

SETTLEMENT AGREEMENT

1. INTRODUCTION

1.1 Parties

This Settlement Agreement is entered into by and between Dennis Johnson (“Johnson”) and Therapy Stores, Inc. (“Therapy”), with Johnson and Therapy each individually referred to as a “Party” and collectively as the “Parties.” Johnson is an individual residing in the State of California who seeks to promote awareness of exposures to toxic chemicals and to improve human health by reducing or eliminating hazardous substances used in consumer products. Johnson alleges that Therapy is a person in the course of doing business for purposes of the Safe Drinking Water and Toxic Enforcement Act of 1986, California Health and Safety Code section 25249.6 *et seq.* (“Proposition 65”).

1.2 General Allegations

Johnson alleges that Therapy manufactures, distributes for sale and/or sells in California: (i) beverage coaster sets containing Lead and; (ii) vinyl covered cocktail shakers containing the phthalate chemical Diisononyl Phthalate (“DINP”). DINP is listed pursuant to Proposition 65 as a chemical known to cause cancer and Lead is listed pursuant to Proposition 65 as a chemical known to cause cancer and birth defects and other reproductive harm. Johnson alleges that Therapy failed to provide the health hazard warning required by Proposition 65 for exposures to DINP and Lead.

1.3 Product Description

The products covered by this Settlement Agreement are: (i) Wild Eye Designs, Inc. beverage coaster sets containing Lead that are manufactured, sold, or distributed for sale in California by Therapy including, but not limited to, the “*Wink by Wild Eye Designs Inc. Lumberjack Coaster Set*”; and (ii) Wild Eye Designs, Inc. vinyl covered cocktail shakers containing DINP that are manufactured, sold, or distributed for sale in

California by Therapy including, but not limited to, the “*Lumberjack Cocktail Shaker*” (hereinafter collectively referred to as “Products”).

1.4 Notice of Violation

On September 18, 2018, Johnson served Therapy and the requisite public enforcement agencies with a 60-Day Notice of Violation (“September Notice”), alleging that Therapy violated Proposition 65 when it failed to warn its customers and consumers in California of the health hazards associated with exposures to DINP from the cocktail shaker Products and exposures to Lead from the beverage coaster Products. No public enforcer has commenced and is diligently prosecuting the allegations set forth in the Notice.

1.5 No Admission

Therapy 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 Products, have been, and are, in compliance with all laws. Nothing in this Settlement Agreement shall be construed as an admission by Therapy 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 Therapy of any fact, finding, conclusion, issue of law, or violation of law, such being specifically denied by Therapy. Nothing in this Settlement Agreement shall preclude Therapy from asserting any and all applicable defenses available to it in any future proceeding under Proposition 65 or otherwise. This Section shall not, however, diminish or otherwise affect Therapy’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 February 15, 2019.

2. **INJUNCTIVE RELIEF**

2.1 **Existing Inventory**

Therapy agrees that it will not sell, distribute or offer for sale in California any Products that were existing in its inventory prior to the Effective Date.

2.2 **Proposition 65 Warnings Received From Suppliers**

As to all Products Therapy receives from its supplier(s) on or after the Effective Date, if any, Therapy agrees that it is responsible for the placement and maintenance of warning materials, including warnings for Products it sells over the Internet, if any, that Therapy receives pursuant to Title 27, California Code of Regulations Section 25600.2(b) and (c).

2.3 **Therapy's Responsibility to Provide Proposition 65 Warnings**

Where Therapy is responsible for providing a Proposition 65 warning pursuant to Title 27, California Code of Regulations Section 25600.2(e), the Product(s) shall contain a warning in compliance with this sub-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 of purchase and use. For purposes of this Settlement Agreement, a clear and reasonable warning for Products sold in California shall consist of a warning affixed directly to the Product or directly to its packaging, label, or tag using the warning language below:

2.3.1 **For Products Containing Lead:**

⚠ WARNING: This product can expose you to Lead, 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.

or

⚠ WARNING: Cancer and Reproductive Harm – www.P65Warnings.ca.gov.

2.3.2 For Products containing DINP:

 **WARNING:** This product can expose you to DINP, which is known to the State of California to cause cancer. For more information go to www.P65Warnings.ca.gov.

or

 **WARNING:** Cancer – www.P65Warnings.ca.gov.

The symbol depicted above shall consist of a black exclamation point in a yellow equilateral triangle with a bold black outline. Where the label for the product is not printed using the color yellow, the symbol may be printed in black and white. The symbol shall be placed to the left of the text of the warning, in a size no smaller than the height of the word “WARNING”.

2.4 Safe Harbor Methods and Content

Therapy may use any safe harbor warning content and method that complies with Title 27, California Code of Regulations, §§25602 and 25603, *et seq.*, as amended August 30, 2018 and subsequently thereafter.

2.5 Products Exempt Form Warning Requirements

Products that comply with the “DINP Standard” and “Lead Standard” shall not require a Proposition 65 warning.

Products meeting the DINP Standard are those products containing DINP in concentrations less than 0.1 percent (1,000 parts per million) in any accessible component when analyzed pursuant to U.S. Environmental Protection Agency testing methodologies 3580A and 8270C.

Products meeting the Lead Standard are those that: (a) contain Lead in concentrations of no more than 90 parts per million (“ppm”) in any accessible component analyzed pursuant to U.S. Environmental Protection Agency (“EPA”) testing methodologies 3050B and 6010B; and (b) yield a result of no more than 1.0 micrograms

of Lead on any surface sampled and analyzed pursuant to the NIOSH 9100 testing protocol.

In addition to the testing methodologies provided above, the Parties may use equivalent methodologies utilized by state or federal agencies for the purpose of determining DINP or Lead content in a solid substance to establish exemption pursuant to this sub-section.

3. MONETARY SETTLEMENT TERMS

3.1 Civil Penalty Payment

Pursuant to Health and Safety Code section 25249.7(b)(2), and in settlement of all claims alleged in the Notice or referred to in this Settlement Agreement, Therapy agrees to pay \$1,000 in civil penalties. The penalty payment will be allocated in accordance with California Health and Safety Code section 25249.12(c)(1) & (d), with 75% of the penalty amount remitted to the California Office of Environmental Health Hazard Assessment (“OEHHA”) and the remaining 25% of the penalty amount paid to Johnson, and delivered to the address in Section 3.3 herein.

Therapy will deliver its payment on or before the Effective Date in two checks for the following amounts made payable to: (a) “OEHHA” in the amount of \$750; and (b) “Dennis Johnson” in the amount of \$250. Johnson’s counsel shall be responsible for delivering OEHHA’s portion of the penalties paid under this Settlement Agreement.

3.2 Attorneys’ Fees and Costs

The Parties acknowledge that Johnson 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 the issue to be resolved after the material terms of the agreement had been settled. Shortly after the other settlement terms had been reached, Therapy expressed a desire to resolve Johnson’s fees and costs. The Parties reached an accord on the compensation due to Johnson’s counsel under general contract principles and the private attorney general doctrine codified at Code of Civil Procedure section 1021.5 for

all work performed in this matter. Under these legal principles, on or before the Effective Date, Therapy agrees to pay \$15,000, in the form of a check made payable to “Voorhees & Bailey, LLP,” for all fees and costs incurred investigating, bringing this matter to the attention of Therapy’s management, and negotiating a settlement.

3.3 Payment Address

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

Voorhees & Bailey, LLP
990 Amarillo Avenue
Palo Alto, CA 94303

4. CLAIMS COVERED AND RELEASED

4.1 Johnson’s Release of Proposition 65 Claims

This Settlement Agreement is a full, final, and binding resolution between Johnson, in his individual capacity and *not* on behalf of the public, and Therapy, of any violation of Proposition 65 that was or could have been asserted by Johnson, on his own behalf, or on behalf of his past and current agents, principals, employees, insurers, accountants, entities under his ownership or direction, representatives, attorneys, predecessors, successors, assignees and heirs, against Therapy, its parents, subsidiaries, affiliated entities under common ownership, directors, officers, employees, agents, principals, insurers, accountants, representatives, attorneys, predecessors, successors, assignees, and each entity to whom Therapy directly or indirectly distributes, ships or sells Products, including, but not limited to, its downstream distributors, wholesalers, customers, retailers, if any, and their affiliates, franchisees, cooperative members, licensors, and licensees and their owners, directors, officers, employees, agents, principals, insurers, accountants, representatives, attorneys, predecessors, successors, and assignees (collectively, “Releasees”), for any and all claims based on the alleged or actual failure to warn about exposures to Lead and DINP contained in the Products

manufactured, sold, or distributed for sale by Therapy in California before the Effective Date.

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 Therapy.

4.2 Johnson's Individual Release of Claims

Johnson, in his individual capacity only and *not* in his representative capacity, provides a 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 Johnson of any nature, character, or kind, whether known or unknown, suspected or unsuspected, limited to and arising out of alleged or actual exposures to DINP and Lead in the Products manufactured, imported, distributed, or sold by Therapy prior to the Effective Date.

Johnson acknowledges that he is familiar with Section 1542 of the California Civil Code, which provides as follows:

A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS THAT THE CREDITOR OR RELEASING PARTY DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE AND THAT, IF KNOWN BY HIM OR HER, WOULD HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR OR RELEASED PARTY.

Johnson, as an individual and *not* on behalf of the public, expressly waives and relinquishes any and all rights and benefits which he may have under, or which may be conferred on him by the provisions of Section 1542 of the California Civil Code as well as under any other state or federal statute or common law principle of similar effect, to the fullest extent that he may lawfully waive such rights or benefits pertaining to Lead and DINP in Products manufactured, imported, distributed or sold by Therapy before the Effective Date.

The Parties further understand and agree that this Section 4.2 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 Therapy.

4.3 Therapy's Release of Johnson

Therapy, on its own behalf, and on behalf of its past and current agents, representatives, attorneys, successors, and/or assignees, hereby waives any and all claims against Johnson and his attorneys and other representatives, for any and all actions taken or statements made by Johnson and his attorneys and other representatives, whether in the course of investigating claims, seeking to enforce Proposition 65 against it in this matter, or with respect to the Products.

4.4 Deemed Compliance with Proposition 65

Compliance by Therapy with this Settlement Agreement constitutes compliance with Proposition 65 with respect to alleged exposures to Proposition 65 chemicals Lead and DINP from the Products.

4.5 Public Benefit

The Parties enter into this Settlement Agreement with the understanding that the commitments made herein, and actions to be taken by Therapy under this Agreement, confer a significant benefit to the general public, as set forth in Code of Civil Procedure section 1021.5 and Cal. Admin. Code tit. 11, section 3201. As such, it is Therapy's intent by entering into this Agreement that to the extent any other private party initiates an action against Therapy alleging a violation of Proposition 65 with respect to failure to provide a clear and reasonable warning concerning exposure to Lead and/or DINP from the Products manufactured, distributed, sold or offered for sale by Therapy in California, and subject to Therapy's material compliance with this Settlement Agreement, such action by another private party would not confer a significant benefit

on the general public as to those Products and Proposition 65-listed chemicals addressed under this Agreement.

5. SEVERABILITY

If, subsequent to the execution of this Settlement Agreement, any provision of this Settlement Agreement is deemed by a court to be unenforceable, the validity of the remaining provisions 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 as to the Products, then Therapy may provide written notice to Johnson 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.

7. NOTICE

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

For Therapy:

Wayne Whelan
Therapy Stores, Inc.
347 E. Campbell Avenue
Campbell, CA 95008

For Johnson:

Dennis Johnson
c/o Voorhees & Bailey, LLP
990 Amarillo Avenue
Palo Alto, CA 94303

With a copy to:

Rohit Sabnis, Esq.
BURNHAM BROWN
P.O. Box 119
Oakland, CA 94604

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

8. 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.

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

Johnson and his attorneys agree to comply with the reporting form requirements referenced in California Health and Safety Code section 25249.7(f).

10. MODIFICATION

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

11. AUTHORIZATION

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

AGREED TO:

AGREED TO:

Date: 2/14, 2019

Date: _____, 2019

By: 
DENNIS JOHNSON

By: _____
WAYNE WHELAN, PRESIDENT
THERAPY STORES, INC.

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AGREED TO:

Date: _____, 2019

Date: _____, 2019

By: _____
DENNIS JOHNSON

By: 
WAYNE WHELAN, PRESIDENT
THERAPY STORES, INC.