

## 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 Heys America, Ltd. (“Heys America”). Together, Velarde and Heys America are collectively referred to as the “Parties.” Velarde is an individual who reside 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.

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 Heys America 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”), and further alleges that Heys America has imported, distributed and/or sold in the State of California Marvel Comics Travel Accessories Passport Cases & Luggage Tags that contain Di(2-ethylhexyl) phthalate (DEHP) without first providing a Proposition 65 exposure 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 Marvel Comics Travel Accessories Passport Cases & Luggage Tags (the “Product” or “Products”) that have been imported, distributed, offered for sale and/or sold in California by Heys America.

**1.4 Notices of Violation.** On August 18, 2017, and on March 14, 2018, Karen Calacin and Velarde, respectively, each served Heys America, Stein Mart, Inc. (“Stein Mart”), and various public enforcement agencies with documents entitled “Notice of Violation of California Health & Safety Code § 25249.5, et seq.” (the “Notices”). The Notices provided Heys America and such others, including public enforcers, with notice that Heys America 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 DEHP. No public enforcer has diligently prosecuted the allegations set forth in the Notices.

**1.5 No Admission.** Heys America 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 Products, have been and are in compliance with all laws. Nothing in this Settlement Agreement shall be construed as an admission by Heys America 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 Heys America of any fact, finding, conclusion, issue of law or violation of law, such being specifically denied by Heys America. 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, Heys America 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, Heys America shall not manufacture or order from any supplier any Products intended for retail sale in California that contains DEHP on any component to which consumers are exposed in excess of 0.1% (1,000 ppm) (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 sold by Heys America 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 cancer and 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 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](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 “Cancer and 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 Section 2.1(b) shall be used.

**2.2** The warning provided pursuant to Section 2.1 shall be affixed to or printed on the Products’ 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 claims referred to in this Settlement Agreement, Heys America 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 (“OEHHA”) and the remaining 25% of the penalty remitted to Velarde. The Civil Penalty payment(s) shall be delivered to the addresses identified in Section 3.2, below.

**3.1 Civil Penalty.** Within ten (10) days of the Effective Date, Heys America shall issue two separate checks for the Civil Penalty payment to (a) “OEHHA” in the amount of \$750.00; and to

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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.

(b) "Brodsky & Smith, LLC in Trust for Velarde" in the amount of \$250.00. The Civil Penalty payments shall be delivered to the addresses identified in Section 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 Section 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 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.** Heys America agrees to provide Velarde's counsel with a copy of the checks payable to OEHHA, simultaneous with its penalty payments to Velarde, to be delivered to the address provided in Section 3.2(a)(i), as proof of payment to OEHHA.

(c) **Tax Documentation.** Heys America 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 Section 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, Heys America shall reimburse Velarde’s counsel for fees and costs incurred as a result of investigating and bringing this matter to Heys America’ attention, and negotiating a settlement in the public interest. Within ten (10) days of the Effective Date, Heys America shall issue a check payable to “Brodsky & Smith, LLC” in the amount of \$16,500.00 for delivery to the address identified in Section 3.2(a)(i), above.

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

**5.1 Release of Heys America and Downstream Customers and Entities.** This Settlement Agreement is a full, final and binding resolution between Velarde acting individually, on his own behalf, and on behalf of the Estate of Karen Charlene Calacin, and Heys America, 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 Products, and Releasers hereby release any such claims against Heys America and its parents, subsidiaries, affiliated entities, shareholders, marketplaces, directors, officers, agents, employees, attorneys, successors and

assignees, and each entity to whom Heys America directly or indirectly distributes or sells the Products, including but not limited to, downstream distributors, wholesalers, customers, retailers, including but not limited to Stein Mart, and its 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, or within ninety (90) days after the Effective Date, based on their failure to warn about alleged exposures to DEHP from use of the Products manufactured, distributed, sold and/or offered for sale by Heys America 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, individually and on behalf of the Estate of Karen Charlene Calacin, and on behalf of his and the Estate's past and current agents, representatives, attorneys, successors and/or assignees, hereby covenant not to sue and waive any right to institute, participate in, directly or indirectly, any form of legal action and release all claims that they 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 Heys America's Release of Velarde and Calacin.** Heys America, on behalf of itself, its past and current agents, representatives, attorneys, successors and/or assignees, hereby waives any and all claims against Velarde and the Estate of Karen Charlene Calacin, their attorneys and other representatives, for any and all actions taken or statements made (or those that could have been taken or made) by Velarde, Karen Calacin, and/or the Estate of Karen Charlene Calacin, and or their 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 Products will develop or be

discovered. The Parties acknowledge that this Agreement is expressly intended to cover and include all such claims up through the Effective Date or within 90 days after 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 § 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 Heys America 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 Heys America with this Settlement Agreement constitutes compliance with Proposition 65 with respect to exposures to DEHP in the Products.

**5.5. Public Benefit.** It is Heys America's and Velarde's understanding that the commitments they have agreed to herein, and actions to be taken by Heys America 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 Heys America and Velarde that to the extent any other private party initiates an action alleging a violation of Proposition 65 with respect to Heys America's failure to provide a warning concerning exposure to DEHP from use of 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 Heys America 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, Heys America 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 Heys America:

Bruce Nye, Attorney of Counsel  
**Scali Rasmussen**  
1901 Harrison Street, 14th Floor  
Oakland, CA 94612

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:**

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Date: 7/25/18

Date: 8/29/2018

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

By: Anne Comar  
Heys America, Ltd.