

# **SETTLEMENT AGREEMENT**

## **1. INTRODUCTION**

### **1.1 Parties**

This Settlement Agreement (Settlement Agreement) is entered into by and between Center for Advanced Public Awareness (“CAPA”) and Plow & Hearth, LLC (“Plow & Hearth”), with each individually referred to as a “Party” and, collectively, as the “Parties.” CAPA is a California-based non-profit organization who seeks to protect the environment through the elimination or reduction of toxic chemicals utilized in manufacturing consumer products and to increase public awareness of those chemicals by promoting environmentally sound practices and corporate responsibility. Plow & Hearth employs ten or more persons and is a person in the course of doing business for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, California Health & Safety Code §§ 25249.5 *et seq.* (Proposition 65).

### **1.2 General Allegations**

CAPA alleges that Plow & Hearth manufactures, imports, sells and/or distributes for sale in California, gift wrap organizers with vinyl/PVC components that contain diisononyl phthalate (DINP), and that it does so without providing the health hazard warning that CAPA alleges is required by Proposition 65. DINP is listed pursuant to Proposition 65 as a chemical known to the State of California to cause cancer.

### **1.3 Product Description**

The products covered by this Settlement Agreement are specifically limited to gift wrap organizers with vinyl/PVC components containing DINP that are manufactured, imported, sold or offered for sale in California by Plow & Hearth, such as the *Plow & Hearth Gift Wrap Organizer, SKU# PLHE3840, Model # 56283*, hereinafter, the “Products.”

### **1.4 60-Day Notice of Violation**

On July 27, 2018, CAPA served Plow & Hearth, the California Attorney General, and the requisite public enforcement agencies with a 60-Day Notice of Violation (“Notice”), alleging

that Plow & Hearth violated Proposition 65 when it failed to warn its customers and consumers in California that the Products expose users to DINP. 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**

Plow & Hearth denies the material, factual and legal allegations contained in the Notice and maintains that all products it has 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 Plow & Hearth 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 Plow & Hearth of any fact, finding, conclusion, issue of law or violation of law. This section shall not, however, diminish or otherwise affect the obligations, responsibilities and duties under this Settlement Agreement.

### **1.6 Effective Date**

For purposes of this Settlement Agreement, the term "Effective Date" shall mean April 5, 2019.

## **2. INJUNCTIVE RELIEF: REFORMULATED PRODUCTS AND WARNINGS**

### **2.1 Commitment to Reformulate or Warn**

Commencing on the Effective Date and continuing thereafter, Plow & Hearth agrees to only manufacture, import, sell or distribute for sale, in or into California Products that are either: (a) "Reformulated Products", as defined in Section 2.2; or (b) Products bearing a clear and reasonable health hazard warning, pursuant to Sections 2.3 and 2.4, below.

### **2.2 Reformulated Products Defined**


For purposes of this Settlement Agreement, "Reformulated Products" are defined as Products containing DINP in a maximum concentration of 0.1% (1,000 parts per million) in any accessible component (i.e., any component that may be touched during a reasonably foreseeable use) when analyzed by a laboratory accredited by the State of California, a federal agency, or a

nationally recognized accrediting organization. For purposes of compliance with this reformulation standard, testing samples shall be prepared and extracted using Consumer Product Safety Commission (“CPSC”) methodology CPSC-CH-C1001.09.3 and analyzed using U.S. Environmental Protection Agency (“EPA”) testing methodology 8270D, or equivalent methodologies utilized by federal or state government agencies for the purpose of determining DINP content in a solid substance.


### 2.3 Product Warnings

Commencing on the Effective Date and continuing thereafter, Plow & Hearth shall provide clear and reasonable warnings as set forth in this Section for all Products manufactured, imported, sold, or distributed for sale in California that do not qualify as Reformulated Products. Each Product 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. For purposes of this Settlement Agreement, a clear and reasonable warning displayed or transmitted according the criteria detailed in Cal. Code of Regs. § 25602 et seq. and detailed below shall satisfy these requirements

For Products:

 **WARNING:** This product can expose you to chemicals, including DINP, which is known to the State of California to cause cancer. For more information go to [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov)

Or, if placed directly on a Product or the Product’s packaging and/or labeling, Plow & Hearth may use the following short-form warning statement, provided it appears in a type size no smaller than the largest type size used for other consumer information on the Product’s label and in no case smaller than 6-point type:

 **WARNING:** Cancer- [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov)

## **2.4 Catalogue and Internet Product Warnings**

In the event Plow & Hearth sells Products that do not qualify as Reformulated Products through a catalogue or via the internet to consumers or customers located in California, the warning requirements of this Section shall be satisfied if, prior to purchase: (a) one of the foregoing warnings, described in Section 2.3, appears on the same page, in the same type size or larger than the Product description text, as the Product; (b) a warning appears on the same web page as the price for the Product, in the same type size or larger than the Product description text; (c) a warning appears on one or more web pages displayed to the consumer prior to purchase, in the same type size or larger than the Product description text; or (d) a hyperlink, clearly marked “WARNING” appears on the same web page and in the same location as the display and/or description of the Product, in type large enough so that the consumer does not have to search for it, and a prominently placed warning appears elsewhere, such as on the Product description page, in a manner that clearly associates it with the Product to which the warning applies, prior to checkout or purchase. If Plow & Hearth utilizes the short-form label content, pursuant to Cal. Code Regs. §25602(a)(4) and detailed above, the warning provided on the website or in the catalogue may use the same content.

## **3. MONETARY SETTLEMENT TERMS**

### **3.1 Civil Penalty Payment**

Pursuant to Health and Safety Code § 25249.7(b), and in settlement of all claims alleged in the Notice or referred to in this Settlement Agreement, Plow & Hearth agrees to pay a total of \$2,750 in civil penalties. The penalty payment shall be allocated in accordance with California Health and Safety Code § 25249.12(c)(1) and (d), with 75% of the penalty amount paid to the California Office of Environmental Health Hazard Assessment (“OEHHA”) and the remaining 25% of the penalty amount retained by CAPA.

Plow & Hearth will deliver its payment on or before the Effective Date, in two checks made payable to: (a) “OEHHA” in the amount of \$2,062.50; and (b) “Gates Johnson Law, in

Trust for CAPA” in the amount of \$687.50. CAPA’s counsel shall be responsible for delivering OEHHA’s portion of the penalties paid under this Settlement Agreement.

### **3.2 Reimbursement of Attorneys’ Fees and Costs**

The Parties acknowledge that CAPA and its counsel offered to resolve this dispute without reaching terms on the amount of fees and costs to be reimbursed to them, thereby leaving the issue to be resolved after the Parties settled the material terms of the agreement. Shortly after the Parties finalized the other terms, Plow & Hearth expressed a desire to resolve CAPA’s attorneys’ fees and costs. The Parties then negotiated a resolution of the compensation due to CAPA and its 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 Settlement Agreement. Under these legal principles, within five days of the Effective Date, Plow & Hearth agrees to pay \$20,000 to CAPA and its counsel for all fees and costs incurred in investigating, bringing this matter to the attention of Plow & Hearth’s management, and negotiating a settlement in the public interest. Plow & Hearth’s payment shall be delivered to the address listed in Section 3.3, below, in the form of a check, made payable to “Gates Johnson Law.”

### **3.3 Payment Address**

All payments required by this Settlement Agreement shall be delivered to the following address:

Gates Johnson Law  
c/o Kimberly Gates  
2822 Moraga Street  
San Francisco, CA 94122

## **4. CLAIMS COVERED AND RELEASED**

### **4.1 CAPA’s Release of Plow & Hearth**

This Settlement Agreement is a full, final and binding resolution between CAPA, as an individual and *not* on behalf of the public, and Plow & Hearth, of any violation of Proposition 65 that was or could have been asserted by CAPA on behalf of itself, its past and current agents,

representatives, attorneys, successors, and/or assignees, against Plow & Hearth, its parents, subsidiaries, affiliated entities under common ownership, directors, officers, employees, attorneys, and each entity to whom Plow & Hearth directly or indirectly distributes or sells Products, including, but not limited, to downstream distributors, wholesalers, customers, retailers, franchisees, cooperative members, and licensees (collectively, Releasees), based on their failure to warn about alleged exposures to DINP contained in the Products that were manufactured, distributed, sold and/or offered for sale by Plow & Hearth in California before the Effective Date, as alleged in the Notice.

In further consideration of the promises and agreements herein contained, CAPA as an individual and *not* on behalf of the public, on behalf of itself, its past and current agents, representatives, attorneys, successors, and/or assignees, hereby waives all of CAPA's rights to institute or participate in, directly or indirectly, any form of legal action and releases all claims that CAPA may have, 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 exclusively, investigation fees, expert fees, and attorneys' fees arising under Proposition 65 with respect to DINP in the Products, as alleged in the Notice, manufactured, distributed, sold and/or offered for sale by Plow & Hearth before the Effective Date, against Plow & Hearth and Releasees.

The Parties further understand and agree that this Section 4.1 release shall not extend upstream to any entities that manufactured the Products or any component parts thereof, or any distributors or suppliers who sold the Products or any component parts thereof to Plow & Hearth. Nothing in this Section affects CAPA's right to commence or prosecute an action under Proposition 65 against a Releasee that does not involve Plow & Hearth' Products.

#### **4.2 Plow & Hearth's Release of CAPA**

Plow & Hearth, on behalf of itself, its past and current agents, representatives, attorneys, successors, and assignees, hereby waives any and all claims against CAPA and its attorneys and other representatives, for any and all actions taken or statements made (or those that could have

been taken or made) by CAPA and its attorneys and other representatives, whether in the course of investigating claims or otherwise seeking to enforce Proposition 65 against it in this matter with respect to the Products.

**5. 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.

**6. 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 if any of the provisions of this Settlement Agreement are rendered inapplicable or no longer required as to the Products as a result of any such repeal or preemption or rendered inapplicable by reason of law generally, then Plow & Hearth shall provide written notice to CAPA of any asserted change in the law and shall have no further injunctive obligations pursuant to this Settlement Agreement with respect to, and to the extent that, the Products are so affected. Nothing in this Settlement Agreement shall be interpreted to relieve Plow & Hearth from any obligation to comply with any pertinent state or federal toxics control law.

**7. NOTICE**

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

For Plow & Hearth:

Richard Koval, Vice President  
Plow & Hearth, LLC  
7021 Wolfstown Hood Road  
Madison, VA 22727

With a Copy to:

Melissa Jones, Esq.  
Stoel Rives LLP  
500 Capital Mall, Suite 1600  
Sacramento, CA 95814

For CAPA:

Kimberly Gates, Esq.  
Gates Johnson Law  
2822 Moraga Street  
San Francisco, CA 94122

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.

**8. COUNTERPARTS; FACSIMILE AND 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.

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

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

**10. MODIFICATION**

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

**11. AUTHORIZATION**


The undersigned are authorized to execute this Settlement Agreement and have read, understood and agree to all of the terms and conditions contained herein.


**AGREED TO:**

**AGREED TO:**

Date: April 03, 2019

Date: APRIL 03, 2019

By:   
Linda DeRose Droubay, Executive Director  
Center for Advanced Public Awareness

By:   
Richard Koval, Vice President  
Plow & Hearth, LLC



