

## SETTLEMENT AGREEMENT

### 1. INTRODUCTION

**1.1 The Parties.** This Settlement Agreement is entered into by and between Anthony Ferreiro ("Ferreiro"), Precila Balabbo ("Balabbo") (collectively, "Citizen Enforcers"), and Bed Bath & Beyond, Inc. ("BB&B"). Together, Ferreiro, Balabbo and BB&B are collectively referred to as the "Parties." Ferreiro and Balabbo is each an individual that resides in the State of California, and who seeks to promote awareness of exposures to toxic chemicals and to improve human health by reducing or eliminating hazardous substances contained in consumer products. Citizen Enforcers allege that BB&B 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.** Citizen Enforcers allege that BB&B has, without providing a requisite Proposition 65 exposure warning, imported, distributed and/or sold in the State of California (a) AirQuart travel bags, and (b) Real Simple sewing kits that contain di(2-ethylhexyl) phthalate (DEHP), and (c) Laminet furniture coverings/protectors that contain diisononyl phthalate (DINP). DEHP and DINP are chemicals known to the State to cause cancer, and DEHP is also know to the State as a reproductive toxin.

**1.3 Product Description.** The products covered by this Settlement Agreement are (a) AirQuart travel bags, (b) Real Simple sewing kits, and (c) Laminet furniture coverings/protectors (the "Products") that have been imported, distributed, offered for sale and/or sold in California by BB&B.

**1.4 Notices of Violation.** On October 17, 2017, January 19, 2018, and April 11, 2018, Ferreiro and Balabbo, caused to be served on BB&B and various public enforcement agencies documents entitled "Notice of Violation of California Health & Safety Code § 25249.5, et seq." (collectively, the "Notices"). The Notices provided BB&B and such others, including public enforcers, with notice that alleged that BB&B 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 and/or DINP. To the best of the Parties' knowledge, no public enforcer has diligently

prosecuted the allegations set forth in the Notices. The Notice period in each case has been extended by mutual agreement of the Parties during settlement negotiations.

**1.5 No Admission.** BB&B denies the material factual and legal allegations contained in the Notices and maintains that, to the best of its knowledge, all products that are being or have been sold and distributed by BB&B in California, including the Products, have been and are in compliance with Proposition 65 or any other statutory, regulatory, common law or equitable doctrine. Nothing in this Settlement Agreement shall be construed as an admission by BB&B 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 BB&B of any fact, finding, conclusion, issue of law or violation of law, such being specifically denied by BB&B. Nothing in this Settlement Agreement, nor compliance with its terms, shall constitute or be construed, considered, offered, or admitted as evidence of an admission against interest or evidence of fault, wrongdoing, or liability by BB&B, its officers, directors, employees, or parents, subsidiaries, or affiliated corporations, or any person acting for BB&B, or any direct or indirect customer of BB&B who sold or sells the Products, in any administrative or judicial proceeding or litigation in any court, agency, or forum. However, this § 1.5 shall not diminish or otherwise affect the obligations, responsibilities and duties under this Settlement Agreement. Notwithstanding the allegations in the Notices, BB&B maintains that it has not knowingly distributed, or caused to be distributed, 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 Products.** As of the Effective Date, and continuing thereafter, Products that BB&B directly 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 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. Products sold by BB&B before the Effective Date may sell through without a warning even if they contain DEHP and/or DINP in excess of 0.1% (1,000 ppm).

**2.2 Reformulation Standard.** “Reformulated Products” shall mean Products that contain concentrations less than or equal to 0.1% (1,000 parts per million (ppm)) of DEHP and/or DINP when analyzed pursuant to U.S. Environmental Protection Agency testing methodologies 3580A and 8270C or other methodology 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 Effective Date, and continuing thereafter, a clear and reasonable exposure warning as set forth in this §§ 2.3 and 2.4 must be provided for all Products that BB&B imports, distributes, sells, or offers for sale in California that is not a Reformulated Product. There shall be no obligation for BB&B to provide an exposure warning for Products that entered the stream of commerce prior to the Effective Date. The warning shall consist of either the **Warning** or **Alternative Warning** described in §§ 2.3(a), (b), or (c) respectively:

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

**⚠ WARNING:** This product can expose you to chemicals including [name of chemical], which is known to the State of California to cause cancer [and birth defects or other reproductive harm]<sup>1</sup>. For more information go to [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov).

(b) **Alternative Warning:** BB&B may, but is not required to, use the alternative short-form warning as set forth in this § 2.3(b) (“**Alternative Warning**”) as follows:

**⚠ WARNING:** Cancer [and Reproductive Harm]<sup>2</sup> - [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov).

(c) Any warning that substantially and materially complies with the requirements of Proposition 65, including 27CCR, Section 25600 *et seq* as may be amended.

**2.4 A Warning or Alternative Warning** provided pursuant to § 2.3 (a) or (b) 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 triangle

<sup>1</sup> For Products that expose persons to DEHP.

<sup>2</sup> For Products that expose persons to DEHP.

with a black outline, except that if the sign or label for the Products does not use the color yellow, the symbol may be in black and white. 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 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.

**2.5 Compliance with Warning Regulations.** BB&B 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 the State of California's Office of Environmental Health Hazard Assessment ("OEHHA") after the Effective Date. In the event that OEHHA promulgates one or more regulations requiring or permitting warning text and/or methods of transmission different than those set forth above, BB&B shall be entitled to use, at its discretion, such other warning text and/or methods of transmission without being deemed in breach of this Settlement Agreement. If modifications or amendments to Proposition 65 or its regulations after the Effective Date are inconsistent with, or provide warning specifications or options different from, the specifications in this Settlement Agreement, BB&B may modify the content and delivery methods of its warnings to conform to the modified or amended provisions of Proposition 65 or its regulations. If Proposition 65 warnings for DEHP and/or DINP should no longer be required, BB&B shall not have any further obligations pursuant to this Settlement Agreement.

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

In settlement of all the claims referred to in this Settlement Agreement, BB&B 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 Penalty remitted to OEHHA and the remaining 25% of the Penalty remitted to Citizen

Enforcers. The Civil Penalty payment(s) shall be delivered to the addresses identified in § 3.2, below. For all amounts due and owing that are not received within the payment times set forth below, BB&B shall pay a late civil penalty payment fee equal to \$100/day to be allocated in accordance with California Health & Safety Code §§ 25249.12(c)(1) and (d).

**3.1 Civil Penalty.** Within ten (10) business days of its receipt of the W-9 forms set forth in Section 3.2 (c), BB&B shall issue three (3) separate checks for the Civil Penalty payment to (a) "OEHHA" in the amount of \$750.00; (b) "Brodsky & Smith, LLC in Trust for Anthony Ferreiro" in the amount of \$125.00, and (c) "Brodsky & Smith, LLC in Trust for Precila Balabbo" in the amount of \$125.00. The Civil Penalty payments shall be delivered to the addresses identified in § 3.2, below.

**3.2 Payment Procedures.**

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

(i) All payments owed to Citizen Enforcers, pursuant to § 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 § 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.** BB&B agrees to provide Citizen Enforcers' counsel with a copy of the checks payable to OEHHA, simultaneous with its penalty payments to Citizen Enforcers, to be delivered to the address provided in § 3.2(a)(i), as proof of payment to OEHHA.

(c) **Tax Documentation.** BB&B agrees to provide a completed IRS 1099 for its payments, and Brodsky & Smith 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) "Precila Balabbo" whose address and tax identification number shall be provided within five (5) days after this Settlement Agreement is fully executed by the Parties;

(iii) "Brodsky & Smith, LLC" (EIN: 23-2971061) at the address provided in § 3.2(a)(i); and

(iv) "Office of Environmental Health Hazard Assessment" 1001 I Street, Sacramento, CA 95814.

#### 4. REIMBURSEMENT OF FEES AND COSTS

The Parties acknowledge that the Citizen Enforcers and their 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 Citizen Enforcers and their 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, BB&B shall reimburse Citizen Enforcers' counsel for fees and costs incurred as a result of investigating and bringing this matter to BB&B's attention, and negotiating a settlement in the public interest. Within ten (10) business days of receipt of the tax forms set forth in Section 3.2 (c), BB&B shall issue a check

payable to "Brodsky & Smith, LLC" in the amount of \$14,000.00 for delivery to the address identified in § 3.2(a)(i), above.

5. **RELEASE OF ALL CLAIMS**

**5.1 Release of BB&B, Laminet, Allary and Flanabags and Downstream Customers and Entities.** This Settlement Agreement is a full, final and binding resolution between Citizen Enforcers, each acting on their own behalf, and BB&B, of any violation of Proposition 65 that was or could have been asserted by Citizen Enforcers or on behalf of their past and current agents, representatives, attorneys, successors, and/or assigns ("Releasers") for failure to provide warnings for alleged exposures to DEHP or DINP contained in the Products. Without limiting the generality of the foregoing, Releasers hereby release any such claims against BB&B and its parents, subsidiaries, affiliated entities, shareholders, marketplaces, directors, officers, agents, employees, attorneys, successors and assignees, and each entity from whom BBB purchased the Products, including but not limited to Laminet Cover Company, Flanabags, LLC, Allary Corporation, Time Inc., and each of their respective subsidiaries, affiliates and parents, sister entities (collectively "Upstream Releasees"); and each entity to whom BB&B directly or indirectly distributes or sells the Products, including but not limited to, downstream distributors, wholesalers, customers, retailers, licensors, licensees, auctioneers, franchisees, dealers, shareholders, cooperative members, purchasers, users, officers, directors, attorneys, representatives, shareholders, agents, and employees (collectively, the "Downstream Releasees" and together with BBB and Upstream Releasees, "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 and/or DINP. The release to Upstream Releasees shall be limited to Products sold to BBB as of the Effective Date.

In further consideration of the promises and agreements herein contained, and for the payments to be made pursuant to §§ 3 and 4 above, Citizen Enforcers, each on behalf of themselves, their 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 she may have, including without limitation, all actions and causes of action in

law and in equity, all suits, claims, obligations, costs, fines, penalties, 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, fixed or contingent, limited to and arising out of the alleged or actual exposure to the chemical DEHP and/or DINP in the Products, including any and all claims arising under Proposition 65, or any other statutory or common law claims that were or could have been asserted in respect of any Products sold up to the Effective Date, including without limitation to the extent that such claims relate to BB&B and/or Releasee's alleged or actual failure to warn about exposures to DEHP or DINP in the Products allegedly sold, or distributed for sale before the Effective Date by BB&B or Releasees. Citizen Enforcers, each on behalf of themselves, their past and current agents, representatives, attorneys, successors, and/or assignees, provides a general release herein which shall be effective as a full and final accord and satisfaction, as a bar to all actions, causes of action, obligations, costs, expenses, attorneys' fees, damages, losses, claims, liabilities and demands of any nature, character or kind, known or unknown, suspected or unsuspected, against BB&B and the Releasees.

**5.2 BB&B's Release of Citizen Enforcers.** BB&B, on behalf of itself, its past and current agents, representatives, attorneys, successors and/or assignees, hereby waives any and all claims against Citizen Enforcers, their attorneys and other representatives, for any and all actions taken or statements made (or those that could have been taken or made) by Citizen Enforcers 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 Notice and relating to the Products will develop or be discovered. Citizen Enforcers each on behalf of herself only, on one hand, and BB&B, 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 §§ 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.

Citizen Enforcers and BB&B 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 BB&B with this Settlement Agreement constitutes compliance with Proposition 65 with respect to exposures to DEHP and/or DINP in the Products.

**5.5. Public Benefit.** It is BB&B's understanding that the commitments it has agreed to herein, and actions to be taken by BB&B 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 BB&B that to the extent any other private party initiates an action alleging a violation of Proposition 65 with respect to BB&B's failure (or failure of any Releasee) to provide a warning concerning exposure to DEHP or DINP with respect to the Products it has distributed, sold, or offered for sale in California, or will 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 BB&B 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, BB&B shall have no further obligations pursuant to this Settlement Agreement with respect to, and to the extent that, a Product is so affected. This Settlement Agreement shall have no application to Products which are not sold to California consumers.

**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 BB&B:

Kenneth O. Bradley, Esq.  
Vice President - Litigation  
Bed Bath & Beyond Inc.  
650 Liberty Ave.  
Union NJ 07083

For Citizen Enforcers:

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(D)**

Citizen Enforcers agree 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.

13. **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: 4/10/19

Date: 4-9-19

By: Anthony Ferreira  
Anthony Ferreira

By: Precila Balabbo  
Precila Balabbo

**AGREED TO:**

**AGREED TO:**

Date: April 4, 2019

By: William David  
Bed Bath & Beyond Inc.

*WB*