

SETTLEMENT AGREEMENT

1. INTRODUCTION

1.1 The Parties. This Settlement Agreement is entered into by and between Hector Velarde (“Velarde”) individually, and as administrator of the Estate of Karen Charlene Calacin, and ESI Cases and Accessories, Inc. (“ESI”). Together, Velarde and ESI are collectively referred to as the “Parties.” Velarde is an individual that 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. ESI is alleged to be 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”).

On or about June 8, 2018, the Superior Court for the County of Los Angeles appointed Velarde as the administrator of the Estate of Karen Charlene Calacin, who passed away on March 1, 2018.

1.2 General Allegations. Velarde alleges that ESI has imported, distributed and/or sold in the State of California Everlast bike frame pouches and Wireless Gear waterproof bags that contain di(2-ethylhexyl) phthalate (DEHP) without providing a requisite Proposition exposure 65 warning. On January 1, 1988, the State of California listed DEHP as a chemical known to the State to cause cancer. On October 24, 2003, the State of California listed DEHP as a chemical known to cause reproductive toxicity.

1.3 Product Description. The products covered by this Settlement Agreement are (a) Everlast bike frame pouches, and (b) Wireless Gear waterproof bags, Model G0364 (the “Covered Products”) that have been imported, distributed, offered for sale and/or sold in California by ESI.

1.4 Notice of Violation. On January 11, 2018, and on March 9, 2018, Calacin and Velarde, respectively, served ESI, Kmart Corp. (“Kmart”), The Office Club, Inc., OfficeMax Inc., OMX, Inc., Everlast World’s Boxing Headquarters Corp. (“Everlast”), and various public enforcement agencies with a document entitled “Notice of Violation of California Health & Safety Code § 25249.5, et seq.” (the “Notices”). The Notices provided ESI and such others, including

public enforcers, with notice that alleged that ESI was in violation of California Health & Safety Code § 25249.5, for failing to warn consumers and customers that the Covered Products exposed users in California to DEHP. No public enforcer has diligently prosecuted the allegations set forth in the Notices.

1.5 No Admission. ESI denies the material factual and legal allegations contained in the Notices and maintains that, to the best of its knowledge, all products that are or have been sold and 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, 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, Section 1.5 shall not diminish or otherwise affect the obligations, responsibilities and duties under this Settlement Agreement. Notwithstanding the allegations in the Notices, ESI 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 Reformulation of Covered Products. As of the date this Settlement Agreement is signed by both Parties, and continuing thereafter, Covered Products that ESI directly manufactures, imports, distributes, sells, or offers for sale in California shall either: (a) be Reformulated Products pursuant to § 2.2, below; or (b) be labeled with a clear and reasonable exposure warning pursuant to §§ 2.3 and 2.4, below. For purposes of this Settlement Agreement, a “Reformulated Product” is a Covered Product that is in compliance with the standard set forth in § 2.2 below. The warning requirement set forth in §§ 2.3 and 2.4 shall not apply to any Reformulated Product.

2.2 Reformulation Standard. “Reformulated Products” shall mean Covered Products that contain concentrations less than or equal to 0.1% (1,000 parts per million (ppm) of DEHP when


analyzed pursuant to U.S. Environmental Protection Agency testing methodologies 3580A and 8270C or other methodologies utilized by federal or state government agencies for the purpose of determining the phthalate content in a solid substance.

2.3 **Clear and Reasonable Warning.** As of the date this Settlement Agreement is signed by both Parties, and continuing thereafter, a clear and reasonable exposure warning as set forth in this §§ 2.3 and 2.4 must be provided for all Covered Products that ESI manufactures, imports, distributes, sells, or offers for sale in California that is not a Reformulated Product. There shall be no obligation for ESI to provide a warning for Covered Products that enter the stream of commerce prior to the date this Settlement Agreement is signed by both Parties. The warning shall consist of either the **Warning** or **Alternative Warning** described in §§ 2.3(a) or (b), respectively:

(a) **Warning.** The “Warning” shall consist of the statement:

 **WARNING:** This product can expose you to chemicals including di(2-ethylhexyl) phthalate (DEHP), 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.

(b) **Alternative Warning:** ESI may, but is not required to, use the alternative short-form warning as set forth in this § 3.3(b) (“**Alternative Warning**”) as follows:

 **WARNING:** Cancer and Reproductive Harm - www.P65Warnings.ca.gov.

2.4 A **Warning** or **Alternative Warning** provided pursuant to § 2.3 must print the word “**WARNING:**” in all capital letters and in bold font, followed by a colon. The warning symbol to the left of the word “**WARNING:**” must be a black exclamation point in a yellow equilateral triangle with a black outline, provided however, the symbol may be printed in black and white if the Covered Product’s labels is not printed against a yellow background. The symbol must be in a size no smaller than the height of the word “**WARNING:**”. The warning shall be affixed to or printed on the Covered 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.

2.5 Compliance with Warning Regulations. ESI shall be deemed to be in compliance with this Settlement Agreement by either adhering to §§ 2.3 and 2.4 of this Settlement Agreement or by complying with warning requirements adopted by OEHHHA after the Effective Date.

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

In settlement of all the claims referred to in this Settlement Agreement, ESI shall pay \$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 (“OEHHHA”) and the remaining 25% of the penalty remitted to Velarde. The Civil Penalty payment(s) shall be delivered to the addresses identified in Paragraph 3.2, below.

3.1 Civil Penalty. Within ten (10) business days of the Effective Date, ESI shall issue two separate checks for the Civil Penalty payment to (a) “OEHHHA” in the amount of \$750.00; and to (b) “Brodsky & Smith, LLC in Trust for Velarde” in the amount of \$250.00. The Civil Penalty payment(s) 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 Velarde, 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 OEHHHA (EIN: 68-0284486), pursuant to Paragraph 3.1 shall be delivered directly to OEHHHA (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 Payment to OEHHA.** ESI agrees to provide Velarde's counsel with a copy of the check payable to OEHHA, simultaneous with its penalty payments to Velarde, to be delivered to the address provided in Paragraph 3.2(a)(i), as proof of payment to OEHHA.

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

(i) "Hector Velarde" 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 Velarde 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

Velarde 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, ESI shall reimburse Velarde's counsel for fees and costs incurred as a result of investigating and bringing this matter to ESI attention, and negotiating a settlement in the public interest. Within ten (10) business days of the Effective Date, ESI shall issue a check payable to "Brodsky & Smith, LLC" in the amount of \$10,000.00 for delivery to the address identified in Paragraph 3.2(a)(i), above.

5. RELEASE OF ALL CLAIMS

5.1 Release of ESI and Downstream Customers and Entities. This Settlement Agreement is a full, final and binding resolution between Velarde, acting on his own behalf, and ESI, of any violation of Proposition 65 that was or could have been asserted by Velarde 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 DEHP contained in the Covered Products, and Releasers hereby release any such claims against ESI and its parents, subsidiaries, affiliated entities, shareholders, marketplaces, directors, officers, agents, employees, attorneys, successors and assignees, and each entity to whom ESI directly or indirectly distributes or sells the Covered Products, including but not limited to Kmart, Everlast, OMX, Inc., The Office Club, Inc., OfficeMax, Inc., and each of their respective subsidiaries, affiliates and parents, franchisees, cooperative members and licensees, (collectively, the "Releasees"), from all claims for violations of Proposition 65 through the Effective Date based on their failure to warn about alleged exposures to the chemical DEHP that is contained in the Covered Products, and were manufactured, distributed, sold and/or offered for sale by ESI 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, Velarde, 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 DEHP in the Products.

5.2 ESI's Release of Velarde. ESI, on behalf of itself, its past and current agents, representatives, attorneys, successors and/or assignees, hereby waives any and all claims against Velarde, his attorneys and other representatives, for any and all actions taken or statements made (or those that could have been taken or made) by Velarde and/or his 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 Notices and relating to the Covered Products will develop or be discovered. Velarde on behalf of himself only, on one hand, and ESI, 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.

Velarde and ESI 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 ESI with this Settlement Agreement constitutes compliance with Proposition 65 with respect to exposures to DEHP in the Covered Products.

5.5. Public Benefit. It is ESI's understanding that the commitments it has agreed to herein, and actions to be taken by ESI 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 ESI that to the extent any other private party initiates an action alleging a violation of Proposition 65 with respect to ESI for failure to provide a warning concerning exposure to DEHP with respect to the Covered 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 Covered Products addressed in this Settlement Agreement, provided that ESI 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 Covered Products, ESI shall provide written notice to Velarde 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 ESI:

Carol Brophy
Steptoe & Johnson, LLP
Steuart Tower, 1 Market Street, #1800
San Francisco, CA 94105

For Velarde:

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)

Velarde 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: 8/2/18

Date: _____

By: H T Velarde

By: _____

Hector Velarde, Individually and
as Administrator of the Estate
of Karen Charlene Calacin

ESI Cases & Accessories, Inc.

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:

Date: _____

By: _____
Hector Velarde, Individually and
as Administrator of the Estate
of Karen Charlene Calacin

AGREED TO:

Date: 8/13/18

By: 
ESI Cases & Accessories, Inc.