignees, directors, officers, agents, employees, attorneys and each person or entity who may directly or indirectly use, provide, maintain, distribute or sell Products, including, but not limited to, West Marine, Amazon., downstream distributors, wholesalers, customers, retailers, (collectively, the "Releasees"), from all claims for violations of Proposition 65 through 90 days after the Effective Date based on their failure to warn about alleged exposures to the chemical BPA that is contained in the Products, and was distributed, sold and/or offered for sale by Innova to customers and consumers in the State of California. This settlement is a full, final and binding resolution of all claims that were or could have been asserted against Innova and/or the Releasees for failure to provide warnings for alleged exposures to BPA contained in the Products.

In further consideration of the promises and agreements herein contained, and for the payments to be made pursuant to Section(s) 4 and 5 above, Citizen Enforcers, each on behalf of himself, his past and current agents, representatives, attorneys, successors and/or assignees, provides a 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'

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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, Innova 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.

(a) Product Labeling. Innova shall affix a warning to the packaging, labeling or directly on each Products sold or intended for sale in California by Innova or any person selling the Products that states:

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] Bisphenol A [(BPA)], which is 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 bracketed text may, but is not required to be used.

(b) Mail Order Catalog Warning. In the event that Innova sells Products via mail order catalog directly to consumers located in California more than ninety (90) days after the Effective Date that is not a Reformulated Product, Innova shall provide a warning for such Products sold via mail order catalog to California residents. A warning that is given in a mail order catalog shall be in the same type size or larger than the Products' description text within the catalog. The following warning shall be provided on the same page and in the same location as the display and/or description of the Products:

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] Bisphenol A [(BPA)], which is 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.

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1.5 Effective Date

For purposes of this Agreement, the term “Effective Date” shall mean the date that this Settlement Agreement is signed by the Parties.

3. INJUNCTIVE RELIEF

3.1 Innova’s Commitment to Reformulate or Provide a Warning

Commencing ninety (90) days after the Effective Date, and continuing thereafter, Innova and its downstream retailers, including West Marine and Amazon, shall only ship, sell, or offer for sale in California, Reformulated Products pursuant to Section 3.2 or Products that are labeled with a clear and reasonable warning pursuant to Section 3.3. Innova and its downstream retailers, including West Marine and Amazon, shall have no obligation to label or reformulate Products that entered the stream of commerce prior to the Effective Date or within ninety (90) days after the Effective Date. For purposes of this Settlement Agreement, “Reformulated Products” are Products that are in compliance with the standard set forth in Section 3.2, below.

3.2 “Reformulated Products” shall mean Products that are BPA-Free when analyzed pursuant to test method ATS 367 Rev. 0 by LC/MS/MS.

3.3 Clear and Reasonable Warnings

Commencing ninety (90) days after the Effective Date, Innova shall, for all Products it sells or distributes and that are intended for sale in California and that is not a Reformulated Product, provide clear and reasonable warnings as set forth in subsections 3.3(a)-(c) below. 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 understands to which specific Products the warning applies, so as to minimize the risk of consumer confusion.

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fees, damages, losses, claims, liabilities and demands of Innova or 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 exposure to the chemical BPA in the Products.

6.3 Innova's Release

Innova, on behalf of itself, its past and current agents, representatives, attorneys, successors and/or assignees, hereby waives any and all claims against the Citizen Enforcers, their attorneys and other representatives, for any and all actions taken or statements made (or those that could have been taken or made) by the Citizen Enforcers and/or their 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.

6.4 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. The Citizen Enforcers, each on behalf of himself, on one hand, and Innova, on the other hand, acknowledge that this Agreement is expressly intended to cover and include all such claims up through the Effective Date and within 90 days after the Effective Date, including all rights of action therefor. The Parties acknowledge that the claims released in Sections 6.2 and 6.3 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.

The Citizen Enforcers and Innova each acknowledge and understand the significance and consequences of this specific waiver of California Civil Code section 1542.

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7. **SEVERABILITY**

If, subsequent to the execution of this Agreement, any of the provisions of this Agreement are deemed by a court to be unenforceable, the validity of the enforceable provisions remaining shall not be adversely affected.

8. **GOVERNING LAW**

The terms of this Agreement shall be governed by the law of the State of California and apply within the State of California.

9. **NOTICES**

Unless specified herein, all correspondence and notices required to be provided pursuant to this 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 Innova:

Lawrence S. Bazel
Briscoe Ivester & Bazel LLP
155 Sansome Street, Seventh Floor
San Francisco, California 94104

For Citizen Enforcers:

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.

10. **COUNTERPARTS: SIGNATURES**

This 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.

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11. COMPLIANCE WITH HEALTH & SAFETY CODE § 25249.7(f)

Citizen Enforcers agrees to comply with the reporting requirements referenced in Health & Safety Code section 25249.7(f).

12. MODIFICATION

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

13. AUTHORIZATION

The undersigned are authorized to execute this Agreement and have read, understood and agree to all of the terms and conditions contained of this Agreement.


AGREED TO:

AGREED TO:

Date: _____

Date: February 12, 2018

By: _____
Anthony Ferreiro

By: 
Innova Products US, LLC

Date: _____

By: _____
Gabriel Espinosa

11. **COMPLIANCE WITH HEALTH & SAFETY CODE § 25249.7(f)**

Citizen Enforcers agrees to comply with the reporting requirements referenced in Health & Safety Code section 25249.7(f).

12. **MODIFICATION**

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

13. **AUTHORIZATION**

The undersigned are authorized to execute this Agreement and have read, understood and agree to all of the terms and conditions contained of this Agreement.

AGREED TO:

AGREED TO:

Date: 2/27/18

Date: _____

By: Anthony Ferreiro
Anthony Ferreiro

By: _____
Innova Products US, LLC

Date: 1/31/18

By: Gabriel Espinosa
Gabriel Espinosa