State of California - Department of Justice - Attorney General's Office - Proposition 65 Enforcement Reporting

Attention: Prop 65 Coordinator, 1515 Clay Street, Suite 2000, Oakland, CA 94612

FORM JUS 1501
(03-01)

PRIVATE ENFORCEMENT FILING - Health and Safety Code section 25249.7(e) and (f)

REPORT OF SETTLEMENT

Please print or type required information

☒ Original Filing ☐ Supplemental Filing ☐ Corrected Filing

PARTIES TO THE ACTION

PLAINTIFF(S)

Shefa LMV Inc.

DEFENDANT(S) INVOLVED IN SETTLEMENT

Cotton On USA, Inc.

CASE INFO

COURT DOCKET NUMBER: n/a

COURT NAME: n/a

SHORT CASE NAME: n/a

REPORT INFO

INJUNCTIVE RELIEF: Reformulation and/or Warning label

PAYMENT: CIVIL PENALTY: 4000

PAYMENT: ATTORNEYS FEES: 16500

PAYMENT: OTHER: 0.00

WILL SETTLEMENT BE SUBMITTED TO COURT? ☐ Yes ☒ No

IF YES, AFTER ENTRY OF JUDGMENT BY COURT, REPORT OF ENTRY OF JUDGMENT MUST BE SUBMITTED TO ATTORNEY GENERAL

DATE SETTLEMENT SIGNED: 11 / 27 / 2018

COPY OF SETTLEMENT MUST BE ATTACHED

For Internal Use Only

FILER INFO

NAME OF CONTACT: Daniel N. Greenbaum

ORGANIZATION: Law Office of Daniel Greenbaum

TELEPHONE NUMBER: (818 809-2199

ADDRESS: 7120 Hayvenhurst Ave., Suite 320

FAX NUMBER: (424 243-7698

CITY: Van Nuys

STATE: CA

ZIP: 91406

E-MAIL ADDRESS: dgreenbaum@greenbaumlawfirm.com

FILING INSTRUCTIONS: This form can be completed online and printed. If electronic filing is not available, mail the completed form with a copy of the settlement to the attention of the Prop 65 Coordinator at the address shown above. If you need additional space to complete this form please use an attachment.

Clear Form

SETTLEMENT AGREEMENT BETWEEN

SHEFA LMV, INC. AND COTTON ON USA, INC.

Shefa LMV, INC. ("Shefa") and Cotton On USA, Inc. ("Defendant"), (Shefa and Defendant collectively are referred to as the "Parties") enter into this agreement ("Settlement Agreement") for the purpose of avoiding prolonged and costly litigation to settle Shefa's allegations that Defendant violated the California Safe Drinking Water and Toxic Enforcement Act of 1986, California Health and Safety Code § 25249.6 *et seq.* ("Proposition 65"). The effective date of this Settlement Agreement shall be the date upon which it is fully executed by all Parties hereto (the "Effective Date").

1.0 **Introduction**

1.1 Shefa is a California-based entity that seeks to promote awareness of exposures to toxic chemicals and improve human health by reducing or eliminating hazardous substances contained in consumer and industrial products.

1.2 Shefa alleges that Defendant manufactures, imports, sells, or distributes for sale in the State of California plastic pencil case products that contain Di [2-Ethylhexyl] Phthalate ("DEHP") without first providing a clear and reasonable warning as required by Proposition 65.

1.3 DEHP is listed pursuant to Proposition 65 as a chemical known to cause cancer and birth defects or other reproductive harm.

1.4 The product covered by this Settlement Agreement are plastic pencil case products manufactured by or for Defendant, imported by or for Defendant, or distributed or sold by or for Defendant to others, including, but not limited to: 1) Buffalo Barrel Pencil Case; RN 129164 Typo; UPC: 9351785182001; and 2) Deluxe Sunny Pencil Case; Style 140566; Typo (the "Covered Products").

1.5 On January 1, 1988, the Governor of California added DEHP to the list of chemicals known to the State to cause cancer.

1.6 On October 24, 2003, the Governor of California added DEHP to the list of

chemicals known to the State to cause reproductive toxicity.

1.7 These additions took place more than twelve (12) months before Shefa served its "60-Day Notice of Violation" which is further described below.

1.8 DEHP is referred to hereinafter as the "Listed Chemical."

1.9 On or about May 31, 2018, Shefa served Defendant, as well as certain relevant public enforcement agencies, with a document entitled "60-Day Notice Of Violation" ("Notice") advising of its intent to sue for violations of Proposition 65 arising from or related to Covered Product containing the Listed Chemical.

1.10 The Notice alleged Defendant violated Proposition 65 by failing to warn consumers in California that use of Covered Product exposed users to the Listed Chemical.

1.11 To the best of the Parties' knowledge, no public enforcer has commenced and is diligently prosecuting the same allegations against Defendant.

1.12 Defendant denies the material, factual and legal allegations contained in the Notice and maintains that all of the products that it has sold and distributed in California, including the Covered Product, are and have been in compliance with all laws.

1.13 The Parties enter into this Settlement Agreement to settle disputed claims between the Parties as alleged in the Notice and as set forth below concerning the Parties' and the Covered Product' compliance with Proposition 65 (the "Dispute").

1.14 By execution of this Settlement Agreement, the Parties do not admit any facts or conclusions of law, including, but not limited to, any facts or conclusions of law regarding any violation of Proposition 65, or any other statutory, regulatory, common law, or equitable doctrine. Nothing in this Settlement Agreement shall be construed as an admission against interest by any Party of any fact, conclusion of law, issue of law, or violation of law.

1.15 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 Defendant, its officers, directors,

employees, or parents, subsidiaries, or affiliated corporations, or any person acting for Defendant, or any direct or indirect customer of Defendant who sold or sells the Covered Product, in any administrative or judicial proceeding or litigation in any court, agency, or forum.

1.16 Except for the allegations settled and compromised, nothing in this Settlement Agreement shall prejudice, waive, or impair any right, remedy, argument, or defense that Shefa or Defendant may have against one another in any other legal proceeding as to allegations unrelated to the Dispute or claims released herein.

2.0 Release

2.1 This Settlement Agreement is a full, final, and binding resolution between Shefa, individually and *not* in its representative capacity, and (a) Defendant, and its owners, parents, subsidiaries, affiliates, sister and related companies, employees, shareholders, members, officers, directors, insurers, agents, attorneys, predecessors, successors, and assigns (collectively the "Releasees"), and (b) all entities to whom Releasees directly or indirectly provide, distribute, or sell the Covered Product, including but not limited to distributors, wholesalers, customers, retailers, franchisees, cooperative members, and licensees, including The Walt Disney Company, ("Downstream Releasees"), on the other hand, of any violation(s) or claimed violation(s) of Proposition 65 or any statutory or common law claim that has been, could have been, or may in the future be asserted against the Releasees and/or Downstream Releasees regarding exposing persons to the Listed Chemical and the failure to warn about exposure to the Listed Chemical arising in connection with the Covered Product manufactured, shipped, and/or otherwise distributed prior to the Effective Date, even if sold by Downstream Releasees after the Effective Date. The Parties agree that compliance with the terms of this Settlement Agreement by Defendant shall be deemed to be compliance with Proposition 65 by Releasees and Downstream Releasees with respect to any exposures to the Listed Chemical in the Covered Product manufactured, distributed, or sold by Defendant after the Effective Date.

2.2 The Covered Product subject to this Settlement Agreement are limited to those

manufactured by or for Defendant, or imported by or for Defendant, or distributed by or for Defendant, or sold by or for Defendant.

2.3 Shefa, on behalf of itself, its past and current agents, representatives, attorneys, successors, and/or assignees, but not in its capacity as representative of the public, hereby waives and releases with respect to the Covered Product all rights to institute or participate in, directly or indirectly, any form of legal action, including, without limitation, all actions, and causes of action, in law or in equity, suits, liabilities, demands, obligations, damages, costs, fines, penalties, losses, or expenses (including, but not limited to, investigation fees, expert fees, and attorneys' fees) (collectively the "Claims"), against Releasees and/or Downstream Releasees that arise under Proposition 65 or any other statutory or common law claims that were or could have been asserted in respect of any Covered Product sold up to the Effective Date, including without limitation to the extent that such claims relate to Releasees' and/or Downstream Releasees' alleged exposure of persons to the Listed Chemical contained in the Covered Product or any failure by Releasees and Downstream Releasees to warn about exposures to the Listed Chemical contained in the Covered Product.

2.4 Shefa acknowledges that it is familiar with Section 1542 of the Civil Code, which provides 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.

Shefa, its past and current agents, representatives, attorneys, successors, and/or assignees, in its individual and *not* representative capacity, expressly waives and relinquishes any and all rights and benefits which it may have under, or which may be conferred on it by the provisions of,

Civil Code § 1542, as well as under any other state or federal statute or common law principle of similar effect, to the fullest extent that it may lawfully waive such rights or benefits pertaining to the released matters.

3.0 Defendant's Duties

3.1 Commencing on the Effective Date, Defendant shall only sell or offer for sale in California Covered Products containing the Listed Chemical in a concentration less than or equal to 1,000 parts per million ("ppm") (0.1%) when analyzed pursuant to a scientifically reliable application of U.S. Environmental Protection Agency testing methodologies 3580A and 8270C or any other scientifically reliable methodology for determining the Listed Chemical content in a substance of the form of the Covered Product herein ("Reformulation Standard"), or those Covered Product exhibiting a warning in compliance with Proposition 65 ("Compliant Warning").

3.2 Whenever a clear and reasonable warning is required under Section 3.1 for Covered Product offered for sale in the State of California, it shall state one of the warnings described in Section 3.3 in such a conspicuous and prominent manner as to be likely to be read and understood by the consumer prior to or at the time of the sale or purchase.

3.3 The Parties agree that any of the following warnings shall constitute a Compliant Warning for the Listed Chemical in the Covered Product:

(a) the text, **"WARNING This product can expose you to chemicals, including DEHP, which is known to the State of California to cause birth defects or other reproductive harm. For more information go to www.P65Warnings.ca.gov."** accompanied by and placed to the right of a symbol consisting of a black exclamation point in a yellow equilateral triangle with a bold black outline sized to be no smaller than the word, "WARNING" as provided by regulations adopted on or about August 30, 2016; or

(b) the text, **"WARNING Cancer and Reproductive Harm - www.P65Warnings.ca.gov."** accompanied by and placed to the right of a symbol consisting of a black exclamation point in a yellow equilateral triangle with a bold black

outline sized to be no smaller than the word, "WARNING" as provided by regulations adopted on or about August 30, 2016.

The triangular warning symbol specified in Section 3.3(a) and 3.3(b) shall be in yellow with a black exclamation mark; *provided however*, the symbol may be printed in black and white if the Covered Product label is not printed against a yellow background.

3.4 The Parties agree that the specifications for Compliant Warnings in this Settlement Agreement comply with Proposition 65 and its regulations as of the date of this Settlement Agreement, and with regulations adopted on or about August 30, 2016 and which become effective August 30, 2018.

3.5 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, Defendant may modify the content and delivery methods of its warnings to conform to the modified or amended provisions of Proposition 65 or its regulations.

4.0 <u>Payments</u>

4.1 Payment from Defendant. Within ten (10) business days of the Effective Date, Defendant shall make the Total Settlement Payment of $20,500.00.

4.2 Allocation of Payments. The Total Settlement Payment shall be paid in three (3) separate checks made payable and allocated as follows:

4.2.1 Civil Penalty. Defendant shall pay $4,000.00 as a civil penalty pursuant to Health & Safety Code § 25249.7(b). The civil penalty shall be apportioned in accordance with Health & Safety Code § 25249.12 (25% to Shefa and 75% to the State of California's Office of Environmental Health Hazard Assessment ("OEHHA")). Accordingly, the OEHHA portion of the civil penalty payment in the amount of $3,000.00 shall be made payable to OEHHA and associated with taxpayer identification number 68-0284486. This payment shall be delivered as follows:

For United States Postal Service Delivery:
Attn: Mike Gyurics
Fiscal Operations Branch Chief
Office of Environmental Health Hazard Assessment
P.O. Box 4010, MS #19B
Sacramento, CA 95812-4010

For Non-United States Postal Service Delivery:
Attn: Mike Gyurics
Fiscal Operations Branch Chief
Office of Environmental Health Hazard Assessment
1001 I Street, MS #19B
Sacramento, CA 95814

The Shefa portion of the civil penalty payment in the amount of $1,000.00 shall be made payable to Shefa LMV, Inc. and associated with taxpayer identification number 81-0907002. This payment shall be delivered to the Law Office of Daniel N. Greenbaum, 7120 Hayvenhurst Ave, Suite 320, Van Nuys, CA 91406.

4.2.2 Attorney's fees and Costs. A reimbursement of Shefa's attorney's fees and costs in the amount of $16,500.00 payable to the "Law Office of Daniel N. Greenbaum," and associated with taxpayer identification number 46-4580172. This payment shall be delivered to the Law Office of Daniel N. Greenbaum, 7120 Hayvenhurst Ave, Suite 320, Van Nuys, CA 91406.

4.2.3 Tax Forms: Additionally, two separate 1099s shall be issued for the above payments: The first 1099 shall be issued to OEHHA, P.O. Box 4010, Sacramento, CA 95184 (EIN: 68-0284486) in the amount of $3,000.00. The second 1099 shall be issued in the amount of $1,000.00 to Shefa and delivered to: Daniel N. Greenbaum, 7120 Hayvenhurst Avenue, Suite 320, Van Nuys, CA 91406.

5.0 Report of the Settlement Agreement to the Office of the Attorney General

5.1 Shefa shall report this Settlement Agreement to the Attorney General's Office within five (5) days of the Parties' execution of this Settlement Agreement.

6.0 Execution in Counterparts and Facsimile

6.1 This Settlement Agreement may be executed in counterparts, which taken together shall be deemed to constitute the same document.

6.2 A facsimile or portable document format (PDF) signature shall be as valid as the original.

7.0 Entire Agreement

7.1 This Settlement Agreement contains the sole and entire agreement and understanding of the Parties with respect to the entire subject matter hereof, and all related prior discussions, negotiations, commitments, and understandings.

7.2 No other agreements, oral or otherwise, exist to bind any of the Parties.

8.0 Modification of Settlement Agreement

8.1 Any modification to this Settlement Agreement shall be in writing and signed by the Parties.

9.0 Application of Settlement Agreement

9.1 This Settlement Agreement shall apply to, be binding upon, and inure to the benefit of, Shefa and the Releasees and Downstream Releasees identified in Section 2 above. Defendant's compliance with this Settlement Agreement shall constitute compliance with Proposition 65 by the Releasees and Downstream Releasees with regard to the Listed Chemical in the Covered Product.

10.0 Enforcement of Settlement Agreement

10.1 Any Party may file suit before the Superior Court of the County of Los Angeles, consistent with the terms and conditions set forth in paragraphs 10.2 and 10.3 of this Settlement Agreement, to enforce the terms and conditions contained in this Settlement Agreement.

10.2 No action to enforce this Settlement Agreement may be commenced or maintained, and no notice of violation related to the Covered Product may be served or filed against Defendant by Shefa, unless the Party seeking enforcement or alleging violation notifies the other Party of the specific acts alleged to breach this Settlement Agreement at least 90 days

before serving or filing any action or Notice of Violation and the entity receiving the notice fails to comply with the requirements set forth in Section 10.3 below. Any notice to Defendant alleging a new violation with respect to a Covered Product which is not subject to the releases of claims herein must contain (a) the name of the product, including SKU if applicable, (b) specific dates when the product was sold after the Effective Date in California without reformulation or a warning, (c) the store or other place at which the product was available for sale to consumers, (d) evidence that the Reformulation Standard was exceeded or warning not provided, and (e) any other evidence or other support for the allegations in the notice.

10.3 Within thirty (30) days (or such additional time as the Parties may mutually agree upon) of receiving the notice described in Section 10.2, Defendant and Shefa shall meet and confer on the alleged violation. If Defendant refutes the alleged violation (for example, by establishing the Covered Product is subject to the releases of claims herein or by producing test results documenting the subject Covered Product meets the Reformulation Standard), no further action is necessary. If Shefa establishes the violation, then Defendant shall send the store or other place at which the product was available for sale to the public a letter directing that the subject product be immediately removed from inventory and returned to Defendant. Should the Parties be unable to resolve the dispute, any Party may seek relief under Section 10.1.

11.0 Notification Requirements

11.1 Any notice required or permitted hereunder shall be effective only if given in writing and delivered in person, certified or registered mail return receipt requested, or traceable overnight delivery service, to the following designees:

For Shefa:
Daniel N. Greenbaum, Esq.
Law Office of Daniel N. Greenbaum
7120 Hayvenhurst Avenue, Suite 320
Van Nuys, CA 91406

For Cotton On USA, Inc.
Joseph J. Green, Esq.

KELEY DRYE & WARREN LLP
Washington Harbour, Suite 400
3050 K Street, NW
Washington, DC 20007

Any Party may change its designee(s) for purposes of notification by providing written notice of such change pursuant to this section.

12.0 SEVERABILITY

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

13.0 GOVERNING LAW

13.1 The terms of this Settlement Agreement shall be governed by the laws of the State of California and apply within the State of California. This Settlement Agreement shall have no application to Covered Product which are not sold to California consumers.

13.2 In the event that Proposition 65 is repealed, preempted, or otherwise rendered inapplicable by reason of law generally, or as to the Covered Product, then Defendant shall have no further obligations pursuant to this Settlement Agreement with respect to, and to the extent that, any Covered Product that are so affected.

13.3 The Parties, including their counsel, have participated in the preparation of this Settlement Agreement and this Settlement Agreement is the result of the joint efforts of the Parties.

13.4 This Settlement Agreement was subject to revision and modification by the Parties and has been accepted and approved as to its final form by all Parties and their counsel.

13.5 Each Party to this Settlement Agreement agrees that any statute or rule of construction providing that ambiguities are to be resolved against the drafting Party should not be employed in the interpretation of this Settlement Agreement and, in this regard, the Parties hereby waive California Civil Code § 1654.

14.0 AUTHORIZATION

14.1 Each signatory to this Settlement Agreement certifies that he or she is fully authorized by the Party he or she represents to stipulate to this Settlement Agreement and to enter into and execute the Settlement Agreement on behalf of the Party represented and legally bind that Party.

14.2 The undersigned have read, understand, and agree to all of the terms and conditions of this Settlement Agreement.

14.3 Except as explicitly provided herein, each Party is to bear its own fees and costs.

AGREED TO:

Dated: 11/27/2018

SHEFA LMV, INC.

By: _____

Dated:

27 November 2018

Cotton On USA, Inc.

By: _____