

SETTLEMENT AGREEMENT

1. INTRODUCTION

1.1 Parties

This Settlement Agreement is entered into by and between Michael DiPirro, on the one hand, (“DiPirro”) and Waterline Marketing Company dba CreamRight.com (“Waterline”), on the other hand, with DiPirro and Waterline individually referred to as a “Party” and collectively as the “Parties.” DiPirro is an individual residing in California 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. At certain times during the relevant period, Waterline employed ten or more persons and was a person in the course of doing business for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, Health and Safety Code section 25249.6 *et seq.* (“Proposition 65”).

1.2 General Allegations

DiPirro alleges that Waterline manufactures, imports, sells, or distributes for sale, in the state of California, nitrous oxide cartridges/chargers containing Nitrous Oxide (“N₂O”) without first providing the clear and reasonable exposure warning required by Proposition 65. N₂O is listed pursuant to Proposition 65 as a chemical that is known to the state of California to cause birth defects or other reproductive harm (hereinafter “Listed Chemical”).

1.3 Product Description

The products covered by this Settlement Agreement are nitrous oxide cartridges/chargers containing the Listed Chemical that are manufactured, sold, or distributed for sale in California by Waterline, including, but not limited to, *CreamRight Sexy Whip Cream Chargers, Box of 24 (UPC# 8-37654-59941-9), ISI Whip Nitrous Oxide Whip Cream Chargers – Box of 24 (UPC# 9-002377-000844) (SKU# WCC-MN-IS24), Ultra-Purewhip Cream Chargers – Box of 24 (UPC# 8-37654-59940-2) (SKU# WCC-MN-PW-UL-24), CreamRight Ultra-Purewhip Box of 24 Cream Chargers (UPC# 8-37654-59940-2), SFG Box of 24 Cream Chargers (UPC # 8-04879-06477-0) (SKU* WC-WCC-SFG24), ISI Whip Cream Chargers - 10 Pack (UPC # 9-002377-000769),*

WhipRite Cream Chargers- 50 per pack (UPC # 6-96859-30492-7), ISI Whip Nitrous Oxide Whip Cream Chargers - Box of 24 (UPC # 9-002377-000844), ISI Professional Chargers 20 Pack (UPC # 9-002377-007225), SparkWhip by ISI Cream Chargers (UPC # 0-85355-05829-6), 10 Pack Carton Ultra-Purewhip Whipped Cream Chargers (UPC # 0-610708-288084) (“Products”).

1.4 Notice of Violation

On or about April 20, 2017, DiPirro served Waterline and certain requisite public enforcement agencies with a “60-Day Notice of Violation,” a document that informed the recipients of DiPirro’s allegation that Waterline violated Proposition 65 by failing to warn its customers and consumers in California that the Products expose users to the Listed Chemical. On or about May 17, 2018, DiPirro served Waterline and certain requisite public enforcement agencies with a “Supplemental 60-Day Notice of Violation,” a document that informed the recipients of DiPirro’s allegation that Waterline violated Proposition 65 by failing to warn its customers and consumers in California that the Products expose users to the Listed Chemical (collectively, “Notice”). To the best of the Parties’ knowledge, no public enforcer has commenced and is diligently prosecuting the allegations set forth in the Notice.

1.5 No Admission

Waterline denies the material, factual, and legal allegations contained in the Notice and maintains that all of the products Waterline has manufactured, sold, or distributed for sale 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 Waterline of any fact, finding, conclusion of law, issue of law, or violation of law; nor shall compliance with this Settlement Agreement constitute or be construed as an admission by Waterline of any fact, finding, conclusion of law, issue of law, or violation of law, the same being specifically denied by Waterline. This section shall not, however, diminish or otherwise affect Waterline’s obligations, responsibilities, and duties under this Settlement Agreement.

1.6 Effective Date

For purposes of this Settlement Agreement, the term “Effective Date” shall mean January 18, 2019.

2. INJUNCTIVE RELIEF: PRODUCT WARNINGS

2.1 Product Warnings. On or before the Effective Date, for all Products that contain the Listed Chemical, and are shipped to a California address for sale by Waterline, or any agent, distributor, or affiliated company working on behalf of Waterline, Waterline shall provide a clear and reasonable warning on each Product as set forth below in Section 2.3. Each warning shall be prominently placed with such conspicuousness as compared with other words, statements, designs, or devices as to render it likely to be read and understood by an ordinary individual under customary conditions before purchase or use. Each warning shall be provided in a manner such that the consumer or user understands to which specific Product the warning applies, so as to minimize the risk of consumer confusion.

2.2 Internet Warnings. For all Products that Waterline offers for sale directly to consumers in California via the internet, Waterline shall provide a warning for such Products by including the warning set forth below in Section 2.3 on one or more of the following: a) on the product display page; b) on the product packaging box, or c) by including a warning in the shipment to the California consumer.

2.3 Text of the Warning. The text of the warning shall be printed in black ink on a light background, in a font that is easy to read and legible, but in no case less than a size 12 font. Waterline shall use the warning language as set forth below, which shall include a symbol consisting of a black exclamation point in a yellow equilateral triangle with a bold black outline as shown below (the symbol may be black or white if the color yellow is otherwise not used on the Product’s packaging).



WARNING: This product can expose you to nitrous oxide, a chemical known to the State of California to cause birth defects or other reproductive harm. For more information go to www.P65Warnings.ca.gov.

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

3.1 Civil Penalty Payment Pursuant to Health & Safety Code § 25249.7(b).

Waterline shall make a civil penalty payment of \$3,500.00, in accordance with this section, on or before the Effective Date. The penalty payment will be allocated in accordance with California Health & Safety Code § 25249.12(c)(1) & (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 DiPirro in accordance with Section 3.2 below. The penalty payment shall be remitted in accordance with the procedure set out in Section 3.2.

3.2 Payments. Payments shall be delivered to the offices of Bush & Henry, 6761 Sebastopol Avenue, Suite 111, Sebastopol CA 95472, and shall be in the form of three checks for the following amounts made payable to:

- (a) “Bush & Henry, Attorneys at Law” in the amount of \$2,625.00 for payment to OEHHA. Bush & Henry agree to forward such funds to OEHHA in a timely manner. Alternatively, at Waterline’s option, it can choose to deliver to the offices of Bush & Henry a certified or cashier’s check made payable to “Office of Environmental Health Hazard Assessment.”
- (b) “Bush & Henry, Attorneys at Law” in the amount of \$875.00 as payment to Michael DiPirro. Bush & Henry agree to forward such funds in a timely manner. Alternatively, at Waterline’s option, it can choose to deliver to the offices of Bush & Henry a certified or cashier’s check made payable to “Michael DiPirro.”
- (c) “Bush & Henry, Attorneys at Law” in the amount of \$36,500.00, as payment for attorneys’ fees and costs pursuant to Section 4 below.

For any payment that is returned for insufficient funds, payment must be made by a cashier's check within ten (10) calendar days of notification of insufficient funds, plus a 10% service fee. Any payment that is not actually received by the due date will also be subject to a 10% fee.

3.3 Issuance of 1099 Forms. Waterline shall provide DiPirro's counsel with a separate 1099 form for each of its payments under this Agreement to:

- (a) "Office of Environmental Health Hazard Assessment", P.O. Box 4010, Sacramento, CA 95814 (EIN: 68-0284486) for civil penalties paid;
- (b) "Michael DiPirro," whose address and tax identification number shall be furnished upon request after this Agreement has been fully executed by the Parties for his portion of the civil penalties paid; and
- (c) "Bush & Henry, Attorneys at Law, PC," for fees and costs reimbursed pursuant to Section 4.

4. REIMBURSEMENT OF FEES AND COSTS

The Parties acknowledge that DiPirro and his counsel offered to resolve this dispute without reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving this fee issue to be resolved after the material terms of the agreement had been settled. Waterline then expressed a desire to resolve the fee and cost issue shortly after the other settlement terms had been finalized. The Parties then attempted to (and did) reach an accord on the compensation due to DiPirro and his counsel under general contract principles and the private attorney general doctrine codified at California Code of Civil Procedure § 1021.5, for all work performed through the mutual execution of this agreement. Waterline shall pay a total of \$36,500 for fees and costs incurred as a result of investigating, bringing this matter to Waterline's attention, and negotiating a settlement in the public interest. Waterline shall issue a separate 1099 for fees and costs (EIN: 81-1257634), shall make the check payable to "Bush & Henry, Attorneys at Law" and shall deliver payment on or before the Effective Date to the address listed in Section 3.2 above.

5. CLAIMS COVERED AND RELEASED

5.1 DiPirro's Release of Waterline

This Settlement Agreement is a full, final, and binding resolution between DiPirro and Waterline of any violation of Proposition 65 that was or could have been asserted by DiPirro, on behalf of himself, or on behalf of his past and current agents, representatives, attorneys, successors, and assignees, against Waterline, its parents, subsidiaries, affiliated entities under common ownership, directors, officers, employees, attorneys, and each entity to whom Waterline directly or indirectly distributes or sells the Products ("Releasees"), including its downstream distributors and retailers including Amazon.com and North Bay Distribution, Inc., but not including its upstream suppliers and manufacturers such as ISI North America, Inc., for unwarned exposures to the Listed Chemical from the Products manufactured, distributed, sold or distributed for sale in California by Waterline prior to the Effective Date.

In further consideration of the promises and agreements herein contained, DiPirro, on his own behalf and on behalf of his past and current agents, representatives, attorneys, successors, and/or assignees, hereby waives all rights to institute or participate in, directly or indirectly, any form of legal action, and releases all claims that he may have against Waterline and Releasees, including, without limitation, all actions and causes of action, suits, liabilities, demands, obligations, damages, costs, fines, penalties, losses, or expenses, including, without limitation, investigation fees, expert fees, and attorneys' fees arising under Proposition 65 for exposures to the Listed Chemical from Products distributed, sold, or distributed for sale in California by Waterline prior to the Effective Date.

5.2 Waterline Release of DiPirro

Waterline, on its own behalf and on behalf of its past and current agents, representatives, attorneys, successors, and assignees, hereby waives any and all claims that it may have against DiPirro and his attorneys and other representatives, for any and all actions taken or statements made (or those that could have been taken or made) by DiPirro and his attorneys and other

representatives, whether in the course of investigating claims, otherwise seeking to enforce Proposition 65 against it in this matter, or with respect to the Products.

6. SEVERABILITY

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

7. GOVERNING LAW

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 or is otherwise rendered inapplicable by reason of law generally, or as to the Products, then Waterline may provide written notice to DiPirro of any asserted change in the law, and have no further obligations pursuant to this Settlement Agreement, with respect to, and to the extent that, the Products are so affected. Nothing in this Consent Judgment shall be interpreted to relieve Waterline from any obligation to comply with any pertinent state or federal toxics control laws.

8. NOTICES

Unless specified herein, all correspondence and notices required to be provided pursuant to this Settlement Agreement shall be in writing and sent by: (i) personal delivery; (ii) first-class, registered or certified mail, return receipt requested; or (iii) a recognized overnight courier on any party by the other party at the following addresses:

For Waterline:

Kathryn Oehlschlager
Downey Brand LLP
455 Market Street, Suite 1500
San Francisco, CA 94105

For DiPirro:

Bush & Henry, Attorneys at Law, PC
6761 Sebastopol Avenue, Suite 111
Sebastopol CA 95472

Any Party may, from time to time, specify in writing to the other Party a change of address to which all notices and other communications shall be sent.

9. COUNTERPARTS; FACSIMILE SIGNATURES

This Settlement Agreement may be executed in counterparts, and by facsimile or portable document format (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. POST-EXECUTION ACTIVITIES

DiPirro agrees to comply with the reporting form requirements referenced in Health and Safety Code section 25249.7(f).

11. MODIFICATION

This Settlement Agreement may be modified only by a written agreement of the Parties.

12. AUTHORIZATION

The undersigned are authorized to execute this Settlement Agreement on behalf of their respective Parties and have read, understood and agree to all of the terms and conditions of this Settlement Agreement.

AGREED TO:

AGREED TO:

Date: 01/08/2019

Date: 11 January 2019

By: 
Michael DiPirro

By: 
Waterline Marketing Company dba
CreamRight.com
Print Name: Douglas Meester
Title: President