

## SETTLEMENT AGREEMENT

### 1. INTRODUCTION

**1.1 The Parties.** This Settlement Agreement is entered into by and between Anthony Ferreiro (“Ferreiro”) and Incipio, LLC, a Delaware limited liability company (“Incipio”). Together, Ferreiro and Incipio are collectively referred to as the “Parties.” Ferreiro is an individual that resides in the State of California, and purports to promote awareness of exposures to toxic chemicals and to improve human health by reducing or eliminating hazardous substances contained in consumer products. Ferreiro alleges that Incipio is a person in the course of doing business for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, Health & Safety Code § 25249.6, *et seq.* (“Proposition 65”).

**1.2 General Allegations.** Ferreiro alleges that Incipio has imported, distributed and/or sold in the State of California The Specialist Durable Gaming Cases that contain the chemical Bisphenol A (BPA) without providing a requisite Proposition 65 exposure warning. On May 11, 2015, the State of California listed BPA as a chemical known to the State to cause reproductive toxicity.

**1.3 Product Description.** The products covered by this Settlement Agreement are cases, covers and accessories for consumer mobile electronics, including but not limited to the Specialist Durable Gaming Cases and Curved Tempered Glass Screen Protector (the “Product” or “Products”) that have been imported, distributed, offered for sale and/or sold in California by Incipio, that contain BPA.

**1.4 Notice of Violation.** On December 20, 2017, Ferreiro served Incipio, Wal-Mart Stores, Inc. (“Walmart”), 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 Incipio and such others, including public enforcers, with notice that alleged that Incipio was in violation of California Health & Safety Code § 25249.5, for failing to warn consumers and customers that the Products exposed users in California to BPA. No public enforcer has diligently prosecuted the allegations set forth in the Notice.

**1.5 No Admission.** Incipio 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, specifically that pursuant to testing by Intertek, the Products contains well less than the maximum allowable dose level for BPA. Nothing in this Settlement Agreement shall be construed as an admission by Incipio 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 Incipio of any fact, finding, conclusion, issue of law or violation of law, such being specifically denied by Incipio. However, Paragraph 1.5 shall not diminish or otherwise affect the obligations, responsibilities and duties under this Settlement Agreement. Notwithstanding the allegations in the Notice, Incipio 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: WARNINGS**

**2.1** Commencing ninety (90) days after the Effective Date, and continuing thereafter, Incipio shall not manufacture or order from any supplier any Products intended for retail sale in California that contains BPA on any component to which consumers are exposed in excess of 3 micrograms per day of dermal exposure from solid materials per AATCC TM 15-2013 (hereinafter "Reformulated Products") unless the Product is accompanied by a warning that complies with Article 6 of Title 27 of the California Code of Regulations. Products bought or sold by Incipio before the date this Settlement Agreement is signed by both Parties may sell through without a warning even if not Reformulated Products. Until August 30, 2018, the warning shall consist of either:

- (a) The statement: "WARNING: This product contains a chemical known to the State of California to cause birth defects or other reproductive harm."; or (b) (1) A symbol consisting of a black exclamation point in a yellow equilateral triangle with a bold black

outline to the left of the word “warning” in bold all capital letters, followed by the statement “This product can expose you to chemicals including Bisphenol A (BPA), which is known to the State of California to cause birth defects or other reproductive harm. For more information, go to [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov).”; or (2) a warning consisting of a symbol that is a black exclamation point in a yellow equilateral triangle with a bold black outline to the left of the word “warning” in bold all capital letters, followed by the statement “Reproductive Harm - [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov).”<sup>1</sup>

For Products manufactured on and after August 30, 2018, the warning set forth in Paragraph 2.1(b) shall be used.

**2.2** The warning provided pursuant to Paragraph 2.1 shall be affixed to or printed on the Product’s packaging or labeling, or on a placard, shelf tag, sign or electronic device or automatic process, providing that the warning is displayed with such conspicuousness, as compared with other words, statements, or designs as to render it likely to be read and understood by an ordinary individual under customary conditions of purchase or use. A warning may be contained in the same section of the packaging, labeling, or instruction booklet that states other safety warnings, if any, concerning the use of the product and shall be at least the same size as those other safety warnings.

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

In settlement of all the claims referred to in this Settlement Agreement, Incipio shall pay a total of \$500.00 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 Ferreiro. The Civil Penalty payment(s) shall be delivered to the addresses identified in Paragraph 3.2, below. Incipio 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 the payment times set forth below.

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<sup>1</sup> The triangular symbol need only be in yellow where the sign, label, shelf tag or other transmission format is being printed in color for purposes of other language, symbols or designs.

**3.1 Civil Penalty.** Within ten (10) business days of the Effective Date, Incipio shall issue two separate checks for the Civil Penalty payment to (a) “OEHHA” in the amount of \$375.00; and (b) “Brodsky & Smith, LLC in Trust for Ferreiro” in the amount of \$125.00. The Civil Penalty payments shall be delivered to the addresses identified in Paragraph 3.2, below.

**3.2 Payment Procedures.**

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

(i) All payments owed to Ferreiro, pursuant to Paragraph 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 Paragraph 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.** Incipio agrees to provide Ferreiro’s counsel with a copy of the checks payable to OEHHA, simultaneous with its penalty payments to Ferreiro, to be delivered to the address provided in Paragraph 3.2(a)(i), as proof of payment to OEHHA.

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

(i) “Anthony Ferreiro” 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 Paragraph 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 Ferreiro and his 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 Ferreiro and his 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, Incipio shall reimburse Ferreiro’s counsel for fees and costs incurred as a result of investigating and bringing this matter to Incipio’s attention, and negotiating a settlement in the public interest. Within ten (10) business days of the Effective Date, Incipio shall issue a check payable to “Brodsky & Smith, LLC” in the amount of \$15,750.00 for delivery to the address identified in Paragraph 3.2(a)(i), above.

#### **5. RELEASE OF ALL CLAIMS**

**5.1 Release of Incipio and Downstream Customers and Entities.** This Settlement Agreement is a full, final and binding resolution between Ferreiro, acting on his own behalf, and Incipio, of any violation of Proposition 65 that was or could have been asserted by Ferreiro or on behalf of his past and current agents, representatives, attorneys, successors, and/or assigns (“Releasers”) for failure to provide warnings for alleged exposures to BPA contained in the

Products, and Releasers hereby release any such claims against Incipio and its parents, subsidiaries, affiliated entities, shareholders, marketplaces, directors, officers, agents, employees, attorneys, successors and assignees, and each entity to whom Incipio directly or indirectly distributes or sells the Products, including but not limited to, downstream distributors, wholesalers, customers, retailers, including but not limited to Walmart and Ingram Micro Inc., and their respective agents, representatives, subsidiaries, affiliates and parents, franchisees, cooperative members and licensees, (collectively, the "Releasees"), from all claims for violations of Proposition 65 for Product bought or sold through the Effective Date based on their failure to warn about alleged exposures to the chemical BPA that is contained in the Products, and were manufactured, distributed, sold and/or offered for sale by Incipio to customers and consumers in the State of California.

In further consideration of the promises and agreements herein contained, and for the payments to be made pursuant to Sections 3 and 4 above, Ferreiro, on behalf of himself, his 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 he 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 BPA in the Products.

**5.2 Incipio's Release of Ferreiro.** Incipio, on behalf of itself, its past and current agents, representatives, attorneys, successors and/or assignees, hereby waives any and all claims against Ferreiro, his attorneys and other representatives, for any and all actions taken or statements made (or those that could have been taken or made) by Ferreiro 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 § 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. Ferreiro on behalf of himself only, on one hand, and Incipio, 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 Paragraphs 5.1 and 5.2, above, may include unknown claims, and nevertheless waive California Civil Code § 1542 as to any such unknown claims. California Civil Code § 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.

Ferreiro and Incipio each acknowledge and understand the significance and consequences of this specific waiver of California Civil Code § 1542.

**5.4 Deemed Compliance with Proposition 65.** Compliance by Incipio with this Settlement Agreement constitutes compliance with Proposition 65 with respect to exposures to BPA in the Products.

**5.5. Public Benefit.** It is Incipio's understanding that the commitments it has agreed to herein, and actions to be taken by Incipio under this Settlement Agreement, would confer a significant benefit to the general public, as set forth in Code of Civil Procedure § 1021.5 and Cal. Admin. Code tit. 11, § 3201. As such, it is the intent of Incipio that to the extent any other private party initiates an action alleging a violation of Proposition 65 with respect to Incipio failure to provide a warning concerning exposure to BPA 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 Incipio 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, Incipio shall provide written notice to Ferreiro 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 Incipio:

Eric Kennedy  
Buchalter, A Professional Corporation  
1000 Wilshire Boulevard  
Suite 1500  
Los Angeles, California 90017-173

For Ferreiro:

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)**

Ferreiro agrees to comply with the reporting requirements referenced in Health & Safety Code § 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 of the Parties and any and all prior negotiations and understandings related hereto shall be deemed to have been merged within it. No representations or terms of agreement other than those contained herein exist or have been made by any Party with respect to the other Party or the subject matter hereof.

**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: 7/23/18

By: \_\_\_\_\_  
Anthony Ferreiro

By:  \_\_\_\_\_  
Incipio, LLC

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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: 7/27/18

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

By: Anthony Ferreiro  
Anthony Ferreiro

By: \_\_\_\_\_  
Incipio, LLC