

## SETTLEMENT AGREEMENT

### 1. INTRODUCTION

#### 1.1 Parties

This Settlement Agreement is entered into by and between the CENTER FOR ADVANCED PUBLIC AWARENESS, INC. (“CAPA”) and E.S.I. STORES, INC. (“ESI”), with ESI and CAPA each individually referred to as a “Party” and collectively as the “Parties.”

#### 1.2 Introduction and General Allegations.

1.2.1 CAPA is a not-for profit corporation duly organized and existing in the State of California, which seeks to promote awareness of exposures to toxic chemicals and to improve human health by reducing or eliminating hazardous substances used in consumer products.

1.2.2 CAPA alleges that ESI employs ten or more persons and is a person in the course of doing business for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, California Health and Safety Code section 25249.6 *et seq.* (“Proposition 65”).

1.2.3 CAPA alleges that ESI imported, sold, and/or distributed for sale in California the Covered Product without provision of a Proposition 65 warning, and that the Covered Product contains Di-(2-ethylhexyl) phthalate (“DEHP”), a chemical known to the State of California to cause cancer and reproductive toxicity. CAPA further alleges that ESI failed to provide the health hazard warning required by Proposition 65 for exposures to DEHP from the Covered Product.

#### 1.3 Product Description.

The products covered by this Settlement Agreement are the Billboard Headphones, which are imported, sold and/or distributed for sale in California by ESI with UPC No. 680988137792 and SKU No. BB779 (“Covered Products”).

#### **1.4 60 Day Notice of Violation and Exchange of Information.**

On January 11, 2018, CAPA served ESI, Marshalls of CA, LLC, TJ Maxx of CA, LLC, and the requisite public enforcement agencies with a 60-Day Notice of Violation (“Notice”), alleging that ESI violated Proposition 65. The Notice alleged that ESI had failed to warn its customers and consumers in California of the health hazards associated with exposures to DEHP from its import, sale and/or distribution of the Covered Products.

CAPA subsequently provided ESI with test results in CAPA’s possession concerning its allegations. ESI provided CAPA with sales data related to the Covered Products. To the best of the Parties’ knowledge, no public enforcer has commenced and is diligently prosecuting the allegations set forth in the Notices.

#### **1.5 No Admission.**

The Parties enter into this Settlement Agreement to settle disputed claims between the Parties as set forth below concerning the Parties’ and the Covered Products’ compliance with Proposition 65 (the “Dispute”). Specifically, CAPA alleges that ESI imported, sold or distributed for sale in the state of California the Covered Product, which contained DEHP without first providing the clear and reasonable exposure warning required by Proposition 65. ESI denies that such a warning is required under Proposition 65 or any otherwise applicable law.

ESI further denies the material, factual, and legal allegations contained in the Notice and maintains that all of the products that it has imported, sold and/or distributed in California, including the Covered 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, conclusion, 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 ESI’s obligations, responsibilities, and duties hereunder. Notwithstanding the allegations in the Notice, ESI maintains that it has not knowingly sold or caused to be sold the Covered Product 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 that the Agreement is fully executed by the Parties.

**2. INJUNCTIVE RELIEF: REFORMULATED PRODUCTS AND WARNINGS**

**2.1 Reformulation Standard.** On or before ninety (90) days from the Effective Date, and continuing thereafter, any Covered Products that ESI imports, manufactures and/or ships to be sold or offered for sale or purchase in or into California, shall be deemed to comply with Proposition 65, and be exempt from any Proposition 65 warning requirements with respect to DEHP, if the Product meets the standard of "Reformulated Products." "Reformulated Products" shall mean Covered Products containing less than or equal to 1,000 parts per million (0.1%) DEHP in each accessible component when analyzed pursuant to Environmental Protection Agency testing methodologies 3580A and 8270C, CPSC-CH-C1001-09.3 or equivalent methodologies utilized by federal or state agencies for the purpose of determining DEHP content in a solid substance ("Reformulation Standard"). With respect to existing Covered Products, meaning those that are currently in the channels of distribution, with distributors, retailers, and/or ESI's storage facilities, ESI may continue to sell-through those items. However, after the ninety (90) day period, no new Covered Products may be distributed by ESI for sale to California that are not Reformulated Products or do not contain the warnings set forth in Paragraph 2.3

2.2 **Warning Option.** Covered Products that do not meet the warning exemption standard set forth in Section 2.1 above shall be accompanied by a warning as described in Section 2.3 below. This warning shall only be required as to Covered Products that are sold or shipped out to consumers, retailers, or distributors after the Effective Date. No Proposition 65 warning for DEHP shall be required as to any Covered Products that are already in the stream of commerce as of the Effective Date.

2.3 **Warning Language.** Commencing ninety (90) days after the Effective Date, ESI shall ensure that any unreformulated Covered Product that it ships to California retailers or for sale in California includes clear and reasonable warning. The warning shall be affixed to the packaging or labeling using language similar to the warnings below:

⚠ **WARNING:** This product can expose you to chemicals including Di-(2-ethylhexyl) phthalate, 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

⚠ **[California Proposition 65] WARNING:** Cancer and Reproductive Harm - [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov).

After the Effective Date, but before August 30, 2018, the following warning, or one that complies with 27 CCR Section 25600, *et. seq.* may be used:

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

The warning shall be prominently displayed 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 the 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 methods of transmission without being deemed in breach of this Agreement.

2.4 **Accessible Component.** The term “Accessible Component” shall mean any component of the Covered Product that could be touched by a person during reasonably foreseeable use.

2.5 **Compliance.** The parties agree that compliance with the terms of this Agreement constitutes compliance with Proposition 65 with regard to the Covered Products.

### 3. **CIVIL PENALTY PURSUANT TO HEALTH & SAFETY CODE § 25249.7(b)**

ESI shall pay a civil penalty of \$2,000, to be apportioned in accordance with California Health & Safety Code §§25249.12(c) & (d), with 75% of these funds remitted to the State of California's Office of Environmental Health Hazard Assessment (“OEHHA”) and the remaining 25% of the penalty remitted to CAPA. ESI shall issue two separate checks or wires for the penalty payment: (a) one check/wire made payable to the Kawahito Law Group in Trust for the State of California's Office of Environmental Health Hazard Assessment (“in Trust for OEHHA”) in the amount of \$1500, representing 75% of the initial civil penalty and (b) one check/wire to “Kawahito Law Group in Trust for Center for Advanced Public Awareness, Inc.,” in the amount of \$500, representing 25% of the initial civil penalty. Two separate 1099s shall be issued for the above payments: The first 1099 shall be issued to OEHHA, P.O. Box 4010, Sacramento, CA 95814 (EIN: 68-0284486). The second 1099 shall be issued to the Kawahito Law Group APC, who shall furnish a W-9 at least five calendar days before payment is due. The payments shall be delivered within fifteen (15) business days from the Effective Date to the following address or wired to the below account:

James Kawahito, Esq.  
Kawahito Law Group APC  
222 N. Sepulveda, Blvd. Suite 2222  
El Segundo, CA 90245

Wire Instructions:

Kawahito Law Group APC  
Client Trust Account  
Account Number: 3250 8882 4857  
Routing Number: 122000661/121000358 (paper/electronic transfer); 026009593  
(wire)  
Bank of America  
4754 Admiralty Way  
Marina Del Rey, CA 90292

#### **4. REIMBURSEMENT OF FEES AND COSTS**

The Parties acknowledge that CAPA and its counsel offered to resolve this dispute without reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving any fee reimbursement issue to be resolved after the material terms of the agreement had been settled. The parties reached an accord on the compensation due to CAPA and its counsel under general contract principles and the private attorney general doctrine codified at California Code of Civil Procedure (CCP) § 1021.5, for all work performed through the mutual execution of this agreement. More specifically, ESI shall pay the total amount of \$16,000 for fees and costs incurred by CAPA as a result of investigating, bringing this matter to the attention of ESI, and negotiating a settlement. Payment shall be made within fifteen (15) business days from the Effective Date to the following address or wired below to the following account.

James Kawahito, Esq.  
Kawahito Law Group APC  
Attn. CAPA v. ESI  
222 North Sepulveda Blvd., Suite 2222  
El Segundo, CA 90245

#### **Wire Instructions:**

Kawahito Law Group APC  
Client Trust Account  
Account Number: 3250 8882 4857  
Routing Number: 122000661/121000358 (paper/electronic transfer); 026009593  
(wire)  
Bank of America  
4754 Admiralty Way  
Marina Del Rey, CA 90292

To allow for the issuance of a timely payment to be rendered pursuant to the above, CAPA shall provide ESI with a completed IRS Form W-9 for the Kawahito Law Group APC at least five calendar days before payment is due.

## 5. RELEASE OF ALL CLAIMS

### 5.1 Full, Final and Binding Resolution of Proposition 65 Allegations.

This Settlement Agreement is a full, final and binding resolution between CAPA, on behalf of itself, its past and current agents, representatives, attorneys, successors and/or assignees, and ESI and the TJX Companies, Inc., of any violation of Proposition 65 that was or could have been asserted by CAPA against ESI and the TJX Companies, Inc., its parents, subsidiaries, affiliated entities that are under common ownership, directors, officers, employees, licensors, licensees, predecessors in interest, retailers, and/or distributors, including but not limited to the TJX Companies, Inc., TJ Maxx of CA, LLC, Marshalls, Inc., and Marshalls of CA, LLC, (“Releasees”), based on their failure to warn about alleged exposures to DEHP contained in the Covered Products that were manufactured, imported, distributed, sold and/or offered for sale by ESI (either directly or through the Releasees) in California before the Effective Date. This release is provided in CAPA’s individual capacity and is not a release on behalf of the public.

Each of the Parties hereto hereby warrants, represents and agrees that it is fully aware of California Civil Code § 1542, 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 of the Parties voluntarily and expressly waives the provisions of California Civil Code § 1542 available based on ESI’s alleged failure to warn about alleged exposures to DEHP contained in the Covered Products. The Parties acknowledge that the effect and import of the provisions of the California Civil Code § 1542 has been explained to each of them by their respective counsels. The Parties further understand that the facts with respect to which the releases contained in this Agreement are given may hereafter prove to be different from those now known or believed by the Parties, and the Parties hereby respectively assume and accept the risk thereof.

In further consideration of the promises and agreements herein contained, CAPA on behalf of itself, its past and current agents, representatives, attorneys, successors and/or assignees, also hereby waives all of its rights to institute or participate in, directly or indirectly, any form of legal action and releases all claims that it or they may have including, without limitation, all actions, and causes of action, in law or in equity, suits, liabilities, demands, obligations, damages, costs, fines, penalties, losses or expenses -- including, but not limited to, investigation fees, expert fees and attorneys' fees -- arising with respect to ESI's compliance with Proposition 65 with respect to the Covered Products before the Effective Date.

#### **5.2 ESI's Release of CAPA.**

ESI on behalf of itself, its past and current agents, representatives, attorneys, successors, and/or assignees, hereby waives any and all claims against CAPA, its attorneys and other representatives, for any and all actions taken or statements made (or those that could have been taken or made) by CAPA and its attorneys and other representatives, whether in the course of investigating claims or otherwise seeking to enforce Proposition 65 against it in this matter with respect to the Covered Products.

#### **5.3 Enforcement of Settlement Agreement.**

Any party may file suit before the Superior Court of the County of Los Angeles to enforce the terms and conditions contained in this Settlement Agreement. The prevailing party shall be entitled to its reasonable attorneys' fees and costs associated with such enforcement.

### **6. SEVERABILITY**

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

### **7. GOVERNING LAW**

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



**8. NOTICE**

Unless specified herein, all correspondence and notice required to be provided pursuant to this Settlement Agreement shall be in writing and sent by: (a) personal delivery; (b) first-class, registered or certified mail, return receipt requested; or (c) a recognized overnight courier on any Party by the other at the following addresses:

For ESI: Carol Brophy  
Steptoe & Johnson, LLP  
One Market Street  
Steuart Tower, Suite 1800  
San Francisco, CA 94105

For CAPA: James K. Kawahito  
Kawahito Law Group APC  
Attn. CAPA v. ESI  
222 North Sepulveda Blvd., Suite 2222  
El Segundo, CA 90245

with a copy to: Center for Advanced Public Awareness, Inc.  
Attn: Linda Droubay  
100 Promenade Circle, Suite 300  
Sacramento, CA 95834

Any Party may, from time to time, specify in writing to the other a change of address to which all notices and other communications shall be sent.

**9. COUNTERPARTS; FACSIMILE SIGNATURES**

This Settlement Agreement may be executed in counterparts and by facsimile or portable document format (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)**

CAPA and his attorneys agree to comply with the reporting form requirements referenced in California Health and Safety Code section 25249.7(f).

**11. MODIFICATION**

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

**12. AUTHORIZATION**


The undersigned are authorized to execute this Settlement Agreement on behalf of their respective Parties and have read, understand, and agreed to all of the terms and conditions of this Settlement Agreement.

**AGREED TO:**

**AGREED TO:**

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

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

By:  \_\_\_\_\_  
Digitally signed by  
Linda DeRose-Droubay  
email= linda@capasafe.com  
Date: 2018.05.24 18:32:22 EDT  
Center for Public Awareness, Inc.

By: \_\_\_\_\_  
E.S.I. Cases and Accessories, Inc.

**12. AUTHORIZATION**

The undersigned are authorized to execute this Settlement Agreement on behalf of their respective Parties and have read, understand, and agreed to all of the terms and conditions of this Settlement Agreement.

**AGREED TO:**

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

By: \_\_\_\_\_  
Center for Public Awareness, Inc.

**AGREED TO:**

Date: 5/29/18 \_\_\_\_\_

By: EA \_\_\_\_\_  
E.S.I. Cases and Accessories, Inc.