

## SETTLEMENT AGREEMENT

### 1. INTRODUCTION

**1.1 The Parties.** This Settlement Agreement is entered into by and between Ema Bell (“Bell”) and Brooklyn Lollipops Import Corp. (“Brooklyn Lollipops”). Together, Bell and Brooklyn Lollipops are collectively referred to as the “Parties.” Bell 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. Bell alleges that Brooklyn Lollipops 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.** Bell alleges that Brooklyn Lollipops has exposed individuals to the chemical Di(2-ethylhexyl) phthalate (DEHP) from its sales of 90 Piece Blocks Play and Learn Sets without first providing users and consumers of the product with a clear and reasonable health hazard exposure warnings as is required under Proposition 65. DEHP is listed under Proposition 65 as a chemical known to the State of California to cause cancer and reproductive toxicity.

**1.3 Product Description.** The products covered by this Settlement Agreement are PVC/vinyl tote cases that contain DEHP, including but not limited to the 90 Piece Blocks Play and Learn Sets (the “Products”) that have been imported, distributed, offered for sale and/or sold in California by Brooklyn Lollipops.

**1.4 Notice of Violation.** On April 23, 2018, Bell served Brooklyn Lollipops and Tuesday Morning Corporation (“Tuesday Morning”), and various public enforcement agencies with a document entitled “Notice of Violation of California Health & Safety Code § 25249.6, et seq.” (the “Notice”). The Notice provided Brooklyn Lollipops and such others, including public enforcers, with notice that alleged that Brooklyn Lollipops was in violation of California Health & Safety Code § 25249.6, for failing to warn California consumers and customers that use of the Products will expose them to DEHP. No public enforcer has diligently prosecuted the allegations set forth in the Notice.

**1.5 No Admission.** Brooklyn Lollipops denies the material factual and legal allegations contained in the Notice 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 Brooklyn Lollipops 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 Brooklyn Lollipops of any fact, finding, conclusion, issue of law or violation of law, such being specifically denied by Brooklyn Lollipops. However, this Section 1.5 shall not diminish or otherwise affect the obligations, responsibilities and duties under this Settlement Agreement. Notwithstanding the allegations in the Notice, Brooklyn Lollipops 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 Settlement Agreement is last executed by the Parties.

## **2. INJUNCTIVE RELIEF**

**2.1** Commencing ninety (90) days after the Effective Date, and continuing thereafter, Brooklyn Lollipops 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. Brooklyn Lollipops may rely upon its suppliers' test results in order to determine whether the Products are Reformulated Products.

**2.2** Products manufactured by Brooklyn Lollipops before the Effective Date may sell through without a warning even if not Reformulated Products. The warning shall consist of:

- (a) (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>

2.3 The warning provided pursuant to Section 2.2 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.

2.4 In lieu of the preceding warning content and methods set forth above, Brooklyn Lollipops may use any warning content and method that complies with Title 27, California Code of Regulations, section 25600 et seq., as amended August 30, 2016 and subsequently thereafter.

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

In settlement of all the claims referred to in this Settlement Agreement, Brooklyn Lollipops shall pay a total of \$2,000.00 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 Bell. The Civil Penalty payment(s) shall be delivered to the addresses identified in § 3.2, below.

3.1 **Civil Penalty.** Within ten (10) business days of the Effective Date, Brooklyn Lollipops shall issue two separate checks for the Civil Penalty payment to (a) “OEHHA” in the amount of \$1,500.00; and to (b) “Brodsky & Smith, LLC in Trust for Bell” in the amount of \$500.00. The Civil Penalty payment(s) shall be delivered to the addresses identified in § 3.2, below.

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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.

**3.2 Payment Procedures.**

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

(i) All payments owed to Bell, 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.** Brooklyn Lollipops agrees to provide Bell's counsel with a copy of the checks payable to OEHHA, simultaneous with its penalty payments to Bell, to be delivered to the address provided in Section 3.2(a)(i), as proof of payment to OEHHA.

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

(i) “Ema Bell” 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 Bell and her 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 Bell and her 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, Brooklyn Lollipops shall reimburse Bell’s counsel \$16,000.00 for fees and costs incurred as a result of investigating and bringing this matter to Brooklyn Lollipops’ attention, and negotiating a settlement in the public interest. The fees and costs shall be paid in five (5) equal monthly payments of \$3,200.00 on or before the 5<sup>th</sup> day of the month starting January 5, 2019. For each payment Brooklyn Lollipops shall issue a check payable to “Brodsky & Smith, LLC” for delivery to the address identified in § 3.2(a)(i), above.

**5. RELEASE OF ALL CLAIMS**

**5.1 Release of Brooklyn Lollipops and Downstream Customers and Entities.** This Settlement Agreement is a full, final and binding resolution between Bell, acting on her own behalf, and Brooklyn Lollipops, of any violation of Proposition 65 that was or could have been asserted by Bell or on behalf of her 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 Brooklyn Lollipops and its parents, subsidiaries, affiliated entities, shareholders, marketplaces, directors, officers, agents, employees,

attorneys, successors and assignees, and each entity to whom Brooklyn Lollipops directly or indirectly distributes or sells the Products, including but not limited to, downstream distributors, wholesalers, customers, retailers, including but not limited to Tuesday Morning Corporation 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 exposure to the chemical DEHP that is allegedly contained in the Products.

In further consideration of the promises and agreements herein contained, and for the payments to be made pursuant to §§ 3 and 4 above, Bell, on behalf of herself, her 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 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 Brooklyn Lollipops' Release of Bell.** Brooklyn Lollipops, on behalf of itself, its past and current agents, representatives, attorneys, successors and/or assignees, hereby waives any and all claims against Bell, her attorneys and other representatives, for any and all actions taken or statements made (or those that could have been taken or made) by Bell and/or her 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. Bell on behalf of herself only, on one hand, and Brooklyn Lollipops, on the other hand, acknowledge that this Settlement 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.

Bell and Brooklyn Lollipops 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 Brooklyn Lollipops with this Settlement Agreement constitutes compliance with Proposition 65 with respect to exposure to DEHP in the Products.

**5.5. Public Benefit.** It is Brooklyn Lollipops' understanding that the commitments it has agreed to herein, and actions to be taken by Brooklyn Lollipops under this Settlement Agreement, would confer a significant benefit to the general public, as set forth in California Code of Civil Procedure § 1021.5 and Cal. Admin. Code tit. 11, § 3201. As such, it is the intent of Brooklyn Lollipops that to the extent any other private party initiates an action alleging a violation of Proposition 65 with respect to Brooklyn Lollipops failure to provide a warning concerning exposure to DEHP from 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 Brooklyn Lollipops 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, Brooklyn Lollipops shall provide written notice to Bell 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 Products are 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 Brooklyn Lollipops:

Joe Kechek, COO  
Brooklyn Lollipops Import Corp.  
248 W. 35th Street, Suite 904  
New York, NY 10001

For Bell:

Evan J. Smith  
Brodsky & Smith, LLC  
9595 Wilshire Blvd.  
Beverly Hills, CA 90210

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)

Bell 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.

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: 11/15/18

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

By:  \_\_\_\_\_  
Ema Bell

By: \_\_\_\_\_  
Brooklyn Lollipops Import Corp.

10. COMPLIANCE WITH HEALTH & SAFETY CODE § 25249.7(f)

Bell agrees to comply with the reporting requirements referenced in Health & Safety Code § 25249.7(f).

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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: \_\_\_\_\_

Date: 11-16-18

By: \_\_\_\_\_  
Ema Bell

By: [Signature]  
Brooklyn Lollipops Import Corp.