

# SETTLEMENT AGREEMENT

BETWEEN

CONSUMER ADVOCACY GROUP, INC.

AND

SUNNY MARKETING SYSTEM, INC.DBA EARTH THERAPEUTICS

Consumer Advocacy Group, Inc. (“CAG”) and Sunny Marketing System, Inc. dba Earth Therapeutics (collectively referred to as “Sunny”), (CAG and Sunny collectively referred to as, the “Parties”) enter into this agreement (“Settlement Agreement”) for the purpose of avoiding prolonged and costly litigation to settle CAG’s allegations that Sunny violated Proposition 65. The effective date of this Settlement Agreement shall be the date upon which it is fully executed by all Parties hereto (the “Effective Date”).

## 1.0 Introduction

1.1 CAG is a California-based entity that seeks to promote awareness of exposures to toxic chemicals and improve human health by reducing or eliminating hazardous substances contained in consumer and industrial products.

1.2 Sunny previously sold, at various times,

(a) Sole Scrubber, including: “EARTH THERAPEUTICS®”, “SOLE SCRUBBER™”, “CLEAN YOUR FEET MASSAGE YOUR SOLE”, “earththerapeutics.com”, “The Sole Scrubber™ has powerful suction cups to keep it firmly in place”, “Earth Therapeutics, Sunny Marketing Systems, Inc. or any of its related subsidiaries, assigns, agents and distributors are not in any way liable for any loss or injury caused in whole or part by negligence in the use of this

product”, “TURE TO LIFE®”, “EARTH THERAPEUTICS, LTD. PO BOX 1009 PLAINVIEW, NY 11803”, UPC: 073377093821; and

(b) Neck Pillow, including “EARTH THERAPEUTICS”, “RELAXING MICROWAVEABLE neck pillow”, “For the HOT and COLD relief of tension and stress”, “V 29345”, “SEA 6 ACC 09 203 20006932 0 1/1”, “S ET40778 C BLUE”, “TRUE TO LIFE”, “EARTH THERAPEUTICS LTD. P.O. BOX 1009 PLAINVIEW, NY 11803”, “PRODUCT OF CHINA”, UPC: 073377407789; (collectively referred to throughout as the “Covered Products”). The Covered Products are with respect to and limited to those sold by Sunny only.

1.3 CAG alleges that Covered Products contain Di (2-ethylhexyl) phthalate (“DEHP”), also known as Bis (2-ethylhexyl) phthalate, and that Sunny did not provide a required warning in compliance with the California Safe Drinking Water and Toxic Enforcement Act (*Cal. Health & Safety Code* § 25249.5, *et seq.* (“Proposition 65”)).

1.4 On January 1, 1988, the Governor of California added DEHP to the list of chemicals known to the State to cause cancer, and on October 24, 2003, the Governor added DEHP to the list of chemicals known to the State to cause developmental male reproductive toxicity. These additions took place more than twenty (20) months before CAG served its “Sixty-Day Notice of Intent To Sue For Violations Of The Safe Drinking Water And Toxic Enforcement Act of 1986” which is further described below.

1.5 DEHP is referred to hereafter as the “Listed Chemical”.

1.6 On or about February 20, 2018 CAG served, Bed Bath & Beyond Inc.; Bed Bath & Beyond of California, LLC; Sunny Marketing System, Inc. dba Earth Therapeutics; Sunny Marketing System, Inc.; Earth Therapeutics, LTD; and Bed Bath & Beyond # 1063; and certain relevant public enforcement agencies with documents entitled “Sixty-Day Notice Of Intent To Sue For Violations Of The Safe Drinking Water And Toxic Enforcement Act of 1986” regarding the Sole Scrubber containing the Listed Chemical.

1.7 On or about and May 7, 2018 CAG served Burlington Coat Factory Warehouse Corporation; Burlington Coat Factory; Burlington Coat Factory Warehouse Corporation; Burlington Coat Burlington Coat Factory; Burlington Coat Factory Investments Holdings, Inc., dba Burlington Coat Factory Direct Corporation; Burlington Stores, Inc.; Burlington Coat Factory Warehouse Corporation; Sunny Marketing System, Inc. dba Earth Therapeutics; Sunny Marketing System, Inc.; Earth Therapeutics, LTD.; and Burlington Store #00316; and certain relevant public enforcement agencies with documents entitled “Sixty-Day Notice Of Intent To Sue For Violations Of The Safe Drinking Water And Toxic Enforcement Act of 1986” regarding the Neck Pillow containing the Listed Chemical.

1.8 The Sixty-Day Notice referred to in paragraphs 1.6 and 1.7 (referred to as “Notices”) alleged that Sunny and the other noticed parties violated Proposition 65 by failing to warn consumers in California that use of Covered Products exposes persons to the Listed Chemicals.

1.9 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").

1.10 By execution of this Settlement Agreement, the Parties do not admit any facts or conclusions of law, including, but not limited to, any facts or conclusions of law regarding any violation of Proposition 65, or any other statutory, regulatory, common law, or equitable doctrine. Nothing in this Settlement Agreement shall be construed as an admission by the Parties of any fact, conclusion of law, issue of law, or violation of law. Nothing in this Settlement Agreement, nor compliance with its terms, shall constitute or be construed, considered, offered, or admitted as evidence of an admission or evidence of fault, wrongdoing, or liability by Sunny, its officers, directors, employees, or parents, subsidiaries or affiliated corporations, in any administrative or judicial proceeding or litigation in any court, agency, or forum. Except for the allegations settled and compromised, nothing in this Settlement Agreement shall prejudice, waive, or impair any right, remedy, argument, or defense that CAG or Sunny may have against one another in any other pending legal proceeding as to allegations unrelated to the Dispute or claims released herein.

## **2.0 Release**

This Settlement Agreement is a full, final, and binding resolution between CAG, acting in its individual capacity, on the one hand, and Sunny, and its owners, parents, subsidiaries, affiliates, sister and related companies, employees,

shareholders, officers, directors, insurers, attorneys, predecessors, successors, and assigns (collectively “Releasees”) and (b) all entities to whom Releasees directly or indirectly provide, distribute, or sell the Covered Products, including but not limited to distributors, wholesalers, customers, retailers, franchisees, cooperative members, and licensees including but not limited to Bed Bath & Beyond Inc.; Bed Bath & Beyond of California, LLC; Bed Bath & Beyond # 1063; Burlington Coat Factory Warehouse Corporation; Burlington Coat Factory; Burlington Coat Factory Warehouse Corporation; Burlington Coat Burlington Coat Factory; Burlington Coat Factory Investments Holdings, Inc., dba Burlington Coat Factory Direct Corporation; Burlington Stores, Inc.; Burlington Coat Factory Warehouse Corporation; and Burlington Store #00316 (collectively “Downstream Releasees”), on the other hand, of any violation(s) or claimed violation(s) of Proposition 65 or any statutory or common law claim that has been, could have been or may in the future be asserted against the Releasees and Downstream Releasees regarding exposing persons to the Listed Chemicals and the failure to warn about exposure to the Listed Chemicals arising only in connection with the Covered Products manufactured, shipped, and/or otherwise distributed prior to the Effective Date, even if sold by Downstream Releasees after the Effective Date. The Covered Products are limited to those sold by Sunny or supplied by Sunny to its Downstream Releasees.

CAG, its past, current and future agents, representatives, attorneys, successors, and/or assignees, hereby waives and releases with respect to the Covered Products

all rights to institute or participate in, directly or indirectly, any form of legal action, 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) (collectively "Claims"), whether known or unknown, suspected or unsuspected, against Releasees and/or Downstream Releasees that arise under Proposition 65 or any other statutory or common law claims that were or could have been asserted in respect of any Covered Products sold up to the Effective Date, only to the extent that such claims relate to Releasees' and/or Downstream Releasees' alleged exposure of persons to the Listed Chemical contained in the Covered Products or any failure by Releasees and Downstream Releasees to warn about exposures to the Listed Chemical contained in the Covered Products.

CAG acknowledges that it is familiar with Section 1542 of 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.

CAG, its past, current and future agents, representatives, attorneys, successors, and/or assignees expressly waives and relinquishes any and all rights and benefits which it may have under, or which may be conferred on it by the provisions of

Civil Code § 1542 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. The release in this section shall have no force or effect until the full amount of payments set forth in Section 4.0 below are paid in full.

### **3.0 Sunny's Duties**

3.1 Sunny agrees, promises, and represents that Sunny shall reformulate any Covered Products manufactured after the Effective Date and offered for sale in California to a point where the level of DEHP in the Covered Products does not exceed 0.1% by weight and

3.2 Sunny agrees, promises, and represents that, as of the Effective Date, to the extent it ships or sells any Covered Products in existing inventory that have not been reformulated, it will provide warnings on such Covered Products that comply with Proposition 65. The warnings shall be provided in such a conspicuously and prominent manner that will assure the message is made available and likely to be read, seen, or heard by the consumer prior to or at the time of the sale or purchase. The Parties agree that product labeling stating that “WARNING: This product contains chemicals known to the State of California to cause cancer and birth defects, or other reproductive harm” shall constitute compliance with Proposition 65 with respect to the Listed Chemical in the Covered Products for any Covered Products in existing inventory that had not

been reformulated and were distributed and/or sold by Releasees or Downstream Releasees after the Effective Date.

#### **4.0 Payments**

4.1 Sunny agrees, to pay a total of Seventy-two thousand dollars (\$72,000) within 10 business days of the Effective Date by separate checks apportioned as follows:

4.1.1 Penalty: Sunny shall issue two separate checks for a total amount of twenty thousand dollars (\$20,000) as follows: (a) one check made payable to the State of California's Office of Environmental Health Hazard Assessment (OEHHA) in the amount of Fifteen thousand dollars, (\$15,000), representing 75% of the total penalty; and (b) one check to Consumer Advocacy Group, Inc. in the amount of five thousand dollars (\$5,000), representing 25% of the total penalty. OEHHA's check shall be delivered to Office of Environmental Health Hazard Assessment P.O. Box 4010 Sacramento, CA 95812-4010, Attn: Mike Gyurics. CAG's check shall be delivered to: Reuben Yeroushalmi, Yeroushalmi & Yeroushalmi, 9100 Wilshire Boulevard, Suite 240W, Beverly Hills, California 90212. Additionally, two separate 1099s shall be issued for the above payments: The first 1099 shall be issued to OEHHA, P.O. Box 4010 Sacramento, CA 95812-4010, Attn: Mike Gyurics (EIN: 68-0284486) in the amount of \$15,000. The second 1099 shall be issued in the amount of \$5,000 to CAG and delivered to Yeroushalmi & Yeroushalmi, 9100 Wilshire



Boulevard, Suite 240W, Beverly Hills, CA 90212 (EIN: 95-4738518).

4.1.2 Attorneys' Fees and Costs: Fifty-Two dollars (\$52,000) of such payment shall be paid to Yeroushalmi & Yeroushalmi, as CAG's attorneys, for reasonable investigation fees and costs, attorneys' fees, and any other costs incurred as a result of investigating and bringing this matter to Sunny's attention. The check shall be delivered to: Reuben Yeroushalmi, Yeroushalmi & Yeroushalmi, 9100 Wilshire Boulevard, Suite 240W, Beverly Hills, California 90212. By the Effective Date, Yeroushalmi & Yeroushalmi shall provide Sunny with its Employer Identification Number.

**5.0 Authority to Enter Into Settlement Agreement**

5.1 CAG represents that its signatory to this Settlement Agreement has full authority to enter into and legally bind CAG to this Settlement Agreement.

5.2 Sunny represents that its signatory to this Settlement Agreement has full authority to enter into and legally bind Sunny to this Settlement Agreement.

**6.0 Report of the Settlement Agreement to the Office of the Attorney General Of California**

6.1 CAG shall report this Settlement Agreement to the Attorney General's Office within five (5) days of the Parties' execution of this Settlement Agreement.

**7.0 Execution in Counterparts and Facsimile**

7.1 This Settlement Agreement may be executed in counterparts, which taken together shall be deemed to constitute the same document. A facsimile or portable document format (PDF) signature shall be as valid as the original.

**8.0 Entire Agreement**

8.1 This Settlement Agreement contains the sole and entire agreement and understanding of the Parties with respect to the entire subject matter hereof, and all related prior discussions, negotiations, commitments, and understandings. No other agreements, oral or otherwise, exist to bind any of the Parties.

**9.0 Modification of Settlement Agreement**

9.1 Any modification to this Settlement Agreement shall be in writing and signed by the Parties.

**10.0 Application of Settlement Agreement**

10.1 This Settlement Agreement shall apply to, be binding upon, and inure to the benefit of, CAG and the Releasees and Downstream Releasees identified in Section 2 above.

**11.0 Enforcement of Settlement Agreement**

11.1 Any party may file suit before the Superior Court of the County of Los Angeles, consistent with the terms and conditions set forth in paragraphs 11.2 and 11.3 of this Settlement Agreement, 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.

11.2 No action to enforce this Settlement Agreement may be commenced or maintained, and no notice of violation related to the Covered Products may be served or filed against Sunny by CAG, unless the party seeking enforcement or alleging violation notifies the other party of the specific acts alleged to breach this Settlement Agreement at least 60 days before serving or filing any action or Notice of Violation and the entity receiving the notice fails to comply with the requirements set forth in Section 11.3 below. Any notice to Sunny must contain (a) the name of the product, (b) specific dates when the product was sold after the Effective Date in California without reformulation or warning on existing inventory pursuant to Section 3.2, (c) the store or other place at which the product was available for sale to consumers, and (d) any other evidence or other support for the allegations in the notice.

11.3 Within 30 days of receiving the notice described in Section 11.2, Sunny shall either (1) send the store or other place at which the product was available for sale to the public a letter directing that the offending product be immediately removed from inventory and returned to Sunny for full credit, including shipping costs, or (2) refute the information provided under Section 11.2. Should the parties be unable to resolve the dispute, any party may seek relief under Section 11.1.

**12.0 Notification Requirements**

12.1 Any notice required or permitted hereunder shall be effective only if given in writing and delivered in person, certified or registered mail return receipt requested, or traceable overnight delivery service, to the following designees:

For CAG:

Reuben Yeroushalmi, Esq.  
YEROUSHALMI & YEROUSHALMI  
9100 Wilshire Boulevard, Suite 240W  
Beverly Hills, CA 90212

For Sunny:

Christine M. Wallace, Esq.  
LAW OFFICES OF ANTHONY S. CANNATELLA  
53 Orchard Street  
Manhasset, NY 11030

Any party may change its designee(s) for purposes of notification by providing written notice of such change pursuant to this section.

**13.0 SEVERABILITY**

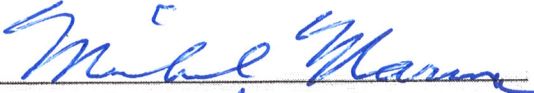
13.1 If, subsequent to the execution of this Settlement Agreement, any of the provisions of this Settlement Agreement are held by a court to be unenforceable, the validity of the enforceable provisions remaining shall not be adversely affected.

**14.0 GOVERNING LAW**

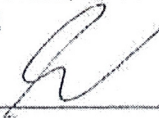
14.1 The terms of this Settlement Agreement shall be governed by the laws of the State of California and apply within the State of California. In the event that

Proposition 65 is repealed, preempted or is otherwise rendered inapplicable by reason of law generally, or as to the Listed Chemical and/or the Covered Products, then Sunny shall provide written notice to CAG 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, the Covered Products are so affected.

CONSUMER ADVOCACY GROUP, INC.

Dated: 08/22/18 By:   
Printed Name: Michael Marcus  
Title: Director

SUNNY MARKETING SYSTEM, INC. DBA EARTH THERAPEUTICS

Dated: 8/23/2018 By:   
Printed Name: John Kang  
Title: President