

## SETTLEMENT AGREEMENT

### 1. INTRODUCTION

#### 1.1 The Parties

This Settlement Agreement is entered into by and between Kimberly Embry, in her individual capacity (“Embry”) and Incom Manufacturing Group (“Incom”). Together, Embry and Incom are collectively referred to as the “Parties.” Embry is an individual who 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. For purposes of this settlement, Incom 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

Embry alleges that Incom manufactured, imported, distributed and/or sold in the State of California vinyl traction tape that contains di(2-ethylhexyl) phthalate (“DEHP”) without sufficiently warning consumers about potential exposure to DEHP in connection with foreseeable use of Products. DEHP is listed as a chemical known to the State of California as a carcinogen. Under California’s Safe Drinking Water and Toxic Enforcement Act of 1986, California Health & Safety Code Section 25249.6 et seq. (“Proposition 65”), “[n]o person in the course of doing business shall knowingly and intentionally expose any individual to a chemical known to the state to cause cancer or reproductive toxicity without first giving clear and reasonable warning to such individual. . . .” (Cal. Health & Safety Code § 25249.6.)

#### 1.3 Product Description

The product covered by this Settlement Agreement is White non-skid Texture Vinyl Traction Tape that has been manufactured, imported, distributed, sold and/or offered for sale in California by Incom that contains DEHP (“Products”).

#### **1.4 Notice of Violation**

On November 6, 2017, Embry served Incom and various public enforcement agencies with a document entitled "Proposition 65 Notice of Violation" (the "Notice"). The Notice provided Incom and such others, including public enforcers, with notice that alleged that Incom 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 diligently prosecuted the allegations set forth in the Notice.

#### **1.5 No Admission**

Incom 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 have been and are in compliance with all laws. Nothing in this Settlement Agreement shall be construed as an admission by Incom 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 Incom of any fact, finding, conclusion, issue of law or violation of law, such being specifically denied by Incom. However, this section shall not diminish or otherwise affect the obligations, responsibilities and duties under this Settlement Agreement. Notwithstanding the allegations in the Notice, Incom 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 and Warnings**

Commencing ninety (90) days after the Effective Date, and continuing thereafter, Products shall be accompanied by a warning as described in Section 2.2 below. The warning requirements set forth in Section 2.2 below shall apply only to Products that are distributed, marketed, sold or shipped for sale in the State of California by Incom. Incom and its downstream customers shall

have no obligation to label Products that entered the stream of commerce prior to the Effective Date or that Incom and its downstream customers place into the stream of commerce within 90 days of the Effective Date.

## **2.2 Clear and Reasonable Warnings**

Where required, commencing ninety (90) days after the Effective Date, Incom shall provide a clear and reasonable warning for any Product that it manufactures, distributes, or offers for sale in California. Incom shall provide the warning affixed to the packaging or labeling using language similar to the warning(s) below:

(a) **WARNING:** This product can expose you to chemicals, including 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](http://www.P65Warnings.ca.gov).

Or

(b) **WARNING:** Cancer and reproductive harm - [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov).

Each warning should be accompanied by and placed to the right of a symbol consisting of a black exclamation point in a yellow equilateral triangle with a bold black outline sized to be no smaller than the word, “WARNING” as provided by regulations adopted on or about August 30, 2018.

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, Incom 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. The Parties recognize that these are not the exclusive methods of providing a warning under Proposition 65 and its implementing regulations, and Incom may utilize any such other warning as is permitted

by law. If such warnings are no longer required by law, Incom shall have no further obligations pursuant to this Settlement Agreement.

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

In settlement of all the claims referred to in this Settlement Agreement, Incom shall pay a total of \$1,000 in civil penalties 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 Embry. Each penalty payment shall be delivered to the addresses listed in Section 3.2 below.

**3.1 Civil Penalty**

Within fifteen (15) business days of the Effective Date, Incom shall issue two separate checks for the initial civil penalty payment to (a) "OEHHA" in the amount of \$750; and (b) "Kim Embry" in the amount of \$250. 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 Embry, pursuant to Section 3.1 shall be delivered to the following payment address:

Noam Glick  
Glick Law Group  
225 Broadway, Suite 2100  
San Diego, CA 92101

(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.** Incom agrees to provide Embry's counsel with a copy of the check payable to OEHHA, simultaneous with its penalty payments to Embry.

**(c) Tax Documentation.** The Parties, including Embry, will exchange completed IRS 1099, W-9, or other forms as required. Relevant information for Glick Law Group and Embry are set out below:

(i) "Kim Embry" whose address and tax identification number shall be provided within five (5) days after this Settlement Agreement is fully executed by the Parties;

(ii) "Glick Law Group" (EIN: 47-1838518) at the address provided in Section 3.2(a)(i);

(iii) "Nicholas & Tomasevic" (EIN: 46-3474065) at the address provided in Section 3.2(a)(i); and

(iv) "Office of Environmental Health Hazard Assessment" 1001 I Street, Sacramento, CA 95814.

**4. REIMBURSEMENT OF FEES AND COSTS**

The Parties reached an accord on the compensation due to Embry and her counsel under general contract principles and the private attorney general doctrine and principles codified at California Code of Civil Procedure § 1021.5, California Health & Safety Code § 25249 et seq., and related regulations. Under these legal principles, Incom shall reimburse Embry's counsel for fees and costs incurred as a result of investigating and bringing this matter to Incom's attention, and negotiating a settlement in the public interest. Within fifteen (15) business days of the Effective Date, Incom shall issue payments to "Glick Law Group" in the amount of \$9,500 and "Nicholas & Tomasevic, LLP" in the amount of \$9,500 (for a total of \$19,000), to be delivered to the following addresses:

Noam Glick  
Glick Law Group  
225 Broadway, Suite 2100  
San Diego, CA 92101

Craig Nicholas  
Nicholas & Tomasevic, LLP  
225 Broadway, 19th Floor  
San Diego, CA 92101

**5. RELEASE OF ALL CLAIMS**

**5.1 Release of Incom and Downstream Customers and Entities**

This Settlement Agreement is a full, final and binding resolution between Embry, acting on her own behalf only, and Incom, of any violation of Proposition 65 that was or could have been asserted by Embry or on behalf of her past and current agents, representatives, attorneys, successors, and/or assigns ("Releasers") for failure to provide warnings for alleged exposures to DEHP contained in the Products, and Releasers hereby release any such claims against Incom and its parents, subsidiaries, affiliated entities, divisions, shareholders, marketplaces, directors, officers, agents, employees, attorneys, successors and assignees, and each entity to whom Incom

directly or indirectly distributes or sells the Products, including but not limited to any upstream or downstream distributor, wholesalers, customers, retailers, including but not limited to Agri Supply Company (collectively, the "Releasees"). As to alleged exposure to DEHP from Products, compliance with the terms of this Settlement Agreement resolves any issue, now and in the future, concerning compliance by Incom and the Releasees.

In further consideration of the promises and agreements herein contained, and for the payments to be made pursuant to Sections 3 and 4 above, Embry, 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 exposure to the chemical DEHP in Products.

## **5.2 Incom's Release of Embry**

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

Embry and Incom 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**

As noted in Section 5.1, compliance by Incom with this Settlement Agreement constitutes compliance with Proposition 65 with respect to exposures to DEHP in the Products.

#### **5.5. Public Benefit**

It is Incom's understanding that the commitments it has agreed to herein, and actions to be taken by Incom under this Settlement Agreement, would confer a significant benefit to the general public, as set forth in Code of Civil Procedure section 1021.5, California Health & Safety Code § 25249 et seq., and Cal. Admin. Code tit. 11, section 3201. As such, it is the intent of Incom that to the extent any other private party initiates an action alleging a violation of Proposition 65 with respect to Incom's alleged failure to provide a warning concerning exposure to DEHP 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 Incom 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, the Attorney General, or other public enforcement



body 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. 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, Incom shall provide written notice to Embry of any asserted change in the law, and 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 Incom:

Charles Malcomb  
Hodgson Russ LLP  
140 Pearl Street, Suite 100  
Buffalo, NY 14202

For Embry:

Noam Glick  
Glick Law Group  
225 Broadway, Suite 2100  
San Diego, CA 92101

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)**

Embry 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.

12. **ENTIRE AGREEMENT**

This Settlement Agreement contains the sole and entire agreement and understanding of the parties with respect to the subject matter hereof, and any and all prior discussions, negotiations, commitments, and understandings related thereto. 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.

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:**

**AGREED TO:**

Date: October 12, 2018

Date: Oct 12, 2018

By:   
Kim Embry

By:   
Incom Manufacturing Group