

## **GENERAL RELEASE AND SETTLEMENT AGREEMENT**

### **1. INTRODUCTION**

#### **1.1 Parties**

This General Release and Settlement Agreement is entered into by and between the CENTER FOR ADVANCED PUBLIC AWARENESS, INC. (“CAPA”) and LOUNGEFLY, LLC (“LOUNGEFLY”), with LOUNGEFLY and CAPA each individually referred to as a “Party” and collectively as the “Parties.”

#### **1.2 Introduction and General Allegations.**

1.2.1 CAPA is a not-for profit corporation duly organized and existing in the State of California, which seeks to promote awareness of exposures to toxic chemicals and to improve human health by reducing or eliminating hazardous substances used in consumer products.

1.2.2 CAPA alleges that LOUNGEFLY 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 and Safety Code section 25249.6 *et seq.* (“Proposition 65”).

1.2.3 CAPA alleges that LOUNGEFLY imported, sold, and/or distributed for sale in California the Covered Products without provision of a Proposition 65 warning, and that the Covered Products contain Di-(2-ethylhexyl) phthalate (“DEHP”), a chemical known to the State of California to cause cancer and reproductive toxicity. CAPA further alleges that LOUNGEFLY failed to provide the health hazard warning required by Proposition 65 for exposures to DEHP from the Covered Products.

1.2.4 LOUNGEFLY has denied and continues to deny any wrongdoing whatsoever. LOUNGEFLY contends that it has complied with Proposition 65 at all times. LOUNGEFLY has maintained and continues to maintain that it has meritorious defenses to all claims in the Notice and was and is prepared to vigorously defend against any claims brought as

a result of the Notice. LOUNGEFLY enters into this Settlement Agreement solely to avoid the legal costs and inconvenience that would be incurred in defending against those claims.

### **1.3 Product Description.**

The products covered by this Settlement Agreement are the Black Skull Pouches, UPC No. 11283706, which were imported, sold and/or distributed for sale in California by LOUNGEFLY (“Covered Product(s)”).

### **1.4 60 Day Notice of Violation and Exchange of Information.**

On October 15, 2018, CAPA served Hot Topic, Inc. (“Hot Topic”) and the requisite public enforcement agencies with a 60-Day Notice of Violation (“Notice”), alleging that Hot Topic violated Proposition 65. The Notice alleged that Hot Topic and its vendors had failed to warn their customers and consumers in California of the health hazards associated with exposures to DEHP from the import, sale and/or distribution of the Covered Products. A true and correct copy of the Notice is attached hereto as “Exhibit A.”

CAPA subsequently provided LOUNGEFLY with test results in CAPA’s possession concerning its allegations. LOUNGEFLY provided CAPA with sales data related to the Covered Products. To the best of the Parties’ knowledge, no public enforcer has commenced and/or is diligently prosecuting the allegations set forth in the Notices.

### **1.5 No Admission.**

The Parties enter into this Settlement Agreement to settle disputed claims between the Parties as set forth below concerning the Parties’ and the Covered Products’ compliance with Proposition 65 (the “Dispute”). Specifically, CAPA alleges that LOUNGEFLY imported, sold or distributed for sale in the state of California the Covered Products, which contained DEHP without first providing the clear and reasonable exposure warning required by Proposition 65. LOUNGEFLY denies that such a warning is required under Proposition 65 or any otherwise applicable law.

LOUNGEFLY further denies the material, factual, and legal allegations contained in the Notice and maintains that all of the products that it has imported, sold and/or distributed in

California, including the Covered Products, have been, and are, in compliance with all laws. Nothing in this Settlement Agreement shall be construed as an admission by LOUNGEFLY 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 LOUNGEFLY of any fact, finding, conclusion, issue of law, or violation of law, such being specifically denied by LOUNGEFLY. However, this section shall not diminish or otherwise affect LOUNGEFLY's obligations, responsibilities, and duties hereunder. Notwithstanding the allegations in the Notice, LOUNGEFLY maintains that it has not knowingly sold or caused to be sold the Covered Product 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 that the Agreement is fully executed by the Parties.

## **2. INJUNCTIVE RELIEF**

**2.1 Reformulation Standard.** Commencing on the Effective Date, and continuing thereafter, Covered Products that LOUNGEFLY imports, manufactures, ships to be sold or offered for sale or purchase in or into California, or sells in California shall be deemed to comply with Proposition 65, and be exempt from any Proposition 65 warning requirements with respect to DEHP, if the Products meet the standard of "Reformulated Products." "Reformulated Products" shall mean Covered Products containing less than or equal to 1,000 parts per million (0.1%) DEHP in each accessible component when analyzed pursuant to Environmental Protection Agency testing methodologies 3580A and 8270C, CPSC-CH-C1001-09.3 or any other scientifically reliable methodology for determining DEHP content in a solid substance ("Reformulation Standard"). With respect to existing Covered Products, meaning those that are currently in the channels of distribution, with distributors, retailers, and/or LOUNGEFLY's storage facilities, LOUNGEFLY may continue to sell-through those items. However, after the Effective Date, no new Covered Products may be distributed by LOUNGEFLY for sale to California that are not Reformulated Products or do not contain the warnings set forth in Paragraph 2.3.

2.2 **Warning Option.** Covered Products that do not meet the warning exemption standard set forth in Section 2.1 above shall be accompanied by a warning as described in Section 2.3 below. This warning shall only be required as to Covered Products that are sold or shipped out to consumers, retailers, or distributors after the Effective Date. No Proposition 65 warning for DEHP shall be required as to any Covered Products that are already in the stream of commerce as of the Effective Date.

2.3 **Warning Language.** Commencing after the Effective Date, LOUNGEFLY shall ensure that in the event it ships any non-reformulated Covered Product to California retailers or for sale in California, they include clear and reasonable warnings. The warning shall be affixed to the packaging or labeling using language similar to the warnings below:

⚠ **WARNING:** This product can expose you to chemicals including Di-(2-ethylhexyl) phthalate, 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

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

The warning shall be prominently displayed 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 is reasonably likely to understand to which the specific Product the warning applies, so as to minimize the risk of consumer confusion. In the event that the Office of Environmental Health Hazard Assessment promulgates one or more regulations requiring or permitting warning text and/or methods of transmission different than those set forth above, LOUNGEFLY shall be entitled to use, at its discretion, such other warning text and/or methods of transmission without being deemed in breach of this Agreement.

2.4 **Accessible Component.** The term “Accessible Component” shall mean any component of the Covered Product that could be touched by a person during reasonably foreseeable use.

2.5 **Compliance.** The parties agree that compliance with the terms of this Agreement constitutes compliance with Proposition 65 with regard to the Covered Products.

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

LOUNGEFLY shall pay a civil penalty of \$1000, to be apportioned in accordance with California Health & Safety Code §§25249.12(c) & (d), with 75% of these funds remitted to the State of California's Office of Environmental Health Hazard Assessment (“OEHHA”) and the remaining 25% of the penalty remitted to CAPA. LOUNGEFLY shall issue two separate checks or wires for the penalty payment: (a) one check/wire made payable to the Kawahito Law Group in Trust for the State of California's Office of Environmental Health Hazard Assessment (“in Trust for OEHHA”) in the amount of \$750, representing 75% of the initial civil penalty and (b) one check/wire to “Kawahito Law Group in Trust for Center for Advanced Public Awareness, Inc.,” in the amount of \$250, representing 25% of the initial civil penalty. Two separate 1099s shall be issued for the above payments: The first 1099 shall be issued to OEHHA, P.O. Box 4010, Sacramento, CA 95814 (EIN: 68-0284486). The second 1099 shall be issued to the Kawahito Law Group APC, who shall furnish a W-9 at least five calendar days before payment is due. The payments shall be delivered check or wire within ten (10) calendar days from the Effective Date to the following address or wired to the below account:

James Kawahito, Esq.  
Kawahito Law Group APC  
222 N. North Pacific Coast Hwy. Suite 2222  
El Segundo, CA 90245

Wire Instructions can be provided upon request.

**4. REIMBURSEMENT OF 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 any fee reimbursement issue to be resolved after the material terms of the agreement had been settled. The parties reached an accord on 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 (CCP) § 1021.5, for all work performed through the mutual execution of this agreement. More specifically, LOUNGEFLY shall pay the total amount of \$19,000 for fees and costs incurred by CAPA as a result of investigating, bringing this matter to the attention of LOUNGEFLY, and negotiating a settlement. Payment shall be made within ten (10) calendar days from the Effective Date to the following address or wired below to the following account.

James Kawahito, Esq.  
Kawahito Law Group APC  
Attn. CAPA v. LOUNGEFLY  
222 North Pacific Coast Hwy. Suite 2222  
El Segundo, CA 90245

Wire Instructions can be provided upon request.

To allow for the issuance of a timely payment to be rendered pursuant to the above, CAPA shall provide LOUNGEFLY with a completed IRS Form W-9 for the Kawahito Law Group APC at least five calendar days before payment is due.

## **5. RELEASE OF ALL CLAIMS**

### **5.1 Full, Final and Binding Resolution of Proposition 65 Allegations.**

This Settlement Agreement is a full, final and binding resolution between CAPA, on behalf of itself, its past and current agents, representatives, attorneys, successors and/or assignees, and (a) LOUNGEFLY, 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 Products, including but not limited to distributors, wholesalers, customers, retailers, franchisees, cooperative members, and licensees, including Hot Topic and its owners, parents, subsidiaries, affiliates, sister and related companies, employees, shareholders, members, officers, directors, agents, attorneys, predecessors, successors, and assigns (“Downstream Releasees”), on the other hand, of any violation or claimed violation of Proposition 65 or any statutory or common law claim that was or could have been asserted by CAPA against the Releasees and/or Downstream

Releasees regarding exposing persons to DEHP and the failure to warn about exposure to DEHP arising in connection with the Covered Products 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 LOUNGEFLY shall be deemed to be compliance with Proposition 65 by Releasees and Downstream Releasees with respect to any exposures to DEHP in the Covered Products manufactured, distributed, or sold by Defendant after the Effective Date. This release is provided in CAPA's individual capacity and is not a release on behalf of the public.

With respect to the foregoing waivers and releases in this paragraph, CAPA hereby specifically waives any and all rights and benefits which it now has, or in the future may have, conferred by virtue of the provisions of Section 1542 of the California Civil Code related to the Covered Products, 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.

#### **5.2 LOUNGEFLY's Release of CAPA.**

LOUNGEFLY on behalf of itself, its past and current agents, representatives, attorneys, successors, and/or assignees, hereby waives any and all claims against CAPA, 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 Covered Products.

#### **5.3 Enforcement of Settlement Agreement.**

Any party may file suit before the Superior Court of the County of Los Angeles to enforce the terms and conditions contained in this Settlement Agreement. The prevailing party shall be entitled to its reasonable attorneys' fees and costs associated with such enforcement.

**6. 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.

**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.

**8. 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 LOUNGEFLY: Kristine Kruger  
Jasmine Wetherell  
Perkins Coie LLP  
1888 Century Park East, Suite 1700  
Los Angeles, CA 90067

For CAPA: James K. Kawahito  
Kawahito Law Group APC  
Attn. CAPA v. LOUNGEFLY  
222 North Sepulveda Blvd., Suite 2222  
El Segundo, CA 90245

with a copy to: Center for Advanced Public Awareness, Inc.  
Attn: Linda Droubay  
100 Promenade Circle, Suite 300  
Sacramento, CA 95834

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.

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

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

**11. MODIFICATION**

This Settlement Agreement may be modified only by 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, understand, and agreed to all of the terms and conditions of this Settlement Agreement.

**AGREED TO:**

**AGREED TO:**

Date: 9/16/2019

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

By:   
Center for Public Awareness, Inc.

By: \_\_\_\_\_  
Loungefly, LLC

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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: \_\_\_\_\_

Date: 10/8/19

By: \_\_\_\_\_  
Center for Public Awareness, Inc.

By:   
Loungefly, LLC